

RECEIVED

'09 JUL 14 P2:24

ATTORNEY GENERAL
OF WASHINGTON
CENTRAL OFFICE
ATTORNEY GENERAL
STATE OF WASHINGTON
JUL 14 2009

GOVERNMENT COMPLIANCE
& ENFORCEMENT

Washington State
Office of the Attorney General
Acknowledged Receipt, this 14 day
of July, 2009, Time: 2:28
in Olympia, Washington
Signature: [Signature]
Print Name: Doree Stolci
Assistant Attorney General

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF THURSTON

In Re:

NORTH AMERICAN DEALER CO-OP;
NATIONAL ADMINISTRATIVE
DEALER SERVICES, INC.; AND HENRY
C. ("HANK") BAILEY, JR.,

Petitioners,

09 2 01710 4
..No.

PETITION FOR REVIEW

COME NOW Petitioners named above, by and through their undersigned attorneys, and pursuant to RCW 34.05.542 and .546, respectfully petition this Court for review of an order issued by the Hearing Unit of the State of Washington Office of the Insurance Commissioner, as follows:

1. **PETITIONERS:**

Henry C. Bailey, Jr.; aka Hank Bailey
North American Dealer Co-Op
National Administrative Dealer Services, Inc.
1661 Wadsworth Boulevard
Lakewood, CO 80214

PETITION FOR REVIEW

Page 1 of 21

rml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

COPY

1 **2. PETITIONERS' ATTORNEYS:**

2 Brian M. King, Esq.
3 Peter T. Petrich, Esq.
4 DAVIES PEARSON, P.C.
5 920 Fawcett Avenue
6 P.O. Box 1657
7 Tacoma, WA 98401

8 **3. AGENCY WHOSE ACTION IS AT ISSUE:**

9 State of Washington Office of the Insurance Commissioner
10 P.O. Box 40255
11 Olympia, WA 98504-0255

12 **4. AGENCY ACTION AT ISSUE:**

13 Chief Hearing Officer Patricia D. Petersen's Final Findings of Facts, Conclusions
14 of Law and Order on Hearing filed on July 10, 2009 (Copy Attached).

15 **5. INDIVIDUALS WHO WERE PARTIES IN THE ADJUDICATIVE**
16 **PROCEEDING:**

17 Henry C. Bailey, Jr.; aka Hank Bailey
18 North American Dealer Co-Op
19 National Administrative Dealer Services, Inc.
20 State of Washington Office of the Insurance Commissioner
21
22
23

24 **PETITION FOR REVIEW**

25 Page 2 of 21

26 rml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 **6. FACTS DEMONSTRATING PETITIONERS ARE ENTITLED TO**
2 **OBTAIN JUDICIAL REVIEW:**

3 Petitioners seek judicial review of the “Final Findings of Fact, Conclusions of
4 Law, and Order on Hearing” (hereinafter, the “Order”), issued by Patricia D. Petersen,
5 Chief Hearing Officer of the State of Washington Office of the Insurance Commissioner,
6 and dated July 10, 2009.

7
8 **a. Factual Background of Petitioners**

9 North American Dealer Co-op (“NADC”) is a Co-op of motor vehicle dealers
10 throughout the United States, including dealers in the state of Washington. Its current
11 President is John C. Mercer, a California resident. NADC was established under the laws
12 of Colorado in 1995. It is presently principally located in Reno, Nevada.

13
14 National Administrative Dealer Services, Inc. (“NADS”) is a Colorado
15 corporation principally located in Lakewood, Colorado. Henry C. Bailey, Jr. is an
16 individual residing in the state of Colorado. Mr. Bailey is currently the President of
17 NADS. Mr. Bailey is the former President of NADC.

