

FILED

2013 SEP 12 A 9:33

Hearings Unit, DIC  
Patricia D. Petersen  
Chief Hearing Officer

STATE OF WASHINGTON  
OFFICE OF INSURANCE COMMISSIONER

In the Matter of

PREFERRED CHIROPRACTIC DOCTOR,  
INC.

Respondent,

NO. 13-0134

MOTION OF PREFERRED  
CHIROPRACTIC DOCTOR, INC. FOR  
SUMMARY JUDGMENT

I. INTRODUCTION AND SUMMARY

Respondent, Preferred Chiropractic Doctor, Inc. (PCD or the company) as authorized by the Chief Presiding Officer the Honorable Patricia D. Petersen, pursuant to her authority under RCW 34.05.437(1), at a prehearing conference in this matter on August 22, 2013, files this Motion for Summary Judgment in this matter that PCD believes is a case of first impression. The Chief Presiding Officer did not set a fixed date for the filing of the motion but stated that she would like to have the opportunity to read it before the hearing scheduled on September 19, 2013.

This motion is based on the lack of authority of the Insurance Commissioner to levy a fine on an unlicensed discount plan organization (DPO) that is not willfully operating as a DPO.

1 The Commissioner has not claimed that PCD has willfully operated as a DPO under  
2 the provisions of RCW 48.155.130(2), which contains the only provisions that authorize the  
3 Commissioner to levy fines and penalties against an unlicensed DPO. His Notice of Request  
4 for Hearing for Imposition of Fines claims that PCD violated RCW 48.155.130(1)(b) because  
5 PCD operated as a DPO without a license. The Commissioner seeks a fine of \$100 under  
6 those provisions for each of 1,524 health care plan discount cards that PCD sold to  
7 Washington residents between January 1, 2009 and January 1, 2012. The Commissioner  
8 claims that each of those sales is a violation. PCD, which began DPO operations in  
9 Washington in 1994, admits that it inadvertently so operated without a license because it was  
10 not aware of the Healthcare Discount Plan Organization Act (the Act) that became effective  
11 on July 26, 2009, 15 years after it had commenced operations in Washington. However, as  
12 stated below, that subsection does not authorize the Commissioner to fine unlicensed DPOs  
13 unless the DPO acted willfully.

14 The internal file of the Insurance Commissioner in this matter provided to counsel for  
15 PCD contains no information that shows that PCD willfully operated in violation of the  
16 requirement that it obtain a license that would subject it to the penalties imposed by RCW  
17 48.155.130(2). That section, which incorporates by its terms the penalties imposed by RCW  
18 48.15.020 and RCW 48.15.023. RCW 48.15.020, applies to the solicitation of insurance  
19 business in Washington by an unauthorized insurer. It provides that only a duly licensed  
20 surplus line broker acting in good faith under his or her license may represent an unauthorized  
21 insurer. It provides that if a person other than a duly licensed surplus line broker makes a  
22 contract of insurance in Washington for an unauthorized insurer, such broker, in addition to  
23 other liabilities to which the broker is subject, can be fined up to \$25,000 for each such  
24 insurance contract. RCW 48.15.023 provides that if any individual, company, insurer or other  
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1 entity knowingly violates the provisions of RCW 48.15.020(1) any such person or entity is  
2 guilty of a class B felony.

3 There is no evidence that would support a claim that PCD willfully operated without a  
4 license that would subject it to such draconian penalties. To the contrary, all evidence shows  
5 that once PCD learned of the existence of the Act it began to take steps to understand the law  
6 and its obligations under it and to take steps to obtain a license.

7 PCD in fact voluntarily self-reported to the OIC that it was unlicensed by email dated  
8 December 4, 2012, from Edward Clabaugh, counsel for PCD, to Ms. Susan Baker, Company  
9 Licensing Specialist, Ms. Carol Surcau, Deputy Commissioner, Legal Affairs Division, and  
10 Ms. Gayle Pasero, Company Licensing Manager. Mr. Clabaugh had spoken with each of those  
11 individuals during the fall concerning PCD, without naming the company, as it sought to  
12 determine its obligations and responsibilities under the Act, including the form of the financial  
13 statements to be filed with the Application for Licensure.

14 Additionally, by letter dated December 6, 2012, Dr. Stephen Below, the President and  
15 CEO of PCD, notified the Commissioner that PCD had become aware in the past several  
16 months that PCD was required to register in order to legally conduct business and that it was  
17 in the process of completing such registration.

18 At no time did any of the OIC staff members state or suggest to Mr. Clabaugh that the  
19 company should halt its DPO activities until it received its license. In fact they encouraged  
20 Mr. Clabaugh to have the company file its Application for Licensure.

21 The company in fact filed its application for licensure as a DPO by letter dated  
22 February 13, 2013, which was accompanied by the Application and required documentation  
23 and fee. However, after receipt of a letter dated March 19, 2013, from Ms. Susan Baker that  
24 questioned the company's net worth among other matters, the company withdrew its  
25 Application by letter dated April 8, 2013. The company voluntarily ceased discount plan

1 activities on March 22, 2013, and voluntarily offered refunds of membership fees to its patient  
2 members on April 23, 2013.

3 The Commissioner seeks a fine against PCD under the provisions of RCW  
4 48.155.130(1)(b). However, RCW 48.155.130(1)(b), by its terms, only provides the  
5 Commissioner the authority to assess any such fine against a licensed discount plan that has  
6 violated a provision of the Act. RCW 48.155.130(1)(b) grants the Commissioner the authority  
7 to impose a monetary penalty only in lieu of or in addition to the suspension, revocation, or  
8 refusal to renew the license of the licensed discount plan organization. Obviously, unless the  
9 discount plan organization is licensed, there is and can be no license for the Commissioner to  
10 suspend, revoke or refuse to renew. Therefore, by the terms of the statute, the Commissioner  
11 does not have the authority to impose any fine on PCD, or any other unlicensed DPO, under  
12 RCW 48.155.130(1)(b).

13 In three recent opinions, the Washington Supreme Court held that legislative intent is  
14 determined by the plain reading of the statute if it is not ambiguous and an agency's  
15 interpretation that is not plausible or that is contrary to legislative intent is not entitled to  
16 deference.<sup>1</sup>

17 As an aside, the company, which began discount plan operations in Washington in  
18 1994, before the enactment of the Act, only charges a membership fee of \$37 per year, or  
19 \$3.08 per month, for its discount plan. New patient members without exception recoup the  
20 cost of membership on their first visit to their chiropractor. Renewing members, who do not  
21 have the same expensive initial visit, recoup the cost of membership on their first or second  
22 appointment. Based on the Membership fees charged by the company, the amount of the fine  
23 sought by the commissioner, \$152,400, is equal to almost three years of membership fees for  
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25 <sup>1</sup> *In re Estate of Bracken*, 175 Wn.2d 549, 575 (2012); *Bostain v. Food Express, Inc.*, 159 Wn.2d 700, 716  
(2007); *Agrilink Foods, Inc. v Dep't of Revenue*, 153 Wn.2d 392, 396 (2005)

1 each discount plan sold by the company in Washington during the time period for which the  
2 fine is sought. Additionally, as determined by the OIC in its analysis of the financial  
3 statements that accompanied the company's Application for Licensure, the company did not  
4 meet the minimum \$150,000 net worth requirement under generally accepted accounting  
5 principles. The fine sought by the commissioner is in excess of \$150,000 and would in all  
6 probability financially destroy the company.

