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HEARINGS UNIT
OFFICE OF
INSURANCE COMMISSIONER

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**STATE OF WASHINGTON
OFFICE OF THE INSURANCE COMMISSIONER**

In Re:

BUSINESS HEALTH TRUST, et al.,

Petitioners.

OIC NO. 15-0133

OIC'S RESPONSE IN OPPOSITION
TO BHT'S MOTION TO "STAY" FOR
LACK OF SUBJECT MATTER
JURISDICTION

I. INTRODUCTION

Under the Washington Insurance Code, Title 48 RCW, and rules promulgated by the Insurance Commissioner, the Commissioner has the authority to review health plan filings submitted by issuers, to ensure compliance with all applicable state and federal laws and regulations. Nothing in the Employee Retirement Income Security Act (ERISA) strips the Insurance Commissioner of this authority, or vests any regulatory authority over fully insured health plans exclusively in the federal courts. Because there is no exclusive federal jurisdiction to challenge the Commissioner's decision, Petitioners motion should be denied.

Further, the question this tribunal is authorized to answer is distinct and not controlled by Petitioners' characterization of the question they have posed to the U.S. District Court for the Western District of Washington. Because there is no statute that gives the federal courts exclusive jurisdiction to determine whether an association satisfies the requirements of the Patient Protection and Affordable Care Act ("Affordable Care Act" or "ACA"), or state law, this matter should not be stayed merely because Petitioners are engaged in forum shopping.

1 Finally, Petitioners claim that this tribunal does not have subject matter jurisdiction over
2 the question they want this tribunal to answer, does not limit this tribunal's exclusive jurisdiction
3 over challenges to agency action under the Administrative Procedures Act, Chapter 34.05 RCW,
4 and the Insurance Code. If, as Petitioners allege, this tribunal cannot answer the question they
5 actually want answered, the deficiency is in the Petitioners' claim, not this tribunal's jurisdiction.
6 For these reasons, Petitioner's motion for stay should be denied.

7 II. FACTS

8 In December 2013, The Washington State Insurance Commissioner adopted a number
9 of market transition rules designed to provide clarity for regulated insurance carriers, also
10 called health plan issuers, on how to demonstrate compliance with the new requirements of the
11 Affordable Care Act and state law. Specifically, the Commissioner adopted market transition
12 rules, including WAC 284-170-955 and 958, which establish the requirements health insurance
13 issuers must satisfy when selling a large group health plan to a group of employers. Under the
14 Commissioner's rule and the Affordable Care Act, issuers that want to sell large group policies
15 can only do so to entities that satisfy the definition of "large employer" under the ACA.

16 The ACA limits both the size of the employer and the nature of the organizations that
17 can claim to be large groups. For the 2014 plan year, any group can only be sold to an entity
18 that satisfies the definition of "employer" found in the ACA. The ACA incorporates the
19 definition of "employer" found in the ERISA, Section 3(5), 29 U.S.C. § 1002(e)(1), 42
20 U.S.C.A. § 300gg-91(d)(6). Similarly, the Commissioner's rule incorporates the definition of
21 "employer" from ERISA into its own rule limiting the sale of association health plans to those
22 groups that qualify as large employers under the ACA. It is not enough, however, to simply be
23 an employer under ERISA. In order to qualify as a large group, the "employer" purchasing the
24 plan must have at least 51 employees. 42 U.S.C.A §300gg-91 (e)(2) ¹. If the "employer"

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26 ¹ For the 2015 plan years, which are not the subject of this hearing, large employers must have at least
101 employees.

1 purchasing the plan does not have 51 employees, then the employer is not eligible to purchase
2 large group health plans, and therefore can only purchase health plans in the small group
3 market.

4 The definition of "employer" found in ERISA can be met by nearly every employer
5 member of an association. However, the definition of *large* employer cannot be met many
6 employers who purchase insurance through associations, because they do not have enough
7 employees. Under the ACA, if these small employers do not band together in associations that
8 satisfy the definition of employer, they are limited to purchasing in the small group market.
9 Small group health plans are subject to many of the requirements of the affordable care act that
10 large group plans do not have to satisfy. As a result, issuers, such as Premera, have been
11 submitting filings identifying an association as the employer, not each employer member.

