FILED
JUL 16 2009
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

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,	No. 09-2-01710-4 **STIPULATION AND ORDER TO STAY EFFECTIVE DATE OF ORDER**

I. STIPULATION

On July 10, 2009, the Office of the Insurance Commissioner, Mike Kreidler, Insurance Commissioner (collectively "OIC"), issued the Final Findings of Facts, Conclusions of Law and Order on Hearing (Final Order). The Final Order required Petitioners North American Dealer Co-Op (NADC), National Administrative Dealer Services, Inc. (NADS), and Henry C. ("Hank") Bailey, Jr., to take certain actions within 10 days of the date of the Final Order. On July 14, 2009, Petitioners filed a Petition for Review of the Final Order, a Motion for Stay of the Final Order, and a Motion to Shorten

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ORIGINAL

Time in order to have the Motion for Stay heard before the deadline imposed by the Final Order.

The parties, by and through their attorneys, hereby stipulate and agree:

1. That the efficient administration of this matter will be best served by delaying the effectiveness of the Final Findings of Facts, Conclusions of Law and Order on Hearing, entered by the OIC on July 10, 2009 (Final Order), until August 10, 2009 or until further order of the Court, whichever is later. However, the OIC does not agree that any further stay is appropriate or necessary, or that the Petitioners have satisfied the requirements of RCW 34.05.550, or RCW 48.04.140 with respect to any stay beyond August 10, 2009.

2. That any further motions to stay the effectiveness of the OIC's Final Order must be noted on or before August 10, 2009, and must comply with the court rules for timing, filing, and formatting of motions, so that all parties have a meaningful opportunity to present their arguments regarding any further stay of the effectiveness of the Final Order;

3. The OIC will not further publish, distribute, or otherwise communicate the Final Findings of Facts, Conclusions of Law and Order on Hearing, except as required by statute, court rule, or court order, before the stay is lifted;

4. The OIC will post this signed stipulation and order online with the Final Order, and will forward a copy of this Stipulation and Order to any person or entity to whom the OIC has communicated the July 10, 2009 Order;

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5. This Stipulation will not bar the Petitioners from amending their petition for review within the statutory timeframe for filing the original petition for review.

SIGNED this 16 day of July, 2009.

By: _____
PETER T. PETRICH
WSBA# 8316
Attorneys for Petitioners

SIGNED this 16 day of July, 2009.

By: _____
MARTA DE LEON
WSBA# 35779
Attorneys for State of Washington
Office of the Insurance Commissioner

II. ORDER

Based upon the foregoing stipulation, it is hereby ORDERED that the Final Findings of Facts, Conclusions of Law and Order on Hearing, entered by the OIC on July 10, 2009 is stayed and shall not become effective until August 10, 2009, or until further order of the Court, whichever is later.

It is further ORDERED that the Office of the Insurance Commissioner shall post this signed Stipulation and Order online with the Final Order, and will not further publish or distribute the Final Findings of Facts, Conclusions of Law and Order, except as required by statute, court rule, or court order, until the stay is lifted.

DONE this 16 day of July, 2009.

_____
JUDGE THOMAS MCPHEE

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and

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STATE OF WASHINGTON

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BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In re: **NORTH AMERICAN DEALER CO-OP, NATIONAL ADMINISTRATIVE DEALER SERVICES, INC., AND HENRY C. ("HANK") BAILEY JR.,** **Respondents.**	DOCKET NO. D07-0149 FINAL FINDINGS OF FACTS, CONCLUSIONS OF LAW AND ORDER ON HEARING

TO: Brian M. King, Esq.
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Henry C. Bailey, Jr., aka Hank Bailey
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North American Dealer Co-Op
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COPY TO: Mike Kreidler, Insurance Commissioner
Mike Watson, Chief Deputy Insurance Commissioner
James T. Odiorne, Deputy Commissioner, Company Supervision
John F. Hamje, Deputy Commissioner, Consumer Protection
Carol Sureau, Deputy Commissioner, Legal Affairs Division
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Pursuant to RCW 34.04.090, 34.04.120, 48.04.010 and WAC 10-08-210, and after notice to all interested parties and persons, the above-entitled matter came on regularly for hearing before the Insurance Commissioner for the state of Washington on August 22, 2007, with several following presentations of evidence and subsequent filings made for many months thereafter, in Tumwater, Washington. All persons to be affected by the above-entitled matter were given the right to be present at such hearing during the giving of testimony, and had reasonable opportunity to inspect all documentary evidence. The Insurance Commissioner appeared pro se, by and through his Staff Attorney, Alan M. Singer. North American Dealer Co-op, National Administrative Dealer Services, Inc., and Henry C. Bailey Jr. were represented by and through Brian M. King, Esq., of Davies Pearson, P.C. of Tacoma, Washington.

NATURE OF PROCEEDING

On April 17, 2007, the Insurance Commissioner issued a letter ruling that, based upon a review of the North American Dealer Co-op Membership Agreement and the activities of Respondents and a related Western Insurance Company liability insurance policy, Respondents have for several years been acting in violation of the Title 48 RCW, the Insurance Code. Specifically, the Insurance Commissioner alleges that the North American Dealer Co-op and the National Administrative Dealer Services, both organized, owned and managed by Henry C. Bailey, Jr., have created an Auto Dealer Extended Service Contract Reimbursement Guarantee Program whereby the North American Dealer Co-op offers insurance without a certificate of authority and is committing other illegal acts including using an unauthorized insurer (Western Insurance Company of Reno, NV) as part of its Program, inducing its Dealer Members to act as unlicensed agents for North American Dealer Co-op and distributing misleading and deceptive information relative to the business of insurance. On April 24, 2007, Respondents, by and through Brian M. King, Esq., of Davies Pearson, P.C. of Tacoma, Washington, filed a request for hearing to contest the abovereferenced Insurance Commissioner's letter ruling. Respondents' request was granted, based upon the finding that the letter ruling constituted an act or threatened act of the Insurance Commissioner upon which an aggrieved party may appeal. Therefore, the purpose of the scheduled hearing was to take testimony and evidence and hear argument as to whether the Insurance Commissioner's letter ruling should be confirmed, set aside or modified.