7 Dr. Stephen Below, the founder and President and CEO of the company, has been an  
8 outstanding chiropractor and chiropractic practice owner throughout his long career. He has  
9 been involved in many professional and civic organizations during his career. Among those,  
10 he was president of the Alabama State Board of Chiropractic Examiners from 1991 to 1996.  
11 He was a member of the Alabama State Chiropractic Association Board of Directors in 1985-  
12 1986 and was the founding President of the Alabama Chiropractic Council in 1992. He was  
13 also President of the Central Alabama American Heart Association from 1985 to 1987.

## 14 15 **II. RELIEF REQUESTED**

16 Respondent PCD requests that the Office of the Insurance Commissioner (OIC) grant  
17 summary judgment in favor of PCD that it did not willfully operate as a DPO in violation of  
18 the licensing provisions of the Act and by dismissing the request of the Commissioner that  
19 PCD be fined under the provisions of RCW 48.155.130(1)(b) because a fine under that section  
20 may only be imposed by the Commissioner on a licensed DPO. PCD also requests summary  
21 judgment in its favor that it did not violate the purpose of the Act. Alternatively, PCD requests  
22 that the Office of the Insurance Commissioner grant summary judgment that PCD committed  
23 only one violation of the Act for which no penalty is specified.

## 24 25 **III. STATEMENT OF FACTS**

1           **3.1    Background**

2           The President and CEO of PCD, Dr. Stephen Below, is a fourth generation  
3 chiropractor. Dr. Below purchased a chiropractic clinic in his home-state of Alabama in 1983  
4 while still in chiropractic school and renamed it the Below Chiropractic Clinic. The former  
5 owner and Dr. Below's father and brother practiced chiropractic part time at the Clinic while  
6 Dr. Below was still in school. Following his graduation from Life Chiropractic College in  
7 1984, and the receipt of his chiropractic license, Dr. Below became a full time chiropractor  
8 with the Clinic. Early in his practice, Dr. Below learned that chiropractors and patients both  
9 encountered problems with health insurers. Insurance plans that covered chiropractic care  
10 were expensive. Reimbursement by insurance plans to chiropractors was often erratic,  
11 reduced, delayed and unreliable. Additionally, in order to process insurance claim forms  
12 efficiently, the chiropractors were compelled to install specialized billing systems at a cost of  
13 \$10,000 - \$15,000. Plus the chiropractor had to hire additional administrative staff to handle  
14 the billings to the health insurers. Further, there was typically at least a 30-day delay before  
15 the insurance carrier would pay the chiropractor and it was not at all uncommon for the  
16 insurance carrier to return the submitted paperwork claiming some type of technical error,  
17 which added to the delay in reimbursement and added additional administrative expense.  
18 Further, many Preferred Provider Organization and Health Maintenance Organization plans,  
19 in their contracts with providers, reduced the amount of Usual, Customary and Reasonable  
20 (UCR) Fees to amounts that were actually less than the UCR Fees in the covered region. Also,  
21 the majority of states had adopted statutes that made it illegal for a chiropractor to charge a  
22 patient with insurance more than a patient without insurance even though the actual payment  
23 received for the insured patient from the carrier would be less than the billed amount. The  
24 result of the significant increase in costs to deliver healthcare and to process third party  
25 insurance claim forms plus the reduction in fees received by providers was that it was

1 becoming unconomical for some chiropractors to practice and charges to patients were, of  
2 necessity, being increased so that care would still be available. Against this backdrop, Dr.  
3 Below came up with the idea of providing, for a small, affordable, annual fee, a discount plan  
4 that would provide to patients at least a 25% discount on fees at participating chiropractors.  
5 As part of the plan the patient would pay the chiropractor at the time of service. From the  
6 chiropractor's standpoint, that eliminated the administrative fees associated with billing an  
7 insurance company and the delay in receipt of payment. To implement his plan, Dr. Below  
8 formed PCD in Alabama in 1993 and began notifying chiropractors who wanted to offer the  
9 plan to their patients.

10 Dr. Below made the determination that the company would not directly offer the plan  
11 to consumers or solicit consumers to become members of the plan. Rather, PCD signed  
12 agreements with chiropractors who wanted to become involved with the plan. The  
13 chiropractors do not pay any fee. Rather they agree to provide a discount of at least 25% to  
14 plan members. The chiropractors offer the plan to their existing patients. The patients can  
15 either fill out paperwork in the office of the chiropractor who submits it for them along with  
16 the annual membership fee or they can call PCD on the telephone or fax the papers or, more  
17 often in today's internet world, they can sign up on the internet and pay by credit card.

18 PCD's discount plan began to spread as chiropractors learned about it. The company  
19 employed a national law firm, Epstein, Becker & Green, to confirm that PCD was operating  
20 legally in all the states in which it was conducting operations. Additionally the company  
21 contacted all state chiropractic associations, state chiropractic regulatory boards and many  
22 state insurance departments to ensure they were acting lawfully.

### 23 3.2 Discount Plan Operations in Washington Prior to the Act

24 The company began providing its discount plan in Washington in 1994. At about that  
25 time, the company contacted the State Of Washington Department of Health and the OIC to

1 advise the OIC of the plan it was offering and to ask whether it would be necessary for it to  
2 qualify or register in Washington. The OIC staff member who was contacted by the company,  
3 Mr. Dennis Julnes, stated the company should review RCW Chapter 48.44, Health Care  
4 Services, and particularly RCW 48.44.010, definitions. Following review of that chapter and  
5 the definitions, the company determined that it was not required to enroll in Washington since  
6 it was neither an "insurance producer" nor a "health care service contractor." The company  
7 therefore continued its operations and continued to provide its plan to Washington  
8 chiropractors who offered it to their patients.

9 The company's discount plan is offered to consumers in Washington, and nationwide,  
10 only through its member chiropractors (sometimes herein "providers"), who offer it to their  
11 patients. The company does not directly market its plan to consumers in Washington or any  
12 other state. It markets only to licensed chiropractors through direct mail advertisements,  
13 referrals, and by recommendations from industry leaders at trade association meetings.

14 In 2011 Dr. Below became aware that a software company in Iowa was claiming that  
15 all DPOs in that state were required to obtain a license to operate in the state. The software  
16 company claimed that its software would complete the required paperwork more quickly and  
17 efficiently than the companies could do it on their own. Dr. Below therefore conducted some  
18 research to see about any licensing requirements for Iowa and found there were none.  
19 However, he learned that several states had adopted some type of licensing requirement for  
20 DPOs. PCD was doing business in all 50 states at that time and Dr. Below was concerned  
21 whether there were other states in which the company needed to obtain licenses. PCD was,  
22 and is, a small company which does not have the human or financial resources to conduct an  
23 investigation into the requirements of each state. Further, Dr. did not believe the company had  
24 the human and financial resources to apply for necessary licenses if more than a few states  
25 required licensing. He therefore began searching for a company that had received DPO