12 The Commissioner has repeatedly informed issuers that their determination of whether
13 an association is an employer would be subject to the same rigorous review as any other issuer
14 determination in a rate filing, and that the Commissioner may demand any documentation
15 necessary to evaluate that determination, as the Commissioner does with in every health plan
16 filing. In adopting the Market Transition Rules, the Commissioner expressly noted, "Where
17 necessary, the Commissioner will confirm with issuers that a product is properly filed and rated
18 based on further inquiry, where the filing avers large group status for a specific association of
19 employers." Market Transition Rules, Concise Explanatory Statement: R. 2013-13, 5
20 (December 11, 2013). The Commissioner's filing instructions to all issuers informed them that
21 the documentation they relied on in making good faith determination that a group is an
22 employer under WAC 284-170-958(2) should be filed with the issuer's rate and form filing.
23 Washington State SERFF Health and Disability Rate Filing General Instructions (SERFF
24 Filing Instructions) 6-17. These filing instructions note that the documentation submitted in
25 the Supporting Documentation tab as "Evidence as an Employer" must include "at a
26

1 minimum” either a DOL opinion or an attorney opinion. SERFF Filing Instructions, 13, §
2 III.L.5.

3 On December 17, 2014, Petitioner Business Health Trust (BHT) filed a hearing demand
4 seeking to prevent the Commissioner from conducting his statutorily required review of the
5 association health plan filing submitted by Premera for health plans sold to the Associations
6 created by the Seattle Chamber of Commerce and BHT. That hearing demand was dismissed for
7 failure to identify any particular threatened agency action, other than the Commissioner’s promise
8 to conduct his statutorily required review. On May 11, 2015, BHT demanded a hearing for the
9 second time, challenging the Commissioner’s disapproval of Premera’s association health plan
10 filing. Now BHT claims that it has no interest in whether the Commissioner’s disapproval of
11 Premera’s 2014 health plan filing was proper. Rather, BHT’s only concern is whether their newly
12 created associations are in fact employers under ERISA. BHT alleges that this tribunal does not
13 have jurisdiction to answer the question BHT wants to have answered, and therefore their own
14 challenge to the Commissioner’s decision should be “stayed” for lack of jurisdiction, until the
15 Federal Court answers BHT’s question.

16 If BHT is not concerned with the Commissioner’s 2014 health plan filing disapproval, it is
17 welcome to withdraw what now appears to be a pointless hearing demand. However, the
18 Commissioner, and therefore this tribunal as his delegate, has the authority to determine whether a
19 large group health plan has satisfied the requirements of the Affordable Care Act, and State Law,
20 and whether the disapproval of Premera’s filing was proper based on the records submitted by
21 Premera in the health plan filing. Because there is no exclusive federal jurisdiction to decide these
22 issues, and because the federal court’s eventual decision does not affect the record reviewable by
23 this tribunal on the issue of the commissioner’s disapproval, there is no valid basis cited by
24 Petitioners to stay this action beyond the current briefing schedule.

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III. ARGUMENT

A. **There Is No "Exclusive" Federal Jurisdiction Over ERISA.**

The federal courts have found that unless instructed otherwise by Congress, state and federal courts have equal power to decide federal questions. *Federal Express Corp. v. Tenn. Pub. Serv. Comm'n*, 925 F.2d 962, 968 (6th Cir.), cert. denied, 502 U.S. 812, 112 S.Ct. 59, 116 L.Ed.2d 35 (1991); *CSXT, Inc. v. Pitz*, 883 F.2d 468, 472 (6th Cir.1989), cert. denied, 494 U.S. 1030, 110 S.Ct. 1480, 108 L.Ed.2d 616 (1990). "ERISA nowhere makes federal courts the exclusive forum for deciding the ERISA status *vel non* of a plan or fiduciary." *Int'l Ass'n of Entrepreneurs of Am. v. Angoff*, 58 F.3d 1266, 1269 (8th Cir. 1995). Moreover, several state courts have in the past decided questions of ERISA status without correction by the United States Supreme Court or Congress. *Marshall, et. al. v. Bankers Life and Cas. Co.*, 2 Cal. 4th 1045, 10 Cal.Rptr.2d 72, 832 P.2d 573, 575 (plan covered by ERISA), cert. denied, 506 U.S. 1000, 113 S.Ct. 601, 121 L.Ed.2d 537 (1992); *Rizzi v. Blue Cross of S. Calif.*, 206 Cal.App.3d 380, 253 Cal.Rptr. 541, 542 (1988) (covered), cert. denied, 493 U.S. 821, 110 S.Ct. 78, 107 L.Ed.2d 44 (1989); *Cramer v. Ass'n Life Ins. Co.*, 569 So.2d 533, 534 (La.1990) (covered; ERISA status litigated in lower courts but not appealed to state Supreme Court), cert. denied, 499 U.S. 938, 111 S.Ct. 1391, 113 L.Ed.2d 447 (1991); *Blue Cross Hosp. Servs., Inc. of Missouri, et al. v. Frappier*, 681 S.W.2d 925, 931 (Mo.1984) (not covered), vacated, 472 U.S. 1014, 105 S.Ct. 3471, 87 L.Ed.2d 608, and readopted on remand, 698 S.W.2d 326 (Mo.1985); *Angoff v. Kenemore, et al.*, 887 S.W.2d 782, 786 (Mo.Ct.App.1994) (not covered). Because ERISA is silent on the matter of the power to declare ERISA status, the question of a plan's ERISA status falls under the usual concurrent state and federal jurisdiction. *Angoff*, 58 F.3d at 1269.

