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STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:

STEWART TITLE GUARANTY
COMPANY,

An Authorized Title Insurer.

Docket No. 11-0106 Hearing Unit, DIC
Patricia D. Petersen
Reg. Officer
STEWART TITLE GUARANTY
COMPANY'S OPPOSITION TO
MOTION AND CROSS-MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

Rainier Title Company, LLC ("Rainier") allegedly posted a link on its website to a company that apparently specializes in assisting home owners with short sales. The OIC claimed that the link violated WAC 284-29-215(2), which prohibits advertising on behalf of producers of title insurance. Without consulting with Stewart Title, Rainier agreed to the entry of a consent order and the payment of a \$500 fine.

The OIC claimed that Stewart Title, which has authorized Rainier to issue policies it underwrites, was vicariously liable for the link on Rainier's website. It demanded Stewart also enter into a consent order and pay a fine. Stewart objected because it is not vicariously liable for the acts of its independent underwritten title companies, like Rainier. It requested that the OIC delay further action on this matter until the issue of vicarious liability was decided in *Chicago Title Insurance Company v. Washington State Insurance Commissioner*, No. 40752-3-II, pending before Division II of the Washington State Court of Appeals. It offered to pay the proposed fine, but to disclaim liability for Rainier's actions. Ultimately, the OIC rejected the offer, and filed this summary judgment motion instead.

In its motion, OIC seeks to hold Stewart responsible for the alleged posting even though: (1) it submits no evidence of Rainier's alleged misdeed, other than the consent order itself; (2) the convoluted logic it employs to impose vicarious liability has no legal basis; (3) it fails to submit any evidence that Rainier was acting as

Stewart's agent by posting the alleged link; and (4) imposition of vicarious liability on underwriters for the regulatory misdeeds of its limited agents would wreak havoc on the title insurance industry.

The OIC has failed to demonstrate that it is entitled to summary judgment, and Stewart respectfully requests that its motion be denied.

Stewart cross-moves for summary judgment on the issue of vicarious liability. Regardless of whether Rainier violated any law or regulation, as a matter of law, Stewart is not responsible for that violation, and summary judgment should be entered in its favor dismissing this matter.

II. FACTS

A. Stewart Title Guaranty.

Stewart Title Guaranty Company is a Texas corporation that issues title insurance policies on properties in 49 states, including Washington State. In Washington, it issues policies directly, through its own offices located in 14 counties. From these offices, Stewart provides direct services including escrow and closing services. Stewart conducts its own marketing and sales efforts to support these direct services operating out of its own offices. Pillette Decl., ¶ 3.

Stewart also underwrites policies that are issued by independent title companies, often referred to as "underwritten title companies," or UTCs. In Washington, Stewart underwrites policies for 18 UTCs located in 18 counties. These UTCs conduct their own advertising and marketing, and provide independent escrow and closing services. In some cases, the UTCs compete with Stewart's own offices. Stewart does not monitor the UTC's independent sales activities. In particular, Stewart, like other title underwriters, does not routinely monitor the content on the UTC's websites. Pillette Decl., ¶¶ 5, 6.

Each title company operating in Washington State—whether it is Stewart operating its own retail operation, or a UTC—must maintain or subscribe to a title plant. RCW 48.29.160.

Stewart maintains its own offices and underwrites for other UTCs in the counties where Rainier operates. These offices conduct title searches, and perform escrow and closing services in competition with Rainier. Pillette Decl., ¶ 7.

B. Rainier Title, LLC.

Rainier Title, LLC (“Rainier”) is an independent title company operating in King, Snohomish, and Pierce counties. Stewart and Rainier entered into an underwriting agreement (the “Agreement”) on December 3, 2008. A copy of the Agreement is attached as *Exhibit A* to the Pillette Declaration. Relevant features and provisions of this Agreement include the following:

- The Agreement is non-exclusive. In other words, Rainier may issue policies underwritten by another title underwriter, and Stewart may underwrite policies issued in the same territory covered by the Agreement. 90-95% of Rainier’s policies are underwritten by Stewart. Pillette Decl., ¶ 7.
- The Agreement requires Rainier to pay Stewart 10% of the title insurance premiums it collects on policies underwritten by Stewart. Agreement, ¶ 11(a).
- The Agreement specifically allows Rainier to charge what it desires for services not imposing an obligation on Stewart. Agreement, ¶ 11(a).
- The Agreement does not regulate in any manner how Rainier is to operate its services not relating to issuance of title insurance.

- The Agreement provides expressly that Rainier is not Stewart's agent for purposes of providing abstracting and /or escrow services, or for receipt of service of process. Agreement, ¶¶ 4(f), (g).

In accordance with this Agreement, Stewart has underwritten policies issued by Rainier. Rainier does not use Stewart's name in connection with its services, except that the Stewart name appears on the cover of the policy ultimately issued to the customer, and on rate schedules for title insurance. Pillette Decl., ¶ 8. Stewart's name does not appear on Rainier's website. Rainier conducts its own title searches, performs its own escrows and closings without input from Stewart, and conducts its own marketing and advertising, without the use of the Stewart name. Stewart receives income only on Rainier's issuance of title insurance policies. It receives no other income from Rainier, and in particular, receives no income based on Rainier's charges for title searches, escrow services, or closing services. Pillette Decl., ¶ 9.

C. Procedural Background.

On August 26, 2010, the OIC sent Stewart a draft consent order imposing a \$12,500 fine, and requested that Stewart sign the order and pay the fine. The draft order would have required *Stewart* to admit that Rainier advertised on *Rainier's* website "with and on behalf of Nest Financial, LLC" from between March 20, 2009 and July 20, 2010.¹ It also would have required Stewart to admit that it committed violations of WAC 284-29-215(2) through these acts of Rainier. Stewart was unaware of Rainier's alleged violation before it received this letter. Thomas Decl., ¶ 3.

Stewart did not sign the order or pay the fine because it disagreed that a title insurer is vicariously liable for the regulatory misdeeds of its UTCs. Because it

¹ The original consent order also included a claim that Rainier advertised on behalf of 1031 Exchange facilitators. That claim has been dropped.

knew that this very issue was (and still is) being decided in *Chicago Title Insurance Company v. Washington State Insurance Commissioner*, No. 40752-3-II, pending before Division II of the Washington State Court of Appeals, it requested that the OIC delay action on this case until there was a decision in the appellate matter. Thomas Decl., ¶ 4.

On November 12, 2010, the OIC sent Stewart a different proposed consent order and requested that Stewart sign it. This order would have imposed a \$2,500 fine, and would have required Stewart to admit a violation based on a link Rainier posted on its website. Again, Stewart protested signing an order admitting to vicarious liability, but offered to pay the fine. On February 22, 2011, the OIC expressed willingness to entertain some changes in the language that would not set a precedent on the agent/principal issue. Ultimately, the OIC and Stewart were unable to reach an agreement on the terms of a consent order, and the OIC set the matter for hearing and filed this motion for summary judgment. Thomas Decl., ¶¶ 6-8.

Meanwhile, on December 13, 2010, Rainier signed a consent order agreeing to pay a \$500 fine, and consenting to findings and conclusions that by posting a link to the Nest Financial website, it had committed one violation of WAC 284-29-215(2). Rainier's decision to sign the consent order was made independently, without input from or consultation with Stewart. Pillette Decl., ¶ 10; Thomas Decl., ¶ 5. The parties agree that Rainier long ago removed the Nest link from its website.