FINDINGS OF FACTS

Having considered the evidence and arguments presented at the hearing, and the documents on file herein, the undersigned presiding officer designated to hear and determine this matter finds as follows:

1. The hearing was duly and properly convened and all substantive and procedural requirements under the laws of the state of Washington have been satisfied. This Final Order is entered at this

time for good cause shown, particularly due to the complex nature of this case, and inadequate compliance by Henry C. Bailey, Jr., North American Dealer Co-op and National Administrative Services, Inc. (hereinafter referred to collectively as "Respondents" where appropriate) with discovery orders as noted below, in addition to the parties' request that the record be kept open after the hearing for filing of posthearing briefs and later presentation of closing arguments along with substantial posthearing activities of the parties including the Insurance Commissioner's ("OIC") filing three Motions to Supplement, presentation of additional testimony and presentation of other issues by the parties during the months following the hearing itself, all held either by agreement of the parties or by ruling of the undersigned, and each as documented in the hearing file.

2. Prior to the hearing date, on May 24, 2007, the OIC propounded First Interrogatories and Requests for Production to Respondents. Subsequently, in spite of the OIC having called a CR 26(i) conference of counsel on July 30, 2007 to discuss Respondents' failure to provide discovery within the 30 days required by CR 33(a), and in spite of repeated assurances from Respondents that the responses were to be delivered shortly, 71 days passed. Upon receipt of the discovery on August 2, 2007, the OIC determined said responses to be incomplete and for this reason, on August 6 and 8, 2007, the undersigned heard the OIC's Motion to Compel. The hearing record contains the arguments of the parties regarding compliance with discovery requirements and includes the parties and the undersigned spending hours going through each of the OIC's discovery requests line by line, hearing the OIC's arguments in support of its Motion, and Respondents' objections, and the undersigned orally ordering Respondents to comply with a large majority of these discovery requests; during that proceeding, Respondents agreed to deliver the documents identified in these discovery requests, as ordered, by August 20, 2007. The undersigned documented the OIC's Motion, along with the arguments of the parties and each of her specific rulings, in written form shortly thereafter, and in order to allow Respondents time to comply with the Order Compelling Discovery and the OIC time to review it, by agreement of the parties, the undersigned continued the hearing date until August 22, 2007. However, on August 22, 2007, at commencement of the hearing, contrary to the Order Compelling Discovery and assurances of compliance by Respondents during hearing on Motion to Compel, Respondents had still failed to comply with a significant portion of those OIC discovery requests. However, there being no further request for continuance from either party, the hearing proceeded as scheduled.

3. The North American Dealer Co-op ("NADC") is a corporation formed on August 10, 1995 under the laws of Colorado with its principal place of business in Colorado, [OIC Ex. 11, NADC Articles of Incorporation] although NADC's 2004, 2005 and 2006 federal tax returns state that it was incorporated on February 27, 2002. [OIC Ex. 24, 2004, 2005 and 2006 NADC Form 1120 U.S. Corporation Income Tax Returns.] Henry C. Bailey, Jr., aka Hank Bailey, ("Bailey") is the Chief Executive Officer and a Director of NADC [Testimony of Bailey; OIC Exs. 17, 18, 19, 22, 23], was an Incorporator, an Initial Director and its sole Initial Registered Agent. [OIC Exs. 10, NADC Articles of Incorporation.] Respondents failed to furnish complete copies of the NADC federal tax returns for all years submitted – namely, 2004, 2005, 2006 - omitting the Sched. K-1 which would show Bailey's percentage of ownership interest in NADC. It is otherwise unclear of his percentage of ownership interest in NADC as well. However, although all of these 2004-2006

Form 1120 NADC U.S. Corporation Income Tax Returns bear only the signature of the accountant but not a "Signature of Officer" as required, stapled to the back of the 2006 return is a duplicate copy of it which does bear a "Signature of Officer" which appears to be that of Bailey. In addition, there is little evidence of anyone else's active affiliation with NADC except Bailey, who states "I do everything within the company;" states that he was also President of NADC until some time ago when Christopher Mercer was made President because in the 2002 California disciplinary action against Respondents the California Department of Insurance required a licensed insurance agent to be involved in NADC. [Testimony of Bailey; Testimony of Mercer; OIC Exs. 18, 19.] Finally, Bailey's is the only name set forth as author of communications from NADC to members or prospective members with whom NADC works or wishes to work, and Bailey was the apparent client representative for NADC who solicited a legal opinion from Washington counsel concerning NADC's operations. [E.g., letters included in OIC Exs. 17, 22, 23.] Finally, Bailey was the sole individual representing himself as the sole Respondent and the sole individual representing both NADC and NADS who signed the 2002 Stipulation settling the California Department of Insurance's disciplinary action against him, NADC and NADS for these operations in California. [OIC Ex. 18, 19.] NADC solicits members who are automobile dealers located in 48 of the United States, including Washington State. [Testimony of Bailey.] Said automobile dealers sell new and used automobiles, trucks, motorcycles, motor homes and marine vehicles along with – as an option and for an additional premium - Vehicle Extended Service Contracts ("Vehicle Service Contracts"). [OIC Exs. 2, 13, 19.] NADC is not licensed by the OIC to solicit or sell insurance in Washington or licensed in any capacity. [Ex. 1, Decl. of Kristopher Graap.]

4. National Administrative Dealer Services, Inc. ("NADS") is a corporation formed on February 9, 1995 under the laws of Colorado with its principal place of business in Colorado. Bailey is the Chief Executive Officer of NADS [Testimony of Bailey; OIC Exs. 22, 23], was its sole Incorporator, its sole Initial Director and its Initial Registered Agent. [OIC Ex. 10, NADS Articles of Incorporation.] Further, Bailey owns 100% of NADS. [Testimony of Bailey; Respondents' Ex. 20, 30; OIC Ex. 24, 2006 NADS U.S. Form 1120S U.S. Income Tax Return for an S Corporation at Sched. K-1.] NADS is not licensed by the OIC to solicit or sell insurance in Washington or licensed in any capacity. [Decl. of Bailey; Decl. of Kristopher Graap; OIC Exs. 1, 10.]