18
19 Many NADC member dealers offer vehicle service contracts to their customers
20 upon the sale of a vehicle. Under the existing program, NADC member dealers may
21 offer to their customers a “money back guarantee program” at no separate additional
22 charge to the customer. The reimbursement agreement, in the form of a Service Contract
23

24 **PETITION FOR REVIEW**

25 Page 3 of 21

26 rml s:\1xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 Reimbursement Guarantee, is a benefit offered by the NADC dealers directly to their
2 customers. Pursuant to the express terms of the Reimbursement Guarantee, the dealer is
3 the party obligated to provide the refund to the qualifying customers. In this way, the
4 guarantee is identical to all other guarantees offered by retailers to consumers who
5 purchase their goods or services. The reimbursement guarantee offered by NADC dealer
6 members is also similar to money-back guarantees on service contracts offered by
7 automobile manufacturers Ford and Daimler Chrysler in the state of Washington. The
8 reimbursement guarantee is currently being offered by NADC member dealers in
9 approximately forty-eight states. It is not offered in the states of Wisconsin and Florida
10 because of statutory prohibitions concerning money-back guarantees. Washington
11 NADC members have been offering the reimbursement guarantee continuously since
12 2002.
13

14
15 The Reimbursement Guarantee has terms and conditions that are completely
16 independent from the terms and conditions of the customer's vehicle service contract.
17 The member dealer's Reimbursement Guarantee has no direct relationship with the
18 vehicle service contract and/or vehicle service contract company. Although the
19 reimbursement guarantee is subject to certain terms and conditions, it is generally
20 available to customers who purchase an extended service contract from the dealer and
21 subsequently do not make a claim during the duration of the vehicle service contract
22 period. Although NADC member dealers may have discretion regarding the sale price of
23

24 **PETITION FOR REVIEW**

25 Page 4 of 21

26 rml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 a vehicle service contract, that is a contractual issue decided between the dealer and its
2 customer. NADC member dealers do not separately charge customers for the
3 reimbursement guarantee. The only NADC member dealer that testified at the hearing
4 was Mark King, General Manager of Roy Robinson Chevrolet located in Marysville,
5 Washington. Mr. King, an OIC witness, testified that Roy Robinson Chevrolet never
6 charged a customer more for a service contract that included the reimbursement
7 guarantee than it did for a service contract that did not include the reimbursement
8 guarantee.
9

10 NADC has contracted with National Administrative Dealer Services (“NADS”) to
11 handle all administration issues related to this program. NADS is also obligated under the
12 declarations page of the Western performance bond to serve as the administrator. NADS
13 administers the reimbursement guarantee claims for the dealers obligated by the program.
14 Thus, the NADC and NADS reduce some of the administrative burdens typically
15 associated with reimbursement guarantees offered by merchants. Dealers who join the
16 NADC agree to use NADS for the administration of the program and to pay it certain
17 administration fees related to the processing of claims as well as the processing of dealer
18 reserve accounts.
19

20 NADC has elected to purchase a performance bond from an insurance company
21 authorized to do business in the states of Colorado and Nevada. NADC and its members
22 are presently the named principals of a Reimbursement Guarantee Performance Bond
23

24 **PETITION FOR REVIEW**

25 Page 5 of 21

26 mml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 issued by Access Insurance Services, Inc. d/b/a Western Insurance Company. The
2 performance bond was obtained by NADC through A and H Insurance Inc., a licensed
3 broker located in Reno, Nevada. Western Insurance Company's President is Dick
4 Rottman, the former Insurance Commissioner for the State of Nevada.¹

5 Pursuant to the terms of the performance bond, Western Insurance Company
6 agrees to reimburse the named principal for losses extended under a valid Reimbursement
7 Guarantee from the dealer's reserve account up to two thousand five hundred dollars
8 (\$2,500).²

10 Western Insurance Company has agreed to hold a certain amount from the dealer
11 based on the number of issued reimbursement guarantees in a "Collateral Reserve
12 Account" (the dealer's reserve). The dealer's reserve amount is based on the number of
13 Reimbursement Guarantees offered by NADC member dealers to their customers. The
14 Collateral Reserve Account is nothing more than a deposit made by the individual dealers
15 of their own monies, transmitted through NADC and NADS to Western Insurance
16 Company, to be available in the event that a claim is made against a reimbursement
17 guarantee they issued.
18

19
20 ¹ Mr. Rottman testified telephonically in these proceedings and proved to be extremely knowledgeable
21 concerning the Western Insurance Company bond and the NADC program. The Chief Hearing Officer
22 dismissed the former Insurance Commissioner of the State of Nevada as "[not] a particularly credible
23 witness."

