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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In Re:

BUSINESS HEALTH TRUST, et al.,
Petitioners.

OIC No. 15-0133

REPLY TO OIC'S OPPOSITION TO
STAY

I. INTRODUCTION

All of the state law insurance issues in this action have been decided. There is no issue relating to the terms of any insurance contract that is pending review before the State of Washington Office of the Insurance Commissioner (the "OIC").

This action involves the sole issue of whether an approved large-group contract may be sold to and offered by a particular association. The OIC contends that this issue is a matter of state insurance law and, therefore, that resolution should proceed at the state administrative level pursuant to the Administrative Procedures Act. To the contrary, because the Washington State insurance code requires all association plans to be regulated as large-group contracts, *see* RCW 48.44.024, state insurance law is clearly not at issue. If it were, the thirteen Business Health Trust ("BHT") Association Health Plans ("Health Trusts") would automatically be renewed.

The OIC also indicates that it has the power to review state insurance contracts to ensure that such contracts contain federal provisions relating to health care reform. There is no question in this action that the relevant insurance contracts contain all provisions required by health care reform. The OIC is not challenging the contracts on this basis. Rather, the OIC is

1 challenging the federal status of the “purchaser” of the contracts, not the insurance contracts
2 themselves.

3 The relief that Petitioners seek is a declaratory judgment that the thirteen Health Trusts
4 are sponsored by ERISA Section 3(5) employers. This remedy will enable each Health Trust,
5 as a purchaser of insurance, to purchase a policy from Premera Blue Cross (“Premera”), or any
6 other insurance carrier, including Regence or Group Health. It is well established law that a
7 declaratory action under ERISA is exclusively federal in nature.

8 Even if this Tribunal were to find that it does have concurrent jurisdiction over this
9 action, a stay must nevertheless be granted for the following reasons:

- 10 1. the principles of comity require deference to an earlier filed federal action;
- 11 2. a determination at the state administrative level is likely to lead to inconsistent
12 results;
- 13 3. this Tribunal both lacks jurisdiction and cannot provide the relief requested; and
- 14 4. the determination is not within the OIC’s expertise.

15 II. ARGUMENT

16 A. An Employer’s ERISA Section 3(5) Status Involves an Issue of Exclusive 17 Federal Concern

- 18 1. **The OIC does not have primary jurisdiction because the status of
19 the “purchaser” of an insurance policy does not require review or
20 analysis of the insurance contract.**

21 The OIC argues that its jurisdiction is primary because it is applying state insurance law
22 to the policies before it. However, Washington State insurance law on the issue of association
23 plans has not changed in a decade. Under Washington State insurance laws, all association
24 policies must be rated as large group policies. RCW 48.44.024. Thus, applying Washington
25 State insurance law to the associations, each Health Trust contract must be renewed and could
26 not be disapproved.

27 Contrary to the OIC’s argument, this analysis does not change merely because the
association is a multiple employer welfare arrangement (“MEWA”). ERISA Section 514

1 carves out an exemption to the general preemption rules to permit the OIC to apply its own
2 state insurance laws to a MEWA. However, as previously indicated, Washington State law
3 governing associations requires any association plan, *including* a MEWA, to be rated as a large
4 group employer.

5 The OIC next argues that it has primary jurisdiction because 42 U.S.C. § 300gg-22
6 gives states the authority to review an insurance policy to ensure that such policy contains the
7 group market reform provisions mandated by the Affordable Care Act (“ACA”). However, in
8 the instant case, there is no dispute that the Premera policy contains all the required provisions
9 of the ACA. The OIC is not interpreting or reviewing the terms of the Premera insurance
10 policy, rather it is reviewing the status of the “purchaser” of an approved policy, an issue that
11 does not involve the application of state or federal insurance laws to the insurance policy or to
12 the insurance carrier.

