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INSURANCE COMMISSIONER

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January 14, 2014

Hearings Unit, DIC
Patricia D. Petersen
Chief Hearing Officer

VIA U.S. MAIL AND ELECTRONIC MAIL

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Timothy J. Parker, Esq.
Jason W. Anderson, Esq.
Carney Badley Spellman, P.S.,
701 Fifth Avenue, Suite 3600
Seattle, WA 98104-7010
Parker@carneylaw.com
Anderson@carneylaw.com

RE: Edmund C. Scarborough and Walter W. Wolf, No. 13-0084

Dear Messrs. Singer, Parker and Anderson:

This letter is in response to Mr. Singer's objections filed by email on January 9, 2014 and Mr. Anderson's email response of even date which have both become part of the hearing file.

My Order on Discovery Conference ("Order") was entered on December 19, 2013. This Order was entered after two prehearing discovery conferences, the first held at the request of the OIC on November 18, 2013 and the second held at the request of the OIC on December 19, 2013. As reflected in my Order, the November 18 prehearing discovery conference was held to discuss the OIC's request for a subpoena duces tecum for bank records of Respondent Scarborough held by Wells Fargo Bank. At that time, Respondent Scarborough indicated his opposition to the OIC's request and subsequently both Respondent Scarborough and Wells Fargo filed briefs opposing this request. Thereafter, on November 27, the OIC filed a Motion to Compel, seeking an order

compelling Respondent Scarborough to produce more complete, executed and attested answers and responses to the OIC's Interrogatories and Requests for Production. As my Order also reflects, the OIC requested the December 19 second prehearing discovery conference to discuss its November 27 Motion to Compel and during that conference Mr. Anderson advised that he planned to file a Motion for Summary Judgment.

As also reflected in my December 19, 2013 Order, both parties agreed on the three issues to be included in Respondent Scarborough's Motion for Summary Judgment and they are specifically stated in the Order. Mr. Singer's January 9 statement is not correct in stating that "*Judge Petersen was urged, and she decided, that in lieu of discovery, the issues articulated in her order of even date would be decided by summary judgment.*" Rather, because Mr. Anderson advised he would be filing a Motion for Summary Judgment, it was decided that the matters concerning 1) issuance of a subpoena to Wells Fargo (which as above was formally opposed by Respondent Scarborough and Wells Fargo) and 2) the OIC's Motion to Compel (which argues that Respondent Scarborough's answers to the OIC's Interrogatories and Requests for Production are not complete, are not executed or attested to) -- which will entail a significant amount of time and effort by all parties -- will be dealt with after said Motion for Summary Judgment was decided because if summary judgment is granted then these matters will be moot. Contrary to Mr. Singer's January 9 statement, the Order specifically encourages the parties *as soon as possible, to consider entering into joint stipulation of facts and/or Declarations regarding facts which can be agreed* but the Order does not require that the parties enter into a stipulation of facts as a precondition of either party filing a Motion for Summary Judgment. While I most certainly expect both parties to act with true good faith and professionalism in endeavoring to enter into a stipulation of facts promptly - just as stated in the Order - under both Title 34 and the court rules either party has the right to file a Motion for Summary Judgment when it wishes to do so. Additionally, it would seem that it would be in Mr. Anderson's best interests to make all effort to enter into a stipulation of facts because, as Mr. Singer states, pursuant to CR 56 one condition of granting summary judgment is that there are no genuine issues as to any material facts, and therefore if there are any genuine issues as to any material facts then Scarborough will simply not prevail in his Motion for Summary Judgment.

Finally, I heard no indication during the December 19, 2013 prehearing conference that in its Motion for Summary Judgment Respondent Scarborough will argue that the bonds are fully collateralized; if this fact is raised then one could expect that this might be a genuine issue of material fact which might defeat his Motion for Summary Judgment.

For the above reasons, and consistent with my December 19, 2013 Order, I do not believe Mr. Singer has shown any reason to hold a third prehearing discovery conference at this time and we will proceed with the agreed upon plan as set forth in my Order. However, as clearly stated in

that Order, *“if this case is to proceed to hearing after determination of Scarborough’s Motion for Summary Judgment [i.e. if Respondent Scarborough’s Motion for Summary Judgment is denied], then discovery shall commence promptly, with time periods for response – if not already provided ... – shortened by the fact that Scarborough and Wells Fargo have had a significant period of time in which to review, consider and respond to this discovery already.”* During the December 19 conference, I also advised that in the event Respondent Scarborough’s Motion for Summary Judgment is denied and discovery continues, I will promptly consider the OIC’s Motion to Compel and at the request of either party I stand ready to review – line by line - each request, hear argument from the parties on both the OIC’s Motion to Compel and on the OIC’s request for a subpoena to Wells Fargo, and will enter specific decisions on each specific request regarding enforcement of those discovery efforts.

I look forward to receipt of Respondent Scarborough’s Motion for Summary Judgment on or before January 20, 2014, to the OIC’s Response within 14 days after the Motion is filed, to any Reply within seven days after the OIC’s Response is filed, and to oral argument to be scheduled thereafter, all as set forth in my December 19, 2013 Order on Discovery Conference.

