

BEFORE THE INVESTOR PROTECTION DIRECTOR **MAY 26 2019**
OF THE STATE OF DELAWARE

IN THE MATTER OF:

CARING ANGELS HOME HEALTH
CORPORATION, FLORENCE
NICOL AND LILIA MOSQUERA,

Respondents.

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CASE NO. 17-0028

ADMINISTRATIVE HEARING OFFICER'S OPINION AND ORDER

Based on the evidence presented at the hearing held on February 25, 26 and 27, 2019 (the "Hearing"), including determinations as to the credibility of witness testimony, and based on the applicable law, the Hearing Officer assigned to this case makes the following findings of fact and conclusions of law:

A. Charges and Procedural History

1. On or about March 22, 2018, the Investor Protection Unit ("IPU") filed an Administrative Complaint (the "Complaint") pursuant to the Delaware Securities Act, 6 Del. C. § 73-101, *et seq.* (the "Act") against the following respondents: Caring Angels Home Health Corporation ("Caring Angels"), Florence Nicol ("Nicol") and Lilia Mosquera ("Mosquera"). (Dkt. No. 1).¹ In the Complaint, IPU alleged the following four counts arising from the sale of securities in Delaware against all respondents: (1) the sale of unregistered securities to [REDACTED] in violation of § 73-202 of the Act; (2) the sale of unregistered securities to [REDACTED] in violation of § 73-202 of the Act; (3) doing business as an unregistered broker-dealer

¹ References to the official docket of this proceeding maintained by the Investor Protection Director will be referred to herein as "(Dkt. No. ____)."

agent in violation of § 73-301(a) of the Act; and (4) securities fraud in violation of § 73-201 of the Act.

2. On August 15, 2018, at the request of the Hearing Officer, the IPU Director entered a default order against respondent Caring Angels for failure to respond to the Complaint. (Dkt. No. 36). On October 15, 2018, respondent Nicol filed an Answer to the Complaint (the "Answer"). (Dkt. No. 49) (IPU Hrg. Ex. 35).²

3. On October 15, 2018, respondent Mosquera filed an Answer to the Complaint (the "Mosquera Answer"). (Dkt. No. 50). On January 29, 2019, the Hearing Officer entered a Consent Order settling the Complaint as against respondent Mosquera (the "Consent Order"). (Dkt. No. 63). Pursuant to the Consent Order, Mosquera agreed that she (i) offered and sold unregistered securities; (ii) acted as an unregistered broker-dealer; and (iii) committed securities fraud. Mosquera also agreed to pay ████████ a total of \$5,000.00 by April, 31, 2020.

4. In a Pre-Hearing Conference Order, the documents submitted by Nicol and IPU as their hearing exhibits were admitted into evidence, with the exception of Nicol's Exhibits No. 2, 3 and the second portion of 4. Additional documents by both parties were admitted into evidence at the start of the Hearing. IPU and respondent Nicol entered into a Stipulation of Facts between the Investor Protection Unit and Florence Nicol, the contents of which were entered into evidence (the "Stipulation of Facts").³ (Dkt. No. 73). The facts set forth in the Declaration of Mosquera, dated January 31, 2019, were also admitted into evidence, with Mosquera being subject to

² References to the exhibits of the parties accepted into evidence at the Hearing in this proceeding will be referred to herein as "(IPU Hrg. Ex. ___)" or "(Nicol Hrg. Ex. ___)."

³ References to the Stipulation of Facts accepted into evidence as part of the Hearing in this proceeding will be referred to as "(Stip. at §___)."

cross examination during the Hearing regarding the facts set forth in the Declaration.⁴ (Dkt. No. 65). A complete copy of all documents admitted during the Hearing will be provided by the Hearing Officer to the IPU Director as part of the record of this proceeding.

5. During the Hearing, IPU presented the following witnesses: [REDACTED] (2) Mosquera; [REDACTED] (4) Nicol; and [REDACTED] Ms. Nicol presented the following witnesses: (1) herself; [REDACTED]; (3) Mosquera; [REDACTED]
[REDACTED]

6. Many facts during the Hearing were the subject of contradictory testimony from different witnesses or from witness testimony that contradicted documentary evidence. The Hearing Officer made credibility determinations regarding which version of the contradictory facts was most believable, based on the testimony provided, the documentary evidence in support, the context of the information, and the overall demeanor and believability of each witness.

B. The Delaware Securities Act and Relevant Law

Purpose of the Act

7. The purpose of the Act "is to prevent the public from being victimized by unscrupulous or overreaching broker-dealers, investment advisers or agents in the context of selling securities or giving investment advice, as well as to remedy any harm caused by securities law violations." 6 Del. C. § 73-101(b). The Act is modeled on the Uniform Securities Act of 1956 (the "Uniform Act"). See 59 Del. Laws, c. 208; Unif. Sec. Act § 101, U.L.A. 1 (1956) (table of adopting states).