13 **2. The federal courts have primary and exclusive jurisdiction over an**
14 **employer’s ERISA Section 3(5) status.**

15 The question of ERISA Section 3(5) status is exclusively federal, and state law on this
16 issue is of no relevance. *See* Adv. Opin. 2007-05A (Nevada state law has no relevance to a
17 finding of ERISA Section 3(5) status). However, in light of the OIC’s disapproval of the 2014
18 policies, the only method by which the thirteen Health Trusts can now purchase a large group
19 health plan is by obtaining an affirmative declaration that they are sponsored by ERISA Section
20 3(5) employers. Pursuant to ERISA Section 502(e)(1), this declaratory action is within the
21 exclusive jurisdiction of the federal courts, as concurrent jurisdiction only exists for claims by a
22 participant for benefits under the terms of the plan. *See American Family Mutual Ins. Co. v.*
23 *Hollander*, 705 F.3d 339, fn. 8 (8th Cir. 2013).

24 **3. The OIC’s reliance on *Angoff* to establish concurrent jurisdiction is**
25 **misplaced.**

26 The OIC indicates that a state-level tribunal has concurrent jurisdiction with the federal
27 courts, relying on *Angoff* for its position that because the plan’s ERISA status has not yet been
determined, the Health Trusts cannot now claim exclusive federal jurisdiction. *See* Response

1 at 6; *see also International Ass'n of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1269
2 (1995) (whether a plan is subject to ERISA is a question of concurrent jurisdiction). The OIC
3 concedes, however, that once a plan's ERISA status has been established, declaratory and
4 injunctive relief is exclusively federal. Response at 6.

5 In the instant case, there are 661 employers that are providing group medical coverage
6 to their employees. As a matter of law, an ERISA plan exists as the following factors are
7 present: (1) a medical contract, (2) adopted by an employer, (3) for its employees. *Donovan v.*
8 *Dillingham*, 688 F.2d 1367, 1371 (8th Cir. 1982); *see also* ERISA Section 3(2)(A). The issue
9 being litigated is not whether there is an ERISA plan. Rather, the issue is whether there are 661
10 ERISA plans (if the Health Trusts are not sponsored by ERISA Section 3(5) employers) or
11 whether there are thirteen ERISA plans (if each Health Trust is sponsored by an ERISA
12 Section 3(5) employer).

13 As the OIC has never disputed, nor can it seriously be disputed, that a plan offering
14 group medical coverage to employees by an employer is an ERISA plan, the OIC has conceded
15 that jurisdiction over this declaratory action is exclusively federal in nature.

16 **B. Assuming Arguendo That There Is Concurrent Jurisdiction, This**
17 **Administrative Action Should Be Stayed**

18 **1. The principles of comity dictate that BHT's request for a stay be**
19 **granted.**

20 Even assuming arguendo that jurisdiction is concurrent, this administrative action must
21 be stayed due to a pending federal action involving the same parties and the same issues.
22 Petitioners filed the federal district action in December of 2014, and their motion for summary
23 judgment, filed in May 2015 and noted for June, is pending before the federal court. Discovery
24 has been conducted and a trial date is scheduled for November. If the OIC did not want the
25 federal case to proceed, the remedy was to file a motion to stay or dismiss under the *Younger*
26 and *Pullman* doctrines. It failed to do so and the federal case has proceeded with a summary
27 judgment pending and a trial date around the corner.¹

¹ In its opposition to Plaintiffs' Motion for Declaratory and Injunctive Relief in Federal District Court,

1 In contrast, BHT correctly filed a motion to stay the proceedings before this tribunal,
2 which have not yet begun, pending the federal decision. The principles of comity dictate that a
3 subsequently filed state action should defer to a previously filed federal action involving the
4 same parties and the same issues. It would be an abuse of discretion to hold otherwise. *See,*
5 *Florida Crushed Stone Co. v. Travelers Indem. Co.*, 632 So.2d 217, 220 (Fla. 5th DCA 1994).

6 **2. This Tribunal's decision should be stayed to avoid inconsistent**
7 **results.**

8 As indicated in Petitioners' opening brief and not addressed by the OIC in its response,
9 the Oregon State Insurance Commissioner has reached the opposite determination with respect
10 to associations organized under a chamber structure. *See* Declaration of Richard J.
11 Birmingham filed in support of Petitioners' Motion to Stay, ¶ 2, Exs. A-B. Many of the
12 carriers conduct their businesses across state borders in Washington, Oregon and Alaska. If the
13 Washington State Commissioner's determination is upheld, clients with identical business
14 structures will have ERISA Section 3(5) status in Oregon, but not in Washington. The federal
15 district court is the correct forum to resolve this inconsistency and ensure future consistent
16 results on an issue that is exclusively federal and upon which, the Petitioners respectfully
17 mention, the OIC has no expertise.