5. Henry C. Bailey, Jr., aka Hank Bailey, is an approximately 65 year old man, who at all relevant times was a Colorado resident and not licensed by the OIC to solicit or sell insurance in Washington or licensed in any capacity. [Testimony of Bailey; Decl. of Graap; OIC Ex. 11, 19.] Bailey incorporated and has operated NADC and NADS as detailed in Finding Nos. 4 and 5 above since their inception in 1995. Mr. Bailey has been engaged in auto sales and after market auto products since 1963, and has sold autos for over 21 years. [Testimony of Bailey.] Mr. Bailey owns and operates thirteen companies which are all operating out of the same office in Lakewood, Colorado, and three of which are related to the automobile industry: these are Electrolock; Smartlock; Protime Marketing Group; Residential Mortgages for Mexico; Residential Mortgages for Mexico Realty LLC; Hank & Olga LLC; Deerfield Programs LLC; Consumer Protection Package Ltd.; Dealer Services; NADS; Dad's Toys LLC. [Testimony of Bailey.] Bailey could not recall the rest of the companies, "does not know" for which of these companies he signs as the CEO and "does not know" what CEO stands for. [Testimony of Bailey; OIC Ex. 22.] Further,

Bailey testifies that although neither he, NADC nor NADS are licensed in any capacity in Washington State, "they do not have to be; ... there is no reason to be licensed by the OIC." As to any insurance transactions with which he might be affiliated, Bailey testifies that he "can't answer if we/they have a Certificate of Authority from anyone."

6. NADC solicits auto dealers throughout Washington, and 47 of the other United States, to join NADC. In order to join NADC, the auto dealer must sign the NADC Membership Agreement, and at that time the auto dealer becomes a "Dealer Member."

7. Once an auto dealer becomes a Dealer Member, NADC expects that the Dealer Member offer each purchaser of a vehicle (hereinafter referred to as a "consumer") an optional Vehicle Service Contract, issued by the Dealer Member or an insurance company through the Dealer Member, that covers the costs of repairs to the vehicle in the event of malfunction of the vehicle for the life of the Vehicle Service Contract. The consumer buys the Vehicle Service Contract from the Dealer Member, which, typically, covers the vehicle for 48 to 72 months for an additional $500 to $2,500., paid to the Dealer Member. In Washington, Vehicle Service Contracts are regulated by the OIC under the Insurance Code. [OIC Ex. 1; Respondents' Ex. 19.]

8. The product at issue in this case, called the NADC Auto Dealer Extended Service Contract Reimbursement Guarantee (the "NADC Guarantee" and "NADC Guarantee Program" as appropriate) is entirely separate from the Vehicle Service Contract. The NADC Guarantee is not a Vehicle Service Contract and it has no direct relationship with the Vehicle Service Contract or the vehicle service contract provider. Rather, the NADC Guarantee is an agreement that promises, to individuals who have purchased vehicles and Vehicle Service Contracts from Dealer Members, that the purchaser will receive back the amount they originally paid for the Vehicle Service Contract should they not use the Vehicle Service Contract (i.e., no claims have been paid under the Vehicle Service Contract) up through the life of the Vehicle Service Contract (and meet other technical conditions).

9. NADC currently solicits and offers automobile dealers to participate in this NADC Guarantee Program in Washington State. [Testimony of Bailey; Testimony and Decl. of Mark King; OIC Exs. 1-9, 12-14; Respondents' Ex. 19.] In fact, NADC <u>requires</u> all Dealer Members to offer the NADC Guarantee to all consumers at the time they offer those consumers the Vehicle Service Contracts. [OIC Ex. 2, NADC Membership Agreement.]

10. In order to encourage auto dealers to participate in the NADC Guarantee Program, NADC advises auto dealers that the NADC Guarantee provides a significant incentive for a purchaser of a vehicle to also purchase a Vehicle Service Contract. [Exs. 15, 22, 23.] Such Vehicle Service Contracts have historically been very profitable for automobile dealers. In order to enhance sales of Vehicle Service Contracts, NADC wishes to counter consumers' perception that Vehicle Service Contracts are a *waste of money*, Respondents designed the NADC Guarantee Program to shift the consumers' risk of paying for a Vehicle Service Contract they will not use, by *giving a customer complete protection without the risk of losing money*. Thus, Respondents market their NADC Guarantee as a way to increase sales of Vehicle Service Contracts (and therefore the profits gained

by dealers from those sales) by advertising to auto dealers that *many Dealer Members have experienced a 15% - 25% increase in sales of the Vehicle Service Contracts by as much as 15% to 25%.* [Testimony of Bailey; OIC Exs. 15, 22] as a result of being able to also offer the NADC Guarantee along with the Vehicle Service Contract.

11. At the same time, NADC advises the dealer that the NADC Guarantee is ideal for him as well: along with realizing more sales of Vehicle Service Contracts (and therefore the profits gained by those sales), NADC assures the dealer that there is *no cost* [for the NADC Guarantee] *to the dealership*. [Testimony of Bailey; OIC Exs. 15, 22.] This is because Respondents recommend to Dealer Members that they charge the "policy reserve" amount which Dealer Members must pay to Respondents (see below) to their consumers, but *also add an additional $200-$400 to the selling price of the Vehicle Service Contract* to cover the "program fee schedule amount" which Dealer Members must also pay to Respondents (see below) because, Respondents advise, consumers may now perceive extra value in considering their purchase of a Vehicle Service Contract when they buy the vehicle. [OIC Ex. 16.] Additionally, NADC advises the dealer that the NADC Guarantee is also ideal for him because there is *no liability* on the part of the Dealer Member [OIC Ex. 15, 22, 23.] This is because, NADC advises, *NADS has arranged for the acquisition of contractual liability coverage through a licensed insurance agent or broker on behalf of Dealer and other members to cover against Dealer losses resulting from the Dealer's written* [NADC Guarantee] and *Dealer agrees to use the NADC Program to pay all valid vehicle service contract reimbursement guarantee claims.* [OIC Ex. 2, NADC Membership Agreement at Sec. 2, 3.]