⁴ References to the Declaration of Mosquera, which facts were accepted as direct testimony in the Hearing in this proceeding will be referred to as "(Mosquera Dec. at § ____)."

Securities Fraud

8. Section 73-201 of the Act provides that “[i]t is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) To employ any device, scheme or artifice to defraud; (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person.”

9. Section 73-201 of the Act also provides that “[i]n interpreting this Section, courts will be guided by the interpretations given by Federal Courts to similar language set forth in Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q] and Rule 10b-5 [17 C.F.R. § 240.10b-5] promulgated under the Securities Exchange Act of 1934, to include, without limitation, any difference in pleading requirements governing actions brought by securities regulators as opposed to private litigants.” Based upon this language added to Section 73-201, scienter is not required to prove a violation of Section 73-201(2) because of the difference in pleading requirements for regulators as compared to private litigants. *Trivectra v. Ushijima*, 144 P.3d 1, 15 (Haw. 2006).

10. Delaware has adopted the materiality standard set forth in *TSC Industries v. Northway*, 426 U.S. 438, 449 (1976). See *Chen v. Howard-Anderson*, 87 A.3d 648, 687 (Del. Ch. 2016); *Zim v. VLI Corp.*, 621 A.2d 773, 779 (1993). “[A] fact is material ‘if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.’” *Chen*, 87 A.3d at 687 (quoting *Rosenblatt v. Getty Oil Co.*, 493 A.2d 929, 944 (Del. 1985) (quoting *TSC Industries*, 426 U.S. at 449)). To

satisfy the materiality requirement, "the question is whether there is 'a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available.'" *Id.* (same).

Registration of Securities

11. Section 73-202 of the Act prohibits the offer or sale of any security in Delaware unless (1) it is registered under the Act, (2) the security or transaction is exempted under § 73-207 of the Act, or (3) it is a federal covered security for which a notice filing has been made pursuant to the provisions of § 73-208 of the Act.

12. Section 73-103(a)(17) of the Act defines "sale" or "sell" to include every contract of sale of, contract to sell or disposition of a security interest in a security for value. Section 73-103(a)(17)(a) of the Act defines "offer" or "offer to sell" to include every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value.

13. Section 73-207 of the Act provides that "(a) the following securities are exempted from §§ 73-202, 73-208 and 73-211 of this title: ... (11) Any investment contract issued after the effective date of this act in connection with an employee's stock purchase, savings, pension, profit-sharing or similar benefit plan." "[A]n investment contract ... means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party, it being immaterial whether the shares in the enterprise are evidenced by formal certificate or by nominal interests in physical assets" *SEC v. W.J. Howey Co.*, 328 U.S. 293, 299 (1943).

14. Section 73-207(d) of the Act provides that “[i]n any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it.”

Agent Registration

15. Section 73-301 of the Act prohibits the transaction of business in Delaware as a broker-dealer or agent unless the person is registered with the IPU Director as provided in the Act.

Remedies Available

16. Pursuant to the Act and IPU Rule 202, the Hearing Officer appointed in this proceeding may issue administrative orders providing for the following remedies: “cease and desist; fine, assessment of costs; restitution to investors; conditional or probationary registration; censure or reprimand; special reporting requirements; or other remedies which the Director determines to be in the public interest.” 6 Del. C. § 73-601(a); IPU Rule 202. In addition, the Hearing Officer “may order the payment of fines and other monetary sanctions for any violation of any provision of this chapter in an amount not to exceed \$10,000 for each and every violation, plus the costs of investigation and prosecution.” 6 Del. C. § 73-601(b); IPU Rule 202.

C. Findings of Fact and Conclusions of Law

General Facts

17. Caring Angels was incorporated in Delaware on January 5, 2011, as a close corporation. (Stip. at ¶ 1; IPU Hrg. Ex. 16(a)). It operated as a home health care company from 2011 to 2018. (Stip. at ¶ 1). Caring Angels was authorized by the Certificate of Incorporation to issue 100,000 shares. (IPU Hrg. Ex. 16(a)). Nicol

established Caring Angels as a closed corporation because she was under the impression it would allow the company freedom to take corporate actions without the need to adhere to specific rules. (Tr. at 176).⁵ Mosquera and Nicol were officers and/or directors of Caring Angels from 2011 through 2015 and were among the initial shareholders of Caring Angels. (Stip. at ¶ 2). Nicol was the President of Caring Angels from 2011 through at least November of 2014. (Stip. at ¶ 3).

18. In her role as President, Nicol handled financial matters, including employee payroll, taxes, and preparing financial statements. (Tr. at 78, 233). Nicol also handled stock issues, including preparing stock certificates, monitoring stock ownership, reporting stock ownership to accountants for preparation of K-1's in connection with tax preparation, and handling stock transfers. (Tr. at 42, 208-209, 233).