1 licensing in all necessary states. Through research Dr. Below learned that AccessOne  
2 Consumer Health, Inc. was a DPO that offered a variety of discount plan services in most  
3 states and that it was licensed in most states that required licensing. He thereupon began  
4 discussions with AccessOne to see if it would be possible to affiliate with them on some basis  
5 so that PCD could offer its discount chiropractic plan under their licenses. Over an  
6 approximately six month period Dr. Below and Robert Fortier, a representative of AccessOne,  
7 discussed the situation and worked out the details of an affiliation. PCD and AccessOne  
8 finally signed two agreements on May 8, 2012. Under the terms of the first agreement, the  
9 Network Access Agreement, AccessOne agreed, among other matters, to maintain at all times  
10 a valid and current license or registration as a Discount Medical Plan Organization in the  
11 jurisdictions that required such license or registration and comply with all pertinent rules,  
12 regulations and statutes.<sup>2</sup> PCD, for its part, agreed to provide a network of participating, duly  
13 licensed chiropractors who each had malpractice and liability insurance in an amount that  
14 exceeded \$250,000 per occurrence who had agreed to discount their "routinely rendered  
15 services." PCD also agreed that its providers would reduce their prevailing professional fee by  
16 a minimum of 25%.<sup>3</sup>

17 Under the term of the second agreement with AccessOne, the Reseller Agreement,  
18 PCD has agreed to affiliate with AccessOne for the purpose of offering individuals the  
19 opportunity to obtain uninsured discounted medical services. Under the terms of the Reseller  
20 Agreement, PCD, among other matters, has to obtain the compliance approval of AccessOne  
21 for all printed and verbal marketing and solicitation material. PCD also is required to report  
22 any provider or consumer complaints to AccessOne immediately.

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24  
25 <sup>2</sup> Network Access Agreement, Section 1.01

<sup>3</sup> Network Access Agreement, Sections 2.01, 2.05, 2.06 and 2.08

1           **3.3     Good Faith Efforts by the Company to Obtain a License Once it Learned**  
2 **of the Licensing Requirement**

3           The company did not realize that new legislation had been passed in Washington  
4 requiring discount plans to obtain a license until July 2012. The company first became aware  
5 of that new requirement when a Washington chiropractor inquired of the company whether it  
6 was registered as a discount medical plan. That was the first the company had heard of the  
7 requirement. Up until that time the company had not been aware of the licensing requirement  
8 and none of its twenty eight chiropractors practicing in Washington had mentioned the  
9 requirement, nor had any of the chiropractors who had either contacted, or been contacted by,  
10 the company about becoming member chiropractors.

11           The company subsequently learned that AccessOne had not registered in Washington.  
12 The company thereupon started the process of filling out the paperwork, determining whether  
13 it met the financial requirement that it have a minimum net worth of \$150,000 and taking  
14 other necessary steps. The company believed its balance sheet showed a net worth in excess  
15 of \$150,000, but its financial statements were maintained by the company on a cash basis  
16 which recognized membership fees in full when they were paid. Also the company's financial  
17 statements had never been audited but instead were compiled. Because the cost of an initial  
18 audit would be very high for this small company, the company was not sure that it could  
19 afford an audit. Further, the accountant to which it initially referred the question assured the  
20 company that a compiled report would be acceptable to the OIC.

21                   **3.3.1   Washington Counsel**

22           In September 2012 the company engaged Washington counsel, Edward  
23 Clabaugh, to help the company with its legal concerns with respect to applying for licensure  
24 in Washington. Following review of the applicable statutes and administrative rules, Mr.  
25 Clabaugh began a series of contacts with pertinent staff members of the OIC. On October 12,

1 2012, Mr. Clabaugh talked by telephone to Ms. Susan Baker, a Company Licensing Specialist  
2 in the Company Supervision Division. Mr. Clabaugh told Ms. Baker that he represented a  
3 company that had been doing business as a discount plan organization in Washington for a  
4 number of years but was not aware of the Act until just recently. He told Ms. Baker that the  
5 company had not registered as a discount plan organization and asked her advice as to how  
6 best to proceed. Ms. Baker was very helpful. She said that she would be the person who  
7 would review the company's application for a license. Mr. Clabaugh also talked by telephone  
8 with Ms. Carol Sureau, Deputy Commissioner, Legal Affairs Division, on October 12. Mr.  
9 Clabaugh provided to Ms. Sureau the same information that he had provided to Ms. Baker.  
10 Ms. Sureau was also very helpful. She advised Mr. Clabaugh to have the company file an  
11 application for a license. She also told him that the company would face an enforcement  
12 procedure. She further stated that the OIC looks for company attempts to comply with the  
13 law. Ms. Sureau said that she would send Mr. Clabaugh the Compliance Group Enforcement  
14 Policies and Procedures, which she did.

### 15 **3.3.2 Financial Statements**

16 The company continued to deal with the issue of the very high cost involved in  
17 performing an initial audit and the question whether the Act and the Rules promulgated  
18 thereunder required an audit or whether a compiled statement would be sufficient. Therefore,  
19 on November 2, 2012, Mr. Clabaugh talked to Ms. Gayle Pasero, the Company Licensing  
20 Manager in the Company Supervision Division, concerning whether there was a possibility  
21 the company could submit a compiled statement rather than an audited statement. Ms. Pasero  
22 advised Mr. Clabaugh she would review the statutes and get back to him but that she believed  
23 the audit requirement was a hard and fast rule. Subsequently Ms. Pasero advised Mr.  
24 Clabaugh that an audited statement was required.

1           On November 5, 2012, Mr. Clabaugh talked by telephone again with Ms.  
2 Baker. He discussed with her the company's problem with obtaining an initial audit and asked  
3 her about the methodology that the OIC would employ in reviewing the company's financial  
4 statements. Ms. Baker was very forthcoming and helpful. She advised that the OIC would  
5 look very carefully at any intangibles listed on the balance sheet. She advised Mr. Clabaugh  
6 to find out how the company is collecting and charging for its membership fees. She said that  
7 membership fee revenue needed to be taken into account as earned. She said the revenue from  
8 an annual membership fee needed to be spread over the entire period covered by the  
9 membership. She also stated that since the calendar year end was coming up, it might be  
10 better to wait until after year end to file. She stated that would provide the auditor time to do  
11 the extensive field work required in connection with an initial audit and provide more up to  
12 date financial statements. She said that if the company was marginal on the \$150,000 net  
13 worth requirement then the OIC would ask for a pro forma to show how the company plans to  
14 maintain its minimum net worth requirement. She also said that companies typically have a  
15 problem with their contracts. She said the company should be sure that its contracts are  
16 compliant with RCW 48.155.070. She also advised Mr. Clabaugh that the company needed to  
17 have a compliant website. She said potential patients had to be able to see who the providers  
18 are. She also advised Mr. Clabaugh that the company has to operate under its full legal name,  
19 not under a "DBA" name. She also asked Mr. Clabaugh whether the company had any cease  
20 and desist orders from any other state.

21           Based on Mr. Clabaugh's telephone conversation with Ms. Baker, a very  
22 serious issue PCD had to deal with was whether under the pertinent provisions of WAC 285-  
23 07-130(2)(g) it would need an audited statement for the year prior to its current year. That  
24 possibility had arisen during the telephone conversation with Ms. Baker who said it could be  
25 required. After a careful review of those provisions, the company determined that since it

1 would be filing its initial audited statement, as provided in those provisions, an audited  
2 statement was not required for the prior year. Following the telephone conversation with Ms.  
3 Baker, Mr. Clabaugh sent a Mewmorandum dated November 6, 2012, to Dr. Below regarding  
4 the conversation together with pertinent provisions of the RCW and the WAC.

