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STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

RENT-A-CENTER, INC.
RENT-A-CENTER WEST, INC.

No. 14-0081
No. 14-0082

and

MOTION FOR RECONSIDERATION

BENEFIT MARKETING SOLUTIONS, LLC and
BENEFIT SERVICES ASSOCIATION,

Rent-A-Center, Inc., Rent-A-Center, West, Inc., Benefit Marketing Solutions, LLC and Benefit Services Association (“Respondents”) request that this Hearing Officer reconsider the Findings of Fact, Conclusions of Law and Final Order (“Final Order”) because the Hearing Officer exceeded his scope of authority by ruling on matters outside of the hearing and misapplied the law.

A. The Hearing Officer exceeded the scope of his authority and contradicted the agreement of the parties by ruling that the waivers are insurance.

Both the OIC and the Respondents agreed at opening statements that the scope of the hearing was limited to two benefits within RAC Benefits Plus program: (1) an Accidental Death & Dismemberment benefit, and (2) the Paid-Out Account Service Protection (the “Paid-Out Account benefit”). The parties agreed that neither the Liability Waiver, Product Replacement Option nor the Unemployment Payment Waiver were at issue during the hearing or within the subject matter of this hearing.

1 The parties reached this mutual understanding during Bobby Frye's investigatory
2 process prior to the OIC initiating this hearing. Mr. Frye alleged in his initial letter to Rent-A-
3 Center that both the waivers were subject to RCW 48 (*see* OIC Ex. 1, Final ROI, Ex. 3). RAC
4 responded (Resp. Ex. 16) and identified the numerous reasons these waivers were not subject
5 to the Insurance Code. The OIC accepted RAC's position and the waivers were never raised
6 as an issue during the 13 months of litigation, meetings, settlement discussions, or this
7 administrative hearing.

8 Neither party presented any substantive evidence regarding the waivers, and there was
9 no argument or authority presented on the subject. The inclusion of the waivers in the Final
10 Order came entirely out of the blue and was the first time the waivers had been substantively
11 mentioned since December 11, 2013.

12 A hearing officer is limited to adjudicating the issues that are presented to it through
13 the demand for hearing. The demand for hearing is required to set out the basis for the relief
14 sought. *See* RCW 48.04.010. Here, the OIC initially filed its Request for Hearing for
15 Imposition of Fines (Ex. 14) which did not seek to impose any fines or request any relief
16 related to the waivers. The Respondents demanded a hearing from the OIC's Second
17 Amended Cease and Desist Order which was likewise silent with respect to the waivers (Ex.
18 13). In each instance, the waivers were not raised because the inapplicability of RCW 48 was
19 not in dispute.

20 The Hearing Officer exceeded his authority by including Findings of Fact and
21 Conclusions of Law in the Final Order related to the waivers when the parties agreed that they
22 were not the subject of this hearing and no argument authority or evidence was presented
23 regarding the waivers. The Hearing Officer must reconsider the Final Order and remove all
24 findings and conclusions related to both the Liability Waiver, Product Replacement Option
25 and Unemployment Waiver.

26 **B. The waivers are not insurance under Washington law.**

1 Had the issue of the waivers been properly before the hearing examiner, the only
2 legally supportable conclusion would have been that the waivers are not insurance and are not
3 subject to RCW 48.

4 First, as indicated in Exhibit 16, no Washington authority (or any other authority of
5 which counsel is aware of) has ever held that waivers are insurance. To the contrary, there are
6 numerous authorities and cases that have expressly held that waivers are not insurance despite
7 having elements of loss shifting and distribution of risk. *See Truta v. Avis Rent A Car System,*
8 *Inc.*, 193 Cal. App. 3d 802 (1987); *Automotive Funding Group v. Garamendi*, 114 Cal. App.
9 4th 846 (2003) (“Insurance regulations are not intended to apply to all businesses having
10 some element of risk assumption or distribution in their operations.”); La. Atty. Gen. Op. No.
11 03-0389 (Dec. 16, 2003) (“Debt waiver or debt forgiveness agreements are not considered
12 insurance.”).

