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April 19, 2017

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RE: In the Matter of: Carey R. Carroll, Jr. Docket No. 12.01-132297J

Enclosed is an Initial Order rendered in connection with the above-styled case.

Administrative Procedures Division
Tennessee Department of State

/aem
Enclosure

BEFORE THE COMMISSIONER OF THE TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE

IN THE MATTER OF:

CAREY R. CARROLL, JR. **DOCKET NO. 12.01-132297J**

NOTICE

ATTACHED IS AN INITIAL ORDER RENDERED BY AN ADMINISTRATIVE JUDGE WITH THE ADMINISTRATIVE PROCEDURES DIVISION.

THE INITIAL ORDER IS NOT A FINAL ORDER BUT SHALL BECOME A FINAL ORDER UNLESS:

1. THE RESPONDENT FILES A WRITTEN APPEAL, OR EITHER PARTY FILES A PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION NO LATER THAN **May 4, 2017.**

YOU MUST FILE THE APPEAL, PETITION FOR RECONSIDERATION WITH THE ADMINISTRATIVE PROCEDURES DIVISION. THE ADDRESS OF THE ADMINISTRATIVE PROCEDURES DIVISION IS:

SECRETARY OF STATE
ADMINISTRATIVE PROCEDURES DIVISION
WILLIAM R. SNODGRASS TOWER
312 ROSA PARKS AVENUE, 8th FLOOR
NASHVILLE, TENNESSEE 37243-1102

IF YOU HAVE ANY FURTHER QUESTIONS, PLEASE CALL THE ADMINISTRATIVE PROCEDURES DIVISION, **615/741-7008 OR 741-5042, FAX 615/741-4472.** PLEASE CONSULT APPENDIX A AFFIXED TO THE INITIAL ORDER FOR NOTICE OF APPEAL PROCEDURES.

STATE OF TENNESSEE
DEPARTMENT OF COMMERCE AND INSURANCE

TENNESSEE INSURANCE DIVISION, **Petitioner,** **vs.** **CAREY R. CARROLL, JR.,** **Respondent.**	**Docket No. 12.01-132297J** **TID No. 15-073**

INITIAL ORDER

The hearing in this matter came before Mattielyn B. Williams, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division, sitting for the Commissioner of the Tennessee Department of Commerce and Insurance, on November 14, 2016. Assistant General Counsel Jesse D. Joseph represented the State. Respondent Carey R. Carroll, Jr. was represented by Attorney David R. Grimmett.

The subject of this hearing was the proposed revocation of Respondent Carroll's Tennessee Resident Insurance Producer Licensure ("License") and a request for civil monetary penalties in response to Respondents' alleged violations of Tennessee Code Annotated ("Tenn. Code Ann.") §§ 56-6-112(a)(4) and (8). After considering the arguments of counsel and the record in this matter, it is determined that the License of Respondent Carroll should be **REVOKED** and that he should be **ORDERED** to pay a **four hundred thousand dollar ($400,000.00)** civil monetary penalty, plus the Division's court reporter and litigation costs.

Respondent shall have **one year** from execution of this Initial Order to pay the above-mentioned civil monetary penalty plus the Division's court reporter and litigation costs pursuant to Tennessee Rules of Civil Procedure ("Tenn R. Civ. P.") 54.04.

All other persons in any way assisting, aiding, or helping Respondent in any of the violations of Tenn. Code Ann. § 56-6-112, should **CEASE AND DESIST** from all such activities in violation of Tennessee insurance laws.

This decision is based upon the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Title 56 of the Tennessee Code Annotated ("Tenn. Code Ann."), specifically Tenn. Code Ann. §§ 56-1-202 and 56-6-112 (the "Law"), places the responsibility for the administration of the Law on the Commissioner of the Department of Commerce and Insurance ("Commissioner"). The Division is the lawful agent through which the Commissioner discharges this responsibility.

2. Carey R. Carroll, Jr. ("Respondent"), is a licensee of the Division who is responsible for being compliant with the insurance laws and regulations of the State of Tennessee. Respondent holds Tennessee insurance producer license, number 0037525, which became active on September 9, 1981. Respondent's insurance producer license expired on January 31, 2015.

3. Respondent's mailing address listed with the Division at all relevant times is 340 Suburban Road, Knoxville, TN 37919.

4. On July 24, 2015, Respondent's Tennessee insurance producer license was summarily suspended pursuant to Tenn. Code Ann. § 4-5-320(c), and remains so suspended through the present.

5. On July 27, 2015, the Division filed its Notice of Hearing and Charges in this matter. The Division alleged in its Notice that Respondent Carroll improperly withheld funds, intentionally misrepresented the terms of an actual or proposed insurance contract, used dishonest practices and demonstrated incompetence and financial irresponsibility.