12. In exchange for this liability-free NADC Guarantee with all of its above advertised benefits to the Dealer Member, NADC Dealer Members contract to *remit to NADS a minimum of TEN (10) CONTRACTS* [NADC Guarantees] *PER MONTH ... forwarded to* [NADS] *on a bi-weekly basis* [OIC Ex. 2, Sec. A.8] all of the following fees for each NADC Guarantee submitted to Respondents:

1. A <u>Set Up Cost</u> of $200 which will be "*used to arrange for the acquisition of contractual liability insurance coverage to pay all valid claims with no liability to the Dealer through a licensed insurance agent or broker, ...inclusion of Dealer in* [NADS'] *computer systems, and for providing Dealer with NADC Program supplies and promotional materials.* [OIC Ex. 2, NADC Membership Agreement.]

2. An "*<u>NADC program fee</u> for each contract sold in accordance with the current NADC Program Fee Schedule*" which currently averages approximately $155-200 per NADC Guarantee issued, but is determined entirely by Respondents who may legally change the amount payable to Respondents as an NADC Program Fee at any time [OIC Ex. 2, NADC Membership Agreement, Sec. 6]. As found above, NADC advises that the NADC Program Fee, together with the "policy reserve" fee (below), can be *passed on to the customer through the retail price* [of the Vehicle Service Contract] ... *[t]he consumer will pay the additional cost by as much as $200-$400 dollars knowing they will receive a full refund if they never use the contract. This is an additional profit to the dealer on every contract sold.* [OIC Ex. 16.] The Dealer Member may roll a charge for the NADC Guarantee into

the cost of the Vehicle Service Contract, so that the consumer may believe s/he may be receiving the NADC Guarantee for free but is actually paying for it in an increased Vehicle Service Contract charge. (While not considered of significance herein, it is noted that this last provision, among several other activities engaged in by Respondents which are the subject of other Findings herein, is contrary to the 1992 Stipulation and Waiver which Respondents executed to settle the disciplinary action taken against them by the California Department of Insurance regarding these operations.) [OIC Ex. 19.]

3. A Policy Reserve Fee of $75 per NADC Guarantee issued. [OIC Ex. 16.] (Prior to March 8, 2001, the required payment to NADC was $50, but NADC raised this amount to $75 at that time.) [OIC Ex. 16.]

4. Continuing fees paid to NADS for its "administrative services". [OIC Ex. 2.]

Upon receipt of the abovereferenced fees from the individual Dealer Member, pursuant to the NADC Membership Agreement drafted by Respondents, *The fees remitted to NADC for each NADC [Guarantee] will be used to pay the administrative cost, insurance costs, and valid claims for the NADC Program* [Emphasis added.]. [OIC Ex. 2, Sec. A14.(i).]

13. Additionally, Respondents require every individual Dealer Member to agree 1) *to offer every consumer the* [NADC Guarantee] and use only the forms drafted by Respondents; and 2) to acknowledge that the Dealer Member has *no authority to pay any NADC Program claim or to amend, waive or change in any manner whatsoever any of the terms, conditions or procedures of the NADC Program....* [OIC Ex. 2, Membership Agreement, Sec. 9, 10; OIC Ex. 3; Testimony of Bailey; Declaration of Mark King at Ex. B.]

14. Respondents contend that it is the individual Dealer Members, and not Respondents, who are the ones making and offering consumers the NADC Program's money back guarantees. Indeed, an initial review of the Service Contract Reimbursement Guarantee, i.e., the NADC Guarantee form [OIC Ex. 3.] entered into by the Dealer Members and the consumers appear that this may be the case. Relative to this issue, the parties presented significant argument over whether Respondents – rather then the Dealer Members – are responsible for payment of valid claims under the NADC Guarantee: this involves the question of who is responsible to pay the valid claims and who is responsible to retain the above fees and use them for payment of valid claims. Respondents maintain that they simply collect these fees and pass all of them – excluding only those retained by NADS as its compensation for "administrative services" – along to Western Insurance Company. A review of the evidence presented including the Membership Agreement drafted by Respondents [OIC Ex. 2, Sec. A.14.(i).], reflect that Respondents commit that *The fees remitted to NADC for each NADC Program guarantee will be used to pay ... valid claims for the NADC Program*[.] Further, Respondents commit that [NADS] *will provide Dealer with an annual report of all NADC Program guarantees in force and a balance of funds held to pay NADC Program guarantee claims* [Emphasis added]. [Ex. 2, NADC Membership Agreement, Sec. A.11 and A.14.] Further, in Respondents' brief before the U.S. Court of Appeals in 2005 U.S. 3rd Cir. Briefs 1453, on the occasion of their suit for unlawful cancellation by Interstate Indemnity Company, their third party

liability carrier prior to Western [OIC Ex. 13.], Respondents represent that, *For each extended service contract sold with a money back guarantee a set amount of the sale price was "reserved" by NADC to pay claims (based on actuarial expectations of how many claims for refunds will be made)*[.] and in its decision the Court described the process as follows: *If the consumer does not file a claim under the extended service contract, the consumer receives a refund from the dealer. The dealer then receives a refund from NADC. NADC maintained a reserve of funds for this purpose, and also bought insurance to cover any shortfalls.* [OIC Ex. 14.]

In fact, Respondents agree, and it is hereby found that, when a valid claim is presented to the Dealer Member from the consumer, the Dealer Member sends the claim to Respondents. It is Respondents who determine whether the claim is valid based upon the NADC criteria. Should Respondents determine the claim is valid, it is Respondents who write a check <u>from their own funds</u> for the entire amount of the NADC Guarantee to the individual Dealer Member or the Dealer Member and the consumer. [Testimony of Bailey; Testimony of Mark King; Respondents' Ex. 19, NADC checks written to pay NADC Guarantee claims.] The Dealer Member is actually prohibited from paying the claim himself. [OIC Ex. 2, Sec. A.3.]