13 Second, the OIC’s substantive allegation related to the waivers in December 2013 was
14 that they were limited line credit insurance under RCW 48.17.060 (*see* OIC Ex. 1, Final ROI,
15 Ex. 3). Limited line credit insurance is defined by RCW 48.17.010(9) to include:

16 [C]redit life, credit disability, credit property, credit unemployment,
17 involuntary unemployment, mortgage life, mortgage guaranty, mortgage
18 disability, automobile dealer gap insurance, and any other form of insurance
19 offered in connection with an extension of credit that is limited to partially or
20 wholly extinguishing the credit obligation that the commissioner determines
21 should be designated a form of limited line credit insurance.

22 A required element of limited line credit insurance is an extension of credit, which
23 does not exist in RAC’s lease-purchase agreement. Instead, RAC maintains ownership of the
24 property during the entire lease period (the only period during which the waivers are
25 applicable). Because credit is never extended (and thereby never extinguished), RCW 48.17 is
26 not applicable to the waivers.

Finally, it is not legally supportable that the waivers fall under the definition of
insurance under RCW 48.01.040. The waivers do not result in a payment of a specific amount

1 to the member, which leaves only the question of whether the waivers are a contract to
2 indemnify. They are not.

3 The unemployment waiver does not provide indemnification as it simply extinguishes
4 the lease obligation if the member becomes unemployed. Extinguishing an obligation
5 between a payor and payee is not indemnification and thus is not insurance. *See Automotive*
6 *Funding, supra*. Debt cancellation commonly arises in the vehicle rental or purchase context
7 when there is an agreement that if a certain event occurs (such as an accident) the remaining
8 indebtedness will be waived. The provider of the loss waiver is not considered to have
9 indemnified or otherwise transacted insurance when it contracts to cancel a remaining
10 obligation from its customer. The same analysis applies in this matter where the member's
11 obligation to pay the remainder of their lease payments is extinguished if they lose their job.

12 The Liability Waiver, Product Replacement provides that RAC will place the member
13 in the exact same lease position the member was in if they suffer damage, theft, etc. of this
14 product during the lease term. Again, this is nothing more than the lessor agreeing to cancel
15 the existing obligations and create a new obligation at a lower cost to the member had they
16 leased a replacement product. There is no exchange of money, nor is any of the Respondents
17 paying a third party for a member's obligation. The Hearing Officer should reconsider his
18 conclusion that the waivers are insurance because they do not involve a contract of indemnity
19 or otherwise fall under RCW 48.

20 **C. The Hearing Officer erred by determining that there was a specific**
21 **duration and additional consideration for the Paid-Out Account Service**
22 **Protection.**

23 The Hearing Officer correctly held that to determine whether the Paid-Out Account
24 benefit was a service contract required a finding of (1) additional consideration above the
25 lease price, and (2) a contract for a specific duration. The Hearing Officer erred by finding
26 that the OIC had met its burden for establishing that both elements existed in this matter.

1 1. The Hearing Officer's interpretation of "specific duration"
2 renders the term "specific" meaningless.

3 The Hearing Officer ruled that the "specific duration" was "from inception to
4 termination," as viewed in hindsight, no matter how long or short that time period was. This
5 determination was a misapplication of the law because it renders the term "specific"
6 meaningless and just requires that there be a "duration."

7 Under Washington law, statutes must be construed "so that all the language used is
8 given effect, with no portion rendered meaningless or superfluous." *Whatcom County v. City*
9 *of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Statutes should be interpreted "in
10 a way that avoids a strained or unrealistic interpretation." *In re Pers. Restraint of Brady*, 154
11 Wn. App. 189, 193, 224 P.3d 842 (2010) (citing *State v. Tejada*, 93 Wn. App. 907, 911, 971
12 P.2d 79 (1999)).

13 Cases using the term "specific duration" in contract law have uniformly held that a
14 specific duration exists when the exact duration is set out at the initiation of the contract. *See*
15 *Yung v. Institutional Trading Company*, 693 F.Supp.2d 70 (DC 2010). In *Freeman v.*
16 *Hardee's Food Systems, Inc.*, 165 S.E.2d 39 (N.C. 1969), the court dealt with a contract that
17 had very similar periods as the Paid-Out Account benefit at issue here, and stated that a
18 contract:

19 [W]here the compensation is specified at a rate per year, month, week or day,
20 but where the duration of the contract is not specified, is for an indefinite
21 period. There is no presumption that it is for any particular period of time and
22 the rate is fixed only for whatever time the employee might actually serve.