19. Mosquera was the Administrator of Caring Angels and handled maintaining the state license to provide home care, marketing to recruit new patients, monitoring the provision of clinical care to the patients, communicating with employees and assisting Nicol in monitoring expenses and income. (Tr. at 39, 78, 232-33, 321-22).

20. There was conflicting testimony as to whether Nicol or Mosquera handled the company's finances. Nicol testified Mosquera had complete autonomy to run the company and all Nicol did was communicate with third parties, get the licenses, do contracts and put money in to finance the company. (Tr. at 114, 117). Mosquera, [REDACTED] testified that Nicol made most of the company's decisions, including all financial decisions and all decisions related to shares of the company, and Mosquera deferred decision-making to Nicol, who was the majority shareholder. (Tr. at

⁵ References to page numbers of the transcript of the Hearing held in this proceeding will be referred to herein as "(Tr. at ____)."

78, 233, 322-323). I find the collective testimony of Mosquera, [REDACTED] more credible than Nicol's testimony on this point.

21. Caring Angels did not maintain a stock registry. (Tr. at 210). All transfers and sales of shares were done verbally, according to Nicol. (IPU Hrg. Ex. 28(b)). Nicol provided the accountant used by Caring Angels with the shareholder information necessary to prepare the K-1s for the tax years 2011 to 2013. (Tr. at 209-211). Nicol testified that the K-1s provided to the shareholders accurately reflected the stock ownership of the shareholders. (Tr. at 209-211; 279).

Sale of Unregistered Securities to [REDACTED] (73-202)

22. [REDACTED] started employment with Caring Angels as a part-time physical therapist in 2012. (Tr. at 40-41). At some point later, [REDACTED] was informed by Mosquera that if he was interested, he could purchase stock of Caring Angels and become a partner in the company. (Tr. at 42)

23. Nicol stipulated that she participated in the sale of stock to [REDACTED]. (Stip. at ¶ 26). Nicol at first denied that she set the price per share of the stock sold to [REDACTED]. (Tr. at 118, 121, 154). She later changed her testimony to indicate she could not remember whether she or Mosquera set the share price for the shares sold to [REDACTED]. (Tr. at 346). [REDACTED] and Mosquera testified that Nicol decided how many shares [REDACTED] could purchase and set the price per share. (Tr. at 42-43; Mosquera Dec. at ¶ 10). [REDACTED] testified that he met with Nicol in Smyrna, DE and she informed him that 5% or 5,000 shares were available for him to purchase, and Nicol thereafter informed him that the price was \$2,500 per share. (Tr. at 43). I find [REDACTED] and Mosquera's testimony more credible than Nicol's testimony on this point.

24. After discussions with Mosquera and Nicol, ██████ decided to purchase Caring Angels stock. (Tr. at 48). On March 26, 2013, ██████ wrote a check for \$6,000 to Caring Angels with the notation "1 of 2 checks, 5% shares." (Tr. at 48; IPU Hrg. Ex. 21(c)). ██████ handed the check to Nicol and Mosquera on the day that he wrote the check. (Tr. at 48). On April 5, 2013, ██████ wrote a check for \$6,500 with the notation "2 of 2, 5% shares." (Tr. at 49; IPU Hrg. Ex. 21(c)). He handed the check to Mosquera on April 5, 2013. (Tr. at 51). Respondent Mosquera deposited the checks from ██████ into the Caring Angel's bank account by April 5, 2013. (Stip. at ¶ 11; Mosquera Dec. at ¶ 11).

25. The evidence shows that Nicol sold 3% of her Caring Angels stock to ██████ in March of 2013. Nicol admitted that she agreed to give up 3% of her shares of Caring Angels stock so ██████ could purchase Caring Angels stock. (Stip. at ¶12). Although Nicol testified that she did not sell her stock directly to ██████, rather that Caring Angels sold stock to ██████ (Tr. at 167-168), the record establishes Nicol's intent to sell her stock to ██████ by passing it through the company. The record includes other evidence that Nicol intended to sell 3% of her Caring Angels stock to ██████ including testimony in a deposition under oath in a different matter (IPU Hrg. Ex. 18(a), p. 29 of deposition transcript; Tr. at 180-182), a declaration Nicol signed under penalty of perjury in a different matter (IPU Hrg. Ex. 33(b), ¶ 12), and an interview with IPU in 2017 (IPU Hrg. Ex. 3, at p. 207-209; Tr. at 182-184). To the extent Caring Angels sold stock to ██████ as opposed to Nicol selling her stock directly to ██████ Nicol dictated to Mosquera what steps to take to have the company purchase back

Nicol's shares and then sell them immediately thereafter to [REDACTED]. Therefore, Nicol controlled the sale of stock to [REDACTED].