15. Additionally, NADC has secured insurance coverage (entitled the "Vehicle Service Contract Reimbursement Guarantee Agreement" by the insurer) issued by Western Insurance Company ("Western") of Reno, Nevada. This policy covers NADC as the Named Principal [i.e., Named Insured] along with "[NADC's] Members and Subsidiaries" with no deductible, agreeing to "*reimburse* [the Named Principal] *for loss from contractual benefits extended under Valid Vehicle Service Contract Reimbursement Guarantees as a result of non use of a Valid Vehicle Service Contract* .... The policy identifies NADS as the administrator for all amounts paid out by Western and grants NADS *the authority to administer claims relating to* [these payments]. [OIC Ex. 7, Western insurance policy.] As stated in the Western policy, Western commits to pay the full amount of the claim without deductible: there is no indication in the Western-NADC insurance policy that Western is to pay only claims which are above any reserve amounts or is in any other manner limited to amounts less than 100% of each claim which Respondents have committed to pay the auto dealers under the NADC-Dealer Member NADC Membership Agreement (for reimbursement to consumers for valid claims under the NADC Guarantee. [OIC Exs. 1, 7.]

16. Regarding the Western policy, the Membership Agreement provides that *NADS has arranged for the acquisition of contractual liability coverage <u>through a licensed insurance agent</u> or broker on behalf of Dealer ... to cover against Dealer losses resulting from the Dealer's written service contract reimbursement guarantee program (the NADC Program)*. [Emphasis added.] [OIC Ex. 2, Sec. 2.] Access Insurance Services, Inc. is not a licensed insurance agent in Washington State as required to secure the insurance and to collect commissions payable on the purchase of the insurance.

17. Further, Western itself was not during any relevant time authorized as an insurer in Washington State as required. Also, the subject Western insurance policy "Vehicle Service Contract Reimbursement Guarantee Performance Contract" was not filed or approved in Washington as required. Also, the rates charged for the subject Western insurance policy were not

filed and approved in Washington as required. Also, Western paid no premium taxes to the OIC as required. [OIC Ex. 28, OIC letter to Western.] It is also noted that the subject Western policy [OIC Ex. 7, Declaration Page] falsely states the situs of the Named Principal as 3301 South Virginia St., Ste. 201, Reno, Nevada, which is actually the address of Western itself and not Respondents. As above, NADC is incorporated and has always been headquartered in Colorado. The Western policy was required to state the Named Principal's correct situs and to be delivered in Colorado, the correct situs of the Named Principal. In addition, Western was required to be authorized as an insurer by the Colorado insurance regulators and presumably the Western policy was required to be approved there. There is no evidence that such authorization and/or approval in Colorado was obtained.

18. Therefore, based upon the significant weight of the evidence presented including testimony of Respondents and a Dealer Member, as well as a wealth of documents presented, including most importantly the NADC Membership Agreement, the process concerning the NADC Guarantee product at issue in this proceeding is as follows: While originally the Dealer Member has entered into the NADC Guarantee with the consumer, the Dealer Member at the same time pays substantial fees of various kinds, as found above – at times called fees and at times called premiums – to Respondents, in order that the Dealer Member not ever actually have to pay any funds of his own in reimbursing the consumer (Respondents actually prohibit Dealer Members from paying the reimbursement guarantee claims themselves). This is because at the time the consumer submits a claim to the Dealer Member, the Dealer Member simply passes it along to NADC (or to NADS as "administrator" for NADC). It is NADC/NADS which makes the determination whether the claim is valid based on criteria NADC has set forth in

1) its NADC Membership Agreement with Dealer Members; and,

2) the NADC Guarantee form signed by the Dealer Member and the consumer but drafted by and required by NADC. If NADC/NADS determines the claim is valid, NADC/NADS pays the amount of the claim, out of NADC's/NADS' own checking account, to the Dealer Member. Then, and only then, can the Dealer Member write its own check, or sign over NADC's/NADS' check to the consumer. The money for the claim clearly comes from NADC/NADS, not from the Dealer Member, which is consistent with the Respondents' marketing of their NADC Program: that NADC Program money back guarantees result in *absolutely no liability* to dealers and *no cost to the dealership*. The sample checks in evidence, which represent Respondents' payments of valid claims under the NADC Guarantees, are drawn on Respondents' checking accounts and are each made payable to both the individual Dealer Member and the consumer. Said claim amounts may be paid from 1) the NADC Program Fee paid by the Dealer Member to NADC specifically in part for this purpose [OIC Ex. 2]; 2) and/or from the "policy reserve" fee paid by the Dealer Member to NADC specifically for this purpose [OIC Ex. 2]; 3) and/or from other continuing fees paid to NADS for its "administrative services" [OIC Ex. 2], all sources of funds as identified in Findings above. Contrary to the argument of Respondents that it is Western and not Respondents who maintain the reserve funds, nowhere in the Western insurance policy or its Endorsement A is there any agreement that Western will receive and hold "policy reserve" or other funds transmitted from Dealer Members to Respondents and Respondents to Western, or that Western is to receive and hold any funds of any kind on behalf of Respondents or any other entity affiliated with this entire arrangement. Finally, under the terms of the Western insurance policy, in the event of a valid

claim being submitted by a consumer under the NADC Guarantee, 100% of the amount of the claim (without deductible) is also paid by Western to NADC as the Named Principal under the policy (and/or NADS as "administrator" for NADC). [OIC Ex. 7, Western policy.] No evidence has been presented to show that Respondents have made any payments to any Dealer Members for any payments of valid NADC Guarantee claims the Dealer Members made themselves, as they have paid none themselves. Indeed, all Dealer Members' fees are paid to Respondents as required under the NADC Membership Agreement, and although some of these fees may go to pay Western premiums, there is no evidence that any entity other than NADC (and/or NASD as the "administrator" for NADC) ever receives any portion of the Western reimbursements. [Testimony of Mark King; Respondents' Ex. 48; OIC Exs. 2, 22, 23.]