III. ISSUES

1. Has the OIC demonstrated that Rainier violated WAC 284-29-215?
2. Even if Rainier has violated WAC 284-29-215, is Stewart vicariously liable for that violation?

IV. AUTHORITY AND ARGUMENT

A. OIC Has Failed To Demonstrate Liability Under WAC 284-29-215.

1. OIC Offers No Evidence Admissible Against Stewart Supporting Its Theory That Rainier Violated WAC 284-29-215.

OIC's only claim against Rainier is that it posted a link on its website for Nest Financial, LLC, and that this posting violated WAC 284-29-215(2). It does not offer a screenshot of that link, identify under what heading the link was listed on the website, or provide any evidence regarding Nest Financial, LLC, its activities, or whether it was in a position to refer title insurance business to Rainier.

OIC has moved for summary judgment. It has the burden of demonstrating a lack of material issues of fact. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989) (moving party bears initial burden of showing absence of material facts). It has offered absolutely no evidence, disputed or undisputed, that supports its contention that Rainier Title advertised on behalf of a producer. For that reason alone, summary judgment should be denied.

The only evidence it offers is the consent order Rainier signed. For reasons stated below, that order cannot be used in a case against Stewart.

2. The Consent Order Is Not Admissible Against Stewart.

In order for the consent order signed by Rainier to be admissible against Stewart, OIC must demonstrate either that it was authorized by Stewart, or that it was made by Stewart's agent while "acting within the scope of the authority to make the statement for [Stewart]." ER 801(2). "As a matter of foundation, the proponent must establish the agent's authority to speak for the party, and must show that the agent was acting within the scope of that authority when making the statement in question." 5B WASH. PRAC., EVIDENCE, § 801.48 (5th ed.).

OIC has made no showing that Rainier was Stewart's agent for purposes of admitting liability. Nothing in the Agreement suggests any such authority. To the contrary, the Agreement provides that Rainier is not to accept service of process (§ 4(d)), and that Stewart has no obligation to defend Rainier in any action filed against it for malfeasance or negligence (§ 2(d)). Rainier engaged its own counsel to represent it in this matter. Stewart was not consulted about, and had no input into, the consent order Rainier signed. Any statement Rainier made about its agency cannot be used to establish that it was acting within the scope of agency with Stewart. *Ennis v. Smith*, 171 Wash. 126, 129, 18 P.2d 1 (1933) (admission of agent as to fact of agency was not competent evidence of agency); *Mauch v. Kissling*, 56 Wn. App. 312, 316, 783 P.2d 601 (1981) (apparent authority can only be inferred from acts of principal and not from acts of agent; there must be evidence that principal had knowledge of the acts committed by its agent).

OIC cannot claim the consent decree is binding under the doctrine of collateral estoppel. In order to assert that doctrine, OIC must demonstrate, *inter alia*, that Stewart was a party to the action against Rainier, or in privity with Rainier, and that application of the doctrine would not work an injustice. *State v. Williams*, 132 Wn.2d 248, 254, 9037 P.2d 1052 (1997).

Public policy must also be considered before the doctrine can be applied to an agency finding. *Christensen v. Grant County Hospital*, 152 Wn.2d 299, 308, 96 P.3d 957 (2004). The party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Id.* at 307.

In this case, Stewart had no opportunity to litigate the issue before Rainier signed the consent decree. Rainier's decision to sign was purely its own choice. It did not consult with Stewart, or advise Stewart that it intended to sign. Pillette Decl., § 10;

Thomas Decl., ¶ 5. Stewart was not a party to the action against Rainier, and Rainier was not acting as its agent in signing the consent order.

Stewart does not know the reason Rainier chose to sign, but can theorize that the fine imposed (\$500) and the required removal of the allegedly offending web posting was too *de minimus* to fight. See *Christensen*, 152 Wn.2d at 309 (“disparity of relief may be so great that a party would be unlikely to have vigorously litigated the crucial issues in the first forum and so it would be unfair to preclude relitigation of the issues in a second forum”). In contrast, the issues are of crucial importance to Stewart, because an adverse result here could impose a liability on it to hawkishly scrutinize the websites and marketing activities of all of its UTCs.

3. Rainier’s Actions Did Not Violate WAC 284-29-215.

OIC cannot demonstrate that Rainier violated WAC 284-29-215(2). That regulation provides:

Except as provided in subsection (1) of this section, *a title company must not* directly, indirectly, by payment to a third party or otherwise, use any means of communication or media to *advertise on behalf of, for, or with a producer*, including but not limited to:

- (a) Advertising real property for sale or lease unless the property is owned by the title company;
- (b) Advertising or promoting the listings of real property for sale by real estate licensees; or
- (c) Advertising in connection with the promotion, sale, or encumbrance of real property.

(Emphasis added.)

The OIC has failed to demonstrate that the link constitute “advertising” on behalf of Nest Financial, LLC. “Advertising” is defined in WAC 284-29 as:

a representation about any product, service, equipment, facility, or activity or any person who makes, distributes, sells, rents, leases, or otherwise makes available such a product, service, equipment, facility, or activity, when the representation:

(a) Is communicated to a person that, to any extent, by content or context, *informs the recipient* about such product, service, equipment, facility, or activity;

(b) Recognizes, honors, or otherwise *promotes* such a product, service, equipment, facility, or activity; or

(c) *Invites, advises, recommends, or otherwise solicits* a person to participate in, inquire about, purchase, lease, rent, or use such a product, service, equipment, facility, or activity.

In this case, OIC alleges that Rainier Title merely posted a link on its website to the website of Nest Financial, LLC. There is no allegation that the link was accompanied by any "representation" about any product provided by Nest Financial, LLC. There is no allegation that Rainier's website informed the viewer of any product that the company provided, promoted the product, or recommended any product provided by Nest Financial. Because the link did not constitute "advertising" as defined, it did not violate the regulation.

If there is any question as to the breadth of the definition of "advertising" contemplated in WAC 284-29-215(2), one need only look at the more specific examples of prohibited advertising in WAC 284-29-215(2). Although these examples are not exhaustive, they narrow, rather than expand, the types of "advertising" contemplated in the regulation, further supporting the conclusion that a website link, standing alone, does not constitute "advertising." *City of Seattle v. Dep't of Labor and Indus.*, 136 Wn.2d 693, 699, 965 P.2d 619 (1998) (under *ejusdem generis* rule, specific terms in a statute modify or restrict application of general terms to items similar to those specified). The examples in the regulation all contemplate advertising *in connection with sale, lease,*

listing, promotion, or encumbrance of real property. There is no allegation here that the Nest Financial link advertised real property or listings for real property, or was in any way connected with the promotion, sale, or encumbrance of real property. A bare link outside the context of any particular property or listing is outside the realm of prohibited advertising contemplated in the regulation.