18 **3. This Tribunal's review will not provide the relief requested.**

19 As a party aggrieved by the Commissioner's action, the Health Trusts have standing to
20 challenge the OIC's action. The OIC attempts to avoid exclusive federal jurisdiction by
21 indicating that it isn't making a determination of each association's ERISA Section 3(5) status,
22 but only found that the facts are not sufficient to make a definitive ruling. The converse is, of
23 course, true. In order to prevail, the Health Trusts must actually obtain a declaration that each
24 Health Trust is in fact sponsored by an ERISA Section 3(5) employer, an issue that is left to the
25 exclusive jurisdiction of the federal courts.

26
27 the OIC indicated that it intended to file a cross-motion to dismiss under the *Younger* and *Pullman*
doctrines, but it failed to do so. Dkt. No. 29, fn. 3.

1 The OIC further states, without authority, that this Tribunal's review is limited to the
2 record Premera developed in SERFF. There is nothing in the Administrative Procedures Act or
3 RCW 48.04 that restricts the evidence to that which was presented by Premera. In fact, on the
4 rating hearings previously conducted before this Tribunal, both the petitioners in those actions
5 and the OIC submitted evidence to supplement the administrative filings. To hold an
6 administrative hearing based solely on the evidence before the OIC at the time of its
7 determination would be meaningless as no one is currently covered by the 2014 policies nor are
8 they for sale in the insurance market.

9 The remedy Petitioners seek before the Tribunal is whether the associations are each in
10 fact an ERISA Section 3(5) employer and in this regard, Petitioners are free to submit
11 additional evidence. The OIC's response that the remedy offered through the administrative
12 process is whether the determination with respect to the discontinued 2014 Premera policy was
13 reasonable in light of the facts presented, is yet another reason why a stay is appropriate. The
14 federal court will determine each association's status as an ERISA Section 3(5) employer, as a
15 matter of law, once and for all, and such determination will not be limited to the 2014 policies
16 that currently cover no one.

17 **4. The OIC admits that the DOL and federal courts have the required**
18 **expertise.**

19 In a touch of irony, the OIC admits that it lacks expertise in the application of federal
20 law, suggesting that BHT should have applied to the DOL for an advisory opinion in order to
21 obtain a definitive ruling. Response at 10. OIC's suggestion lacks candor before this Tribunal
22 as it fails to acknowledge: (i) the Petitioners worked with the Commissioner for a number of
23 years and received an opinion from the OIC in March of 2013, approving the Aerospace
24 Industry Trust and rendering a request to the DOL moot, until the OIC suddenly reversed its
25 opinion, *see* Declaration of Christine Hawkins ("Hawkins Decl."), ¶ 2, Ex. A; (ii) the OIC,
26 acknowledging its own lack of expertise, had been working with the DOL for years to obtain an
27 opinion but has been unable to get the DOL to issue an opinion:

1 We have continued to seek a more formal
2 written response from the U.S. Department
3 of Labor. Unfortunately, it has not yet been
4 provided.

5 See Hawkins Decl., ¶ 3, Ex. B; and (iii) the OIC has alleged both structural and factual areas of
6 concern. The DOL will not issue advisory opinions when issues of fact are in dispute. See
7 DOL Op. No. 2003-13A ("The question of whether the Fund is subject, not only in form, but
8 also in substance, to the control of the AICP producer members who are participating
9 employers is an inherently factual issue on which the Department generally will not rule in an
10 advisory opinion").

11 While the DOL will not rule on factual issues, the federal court will so rule and it may
12 also find that there are, in fact, no material issues in dispute. This matter is properly before the
13 federal court and the OIC will be bound by a federal decision on this matter.