19. Pursuant to the above Findings of Facts, under the NADC Program – every facet of which is entirely controlled and operated by Respondents, and specifically Bailey - Respondents advertise to, and collect payments from, Dealer Members for the specific purpose of then providing Dealer Members with the ability to offer consumers the NADC Guarantee at no liability to themselves. Specifically, Respondents promise Dealer Members to pay the Dealer Members the full amount of the NADC Guarantee (and only after receipt of payment from Respondents may the Dealer Member pay the consumer). Under this NADC Program, therefore, Respondents promise to pay Dealer Members specified amounts in the event of specified contingencies. Therefore, Respondents are conducting the business of insurance.

20. Pursuant to the above Findings of Facts, under the NADC Program – every facet of which is entirely controlled and operated by Respondents - Respondents advertise to, and collect payments from, Dealer Members for the specific purpose of then providing Dealer Members with the ability to offer consumers the NADC Guarantee at no liability to themselves. While Respondents contract with Dealer Members to pay the Dealer Members the full amount of the NADC Guarantee, Respondents also use part of the fees they collect from Dealer Members to purchase insurance from Western to pay to NADS the full amount of the claims payable to consumers. By soliciting for this insurance, Respondents are acting as an insurance agent or broker (as of July 1, 2009, both insurance agents and brokers are termed "producers") without the agent's or broker's license required by the OIC to solicit for insurance in Washington. Further, Dealer Members are unwittingly used to solicit NADC's unauthorized plan of insurance, and in so doing, are made to act as unlicensed agents for NADC, an unauthorized insurer.

21. Additionally, pursuant to Item 14 in the NADC Membership Agreement [Ex. 2, p. 2], *(iii)* [a]*t the expiration of each NADC Program guarantee, NADC may receive a refund of a certain percentage of the NADC Program insurance premiums less insurance costs, administrative costs and valid claims. Should the Dealer continue to use the NADC Program, without interruption from the date of this Agreement, then NADC agrees to pay to Dealer seventy-five percent (75%) of the amount refunded applicable to Dealer's account.... (iii) This payment will be made to the Dealer annually at the end of the first quarter of the calendar year, following the year the premium refund is received by NADC.* The agreement regarding a refund to Respondents is confirmed in the Western insurance policy Retrospective Collateral Fund Endorsement A dated April 2, 2004 [OIC Ex. 7] whereby Western agrees to refund to NADC (as the Named Principal) the actual number of

NADC Guarantee reserve funds expiring during any calendar year – less claims paid - no later than March 31st of the year following the calendar year under consideration. There is no evidence that any Dealer Members have ever received any refunds at all from Respondents (or from Western). [Testimony of Mark King.] However, read together, NADC and Western have entered into an insurance premium refund incentive program, the benefits of which are in turn given proportionally to Dealer Members pursuant to Item 14 of the Membership Agreement. This arrangement encourages Dealer Members to minimize claims and to provide Respondents (or Western, although there is no requirement that these funds be transferred to Western even for safekeeping) with yet another source of cash flow (the fifth; see Finding No. 12 above) in this entire arrangement.

22. Pursuant to the above Findings of Facts, the NADC Membership Agreement requires that all Dealer Members use forms provided by the NADC in offering and documenting the NADC Refund Guarantee Program. The actual NADC Guarantee form entered into between the Dealer Members and consumers, called the Service Contract Reimbursement Guarantee, clearly, and falsely, states in that contract and thereby to the consumer that consumers are covered under a policy of California insurance and are able to bring claims against that California insurance policy, as follows: *Performance to you under this contract is guaranteed by a California approved insurance company. You may file a claim with this insurance company if any promise made in the contract has been denied or has not been honored within 60 days the proof of loss was filed. The name and address of the insurance company is: Western Insurance Company, P.O. Box 21030, Reno, NV 89515. If you are not satisfied with the insurance company's response, you may contact the California Department of Insurance at 1-800-927-4357.* [OIC Ex. 3, Service Contract Reimbursement Guarantee form at p. 2.] However, the only insurance policy existing in this entire arrangement is the Western policy covering NADC (and "its members and affiliates") as the Named Principal; there is clearly no privity of contract between Western and any consumers. Moreover, Dealer Members are required to use NADC's Program to offer any money back guarantees, but those Dealer Members have no authority to actually pay any NADC Program claims (the premium refunds) themselves. Based upon these Findings of Facts, NADC is engaged in misleading and deceptive advertising in the business of insurance.

23. Mark King of Marysville, WA, who is and has been the General Manager of Roy Robinson Auto Dealership since 1988, appeared by telephone on behalf of both the OIC and Respondents. Mr. King presented his testimony in a clear and detailed manner. Notably, his testimony was presented based upon experience, expertise and first hand experience with Respondents and without biases. For these reasons, his testimony was given significant weight.

24. Henry C. Bailey, Jr., aka Hank Bailey, appeared as a witness on his own behalf and as a duly authorized representative of NADC and NADS. Mr. Bailey is the Chief Executive Officer of both, the individual who operates both, President of NADS, past President of NADC, a Director of both, the sole incorporator of NADS, and an incorporator of NADC, the Initial Registered Agent of both, the 100% shareholder of NADS and the owner of an undetermined percentage of NADC, and the founder of the NADC Program which is the subject of this proceeding. Mr. Bailey was not credible for the following reasons: 1) In general, as a witness, while he is clearly capable of understanding and operating business organizations and transactions, his testimony often conflicted