B. Even If Rainier Has Violated WAC 284-29-215, Stewart Is Not Vicariously Liable.

1. Overview.

Even if the OIC could demonstrate that Rainier violated WAC 284-29-215, it has failed to show that there is any statutory authority making Stewart vicariously liable. Without such statutory authority, it must demonstrate, in accordance with common law, that Rainier was acting within the scope of its agency agreement with Stewart. This the OIC will be unable to show, because the very nature of the agreement between a title underwriter and a UTC is a limited one, and is not the typical insurance "agency" agreement.

Washington courts have long recognized the unique nature of the title insurance business, as well as the unique relationship between a title underwriter, like Stewart, and a UTC or title insurance company, like Rainier. In *Fidelity Title Co. v. Dep't of Revenue*, 49 Wn. App. 662, 745 P.2d 530 (1987), the court relied on the fact that UTCs like Rainier differ from ordinary insurance agents in that (1) only a small fraction (in Rainier's case 10%) of the premium paid for title insurance is forwarded to the title underwriter, and (2) the UTC's business encompasses activities that far exceed the scope of the relationship with the title underwriter. The court emphasized that a UTC "generates business for its own account. It places the relatively small insurance component with an insurer qualified, by reason of compliance with financial requirements, to underwrite the slight risk that [the UTC] has not properly done its

work." *Id.*, at 669-70. The actual contractual relationship between the UTC and the underwriter was the determining factor in interpreting, in that case, the state tax laws, rather than the mere statutory designation of the UTC as an authorized "agent."

Citing *Fidelity Title* with approval, the court in *First Am. Title Ins. Co. v. Dep't of Revenue*, 144 Wn.2d 300, 27 P.3d 604 (2001), held that the underwriter was not liable for taxation on premiums collected by its UTC:

[T]he proceeds of the business arrangement, described in the contracts between [the underwriter] and the UTCs, recognize the activities of the title insurer and the UTCs as separate business services ... We agree with [*Fidelity Title*] and recognize that a UTC is not a mere insurance agent or broker, but rather generates business for its own account, ... The UTCs are compensated for the most significant part of the title insurance process - the search, examination, and preparation of the report which forms the basis for insurance. The title insurer is compensated for assuming the risk the title search and examination is deficient.

Id., 144 Wn.2d at 304-05.

2. The Statute Does Not Make a Title Underwriter Vicariously Liable for the Advertising Misdeeds of its UTC.

The OIC claims Stewart is liable solely because it appointed, under RCW 48.17.160, Rainier to issue title insurance policies it underwrites. That statute, however, does not make the underwriter responsible for every act of the agent. In particular, nothing in that statute suggests that the title underwriter should be liable for the regulatory violations committed by the agent.

There is no other statutory authority imposing vicarious liability on a title underwriter for acts of its authorized agent. Instead, other sections limit the OIC's ability to seek vicarious liability. RCW 48.30.010(5), for example, authorizes the OIC to assess penalties only against the "person ... violating" the statute. "Person" is defined as "an individual or a business entity." RCW 48.29.010(11) and WAC 284029-200(7).

No provision is made for holding others vicariously responsible. Here, the only "person" alleged to have violated the regulation was Rainier. Stewart was not the "person" allegedly in violation.

RCW 48.29.010(2) further limits the OIC's ability to seek vicarious liability. That statute, upon which WAC 284-29-215 is based, prohibits "[a] title insurer, title insurance agent, or employee, agent, or other representative of a title insurer or title insurance agent" from giving anything of value to a producer of title insurance business. If a title insurance agent were automatically an agent of a title insurer for purposes of this statute, there would have been no need to join both the entities with the disjunctive. Instead, the statute would have been drafted to read: "a title insurer, either directly or through the acts of its title insurance agent" Moreover, the statute distinguishes between an "agent" and a "title insurance agent," underscoring the fact that a "title insurance agent" is a special form of an agent, is distinct from a general "agent," and is not an "agent" for all purposes. A statute should be interpreted to give meaning to all of its words. *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 965 P.2d 619 (1998).

Had the Legislature intended that a title insurer be vicariously liable for the acts of a title insurance agent, it would have said so, as it does in other circumstances. For example, RCW 48.98.025 provides that an insurer is responsible for the actions of its managing general agent (as opposed to an issuing agent such as Rainier): "The acts of the managing general agent are considered to be the acts of the insurer on whose behalf it is acting." There is no such clear statement of vicarious liability with respect to an issuing title insurance agent. The Legislature's non-inclusion of such a statement indicates its reluctance to impose such vicarious liability on this relationship. See *Spain v. Emp't Sec. Dep't*, 164 Wn.2d 252, 259, 185 P.3d 1188 (2008) ("It is an elementary rule that where the Legislature uses certain statutory language in one

instance, and different language in another, there is a difference in legislative intent" (internal quotations omitted)).

In contrast, statutes that identify "agents" do not necessarily establish that agency for all purposes, and certainly do not suggest that the principal is liable for all acts or regulatory violations of the "agent." For example, although RCW 23B.05.010 requires a corporation to register an "agent" for the purpose of accepting service on its behalf, it would be illogical to contend that the corporation should then be *per se* liable for the agent's regulatory violations notwithstanding the limited agency relationship between the parties. See *Kroshus v. Koury*, 30 Wn. App. 258, 263, 633 P.2d 909 (1981) (the label "agent" does not create *per se* vicarious liability). In relying solely on the registration of Rainier as an "agent" as a basis to find vicarious liability, the OIC seeks the same result.

3. Common Law Does Not Make Stewart Vicariously Liable for the Regulatory Violations of Rainier.

There is no statute making Stewart liable *per se* for the regulatory violations of its UTC. Similarly, common law agency principles indicate that Stewart is not vicariously liable. See *Proctor v. Metro Money Store Corp*, 579 F.Supp.2d 724, 739 (D. Md. 2008) (Maryland insurance code did not expand the agency relationship between title underwriter and UTC as provided in the agency agreement, and common law agency principles applied).

Under common law principles, the OIC must show that Rainier was acting within the scope of its agency with Stewart in posting the offending link on its website, and that the acts were subject to the Stewart's control. "When a superior business party has retained no right of control and there is no reason to infer a right of control over a subordinate business party, then he cannot be held liable for the negligent acts of the

subordinate party." *Larner v. Torgerson Corp.*, 93 Wn.2d 801, 804-05, 613 P.2d 780 (1980) (following RESTATEMENT (SECOND) AGENCY § 220(2) (1958)).

In *Stephens v. Omni Insurance Company*, 138 Wn. App. 151, 159 P.3d 10 (2007), *aff'd sub nom, Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 204 P.3d 885 (2009), plaintiff claimed defendant insurance company was vicariously liable for the unfair debt collection practices of the company it engaged to pursue subrogation claims. The court disagreed, holding the insurer had exerted no control over the particular practices that were deemed unfair. "The right to control is indispensable to vicarious liability." 138 Wn.App. at 183, citing *Kroshus v. Koury*, 30 Wn. App. 258, 267, 633 P.2d 909 (1981) (principal liable only for agent's activities over which principal has a right of control). See also *Barker v. Skagit Speedway*, 119 Wn. App. 807, 814, 82 P.3 244 (2003) ("control establishes agency only if the alleged principal *controls the manner of performance*") (emphasis added).