6. U. S. Xpress Enterprises, Inc. ("U.S. Xpress"), is a national truckload shipping transportation company. During all relevant periods of time, Respondent was the owner of, and submitted his invoices to U.S. Xpress through a Tennessee corporation named Insurance Incorporated of Athens, Inc. ("IIA").

7. In the 1990's, U.S. Xpress began using the Respondent for its insurance needs. For many years, U.S. Xpress relied upon Respondent for advice and expertise regarding insurance coverage and the procurement of insurance, including property and inland marine insurance for various offices, truck terminals and other properties owned or leased by U.S. Xpress nationwide. By 2014, Respondent was entrusted with providing adequate insurance coverage for approximately sixty-two (62) properties owned or leased by U.S. Xpress in approximately twenty-nine (29) states.

8. On or about August 2010, Respondent sold U.S. Xpress a multi-state property insurance policy issued by The Hartford Fire Insurance Company ("The Hartford"), policy # 020UUM JD0772 (the "Hartford policy"). For the next four years, Respondent sent U.S. Xpress more than 30 inflated invoices for premiums Respondent represented were due, overbilling U.S. Xpress by many hundreds of thousands of dollars. U.S. Xpress paid all these invoices in full without any knowledge of any overbilling on Respondent's part.

9. Between August 1, 2010 and August 31, 2011, Respondent sent approximately nineteen (19) invoices to U.S. Xpress for the 2010-2011 Hartford Policy period totaling $652,971.07. Copies of these invoices, along with proof of payment of the invoices by U.S. Xpress, are attached as Collective Tab 1 to Mr. Lemm's March 11, 2016 affidavit. Respondent overbilled U.S. Xpress by $88,440.87; the actual aggregate amount due for that period was $564,530.20. Copies of the acual policy amounts due are attached as Collective Tab 2 to Exhibit 3. According to Mr. Lemm's Affidavit, a summary of the Respondent's

2010-2011 overbillings on The Hartford policy is as follows:

IIA Invoice Number	IIA Invoice Date	IIA Invoiced Amount	Actual Amount Due Hartford	Amount Paid by U.S. Xpress
			$521,910.10	
			$22,192.00	
			$591.00	
			$3,596.00	
			$14,260.00	
			$1,981.10	
8438	8/27/2010	$130,500.00		$130,500.00
8461	9/23/2010	$43,500.00		$43,500.00
8484	10/15/2010	$11,497.75		$11,497.75
8489	10/21/2010	$43,327.00		$43,327.00
8485	10/15/2010	$11,497.75		$11,497.75
8524	12/1/2010	$43,390.00		$43,390.00
8545	12/17/2010	$43,327.00		$43,327.00
'8576	1/2112011	$43,327.00		$43,327.00
8580	1125/2011	$594.00		$594.00
8581	1/25/2011	$3,596.00		*$3,596.00*
8615	2/16/2011	$43,327.00		$43,327.00
8645	3/16/2011	$43,327.00		$43,327.00
8689	4/14/2011	$43,327.00		$43,327.00
8717	5112/2011	$43,327.00		$43,327.00
8739	6110/2011	$43,327.00		$43,327.00
8783	7/15/2011	$43,327.00		$43,327.00
8794	7/29/2011	$1,981.00		$1,981.00
8800	8/8/2011	$2,211.57		$2,211.57
8795	7/29/2011	$14,260.00		$14,260.00
		$652,971.07	$564,530.20	$652,971.07
AMOUNT OVERBILLED AND OVERPAID				$88,440.87

10. Between August 1, 2011 and August 31, 2012, Respondent sent approximately thirteen (13) invoices to U.S. Xpress for the 2011-2012 Hartford Policy period totaling $819,016.29. Copies of these invoices, along with proof of payment of the invoices by U.S. Xpress, are attached as Collective Tab 3 to Mr. Lemm's Affidavit. Respondent overbilled U.S. Xpress by $233,819.95; the actual aggregate amount due for that period was $585,196.34. Copies of the actual policy amounts due are attached as Collective Tab 4 to Exhibit 3. A summary of the 2011-2012 overbillings is below:

IIA Invoice Number	IIA Invoice Date	IIA Invoiced Amount	Actual Amount Due Hartford	Amount Paid by U.S. Xpress
			$578,185.50	
			$2,779.00	
			$474.00	
			$2,844.00	
			$250.00	
			$663.84	
8813	8/18/2011	$148,617.50		$148,617.50
8836	9/20/2011	$44,557.25		$44,557.25
8869	10/20/2011	$145,528.66		$145,528.66
8905	11/16/2011	$48,080.76		$48,080.76
8931	12/19/2011	$48,080.76		$48,080.76
8952	1/11/2012	$48,018.92		$48,018.92
8983	2/16/2012	$48,018.92		$48,018.92
9020	3/19/2012	$48,018.92		$48,018.92
9042	4111/2012	$48,018.92		$48,018.92
9072	5/11/2012	$48,018.92		$48,018.92
9107	6/13/2012	$48,018.92		$48,018.92
9133	7/10/2012	$48,018.92		$48,018.92
9154	8/6/2012	$48,018.92		$48,018.92
		$819,016.29	$585,196.34	$819,016.29
AMOUNT OVERBILLED AND OVERPAID				$233,819.95

