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THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

Global Warranty Group, LLC
d/b/a www.globalwarrantygroup.com, and
Wireless Protection Program Association, d/b/a
www.wirelessprotectionprogram.com, and Arthur
Krantz, Charles S. Pipia, and
and (sic) Andrew J. Schenker,

Respondents.

Docket No. 14-0117

RESPONDENTS' REPLY
TO OIC'S RESPONSE TO
MOTION TO DISMISS

Respondents, by and through their undersigned counsel, and herewith submit their Reply to OIC Response to Global Warranty's Motion to Dismiss.

1. The Insurance Commissioner is not authorized to initiate this action against the Respondents by simply requesting a hearing.

The Insurance Commissioner, his staff attorney, and the OIC repeatedly insist that the "OIC's long-standing interpretations" of the provisions of the insurance code (OIC's Response at pages 6,8,9,10) provides sufficient legal support for the Insurance Commissioner's attempt to initiate this quasi-legal proceeding against the Respondents, and further appear to insist that the Presiding Judge in this matter pay deference to the OIC's "long-standing interpretation" (OIC's Response at page 10) to defeat

RESPONDENTS' REPLY - 1

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1 Respondents' Motion to Dismiss. The Insurance Commissioner argues, but cites no
2 legal authority, that merely because of the "OIC's long-standing interpretation" of
3 some provision of law, that is good enough for the Presiding Judge to rule in the OIC's
4 favor. That argument is without merit and the Insurance Commissioner's reliance on
5 his own interpretation of the insurance code, or any other provision of law, is not well
6 placed.

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8 There can be no greater example of the Insurance Commissioner's faulty
9 reasoning and misplaced reliance on his own interpretation of the law as a reliable legal
10 resource, than in his own Response brief. The Insurance Commissioner asserts that
11 "The specific relief here sought by the OIC is specifically authorized under the Code.
12 For example, the OIC is seeking to impose a fine on Global Warranty for violations of
13 RCW 48.15.020(1), which provides that an "insurer that is not authorized by the
14 commissioner may not solicit insurance in this state or transact insurance business in
15 this state." (OIC Response, pages 2-3; quotes in original). The Insurance
16 Commissioner conveniently ignores the last phrase of that section of the insurance
17 code, which says, "except as provided in this chapter." Not only is that phrase vitally
18 important to a true interpretation of Chapter 48.15 RCW, it sets the parameters for how
19 that chapter operates.

20 Chapter 48.15 RCW is titled "Unauthorized Insurers" and, to those familiar
21 with the business of insurance in the State of Washington, is commonly known as the
22 "Surplus Lines" act. Under that chapter, insurers that hold a valid certificate of
23 authority in another state, but do not hold a Washington certificate of authority (hence,
24 are "unauthorized") can, and do, write business in the State of Washington if the
business is placed by and procured through a surplus line broker as provided in that

1 chapter. Contrary to what the Insurance Commissioner says, and contrary to the
2 Insurance Commissioner's interpretation, Chapter 48.15 RCW is not a law of general
3 application that "specifically allows" the Insurance Commissioner to initiate a
4 proceeding against a person for an alleged unlawful transacting of insurance without
5 authority. Rather, it is a special law that actually *allows* otherwise unlicensed insurers
6 (those that do not hold a Washington OIC-issued certificate of authority) to *lawfully*
7 engage in the business of insurance in the State of Washington as an approved Surplus
8 Line carrier.

9 Chapter 48.15 RCW has absolutely no applicability to the alleged unauthorized
10 acts the Insurance Commissioner ascribes to Respondents. This example of the
11 Insurance Commissioner's "long-standing interpretation" of the insurance code
12 demonstrates an almost unbelievable ignorance of the very business the Insurance
13 Commissioner is charged with regulating, and it is clear that the Insurance
14 Commissioner's interpretation of the provisions of the insurance code is unreliable,
15 unfounded, and uninformed, and is deserving of absolutely no deference whatsoever.

16 The same must be said about the Insurance Commissioner's reliance on Chapter
17 48.17 RCW. This is the provision of the insurance code that regulates insurance
18 producers (agents), title insurance agents, and claims adjusters. None of the alleged
19 unauthorized acts the OIC asserts against the Respondents relates to the acts of an
20 insurance agent or claims adjuster; rather, the OIC alleges the Respondents acted as
21 either an unauthorized insurance company or an unregistered service contract provider.
22 The Insurance Commissioner does not, and cannot, offer any rationale for his
23 interpretation of the provisions relating to the conduct of insurance agents and claims
24 adjusters as a basis for attempting to initiate this proceeding against the Respondents.

