

**STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE OFFICE OF INSURANCE COMMISSIONER**

In the Matter of

Docket No. 2008-INS-0002

**CHICAGO TITLE INSURANCE  
COMPANY,**

**RESPONSE AND OPPOSITION TO  
CHICAGO TITLE INSURANCE  
COMPANY'S "MOTION FOR  
SUMMARY JUDGMENT RE:  
AGENCY LIABILITY"**

An authorized insurer

**I. INTRODUCTION**

Starting from an incorrect legal premise, Chicago Title Insurance Company's ("Chicago Title") Motion for Summary Judgment argues that the present matter must be dismissed because Chicago Title allegedly has no right to control its agent Land Title Company of Kitsap County, Inc. ("Land Title"). Chicago Title's argument tries to couch Land Title as some sort of fully "independent" entity, but ultimately it relies on a patchwork of inadmissible conclusory remarks, incorrect factual assertions, and selective references to a private agreement that did not include the Office of the Insurance Commissioner ("OIC") and that does not impact the OIC's authority.

Chicago Title's motion fails to consider facts that show that Chicago Title does retain the right to control Land Title, but despite this right, it has instead chosen to do nothing and even overlook the unfair practices that violate WAC 284-30-800. The facts show that

1 Chicago Title is completely reliant on Land Title's marketing activities now at issue to  
2 generate Chicago Title's profits for Chicago Title's insurance. Those facts also show that  
3 Chicago Title has failed to exercise any of the control it clearly has over its appointed agent,  
4 Land Title, even knowing that the OIC has told Chicago Title that it would be held  
5 responsible for any activity conducted by its agents like Land Title regarding WAC 284-30-  
6 800, *whether the title insurers have knowledge of the activity or not*. They show that Land  
7 Title and Chicago Title are owned by the same parent company, and that Land Title's board  
8 members are or were employed by that parent company. They also show an agency  
9 agreement that, if considered, not only shows Chicago Title does retain the right to control  
10 Land Title, it even contemplates that Chicago Title could be fined by OIC for Land Title's  
violations of WAC 284-30-800.

11 Nevertheless, though these facts alone would require the motion to be denied for  
12 raising genuine issues of material fact — if they were indeed “material” — the OIC's action  
13 against Chicago Title is authorized and appropriate as a matter of law. Chicago Title's  
14 motion misapprehends the regulatory context here, embodied in Title 48 RCW and Title 284  
15 WAC, and misapplies the relevant regulations and legal authorities used in insurance  
regulatory cases such as this.

16 In short, the OIC requests that Chicago Title's Motion for Summary Judgment be  
17 denied for the following reasons:

- 18 1. The OIC is authorized to take the present action against Chicago  
19 Title because under RCW 48.30.150, WAC 284-30-800, and other  
20 Code provisions, the Insurance Commissioner acts within his or her  
21 authority by fining title insurers/principals whose agents/producers  
22 commit inducement violations.
2. The OIC is authorized to take the present action against Chicago  
23 Title because Washington law makes clear that the acts of an agent  
are imputed to the principal, such as between title insurers and their  
agents/producers.
3. The OIC is authorized to take the present action against Chicago  
Title because Washington law also makes clear that the acts of an  
insurance agent are imputed to the insurer/principal under the  
principle of apparent authority.

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4. The OIC is authorized to take the present action against Chicago Title because although the question of whether Chicago Title had a “right to control” is not the proper or applicable inquiry governing this matter — as tort liability concepts do not apply here — even if it were, the facts show that such control existed, or that sufficient factual dispute exists to warrant denying the motion.
  5. Finally, Chicago Title’s argument that the OIC’s action here amounts to “impermissible de facto rulemaking” warranting dismissal misapprehends the facts, confuses the issues, and provides no basis to support dismissal.