The OIC, as the party asserting the agency relationship, has the burden of proving the scope of the agent's authority, and that the agent was acting within that scope. *Costco Wholesale Corp. v. World Wide Licensing Corp.*, 78 Wn.App. 637, 646, 898 P.2d 347 (1995). The OIC has made no such showing here, nor can it. It argues only that since Rainier advertised on its website for Rainier's title insurance services, and also posted a link to Nest Financial's website which might have referred business to Rainier, it was advertising on behalf of Stewart. The OIC can only make this leap of logic by *assuming* that Rainier's advertising that was "part and parcel of its title insurance solicitation business ... benefited [Stewart] as well as itself." OIC's Summary Judgment Motion, at 3. This is like saying a car manufacturer is liable for the unfair sales practices of its independent dealer simply because the practices might increase the sales of the manufacturer's cars. The issue in that example is whether the manufacturer had any control over the dealer's sales practices, not whether the manufacturer is the

remote and unintended beneficiary of such tactics. *See, e.g., Kroshus v. Koury*, 30 Wn. App. at 262 (even though oil company retained and exercised control over aspects of defendant's gas station business "in order to maximize profits," it did not control the particular activity in which the tortious act occurred, and was not vicariously liable).

The same principle applies here. The mere fact that Rainier may have hoped that by posting the link it would increase *its* business (a fact that the OIC assumes without evidence), of which issuing a title policy is only a part, does not mean that Stewart is vicariously liable because it would receive 10% of the premium on any additional title policies issued. Stewart's possible unwitting receipt of enhanced business does not mean it exerted any control over the posting of that link, and certainly does not mean that Rainier acted as its agent in posting the link.

The agreement between Stewart and Rainier is a limited one. It only authorizes Rainier "to issue [Stewart's] title policies." Agreement, ¶ 1. The authorization is limited to issuing policies on Stewart forms, and further limits the amount of policy that can be written without prior approval. *Id.*, ¶ 4(a), (b). The agreement does not require or authorize Rainier to maintain a website or conduct any advertising on Stewart's behalf. Consistent with the unique relationship between a title underwriter and its UTC, as recognized in *Fidelity Title Co. v. Dep't of Revenue*, and *First Am. Title Ins. Co. v. Dep't of Revenue*, cited at 10 above, the agreement neither authorizes nor prohibits Rainier's "separate business practices." These practices, including provision of escrow and abstracting services, are simply outside the scope of the agency relationship. Indeed, the Agreement expressly prohibits Rainier from acting as Stewart's agent with respect to abstracting and escrow services. Agreement, ¶ 4(f). Rainier's actions taken to support its separate business practices, including advertising, marketing, website development, employment practices, and office management, are all outside its limited Agreement with Stewart.

Courts consistently find that underwriting agreements between title underwriters and their UTCs do not subject the underwriter to vicarious liability for acts outside the scope of the agreement. In *Proctor v. Metro Money Store Corp*, 579 F.Supp.2d 724, 739 (D. Md. 2008), the court refused to impose vicarious liability on an underwriter for acts outside the purposes specifically set forth in the agency agreement—issuing title insurance commitments and policies. Quoting *National Mortgage Warehouse, LLC v. Bankers First Mortgage Co.*, 190 F.Supp.2d 774, 780 (D. Md. 2002), the court reasoned:

an issuing [title insurance] agent may, in accordance with an agency contract, wear 'two hats,' one as an agent to issue or sell title insurer's insurance policies, and the other as a settlement agent to conduct closings on his or her own behalf. In such cases, the title insurer is responsible only for the title insurance issued; it cannot be held liable for the agent's participation in related closings or provision of escrow services.

594 F.3d at 1059. See also, *Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055 (8th Cir. 2010) (title insurer not vicariously liable for misdeeds of agent exceeding limited scope of underwriting agreement); *Fidelity Nat'l Title Ins. Co. v. Mussman*, 930 N.E.2d 1160, 1165-68 (Ct. App. Ind. 2010) (same).

C. As a Policy Matter, the Regulatory Misdeeds of Title Agents Should Not Be Imputed to Underwriters.

Imposition of vicarious liability on underwriters for regulatory violations of their UTCs would be disastrous to the industry. *First*, it would require underwriters to police all of the internal activities of the independent title companies. That would require constant monitoring of every UTC website (and other media), each of which can consist of multiple pages and change constantly, and most of which are unrelated to the issuance of title policies. The underwriters would need to regularly audit the UTCs' private operating accounts to make sure no funds have been used to purchase

prohibited gifts. They would also need to keep an eye on the UTCs' facilities to make sure that any use is not prohibited.

Underwriters have neither the staff nor resources to perform what amounts to regular fraud audits to ferret out small expenditures for lunches, sporting events and the like. Even if the underwriters could design and fund an effective audit system, it would be at substantial cost, which would only drive up the very insurance premiums that the anti-inducement regulations were designed to hold in check.²

Such policing would be exceedingly burdensome. Underwriters receive only 10-15% of the policy premium on policies their title insurers issue (Stewart receives only 10% on the policies issued by Rainier). This compensates the underwriters for the risk they assume in underwriting the policies. It does not compensate them for the substantial additional staffing and administrative burden they would take on by having to police the UTCs' own business affairs.

Courts recognize that it is not reasonable to impose a duty on underwriters to audit and supervise all acts of UTCs, particularly where a UTC's regular activities exceed the scope of its limited agency. See *Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055, 1060 (8th Cir. 2010) ("There is no genuine dispute that Capital Title lacked actual authority to provide escrow and closing services as First American's agent. The conduct alleged in the complaint falls outside the scope of Capital Title's authority, and the vicarious liability claims necessarily fail as a matter of law").

² In *Bank of America v. Prestance Corp.*, 160 Wn.2d 560, 580-81, 160 P.3d 17 (2007), the court recognized the public importance of outcomes that result in lower title insurance premiums.

Second, such monitoring and auditing exceeds the scope of the agency agreements and the rights of the underwriters under the agreements.³ As a result, there would be a mass re-write of all the underwriting agreements in the industry. If they are forced to re-write the agreements, the underwriters may choose to eliminate many of the UTCs. Pillette Decl., ¶ 11.

Underwriters have already begun to reduce the number of UTCs they contract with by (1) being more selective in their appointment of UTCs, and (2) terminating UTCs that create exposure that is not financially viable. Title underwriters now rely primarily on direct operations in all but the most rural areas of the county. Raymond J. Werner and Scott R. Borstein, *Present Climate for Title Agents*, ABA National Institute on Attorneys' Role in Title Insurance, May 24-25 and June 14-15, 1990.

The problem became more acute with the recent real estate collapse. When the real estate market was healthy and claims against title policies were relatively controlled, the underwriter-UTC arrangement (reduced in scope as it already was) worked tolerably well for the underwriters. *See id.* The recent real estate collapse, however, has increased strains on the underwriter-UTC relationship. Claims against title insurance policies, and resulting defense and loss payments by underwriters, are at an all-time high. Third-party attempts to impose liability on underwriters for remote acts of UTCs are also increasing. *See, e.g., Wells Fargo Bank v. Old Republic Title Ins.*, 2011 WL 703475 (4th Cir. 2011) (rejecting attempt by bank to recover from underwriter the value of mortgages purchased on the secondary market from the UTC). It is increasingly clear to underwriters that remittances of 10 to 15 percent of premiums, in

³ The Agreement between Stewart and Rainier does allow Stewart to audit escrow accounts in any transaction in which a Stewart title policy is issued. Agreement ¶ 3(e). Courts have consistently held that this provision does not render a UTC an agent of the underwriter for negligence in handling of an escrow account. *See Bluehaven Funding, LLC v. First Am. Title Ins. Co.*, 594 F.3d 1055, 1060 (8th Cir. 2010)

an era when the premium dollar is shrinking, is insufficient to cover the increasing risk and cost inherent in insuring titles through UTCs. *See, e.g.,* "A Look Back: 10 Years in the Title Insurance Industry," <http://www.thetitlereport.com>, November 30, 2009.