11. Despite the fact U.S. Xpress made full payment to Respondent Carroll of all premiums and other charges actually due under the Hartford Policy (including the excess overbilled amounts), Respondent failed to remit all of U.S. Xpress' required premium payments to Hartford. As a result, The Hartford cancelled the policy for nonpayment of premiums effective January 2013. Respondent admitted that he received and reviewed The Hartford notice of cancellation of this policy effective January 1, 2013, and that he knew for many months in 2013 that U.S. Xpress had no property coverage as The Hartford's policy was canceled.

12. U.S. Xpress continued to make payments on The Hartford policy for the 2012-2013 policy year beginning in August 2012, and paid Respondent $284,117.28 out of $288,403.11 invoiced by Respondent for this period.

13. U.S. Xpress had no knowledge of this cancellation for more than one year, until approximately April 9, 2014. Hartford did not send any notices of nonpayment in 2012 to

U .S. Xpress, and did not send U.S. Xpress any notification of the cancellation. Notices were sent, instead, to Respondent. Respondent did not forward any of these notices to U.S. Xpress, and did not tell U.S Xpress of the cancellation until Respondent confessed at an April 9, 2014 meeting with U.S. Xpress representatives, including Mr. Lemm, that the Hartford Policy had been canceled due to Respondent's failure to remit U.S. Xpress' premium payments to Hartford.

14. Respondent sent numerous invoices to U.S Xpress for amounts Respondent represented were due under the Hartford Policy for the 2012-2013 policy period even though Hartford had canceled the Hartford Policy for alleged non-payment of premiums. Copies of these invoices, along with proof of payment of the invoices by U.S. Xpress, are attached as collective Tab 5 to Mr. Lemm's Affidavit. U.S. Xpress paid these invoices in full, in the amount of $284,117.28. A summary of the 2012-2013 invoices is below:

IIA Invoice Number	IIA Invoice Date	IIA Invoiced Amount	Amount Paid by U.S. Xpress
9178	8/30/2012	$118,027.50	$118,027.50
9242	10/29/2012	$31,218.21	$31,218.21
9270	11119/2012	$42,757.20	$42,757.20
9296	1/3/2013	$4,942.00	$4,942.00
9297	1/3/2013	$362.00	$362.00
9318	1/24/2013	$42,757.20	$42,757.20
9330	2/19/2013	$42,757.20	$30,858.17
9325	2/13/2013	($7,559.00)	credit
9490	11/612013	$13,141.00	$13,195.00
		$288,403.31	$284,117.28
AMOUNT PAID FOR CANCELED			$284,117.28

15. Respondent also sent a $128,571.50 invoice to U.S. Xpress for an amount Respondent falsely represented was due under the Hartford Policy for the 2013-2014 policy renewal period. A copy of this invoice, along with proof of payment of the invoice by U.S. Xpress, is attached as Tab 6 to Mr. Lemm's March 2016 Affidavit. U.S. Xpress paid

this invoice in full, in the amount of $128,571.50. A summary of the 2013-2014 invoice is below:

IIA Invoice Number	IIA Invoice Date	IIA Invoiced Amount	Amount Paid by U.S. Xpress
9448	8/29/2013	$128,271.50	$128,271.50

16. Respondent claims that the overbilling was a result of clerical error. If so, it is unclear why Respondent was not able to pay The Hartford in full for the 2013-2014 period. It is also unclear why Respondent did not notify U.S. Xpress of the problem with overbilling until "caught" on April 9, 2014.

17. One of the properties covered by the Hartford Policy was a truck terminal in Richland, Mississippi. This terminal was the property of Total Transportation of Mississippi, LLC, a wholly-owned subsidiary of U.S. Xpress. On March 18, 2013, the Richland facility sustained significant damage from wind and hail (the *"Richland Loss").*

18. US. Xpress notified Respondent of the Richland Loss within a few days of the March 18, 2013 storm. Respondent did not inform U.S. Xpress at the time of the Richland Loss that the Hartford Policy had been cancelled months earlier due to his failure to remit U.S. Xpress' premium payments. Instead, through repeated misrepresentations, Respondent led U.S. Xpress to believe the loss was covered and U.S. Xpress' claim would be paid.