26. The Caring Angels stock sold to [REDACTED] was not registered with the Director of the Investor Protection Unit or otherwise registered in Delaware. (Stip. at ¶ 14). No notice filing regarding the Caring Angels stock sold to [REDACTED] was made with the Director of the Investor Protection Unit or otherwise. (Stip. at ¶ 15). Neither Nicol, Mosquera nor Caring Angels was registered to sell securities in Delaware at the time the Caring Angels stock was sold to [REDACTED]. (Stip. at ¶ 16).

27. Nicol's defense to the charge that she sold unregistered securities to [REDACTED] was that the sale of securities to [REDACTED] was covered by Section 73-207(11) of the Act, which exempts from the registration provisions of the Act "any investment contract issued after the effective date of this act in connection with an employee's stock purchase, savings, pension, profit-sharing or similar benefit plan." Nicol did not establish by her testimony or documentary evidence that the sale of securities to [REDACTED] was covered by the exemption set forth in Section 73-207(11) of the Act.

28. At some point in the past, Nicol engaged an attorney to form an unrelated corporation in Georgia, and the corporate documents drafted by that lawyer included a disclaimer exempting the unrelated company from registration of securities. (Tr. at 118). Nicol then used the corporate documents from the Georgia company and altered them to fit Caring Angels. (Tr. at 118). Nicol drafted and revised all Caring Angels' formation and governance docs without consulting counsel. (Tr. at 118).

29. Nicol testified that at the time she copied the Georgia corporation's formation documents to use for Caring Angels, she researched Delaware securities

registration requirements and discovered the exemption for registration for employee benefits. (Tr. at 118, 175-176). However, Nicol indicated during her official IPU interview that she was not aware of and did not understand the Delaware exemption contained in Section 73-207(11) of the Act. (Tr. at 185). Nicol did not do anything to comply with the exemption, other than copying the documents and getting some of the documents signed by some of the shareholders. (Tr. at 217).

30. Nicol stated in response to an IPU subpoena for documents in this proceeding that, "[w]e are so small that there is no employee profit sharing plans, stock option plans, savings plans, pensions or other similar benefit plans." (IPU Hrg. Ex. 27(b)). Mosquera, [REDACTED] all testified that Caring Angels did not make available any stock option, stock purchase, savings, pension, profit-sharing plan or other similar benefit plan for employees. (Mosquera Dec. at ¶ 5; Tr. at 71, 319, 238). Nicol confirmed that Caring Angels did not have a compensatory benefit plan for its employees and did not issue or sponsor or make available any stock option, stock purchase, savings, pension, profit-sharing plan or other similar benefit plan for employees. (Tr. at 157-158, 163-164, 222-223). Nicol testified that the company offered "stock purchase plans" for shareholders and board members, but she relied only on the fact that some employees were sold stock, not citing to a formal stock purchase plan. (Tr. at 163-165).

31. To the extent Nicol relied on the Nonqualified Ownership Option as the justification for the exemption in Section 73-207(11) of the Act, no copy of that document executed by [REDACTED] was produced as evidence in this proceeding.⁶

⁶ [REDACTED] also testified that he was never provided a copy of nor signed a Nonqualified Ownership Option or a Stock Grant Agreement. (Tr. at 327-329).

Although the Nonqualified Ownership Option indicates that "[t]he grant hereunder is in connection with and in furtherance of the Company's compensatory benefit plan for participation of the company's employees (including officers, managers and consultants)," (Nicol Hrg. Ex. 9(c)), Nicol could not articulate what compensatory benefit plan the document was referencing. (Tr. at 223). Nicol testified that the reference in the Nonqualified Ownership Option to the "2011 Stock Option Plan" is referring to the Stock Grant Agreement (Nicol Hrg. Ex. 9(d); Tr. at 221), but no copy of the Stock Grant Agreement executed by [REDACTED] was produced as evidence in this proceeding.

32. I find that Caring Angels did not issue, sponsor or make available any stock option, stock purchase, savings, pension or profit-sharing plan. Therefore, the exemption set forth in Section 73-207(11) of the Act does not provide an exemption to registration of the Caring Angels stock. Nicol's conduct in offering and selling 3% of her shares of Caring Angels stock to [REDACTED] whether directly or by directing Caring Angels as its President to buy her shares of Caring Angels and resell them to [REDACTED] where the stock was not registered in Delaware and no valid exemption applied, was in violation of Section 73-202 of the Act.

Sale of Unregistered Securities with respect to [REDACTED] (73-202)

33. [REDACTED] was employed by Caring Angels as a nurse. (Stip. at ¶8; Tr. at 124-26). She was one of the Caring Angels' initial shareholders. (Tr. at 127). She purchased 2,000 shares of Caring Angels stock in 2011 for \$3,000. (Tr. at 126-127). She received K-1s in 2011 and 2012 reflecting her 2 percent ownership. (Tr. at 127-128). In April of 2012, [REDACTED] moved to New Jersey and stopped working for Caring Angels. (Stip. at ¶ 8; Tr. at 135). [REDACTED] was told by Mosquera that according to

Nicol, ██████ could not be a stockholder because she was no longer an employee. (Tr. at 136). Nicol stated that when ██████ left for New Jersey, ██████ was told by Nicol that she no longer had shares and Caring Angels was taking the shares back. (IPU Hrg. Ex. 28(b)). There are no executed corporate documents in evidence that prove that ██████ had a legal or contractual obligation to return her stock to the company when she was no longer an employee.⁷ However, Nicol, Mosquera and ██████ all understood that her stock had to be turned back to the company because she was no longer an employee. (Tr. at 136, 197, 266).