24 ² The performance bond had previously been issued by Interstate Insurance Company, a Fireman's Fund
25 company. Since the operation of NADC began in 1995, NO CLAIMS have been paid out of the
26 performance bond. Rather, dealer reserves, discussed in the next section, have been sufficient to pay all
valid claims that have been made under the program.

PETITION FOR REVIEW

Page 6 of 21

m:\s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 The Collateral Reserve Account is held by Western Insurance Company pending
2 the presentation of a valid reimbursement claim. Importantly, NADS does not hold any
3 funds from NADC or its members nor does NADC hold any funds. NADS administers
4 NADC's reserves and fees by documenting the amounts paid by NADC and forwards
5 those amounts to Western Insurance Company in Nevada. It also retains a certain
6 amount to pay to sales representatives located throughout the United States.
7

8 Once a valid claim is administered, submitted to Western Insurance Company,
9 and paid by Western Insurance Company out of the dealer's reserves, NADS submits a
10 reimbursement check made payable jointly to the dealer member and its customer.³ The
11 NADC member dealer is responsible for refunding the purchase price to the customer,
12 and remains contractually obligated to the customer for the money-back guarantee. The
13 check is made payable jointly to the NADC member dealer and its customer so it is easier
14 for the NADC member dealer to identify the amount owed to each of its customers.
15

16 **b. Procedural Background of Proceedings before Office of Insurance
17 Commissioner's Hearings Unit.**

18 The State of Washington Office of Insurance Commissioner has never issued a Cease and
19 Desist Order against NADC, NADS and/or Mr. Bailey. Rather, these proceedings were
20 commenced as a result of a completely unrelated change in Washington's laws pertaining
21

22 ³ NADS submits a group of claims to Western Insurance Company on a weekly basis and Western in
23 return issues one check payable to NADS from the dealers accounts to cover all those claims. NADS then
deposits that check and issues checks to each dealer for their individual reimbursement claims from
customers.

24 **PETITION FOR REVIEW**

25 Page 7 of 21

26 rml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 to service contracts that went into effect in 2006. Those changes related solely to
2 providers of service contracts and not money-back guarantees. However, one NADC
3 dealer contacted the State of Washington Office of Insurance Commissioner in order to
4 obtain an opinion concerning the NADC program and a recent opinion letter concerning
5 the effect of the recent changes to the Revised Code of Washington pertaining to service
6 contracts.

7
8 Petitioners cooperated with the Office of Insurance Commissioner with respect to
9 the OIC's request for information concerning the program. However, in a written letter
10 dated April 11, 2007, the OIC offered an opinion that the program constituted insurance.
11 The OIC did not, nor has it ever, adequately explained how this program differs from
12 money-back guarantees offered in the state of Washington by almost all retail sellers of
13 products and services. As a result of the OIC's seemingly arbitrary decision-making and
14 position with respect to money-back guarantees, the Petitioners requested a hearing
15 concerning this matter.
16

17 The significant delays in the hearing process and the issuance of a decision by the
18 Hearings Officer are important issues in consideration of the Petitioner's request for an
19 immediate and temporary stay of the Hearing Officer's decision. A concise summary of
20 the proceedings is as follows:
21

