MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

Phone: (360) 725-7000
www.insurance.wa.gov

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Hearings Unit, OIC
Patricia D. Petersen
Hearing Officer

OFFICE OF
INSURANCE COMMISSIONER
HEARINGS UNIT
Fax: (360) 664-2782

Patricia D. Petersen
Chief Presiding Officer
(360) 725-7105

Kelly A. Claims
Paralegal
(360) 725-7002
hearings@oic.wa.gov

BEFORE THE STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

In the Matter of	)	**Docket No. 12-0103**
	)	
SAM Y. CHAN,	)	**ORDER ON**
	)	**LICENSEE'S MOTION**
Licensee.	)	**FOR RECONSIDERATION**
	)	

TO: Sam Y. Chan
14415 SE 188th Way
Renton, WA 98058-9333

Ronald J. Meltzer, Esq.
Sinsheimer & Meltzer, Inc., P.S.
4780 Columbia Center
701 Fifth Avenue
Seattle, WA 98104

COPY TO: Mike Kreidler, Insurance Commissioner
James T. Odiorne, Chief Deputy Insurance Commissioner
John F. Hamje, Deputy Commissioner, Consumer Protection Division
Alan Michael Singer, Staff Attorney, Legal Affairs Division
AnnaLisa Gellermann, Deputy Commissioner, Legal Affairs Division
Office of the Insurance Commissioner
PO Box 40255
Olympia, WA 98504-0255

NATURE OF PROCEEDING

On May 9, 2013, Sam Y. Chan ("Licensee") filed a Request for Reconsideration in Matter No. 12-0103, which shall be considered to be a Motion for Reconsideration, requesting

reconsideration of the Findings of Facts, Conclusions of Law and Final Order ("Final Order") entered by the undersigned on April 26, 2013. On May 30, 2013, the Office of the Insurance Commissioner (OIC) filed its OIC's Response and Opposition to Sam Chan's Request for Reconsideration. The undersigned has carefully considered the Licensee's Request for Reconsideration in this matter; the OIC's Response and Opposition; the record of this proceeding and the entire hearing file in entering this Order on Reconsideration.

As bases for his Motion, the Licensee argues that all of the totals of 15 substantive Findings of Fact included in the undersigned's Final Order (i.e., Finding of Fact Nos. 2 through 16) are inaccurate except for Finding of Fact Nos. 4 and 5. The Licensee's arguments are addressed in detail in Analysis below.

ANALYSIS

Standard of review. In his Motion for Reconsideration, the Licensee does not identify the legal standards that govern motions for reconsideration. However, while Washington's Administrative Procedures Act, at RCW 34.05.470(1), authorizes "a petition for reconsideration, stating the specific grounds upon which relief is requested," it defers to the standard of review established by an agency through rulemaking. The APA does not indicate the standard of review in the absence of agency rules on the matter, nor has the OIC adopted any such rules of its own. Given this dearth, state rules and standards governing motions for reconsideration should provide guidance here, particularly 1) Washington Civil Rule 59. Additionally, Washington courts often look to the decisions of other courts, even federal courts, for the persuasiveness of their reasoning when trying to decide similar matters, and for that reason it is also helpful to look for guidance to the federal law used by federal courts in Washington hearing civil matters, particularly 2) Fed. R. Civ. P. 59 and Local Rule 7(h).

1) Washington's state courts follow Civil Rule (CR) 59 when considering motions for reconsideration. CR 59(a) provides a list of nine specific grounds for granting motions for reconsideration, briefly: 1) irregularity in the proceedings; 2) misconduct; 3) accident or surprise; 4) newly discovered evidence that the moving party could not with reasonable diligence have discovered and produced at the trial; 5) passion or prejudice; 6) error in assessment of recovery; 7) that there is no evidence or reasonable inference from the evidence to justify the decision or that it is contrary to law; 8) error in law occurring at the trial and objected to at the time by the moving party; or 9) that substantial justice has not been done. Whether one of these grounds is met is "addressed to the sound discretion of the trial court and a reviewing court will not reverse a trial court's ruling absent a showing of manifest abuse of discretion." *Wilcox v. Lexington Eye Institute*, 130 Wn. App. 234, 241, 122 P.3d 729 (2005). Washington state courts also caution that a motion for reconsideration should not be used as a vehicle to get a "second bite at the apple." "CR 59 does not permit a plaintiff to proposed new theories of the case that could have been raised before entry of an adverse decision." *Wilcox*, 130 Wn.App. at 241, *citing JDFJ Corp. v. Int'l Raceway, Inc.*, 97 Wn.App. 1, 7, 970 P.2d 343 (1999).