34. ██████ was not paid for her stock when she left the company's employ in 2012. (Tr. at 137, 267). ██████ was not paid for her stock in connection with the sale or attempted sale of 2% of her Caring Angels stock to ██████ in 2013. (Tr. at 267; Mosquera Dec. at ¶ 9). Mosquera indicated the priority was to pay taxes and employee payroll, so there was not enough money to also pay ██████; however, Nicol was immediately compensated for the sale of her 3% share of stock to ██████ at that same time. (Tr. at 267; Mosquera Dec. at ¶¶ 9, 13). ██████ was paid \$3,000 for her shares on January 12, 2015, by a check bearing the notation "2% shares refund." (Stip. at ¶ 8; IPU Hrg. Ex. 21(b)).

35. According to the minutes from a Caring Angels board meeting held on July 29, 2012 that was attended by Nicol and Mosquera, ██████ 2% shares of Caring Angels stock were available. (Stip. at ¶ 8; IPU Hrg. Ex. 19). Nicol understood that 2% of ██████ stock was available for sale to Facciolo. (Stip. at ¶ 27). Nicol testified that she was not aware that Mosquera hadn't paid ██████ for her shares. (Tr. at 155).

⁷ An unsigned draft Nonqualified Option Agreement for ██████ purports to terminate the option to own shares upon termination of employment, but no copy of this document signed by ██████ was admitted into evidence. (IPU Hrg. Ex. 22(g)).

36. I am not making findings for purposes of this Order of whether Nicol or Mosquera purchased shares of Caring Angels stock from [REDACTED] in 2012 or in 2015. I find that in March and April, 2013, Nicol either offered and sold [REDACTED] Caring Angels stock to [REDACTED], or, alternatively, if [REDACTED] stock was not available for sale because [REDACTED] wasn't paid by Caring Angels until 2015, then Nicol attempted to offer to sell [REDACTED] Caring Angels stock to Facciolo in 2013. It is not necessary for purposes of this Order to decide as a matter of corporate law whether [REDACTED] stock was available for sale at the time Nicol sold or attempted or offered to sell [REDACTED] stock to [REDACTED] because both selling and attempting or offering to sell are violations of Section 73-202 of the Act.

37. At the time of the sale, offer to sell or attempt to offer to sell [REDACTED] stock in Caring Angels to [REDACTED], the securities were not registered with the Investor Protection Director or otherwise registered in Delaware. (Stip. at ¶ 16). At the time of the sale, offer to sell or attempt to offer to sell [REDACTED] stock in Caring Angels to [REDACTED], no notice filing regarding the securities had been made with the Investor Protection Director or otherwise. (Stip. at ¶ 15). At the time of the sale, offer to sell or attempt to offer to sell [REDACTED] stock in Caring Angels to [REDACTED] neither Nicol, Mosquera nor Caring Angels was registered to sell securities in Delaware. (Stip. at ¶ 16).

38. Nicol's defense was that the sale of these securities to [REDACTED] was covered by Section 73-207(11) of the Act, which exempts from the registration provisions of the Act "any investment contract issued after the effective date of this act in connection with an employee's stock purchase, savings, pension, profit-sharing or

similar benefit plan.⁶ As was established above in this Order, Nicol did not establish by her testimony or documentary evidence that the sale of any securities to [REDACTED] was covered by the exemption set forth in Section 73-207(11) of the Act. For the reasons set forth above in this Order, I find that Caring Angels did not issue, sponsor or make available any stock option, stock purchase, savings, pension or profit-sharing plan.

39. Nicol's conduct in offering and selling [REDACTED] shares of Caring Angels stock to [REDACTED] or attempting or offering to sell [REDACTED] shares of Caring Angels stock to [REDACTED], where the stock was not registered in Delaware and no valid exemption applied, was in violation of Section 73-202 of the Act.

Doing Business as an Unregistered Broker-Dealer Agent (73-301(a))

40. In connection with the offer or sale of Nicol's or Caring Angels' securities to [REDACTED] as set forth above in this Order, Nicol was not registered to sell securities in Delaware. (Stip. at ¶ 16).

41. In connection with the offer or sale, or attempt or offer to sell, of [REDACTED] Caring Angels' securities to [REDACTED] as set forth above in this Order, Nicol was not registered to sell securities in Delaware. (Stip. at ¶ 16).