All of this has caused underwriters to rethink the UTC model. *See id.* *See also* "Fraud Protection Protocols and Processes," <http://www.thetitlereport.com>, October 19, 2010. The current tendency is to terminate or not renew agreements with UTCs. This tendency is particularly prevalent in less populated counties, where the costs of maintaining the legally required county title plant are relatively high, but premium volumes are relatively low. If underwriters are forced to become financial guarantors of UTC compliance, those underwriters will further incline toward terminating or not renewing agreements with UTCs. Pillette Decl., ¶ 11.

Nor will underwriters have any economic incentive to set up direct operations in less populated counties. Potential revenue is low. The costs of operation, including personnel, rent, and purchasing (or leasing) and maintaining the legally required county title plant, are high. Direct operations in less populated counties are, for the most part, simply not feasible. The end result is that there will be fewer independent UTCs and less competition in populous counties, no title companies at all in rural counties, less overall competition in the title insurance industry, and less choice for consumers in selecting a title insurer.

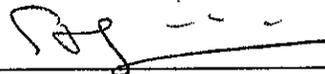
V. CONCLUSION

For the reasons stated above, Stewart requests that summary judgment be granted in its favor holding it not liable for the acts of its independent underwritten title company, Rainier Title, LLC.

If this Court finds issues of fact as to the extent of Stewart's control over Rainier, or the actions of Rainier that led to these proceedings, Stewart requests that the OIC's motion for summary judgment be denied.

DATED: September 15, 2011.

SIRIANNI YOUTZ SPOONEMORE



Stephen J. Sirianni (WSBA #6957)
999 Third Avenue, Suite 3650, Seattle, WA 98104
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Attorneys for Stewart Title Guaranty Co.

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2011 SEP 15 A 9:11

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:
STEWART TITLE GUARANTY COMPANY,
An Authorized Title Insurer.

Hearings Unit, DIC
Lucia D. Petersen
Chief Hearing Officer
Docket No. 11-0106
DECLARATION OF MARK
PILLETTE IN OPPOSITION TO
MOTION FOR SUMMARY
JUDGMENT

I declare, under penalty of perjury and in accordance with the laws of the State of Washington:

1. I am Mark Pillette. I have personal knowledge of the facts stated below.
2. I am employed by Stewart Title Guaranty Company ("Stewart") as Agency Services Division Manager. In this position, I serve as the liaison between Stewart's corporate headquarters in Houston, Texas, and independent underwritten title companies ("UTCs") in Washington, Alaska, Oregon and parts of Idaho and Montana. I have held this position since January 2008. From 2003 through January 2008 I served as District Manager for Stewart. In that position, I also served as a liason between corporate headquarters and a smaller number of UTCs as well as some of Stewart's direct service providers.
3. Stewart underwrites title insurance policies in 49 states. In Washington, as elsewhere, it issues policies directly, through its own offices serving 14 counties. From these "direct service" offices, it provides its own escrow and closing services, hires its own staff, and conducts its own marketing and sales efforts to support these services.
4. Stewart also underwrites policies that are issued by UTCs. In Washington, Stewart underwrites policies for 18 UTCs located in 18 counties. These UTCs conduct their own advertising and marketing, hire their own staff, and provide

independent escrow and closing services. In some cases, the UTCs compete with Stewart's own direct service offices.

5. Under the underwriting agreements with the UTCs, Stewart has the right to and does audit the UTC's escrow trust account and title insurance files to assure that all escrow funds are appropriately disbursed and that underwriting guidelines are followed. However, Stewart has no right to, and does not, monitor a UTC's independent operating accounts, its advertising and marketing activities, its employment practices, its office facilities and contracts, or its website content.

6. I am aware of no title insurance underwriter that monitors or dictates the content of its UTCs' websites.

7. On December 3, 2008, Stewart and Rainier Title, LLC ("Rainier") entered into a Non-Exclusive Underwriting Agreement. A true copy of the Agreement is attached as *Exhibit A*. Through this Agreement, Stewart authorized Rainier to issue title insurance policies underwritten by Stewart in King, Snohomish, and Pierce Counties. The fact that the Agreement is "non-exclusive" means that Rainier may issue policies underwritten by other insurers. Indeed, approximately 5-10 percent of the policies Rainier issues are underwritten by other insurers. "Non-exclusive" also means that Stewart can underwrite policies issued by other UTCs (there are two others in Pierce County) and by its own direct service offices in the counties where Rainier operates.

8. To the best of my knowledge, Rainier has never used Stewart's name in any of its own advertising or marketing. The only place the Stewart name appears in connection with Rainier's business is on the title policies that are ultimately issued to insureds, and on the publicly available insurance rate schedules that Rainier provides.

9. In accordance with the Agreement, Stewart receives from Rainier 10 percent of the premium Rainier charges for policies Stewart underwrites. Stewart

receives no other income from Rainier. In particular, it receives no income based on Rainier's title searches, escrow services or closing services.

10. No one from Rainier ever consulted Stewart regarding whether to agree to any consent order, settlement, plea or other resolution of the OIC's action against Rainier. No one at Stewart advised, approved of, or was involved with Rainier's decision to sign any consent order. Stewart made no decision respecting whether Rainier should sign the consent order.

11. If Stewart were held responsible for acts of its UTCs that are outside the agency agreement, such responsibility would require Stewart to audit virtually all of the operations of every UTC on a regular basis. Stewart has no right, under its agreements with the UTCs, to perform such audits. It has, for example, no right to review a UTC's operating account books and records to assure that no expenditures have been made for lunches or gifts. The necessity to undertake such audits would likely be a substantial factor in Stewart's choice to terminate certain UTC agreements, and to elect, instead, to underwrite policies only through its direct service offices. This result would be especially hard-felt in Washington's rural counties, where no title underwriter operates a direct service office. Those counties—Clallam, Columbia, Garfield, Grays Harbor, Jefferson, Klickitat, Lewis, Okanogan, Pend Oreille, Skamania, Wahkiakum, Walla Walla, and Whitman—could be left with no company issuing title insurance.

DATED September 14, 2011, at 2:00 pm.

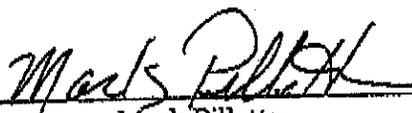

Mark Pillette

Exhibit A

TITLE INSURANCE UNDERWRITING AGREEMENT

(Non-Exclusive Form)

THIS AGREEMENT entered into on December 3, 2008, between STEWART TITLE GUARANTY COMPANY, a Texas Corporation (referred to herein as "UNDERWRITER"), and Rainier Title, LLC, A Washington Limited Liability Company, referred to herein as "Company").