23 Similarly, in *Kepper v. School Directors of District No. 120*, 325 N.E.2d 91
24 (3rd Dist. 1975), the court stated:

25 It has been held expressly that a contract specifying no duration[], and thus
26 terminable at will, is not made otherwise by the inclusion of salary rates based
on units such as months or years.

 For a contract to have a specific duration, that duration must be set at initiation, or
every contract would have a specific duration. You would simply wait for a contract to

1 terminate, count the days, months, or years since initiation, and that time period would be the
2 specific duration.

3 What the Hearing Officer described in the Final Order was a contract of indefinite
4 duration that was terminable at-will by either party. The Final Order correctly identified how
5 either party could terminate the membership (and thus the benefit) and the ability to terminate
6 the membership at-will critically undermines the position that there is a specific duration. If
7 the parties can terminate an agreement at will without further obligations, then there is no
8 specific duration. When there is a specific duration, terminating the contract prior to the end
9 of the duration without cause would be a breach. See *Krizan v. Storz Broadcasting Company*,
10 145 So.2d 636 (La. 1962); *Kvidera v. Rotation Engineering & Manufacturing Co.*, 705 N.W.
11 2d 416 (Minn. 2005); *Thomsen v. Indep. Sch. Dist. No. 91*, 244 N.W.2d 282, 284 (Minn.
12 1976).

13 Both parties agree there is a duration for the Paid-Out Account benefit, it just is not
14 specific. The Hearing Officer must reconsider his determination that a specific duration exists
15 because the Hearing Officer's statutory interpretation renders the term "specific" meaningless.
16 Without a specific duration, the Hearing Officer must reconsider his conclusion that the Paid-
17 Out Account benefit is a service contract.

18 2. The Hearing Officer erred in determining there was additional
19 consideration.

20 The Hearing Officer held that there was additional consideration for the Paid-Out
21 Account benefit because members that sign up for the RAC Benefits Plus program are
22 charged a membership fee. The membership fee is an entirely separate fee, however, and the
23 cost of membership is not tied to the Paid-Out Account benefit.

24 The OIC did not present any evidence in the hearing other than that there was a \$3
25 weekly membership fee. The OIC did not elicit any testimony that any portion of the \$3
26 charge was allocated to pay for the Paid-Out Account benefit. The Hearing Officer

1 overreached when it conflated the membership fee with additional consideration applicable to
2 the Paid-Out Account benefit.

3 The Final Order also stated that no evidence was presented that members purchased
4 multiple products without paying an additional membership fee. Bradley Denison testified,
5 however, that each member leased on average 1.8 products and that it is not uncommon for
6 members to lease three or more products. This means most members leased multiple products
7 and received the Paid-Out Account benefit for multiple products without paying an increased
8 membership fee.

9 The lack of a discreet or identifiable charge for additional products supports
10 Respondents' position that there is no actual charge that is part of the membership fee that is
11 allocated to the Paid-Out Account benefit. The OIC had the burden to establish additional
12 consideration and the Hearing Officer erred as a matter of law by determining it had met its
13 burden by simply identifying the RAC Benefits Plus membership fee.

14 **D. The Hearing Officer erred in determining that Respondents solicited**
15 **insurance in Washington state.**

16 "Solicit" means attempting to sell insurance or asking or urging a person to apply for a
17 particular kind of insurance from a particular insurer. RCW 48.17.010(14). The Hearing
18 Officer relied on two pieces of evidence to determine that the Respondents solicited
19 insurance: (1) that Rent-A-Center had brochures for the RAC Benefits Plus program available
20 at its stores, and (2) if a Rent-A-Center customer had a question about the AD&D that they
21 were directed to a call center. None of these acts constitute "attempting to sell," "asking," or
22 "urging."

23 The testimony from OIC witness Bobby Frye was that the brochure was simply
24 handed to him, nothing more. There was no description offered by or request made from the
25 Rent-A-Center employees and there certainly was no evidence of asking or urging.
26 Furthermore, there was no evidence admitted of any Washington consumer ever accessing the

1 call center, nor was there evidence of what the call center employees stated to the consumer
2 (there was not even evidence of who operated the call center).