19. In this regard, in his March 29, 2013 email to Mr. Lemm, Respondent authorized U.S. Xpress to have contractors "repair what needs to be taken care of to secure building..." and that he would "get adjuster out on Monday." Respondent went on to state in this email that there would be a "sizable deductible on wind and hail. Per policy it is 5% of building value."

20. U.S. Xpress proceeded to obtain repair estimates and, on April 15, 2013, forwarded three estimates for necessary roof repairs to Respondent. After almost two (2) months with

no word, in June 2013, U.S. Xpress again asked Respondent about the adjuster. In response, Respondent told U.S. Xpress that Hartford had decided not to send an adjuster at that time and wanted U.S. Xpress to complete all the necessary repair work first.

21. As to the Richland Loss suffered on March 18, 2013, Respondent affirmatively told Total Transportation of Mississippi LLC's employee Leigh White in an email dated July 11, 2013 to "proceed with the repairs...[and] if you would provide me with the repair information and receipts as you go, I will forward to the carrier as received."

22. In reliance on this representation, U.S. Xpress contacted its contractor to begin work. The contractor completed some necessary wall/stucco repairs, and U.S. Xpress forwarded the invoice for those repairs to Respondent as instructed.

23. In early September 2013, US Xpress sent Respondent an invoice from its contractor for completed repairs, and told him the remaining interior repairs were ongoing. Respondent told Mr. Lemm he was submitting the invoice to Hartford for reimbursement and that Hartford would be sending an adjuster out to verify the work had been done.

24. After repeated inquiries from U.S. Xpress about the adjuster inspection, Respondent notified U.S. Xpress that the adjuster, Hank Stoppelbein, would be inspecting the work around the week of September 16, 2013. On September 25, 2013, Respondent notified U.S. Xpress that the adjuster had verified the repairs and that they would submit the bill to Hartford for reimbursement, later providing U.S. Xpress with a fictitious Hartford claim number ("Richland claim # CP0010088150) in his email to Mr. Lemm dated October 9, 2013 at 3:25 p.m.

25. In late September and early October 2013, Respondent stalled. In response to repeated questions from U.S. Xpress as to when it could expect payment from Hartford of its claim, Carroll repeatedly told U.S. Xpress that he had contacted Hartford and was awaiting a response. It was only after Mr. Lemm's insistence in an October 8, 2013 email exchange that he and

Respondent must "discuss today" the question of the Hartford claim for the Richland Loss, that Respondent ultimately provided the fictitious claim number on October 9, 2013.

26. Between approximately the end of September and mid October 2013, U.S. Xpress received two electronic funds payments from Hartford with no claim reference information ($284,430.72 on September 30, 2013 and $232,831.26 on October 15, 2013). U.S. Xpress believed the funds may have been installment payments related to the Richland Loss. Between October 2013 and January 2014, U.S. Xpress had numerous communications with Respondent inquiring about the purpose and amount of the funds received from Hartford. Not once during these communications did Respondent ever tell U.S. Xpress that the insurance funds could not possibly have been related to the Richland Loss since Hartford had canceled the Hartford Policy prior to the Richland Loss!

27. From February to April 2014, Respondent continued to refuse to provide truthful information, repeatedly telling U.S. Xpress he had requested information from Hartford on numerous occasions but had yet to receive a response. By March 27, 2014, U.S. Xpress had discovered that the approximate $517,000 in Hartford payments received at the end of September and mid-October 2013 were actually payments for a matter unrelated to the Richland Loss.

28. At an April 9, 2014 meeting with U.S. Xpress representatives at his Athens office, Respondent admitted that he failed to submit U.S. Xpress' premium payments to Hartford and that, as a result, the Hartford Policy had been canceled prior to the Richland Loss. This was U.S. Xpress' first knowledge that the Hartford policy had been canceled, and U.S. Xpress immediately conducted an investigation and notified Respondent and Hartford of the findings.

29. Prior to U.S. Xpress' learning in April 2014 of Respondent's misconduct regarding the Hartford policy, Respondent told U.S. Xpress in the fall of 2013 that it could save over

$100,000 in premium costs by switching the property coverages then purportedly provided under the Hartford Policy to a policy issued by Employers Mutual Casualty Company ("EMC"). Respondent then sold U.S. Xpress policy number 5A0-37-77-14 issued by Employers Mutual (the *"Employers Policy")* with an effective policy period beginning December 1,2013.