1. **TERRITORY:** COMPANY is a non-exclusive agent authorized to issue UNDERWRITER's title policies covering property in the State of Washington, Counties of King, Snohomish, Kitsap, and Pierce (hereinafter referred to as "Territory"), and in those areas within said state where UNDERWRITER does not now have, nor in the future acquires, an exclusive title insurance representative. COMPANY shall not issue UNDERWRITER's title policies on property located outside of said Territory.

2. DUTIES OF UNDERWRITER:

- (a) UNDERWRITER shall furnish to COMPANY all regularly issued title policy, binder, commitment, and endorsement forms necessary for the issuance of title insurance.
- (b) UNDERWRITER shall maintain a capacity for the research of matters pertaining to title insurance risks and shall remain active in the various trade associations relating to title insurance. In this regard UNDERWRITER shall:
 - (1) Furnish COMPANY from time to time with rules and instructions involving matters of importance to the business of title insurance.
 - (2) Promptly determine questions submitted by COMPANY regarding the issuance of title policies.
- (c) UNDERWRITER shall pay premium and other similar taxes on the actual cash (gross premium [risk rate]) charged for and remitted to UNDERWRITER by COMPANY pursuant to paragraph 11 hereof. Except that UNDERWRITER shall deduct therefore the cost of any reinsurance or coinsurance purchased by UNDERWRITER, and UNDERWRITER shall not be liable for any other taxes of any kind due on income derived by COMPANY. Should UNDERWRITER be required to pay premium tax on any amount greater than that specified above, COMPANY agrees to reimburse UNDERWRITER for such additional tax.
- (d) UNDERWRITER shall defend at its own expense all actions and pay all losses under its title policies except as herein otherwise provided subject to the right of reimbursement in paragraph 5 hereof. UNDERWRITER does not have any obligation to defend COMPANY in any action filed against COMPANY for COMPANY's malfeasance or negligence, even though COMPANY may have issued UNDERWRITER's title policy.
- (e) UNDERWRITER shall grant COMPANY authority to order UNDERWRITER's usual form of insured closing letter
for each of COMPANY's customers that requests such a letter, pursuant to a subsequently designated authorization of COMPANY'S representative, allowing access to the Insured Closing Letter system of UNDERWRITER thru internet access.

3. DUTIES OF COMPANY:

- (a) COMPANY shall conduct its business in a sound and ethical manner and shall issue title policies according to recognized underwriting practices, the rules and instructions given by UNDERWRITER, and those rules and instructions imposed by the Department of Insurance or other regulatory body.

- (b) All title policies must be based on a written report of title resulting from a complete search and examination of those public records, surveys, and inspections relevant to the insurance afforded by such policies. Where outside attorneys are used for examination, they shall act for and be paid by COMPANY but shall be approved by UNDERWRITER. Each title policy shall be on a form designated by UNDERWRITER and shall correctly reflect the status of title as of the date and time of said policy with appropriate exceptions as to liens, defects, encumbrances, and/or objections disclosed by the search and examination of title or known by COMPANY to exist.
- (c) For each title policy issued, COMPANY shall preserve in a separate file all documents supporting the search, examination, and report of title on which the title policy is based. UNDERWRITER shall have the right to make copies of all said title reports and documents at any time within ten (10) years after termination of this Agreement.
- (d) No later than the fifteenth (15th) day of each month, COMPANY shall send to UNDERWRITER a register which shall consist of the following:
- (1) A numerical list of all policies issued or charged for or voided during the previous month.
 - (2) A copy of each policy issued or charged for during the previous month and the original of each policy voided.
 - (3) A check for the gross premiums charged for the account of UNDERWRITER for the previous month.
- (e) COMPANY agrees to keep safely in its escrow account, separate from COMPANY's individual accounts, all funds received by COMPANY from any source(s) in connection with transactions in which UNDERWRITER title policies will be issued, and to disburse said funds only for the purpose for which they were entrusted. Said account shall be designated "Rainier Title Escrow Account" COMPANY agrees to reconcile said escrow account each month within thirty (30) days of the date of the bank statement. UNDERWRITER may at any time make, but shall have no obligation to make, an audit of said escrow account and the general books of accounts and of all accounts, checks, records, or files of COMPANY pertaining to transactions in which UNDERWRITER's title policies are or will be issued.
- (f) COMPANY agrees to keep in force, at COMPANY's expense, a million dollar (\$1,000,000.00) minimum amount Title Agent Errors and Omissions Policy with opinions coverage and a deductible provision of no more than twenty five thousand (\$25,000.00) per loss payable so as to protect UNDERWRITER as well as COMPANY. In the event COMPANY has in force an Errors and Omissions Policy and/or a Fidelity Bond, COMPANY hereby assigns to UNDERWRITER all of its rights, claims, and causes of action that accrue thereunder. A copy of the Policy and Bond shall be furnished to UNDERWRITER.
- (g) Prior to the issuance of a binder, commitment, or title policy in excess of UNDERWRITER's single policy retention limit, as determined by UNDERWRITER from year to year, or if a customer requests reinsurance at any level, COMPANY shall immediately obtain UNDERWRITER's consent and send a copy immediately to the Reinsurance Department of UNDERWRITER in order that UNDERWRITER may contract for such reinsurance as it deems necessary. UNDERWRITER will pay the percentage of the reinsurance cost equal to the percentage remitted to it by COMPANY pursuant to paragraph 11 hereof, and the balance of the reinsurance costs will be paid by COMPANY. COMPANY shall obtain UNDERWRITER's consent as specified in paragraph 4b.
- (h) In the event a claim is made under a title policy, COMPANY shall give immediate notice thereof to UNDERWRITER and furnish to UNDERWRITER a Claim Report Form, a copy of the title policy involved, and all documents and information available relating to the claim. COMPANY shall conduct all investigations requested by UNDERWRITER and shall cooperate with UNDERWRITER in the defense or settlement of the claim, whether such claim be made before or after the termination of this Agreement.

- (i) COMPANY shall furnish UNDERWRITER with a copy of any audit or report that COMPANY is required to make to the Department of Insurance (or similar regulatory body) and a copy of those reports of operations and financial status as stockholders and directors of the COMPANY are permitted by law to see.
- (j) COMPANY authorizes UNDERWRITER to verify and exchange information regarding COMPANY and/or its principals and any current or subsequent contractual agreement including, but not limited to, requesting investigative consumer reports, records of criminal convictions, credit reports, and/or consumer report information at any time. Further, COMPANY and/or its principals understand that upon reasonable written request they may obtain additional information about such reports under the Fair Credit Reporting Act. COMPANY shall provide UNDERWRITER with a list of COMPANY's ten (10) largest customers as well as any entity in which COMPANY or its principals may have the ability to direct such entity's activities.
- (k) COMPANY agrees that COMPANY will adhere to UNDERWRITER'S guidelines regarding the privacy protection of nonpublic personal information relating to consumers and customers as outlined in UNDERWRITER'S bulletins and other writings as circulated from time to time. COMPANY is not authorized to share nonpublic personal information that COMPANY collects on UNDERWRITER'S behalf with any other persons, except as expressly authorized in writing by the UNDERWRITER'S guidelines.
- (l) Company shall indemnify, protect, save, defend and hold Underwriter harmless from any unauthorized use of the forms, materials and manuals, of whatever nature, supplied by Underwriter to Company, whether such forms, materials and manuals are produced electronically, preprinted or otherwise.