1 The Insurance Commissioner argues that his attempted action against the
2 Respondents is “specifically authorized” by these provisions of the insurance code, but
3 he cites no authority other than “the OIC’s long-standing interpretation” of these
4 provisions. Respondents previously noted (Respondents’ Motion to Dismiss, page 3)
5 that the Insurance Commissioner attempts to bring this quasi-legal action against
6 Respondents on the premise that the “OIC is authorized to initiate a hearing” pursuant
7 to RCW 48.04.050 or RCW 48.02.080. (See, also, OIC’s Request for Hearing, page 4).
8 Respondents also have noted previously that RCW 48.04.050 does nothing more than
9 allow the Insurance Commissioner to issue a notice to show cause, and RCW
10 48.02.080 establishes the only actions the Insurance Commissioner is authorized to
11 take if he suspects that a person has violated the insurance code, namely, (1) to issue a
12 cease and desist order, and (2) to bring an action in court.

13 The Insurance Commissioner does not dispute this. The Insurance
14 Commissioner has not offered any counter argument to the fact that nowhere in the
15 insurance code is the Insurance Commissioner given authority to initiate a legal or
16 quasi-legal proceeding against anyone for anything simply by filing a “request for a
17 hearing.”¹

18
19 ¹ Respondents are compelled to point out the deliberate and misleading error that the
20 Insurance Commissioner asserts in OIC’s Response. The Insurance Commissioner
21 through his Staff Attorney, tries to gain additional “authority” for the Insurance
22 Commissioner under RCW 48.04.010(1)(b), by wrongly claiming that Global Warranty
23 has requested a hearing under that provision (See, OIC’s Response, page 3). This
24 statement is false, and it appears to be offered only as an attempt to mislead the
Presiding Judge by shifting the focus away from the acts of the Insurance
Commissioner, who initiated this proceeding by filing a Request for Hearing without
authority, to the Respondents, who did not request a hearing but rather responded to the
Insurance Commissioner’s unauthorized action. The OIC’s Response, however, makes
it appear that the Insurance Commissioner was merely acting in a reactive or defensive
way. Nothing could be farther from the truth.

1 The Insurance Commissioner still has not cited any legal authority for his
2 position in this regard; rather, he only argues that the "OIC's long-standing
3 interpretation" of the insurance code should be sufficient. Furthermore, the only
4 supposed legal authority the Insurance Commissioner relies on is the OIC's self-
5 serving interpretation of Chapter 48.15 RCW and Chapter 48.17 RCW, neither of
6 which give such authority and neither of which has any application at all to this present
7 matter. Absent any actual legal authority for the Insurance Commissioner's claim that
8 he is "authorized under the Code" to seek this action (OIC's Response, page 2), both
9 his logic and his authority to initiate this action fail.

10 It is axiomatic that only the courts have the authority to interpret laws. "On
11 questions of statutory interpretation the Supreme Court is the final arbiter. (Citation
12 omitted). The court's interpretation of a statute is inherently a question of law, and the
13 court reviews questions of law de novo. (Cit. om.)" *King County v. Growth*
14 *Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000). Even if the
15 Insurance Commissioner did have authority to interpret statutes, and a host of appellate
16 decisions conclusively state that administrative agencies do not have such authority
17 (See, for example, *Higgins v. Salewsky*, 17 Wn. App. 207, (1977); *Prisk v. City of*
18 *Poulsbo*, 46 Wn. App. 793 (1987)), Respondents maintain, as pointed out above, that
19 the Insurance Commissioner's interpretation is wholly inadequate and unsupportable.

20 This matter should be dismissed for lack of authority to bring this proceeding.
21 At the very least, the OIC's allegations against the Respondents based on Chapter
22 48.15 RCW and Chapter 48.17 RCW should be dismissed in their entirety.
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1 **2. Only the Attorney General can represent the Insurance Commissioner**
2 **in actions brought against persons suspected of violating the insurance code.**

3 Respondents will not repeat all the authority, both statutory and case law, that
4 they noted in their Motion to Dismiss that provide clear and convincing proof that the
5 attorney general, and only the attorney general, can represent the Insurance
6 Commissioner in legal and quasi-legal proceedings whether in a court of law or before
7 and administrative tribunal.

8 That is precisely what RCW 43.10.030 says: “The attorney general shall: . . .
9 Institute and prosecute all actions and proceedings . . . which may be necessary in the
10 execution of the duties of any state officer.” (Emphasis added). To reinforce that
11 mandate and to repeat the point that the sole authority for representing the Insurance
12 Commissioner resides exclusively in the attorney general, the Legislature enacted the
13 next section of law, RCW 43.10.040, which states: “The attorney general shall also
14 represent the state and all state officials . . . and agencies of the state . . . before all
15 administrative tribunals or bodies of any nature, in all legal or quasi legal matters.”
16 (Emphasis added).