2) Washington federal courts view motions for reconsideration similarly, but the federal court standard more clearly emphasizes that such motions seek an "extraordinary" remedy that should normally be denied. This standard was recently set forth in a June 20, 2012 order by Judge Robert J. Bryan in the civil action *White v. Ability Ins. Co.*, No. 11-5737-RJB (W.D.Wash.):

> Pursuant to Local Rules W.D. Wash CR 7(h)(a), motions for reconsideration are disfavored and will ordinarily be denied unless there is a showing of a) manifest error in the ruling, or b) facts or legal authority which could not have been brought to the attention of the court earlier, through reasonable diligence. The term "manifest error" is "an error that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." Black's Law Dictionary 622 (9th ed. 2009).
>
> Reconsideration is an "extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources." *Kona Enters., Inc. v. Estate of Bishop*, 229 F.3d 877, 890 (9th Cir. 2000). "[A] motion for reconsideration should not be granted, absent highly unusual circumstances, unless the district court is presented with newly discovered evidence, committed clear error, or if there is an intervening change in the controlling law." *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 880 (9th Cir. 2009). Neither the Local Civil Rules nor the Federal Rule of Civil Procedure which allow for motions for reconsideration is intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through – rightly or wrongly. *Defenders of Wildlife v. Browner*, 909 F.Supp. 1342, 1351 (D.Ariz. 1995). Mere disagreement with a previous order is an insufficient basis for reconsideration, and reconsideration may not be based on evidence and legal arguments that could have been presented at the time of the challenged decision. *Haw. Stevedores, Inc. v. HT & T Co.*, 363 F.Supp.2d 1253, 1269 (D.Haw. 2005). "Whether or not to grant reconsideration is committed to the sound discretion of the court. *Navajo Nation v. Confederated Tribes & Bands of the Yakima Indian Nation*, 331 F.3d 1042, 1046 (9th Cir. 2003).

Licensee's arguments. Licensee's arguments in support of its Motion for Reconsideration are presented in the order in which they appeared in his Motion:

1. The Licensee argues that Finding of Fact No. 3 is inaccurate. Specifically, in his renewal application to the OIC in 2010, the Licensee answered *No* to Question No. 1 which asked *Have you been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime, which has not been previously reported to this state?* In his Motion for Reconsideration, the Licensee argues that his *No* answer was true when made because, he argues, "*A deferred sentence which is later dismissed is not a conviction. The purpose of deferred sentence is to allow persons to get convictions off their records. Therefore the court defers the imposition of sentence to allow a probation process. If the probation is successful the case is dismissed, as was the case for Mr. Chan.*"

In reviewing the evidence presented at hearing, and particularly the testimony of the Licensee and the Renton Municipal Court documents, there was sufficient evidence to find – as set forth in Finding of Fact No. 3 - that on April 9, 2008 the Licensee was arrested, and subsequently charged, with the crime of Making a False or Misleading Statement to a Public Servant. On April 10 the case was filed in Renton Municipal Court. On April 21 the Licensee appeared for arraignment with his attorney, pled not guilty to this crime and demanded a jury trial. On June 24 the parties appeared before the court, and according to a plea agreement which they had reached, the charge against the Licensee was reduced to Obstruction of a Law Enforcement Officer, the Licensee signed a statement acknowledging that he was pleading guilty to this lesser charge, the judge signed an order finding the Licensee guilty of Obstruction of a Law Enforcement Officer and the Licensee received a deferred sentence whereby he was required to pay a $468 fine and complete a six month probationary period. [Ex. VV, Renton Municipal Court documents.] Although, as is unfortunately apparently common in municipal courts, there are no separate documents in evidence whereby the court ordered a deferred sentence in this matter, in its Court Docket Summary [Ex. VV], on June 24, 2008 the court noted that the Licensee had entered his plea of guilty and signed the Statement of Guilty Plea, that the court had entered its finding of guilty and imposed a fine of $468, and also noted:

> *No Criminal Violations: 6 M; Monitored Unsupervised Probation: 6 M; Deferred Sentence Condition: 6 M; Review Set for 11/24/2008*; and finally noted *IF CONDITIONS MET, CASE DIMISSED* [sic].