- 22 1. April 27, 2007 - Petitioner's file a Demand for Hearing.
23

24 **PETITION FOR REVIEW**

25 Page 8 of 21

26 mnl s:\1xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

- 1 2. May 16, 2007 - Hearings Officer issues a Notice of Hearing.⁴
- 2 3. August 16, 2007 - The Hearings Officer issued a one week Order of
- 3 Continuance.
- 4 4. August 22-31, 2007 - Hearings were held before the Hearings Officer at
- 5 the Office of Insurance Commissioner in Tumwater, Washington.
- 6 5. September 17, 2007 – Closing Briefs are filed by Petitioners and the OIC.
- 7 6. October 24, 2007 - OIC files its first motion to supplement the record
- 8 [Denied];
- 9 7. December 10, 2007 – OIC files its second motion to supplement the
- 10 record;
- 11 8. December 12, 2007 - Petitioner’s respond to second motion to supplement
- 12 the record and present Declaration of Janice L. Bowman (see attached);
- 13 9. January 8, 2008 – OIC files its third motion to supplement the record;
- 14 10. February 4, 2008 - Chief Hearing Officer is presented with oral argument
- 15 concerning the OIC’s third motion to supplement the record;
- 16 11. May 19, 2008 - Chief Hearing Officer issues an Order on OIC’s Second
- 17 and Third Motions to Supplement the Record;
- 18
- 19
- 20

21 _____

22 ⁴ Petitioners sought to have the matter heard by an administrative law judge. However, the Hearings

23 Officer denied Petitioner’s request for a hearing in front of an Administrative Law Judge pursuant to RCW

24 48.04.010, on the grounds that only “licensees” are entitled to a hearing before an Administrative Law

25 Judge.

24 **PETITION FOR REVIEW**

25 Page 9 of 21

26 ml s:\1xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 12. August 18, 2008 – Additional testimony provided by Dick Rottman,
2 President of Western Insurance Company (Petitioners’ General Counsel, Fred Greenberg
3 is granted permission to participate in proceedings).

4 13. September 29, 2008 – Oral argument concerning Dick Rottman’s
5 testimony was presented by Fred Greenberg and Brian King for Petitioners and Alan
6 Singer for the OIC.

7
8 14. July 10, 2009 - Hearings Officer issues her Final Findings of Facts,
9 Conclusions of Law and Order on Hearing.⁵

10 It should be noted that the Chief Hearings Officer failed to issue a decision on *two*
11 separate occasions within ninety (90) days as required by RCW 34.05.461(8)(a).⁶ The
12 Petitioners never agreed to waive this requirement, nor did the final decision include any
13 good cause for the considerable delays in the issuance of a final order.
14

15
16
17 ⁵ Although the final decision sets forth Petitioners’ right to file a Petition for Review within thirty (30)
18 days, the exceedingly short time limitations set forth in the order deprive Petitioners’ of their right to use
19 the thirty-day period to draft and prepare a Petition for Review. For this reason, Petitioners’ are requesting
20 leave to amend their Petition for Review at any time through August 10, 2009.

21 ⁶ The operative language provides as follows: “(8)(a) Except as otherwise provided in (b) of this
22 subsection, initial or final orders shall be served in writing within ninety days after conclusion of the
23 hearing or after submission of memos, briefs, or proposed findings in accordance with subsection (7) of this
24 section unless this period is waived or extended for good cause shown.” At no time did the petitioners agree
25 to a waiver of the ninety day rule nor, to petitioner’s knowledge, was an order entered which extended the
26 deadline for good cause shown. The lack of urgency by the Hearing Officer in deciding the case, in
violation of the clear directive in the APA, is in sharp contrast to her decision to require virtually immediate
action on the part of petitioners which would likely destroy their business without allowing appropriate
time to prepare a comprehensive Petition for Review and motion for stay.