Like the plaintiffs in *Angoff*, Petitioners here mistakenly rely 29 U.S.C.A. § 1132 to claim exclusive federal jurisdiction over the question of whether the associations identified in Premera's filings as large employers can actually qualify as ERISA employers, in order to

1 satisfy the large group exception from the many requirements of the Affordable Care Act.
2 However, what Petitioners “assert[] to be an exclusive federal jurisdiction to decide ERISA
3 status by declaration is actually an exclusive federal jurisdiction to grant certain types of
4 declaratory and injunctive relief once ERISA status has been established by either a state or
5 federal court.” *Angoff*, 58 F.3d at 1270. Because that determination has not yet been made, as
6 to the associations claiming employer status, Petitioners, like the plaintiffs in *Angoff*, cannot
7 claim the federal court has exclusive jurisdiction to hear their claims. In fact, Petitioners
8 mischaracterize several inapposite cases as establishing exclusive federal jurisdiction over any
9 question related to ERISA. What these cases actually stand for is the unremarkable premise
10 that when there is no question that an entity qualifies as an employer or other ERISA defined
11 entity, state laws about insurance are preempted as to that entity. These cases assume, the
12 petitioners are, or are acting on behalf, of ERISA self-funded plans. See *NGS American Inc. v.*
13 *Barnes*, 805 F. Supp. 462, 464 (W.D.Tex. 1992); *American’s Health Ins. Plans v. Hudgens*,
14 742 F.3d 1319 (11th Cir. 2014); *Sherfel v. Gassman* 899 F. Supp. 2d 676 (S.D. Ohio 2012).
15 Generally, petitioners’ cases deal with states asserting that certain *self-insured* health plans are
16 actually insurers, and must satisfy the requirements of state insurance laws. This is expressly
17 preempted under ERISA. 29 U.S.C. § 1144(a)). However, the Commissioner’s rule and
18 decision are not being applied to a self-insured plan. The Commissioner’s rule and disapproval
19 addressed a fully insured plan offered by the licensed health plan issuer, Premera.

20 Also unremarkably, these federal cases uniformly hold that the federal courts have
21 jurisdiction to hear the ERISA claims filed in federal court. However, Petitioners grossly
22 overstate the holding of these cases when they claim that these cases find exclusive federal
23 jurisdiction over any claim involving ERISA. In fact, the one case Petitioner cites that asserts
24 that ERISA jurisdiction is exclusively federal, actually represents one part of a split in federal
25 courts concerning the “exclusivity” of ERISA jurisdiction over tax cases. See *E-Systems Inc. v.*
26 *A.W. Pogue*, 929 F.2d 1100 (5th Cir. 1991), and *Darne v. State of Wis.*, 901 F.Supp. 1426,

1 1432 (E.D.Wis.,1995) (dismissing ERISA preemption claims in federal court for petitioner's
2 failure to show she lacked a plain, speedy, and efficient remedy in state court.)

3 In further support of their allegation of exclusivity, Petitioners have also cited a
4 footnote of a case dealing with claims brought by an insurance carrier against its agent for
5 breach of contract, and counterclaims brought by the agent against the company, which
6 included an ERISA claim, as establishing exclusive federal jurisdiction over all ERISA claims.
7 *American Family Mut. Ins. Co. v. Hollander*, 705 F.3d 339, 346 (8th Cir. 2013). However,
8 what that case actually held with regard to ERISA preemption was that in certain cases ERISA
9 may be a defense, and in other cases ERISA may be jurisdictional: *Hollander*, 705 F.3d at
10 354. In the *Hollander* case, an agent claimed the monies due to him upon termination of his
11 employment with an insurer were part of an employee benefit plan. However, after trial, he
12 moved to amend his answer to state that the monies due to him were wages due under state
13 law. The court determined that because there were other grounds for federal jurisdiction,
14 ERISA preemption of the agent's claims was not complete, and therefore abandoning his
15 ERISA claims for state law claims did not deprive the court of federal jurisdiction. *Id.* The
16 footnote cited by Petitioners in actuality simply reiterates the ERISA enforcement jurisdiction
17 statute, which does not address claims to determine whether an entity satisfies the definition of
18 employer.