5 On Friday, November 30, 2012, Mr. Clabaugh had another telephone  
6 conversation with Ms. Baker. He reviewed with Ms. Baker the provisions of WAC 284-07-  
7 130(2)(g) concerning the question of the need of an audit and the company's conclusion that  
8 only an audit of the current year was required. Ms. Baker said that since the company had  
9 been operating without registration that technically the OIC could require that it meet the  
10 minimum net worth requirements for the entire time it had been operating in Washington. She  
11 then stated that the company had two options. It could either file an audited statement for the  
12 current fiscal year and file one for the previous year or, alternatively, file an audited statement  
13 for the current fiscal year and provide a detailed pro forma for the next several years that  
14 demonstrates how the company will maintain the minimum \$150,000 net worth requirement.  
15 PCD determined to use the second option.

16 In early December 2012 the company hired a new CPA firm, Hull & Russell,  
17 P.C. and that firm began working on the audit of the company's financial statements and on  
18 the detailed pro forma financial statements.

### 19 3.4 PCD Self-Reports to the OIC

20 On December 4, 2012, Mr. Clabaugh notified the OIC by email to Ms. Baker, Ms.  
21 Sureau and Ms. Pasero that the client he had been discussing with them was PCD. His email  
22 stated that the company requested that he disclose its name to the OIC. His email further  
23 stated that the company was in the process of obtaining audited financial statements and  
24 completing the necessary information in order to apply for registration.

1 On December 6, 2012, Dr. Stephen Below, the President and CEO of PCD, wrote to  
2 the Honorable Michael Kreidler, the Insurance Commissioner, informing the Commissioner  
3 that the company had become aware in the past several months that registration was required  
4 to legally conduct business. Dr. Below's letter stated that the company was in the process of  
5 completing such registration. Dr. Below concluded by stating that the company looked  
6 forward to working with the OIC as it continued the registration process.

### 7 3.5 Complaint by the John Peick Law Group and OIC Investigation

8 In December 2012 the company received from AccessOne a copy of a letter it had  
9 received dated November 28, 2012, from the Peick Law Group addressed to PCD and  
10 AccessOne at the office of AccessOne in Greenville, South Carolina. Dr. Below emailed a  
11 copy of the letter to Mr. Clabaugh. The letter stated that Peick had become aware that the  
12 company was operating in Washington as a Healthcare Discount Plan. It further said that  
13 Peick had not been able to locate the company's registration with the OIC. Mr. Clabaugh  
14 called attorney John Peick and advised him that PCD was in the process of completing the  
15 Application for Licensure and was seeking to become licensed.

16 In January 2013 the company received from AccessOne a copy of a letter from the  
17 OIC dated January 14, 2013, addressed to the company and Dr. Below and Access One  
18 Consumer Health at the offices of AccessOne in Greenville, South Carolina. The OIC letter  
19 enclosed a copy of letters received from John Peick Law Group to the commissioner dated  
20 December 18, 2012, and dated November 28, 2012, to the company at the offices of Access  
21 One Consumer Health in Greenville, South Carolina. The OIC's letter requested a response by  
22 February 14, 2013.

23 Mr. Clabaugh responded to the OIC's January 14 letter in a letter dated January 28,  
24 2013, to the OIC. Mr. Clabaugh's letter stated many of the facts stated above and concluded  
25 that the company realized it was not currently in compliance and that it was taking steps to

1 become compliant and that its first audit was taking more time than anticipated. He stated that  
2 the company planned to have its complete Application filed by no later than February 28,  
3 2013.

4 The company received a letter dated February 5, 2013 from Mr. Barry Walden, Senior  
5 Investigator, Legal Affairs Division of the OIC. The letter stated that the OIC had received a  
6 complaint that PCD may be conducting the business of insurance and that it is not licensed to  
7 do so. Mr. Walden's letter asked several questions and requested a response by February 25,  
8 2013. Dr. Below answered Mr. Walden's letter by a letter dated February 22, 2013. Dr.  
9 Below's letter provided the answers to Mr. Walden's questions and stated the background  
10 concerning the company's operations in Washington and its current efforts to register. Mr.  
11 Walden subsequently requested information in electronic form concerning the company's  
12 customers in Washington and the dollar amounts received from them. That information was  
13 provided to Mr. Walden by an email dated March 11, 2013 which attached an Excel  
14 spreadsheet with the requested information.

### 15 **3.6 Application for Licensure as a Discount Plan Organization**

16 The company submitted its Application for Licensure as a Discount Plan Organization  
17 to the OIC by letter dated February 13, 2013.

18 Ms. Susan Baker, Company Licensing Specialist, Company Supervision Division,  
19 responded to the Application by letter dated March 19, 2013. Ms. Baker's letter stated the  
20 OIC was unable to qualify the company for a license for the reasons noted in the letter.  
21 Among those reasons were that the audited financial statements for the company were not  
22 under full GAAP standards. Therefore, Ms. Baker concluded that the company could not  
23 demonstrate that it met the minimum net worth requirement under RCW 48.155.030.<sup>4</sup> The  
24 letter stated that since the application disclosed that PCD had been conducting unlicensed

25 <sup>4</sup> \$150,000

1 healthcare plan activities prior to the application that the company confirm the date when all  
2 such activities ceased. The letter further cited the pertinent statute that prohibits conducting  
3 activities until the company is licensed. The company was given until April 9, 2013, to  
4 resolve the deficiencies or request that its application be withdrawn. The letter concluded that  
5 if the OIC did not receive a response by April 9<sup>th</sup> the OIC was prepared to issue a denial.

6 Following receipt of the letter, the company immediately notified its chiropractors by  
7 letter dated March 22, 2013, that the company was ceasing activity in Washington until it was  
8 licensed. The letter stated "...please do not issue any new PCD patient memberships until we  
9 have secured licensure in your state."

10 Dr. Below first responded by email to Ms. Baker on March 20, 2013. In his email Dr.  
11 Below acknowledged receipt of Ms. Baker's letter of March 19 and apologized for the  
12 problems the OIC encountered with the company's website as detailed by Ms. Baker.

13 The company reviewed Ms. Baker's letter and the problems that it raised concerning  
14 the company's application. The company investigated in detail whether it could comply with  
15 the financial requirements. Following several email exchanges with the company's auditor,  
16 Mr. Clabaugh talked by telephone with Ms. Baker on April 2 concerning whether the OIC  
17 would accept an audit with reserves for cancellations based on historical data. Following that  
18 telephone conversation, Ms. Baker sent an email to Mr. Clabaugh that specified the OIC's  
19 concerns about the accounting for the company.

20 After determining that the company could not meet the minimum net worth  
21 requirements, the company withdrew its application by letter dated April 8, 2013

### 22 **3.7 Cessation of Activities in Washington**

23 Following Ms. Baker's letter dated March 19, the company sent a letter dated March  
24 22 to its chiropractors asking them not to issue new patient memberships until the company  
25

1 secured licensure. The company also sent a notice to its patient members dated April 22,  
2 2013, offering them refunds of the fees they had paid for their memberships.

### 3 **3.8 Notice of Request for Hearing for Imposition of Fines**

4 The Commissioner filed a Notice of Request for Hearing for Imposition of Fines on  
5 May 17, 2013.

6 A prehearing conference was held on June 12, 2013. Following the prehearing  
7 conference the Hearing on the commissioner's Request for Imposition of Fines was scheduled  
8 on September 19, 2013.

9 Marcia Stickler, Esq., the attorney for the OIC, voluntarily and graciously provided  
10 Mr. Clabaugh a copy of the OIC's files in this matter.