14 III. SUMMARY

15 There is no dispute as to whether this case is subject to ERISA. The dispute is whether
16 there are 661 ERISA plans that are sponsored by 661 single employers or whether there are
17 thirteen ERISA plans sponsored by each of the industry associations.

18 To prevail in this litigation, each sponsoring association must be declared to be an
19 ERISA Section 3(5) employer. Under ERISA, a suit seeking such declaratory relief is
20 exclusively federal in a nature.

21 Even if jurisdiction were concurrent, there is a preexisting action pending in federal
22 court with a summary judgment motion noted for June, discovery has been conducted and a
23 trial date is scheduled for November. If the OIC did not desire to be in federal court, it should
24 have filed a motion to dismiss or to stay the federal proceeding. The OIC did not and the
25 principles of comity dictate that this action be stayed. It would be an abuse of discretion to
26 hold otherwise.
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RESPECTFULLY SUBMITTED this 27th day of August, 2015.

DAVIS WRIGHT TREMAINE LLP
Attorneys for Plaintiffs

By /s/ Richard J. Birmingham
Richard J. Birmingham, WSBA #8685
Suite 2200
1201 Third Avenue
Seattle, WA 98101-3045
Telephone: 206-622-3150
Fax: 206-757-7700
E-mail: richbirmingham@dwt.com

By /s/ Christine Hawkins
Christine Hawkins, WSBA #44972
Suite 2300
777 108th Avenue NE
Bellevue, WA 98004-5149
Telephone: 425-646-6100
Fax: 425-646-6199
E-mail: christinehawkins@dwt.com

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Electronically and via Certified US Mail

Marta DeLeon
Assistant Attorney General
Office of the Attorney General
Government Compliance and Enforcement Division
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
martad@atg.wa.gov

Attorney for the Washington State Office of the Insurance Commissioner

Gwendolyn Payton
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
PaytonG@lanepowell.com

Attorney for Premera Blue Cross

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

DATED this 27th of August, 2015, at Bellevue, Washington.


Amanda McFadden

FILED

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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

BEFORE THE STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER

In the Matter of

Business Health Trust ("BHT"),

Petitioners

OIC NO. 15-0133

DECLARATION OF CHRISTINE
HAWKINS IN SUPPORT OF
PETITIONERS' REPLY TO OIC'S
OPPOSITION TO STAY

I, Christine Hawkins, declare and state as follows:

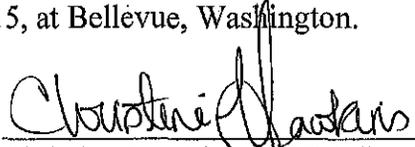
1. I am an associate with the law firm of Davis Wright Tremaine LLP, and counsel of record for Petitioners. I make this declaration based on personal knowledge and am competent to testify as to the matters set forth herein.

2. Attached hereto as Exhibit A is a true and correct copy of a letter dated March 26, 2013, from Carol Sureau, Deputy Commissioner, Legal Affairs, to Mr. Jeff Marcell regarding the Aerospace Industry Health Trust and the Commissioner's determination that the membership constitutes an ERISA Section 3(5) employer.

3. Attached hereto as Exhibit B is a true and correct copy of a letter dated October 28, 2014, from Commissioner Kreidler to Maud Daudon in which Commissioner Kreidler states that the OIC has been unable to obtain a formal written opinion from the U.S. Department of Labor.

1 I declare under penalty of perjury under the laws of the United States that the foregoing
2 is true and correct.

3 Executed this 27th day of August, 2015, at Bellevue, Washington.

4 
5 Christine Hawkins, WSBA # 44972
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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Electronically and via Certified US Mail

Marta DeLeon
Assistant Attorney General
Office of the Attorney General
Government Compliance and Enforcement Division
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
martad@atg.wa.gov

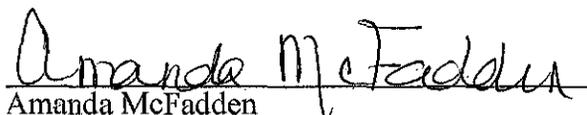
Attorney for the Washington State Office of the Insurance Commissioner

Gwendolyn Payton
1420 Fifth Avenue, Suite 4200
P.O. Box 91302
Seattle, WA 98111-9402
PaytonG@lanepowell.com

Attorney for Premera Blue Cross

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

DATED this 27th day of August, 2015, at Bellevue, Washington.