17 The Insurance Commissioner is a state officer and the Office of the Insurance
18 Commissioner is an agency of the state. If the Insurance Commissioner desires to
19 bring a legal or quasi-legal action against the Respondents, then he must engage the
20 Office of the Attorney General as his legal representative and the action must be
21 commenced according to the only procedural authority afforded the Insurance
22 Commissioner under RCW 48.02.080 (see reference and discussion above).

23 The Insurance Commissioner attempts to dismiss and ignore this clear
24 legislative mandate by contending that the “OIC has long interpreted the powers of the

1 Commissioner to hold and conduct hearings under Title 48 RCW to not conflict with
2 the requirements of Chapter 43.10 RCW, governing representation by the Attorney
3 General.” (OIC’s Response, page 6). Here again, we see the Insurance
4 Commissioner’s reliance on his own “long-standing interpretation” of the law as his
5 sole authority to disregard the clear mandates of both the Legislature and the Supreme
6 Court of the State of Washington.

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8 The Washington Supreme Court could not have been more precise and clear in
9 its holdings regarding the true interpretation and application of RCW 43.10.040 and
10 RCW 43.10.067 than it was in *Goldmark v. McKenna*, 172 Wn.2d 568, 259 P.3d 1095,
11 (2011). The Supreme Court said, “The plain language of the statutes, however, leaves
12 little to question. Under RCW 43.10.040 and 43.12.075 [a law akin to RCW
13 48.02.080], the attorney general has a statutory duty to represent the commissioner.
14 The first section, RCW 43.10.040, states he “shall . . . represent the state” and its
15 agencies “in the courts, and . . . in all legal . . . proceedings.” (*Goldmark, supra*, at 573,
16 quotes in original). The Supreme Court continued, “Moreover, only the attorney
17 general, or an SAAG appointed by the attorney general, may represent the
18 commissioner in legal proceedings since RCW 43.10.067 prohibits the commissioner
19 from hiring outside counsel.” (*Id.*; emphasis added).

20 In fact, even the Office of the Attorney General has weighed in on this issue and
21 issued an opinion that is perfectly in line with the Supreme Court’s ruling in *Goldmark*
22 and *State v. Gattavara*, 182 Wash. 325, 47 P.2d 18 (1935). In an opinion letter
23 responding to the question posed by then-state Senator Phillip Talmadge whether the
24 Washington State Patrol had statutory authority to employ an attorney to serve as legal
advisor to the Patrol, instead of obtaining legal advice from the Office of the Attorney

1 General, Attorney General Ken Eikenberry answered in the negative, citing the same
2 statutory provisions, referred to above, as did the Washington Supreme Court in
3 *Goldmark* and *Gattavara*, and as do Respondents in their Motion to Dismiss. Attorney
4 General Eikenberry went on to opine that “[t]he provisions of RCW 43.10.067, *supra*,
5 do not purport to prohibit state agencies from employing, in any capacity, individuals
6 who are lawyers. Instead, the statute only prohibits the employment of lawyers to
7 perform those functions or duties “. . . specified by law to be performed by the attorney
8 general . . .” Thus, it is not a violation of the statute for a state agency to employ a
9 person who happens to be a lawyer so long as that person is not employed to act as
10 attorney for the agency or to represent it in court proceedings or the like.” (AGO 1984
11 No. 43; quotes in original; emphasis added.)

12 In the OIC’s Response to Respondents’ Motion to Dismiss, the Insurance
13 Commissioner goes on and on about the dual role of the Commissioner and how the
14 mandates of RCW 43.10.030, RCW 43.10.040, and RCW 43.10.067 do not conflict
15 with the powers given to the Insurance Commissioner under Title 48, merely because
16 that has been the long-standing interpretation by the OIC to suit the Insurance
17 Commissioner’s desires. The Insurance Commissioner’s circular argument does not
18 address the legal issues at all and adds nothing to an understanding of the application of
19 RCW 43.10.030, RCW 43.10.040, and RCW 43.10.067 to this matter before the
20 Presiding Judge. What is evident is that the Insurance Commissioner has nothing to
21 argue except his own wish and hope as to how those statutes ought to apply.

22 To repeat what must be repeated, the Insurance Commissioner’s own
23 interpretation of the law, and his reliance on himself as the source of legal authority, is
24 absolutely wrong and is clearly contrary to the statutory mandates, which leave little to

1 question, and to the unambiguous holdings of the Washington Supreme Court, which is
2 the sole arbiter of statutory interpretation, and to the opinion of the Office of the
3 Attorney General, the very person who is charged with the responsibility and duty to
4 represent the Insurance Commissioner in all legal and quasi-legal proceedings.