19 Further, none of the cases cited by Petitioners hold that a state rule applied to a
20 regulated insurance carrier is preempted by ERISA simply because the insurance carrier sells
21 that plan to an ERISA employer. In fact, the federal courts in this state have found that state
22 laws are not preempted when applied to fully insured ERISA health plans. *Z.D., ex rel. J.D. v.*
23 *Grp. Health Coop.*, 829 F. Supp. 2d 1009, 1014 (W.D. Wash. 2011). Nor do any of these cases
24 stand for the proposition that the question of whether or not a plan qualifies as an ERISA plan
25 is subject to exclusive federal jurisdiction.

1 Petitioners have simply cited no authority that overrules or abrogates *Anghoff* in
2 support of their claim that the federal courts have exclusive jurisdiction over the threshold
3 question of whether a group or a plan is actually an ERISA plan. In the absence of any
4 precedent to the contrary, *Anghoff* is controlling.

5 **B. Regulation Of Insurance Is Reserved To The States Under The Affordable Care
6 Act.**

7 In addition, the Affordable Care Act expressly reserved to state insurance regulators the
8 ability to enforce their insurance requirements. In Washington State, one regulation the
9 Commissioner is authorized to enforce is WAC 284-170-958, which is plainly designed to
10 ensure that issuers only sell large group plans to entities that satisfy the ACA's definition of
11 large group.

12 The regulation of insurance has long been reserved to the states. 15 U.S.C. § 1012
13 (“The business of insurance, and every person engaged therein, shall be subject to the laws of
14 the several States which relate to the regulation or taxation of such business.”). In Washington
15 State, that responsibility is delegated to the Insurance Commissioner. RCW 48.02.060. His
16 authority includes the authority to review and disapprove rate and form filings submitted by
17 health plan issuers, such as Premera. RCW 48.44.020²; WAC 284-43-920. The Commissioner
18 also has authority to disapprove rate and form filings that do not satisfy the requirements of the
19 Insurance Code (Title 48 RCW), or applicable federal laws, such as the Affordable Care Act.
20 RCW 48.44.020(2); WAC 284-43-125.

21 The Affordable Care Act reserved to state insurance regulators their already existing
22 authority to review health plan rate and form filings. The ACA also vested state insurance
23 regulators with the responsibility of ensuring that health plans satisfy the requirements of the

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25 ² RCW 48.44.020 is specific to health care service contractors. Other sections of the Washington State
26 Insurance Code vest the Commissioner with the same authority to review health plans filings submitted by other
types of authorized health plan issuers. However, because the filings in this case were submitted by Premera Blue
Cross, a health care service contractor, this brief will primarily cite only to the provisions applicable to health care
service contractors.

1 act. 42 U.S.C.A. § 300gg-22 (“each State may require that health insurance issuers that issue,
2 sell, renew, or offer health insurance coverage in the State in the individual or group market
3 meet the requirements of this part with respect to such issuers.”); 45 Code Fed. Reg. § 150.201
4 (“Except as provided in subpart C of this part, each State enforces PHS Act requirements with
5 respect to health insurance issuers that issue, sell, renew, or offer health insurance coverage in
6 the State.”)

7 Nothing in the Affordable Care Act abrogated the Commissioner’s concurrent
8 jurisdiction with the U.S. Department of Labor to regulate multiple employer welfare
9 arrangements (MEWAs) (formerly referred to as Multiple Employer Trusts, or “METs”)
10 including those that claim to be ERISA-covered employee welfare benefit plans, such as that
11 provided by the Petitioner to the associations at issue in this case. See Employee Benefits
12 Security Administration, U.S. Department of Labor *Multiple Employer Welfare Arrangements*
13 *under the Employee Retirement Income Security Act (ERISA): A Guide to Federal and State*
14 *Regulation*, 5 (2013) (“As a result of the 1983 MEWA amendments to ERISA . . . States are
15 now free to regulate MEWAs whether or not the MEWA may also be an ERISA-covered
16 employee welfare benefit plan.”).