11 On August 9, 2013, Mr. Clabaugh sent to Ms. Stickler by email a list of proposed  
12 stipulations. Ms. Stickler did not respond. Mr. Clabaugh thereupon sent an email dated August  
13 16 to Ms. Kelly Cairns, a Paralegal in the OIC Hearings Unit who is assigned to this matter,  
14 requesting a second prehearing conference to review the proposed stipulations and request  
15 that the OIC provide documents that support their refusal if they would not stipulate. The  
16 point was to narrow the factual issues and obtain all documents in possession of the OIC.  
17 Based on the internal file Ms. Stickler provided to Mr. Clabaugh there were no documents in  
18 the possession of the OIC that could be used to refute the matters to which the company  
19 sought stipulations. Mr. Clabaugh's email to Ms. Cairns stated:

20  
21 "Because of the severity of the monetary penalty requested by the Commissioner,  
22 \$152,400, and the potentially company-destroying impact that would have if granted, I  
23 request that Ms. Petersen schedule a second Prehearing conference to discuss (1) the  
24 stipulations and documents and (2) to request a date for a motion for summary  
25 judgment in late October and (3) to continue the hearing date presently scheduled for  
September 19, 2013, to the first or second week of November in order to provide my  
client the time required to marshal its witnesses and to obtain necessary declarations."

1 Also on August 16, Ms. Stickler stated to Mr. Clabaugh by email that the file provided  
2 by her to him contained all information in the commissioner's files and there was nothing  
3 "elsewhere" in the files of the OIC.

4 Also, on August 16, Ms. Stickler confirmed to Mr. Clabaugh by email that the records  
5 of the OIC did not contain any complaints against PCD.

6 Judge Petersen scheduled a second prehearing conference on August 22. Ms. Stickler  
7 and Mr. Clabaugh both attended by telephone. At the Hearing Mr. Clabaugh asked that Judge  
8 Petersen set a date for a motion for summary judgment in late October and asked that she  
9 continue the Hearing presently scheduled for September 19 to a date in the first or second  
10 week of November. Mr. Clabaugh stated that the reasons were that PCD disagreed with the  
11 OIC's interpretation of RCW 48.155.130 and that PCD needed time to timely file a motion for  
12 summary judgment. Mr. Clabaugh stated that if the motion were granted then the need for Dr.  
13 Below to come from Alabama to appear at the hearing and the need for other witnesses to  
14 appear to testify would be rendered moot. However, he stated, if the motion were denied,  
15 then the company would like additional time to prepare for the Hearing. Mr. Clabaugh further  
16 stated that the penalty sought to be imposed on PCD was more than its actual net worth under  
17 GAAP and would be a potential death blow for the company. Judge Petersen denied PCD's  
18 requests and stated that the hearing on the motion for summary judgment could take place on  
19 September 19 before the previously-scheduled Hearing which would follow immediately.  
20 Judge Petersen did rule, however, that she would like to have the Motion for Summary  
21 Judgment in time for her to read it in advance of the Hearing. She did not set a fixed date for  
22 its service. Ms. Stickler did not object.

### 23 3.9 PCD Offers Free Membership to Patients in Washington

24 PCD values its contractual commitments. It has a large number of patient-members in  
25 Washington who rely on the discount plan provided by PCD. It has a number of chiropractors

1 who provide those discount services, to the mutual benefit of both the patients and the  
2 members. The company determined that it did not want to deprive the members of discounted  
3 chiropractic services. If the company halted operations, some patients might have to  
4 discontinue important medical services upon which they had come to rely. Additionally, it  
5 would eliminate income from its providers who provided services to its members. Therefore,  
6 even though operating in Washington for free would be an economic hardship to the  
7 company, it decided to provide its discount plan for free as provided in RCW 48.155.020(11).  
8 It therefore sent a letter dated June 6, 2013, to that effect to its providers. The company's plan  
9 is to build to the level where it will qualify for licensure in Washington and then to reapply.

### 10 **3.10 PCD's Questionnaire to Chiropractors**

11 On August 13, 2013, PCD sent a letter to each of its Washington chiropractors to  
12 update them on its status. The letter stated, among other matters, that the company was  
13 continuing to offer its program to Washington residents for free because it has developed  
14 many long term relationships in Washington since 1994 that it values highly. The letter stated  
15 that the company believes it has a responsibility to honor those relationships. The letter  
16 reviewed its history with the OIC and its inability to obtain a license because it was deemed  
17 not to have the minimum required \$150,000 net worth. The letter stated that the company was  
18 currently scheduled to attend a hearing on the matter on September 19, 2013. The letter  
19 further stated:

20 "I'd like to ask you for your help with our defense of this issue. While this is  
21 an administrative process (as opposed to a civil issue), it would still be helpful  
22 to PCD if you would be willing to share your experience with our company.  
23 I've enclosed a questionnaire and if you could take a few minutes to complete  
24 it, and return it in the SASE, we would be very appreciative of your response.  
25 If you're willing to help out with this, please complete and return as soon as  
possible. As you'll note, these questionnaires will be sent to a licensed CPA to  
be verified."

1 The CPA, Hull & Russell, received a number of replies to the questionnaire. A number  
2 of them contained such comments as:

3  
4 "RCW 48.155.020 is misguided. It should be no more than a form to the State  
5 with a low fee application so the State is aware of the activity. As it is, the  
6 State is disrupting business and overbearing – and not serving the interests of  
7 the people, but the insurance interest."

8  
9 "We have lots of patients who were able to afford life changing care by using  
10 PCD."

11  
12 "Was not aware of the RCW. I just know that a discount plan levels the  
13 playing field somewhat in a perverse world where insurance companies  
14 demand so much and deliver so little to many of our practice members."

15  
16 "The issue is this DPO-PCD-helps patients who want chiropractic health care,  
17 and it helps their out of pocket expense to make it affordable. In my  
18 professional opinion, standard insurance practice hinders coverage to  
19 chiropractic care by design in multiple ways."<sup>5</sup>

#### 20 IV. STATEMENT OF ISSUES

21 This motion presents the following issues for review:

22 4.1 Whether PCD willfully violated the Act

23 4.2 Whether PCD violated the purpose of the Act

24 4.3 Whether the commissioner has authority to fine PCD under the provisions of  
25 RCW 48.155.130(1)(b)

4.4 Whether each sale of a discount plan constitutes a violation of the Act.

4.5 Whether an inadvertent failure to obtain a license is a violation of the Act for  
which there is no penalty

<sup>5</sup> Decl. Janice Hull, Ex.3, Questionnaires of Robert Kelley, Wayne S. Smith, Patrick C. Dougherty, and an anonymous participating PCD provider