4. COMPANY'S AUTHORITY AND LIMITATIONS THEREON:

- (a) COMPANY is authorized to issue title insurance on forms furnished by UNDERWRITER subject to the provisions of this paragraph, but COMPANY shall not alter forms without the prior written consent of UNDERWRITER.
- (b) No title policy shall be issued by COMPANY in excess of One Million Dollars (\$1,000,000.00) without first obtaining the prior written consent of UNDERWRITER.
- (c) COMPANY's Board of Directors shall approve in writing the names of its employees given authority to countersign UNDERWRITER's title policies, and shall provide UNDERWRITER a list of said authorized employees.
- (d) COMPANY shall not without UNDERWRITER's prior written consent settle, compromise, or negotiate any claim under a title policy of UNDERWRITER, or employ counsel for UNDERWRITER or an insured in regard to a claim, or accept service of process on behalf of UNDERWRITER.
- (e) COMPANY shall not without UNDERWRITER's prior written consent insure over a title defect, lien, or encumbrance, regardless of any indemnity or deposit that COMPANY shall obtain.
- (f) COMPANY is expressly not appointed as an agent of UNDERWRITER for purposes of providing abstracting and/or escrow services, and UNDERWRITER shall have no liability or responsibility for any claims or losses due to COMPANY acting as principal in providing such abstracting and/or escrow services.
- (g) COMPANY is expressly not appointed by UNDERWRITER as its agent for receipt of service of process, a notice of claim and/or complaint. In the event COMPANY receives said service of process, a notice of claim and/or complaint, COMPANY shall immediately inform the person or entity giving said service of process, notice of claim and/or complaint that COMPANY is not the agent of UNDERWRITER for the purpose of service of process, receipt of notice of claim, or receipt of complaint. COMPANY shall immediately inform the Insured to file its claim directly with the UNDERWRITER as required by the policy and inform the UNDERWRITER of the attempt to deliver service of process, notice of claim and/or complaint.

5. **DIVISION OF LOSS AND LOSS EXPENSE:** The term "Loss" shall include the amount paid to or for the benefit of the insured as well as loss adjustment expense including any cost of defending the claim resulting in the loss.
- (a) On each loss under a title policy issued pursuant to this Agreement not due to COMPANY's negligence or fraud, COMPANY shall be liable to UNDERWRITER for the first Five Thousand dollars (\$5,000.00) of such loss.
 - (b) On each such loss due to the fraud or intentional act or omission of COMPANY or its employees, representatives, or agents, or due to the negligence thereof, COMPANY shall be liable to UNDERWRITER for the entire amount of such loss including, but not limited to, attorneys' fees, litigation expenses, and costs of settlement negotiations. Such losses include but are not limited to:
 - (1) Violations of escrow instructions.
 - (2) Failure to follow underwriting guidelines and/or instructions of UNDERWRITER.
 - (3) Failure to prepare a title policy which shows defects and matters affecting title disclosed in the title search or which should have been disclosed in the title search.
 - (c) On each loss suffered by UNDERWRITER by reason of its Insured Closing Letter issued pursuant to paragraph 2e of this Agreement, COMPANY shall be liable to UNDERWRITER for the entire amount of such loss including, but not limited to, attorney fees, litigation expenses, and costs of settlement negotiation.
 - (d) On each loss in which COMPANY is liable to UNDERWRITER under this Section 5, COMPANY hereby grants to UNDERWRITER a lien on all the assets of COMPANY until all sums owing hereunder are paid.
6. **TERMINATION OF AGREEMENT:** This Agreement is terminable without cause by either COMPANY or UNDERWRITER at any time on sixty (60) days written notice.
7. **TERMINATION UPON DEFAULT, ETC.:** In addition to other termination provisions contained in this Agreement, UNDERWRITER may immediately terminate this Agreement at any time by written notice to COMPANY upon the happening of any of the following:
- (a) Any bankruptcy proceedings (voluntary or involuntary), insolvency, receivership, or any like proceedings involving the financial stability of COMPANY.
 - (b) Any Court or Administrative proceeding or decision against COMPANY for the violation of any federal or state law or the breach of any rule or regulation of the Department of Insurance or other regulatory agency.
 - (c) Any revocation, disqualification, suspension, or termination of COMPANY's right to do business or any license it may have as a title insurance agency or abstractor.
 - (d) Any notice or information of any act by COMPANY of apparent fraud or dishonesty, or of any shortage in COMPANY's escrow account, or the refusal of COMPANY to allow UNDERWRITER to perform an audit as set out in Section 3e above.
 - (e) Any failure of COMPANY to keep proper accounting records of its escrow accounts or any failure to reconcile same within thirty (30) days of the date of the last bank statement.
 - (f) Any failure, refusal, or neglect by COMPANY to pay any remittances due to UNDERWRITER within twenty (20) days after written notice from UNDERWRITER to COMPANY of a deficiency.
 - (g) Any failure, refusal, or neglect to cure any default by COMPANY within thirty (30) days after written notice from UNDERWRITER to COMPANY concerning such default.

- (h) Any determination by UNDERWRITER, in its sole discretion, that COMPANY and/or its principals are pursuing a course of conduct not in keeping with sound title insurance business practices, or possess a credit rating which contains negative entries, or upon discovery that COMPANY or its principals have furnished any misleading or false information to UNDERWRITER or COMPANY.
8. **RELATIONSHIP OF UNDERWRITER AND COMPANY SUBSEQUENT TO TERMINATION:** Subsequent to termination or cancellation of this Agreement under any provisions of this Agreement:
- (a) COMPANY shall cease and discontinue the issuance of title policies of UNDERWRITER; provided, however, that UNDERWRITER shall have the right to have its title policies issued on those title transactions in process.
 - (b) COMPANY shall cease the use and/or display of the Stewart name or to hold itself out or to advertise itself as an issuing office of UNDERWRITER.
 - (c) COMPANY shall return to UNDERWRITER all materials, forms, manuals, and supplies furnished COMPANY by UNDERWRITER.
 - (d) COMPANY shall retain all evidence of insurability in its files for the benefit of both UNDERWRITER and COMPANY, and to comply with any governmental regulations or laws. UNDERWRITER shall have the right to copy any such files, which right shall survive the termination of this Agreement.
 - (e) COMPANY shall continue to account to UNDERWRITER for all policies in accordance with the provisions of this Agreement.
9. **ASSIGNMENT:** This Agreement is binding on and inures to the benefit of any successor of UNDERWRITER whether by merger, consolidation, affiliation, or otherwise.
10. **NOTICES:** All notices provided for in this Agreement shall be given in writing to the party affected and shall be personally delivered to the other party or mailed to it by Certified or Registered United States Mail at the appropriate address shown below.
11. **GROSS PREMIUMS - SCHEDULE OF PAYMENTS:**
- (a) COMPANY may charge any fees it desires of whatever character for its services which do not impose an obligation on UNDERWRITER, including the search and examination of title (which are a necessary and integral part of underwriting) in transactions where title insurance is being issued, so long as same are permitted by law and not inconsistent with any rate filing or any rules and regulations of the Department of Insurance or other regulatory Agency. Ten percent (10%) of the [rate filing], including all changes in or amendments to any of the above bracketed items, constitutes the gross premium (risk rate) to be charged for and remitted to UNDERWRITER by COMPANY. The gross premium (risk rate) shall include Ten Percent (10%) of all amounts charged for standard endorsements not described in paragraph 11b. In the event COMPANY, under this paragraph, pays UNDERWRITER according to an attached schedule of charges and COMPANY increases its charges to the public for title insurance, title examination, and escrow in conjunction with the issuance of a title policy, then the amount COMPANY shall pay to UNDERWRITER shall be increased by the same percentage. COMPANY agrees to promptly notify UNDERWRITER of any increase in charges to the public. All amounts constituting the gross premium (risk rate) are the property of UNDERWRITER, and shall be collected and held by COMPANY in trust for UNDERWRITER.
 - (b) COMPANY shall promptly remit to UNDERWRITER as gross premium (risk rate) One Hundred Percent (100%) of all charges made by COMPANY for extra hazardous risks or coverage assumed by UNDERWRITER. Extra hazardous risks shall include, but are not limited to, zoning coverage, usury coverage, non-imputation coverage,