24 **PETITION FOR REVIEW**

25 Page 10 of 21

26 ml s:\1xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 **c. Right to Relief:**

2 Under RCW 34.05.570, the court shall grant relief from an agency order in an
3 adjudicative proceeding if it determines that one of nine specific situations applies,
4 including, but not limited to, the following three relevant to the present matter:

- 5 (d) The agency has erroneously interpreted or applied the law;
- 6
- 7 (e) The order is not supported by evidence that is substantial when
8 viewed in light of the whole record before the court, which
9 includes the agency record for judicial review, supplemented by
any additional evidence received by the court under this chapter;
. . . or
- 10 (i) The order is arbitrary or capricious.

11 RCW 34.05.570(3).

12 As discussed in more detail in subsection 7 below, the Chief Hearings Office
13 relied on factual errors, which were not supported by the evidence presented, and
14 therefore Petitioners are entitled to relief under RCW 34.05.570(3)(e). The Chief
15 Hearings Officer also erroneously applied the law, which warrants relief under RCW
16 34.05.570(3)(d). Additionally, the unreasonable extent of the steps that the Chief
17 Hearings Officer orders Petitioners to accomplish within a mere ten days of her e-mailing
18 the Order to them (after the parties had been awaiting the Chief Hearings Officer's
19 decisions for months), as well as her repeated inflammatory statements about the
20 Petitioners and their evidence, demonstrates bias and that the order is arbitrary and
21 capricious, as outlined in RCW 34.05.570(d)(i). Any of these grounds alone warrants
22
23

24 **PETITION FOR REVIEW**

25 Page 11 of 21

26 msl s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 judicial review and relief from the ruling. Taken together, they are more than enough for
2 the Court to intervene.

3 **7. PETITIONERS' REASONS FOR BELIEVING THAT RELIEF SHOULD**
4 **BE GRANTED:**

5 **a. Petitioners have never been engaged in the insurance business in**
6 **Washington:**

7 The Office of the Insurance Commissioner argued in the underlying action that
8 NADC has been engaged in the insurance business in Washington for the following
9 reasons:

- 10 i. The program is a contractual arrangement in which NADC
11 and/or NADS undertake to pay or indemnify money-back guarantees
12 made to service contract purchasing customers.
- 13 ii. NADC collects premiums, secures insurance, and pools monies to
14 adjust and pay claims.
- 15 iii. NADC is acting as either an unlicensed agent or broker of an
16 insurance provider. See Appellant's Ex. 19; OIC's Hearing Brief.

17 As argued by counsel for the Petitioners, each of these contentions was
18 baseless for the following reasons:

- 19 i. NADC has never agreed to undertake or pay a money-back
20 guarantee to a dealer or customer. Rather, the dealer pays the money-back
21 guarantee directly to the customer, and is contractually obligated to do so.
22 NADC member dealers are reimbursed from reserves and/or insurance
23 premiums purchased by NADC. NADS simply acts as an administrator
24 for purposes of administering the claims.
- ii. NADC member dealers simply obtain insurance and pay premiums
for insurance it has purchased as a consumer. Neither NADC nor NADS

24 **PETITION FOR REVIEW**

25 Page 12 of 21

26 m:\s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 pool or hold any reserves in any way; the funds are held exclusively by an
2 insurance company principally located in the state of Nevada, for the
benefit of a co-operative principally located in the state of Nevada.

3 iii. Neither NADS nor NADC have ever held themselves out as agents or
4 brokers of insurance in the state of Washington. They are acting as
5 neither, as those terms are defined by Washington law. The agent and broker
6 for the insurance obtained by NADC are both located in the state of
Nevada.