5 In a last desperate attempt to avoid the clear mandate that the Attorney General,
6 and only the Attorney General, can bring an appropriate action against a person in the
7 appropriate venue on behalf of the Insurance Commissioner, the Insurance
8 Commissioner, by his Staff Attorney,² argues that the Washington Supreme Court's
9 rulings in *Goldmark v. McKenna*, (*supra*), *State v. Gattavara*, (*supra*), and *Saunders v.*
10 *State*, 166 Wn.2d 164, 207 P.3d 1245 (2009) were not insurance cases (See, OIC
11 Response, page 8) and did not involve the Office of the Insurance Commissioner, and,
12 therefore they should be disregarded by the Presiding Judge as "inapposite."

13 Apparently, the Insurance Commissioner believes that the only time he must
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16 ² It is interesting and curious that the Insurance Commissioner's representative
17 identifies himself sometimes as "Staff Attorney" when he is acting as an attorney in
18 presenting argument or engaging in discovery for the Insurance Commissioner, or, at
19 another time, as "Insurance Enforcement Specialist" when he appears to want to
20 disguise his true role in this matter as the legal representative of the Insurance
21 Commissioner, or yet again at other times, as argued in OIC's Response, as just a
22 "delegated employee" of the Office of Insurance Commissioner who is merely carrying
23 out the work the Insurance Commissioner has delegated to him. It is obvious that the
24 Insurance Commissioner's Staff Attorney is acting as attorney (which is clearly
prohibited) and he should not be allowed to hide behind this convenient identity-
shuffling to suit his needs. If, as Staff Attorney, he acts as an attorney, then, according
to the Attorney General, the Insurance Commissioner violates RCW 43.10.067. If the
Insurance Commissioner's Staff Attorney is just an employee of the OIC "who happens
to be an attorney" and to whom the Insurance Commissioner has merely "delegated"
some of the Insurance Commissioner's duties, then he is only a witness in this matter –
in the same way the Insurance Commissioner would be – and he cannot act as an
attorney or do any of those acts customarily performed by an attorney. Only the
Attorney General can act as the attorney for the Insurance Commissioner.

1 abide by a decision or holding of the Washington Supreme Court is when the Court
2 rules on a case that is directly related to insurance and the Office of the Insurance
3 Commissioner. In fact, the Insurance Commissioner repeats, or expands, his notion of
4 legal interpretation by asserting that, because these cases are not insurance cases they
5 are inapposite and “do not conflict with the OIC’s long-standing practice” of having
6 Staff Attorneys represent the Insurance Commissioner. (OIC’s Response, page 9).
7 This contempt for the Supreme Court and its rulings is stunning. And, if this really is
8 the position of the Insurance Commissioner, then it demonstrates the Insurance
9 Commissioner’s lack of a clear understanding of the respective roles of the judicial and
10 the executive branches of government.

11 The rulings of the Supreme Court which Respondents have noted in their
12 Motion to Dismiss are directly on point that – the Attorney General is the only attorney
13 the Insurance Commissioner may engage to bring an appropriate action against a
14 person suspected of violating the insurance code. The Insurance Commissioner has not
15 presented any contrary holding or any valid legal reasoning to refute those Supreme
16 Court decisions.

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18 **3. The two-year statute of limitations has expired and this action should be**
19 **dismissed on that ground alone.**

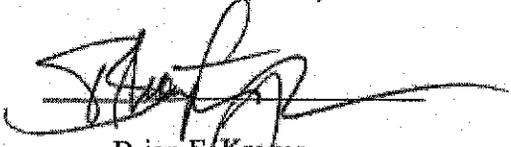
20 The Insurance Commissioner has not offered any satisfactory explanation for
21 not commencing an action against the Respondents within two years of the Insurance
22 Commissioner’s obtaining everything constituting his complete knowledge of all facts
23 necessary to commence an appropriate legal action in an appropriate venue. The
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Respondents simply refer to the authority and the facts set forth in their Motion to Dismiss at pages 15-17, and again request that this matter be dismissed with prejudice.

DATED this 29th day of August August, 2014

KREGER BEEGHLY, PLLC



Brian F. Kreger,
WSBA Number 10670

Attorney for Licensees

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CERTIFICATE OF SERVICE

I, Brian F. Kreger, under penalty of perjury under the laws of the State of Washington do hereby declare and certify that I personally served, and also caused to be delivered by Electronic (e-mail) Delivery, the foregoing Respondents' Reply to OIC's Response to Motion to Dismiss on the following parties or persons at the last known addresses given below:

Hearings Unit
Office of the Insurance Commissioner
5000 Capitol Boulevard
Tumwater, WA 98501

Mr. Darryl E. Colman
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Executed on this 29th day of August, 2014 in Seattle, Washington.


Brian F. Kreger