42. Nicol's conduct in transacting business in Delaware as a broker-dealer or issuer agent when she was not registered with the Investor Protection Director as provided in the Act was in violation of Section 73-301(a) of the Act.

⁶ No Nonqualified Ownership Option executed by either [REDACTED] was produced as evidence in this proceeding, no Stock Grant Agreement signed by [REDACTED] was produced, and the Stock Grant Agreement signed by [REDACTED] was not counter-signed by Nicol or any other person indicating that it was "Accepted and Agreed to" by Caring Angels. (IPU Ex. 25(d)).

Securities Fraud (73-201(2))

43. In connection with the offer and sale of Caring Angels stock to [REDACTED] Nicol made material misrepresentations or omissions regarding outstanding tax liabilities, outstanding employee payroll liabilities, and the profitability of the company.

44. Nicol failed to inform [REDACTED] that Caring Angels failed to report employee wages to the IRS, which led to an additional tax liability that existed at the time of the sale to [REDACTED]. This was a material omission. For the tax year 2012, Nicol, in her capacity as President, handled the calculation of payroll for the Caring Angels' employees and the calculation of the employment taxes owed by Caring Angels. (Stip. at ¶ 6). Nicol did not upload wages in order for the payroll software Intuit to properly include and submit withholding/payroll taxes from employee paychecks. (Stip. at ¶ 25). This failure to upload wages led to unreported wages for which payroll taxes were due to the IRS in the amount of \$28,504 for the 2012 tax year. (Stip. at ¶ 25; Tr. at 201). Mosquera informed Nicol before March, 2013 about the miscalculation and the tax liability. (Mosquera Dec. at ¶ 8). Nicol admitted she was aware that an amount was due to taxing authorities for withholding taxes for the year 2012. (Tr. at 207-208).

45. There is contradictory testimony in the record regarding who made the decision to not pay the proper withholding/payroll taxes owed to the taxing authorities, but it is unnecessary for purposes of this Order to determine whether or not Nicol made that decision. The pertinent facts are that there was a tax liability that arose from information not being uploaded into Intuit, and that Nicol knew about that outstanding tax liability at the time she participated in the sale of stock to [REDACTED]. Nicol's testimony that she paid the December, 2012 taxes due to the taxing authorities out of Caring

Angel's bank account without Mosquera's knowledge is not credible in light of the contradictory documents and evidence establishing that an independent accounting firm determined that wages were misreported and taxes were due based on that misreporting. (Tr. 160-161; Nicol Post Hearing Statement at p. 5). Nicol contradicted her own testimony when she agreed that the failure to upload wages resulted in a tax liability that remained due and owing at the time of the sales of stock to [REDACTED] (Stip. at ¶ 25).

46. Nicol was both aware of the tax liability and aware it was unpaid at the time of the sales of Caring Angels stock to [REDACTED]. (Stip. at ¶ 25). In early 2013, Caring Angels hired Comprehensive Business Services ("Comprehensive") to calculate and manage payroll and prepare the necessary tax returns for Caring Angels. (Stip. at ¶ 7). Comprehensive prepared a spreadsheet reflecting that taxable wages were underreported by approximately \$90,000 for 2012 and additional taxes were due in the amount of at least \$23,000. (IPU Hrg. Ex. 37(d); Tr. at 253-55). Mosquera shared the spreadsheet with Nicol. (Tr. at 254-255, 259; IPU Hrg. Ex. 44; 37(d)). By mid-March of 2013, Nicol was aware that an amended tax return needed to be filed to reflect the proper taxable wages. (IPU Hrg. Ex. 45; Tr. at 201-202, 260-262; Mosquera Dec. at ¶ 8). Caring Angels did not have the money to pay the Tax Liability at the time of the sale of stock to [REDACTED] (Mosquera Dec. at ¶ 14). Nicol failed to inform [REDACTED] of the outstanding tax liability prior to [REDACTED] purchase of Caring Angels stock. (Tr. at 61, 62; Stip. at ¶ 30). Prior to purchasing stock in Caring Angels Facciolo did not ask Nicol if the company had any unpaid tax liabilities. (Nicol Post Hearing St. at p.5). Nicol

believed it was his responsibility to do his own due diligence before investing. (Nicol Post Hearing St. at p.5).

47. Nicol failed to inform ██████ at the time of his purchase of shares that there was unpaid payroll owed to employees, which was a material omission. (Tr. at 61-62, 213-14). As of November 2012, Caring Angels owed employees, including directors, at least \$300,000. (IPU Hrg. Ex. 30(b); Tr. at 211-12). These amounts owed to employees had not been paid as of March, 2013. (Tr. at 212; 278-79). Nicol was aware of the amounts owed by Caring Angels to its employees. (IPU Hrg. Ex. 30(b); Stip at ¶ 29; Tr. at 211-12; Nicol Post Hearing St. at p.5). Nicol did not inform ██████ of the amounts owed by Caring Angels to its employees before he purchased stock in Caring Angels. (Tr. at 213-214; Nicol Post Hearing St. at p.5). Prior to purchasing stock in Caring Angels ██████ did not ask Nicol if any employees were owed past due wages. (Nicol Post Hearing St. at p.5). Nicol believed it was his responsibility to do his own due diligence before investing. (Nicol Post Hearing St. at p.5).

