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November 22, 2010

VIA FACSIMILIE

Honorable Patricia D. Petersen
Administrative Law Judge
Hearings Unit
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

Re: Respondents' Request for Discretionary Stay of
Order to Cease and Desist, No. 10-0199

Dear Judge Petersen:

This law firm represents Respondents in the above captioned matter and respectfully submit this letter brief in support of Respondents' request that this Court exercise its discretion to stay the implementation of the State of Washington Office of the Insurance Commissioner's ("OIC") Order to Cease and Desist to Respondents dated October 21, 2010 (the "Order").

By way of brief background, CHW Group, Inc. d/b/a Choice Home Warranty ("CHW") sells warranties for household goods providing for the repair or replacement of these goods if they are rendered unusable after ordinary wear and tear. These warranties are paid for by the consumer at the point of sale and are paid for with separate and additional consideration, *i.e.*, they are not included in the purchase price of the goods purchased. Initially, CHW believed that its activities in Washington were exempt from regulation pursuant to RCW 48.110.015(1)(a), but in an abundance of caution CHW contacted OIC to provide it with the information necessary to obtain the appropriate registration in the State of Washington as a service contract provider if such a registration were necessary. In the context of its communication with OIC and in the interests of full disclosure, CHW provided OIC with a list of employees working for CHW and a description of their titles within the company. In June 2010, CHW also voluntarily agreed to cease selling its warranties in the State of Washington until it obtained the requisite registration if a determination was made that CHW was providing services not specifically exempted from Title 48 of the Washington Code. Rather than use the information voluntarily provided by CHW to make these determinations and process any request for registration, OIC used this information to issue the Order.

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The Order requires CHW to cease and desist from:

- A. engaging in or transacting the unauthorized business of insurance or acting as an unregistered service contract provider in the State of Washington;
- B. seeking, pursuing and obtaining any insurance or service contract business in the State of Washington and from participating, directly or indirectly, in any act of an insurance company or service contract provider;
- C. soliciting Washington residents to sell any insurance or service contract issued or to be issued by an unauthorized insurer or unregistered service contract provider;
- D. soliciting Washington residents to induce them to purchase any insurance contract or service contract.

Order at 1.

As noted above, CHW voluntarily ceased all operations in the State of Washington (other than the continued fulfillment of the warranties already sold to Washington residents) so CHW has no activity to cease and desist. The Order, however, also requires CHW to mail a copy of the Order to each Washington resident who purchased a warranty from CHW.

The Order's mandates, which are made against not just CHW but the remaining Respondents the majority of whom are simply employees of CHW, not principals, are based upon OIC's findings that, *inter alia*, the warranties constitute "insurance" under RCW 48.01.040.

Upon receipt of the Order, CHW demanded a hearing and requested a stay of its implementation pending that hearing. At the preliminary conference, held telephonically on November 15, 2010, at Respondents' request, the Court directed Respondents to submit this letter brief in further support of their request for a stay. This Court should exercise its discretion to grant a stay for several reasons.

First, as a threshold matter, that part of the Order requiring a mailing to CHW's existing customers far exceeds the OIC's statutory powers. RCW 48.02.080 explicitly delineates the OIC's enforcement powers in the context of a perceived violation of Title 48, which are to (1) issue a cease and desist order, and/or (2) bring an action for an injunction in any court of competent jurisdiction. It does not grant the OIC, even under the guise of a cease and desist letter, to unilaterally issue a mandatory injunction requiring a respondent to take affirmative action such as the mailing requirement contained in the Order.¹ Accordingly, at the very minimum, the mailing requirement contained in the Order must be stayed because it far exceeds the OIC's enforcement powers.

Next, the Order as written is entirely too broad and its entirely erroneous findings and references to CHW's sale of "insurance" potentially amounts to a binding (albeit erroneous) finding that CHW is an "insurer." As noted in Respondents' demand for a hearing, at most,

¹ In addition, if CHW prevails at its hearing, it cannot be meaningfully compensated for the irreparable damage to its business and goodwill caused by complying with this unilateral mandatory injunction.