with itself and at times was false, given the weight of all evidence presented. 2) Mr. Bailey often evaded providing clear answers and information requested of him under oath. His answers were unclear, oversimplified and/or contradictory; e.g., when the undersigned asked him to diagram the format and functions of NADC and NADS, the diagram was so oversimplified and inadequately explained that the presentation was inaccurate and only later through examination of other testimony and exhibits presented herein could the actual nature of the Respondents' activities be made clear; this is particularly important given to some extent the use of the corporate entities as substitutes for individual responsibility and means of pass-through of funds. 3) At the outset of his testimony, when asked to name his ownership and positions held relative to NADC and NADS, Mr. Bailey testified that he, "don't know what CEO stands for" (even though he holds this position in NADC and NADS and likely others of the companies which he has organized and operates); he testified that he could not remember the rest of the 13 companies he owns even though they are operated out of his same office in Colorado; when asked to name his companies and NADS – of which he owns 100% and which is one of the main subjects of this proceeding and the recipient of literally millions of dollars in income each year - he testified, "I forgot about that one." 4) When shown letters written to Dealer Members and consumers which clearly bear Mr. Bailey's name as the sole author and CEO of the company, but which were detrimental to his case herein, he professed to have no knowledge of the letters and stated that, "someone else wrote it." 5) He professed not to know that the favorable trial court opinion received in his federal case against the former insurer involved in the NADC Program had been appealed and overturned on appeal [OIC Exs. 12, 13, 14]; he stated that he had nothing to do with the case (although as above he operates both NADC and NADS and has significant ownership therein). 6) The activities found above, if they had been conducted in California (and there is no evidence his operations in all 48 states are not the same) would be clearly in violation of many sections of the 2002 Stipulation he entered into with the California Department of Insurance in settlement of a major disciplinary action that Department had taken against him, NADC and NADS relative to the NADC Program. 7) Mr. Bailey was previously indicted by a federal grand jury in October 1999 on two counts of personal income tax evasion and two counts of filing false corporate income tax returns for years ending 1993 and 1994. He is a convicted felon and served a significant amount of time in federal prison for these crimes, which involved one of his corporations, Electro Lock, Inc., for which he serves as President and majority shareholder; the case involved using a nominee bank account to divert substantial amounts of money from the corporation for personal use and failed to report the amounts he diverted on his personal income tax returns and caused the corporation to falsely deduct the amounts as "insurance expenses" on the corporate returns for the same period. [OIC Ex. 25.] While significant weight was not given to the following, it is noted that in NADC's and in NADS' federal tax returns which were entered into evidence in this instant proceeding, NADS's 2006 federal tax return reports $6,371.441. in gross receipts, deducts 4,434,276. for "cost of goods sold" identified as "purchases," added other deductions totaling another nearly $2,000,000., resulting in $908. tax paid. NADS' 2003 federal tax return reports $6,344,238. in gross receipts, deducts $4,387,649 for "cost of goods sold," added other deductions totaling nearly $2,000,000., resulting in no tax paid. While 2004 and 2005 were not submitted, during tax years 1995 through 2002, no taxes were paid. NADC's 2006 federal tax return reports $4,755,173. in gross receipts, deducts $4,825,884. not for "cost of goods sold" but instead for "insurance," adds other deductions including over $700,000 in "office expense," resulting in no tax paid and a total loss of $104. In

2005 NADC reported $272,845. in gross receipts, deducted $272,845 not this year for "insurance" but instead for "cost of goods sold" identified therein as "purchases," added other deductions, resulting in $19. tax paid. NADC's 2004 federal tax return which apparently bears the signature of Bailey, reported $3,005,100 in gross receipts, deducted $3,005,100. for "cost of goods sold" identified as "purchases," resulting in no tax paid. [OIC Ex. 24, NADS and NADC federal tax returns.] 8) In demeanor, Mr. Bailey consistently exhibited a hostile and evasive attitude toward OIC staff presenting the case against him and questioning him under oath. Further, he chose, without permission of the undersigned or even agreement of opposing counsel, to go fishing in Alaska on the second day of his hearing even though it had been scheduled well in advance and he could clearly have been recalled as a witness at any time. Under orders from the undersigned he did reappear for the third day of his hearing.

25. John Christopher Mercer, current President of NADC and a Missouri attorney, of Denver, Colorado, was called as a witness by Respondents. Mr. Mercer presented his testimony in a clear, detailed and credible manner with no apparent biases.

26. James E. Tompkins, Staff Attorney with the Office of the Insurance Commissioner, was called as a witness by Respondents. Mr. Tompkins presented his testimony in a clear, detailed and credible manner with no apparent biases.

27. Georgia Cooper, with the Office of the Insurance Commissioner, was called as a witness by Respondents. Ms. Cooper presented her testimony in a clear, detailed and credible manner with no apparent biases.

28. Fritz Denzer, with the Office of the Insurance Commissioner, was called as a witness by Respondents. Mr. Denzer presented his testimony in a clear, detailed and credible manner with no apparent biases.

29. D. Lee Barclay, Senior Actuary with the Office of the Insurance Commissioner, was called as a witness by Respondents. Mr. Barclay presented his testimony in a clear, detailed and credible manner with no apparent biases.

30. Beverly A. Dyal, Fiscal Analyst 3 with the Office of the Insurance Commissioner, was called as a witness by Respondents. Ms. Dyal presented her testimony in a clear, detailed and credible manner with no apparent biases.

31. Dick Rottman was called as a witness by the OIC and appeared and testified by telephone. Mr. Rottman was the Insurance Commissioner for the State of Nevada, and is currently is the Chief Executive Officer of Western Insurance Company sitused in Reno, Nevada. While Mr. Rottman is a highly educated and experienced individual in business and specifically insurance, by his responses to questioning and comments throughout his testimony he exhibited an unwillingness to provide thorough and complete information as requested even though from his position, experience and education the information sought was within his realm of knowledge. Based upon his fairly evasive and uncooperative attitude, it is found that Mr. Rottman did not present himself as a

particularly credible witness.

32. Based upon the above Findings of Facts, the Insurance Commissioner's April 17, 2007 letter, with follow-up letter dated July 19, 2007, stating the OIC's position that NADC's activities relative to its NADC Refund Guarantee Program are in violation of applicable Washington statutes is reasonable under the circumstances and should be upheld.