7 **b. The terms of the Order are contrary to the evidence and the law:**

8 The Chief Hearing Officer's Order sets forth almost eleven and a half pages of
9 Findings of Fact and one page of Conclusions of Law. Despite the above-listed facts, the
10 Chief Hearing Officer's primary overall conclusion was that Petitioners have been
11 offering insurance services, in violation of RCW 48.01 et seq. The Chief Hearing Officer
12 thus entered the following orders:

13 **IT IS HEREBY ORDERED** that, effective immediately, the
14 Respondents are ordered to cease and desist from further offering
15 their NADC Program, as described in the Findings of Fact above,
16 to any automobile dealers or other entities in Washington;

17 **IT IS FURTHER ORDERED** that, within 10 days of the date of
18 this Order, Respondents shall 1) send a copy of these Final
19 Findings of Fact, Conclusions of Law and Order to all Washington
20 NADC Dealer Members in Washington state; and 2) instruct all
Washington NADC Dealer Members that they are to cease offering
and/or entering into any more NADC Auto Dealer Extended
Service Contract Reimbursement Guarantees,

21 **IT IS FURTHER ORDERED** that, within 10 days of the date of
22 this Order, Respondents shall 1) send a copy of these Final
23 Findings of Fact, Conclusions of Law and Order to all Washington
consumers who have purchased an NADC Auto Dealer Extended

24 **PETITION FOR REVIEW**

25 Page 13 of 21

26 rml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 Service Contract Reimbursement Guarantee; and 2) instruct all
2 such consumers that should the consumer file a valid claim against
3 their NADC Auto Dealer Extended Service Contract
4 Reimbursement Guarantee at the time of expiration of their
5 extended service contract, it will be honored by Respondents,

6 **IT IS FURTHER ORDERED that**, as to all NADC Auto Dealer
7 Extended Service Contract Reimbursement Guarantees existing on
8 the date of entry of this Order, Respondents shall honor all valid
9 claims made on these contracts at the time of expiration of the
10 extended service contract.

11 Petitioners believe the Chief Hearing Officer's orders go against the weight of the
12 evidence and are contrary to applicable law, and they should be overturned in their
13 entirety. Petitioners can demonstrate a substantial likelihood of success on the merits.
14 There were considerable errors of fact and law in Hearing Officer's decision that support
15 Petitioners' ability to succeed on the merits, including, but not limited to, the following:

16 i. Finding of Fact Number 11. The Chief Hearings Officer frequently relies upon
17 promotional materials – and takes them out of context - while failing to discuss the actual
18 terms and conditions of the contractual agreement between the dealer and the customer,
19 the dealer and NADC, and the Western Insurance Company Performance Bond.

20 As a prime example, the Chief Hearings Officer implies that an additional cost is
21 added to the price of the service contract to pay for the “dealer reserves.” There is
22 absolutely no evidence in the record to support this contention. In fact, the only
23 testimony in the record concerning whether an additional cost is added for the
24 reimbursement guarantee was offered by Mark King. Mr. King testified that there was

25 **PETITION FOR REVIEW**

26 Page 14 of 21

msl s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 never an additional charge added for the reimbursement guarantee, and that service
2 contracts sold without the reimbursement guarantee were offered at precisely the same
3 price to the consumer. This testimony came from a witness that the Chief Hearings
4 Officer claims was provided “significant weight.”

5 The Hearing Officer believes that because a dealer can price its extended service
6 contract at its discretion – i.e. that there is no suggested retail price for an extended
7 service contract – that this somehow makes the NADC program insurance. She is plainly
8 wrong. What is significant is that dealers may not – and do not - charge a separate fee for
9 a reimbursement guarantee. This is what Mr. King’s testimony established. The
10 reimbursement guarantee program is not “sold”, rather it is offered on all extended
11 service contracts. There is no price difference between an extended service contract
12 which has a reimbursement guarantee and one which does not. The NADC program is no
13 different than other retail guarantees. For example, LL Bean offers Washington
14 consumers an unconditional money back guarantee on everything they buy from it. There
15 is no additional charge for the “guarantee”. It comes with the product. LL Bean may
16 increase its selling price to cover the anticipated cost of returns but it doesn’t charge
17 separately for the guarantee. By increasing the selling price it is not engaging in the sale
18 of insurance. The same is true here. The testimony was that guarantees are offered by
19 NADC members on extended service contracts but that there is no separate charge for
20 them. What NADC members do here is no different than LL Bean, or other retailers in
21
22
23

24 **PETITION FOR REVIEW**

25 Page 15 of 21

26 rml s:\1xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 Washington, who offer money back guarantees. The fact that some dealers may sell their
2 service contracts for a higher price to cover their anticipated costs (but offer the same
3 service contract price to everyone) is no different than what LL Bean may do in raising
4 its prices to cover anticipated returns.