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CHW is a service contract provider providing its customers with the repair or replacement of goods rendered unusable as a result of normal wear and tear as opposed to indemnity for damage resulting from a calamitous or unexpected event. As such, contrary to the OIC's finding in the Order, it is not an "insurer" as defined in RCW 48.01.050, ("Insurer" as used in this code includes every person engaged in the business of making contracts of insurance...") and it does not sell "insurance" as that term is defined in RCW 48.01.040 ("Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies."). Indeed, Washington's purposeful statutory carve-out for service contract providers and intentional statutory delineation in RCW 48.110 (entitled "Service Contracts and Product Protection Guarantees") of the difference between an insurer and service contract providers underscores the inapplicability of the majority of the Order to CHW. *See, e.g.*, RCW 48.110.080(1) ("a service contract provider...shall not use in its name the words insurance, casualty, guaranty, surety, mutual, or any other words descriptive of the insurance, casualty, guaranty or surety business.") In fact, the distinction in the statute is both reasonable and logical since service contract providers provide a service no insurer would ever provide - the repair or replacement of goods rendered unusable as a result of normal wear and tear as opposed to indemnity for damage resulting from a calamitous or unexpected event.

This distinction between an insurer and a service contract provider carries significant potential consequences and the OIC's casual use of the terms "insurance" and "service contract" interchangeably subjects Respondents (including the individual employees of Respondent) to the imminent threat of litigation from consumers, potential criminal prosecution, and potential tax liabilities.² An insurer is required to pay taxes on the premiums it collects from its customers, a service contract provider is not. RCW 48.110.033(2). In fact, the importance of distinguishing between an insurer and a service contract provider can mean the difference between a person going to jail or not because a person who sells insurance in violation of RCW 48.15.020(1) is subject to criminal prosecution for a class B felony. RCW 49.15.023. A service contract provider is not subject to this provision. RCW 48.110.033(2). The OIC's unilateral finding that CHW sells insurance subjects all Respondents to the imminent threat of criminal prosecution and potential incarceration. In addition, the classification of CHW as an "insurer" subjects Respondents to a significantly more complicated and detailed regulatory scheme, a scheme CHW made the conscious decision not to partake in when it decided it did not want to sell insurance. Moreover, CHW will undoubtedly have to expend significant legal expenses to navigate through this complicated regulatory scheme when it is sued by its customers as an unauthorized insurer if it is forced to comply with the Order's mailing requirement while, at the same time, being hamstrung in its ability to contest its status as an insurer by the OIC's "finding." Accordingly, a stay is necessary to prevent this unnecessary harm.

Finally, the Order, as written, is overbroad in that it includes David Bailey, Steven Safdieh, and Michael Gutholc, in their personal capacity, as Respondents. These individuals are employees of CHW, not officers or principals. The fact that Bailey, Safdieh, and Gutholc hold the title of Vice President of Customer Service, Vice President of Sales and Marketing, and Vice President of Contractor Relations, respectively, does not render them in some way personally liable or responsible for any actions taken by CHW. There are no findings in the Order that

² There is no legal authority for treating these terms as fungible as the OIC does in the Order.

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these three employees did anything outside the scope of their employment that should subject them to personal liability. If no stay is issued, these individuals may be subject to lawsuits against them personally especially if CHW is required to mail the Order to its Washington customer and may have their personal credit impacted negatively if the Order is recorded against them. Such a result is unjust and inequitable. As such, implementation of the Order must be stayed.

For all of the foregoing reasons, Respondents respectfully request that the Court exercise its discretion to stay the implementation of the Order pending the outcome of the hearing in this matter.

Respectfully submitted,



Darren Oved

cc: Alan M. Singer, Esq. (via facsimile)