shared application endorsement, option endorsement, and tie-in endorsement. These endorsements are not to be issued without permission of Houston Legal Department or a Senior Underwriter.

- (c) If loss and loss adjustment expenses (including attorney fees) incurred by UNDERWRITER in any one calendar year exceed Thirty Percent (30%) of the gross premium (risk rate) actually remitted to UNDERWRITER by COMPANY in that calendar year, then COMPANY'S remittance to UNDERWRITER for gross premium (risk rate) shall increase Ten Percent (10%) (One Hundred Ten Percent (110%) of the above remittance rate to UNDERWRITER) until UNDERWRITER has recouped all loss and loss adjustment expenses, including attorney fees, incurred in excess of said Thirty Percent (30%) of the gross premium (risk rate). This clause is cumulative.
- (d) In the event COMPANY becomes delinquent in remitting UNDERWRITER'S gross premium (risk rate) as determined by paragraph 11a above, COMPANY hereby grants to UNDERWRITER a lien against all the assets of the COMPANY until UNDERWRITER is fully paid.

IN WITNESS WHEREOF, COMPANY and UNDERWRITER have executed this Agreement as of the day and year first stated above.

UNDERWRITER:

STEWART TITLE GUARANTY COMPANY

P.O. BOX 2029

HOUSTON, TEXAS 77252

By: _____

Senior Vice President

Attest: _____

COMPANY:

RAMIER TITLE, LLC

1501 4th AVE., Suite 208

SEATTLE, WA. 98101

By: James R. Hoagland

Signature

Attest: H.M. Carlson

AGENT ID ~~42007~~

47007

AMENDMENT TO TITLE INSURANCE UNDERWRITING AGREEMENT

BY AND BETWEEN

STEWART TITLE GUARANTY COMPANY

AND

RAINIER TITLE, LLC

BEARING AN EFFECTIVE DATE OF AUGUST 2, 2011

The Title Insurance Underwriting Agreement by and between Stewart Title Guaranty Company and Rainier Title, LLC, and dated December 3, 2008, is hereby amended as follows:

Paragraph 4 - COMPANY'S AUTHORITY AND LIMITATIONS THEREON:

Sub paragraph (b) is hereby amended as follows

- (b) No Title Policy shall be issued by COMPANY in excess of Two Million dollars (\$2,000,000.00) without first obtaining the prior written consent of UNDERWRITER.

All other items and conditions of the Title Insurance Underwriting Agreement remain in full force and effect.

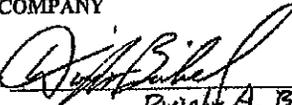
ACCEPTED BY:

STEWART TITLE
GUARANTY COMPANY

By: 
James L. Gosdin, Senior Vice President

Date: 8/5/2011

Rainier Title, LLC
COMPANY

By: 
Dwight A. Bickel

Date: August 3, 2011

FILED

2011 SEP 16 P 12:14

STATE OF WASHINGTON
BEFORE THE OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of:
STEWART TITLE GUARANTY COMPANY,
An Authorized Title Insurer.

Hearings Unit, DIC
Docket No. 11-0106
Nancy Petersen
Chief Hearing Officer
DECLARATION OF MARY
THOMAS RE: CROSS-MOTIONS
FOR SUMMARY JUDGMENT

I declare, under penalty of perjury and in accordance with the laws of the State of Washington, that:

1. I am Mary Thomas. I have personal knowledge of the facts stated below.
2. I am Vice President and Regulatory Counsel for Stewart Title Guaranty Company ("Stewart"), based in Houston, Texas.
3. The Washington State Office of the Insurance Commissioner ("OIC") sent a letter dated August 26, 2010, to Derek A. Matthews, Stewart's Chief Region Counsel located in Seattle. This letter enclosed a proposed Consent Order Imposing a Fine of \$12,500 and requested that Stewart sign the Order and pay the fine. The Order required Stewart to consent to a finding that Rainier Title committed three violations of the law, and to a conclusion that Stewart also committed the violations through Rainier Title. Stewart had no knowledge of Rainier's alleged violations until it received this letter. This letter and proposed Order were forwarded to me on August 30, 2010.
4. On or about September 8, 2010, I had a telephone conversation with Marcia Stickler with the OIC, who agreed to hold the matter against Stewart in abatement until the matter with Rainier Title was resolved, and that there was a possibility that the matter against Rainier Title might be dropped entirely. We discussed the possibility that the OIC might hold the matter against Stewart in abatement until an

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appeal in the matter *Chicago Title Insurance Company v. Washington State OIC*, No. 40752-3-II, pending in Division II of the State Court of Appeals, was decided.

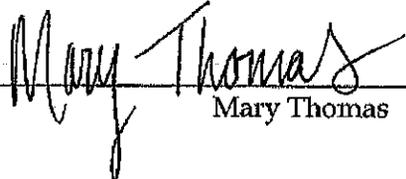
5. Stewart was not involved or consulted about any resolution between the OIC and Rainier Title. I understand that Rainier Title engaged its own attorney to represent it in the matter.

6. The OIC again sent a letter to Derek Matthews, dated November 12, 2010, requesting that Stewart sign an enclosed proposed Consent Order agreeing to pay a \$2,500 fine. This revised Order again required Stewart to consent to a finding that Rainier Title violated the law and to a conclusion that Stewart also committed the violation through Rainier Title.

7. On December 7, 2010, I responded by letter to the November 12 letter, stating that Stewart disputed the legal conclusion that it was liable as a result of Rainier's conduct. I requested that the matter be held pending resolution of the appeal in *Chicago Title* and suggested that Stewart could pay the fine under protest pending the appeal.

8. Over the next several months, Stewart worked with the OIC in an effort to revise the language of the Consent Order so that Stewart would not be bound in the future by any admission of vicarious liability that might be contrary to the ultimate decision in the *Chicago Title* appeal. Unfortunately, we were unable to reach an agreement with the OIC on the language.

DATED September 16, 2011, at Houston, TX



Mary Thomas