Subsequently, at the end of the six month probationary period on December 16, 2008, this same Court Docket Summary [Ex. VV] noted:

> *CONDITIONS OF DEFERRAL MET, CASE CLOSED. Charge 2 Dismissed. Defendant Complied with No Criminal Violations ... Defendant Complied with Monitored Unsupervised Probation ... Defendant Complied with Deferred Sentence Condition* and concluded with *Case Disposition of CL Entered.*

On December 16, 2008 the Licensee appeared once again in court, and was found to have completed the conditions of his deferred sentence (i.e., he paid the fine and successfully completed the six month probation). Because the Licensee had completed these conditions, the court, in its own terminology, both "dismissed" and "closed" the case.
Therefore, in his 2010 OIC Application for Renewal of his Washington producer's license, when the Licensee was asked, in Question No. 1, *Have you been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime, which has not been previously reported to this state?* the Licensee's answer of *No* was correct. The OIC argues that in spite of the fact that the Licensee's case was dismissed in 2008, he had still *been convicted of a crime* within the meaning of Question No. 1. In fact, after review of the evidence provided and particularly the arguments of the parties, it is here found that when the Licensee's case was dismissed after completion of the conditions of his deferred sentence, this dismissal is a dismissal of the entire case which includes dismissal of the charges and the conviction. [Additionally, the Licensee had not *had a judgment withheld or deferred* within the meaning of Question No. 1; based on his guilty plea he had been convicted of the crime and received a deferred *sentence* which was dismissed in 2008 when he completed his terms of deferred sentence. He had not had a deferred (or withheld) *judgment*. In addition, there was no argument that the Licensee was *currently charged with a crime* within the meaning of Question No. 1.] Therefore, the wording of Finding of Fact No. 3 will be changed to read as follows:

> "3. Subsequently, in 2010, in order to renew his Washington insurance producer's license, the Licensee was required to file a Renewal Application. He filed his Renewal Application on April 7, 2010. [Testimony of Licensee; OIC Ex. YY, Declaration of Jeff Baughman, at Ex. A attached thereto, Licensee's Application Summary (Renewal Application).] In this Renewal Application, at Question No. 1, the Licensee was asked *Have you been convicted of a crime, had a judgment withheld or deferred, or are you currently charged with committing a crime, which has not been previously reported to this state?* The Licensee ~~falsely~~ answered *No* to this question~~.~~. His answer was correct because even though in April 2008, pursuant to the terms of his plea agreement, he plead guilty and was ~~had been~~ convicted of the crime of Obstruction of a Law Enforcement Officer. [Ex. VV, Renton Municipal Court records.] ~~Although~~ [The court order provided that if the Licensee paid the fine and completed probation then ~~sentencing on his judgment~~ case would be dismissed ~~still his answer to Question No. 1 in his Renewal Application was false because the Licensee had been convicted of the crime of Obstructing Law Enforcement Officer in 2008.~~ In December 2008 he did complete the terms of his deferred sentence by paying the fine and successfully completing six months probation and therefore according to the plea agreement approved by the court his case - including the conviction - was dismissed. (See Findings relative to this case below.) Nevertheless ~~In addition,~~ the Licensee failed to promptly report the prosecution ~~his conviction~~ of this crime to the OIC in 2008 as required."