5 ii. Finding of Fact 14. The Chief Hearing Officer once again places form over
6 substance in attempting to establish that Petitioners, rather than the individual dealer, is
7 responsible for payment of reimbursement claims. Once again, the Chief Hearings
8 Officer ignores the most important testimony presented to her, namely the *contract*
9 entered into between the customer and the dealer which obligates the dealer to pay all
10 reimbursement guarantees. In fact, all claims that have been made since the program's
11 inception in 1995 have been made from the dealer reserves, which are monies set aside
12 by each dealer when he sells an extended service contract with a reimbursement
13 guarantee and which are maintained by Western Insurance Company as reserves in a
14 collateral account for the purpose of paying valid claims on behalf of the dealer. The
15 Hearing Officer's wrongly concluded that because the payments are made by NADC to
16 the dealer and its customer, with funds provided to NADC from Western out of the
17 dealer's reserve account, that somehow the dealer is not paying the reimbursement. The
18 undisputed record reflects that she is plainly wrong in this regard.

19 iii. Testimony of Dick Rottman. Mr. Rottman is the President of Western
20 Insurance Company and the former Insurance Commissioner of Nevada. Mr. Rottman
21

22 **PETITION FOR REVIEW**

23 Page 16 of 21

24 mml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

25 DAVIES PEARSON, P.C.
26 ATTORNEYS AT LAW
 920 FAWCETT -- P.O. BOX 1657
 TACOMA, WASHINGTON 98401
 TELEPHONE (253) 620-1500
 TOLL-FREE (800) 439-1112
 FAX (253) 572-3052

1 testified unequivocally that: the reserves are held by Western for NADC and its dealer
2 members; Western's performance bond is in place as a benefit to NADC members and
3 issued to NADC in accordance with the laws of Nevada; that the program does not
4 constitute insurance in Washington State and that there is no reason for Western or
5 anyone else to register with or pay fees to the Washington Insurance Department in
6 connection with the reimbursement guarantee program. The Chief Hearings Officer chose
7 to label Mr. Rottman, a witness called by the OIC, as "evasive and uncooperative,"
8 instead of recognizing that Mr. Rottman's testimony fully supported the testimony
9 provided by Mr. Bailey one year earlier, and which directly disproved the allegations and
10 theories asserted by the OIC.
11

12 iv. The Chief Hearing Officer's decision exhibits a pattern of hostility towards
13 Petitioners which is not supported by the record and which goes beyond the issues she
14 was asked to decide. Specifically, the Chief Hearing Officer provides detailed
15 speculation concerning Petitioners' tax records, even though this issue was not before her
16 as required by RCW 34.05.461(4). See Finding of Fact number 22.⁷ The Chief Hearing
17 Officer clearly and excessively focuses on Mr. Bailey's prior tax conviction and
18
19

20 ⁷ The parties had a discovery dispute about tax records. The Petitioners believed that requests for tax
21 records was irrelevant to the issue of whether the program constitutes insurance and objected to requests for
22 them. Notwithstanding its position, petitioners believe that they produced all records requested and offered
23 additional records which the OIC declined to review. The Hearing Officer elevated this discovery dispute
24 into an inappropriate, speculative and unsupported finding of fact which she believes supports her ruling
25 that the reimbursement guarantee program constitutes insurance. Her speculation – which is entirely
26 baseless and wrong – is entirely irrelevant to the matter *sub judice*.

24 **PETITION FOR REVIEW**

25 Page 17 of 21

26 mml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 demeanor which extends far beyond the limited exceptions set forth in the Rules of
2 Evidence. Clear animus towards Mr. Bailey is evident throughout the decision.