1  
2 **V. EVIDENCE RELIED UPON**

3 This motion is based upon the following evidence:

4 Declaration of Stephen L. Below, D.C. in Support of Motion for Partial Summary

5 Judgment and its attached Exhibits:

- 6 Ex. 1 Network Access Agreement with AccessOne Consumer Health, Inc.  
7 Ex. 2 Reseller Agreement with AccessOne Consumer Health, Inc.  
8 Ex. 3 Dr. Below's letter to Insurance Commissioner, Michael Kreidler dated  
9 December 6, 2012  
10 Ex. 4 Letter from the Peick Law Group to PCD and AccessOne dated  
11 November 28, 2012  
12 Ex. 5 Letter from the OIC to PCD, Stephen Below and AccessOne dated  
13 January 14, 2013  
14 Ex. 6 Letter template dated February 12, 2013 to each of PCD's members  
15 Ex. 7 Letter template dated February 12, 2013 to each of PCD's chiropractors  
16 Ex. 8 Letter from Barry Walden, OIC Investigator, dated February 5, 2013  
17 Ex. 9 Dr. Below's letter to Mr. Walden dated February 22, 2013  
18 Ex. 10 Letter from Ms. Susan Baker, OIC, re PCD's Application dated March  
19 19, 2013  
20 Ex. 11 Dr. Below's letter to PCD's chiropractors dated March 22, 2013  
21 Ex. 12 Letter from PCD to Ms. Baker of the OIC withdrawing PCD's  
22 application dated April 8, 2013  
23 Ex. 13 PCD's Refund Postcard to members mailed April 23, 2013  
24 Ex. 14 Letter template to chiropractors dated April 25, 2013  
25 Ex. 15 Letter template to chiropractors offering the plan for free dated June 6,  
2013  
Ex. 16 Letter template to chiropractors with Questionnaire dated August 13,  
2013

Declaration of Edward I. Clabaugh and its attached exhibits:

- Ex. 1 Memorandum from Edward Clabaugh to Dr. Stephen Below dated  
November 6, 2012  
Ex. 2 Email from Edward Clabaugh to Susan Baker, Carol Sureau and Gayle  
Pasero dated December 4, 2012  
Ex. 3 Letter from Edward Clabaugh to the OIC dated January 28, 2013  
Ex. 4 Email from Susan Baker to Ted Clabaugh dated April 2, 2013  
Ex. 5 OIC Staff Attorney Marcia Stickler's Internal File re PCD  
Ex. 6 Email to Ms. Stickler dated August 9, 2013 and Proposed Stipulations  
Ex. 7 Email to Ms. Stickler dated August 15, 2013 and Email to Kelly Cairns  
dated August 16, 2013 and Proposed Stipulations

- 1 Ex. 8 Email from Ms. Stickler to Ted Clabaugh and Kelly Cairns dated  
2 August 16, 2013  
3 Ex. 9 Email from Clabaugh to Ms. Stickler dated August 16, 2013 and Ms.  
4 Stickler's response  
5 Ex. 10 Second email from Clabaugh to Ms. Stickler dated August 16, 2013  
6 Ex. 11 Email from Ms. Stickler to Clabaugh that no complaints against PCD  
7 dated August 16, 2013 at 1:20 PM

8 Declaration of Janice Hull and its attached exhibits:

- 9 Ex. 1 Annual Financial Report for PCD for the Year Ended May 31, 2012  
10 Ex. 2 U.S. Corporation Income Tax Return for PCD for tax year 2012  
11 Ex. 3 PCD Provider Questionnaire Responses with Comments  
12 Ex. 4 PCD Provider Questionnaire Responses without Comments

13 Declaration of Ginger Connell and its attached exhibits:

- 14 Ex. 1 Email to Ms. Susan Baker in care of Ms. Nina Slocum dated April 8,  
15 2013, to which was attached a letter from Dr. Below to Ms. Baker  
16 withdrawing PCD's Application for Licensure and Email from Ms.  
17 Slocum dated April 8, 2013, acknowledging receipt of Dr. Below's  
18 letter  
19 Ex.2 Email to Barry Walden dated March 11, 2013 with attached Excel  
20 spreadsheet of PCD's patients and membership fees paid by each

21 Declaration of David McKinney and its attached exhibit:

- 22 Ex.1 PCD 2012 U.S. Corporation Income Tax Return

23 **VI. AUTHORITIES AND ARGUMENT**

24 **6.1 PCD is Entitled to Summary Judgment that it did not Willfully Violate the**  
25 **Act, that it did not Violate the Purpose of the Act, that the Commissioner**  
**does not have Authority to Fine PCD under the Provisions of RCW**  
**48.155.130(1)(b) and that there is no Penalty for an Inadvertent Failure to**  
**Obtain a License**

As stated by the Washington Supreme Court, "Under CR 56(c), a court may grant summary judgment if the record presents no genuine issue of material fact and the law entitles the moving party to judgment. (citation) 'In conducting this inquiry, this court must view all facts and reasonable inferences in the light most favorable to the nonmoving party.' (citation)

1 Such facts must move beyond mere speculative and argumentative assertions. (citation). The  
2 Court should grant summary judgment 'only if reasonable persons could reach but one  
3 conclusion.'(citation)."<sup>6</sup>

4  
5 **6.1.1 PCD is Entitled to Summary Judgment that it did not Willfully  
6 Violate the Act.**

7 The Act provides that if a person willfully operates as a discount plan  
8 organization (DPO) in violation of the Act's licensing requirements, that constitutes insurance  
9 fraud and is subject to the provisions of RCW 48.15.020 and RCW 48.15.023 as if the  
10 unlicensed DPO were an unauthorized insurer.<sup>7</sup> RCW 48.15.020 provides that each violation  
11 of that section – defined as the making of an insurance contract on behalf of an unauthorized  
12 insurer by a person who is not a duly licensed surplus line broker acting in good faith under  
13 his or her license - constitutes a separate offense punishable by a fine of not more than  
14 \$25,000. RCW 48.15.023 provides that any person who knowingly violates RCW  
15 48.15.020(1) is guilty of a class B felony in addition to any other civil or administrative  
16 penalty or sanction authorized under state law. RCW 48.15.023(5) (a) (ii) also provides for a  
17 civil penalty of not more than \$25,000 for each violation after a hearing.

18 The commissioner has not charged PCD with willfully operating as a DPO  
19 because there are no facts that support such a charge. The commissioner has not sought a fine  
20 based on any violation of RCW 48.155.130(2). However, in his Notice of Request for a  
21 Hearing for Imposition of Fines, the commissioner cites that section and the two sections  
22 referred to in that section. Therefore, out of an abundance of caution, PCD has chosen to  
23 address the issue in case the commissioner should change his mind.  
24

25 <sup>6</sup> CR 56(c); *Adams v. King County*, 164 Wn.2d 640, 647 (2008)

<sup>7</sup> RCW 48.155.130(2)

1 As defined by the Washington Supreme Court, "Willfully means intentionally  
2 and designedly."<sup>8</sup> This meaning attaches to the word whether it is used in civil or criminal  
3 statutes."<sup>9</sup>

4 If PCD had attempted to establish a new network of chiropractors and to sell  
5 discount plans for the first time after the enactment of the Act and it continued to so do after  
6 learning of the Act and if it took no action to obtain a license under the Act, it might be  
7 plausibly argued that such actions were intentionally and designedly in violation of the Act.  
8 Such action could be considered willful in nature. However, as here, where PCD began  
9 establishing its network of chiropractors in Washington in 1994 and began selling its discount  
10 plan at that time, it did not come into the state in violation of the Act. It was already here. It  
11 was here before the Act existed. It had been selling its discount plan in Washington for 15  
12 years before the enactment of the Act. The commissioner had not received any complaints  
13 concerning the company. PCD just was not aware of the passage of the Act. Once it became  
14 aware that legislation existed that required it to obtain a license, it began to take steps to find  
15 out about the legislation and how it would affect the company and the responsibilities and  
16 obligations of the company under the legislation. The company had existing contracts with its  
17 network of providers. It had sold discount plans to patients who were using its services. It did  
18 not believe that it could just halt operations and abrogate those contracts with its provider  
19 network and its patients. Instead, it determined to seek licensure under the Act so that it could  
20 continue to benefit both its members and its provider network. It voluntarily reported to the  
21 OIC that it was not licensed. It voluntarily halted operations in Washington and offered its  
22 patients a refund. It no longer sells discount plans in Washington. It now provides them for  
23 free.