3 The Hearing Officer incorrectly relied on *National Federation of Retired Persons v.*
4 *Insurance Commissioner*, 120 Wn.2d 101, 110-112 (1992) to adopt a broad plain meaning of
5 "solicit." In *National Federation* the court adopted a broad plain meaning because the term
6 "solicit" had not yet been defined by the Washington legislature. The court therefore applied
7 the broad plain meaning and used terms like "invite," "tempt," and "lure" to describe the
8 definition of solicit. The OIC's own witness Jim Thompkins testified about how the *National*
9 *Federation* case would be inapplicable because the statutory definition of solicit had been
10 enacted after the *National Federation* case. Thompkins also testified that it was "somewhat
11 up in the air" as to whether handing out a brochure was solicitation because the *National*
12 *Federation* case was no longer applicable. When your own witness, brought on to testify
13 regarding the Insurance Code, cannot reach the conclusion that the act in question constitutes
14 solicitation this Hearing Officer also should not.

15 ----- These terms used to define solicit and the holding of the *National Federation* case are
16 inapplicable to the definition of solicitation under RCW 48.17.010(14) and to apply the case
17 and its definition constituted an error of law. The Hearing Officer must reconsider his
18 decision that Rent-A-Center solicited insurance because there is no evidence that Rent-A-
19 Center asked, urged, or attempted to sell as required by RCW 48.17.010(14).

20 **E. The Hearing Officer misapplied applicable law and erred in determining**
21 **that the Paid-Out Account benefit was a contract of indemnity.**

22 In paragraphs 11 and 12 of the Conclusions of Law, the Hearing Officer explained the
23 reason why the Paid-Out Account benefit was a contract of indemnity subject to the Insurance
24 Code and cited to case law that ostensibly supported this position. The Hearing Officer relied
25 on case law that is either inapplicable or fully supports Respondents' position that the Paid-
26 Out Account benefit is not insurance.

1 First, in paragraph 11, the Hearing Officer cited to three inapposite cases for the
2 proposition that "indemnification" is a term that is broadly defined. *In re Estate of Martha J.*
3 *Knight*, 31 Wn. 2d 813, 816 (1948) is a case about inheritance tax that minimally touches on
4 the definition of insurance (a definition that is different than the statutory definition contained
5 at RCW 48.01.040) and does not mention the word or the concept of indemnification.
6 *McCarty v. King Co. Medical Service Corp.*, 26 Wn. 2d 660 (1945) is a case about the
7 principal and agent relationship that again barely touches on the subject of insurance and,
8 when it mentions insurance, uses an outdated and inapplicable definition. The *McCarthy* case
9 does not in any way discuss indemnification or stand for the proposition that the definition of
10 insurance or indemnity is to be broadly defined. Finally, *State ex. Rel. Fishback v. Globe*
11 *Casket & Undertaking Co.*, 82 Wash. 124 (1914) is an insurance case, but is a case that
12 identifies the elements of a life insurance contract. Similar to the other two cases, the
13 *Fishback* case applies an outdated and inapplicable definition of insurance and is silent on the
14 subject of indemnification. None of these cases should be relied on to establish any standards
15 related to the definitions of insurance or indemnity.

16 Second, in paragraph 12, the Final Order cites to two cases for the proposition that the
17 Paid-Out Account benefit "involved indemnity and the transfer and distribution of risk
18 characteristic of insurance, not warranty or other non-insurance benefits. Again, the Hearing
19 Officer misapplied these cases. In *Rayos v. Chrysler Credit Corp.*, 683 S.W.2d 546 (Tx. App.
20 1985), the court dealt with a protection plan that entitled the holder to have a Chrysler
21 Corporation Dealer repair certain defects in a vehicle. The court held:

22 [T]he plan may be more in the nature of a warranty to repair certain defects
23 than an insurance policy which undertakes to pay a sum of money upon certain
24 conditions. Warranties are not considered contracts of insurance although they
25 may contain the essential elements of an insurance contract. ... Basically, a
26 warranty is issued to provide protection against defects or failures in a product,
whereas an insurance policy is issued to provide reimbursement or indemnity
based on an accident or occurrence unrelated to any defect or failure of the
product.

1 Here, the Paid-Out Account benefit only provides protection for “product failure and
2 mechanical breakdown of the merchandise not caused by external conditions.” Similar to
3 *Rayos*, the protection is to be provided by a Rent-A-Center store. Under the *Rayos* decision,
4 the Paid-Out Account benefit is clearly designed to provide protection against defects and
5 failures of the product, not reimbursement or indemnity based on an occurrence unrelated to
6 the product. Since the only element of the Paid-Out Account benefit is the protection against
7 product failure and mechanical breakdown, there are no other elements of the benefit the
8 Hearing Officer could look at to determine the benefit is insurance. The Hearing Officer
9 should have applied the *Rayos* case to determine that the Paid-Out benefit is not insurance.