2. The Licensee argues that Finding No. 6 is inaccurate because Finding No. 6 states that *"defendant's case was closed after Mr. Chan completed his conditions of deferral."* The

Licensee argues that "*The case was not closed, it was dismissed. In addition, the charges were dismissed, not the sentence.*"

In reviewing the Renton Municipal Court documents, it is indeed very confusing: there is no written order in evidence which specifies whether the Licensee entered into a "deferred prosecution," "deferred sentence" or other document which might describe this agreement and the effect of successfully completing the conditions during the probation period. Instead, there is only the Court Docket which, as above, describes the activities in this case in words and short clauses. As cited above, these notes include both the statements 1) in April 2008 that if the conditions are met then the case will be "dismissed," and 2) in December 2008 the notes advise the conditions of deferral were met and that the case was "closed." Therefore, contrary to the Licensee's assertions, it is not inaccurate, and clearly not "manifest error," to find that the case was both "closed" and "dismissed." However, the Licensee is correct that the sentence was not dismissed because under a deferred sentence, as in this case, the sentence is not actually imposed unless the terms of probation are not met. In the Licensee's case at issue herein, the sentence for this crime (up to $5,000 fine and 365 in jail) was never imposed because under the terms of the plea agreement no sentence was ever imposed because the Licensee completed the terms of his deferred sentence (payment of a fine and successful completion of six months probation). For this latter reason, strictly for purposes of clarification, the fourth to last sentence of Finding of Fact No. 6 will be changed to read as follows:

> "6. In response to the false Complaint which the Licensee filed with the Renton Police Department on March 31, 2008, law enforcement officers with the Department spent many hours searching for the truck and conducting their investigation of the alleged theft. [Ex. UU, Renton Police Department records.] The Police Department finally concluded that the truck had not been stolen and that the Licensee had submitted the Complaint and Affidavit to the Renton Police Department knowing that it was false. On April 10, 2008 he was arrested and charged with Making a False Statement to a Public Servant, he went to jail and posted his own bail at that time. [OIC Ex. VV, Renton Court records.] On April 21, 2008 he appeared for arraignment, pled not guilty and demanded a jury trial, with his Pre Trial Conference scheduled for May 28, 2008. Thereafter, after his requested continuance, on June 24, 2008 as a result of a plea bargain he pled guilty to and was convicted of Obstruction of a Law Enforcement Officer, in his case also a crime involving dishonesty and breach of trust. His judgment included a provision that his ~~sentence~~case would be dismissed if he paid a $500 fine and completed six months probation. On December 16, 2008 he completed the conditions of deferral of his sentence and the case was closed. [OIC Ex. VV, Renton Municipal Court records.] The Licensee failed to report this criminal prosecution to the OIC as he was required to do. On the basis of the Licensee's activities regarding repossession of the truck and his subsequent charges, arrest and conviction detailed above, American General promptly terminated the Licensee's employment with the company. [Testimony of Licensee.]"

3. The Licensee argues that Finding of Fact Nos. 2 and 15 provide a basis upon which to grant reconsideration because "*there is no reason to believe any of the names used by Mr. Chan were done for an improper purpose. While his legal name was not changed until 2004, he had gone to school and professionally used the name Sam Chan for many years. There is no basis for finding his statement in his original application to the OIC in 2000 was false. There is no evidence of his Chinese birth certificate or that his use of that name was improper. The name change ... is not proof of falsity.*"

In response, first, both parties presented thorough argument at hearing regarding this issue, and the Licensee admitted in his testimony that at the time of his original application to the OIC in 2000 his legal name was not Sam Chan as he had stated. Second, whether or not the Licensee had any improper purpose in providing a name in his OIC application which was not his legal name is not relevant; the fact that the Licensee provided a name which was not his legal name is relevant. Consistent with the OIC's mandate to protect the insurance buying public in this state, the OIC must be given applicants' correct, legal names – along with their fingerprints – in order to conduct its necessary investigation into the backgrounds of all applicants for Washington insurance producer licenses. Third, prior to entry of the Findings of Fact, Conclusions of Law and Final Order the undersigned carefully reviewed the arguments of both the Licensee and the OIC relative to this issue, and the Licensee's argument here in his request for reconsideration is the same as was previously made at hearing and properly rejected. Just as above, the Licensee presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why reconsideration would be appropriate. In addition, under the above principles governing similar motions in state and federal courts, the Licensee's argument is merely an attempt to get a second bite at the same apple. As Judge Bryan noted in *White v. Ability Ins. Co., supra*, a motion for reconsideration is not "intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through – rightly or wrongly. ... Mere disagreement with a previous order is an insufficient basis for reconsideration."