30. In early December 2013, Respondent sent U.S. Xpress an invoice of $169,895.55 for amounts due under the Employers Policy. A copy of the invoice is attached as Tab 20 to Exhibit 3. Respondent overbilled U.S. Xpress by $72,812.38 in this regard, given that the actual amount Respondent paid to Employers Mutual for premiums due on the Employers Policy in December 2013 was $97,083.17, according to the June 16 & 17, 2014 email chain within Tab 21 attached to Exhibit 3. U.S. Xpress paid this $169,895.55 invoice in full to Respondent, and proof of U.S. Xpress' payment is attached to Exhibit 3 at Tab 22.

31. Mr. Lemm executed a second Affidavit dated August 10, 2016. This second affidavit did not change in any way Mr. Lemm's computations regarding the amounts U.S. Xpress paid for insurance coverage, and the amounts invoiced by Respondent, as set out in his March 2016 Affidavit. Both the March and August 2016 Affidavits executed by Mr. Lemm were originally filed in a pending Hamilton County Chancery Court action, captioned *U.S. Xpress Enterprises, Inc. v. Insurance Incorporated of Athens, Inc., Carey R. Carroll, Jr., Hartford Fire Insurance Company, and Employers Mutual Casualty Company*, No. 14C1179 – Division II. Judicial Notice is taken that the lawsuit is currently pending.

32. Respondent admits he was the producer on Hartford policy # 20 UU MJ D0772 insuring U.S. Xpress.

33. Mr. Lemm never gave the Respondent permission to change U.S. Xpress' mailing address of record under the Hartford policy to the Respondent's address. Mr. Lemm never asked

the Hartford to change U.S. Xpress' address for receiving any notices from U.S. Xpress' official business address of 4800 Jenkins Road in Chattanooga, TN.

34. Respondent admits in his September 3, 2014 written statement to the Hartford that he "received premium from the insured and failed to forward it to the Hartford."

35. By indicating "these statements are correct," Respondent admits the following allegations contained in the April 18, 2014 letter sent and faxed to him by Ms. Pate of U.S. Xpress:

- he overbilled the insured (U.S. Xpress) for premium which U.S. Xpress paid to him;
- he failed to submit premiums to The Hartford that the insured paid him;
- he failed to maintain coverage after U.S. Xpress paid him premiums;
- he failed to submit the 3/18/2013 claim regarding damage to an insured facility located at 125 Riverview Drive, Richland, MS to The Hartford that U.S. Xpress notified him of;
- he failed to notify U.S. Xpress that the Hartford policy had been canceled for non-payment of premium after his agency was notified by The Hartford of such cancellation;
- he represented to U.S. Xpress that he had provided documentation supporting the 3/18/2013 claim to The Hartford, and that he had provided to The Hartford estimates of repair which were given to him by U.S. Xpress; and
- he admitted during a 4/9/2014 meeting with representatives of U.S. Xpress that he failed to submit the 3/18/2013 claim to The Hartford, and failed to submit premiums to The Hartford which caused a lapse in coverage that encompassed the 3/18/2013 loss.

36. Respondent admits he was notified about the Richland MS loss at the time it occurred and admits he should have told U.S. Xpress it did not have coverage after the cancellation.

37. In this regard, Respondent intentionally withheld or misappropriated more than $500,000, specifically, he misappropriated $807,461.48 in insurance premiums paid to Respondent by U.S. Xpress on The Hartford and the Employers' Policy between September 2010 and December 2013, calculated as follows:

- $88,440.87 (overbilled and overpaid on Hartford policy for 8/2010 through 7/29/2011 policy year);
- $233,819.95 (overbilled and overpaid on Hartford policy for 8/1/2011 through 8/1/2012 policy year);
- $284,117.28 (billed and paid on canceled Hartford policy);
- $128,271 (phony invoice for 2013-2014 "renewal period" paid nearly 8 months after Hartford policy was canceled); and
- $72,812.38 (overbilled and overpaid down payment required on Employers Policy on 12-3-2013)

38. As of the date of the hearing in this matter, U.S. Xpress has received no payments from Respondent of any amounts U.S. Xpress claims it is due from him.

39. Respondent voluntarily chose to refuse to testify at the administrative hearing conducted on November 14, 2016, by invoking his Fifth Amendment privilege against compelled self-incrimination, as he did at his November 4, 2016 deposition when questions were posed to him, and as his counsel indicated he would do during a November 9, 2016 conference call

40. The Hartford is a Fortune 500 corporation headquartered in Hartford, CT, with an official business address of Hartford Plaza, Hartford, CT 06115.

41. The Harford is not a party to this formal contested case proceeding.

42. Respondent's objections to the admissibility of documents generated by the Hartford were that he considered such certain of such documents to not be self-authenticating.

43. Throughout U.S. Xpress history of using Respondent as its insurance producer, going back to the early 2000's based on Mr. Lemm's recollection, U.S. Xpress was always on "agency bill" with the Respondent, meaning that its insurance premium payments always went to the agent (Respondent), and never to the insurance company.