24  
25 <sup>8</sup> *In re Estate of Kissinger*, 166 Wn.2d 120, 124-125 (2009)

<sup>9</sup> *New York Life Insurance Co. v. Jones*, 86 Wn.2d 44, 47 (1975)

1 The company's efforts to obtain a license in Washington, its self-disclosure, its  
2 application for licensure and its withdrawal of its application are detailed in the Statement of  
3 Facts, above and in the Declarations and Exhibits listed at Article V of this motion.

4 The material facts are not in dispute. None of the company's actions show that it was  
5 intentionally and designedly violating the licensure provisions of the Act. Rather, this  
6 company that had been conducting discount plan activities in Washington for 18 years was  
7 doing its best to comply with the law. Accordingly it is entitled to summary judgment that it  
8 did not willfully operate as a DPO in violation of RCW 48.155.020(1).

9  
10 **6.1.2 PCE is Entitled to Summary Judgment that it did not Violate the  
Purpose of the Act**

11 The purpose of the Act is to "promote the public interest by establishing  
12 standards for discount plan organizations, to protect consumers from unfair or deceptive  
13 marketing, sales, or enrollment practices, and to facilitate consumer understanding of the role  
14 and function of discount plan organizations in providing discounts on charges for health care  
15 services."<sup>10</sup>

16 The OIC has admitted that it has not received any consumer complaints of any  
17 type concerning PCD.<sup>11</sup> That is a remarkable record for a company that has been operating for  
18 almost 20 years in the state, especially in light of the fact that the Staff Summary of Public  
19 Testimony (Health & Long Term Care) in Senate Bill Report SSB 5480 that enacted the Act  
20 stated "The OIC has received over 400 complaints about these products [discount health care  
21 plans] and believes this to be the tip of the iceberg." None of those 400 complaints involved  
22 PCD.

23  
24  
25 <sup>10</sup> RCW 48.155.003

<sup>11</sup> Email from Marcia Stickler, Esq to Clabaugh dated 08/16/13, 1:20 PM, Decl. Clabaugh, Ex. 11

1 The legislature has stated the purpose of the Act in very explicit terms. It does  
2 not, in essence, want any more consumers harmed by bad actors. PCD has not harmed anyone.  
3 Rather, it has provided a valuable discount for chiropractic services to patients that helps them  
4 save money and enables some to be able to take advantage of chiropractic services they might  
5 not otherwise be able to receive. That is certainly something the legislature would want to  
6 encourage.

7  
8 **6.1.3 PCD is Entitled to Summary Judgment that the Commissioner does**  
9 **not have Authority to Fine PCD under the Provisions of RCW**  
10 **48.155.130(1)(b)**

11 Whether or not the commissioner has the authority to fine PCD under the  
12 provisions of RCW 48.155.130(1)(b) is a question of statutory interpretation. The facts are not  
13 in dispute. PCD did not and does not have a license.

14 RCW 48.155.130(1)(b) provides:

15 **“(1) In lieu of or in addition to suspending or revoking a discount plan**  
16 **organization's license under RCW 48.155.020(8), whenever the commissioner has**  
17 **cause to believe that any person is violating or is about to violate any provision of this**  
18 **chapter or any rules adopted under this chapter or any order of the commissioner, the**  
19 **commissioner may**

20 ...

21 **(b) After hearing or with the consent of the discount plan organization and in addition**  
22 **to or in lieu of the suspension, revocation, or refusal to renew any license, impose**  
23 **a monetary penalty of not less than one hundred dollars for each violation and not**  
24 **more than ten thousand dollars for each violation.” (emphasis added)**

25 The commissioner, in his Notice of Request for Hearing for Imposition of  
Fines, seeks to fine PCD \$100 under the provisions of RCW 48.155.020(1) for what it claims  
are 1,524 discount plans PCD sold in Washington between January 1, 2009, and January 1,

1 2012.<sup>12</sup> Plans sold before the effective date of the Act, July 26, 2009, could not, of course,  
2 violate the Act under any circumstances. The commissioner claims that each such sale  
3 constitutes a violation of RCW 48.155.020(1).

4           Concerning the interpretation and construction of statutes, the Washington  
5 Supreme Court said in a 2005 case, “Where statutory language is plain and unambiguous,  
6 courts will not construe the statute but will glean the legislative intent from the words of the  
7 statute itself, regardless of contrary interpretation by an administrative agency. (citations)”  
8 *Agrilink Foods, Inc. v. the Dep’t of Revenue*, 153 Wn.2d 392, 396 (2005). The court went on  
9 to say, “A statute is ambiguous if ‘susceptible to two or more reasonable interpretations,’ but  
10 ‘a statute is not ambiguous merely because different interpretations are conceivable.’  
11 (citations)” *Id.* at 396. In the *Agrilink* case the issue was whether the Department of Revenue  
12 had overtaxed Agrilink on its canned chili products. The DOR taxed it at .484 percent, the  
13 general manufacturing rate under RCW 84.04.240. The company claimed the appropriate rate  
14 was .138 percent under RCW 82.04.260(4). The Supreme Court, following its review of the  
15 statutes, held that Agrilink was correct and that the statute that applied was RCW  
16 82.04.260(4) which taxed the company at .138 percent.

17           In a subsequent Supreme Court case, the court affirmed that the primary  
18 objective of statutory construction is to ascertain and carry out the intent of the legislature.  
19 The court went on to state “An agency’s interpretation that is not plausible or that is contrary  
20 to legislative intent is not entitled to deference. (citation).” *In re Estate of Bracken*, 175 Wn.2d  
21 549, 563, 575 (2012). In *Bracken* the issue was whether the Department of Revenue exceeded  
22 its authority under the enabling statute, RCW chapter 83.100, the Washington Estate and  
23 Transfer Tax Act, by enacting regulations that allowed the Department to treat as a present

24 \_\_\_\_\_  
25 <sup>12</sup> Since the Act did not become effective until July 26, 2009, none of the discount plans sold before that date  
could be in violation of the Act. Further, as provided in WAC 284-155-015(5) a DPO such as PCD had until  
January 26, 2010 to file an application for licensure.

1 taxable event the transfer of assets that actually were transferred years before. The Supreme  
2 Court held that the provisions of the Washington Estate and Transfer Tax Act, contrary to the  
3 interpretation of the Department of Revenue, applied prospectively only and not retroactively  
4 and only to estates of decedents dying on or after the date of that Act.<sup>13</sup>

5 The intent of the legislature with respect to the Act is obvious. The statute can  
6 only be read that the commissioner can only fine the company in addition to or in lieu of the  
7 **suspension, revocation, or refusal to renew any license.** The company does not have a  
8 license. Therefore the legislature did not authorize the commissioner to fine it – an unlicensed  
9 DPO - for a violation of the chapter or any rules adopted under it.