Very truly yours,



Patricia D. Petersen, J.D.
Chief Presiding Officer

cc: James A. McPhee, Esq.
Michael Miles, Esq.

Cairns, Kelly (OIC)

From: Anderson, Jason [Anderson@carneylaw.com]
Sent: Thursday, January 09, 2014 3:16 PM
To: Cairns, Kelly (OIC)
Cc: jmcphree@workwith.com; Singer, Alan (OIC); Parker, Tim; Williams, Christine
Subject: RE: In re Edmund C. Scarborough et al - last prehearing conference

Ms. Cairns,

I acknowledge receipt of Mr. Singer's request for a prehearing conference. I respectfully disagree with his characterization of events and communications and object to the transmittal of argument in this manner. I am prepared to respond to the substance of Mr. Singer's message at an appropriate time.

-Jason Anderson



Jason W. Anderson, Principal
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From: Singer, Alan (OIC) [mailto:AlanS@OIC.WA.GOV]
Sent: Thursday, January 09, 2014 3:07 PM
To: Cairns, Kelly (OIC)
Cc: Anderson, Jason; jmcphree@workwith.com
Subject: RE: In re Edmund C. Scarborough et al - last prehearing conference

Hi Kelly,

I regret that I need to request another prehearing conference in this matter should Judge Petersen see fit.

In the recording of her December 19 prehearing conference (which I reviewed thanks to you kindly sharing it with us), Judge Petersen was urged, and she decided, that in lieu of discovery, the issues articulated in her order of even date would be decided by summary judgment. At the prehearing I held the impression and understanding that the purpose of not conducting discovery and instead proceeding with summary judgment was to choose a way that would be more efficient and save time by finally disposing of those issues one way or the other by summary judgment. Consistent with this, at the prehearing conference there was also some discussion about attempting to reach agreement as to undisputed facts to make sure that summary judgment truly made sense. At the time, I believed and was under the impression that Jason Anderson and I would work together and would certainly be able to reach agreement as to all such "undisputed facts" needed to decide such motions. Suffice to say that, despite subsequent efforts between ourselves to address this, a month later no such agreement has been reached. And today, Mr. Anderson has advised me that he intends to proceed "regardless of whether agreement is reached" as to any undisputed facts. He writes that "Judge Petersen did not "require" us to enter into a stipulation as a condition of bringing Mr. Scarborough's motion but rather "encouraged the parties...to consider entering into [a] joint stipulation of facts and/or Declarations regarding facts which can be agreed upon[.]'" I believe Mr. Anderson's approach crosses unevenly with what was discussed at the December 19 prehearing conference, and would undermine the goal of finding the most efficient way to address the issues stated. We have no agreed statement as to such relevant facts as how and by who the bonds were sold, some basic explanation of what the products sold are, what kind of product the purchasers were looking to purchase and why,

the purpose for the products, and what the products were intended to accomplish. In addition, a few weeks after the December 19 prehearing, Mr. Anderson suggested that one of Mr. Scarborough's summary judgment arguments about why he believes the products sold are not "insurance" is based on his claim that his products are supposedly "fully collateralized." But this claimed "fact" remains in dispute. OIC's discovery sought evidence about the assets that supposedly render the bonds "fully collateralized," but since that discovery was not provided and is now on hold, this remains a disputed fact. If Mr. Scarborough will base in any part his motion for summary judgment on any such disputed fact, I cannot understand how the argument can be disposed of via summary judgment without discovery taking place first. CR 56 provides that summary judgment is only possible, in part, if there is no genuine issue as to any material fact. So if a core asserted "undisputed fact" is, in truth, actually disputed, the issue is incapable of disposition on summary judgment. Without discovery, OIC cannot agree with, and would dispute, any assertion that the bonds are "fully collateralized."

I am concerned that without agreed-upon undisputed facts in advance in place, discovery would be required and motions for summary judgment would be premature, would not be more efficient, and may even just create potentially appealable issues. Mr. Anderson's promise to proceed regardless of whether any facts are in dispute also seems contrary to the intent behind Judge Petersen's order and the discussions that took place on December 19. I will await hearing from you as to how Judge Petersen would like us to proceed.

Alan

Alan Michael Singer

Staff Attorney, Legal Affairs

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From: Singer, Alan (OIC)

Sent: Wednesday, January 08, 2014 3:43 PM

To: Cairns, Kelly (OIC)

Cc: 'Anderson, Jason'; 'jmcphoe@workwith.com'

Subject: RE: In re Edmund C. Scarborough et al - last prehearing conference

Thank you, Kelly. We may have an issue to raise, unfortunately. I will review one last time with Jason where things stand first.

Alan Michael Singer

Staff Attorney, Legal Affairs

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From: Cairns, Kelly (OIC)

Sent: Wednesday, January 08, 2014 12:02 PM

To: Singer, Alan (OIC)

Cc: 'Anderson, Jason'; 'jmcphoe@workwith.com'

Subject: RE: In re Edmund C. Scarborough et al - last prehearing conference

Hi Alan (and Jason and Jim),