CONCLUSIONS OF LAW

1. In accordance with Tenn. Comp. R. & Regs. 1360-04-01-.02(7) and 1360-04-01-.15(3), it is **CONCLUDED** that the Petitioner has proven by a preponderance of evidence that the facts

alleged in the Notice of Hearing and Charges pertaining to Respondent Carey R. Carroll, Jr. are true and that the issues raised therein should be resolved in its favor.

2. In this civil administrative proceeding seeking disciplinary sanctions against Respondent's insurance producer license (to include civil penalties), it is **CONCLUDED** that an adverse inference should be drawn against the Respondent herein for refusing to testify, given the independent evidence of Respondent's misconduct which was admitted at the hearing in this matter. Accordingly, an inference is justified and is drawn to the effect that if Respondent had answered truthfully, his answers would have been unfavorable to his defense, and/or would have corroborated the probative testimony put on by the Petitioner and other probative documentary proof admitted into evidence. *Baxter v. Palmigiano*, 425 U.S. 308 (US. 1976); *Akers v. Prime Succession of Tenn., Inc.*, 387 S.W.3d 495, 506 (Tenn. 2012); *U.S. v. White*, 589 F.2d 1283, 1286-1287 (5th Cir. 1979); *Johnson v. Missouri Board of Nursing Administrators*, 130 S.W.3d 619, 631 (Mo. 2004).

3. In this civil administrative action, the Petitioner has no authority to issue subpoenas compelling the attendance of a witness for the hearing or for a deposition to The Hartford, a Connecticut corporation, in order to certify its business records. Therefore, any such witnesses from The Hartford were not available for the hearing in this matter, and testimony from any such witnesses is not reasonably susceptible to proof under the rules of court. Tenn. R. Civ. P. 45.04 and 45.05; *Rayder v. Grunow*, 1993 WL 95561 (Tenn. Ct. App. 1993), at *2-3.

4. The Tennessee Department of Commerce and Insurance has not promulgated a rule making the Tennessee Rules of Evidence (Tenn. R. Evid.) binding in this agency's administrative hearings. Therefore, the Rules of Evidence do not control questions regarding the admissibility of evidence in administrative proceedings such as the instant case. Instead, Tenn. Code Ann. § 4-5-313(1) governs such questions, and provides:

> The agency shall admit and give probative effect to evidence admissible in a court, and when necessary to ascertain facts not reasonably susceptible to proof under the rules of court, evidence not admissible thereunder may be admitted if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs.

Tenn. R. Evid. 101 (advisory comm'n comment); *Goodwin v. Metropolitan Board of Health*, 658 S.W.2d 383, 388-389 (Tenn. Ct. App. 1983); *Davis v. Shelby County Sheriff's Department*, 278 S.W.3d 256, 266 (Tenn. 2009).

5. The documents attached to Mr. Lemm's March 2016 Affidavit (Exhibit 3) which were generated by the Hartford and EMC (Tabs 2, 4 & 21 attached to this Exhibit) and admitted into evidence in this proceeding were largely self-authenticating (bearing trademarks and/or copyright inscriptions of The Hartford), were part of an email chain of U.S. Xpress (U.S. Xpress' business record), did not indicate any lack of trustworthiness, and are of a type that are reasonably relied upon by reasonably prudent men in the conduct of their affairs.

6. Mr. Lemm's testimony that he relied on the documents generated by The Hartford corroborates this evidence generated by The Hartford.

7. Respondent's admissions that he produced The Hartford policy 020 UUM JD0772, providing U.S. Xpress property insurance in 2010, and his admissions of receiving the cancellation notice in January 2013, of fraud in failing to remit payments received to The Hartford, failing to inform U.S. Xpress of the cancellation, and his provision of false and fictitious information to U.S. Xpress, all as admitted within his September 3, 2014 written statement (Exhibit 5), constitute admissions by a party opponent under Tenn. R. Evid. 803(1.2), and are entitled to considerable probative weight in this matter.

8. This Court's decisions to admit challenged hearsay evidence under Tenn. Code Ann. § 4-5-313(1) rest within the Court's sound discretion, and there has been no abuse of discretion committed here. The Court has applied the correct legal standard under Tenn. Code Ann. § 4-5-313(1), and there have been no illogical conclusions reached here. The Court's decisions in this

regard are not unreasonable or arbitrary, and have not caused any injustice to Respondent as the complaining party. *State v. Franklin*, 308 S.W.3d 799, 809 (Tenn. 2010); *State v. Banks*, 271 S.W.3d 90, 116 (Tenn. 2008); *Konvalinka v. Chattanooga-Hamilton County Hosp. Auth.*, 249 S.W.346, 358 (Tenn. 2008).