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## II. STATEMENT OF THE FACTS

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### A. INSURANCE REGULATION IN WASHINGTON<sup>1</sup>

9 All insurance in Washington, including title insurance, is regulated under the  
10 Insurance Code, Title 48 RCW. The Code creates an Insurance Commissioner, RCW  
11 48.02:010, with the mission to regulate “[a]ll insurance and insurance transactions in this  
12 state, or affecting subjects located wholly or in part or to be performed within this state, and  
13 all persons having to do therewith.” RCW 48.01.020. *See also* RCW 48.01.040 (defines  
14 “insurance”) and RCW 48.01.060 (defines “insurance transaction”). RCW 48.01.030, entitled  
15 “Public interest,” begins the Code with a strongly worded expression of public policy that the  
16 Commissioner’s responsibility in carrying out this mission is a matter of the highest public  
policy of this state:

17 The business of insurance is one affected by the public interest, requiring that  
18 all persons be actuated by good faith, abstain from deception, and practice  
19 honesty and equity in all insurance matters. Upon the insurer, the insured,  
their providers, and their representatives rests the duty of preserving inviolate  
the integrity of insurance.<sup>2</sup>

20 The OIC has broad authority and discretion to enforce the provisions of the Insurance  
21 Code — including those provisions that govern marketing activities and illegal inducements

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<sup>1</sup> This section is based upon the Declaration of Carol Sureau.

23 <sup>2</sup> In order to achieve this public policy, the Legislature vested the Commissioner with broad authority. *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 427, 799 P.2d 235 (1990) (superseded by statute on other grounds); *Federated American Ins. Co. v. Marquardt*, 108 Wn.2d 651, 654, 741 P.2d 18 (1987).

1 in title insurance — for the benefit of Washington consumers and to protect the integrity of  
2 insurance in Washington.<sup>3</sup> Upon finding a violation of the illegal inducement laws, the  
3 Commissioner may use his broad enforcement authority in whatever manner he deems “useful  
4 and proper for the efficient administration of” the Insurance Code — which can include  
5 revoking or suspending the license of a title insurer or title insurance agent, initiating a  
6 hearing, or imposing a fine of up to \$10,000 per violation.<sup>4</sup>

## 7 **B. TITLE INSURANCE IN WASHINGTON**<sup>5</sup>

### 8 **1. Title insurance is unique and is marketed on a reverse competition model.**

9 It is essential that this tribunal keep in mind that title insurance and the title insurance  
10 industry differs greatly from other kinds of insurance. For example, while automobile and  
11 homeowner insurance policies protect an individual from an event that may occur in the  
12 future, title insurance offers protection from events that might have occurred in the past. It  
13 protects against losses that arise from problems connected to a particular parcel of real estate  
14 obtained in a land sale transaction, such as a forged signature on a transfer document, unpaid  
15 real estate taxes, or other liens that may create a cloud on title. Ultimately, for the average  
16 consumer, the purchase of a title insurance policy is merely an expensive and somewhat  
17 confusing step during the closing of a real estate purchase.

18 Moreover, title companies, in stark contrast to property, casualty, life, and other  
19 insurance companies, do not market their products directly to the consumers who pay for  
20 them. Instead, the title insurance industry operates on what is termed a “reverse competition”  
21 model.<sup>6</sup> Reverse competition means that title companies solicit business from the other major  
22 players in the home sale process who are able to refer or steer the consumer to a particular

23 <sup>3</sup> See RCW 48.01.030 and Sureau Decl., ¶¶ 6-13. See also RCW 48.02.060 (authorizing the Commissioner to enforce the Insurance Code); RCW 48.30.140-150 (proscribing rebating and inducements generally); WAC 284-30-800 (proscribing the giving of inducements as an “unfair practice”).

<sup>4</sup> See, e.g., RCW 48.04.010(1); RCW 48.05.140; RCW 48.05.185; RCW 48.17.530; Sureau Decl. ¶¶ 13-16.

<sup>5</sup> This section is based upon the Declaration of Jim Tompkins.