3 The Chief Hearing's Officer treatment of Mr. Bailey and Mr. Rottman is
4 especially concerning given the manner in which she described the OIC's witnesses and
5 employees. For instance, the Chief Hearings Officer incorrectly identifies James E.
6 Tompkins as a "Staff Attorney with the Office of Insurance Commissioner" and finds
7 that he had no "apparent biases," without mentioning that Mr. Tompkins's license to
8 practice law was suspended at the time of the hearing and, according to the records of the
9 Washington State Bar Association, remains suspended to this day. The Chief Hearings
10 Officer even went so far as to make findings concerning the Petitioners' compliance with
11 a *California* Stipulation and Waiver, without any reference to California law, and without
12 mentioning that the California Department of Insurance has allowed California NADC
13 member dealers to offer the NADC reimbursement program continuously since 1995 and
14 that the program is not considered insurance in California. In her finding number 12, the
15 Hearing Officer reports that there was a disciplinary action taken against Petitioners by
16 the Insurance Commissioner of California. Petitioners were never subject to disciplinary
17 action in California nor in any other state. Petitioners and the California Insurance
18 Department entered into a voluntary agreement and there was no disciplinary action
19 pending at the time that agreement was reached.
20
21
22
23

24 **PETITION FOR REVIEW**

25 Page 18 of 21

26 mml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1 as an agent or as a broker. The evidence established that NADC is an insured under a
2 policy purchased and maintained in Nevada and nothing more.

3 vii. There are multiple other factual errors and errors of law in the Decision
4 which will be explained in more detail in a supplemental filing, which, taken with those
5 outlined above, demonstrate that the petitioners are likely to prevail in this appeal.
6 Petitioners also incorporate by reference, as if set forth at length herein, all additional
7 arguments set forth in the Petition for Review filed simultaneously herewith.
8

9 **8. REQUEST FOR RELIEF:**

10 For the reasons outlined above, Petitioners respectfully request that the Final
11 Findings of Facts, Conclusions of Law, and Order on Hearing dated July 10, 2009 be
12 vacated, and that the orders directed to Petitioners be overturned in their entirety.
13

14 In addition, in light of the need to file this Petition for Review on an expedited
15 basis so that a stay of the Order can be sought before the Order's deadline of July 20,
16 2009, Petitioners have not had the benefit of the full 30-day period in which to file their
17 Petition for Review, as allowed by RCW 34.05.542(2). They also lack the presence of
18 their primary counsel, who is on vacation and absent from this jurisdiction at the time of
19 the filing of this Petition for Review. For these reasons, Petitioners respectfully request
20 the right to amend or supplement this Petition for Review as needed at any time before
21 August 10, 2009.
22

23
24 **PETITION FOR REVIEW**

25 Page 20 of 21

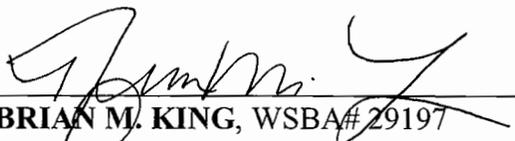
26 rml s:\xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

RESPECTFULLY SUBMITTED this 13TH day of July, 2009.

DAVIES PEARSON, P.C.
Attorneys for Petitioners

By: 
BRIAN M. KING, WSBA# 29197
PETER T. PETRICH, WSBA# 8316
REBECCA M. LARSON, WSBA# 20156

PETITION FOR REVIEW

Page 21 of 21

m:\s\1xxxx\164xx\16432\1\plead\judicial review\petition for review.doc

DAVIES PEARSON, P.C.
ATTORNEYS AT LAW
920 FAWCETT -- P.O. BOX 1657
TACOMA, WASHINGTON 98401
TELEPHONE (253) 620-1500
TOLL-FREE (800) 439-1112
FAX (253) 572-3052