Amanda McFadden

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

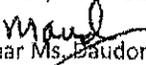
Phone: (360) 725-7000
www.insurance.wa.gov



OFFICE OF
INSURANCE COMMISSIONER

October 28, 2014

Maud Daudon, President & CEO
Seattle Metropolitan Chamber of Commerce
1301 Fifth Avenue, Suite 1500
Seattle, WA 98101-2632


Dear Ms. Daudon and colleagues:

Thank you for your October 8, 2014 letter, sharing with me the important work the Seattle Metropolitan Chamber members have done for the community and for Washington state. I appreciate the value that organizations such as yours provide to employers in addition to offering health plans, including education, leadership and networking opportunities.

I also understand your concerns about the impact of federal health care reform on the Seattle Chamber's ability to provide large-group coverage to member-employers, regardless of size. As you know, in 2011, I began working to provide clear direction to insurance carriers and their clients on the upcoming changes in federal law. That included providing guidance to associations like the Chamber that wished to pursue the ERISA exemption.

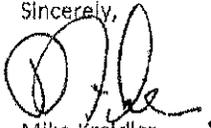
Your organization in particular has made substantial structural changes to satisfy the ERISA standards. My office has been working closely with the Chamber since 2012 on issues including industry code groupings and trust documents. However, even then we understood that the central issue was whether the reorganization of the Chamber into several separate industry groups with dedicated trusts would overcome the Bend Chamber of Commerce decision. As I shared with you in an email dated July 31, 2012, the U.S. Department of Labor's Susan Rees shared that she did not believe the Seattle Chamber was capable of satisfying ERISA's definition of "employer" even with the proposed structural changes.

We have continued to seek a more formal written response from the U.S. Department of Labor. Unfortunately, it has not yet been provided.

I hope our recent meeting on October 1 was useful to you in clarifying the information we need to complete our review of your association status. My staff continues to review the documentation you provided, and decisions will be communicated regarding the plans in the next few weeks.

Thank you again for your concern and interest.

Sincerely,



Mike Kreidler
Insurance Commissioner

Mailing Address: P. O. Box 40255 • Olympia, WA 98504-0255
Street Address: 5000 Capitol Blvd. • Tumwater, WA 98601



EXHIBIT A

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

STATE OF WASHINGTON

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



OFFICE OF
INSURANCE COMMISSIONER

March 26, 2013

Jeff Marcell
President & CEO
enterprise Seattle
1301 5th Avenue Ste 2500
Seattle, WA 98101

RECEIVED
MAR 27 2013
Jason Froggatt

In Re: Aerospace Industry Health Trust

Dear Mr. Marcell:

First, I'd like to thank you for your assistance in the effort we've made to analyze your association membership in the context of your insurance benefits vehicle to determine whether the membership constitutes an "employer" under 29 USCS 1002 (5).

Attached is a copy of the list of occupational categories we have agreed constitute a single industry. Also attached is a copy of the Trust Agreement governing the insurance vehicle which we have agreed provides for the employer members included in the occupational categories list to control the insurance vehicle. These documents should be provided to your carrier, as they will be needed for your plan filings.

If you have any questions, please let me know. Thank you again for your cooperation in this effort.

Very truly yours,

A handwritten signature in black ink, appearing to read "Carol Surban", written over a horizontal line.

Carol Surban
Deputy Commissioner, Legal Affairs
Enclosures

cc: Beth Berendt, Deputy Commissioner, Rates & Forms
Charles Brown, Senior Staff Attorney
Marta DeLeon, Assistant Attorney General
Brendan Williams, Deputy Commissioner, Policy
Jason Froggatt, Davis Wright Tremaine
Keith VanderZanden, Wells Fargo Insurance Services

Mailing Address: P. O. Box 40255 • Olympia, WA 98504-0255
Street Address: 5000 Capitol Blvd. • Tumwater, WA 98501



EXHIBIT B