10 The *GAF Corp. v. Country Sch. Bd. Of Wash. Co.*, 629 F.2d 981 (4th Cir. 1980) case
11 goes further than the *Rayos* decision by holding that contracts could contain elements of
12 insurance – in the *GAF Corp.* case, transfer and distribution of risk – and still not be
13 considered insurance if, taken as a whole, the contract is substantially focused on potential
14 defects in the products sold. The case supports the legal proposition that there must be more
15 ~~than a transfer and distribution of risk for a benefit to be considered insurance.~~ Here, the
16 Hearing Officer misapplied the *GAF Corp.* case when holding that because the Paid-Out
17 Account benefit involved the transfer and distribution of risk, it was an insurance product.

18 The Hearing Officer must reconsider its determination that the Paid-Out Account
19 benefit is insurance because the Hearing Officer misapplied the applicable law in reaching its
20 conclusion and a proper application of the cited cases would unquestionably result in the
21 conclusion that the Paid-Out Account benefit is not insurance.

22 **F. Respondents request clarification on obligations of cease and desist and to**
23 **extend time period for compliance to 60 days.**

24 Respondents interpret the cease and desist portion of the Final Order to not impact
25 Respondents’ ability to continue to provide the current benefits offered by the RAC Benefits
26 Plus program to *existing* members and to continue to collect membership dues from existing

1 members. The cease and desist portion of the Final Order mostly mirrors the statutory
2 prohibitions in the Insurance Code and would clearly prohibit selling, negotiating or soliciting
3 the RAC Benefits Plus program, but none of those actions would be taking place with existing
4 members considering that the Final Order concludes that those members have already been
5 solicited and sold to.

6 Respondents also would request a 30-day extension for the effectiveness of the cease
7 and desist portion of the Final Order. Ceasing to provide memberships at all Rent-A-Center
8 stores in Washington or replacing the benefits ruled insurance by the Final Order in a now 20-
9 day period is procedurally and practically impossible. Respondents should be allowed to
10 adhere to the cease and desist order in an organized and orderly manner and the 60-day period
11 would provide this. A longer time period is supported by the protections for Washington
12 citizens that exist in the RAC Benefits Plus program and the conclusion in the Final Order
13 that there has not been any harm to Washington consumers.

14 **CONCLUSION**

15 ~~RCW 34.05.470 allows this Hearing Officer to reconsider the Final Order. The~~
16 Hearing Officer should reconsider the Final Order because the order exceeded the scope of
17 the hearing and misapplied the law.

18 DATED this 12th day of February, 2015.

19 RYAN, SWANSON & CLEVELAND, PLLC

20
21 By 
22 Gulliver A. Swenson, WSBA #35974
Attorneys for Respondents

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STATE OF WASHINGTON
OFFICE OF INSURANCE COMMISSIONER

RENT-A-CENTER, INC.
RENT-A-CENTER WEST, INC.

No. 14-0081
No. 14-0082

and

DECLARATION OF SERVICE

BENEFIT MARKETING SOLUTIONS, LLC and
BENEFIT SERVICES ASSOCIATION,

I hereby declare as follows:

1. I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within action. I am employed by the law firm of Ryan, Swanson & Cleveland, PLLC, 1201 Third Avenue, Suite 3400, Seattle, Washington, 98101-3034.

2. On the 11th day of February, 2015, I caused to be served upon the individuals and in the manner described below, the following documents:

MOTION FOR RECONSIDERATION

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Paralegal
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- U.S. Mail
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Ms. Marcia G. Sticker
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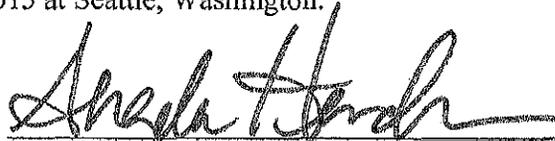
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- Federal Express

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- Federal Express

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

DATED this 11th day of February, 2015 at Seattle, Washington.


Angela A. Henderson