10 The commissioner is only granted authority to fine a licensed DPO as stated in  
11 RCW 48.155.130(1)(b) unless the DPO was in willful violation of the Act as provided in  
12 subsection 2 of that section. RCW 48.155.020(9)(a) details the statutory scheme of violations  
13 that subject a licensed DPO to a fine under RCW 48.155.130(1)(b) as follows:

14  
15 “(9)(a) The commissioner may suspend the authority of a discount plan  
16 organization to enroll new members or refuse to renew or revoke a discount  
17 plan organization’s license if the commissioner finds that any of the following  
18 conditions exist:

19 (i) The discount plan organization is not operating in compliance with  
20 this chapter;

21 (ii) The discount plan organization does not have the minimum net  
22 worth as required under RCW 48.155.030;

23 (iii) The discount plan organization has advertised, merchandised, or

24 <sup>13</sup> See also, *Sanders v. State*, 169 Wn.2d 827, 864 (Wash. 2010) (“If the statute’s meaning is plain on its face,  
25 then courts must give effect to its plain meaning as an expression of what the Legislature intended.” (quoting  
*State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001))).

1 attempted to merchandise its services in such a manner as to misrepresent its  
2 services or capacity for service or has engaged in deceptive, misleading, or  
3 unfair practices with respect to advertising or merchandising;

4 (iv) The discount plan organization is not fulfilling its obligations as a  
5 discount plan organization; or

6 (v) The continued operation of the discount plan organization would be  
7 hazardous to its members.

8 The legislature also provided in RCW 48.155.020(9)(b) the procedures that the  
9 commissioner must follow when he determines not to renew, suspend or revoke the license of  
10 a DPO. Those procedures include notifying the DPO in writing specifically stating the  
11 commissioner's grounds for his actions. The legislature also provided in RCW  
12 48.155.020(9)(c) that following the nonrenewal the DPO stop all activities and proceed to  
13 wind up its affairs. The legislature also provided detailed provisions in RCW 48.155.020(9)(d)  
14 for the commissioner to follow when he suspends a DPO's authority to enroll new members  
15 including the authority of the commissioner to rescind or modify the suspension and to  
16 reinstate the license. From the foregoing, the legislature provided a very specific statutory  
17 scheme that applies to licensed DPOs.

18 The very thorough and detailed statutory scheme adopted by the legislature and  
19 signed into law by the governor does not include the authority to fine an unlicensed DPO  
20 under RCW 48.155.130(1)(b).

21  
22 **6.2 For Purposes of Argument Only, and Without Concession, in the Event**  
23 **the Office of the Insurance Commissioner should Determine that PCD is**  
24 **Subject to a Fine Under RCW 48.155.130(1)(b), PCD is Entitled to**  
25 **Summary Judgment that such Fine can only be for One Violation for**  
**PCD's Operating as a DPO Without a License**

1 Absent a definition of a "violation" from the legislature, or a grant of authority from  
2 the legislature to make rules determining what constitutes a "violation" of a particular statute,  
3 the commissioner has no power to determine on his own what constitutes a statutory violation.  
4 See, e.g., *Kaiser Aluminum & Chem. Corp v. Pollution Control Hearings Bd.*, 33 Wn. App.  
5 352 (1982). The commissioner may not read the statute in a way the enacting legislature never  
6 intended. Since the legislature has not defined a violation by an unlicensed DPO that is not  
7 willfully violating the Act, - or provided for any punishment or penalty - the commissioner  
8 may not define the violation and determine a punishment or penalty arbitrarily. It is up to the  
9 legislature to amend the statute if it wants to define what constitutes a violation by an  
10 unlicensed DPO that has not willfully violated the statute. See, e.g., *Kim v. Pollution Control*  
11 *Hearings Bd.*, 115 Wn. App. 157, 163 (2003). As concluded by the court in *Kim*, the court  
12 must look at the overall scheme of the statute in question. *Id.* at 160. In a similar case that  
13 cited *Kim*, the 9<sup>th</sup> Circuit Court of Appeals stated "In the State of Washington, the executive  
14 branch may not amend a statute by its interpretation or advice to the public. (citing *Kim*).  
15 Neither an administrative agency nor the courts may read [a statute] in a way that the enacting  
16 legislature never intended." *United States v. Bohn*, 622 F.3d 1129, 1138 (2010)

17 Except with respect to a licensed DPO, or a person who willfully operates as a DPO  
18 without a license, no violation or punishment is defined or specified for an unlicensed person,  
19 such as PCD, who is non-willfully operating as a DPO. RCW 48.155.130, which is the  
20 enabling statute for the authority of the commissioner to fine violators, is entitled "Violation  
21 of chapter – Commissioner's authority – Penalties – Criminal sanctions – Civil action for  
22 recovery of damages. No matter how carefully or thoroughly that section is read, nothing in it  
23 states that acting inadvertently as a DPO subjects the actor to any penalty. That is in stark  
24 contrast to the penalty provisions of RCW Chapter 48.15 that applies to unauthorized insurers  
25 and establishes in succinct terms the desire and intent of the legislature. In RCW 48.15.020(3)

1 the statute states that "Each violation of subsection (2) of this section constitutes a separate  
2 offense punishable by a fine of not more than twenty-five thousand dollars ..." That spells out  
3 the intent of the legislature. It states that each making of a contract of insurance in  
4 Washington on behalf of an unauthorized insurer without complying with the provisions of  
5 the Chapter subjects the actor to the fine. The reader of RCW 48.155.130 will look in vain in  
6 that section, or anywhere else in RCW Chapter 48.155, for similar statutory provisions that  
7 apply to a DPO that inadvertently sells discount plans in Washington without a license.  
8

## 9 VII. CONCLUSION

10 For the reasons stated in this motion, PCD respectfully requests that the Office of the  
11 Insurance Commissioner grant summary judgment to PCD as follows:

12 7.1 That PCD did not willfully violate any provisions of RCW Chapter 48.155;

13 7.2 That PCD did not violate the purpose of the Health Care Discount Plan  
14 Organization Act;

15 7.3 That the commissioner does not have authority to fine PCD under the  
16 provisions of RCW 48.155.130(1)(b);

17 7.4 That the inadvertent failure of PCD to obtain a license to operate as a DPO is  
18 not a violation for which there is a penalty under RCW Chapter 48.155;

19 7.5 Alternatively, if the inadvertent failure of PCD to obtain a license to operate as  
20 a DPO is deemed a violation of RCW Chapter 48.155, it is only one violation, not 1,524  
21 violations.

22 (continued on following page)  
23  
24  
25

1 Respectfully submitted this 10<sup>th</sup> day of September, 2013.

2  
3 LAW OFFICES OF EDWARD L. CLABAUGH

4  
5  
6 By: /s/Edward L. Clabaugh  
7 Edward L. Clabaugh, WSBA #30676  
8 Attorney for Respondent  
9 Preferred Chiropractor Doctor, Inc.  
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**DECLARATION OF SERVICE**

I, Ginger Connell, hereby declare as follows:

1. I am a resident of the United States and of the State of Alabama, living and residing in Chilton County in said State. I am over the age of eighteen years, not a party to the above-entitled action, and competent to be a witness therein.

2. On September 10, 2013, I caused a copy of the foregoing, together with its accompanying Declarations and Exhibits, to be served upon the following in the manner noted as requested by her:

Marcia Stickler, Esq.  
Office of the Insurance Commissioner  
Via Email to MarciaS@OIC.WA.GOV

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 10<sup>th</sup> day of September, 2013, at Clanton, Alabama

  
Ginger Connell