48. Nicol made misrepresentations to ██████ as to the profitability of the company, which were material misrepresentations. When ██████ found out that others had purchased Caring Angels stock for a lower price per share, Nicol informed him that the sale price to him was higher because the company was making money, so the costs of the shares had increased. (Tr. at 43-45). Nicol told him that the company was profitable. (Tr. at 44). ██████ asked to see an A&R report, a P&L report or a valuation, but those were not provided to him by Nicol or Mosquera. (Tr. at 44). It was not until ██████ second meeting as a shareholder that he learned the company was not in good financial standing. (Tr. at 53-55, 60-61). At the end of 2013, the fiscal year

during which ██████ purchased stock, the company reported a loss on its federal tax return. (Tr. at 52; IPU Hrg. Ex 11).

49. Nicol also failed to show ██████ an operating agreement, a stock grant agreement, a nonqualified ownership option, a stock option plan or any other paperwork relating to his stock purchase prior to or at the time of his purchase of Caring Angels stock. (Tr. at 48, 55-56, 62-63, 70, 74, 265, 269). ██████ indicated that he made the notation in the memo line on his check in order to evidence that he was purchasing stock, since he had received no paperwork for the stock he was purchasing. (Tr. at 48). It was not until several months after his purchase that ██████ received an operating agreement and an unsigned original stock certificate. (Tr. at 56, 67-68; IPU Hrg. Ex. 13(a); 17(g)). Nicol's Answer says that she gave ██████ a copy of these documents, but she then testified that she did not provide these documents to ██████, but instead provided a copy to Mosquera on March 23, 2013 to transmit to ██████ prior to his purchase. (IPU Hrg. Ex. 35; Tr. 173-174, 189). Mosquera's testimony does not support Nicol's testimony. (Tr. at 269-270). I find ██████ testimony that he did not receive these documents until after he purchased his shares to be more credible. In Nicol's role as President, with responsibility to prepare and execute corporate documents, deal with stock investments and keep track of stock ownership, she should have ensured that any potential new investor received copies of the relevant corporate documents governing shares in advance of investing.

50. It is unclear whether the vesting provisions in the unsigned Nonqualified Ownership Option documents entered into evidence in this proceeding were operable under corporate law or contract principles, since no copy executed by ██████ was

submitted in this proceeding. ██████ testified that he was not told prior to his purchase of stock that the stock would vest over time and he did not believe his stock vested over time. (Tr. at 62, 73). ██████ K-1 for the year 2013 showed that he owned 4% of the stock of Caring Angels, and for each year thereafter, his K-1 showed that he owned 5% of the stock of Caring Angels. (Stip. at ¶ 18). He was told by Nicol that the 4% was a clerical error. (Tr. at 69). But the stock ownership percent listed in the K-1's did not reflect the vesting schedule in the draft Nonqualified Ownership Option, and Nicol testified that she ignored the vesting schedule. (Nicol Hrg. Ex. 9(c); Tr. at 224). Therefore, I do not make findings of fact or conclusions of law regarding any representations or misrepresentations made by Nicol to ██████ regarding the vesting of Caring Angels stock over time.

51. ██████ was told that he had 5% of stock from the time of his purchase, which he understood to have voting rights. (Tr. at 53, 55, 62). Several months after his stock purchase, ██████ received an operating agreement and an unsigned stock certificate in a package directed to his attention and sent to the Caring Angels' office in Smyrna from Nicol. (Tr. at 55-56, 66-67). At that time ██████ learned that the stock he purchased did not have voting rights. (Tr. at 67-68). At some meetings of shareholders he was allowed to vote, but at others he was told he could not vote. (Tr. at 54, 56-57). Nicol testified that she never promised ██████ prior to his purchase of Caring Angels stock that he could vote with his 5% ownership, and stated that since day one, only investors with at least 6% ownership could vote. (Tr. at 156).