For the above reasons, reconsideration based on this argument is not appropriate: the Licensee has failed to show any basis upon which reconsideration should be granted.

4. The Licensee argues that Finding of Fact No. 7 is inaccurate in that it states that in the May 2008 Application to work as a producer for Bankers Life the Licensee falsely stated that he had never been known by or conducted business in any name other than Sam Chan. The Licensee argues that, as a practical matter, Sam Chan was the name the Licensee used for school and business and there is no evidence that Bankers was harmed or injured by this answer.

In response, first, it is irrelevant that the Licensee used another name on some occasions: in the Bankers Application he was expected to state his legal name and he failed to do so. It is also irrelevant whether or not Bankers was harmed; as reviewed in detail in the Final Order, applicants must provide their legal names when required to do so. Second, both parties

presented thorough argument at hearing regarding this issue, and the Licensee admitted in his testimony that at the time of his application to Bankers Life his legal name was not Sam Chan as he had stated. Third, whether or not the Licensee had any improper purpose in providing a name in his OIC application which was not his legal name is not relevant; the fact that the Licensee provided a name which was not his legal name is relevant. As found above, consistent with the OIC's mandate to protect the insurance buying public in this state, the OIC must be given applicants' correct, legal names – along with their fingerprints – in order to conduct its necessary investigation into the backgrounds of all applicants for Washington insurance producer's licenses. Fourth, prior to entry of the Findings of Facts, Conclusions of Law and Final Order the undersigned carefully reviewed the arguments of both the Licensee and the OIC relative to this issue, and the Licensee's argument here in his request for reconsideration is the same as was previously made at hearing and properly rejected. Just as above, the Licensee presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why reconsideration would be appropriate. In addition, under the above principles governing similar motions in state and federal courts, the Licensee's argument is merely an attempt to get a second bite at the same apple. As Judge Bryan noted in *White v. Ability Ins. Co., supra*, a motion for reconsideration is not "intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through – rightly or wrongly. ... Mere disagreement with a previous order is an insufficient basis for reconsideration."

For the above reasons, reconsideration based on this argument is not appropriate: the Licensee has failed to show any basis upon which reconsideration should be granted.

5. The Licensee argues that Finding of Fact Nos. 8 and 9 should be reconsidered because *As previously argued in our Hearing memorandum a notarization requires an attestation which was missing from the document in question. The intent of the Notary is not relevant to this inquiry. The findings ignore the fact this was, in fact, Mr. Anderson's signature on the document. ... While Mr. Chan may be an incompetent Notary, this does not reflect on his ability to hold an insurance license.*

In response, as stated in the Licensee's Motion on this issue, he did indeed previously make this argument at hearing. Prior to entry of the Findings of Facts, Conclusions of Law and Final Order the undersigned carefully reviewed the arguments of both the Licensee and the OIC relative to this issue, and the Licensee's argument here in his request for reconsideration is the same as was previously made at hearing and properly rejected. Just as above, the Licensee presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why reconsideration would be appropriate. In addition, under the above principles governing similar motions in state and federal courts, the Licensee's argument is merely an attempt to get a second bite at the same apple. As Judge Bryan noted in *White v. Ability Ins. Co., supra*, a motion for reconsideration is not "intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a

court to rethink what the court had already thought through – rightly or wrongly. ... Mere disagreement with a previous order is an insufficient basis for reconsideration."

For the above reasons, reconsideration based on this argument is not appropriate: the Licensee has failed to show any basis upon which reconsideration should be granted.