17 Petitioners have cited no law that prevents or prohibits the Commissioner from
18 reviewing the large employer status of an entity that an issuer has sold a large group health
19 plan to. Without any support or foundation, Petitioners cite to WAC 284-170-958 as somehow
20 limiting the commissioner’s ability to review the question of large employer status “in the first
21 instance.” Motion at 4. First, the fact that an issuer has made an initial determination neither
22 limits the Commissioner’s ability to address the question of whether that decision was
23 appropriately made, or from conducting a robust and thorough review. Indeed, to date,
24 Petitioners have not claimed that the Commissioner asked the wrong questions, used the wrong
25 test, or applied the wrong law. They simply disagree with his conclusion.

1 Moreover, the real issue appears to be that this administrative proceeding is limited to
2 challenging the Commissioner's decision on Premera's 2014 health plan filing, and is not
3 required to conclusively determine whether the associations created by BHT satisfy the
4 definition of large employers under state and federal law. It is true that this hearing concerns
5 the Commissioner's disapproval of Premera's filings, and may not conclusively determine that
6 Petitioners satisfy the definition of employer under ERISA. However, there is nothing that
7 bars this tribunal from making that determination; if it is necessary to the review of the
8 Commissioner's disapproval. Further, the mere fact that this hearing may not answer every
9 question Petitioners may want answered in order to securely proceed with their business efforts
10 in the future is no grounds for delaying the relief this tribunal can provide. If Petitioner's were
11 truly desirous of a final determination, they have had the option of seeking an opinion from the
12 U.S. Department of Labor, which the Commissioner would treat as conclusively answering the
13 question of the Associations' status in the State of Washington. WAC 284-170-958. Despite
14 years of discussion on this issue, BHT has declined to obtain an opinion from the entity that
15 can conclusively provide it. Their failure to seek that opinion should not be grounds for
16 staying any action that might answer that question.

17 **C. There Is No Abuse Of Discretion In Refusing To Defer To Forum Shopping.**

18 The actual hearing Petitioners have the right to demand before this tribunal is a hearing
19 challenging a decision made by the Commissioner. RCW 48.04.010. The question this tribunal
20 has the authority to decide is limited by the record provided to the Commissioner as he made that
21 decision. Therefore, even if the U.S. District Court were to rule in Petitioners' favor in that
22 proceeding, it would not eliminate this tribunal's obligation to determine whether the legal
23 analysis and factual information provided by Premera to the Commissioner in response to his
24 repeated requests for information, were deficient. Regardless of the legal determination by the
25 U.S. District Court, this hearing will also be required to determine if the Commissioner's decision
26 was reasonable in light of the information submitted by Premera. Because this is distinct from the

1 broader issue presented in BHT's federal proceedings, and because it is limited to the record
2 before the Commissioner at the time he made his determination, there is no need to wait for the
3 federal court to make its own decision about the broader question. Further, Petitioners have cited
4 no authority for this "horn book law" that Petitioner's decision to go forum shopping should be
5 rewarded by staying Petitioner's own request for review of agency action until a record that was
6 not before the agency is created in a separate forum. Allowing entities that are not regulated by
7 the Insurance Commissioner to not only challenge the Commissioner's decisions, but to inject
8 entire proceedings that had not occurred at the time Commissioner's decision was made, as the
9 basis for their challenge, would impose an unfair disadvantage on the Commissioner. Petitioners
10 have cited no law for the proposition that an administrative proceeding must be stayed to allow a
11 party challenging an agency decision to obtain legal opinions and factual determinations that did
12 not exist at the time the agency decision was made, and then inject that new record into an
13 administrative proceeding. No law requires an agency to first allow a challenger to forum shop
14 for their preferred decision before conducting the review required under the Administrative
15 Procedures Act, RCW 34.05.

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IV. CONCLUSION

Nothing in ERISA creates exclusive jurisdiction to evaluate the nature of an employer. The Affordable Care Act expressly grants concurrent jurisdiction to the states, to continue to regulate the insurance market. Even though there may be some overlap between the question Petitioners claim is before the U.S. District Court and this tribunal, there is no need to wait for the federal court to decide a separate legal issue from the narrow question before this tribunal: whether the Commissioner's disapproval of Premera's filings was justified. Therefore Petitioner's motion should be rejected, and this matter should proceed on the current briefing schedule.

DATED this 14th day of August, 2015.

ROBERT W. FERGUSON
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PROOF OF SERVICE

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

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

DATED this 14th day of August, 2015, at Olympia, Washington.



MARLENA MULKINS
Legal Assistant