52. The voting rights of the stock were conveyed in the Caring Angels Operating Agreement. The only executed versions of the Operating Agreement entered

into evidence in this proceeding were the 2013 Operating Agreement and the 2014 Operating Agreement, both of which were signed by [REDACTED] and by Nicol as President of and on behalf of the company, but neither of which were fully executed by all shareholders listed therein. (Nicol Hrg. Ex. 6, 9(b)). The partially executed 2013 Operating Agreement signed by all shareholders except one states that the company would issue nonvoting Class B stock to anyone with less than 6% ownership, but does not include [REDACTED] as an owner of stock. (Nicol Hrg. Ex. 6, section 6.2). The partially executed 2014 Operating Agreement signed only by [REDACTED] and Nicol lists [REDACTED] 5% shares as voting stock. (Nicol Hrg. Ex. 9(b), section 6.3). Nicol indicates the company had a "rule" that for an operating agreement to be valid, it had to be signed by all board members, the consequence of which was that the 2014 Operating Agreement that was not signed by several members never became valid and the 2013 Operating Agreement remained in force. (Tr. at 116). However, no fully executed copy of the 2013 Operating Agreement was entered into evidence in this case,⁹ and the partially executed 2013 Operating Agreement in evidence does not even list [REDACTED] as owning stock in the company. (Nicol Hrg. Ex. 6). Because the Operating Agreements in evidence in this proceeding do not prove that [REDACTED] stock was non-voting stock under corporate law or contract principles, I do not make findings of fact or conclusions of law regarding any representations or misrepresentations made by Nicol to [REDACTED] regarding whether his Caring Angels stock was voting stock or nonvoting stock.

⁹ The signature of [REDACTED], who is listed in the 2013 Operating Agreement as owning a 3% non-voting ownership interest, was missing from the 2013 Operating Agreement. Board meeting minutes for a meeting held on February 24, 2014 indicate [REDACTED] was removed as a board member. (IPU Hrg. Ex. 19). However, during 2013, when the 2013 Operating Agreement dated "March ____, 2013" was executed, [REDACTED] was still a board member.

53. Nicol, as the President of Caring Angels, who was involved the offer and sale or attempt to offer for sale Caring Angels stock to [REDACTED], misled [REDACTED] as a potential investor by failing to disclose the profitability of the company, outstanding tax liabilities, and outstanding employee payroll liabilities. These failures of disclosure were material. Nicol's conduct in making untrue statements of material fact to [REDACTED] and omitting to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, untrue, in connection with the offer, sale or purchase of Caring Angels stock to [REDACTED], was in violation of Section 73-201(2) of the Act.

54. I do not find sufficient evidence in the record to establish that Nicol engaged in an act, practice or course of business, which operated as a fraud or deceit upon Facciolo, pursuant to Section 73-201(3) of the Act.

Misrepresentations of Fact During Administrative Proceedings (73-209)

55. IPU raised in its Post-Hearing Statement a new violation of the Act that arose after the filing of the Complaint, but that was not addressed during the Hearing. IPU notes that Nicol violated Section 73-209 of the Act, which states that "[i]t is unlawful for any person to make or cause to be made, in any document filed with the Director or in any proceeding under this chapter, any statement which is, at the time and in the light of the circumstances under which it is made, false or misleading in any material respect." IPU notes that statements of Nicol in her Motion to Dismiss (Dkt. No. 40) (IPU Hrg. Ex. 34) and her Answer (Dkt. No. 49) (IPU Hrg. Ex. 35), as well as Nicol's statements at the Hearing show that she submitted inaccurate and misleading

documents in this proceeding and that she knew the documents were inaccurate and misleading when she submitted them.

56. Because the parties' Post Hearing Statements were submitted simultaneously, Nicol was not provided an opportunity to respond to this new charge. Accordingly, the Hearing Officer is not prepared to address the issue of whether Nicol violated Section 73-209 of the Act by making statements in documents filed with the Director and in this proceeding, which were, at the time and in light of the circumstances under which they were made, false or misleading in any material respect. IPU is free to raise that charge in a supplemental action against Nicol, which would allow Nicol the opportunity to submit a response or defense to the charge.

D. Remedies

In light of the above, I order the following relief, all of which are in the public interest:

- a. Florence Nicol shall make restitution to [REDACTED] by delivering to the Delaware Investor Protection Unit, within ninety (90) days of the date of this Order, a certified check made payable to [REDACTED] in the amount of \$12,500.00. The Investor Protection Unit shall then deliver the check to [REDACTED] within a reasonable amount of time.
- b. Florence Nicol shall pay to the Delaware Investor Protection Unit a fine in the total amount of \$20,000.00 for the violations of the Act contained in this Order. Such fine shall be paid to the Investor Protection Unit within ninety (90) days of the date of this Order.
- c. Florence Nicol shall pay to the Delaware Investor Protection Unit within ninety (90) days of the date of this Order the out of pocket costs of IPU for

conducting the investigation and Hearing, excluding reimbursements for attorney or staff time. The Investor Protection Unit shall quantify those out of pocket costs, and within thirty (30) days of the date of this Order shall provide Nicol in writing the total amount due and the basis for the calculation.

IT IS SO ORDERED this 28th day of May, 2019



Victoria W. Coughlin
Administrative Hearing Officer

cc: Marion Quirk, IPU
Florence Nicol
Lilia Mosquera
Caring Angels Home Health Corp.