6. Finally, the Licensee argues that Findings of Fact Nos. 10 through 14 are inaccurate in that they conclude that the Bankers Life Annuity was not suitable for Mr. Schevers. *...At best this evidences a misunderstanding which did no harm to the consumer.*

In response, first, both parties presented thorough argument at hearing regarding this issue. Second, prior to entry of the Findings of Fact, Conclusions of Law and Final Order the undersigned carefully reviewed the arguments of both the Licensee and the OIC relative to this issue, and the Licensee's argument here in his request for reconsideration is the same as was previously made at hearing and properly rejected. Just as above, the Licensee presents no highly unusual circumstances, newly discovered evidence, clear error, intervening change in the controlling law, or other reason why reconsideration would be appropriate. In addition, under the above principles governing similar motions in state and federal courts, the Licensee's argument is merely an attempt to get a second bite at the same apple. As Judge Bryan noted in *White v. Ability Ins. Co., supra*, a motion for reconsideration is not "intended to provide litigants with a second bite at the apple. A motion for reconsideration should not be used to ask a court to rethink what the court had already thought through – rightly or wrongly. ... Mere disagreement with a previous order is an insufficient basis for reconsideration."

For the above reasons, reconsideration based on this argument is not appropriate: the Licensee has failed to show any basis upon which reconsideration should be granted.

CONCLUSION

First, with the exception of a portion of Finding of Fact No. 3 as detailed above, based upon the above authorities and analysis, the Licensee has not persuaded the undersigned that there are any issues of fact or law that warrant reconsideration of the Findings of Fact, Conclusions of Law and Final Order entered by the undersigned on April 26, 2013. With this single exception, the Licensee has not persuaded the undersigned that she committed error, manifest or otherwise, in entering her Findings of Fact, Conclusions of Law and Final Order in this matter. Therefore, with this single exception, the Licensee has not made the requisite showing for reconsideration pursuant to state and federal rules and case law, and thus the Licensee's Motion for Reconsideration should be granted only with respect to Finding of Fact No. 3 as detailed above and denied on all other bases.

Second, the language being changed in Finding of Fact No. 3 as a result of this reconsideration was not the basis of any statutory violations found in the undersigned's original Conclusions of

Law and Final Order entered on April 26, and therefore no portion of the original Conclusions of Law or Final Order need to changed as a result of this reconsideration.

Third, because there were multiple significant bases found for the revocation of the Licensee's Washington insurance producer's license in the undersigned's Findings of Facts, Conclusions of Law and Final Order entered April 26, and the language being changed as a result of this reconsideration did not form the basis for any conclusion that the Licensee had violated any statute or regulation, the OIC's Order Revoking License issued against the Licensee is still upheld on all of bases cited therein.

Fourth, because pursuant to Title 34 RCW the Licensee's Motion for Reconsideration did not stay the effectiveness of the Final Order herein, the Licensee should have surrendered his insurance producer's license to the OIC on or before May 14, 2013 as required in the Final Order entered by the undersigned herein.

ORDER

On the basis of the foregoing,

IT IS HEREBY ORDERED that Sam Y. Chan's Motion for Reconsideration is **GRANTED** only with respect to part of Finding of Fact No. 3 of the original Findings of Facts, Conclusions of Law and Final Order in this matter entered by the undersigned on April 26, 2013, and **DENIED** with respect to all other bases raised by the Licensee in his Motion. The Amended Findings of Fact, Conclusions of Law and Final Order herein, entered by the undersigned on this date only to reflect the changes made to Finding of Fact No. 3 is attached hereto and shall be the final order in this proceeding. With the exception of the change to Finding of Fact No. 3 (and one word in Finding of Fact No. 6 for clarification only) the balance of the original Findings of Facts, Conclusions of Law and Final Order entered April 2, 2013 shall remain unchanged and in full force and effect as indicated therein.

ENTERED at Tumwater, Washington, this 7th day of August, 2013, pursuant to Title 34 RCW and specifically RCW 34.05.470; Title 48 RCW; and regulations pursuant thereto.

PATRICIA D. PETERSEN
Chief Presiding Officer

Pursuant to RCW 34.05.461(3), 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.

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 normal office mailing custom, a true copy of this document to the following people at their addresses listed above: Sam Y. Chan, Ronald J. Meltzer, Esq., Mike Kreidler, James T. Odiorne, John F. Hamje, Esq., Alan Singer, Esq., and Charles Brown, Esq.,

DATED this 14th day of August, 2013.

Kelly A. Cairns

KELLY A. CAIRNS