9. The review by appellate courts in Tennessee of decisions from administrative hearings, is "guided not by the Rules of Evidence, but instead by a sense of fair play and the avoidance of undue prejudice to either side of the controversy...[to determine] whether the action of the hearing Board in admitting or excluding evidence was unreasonable or arbitrary." *Martin v. Sizemore*, 78 S.W.3d 249, 264 (Tenn. Ct. App. 2001); *Goodwin*, 656 S.W.2d at 388.

10. Tenn. Code Ann. §§ 56-6-112(a)(4), (a)(5), & (a)(8) provide:

> The commissioner may place on probation, suspend, revoke, or refuse to issue or renew a license issued under this part or may levy a civil penalty in accordance with this section or take any combination of those actions, for any one (1) or more of the following causes:
>
> ...
>
> (4) Improperly withholding, misappropriating or converting any moneys or properties received in the course of doing insurance business;
>
> (5) Intentionally misrepresenting the terms of an actual or proposed insurance contract or application for insurance; and,
>
> ....
>
> (8) Using fraudulent, coercive, or dishonest practices, or demonstrating incompetence, untrustworthiness or financial irresponsibility in the conduct of business in this state or elsewhere[.]
>
> ....

11. It is **CONCLUDED** that the Division has shown by a preponderance of the evidence that, on multiple occasions the Respondent improperly withheld and misappropriated moneys (monthly premiums, annual renewals, down payments on new policies) he received from U.S. Xpress in the course of performing his insurance business between August 2010 and December 2013; that he misrepresented to U.S. Xpress for a 11 month period (January through early

December 2013) that the Hartford policy was still in effect; and that he continuously engaged in fraudulent and dishonest conduct by overbilling U.S. Xpress since August 2010, deceiving U.S. Xpress and misrepresenting the true state of affairs relative to the Richland claim, and the status of The Hartford policy, through April 8, 2014, all in violation of Tenn. Code Ann. §§ 56-6-112(a)(2), (a)6), (a)(7), and (a)(8).

12. Tenn. Code Ann. § 56-6-112(g) provides, in pertinent part:

> (g) If . . . the commissioner finds that any person required to be licensed, permitted, or authorized by the division of insurance pursuant to this chapter has violated any statute, rule or order, the commissioner may, at the commissioner's discretion, order:
>
> (1) The person to cease and desist from engaging in the act or practice giving rise to the violation.
>
> (2) Payment of a monetary penalty of not more than one thousand dollars ($1,000) for each violation, but not to exceed an aggregate penalty of one hundred thousand dollars ($100,000). This subdivision (g)(2) shall not apply where a statute or rule specifically provides for other civil penalties for the violation. For purposes of this subdivision (g)(2), each day of continued violation shall constitute a separate violation; and
>
> (3) The suspension or revocation of the person's license.

13. It is **CONCLUDED** that Respondent's improper withholding of premiums received from U.S. Xpress and his misappropriations have continued to date; thus, every day Respondent has failed to make U.S. Xpress whole in this regard constitutes a continuing violation of Tenn. Code Ann. §§ 56-6-112(a)(4). Respondent continued to falsely inform U.S. Xpress that the Hartford policy was still in effect for an 11 month period between January and early December 2013; and he continually misrepresented to U.S. Xpress the status of the Richland Loss and that he had submitted to Hartford a claim for the Richland Loss for a 13 month period between March 18, 2013 and April 9, 2014.

14. Pursuant to Tenn. Code Ann. § 56-6-112(g)(2) & (3), it is **CONCLUDED** that the proof adduced at hearing provides adequate grounds for the revocation of Respondent's Tennessee insurance producer license, and for the imposition of a civil penalty against Respondent in the total amount of four hundred thousand dollars ($400,000), or an aggregate one hundred thousand dollars ($100,000) for each of the three above multiple violations of Tenn. Code Ann. §§ 56-6-112(a)(4), (a)(5), and (a)(8), and a separate one hundred thousand dollar ($100,000) penalty given Respondent's ongoing and continuing violations of Tenn. Code Ann. § 56-6-112(a)(4) given his failure to return to U.S. Xpress the amounts he has misappropriated, to date.

15. Tenn. R. Civ. P. 54.04(1) and Tenn. Comp. R. & Regs. 1360-04-01-.01(1) respectively, provide as follows:

> 54.04. Costs. -
>
> (1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, but costs against the state, its officers, or its agencies shall be imposed only to the extent permitted by law.
>
> 1360-04-01-.01(3) SCOPE.
>
> (3) In any situation that is not specifically addressed by these rules, reference may be made to the Tennessee Rules of Civil Procedure for guidance as to the proper procedure to follow, where appropriate and to whatever extent will best serve the interests of justice and the speedy and inexpensive determination of the matter at hand.