CONCLUSIONS OF LAW

1. The hearing herein was duly and properly convened and conducted and all applicable statutes and regulations were complied with, and specifically Title 34 RCW, Title 48 RCW and regulations applicable thereto. These Findings of Facts, Conclusions of Law and Final Order are properly entered at this time, pursuant to Finding of Fact No. 1 for good cause shown.

2. Based upon the above Findings of Fact, the NADC Program created and operated by Respondents, and which involves the offer of the NADC Guarantee to consumers through Dealer Members, is a contractual arrangement whereby Respondents undertake to indemnify another or pay a specified amount upon determinable contingencies. It, therefore, constitutes an offer of "insurance" as defined in RCW 48.01.040.

3. Based upon the above Findings of Fact, Respondents are not licensed or authorized by the Insurance Commissioner in any capacity. As found above, the Respondents are soliciting for and transacting the business of insurance in Washington without holding an insurance agents or brokers license in Washington. Further, Respondent NADC is acting as an insurer in Washington without being authorized to do so. In engaging in these activities, Respondents are violating RCW 48.05.030(1), RCW 48.01.060 and RCW 48.15.020.

4. Based upon the above Findings of Fact, Respondents are unlicensed and unappointed persons actively soliciting applications for insurance and acting as unlicensed insurance agents or brokers, in violation of RCW 48.17.010, 48.17.060, RCW 48.17.060(2), 48.17.150(1)(g), RCW 48.17.160(1) and WAC 284-17-455.

5. Based upon the above Findings of Fact, Respondents are procuring insurance from Western, purporting to cover their Washington "Dealer Members and Affiliates" along with NADC, while not properly licensed as an insurance agent or broker in Washington, in violation of RCW 48.17.010, 48.17.060, 48.17.060(2), 48.17.150(1)(g), 48.17.160(1) and WAC 284-17-455.

6. Based upon the above Findings of Fact, Respondents' NADC Program misrepresents to Washington consumers the terms of the offered insurance, it fails to fully disclose all pertinent benefits, coverages, or other provisions and it fails to provide consumers with a copy of that coverage, all in violation of RCW 48.30.090, WAC 284-30-350, RCW 48.30.010(1) and RCW 48.30.040.

7. Pursuant to Chapter 48.04 RCW, the Insurance Commissioner has jurisdiction over this

matter, and may require Respondents to cease these activities which have been found to be violations of the Insurance Code and regulations, pursuant to RCW 48.02.060, 48.02.080, 48.15.023 and 48.17.063. Further, the Insurance Commissioner may impose monetary penalties on Respondents for these violations, pursuant to RCW 48.15.023(5)(ii) and RCW 48.17.063(6)(iii).

ORDER

On the basis of the foregoing Findings of Fact and Conclusions of Law, to the effect that the Respondents' NADC Program is an illegal offering of insurance, that Respondents are acting as insurance agents and/or brokers without the legal authority to do so, that Respondent NADC is acting as an insurer without the legal authority to do so, that Respondents are engaged in misrepresentation to consumers in the business of insurance, and that the NADC Program is misleading and deceptive,

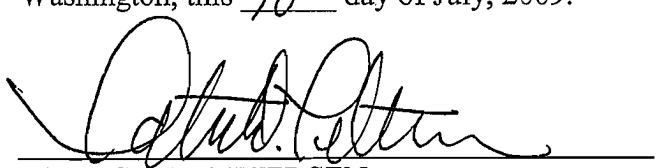
IT IS HEREBY ORDERED that, effective immediately, the Respondents are ordered to cease and desist from further offering their NADC Program, as described in the Findings of Facts above, to any automobile dealers or other entities in Washington,

IT IS FURTHER ORDERED that, within 10 days of the date of this Order, Respondents shall 1) send a copy of these Final Findings of Facts, Conclusions of Law and Order to all Washington 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,

IT IS FURTHER ORDERED that, within 10 days of the date of this Order, Respondents shall 1) send a copy of these Final Findings of Facts, Conclusions of Law and Order to all Washington consumers who have purchased an NADC Auto Dealer Extended Service Contract Reimbursement Guarantee; and 2) instruct all such consumers that should the consumer file a valid claim against their NADC Auto Dealer Extended Service Contract Reimbursement Guarantee at the time of expiration of their extended service contract, it will be honored by Respondents,

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

This Order is entered pursuant to RCW 34.05, WAC 10-08-210 and RCW 48.04.010 at Tumwater, Washington, this 10th day of July, 2009.



PATRICIA D. PETERSEN
PRESIDING OFFICER
CHIEF HEARING OFFICER

Pursuant to RCW 34. 05.461(3), the parties are advised that they may seek reconsideration of this order by filing a request for reconsideration under RCW 34.05.470 with the undersigned within 10 days of the date of service (date of mailing) of this order. Further, the parties are advised that, pursuant to RCW 34.05.514 and 34.05.542, this order may be appealed to Superior Court by, within 30 days after date of service (date of mailing) of this order, 1) filing a petition in the Superior Court, at the petitioner's option, for (a) Thurston County or (b) the county of the petitioner's residence or principal place of business; and 2) delivery of a copy of the petition to the Office of the Insurance Commissioner; and 3) depositing copies of the petition upon all other parties of record and the Office of the Attorney General in the United States mail. If a party chooses to file a petition in the Superior Court, he or she may, but is not required to, first file a request for reconsideration. For further information or to obtain copies of the applicable statutes, the parties may contact the administrative assistant to the undersigned.

Declaration of Mailing

I declare under penalty of perjury under the laws of the State of Washington that on the date listed below, I mailed or caused delivery through routine office mailing procedures, to the addresses listed above, a true copy of this document to Brian M. King, Chad Greenlee, Henry Bailey, Mike Kreidler, Mike Watson, James Odiorne, John Hamje, Carol Sureau, and Alan Singer.

DATED this 10th day of July, 2009.

Wendy Galloway
WENDY GALLOWAY