16. It is further determined, pursuant to the above authorities, that the hearing costs incurred by the Division to the Administrative Procedures Division of the Secretary of State, and to the court reporter in this matter, should be assessed against the Respondent.

JUDGMENT

IT IS, THEREFORE, ORDERED that:

1. The Respondent's Tennessee insurance producer license (No. 0037525) **BE** and **HEREBY IS REVOKED**, due to his actions in violations of Tenn. Code Ann. §§ 56-6-112(a)(4), (a)(5), and (a)(8), as described above.

2. The Respondent is **ASSESSED** a civil penalty of four hundred thousand dollars ($400,000), for which execution may issue if necessary, based on his violations of the three (3) statutory provisions cited above, and his continuing violations of Tenn. Code Ann. § 56-6-112(a)(4), all as set out above.

3. The Respondent, and any and all persons who may assist him in any of the aforementioned violations of Tenn. CODE Ann. § 56-6-112, **SHALL CEASE and DESIST** from any such activities.

4. The Division shall **FILE** its Itemized Assessed Bill of Costs including the Administrative Procedures Division costs, and those of the court reporter, within fifteen (15) days after the filing of the Initial Order in this matter, and said costs shall be incorporated within the Initial Order.

5. The Respondent is **ASSESSED all such costs** incurred by the Division herein pursuant to Tenn. R. Civ. P. 54.04(1) and Tenn. Comp. R. & Regs. 1360-04-01-.01(3), for which execution may issue if necessary.

6. This **INITIAL ORDER,** imposing sanctions against Respondent Carey R. Carroll, Jr. , is entered to protect the public in the State of Tennessee, consistent with the purposes fairly intended by policy and provisions of the Tennessee Insurance Law (the "Law"), Title 56 of Tenn. Code Annotated.

This Initial Order entered and effective this 19th day of April 2017.

Mattielyn B. Williams
Administrative Judge

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 19th day of April 2017.

J. Richard Collier

J. Richard Collier, Director
Administrative Procedures Division

7.

APPENDIX A TO INITIAL ORDER
NOTICE OF APPEAL PROCEDURES

Review of Initial Order

This Initial Order shall become a Final Order (reviewable as set forth below) fifteen (15) days after the entry date of this Initial Order, unless either or both of the following actions are taken:

(1) A party files a petition for appeal to the agency, stating the basis of the appeal, or the agency on its own motion gives written notice of its intention to review the Initial Order, within fifteen (15) days after the entry date of the Initial Order. If either of these actions occurs, there is no Final Order until review by the agency and entry of a new Final Order or adoption and entry of the Initial Order, in whole or in part, as the Final Order. A petition for appeal to the agency must be filed within the proper time period with the Administrative Procedures Division of the Office of the Secretary of State, 8th Floor, William R. Snodgrass Tower, 312 Rosa L. Parks Avenue, Nashville, Tennessee, 37243-1102. (Telephone No. (615) 741-7008). See Tennessee Code Annotated, Section (T.C.A. §) 4-5-315, on review of initial orders by the agency.

(2) A party files a petition for reconsideration of this Initial Order, stating the specific reasons why the Initial Order was in error within fifteen (15) days after the entry date of the Initial Order. This petition must be filed with the Administrative Procedures Division at the above address. A petition for reconsideration is deemed denied if no action is taken within twenty (20) days of filing. A new fifteen (15) day period for the filing of an appeal to the agency (as set forth in paragraph (1) above) starts to run from the entry date of an order disposing of a petition for reconsideration, or from the twentieth day after filing of the petition, if no order is issued. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Initial Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

Review of Final Order

Within fifteen (15) days after the Initial Order becomes a Final Order, a party may file a petition for reconsideration of the Final Order, in which petitioner shall state the specific reasons why the Initial Order was in error. If no action is taken within twenty (20) days of filing of the petition, it is deemed denied. See T.C.A. §4-5-317 on petitions for reconsideration.

A party may petition the agency for a stay of the Final Order within seven (7) days after the entry date of the order. See T.C.A. §4-5-316.

YOU WILL NOT RECEIVE FURTHER NOTICE OF THE INITIAL ORDER BECOMING A FINAL ORDER

A person who is aggrieved by a final decision in a contested case may seek judicial review of the Final Order by filing a petition for review in a Chancery Court having jurisdiction (generally, Davidson County Chancery Court) within sixty (60) days after the entry date of a Final Order or, if a petition for reconsideration is granted, within sixty (60) days of the entry date of the Final Order disposing of the petition. (However, the filing of a petition for reconsideration does not itself act to extend the sixty day period, if the petition is not granted.) A reviewing court also may order a stay of the Final Order upon appropriate terms. See T.C.A. §4-5-322 and §4-5-317.