<sup>6</sup> Tompkins Decl., Exhibit A, *OIC Report: An Investigation into the Use of Incentives and Inducements by Title Insurance Companies*, p. 1, October 2006. See also Birny Birnbaum, Report to California Insurance Commissioner, *An Analysis of Competition in the California Title Insurance and Escrow Industry*, §§ 5.1-5.2, December 2005, a public record available at [www.insurance.ca.gov](http://www.insurance.ca.gov) (not attached due to size).

1 title company or title insurer—such as real estate agents and agencies, banks, lenders,  
2 builders, developers, and so forth. These individuals/entities to whom title companies market  
3 their products are often called middlemen or go-betweens.

4 Reverse competition, as the term suggests, is not a model that benefits consumers  
5 through market-driven forces. In fact, consumers are bypassed completely as title companies  
6 spend nearly all of their marketing budgets “wining and dining” real estate agents, banks,  
7 lenders, builders, developers and others in an effort to convince these middlemen to steer their  
8 home-buying clients to their title companies for their title insurance needs.

9 In 1988, due to complaints and reports of abuses, the OIC adopted WAC 284-30-800  
10 (amended in 1990) in an attempt to curtail the “wining and dining” or illegal inducements  
11 within the title industry. The provision declares that the giving of inducements amounts to an  
12 “unfair practice,” and it applies to both title insurers and to their “agents,” or producers.<sup>7</sup> But  
13 the title insurance industry proved cunning and created new schemes and methods for  
14 providing illegal gifts and inducements in order to steer title insurance business. As such, the  
15 Commissioner continues to monitor the title industry and illegal inducements are strictly  
16 regulated by RCW 48.30.140-150 and WAC 284-30-800.

17 **2. In 2006, the OIC investigated the title insurance industry in Washington**  
18 **amidst reports of rampant violations of the illegal inducement regulations.**

19 In October 2006, the OIC issued a Report entitled “An Investigation into the Use of  
20 Incentives and Inducements by Title Insurance Companies.”<sup>8</sup> The OIC Report describes,  
21 among other things, the OIC’s findings during a 10-month investigation of select title insurers  
22 and agents as their conduct related to the illegal inducement provisions of WAC 284-30-800.

23 As the OIC Report explains, the investigation uncovered a clear pattern of  
inducements and incentives in the title industry. Although details and form varied from  
company to company, it became apparent that the inducements and incentives represented

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<sup>7</sup> Effective July 1, 2009, the term “agent” is replaced by the term “producer.” See RCW 48.17.010.

<sup>8</sup> Tompkins Decl., Exhibit A.

1 similar patterns of behavior for all the companies. Generally speaking, all of the companies  
2 investigated used some scheme or inducement (i.e., food/drinks, classes, meals, broker opens,  
3 co-advertising, gifts, golf, sporting events, etc.) to influence the title industry's middlemen  
4 (real estate agents, banks, lenders, builders, developers and others) who were in a position to  
5 steer title insurance business. Chicago Title, in particular, was found to have violated WAC  
6 284-30-800 with such activities as illegal co-advertising, sports tickets, golf tournaments, and  
7 hospitality suites:

8 **Chicago Title Insurance Co.**

9 A review of this company's records revealed that the company does pay some heed to  
10 the \$25 limit. Yet, investigators found that the company repeatedly violated the limit  
11 on many occasions. The company often participated in coadvertising campaigns,  
12 paying the production costs and postage for flyers more than 150 times during the 18-  
13 month period. Those costs individually ranged from \$100 to more than \$4,300 each.

14 The company made extensive use of sporting tickets, including one Seahawk game for  
15 which it paid nearly \$2,400 for 26 seats. Some of these events included the use of  
16 chartered buses for transportation.

17 The company spent thousands of dollars paying for food at hundreds of middlemen  
18 meetings and broker opens. The company sponsored golf tournaments, spending in  
19 excess of \$3,000.

20 The company also hosted receptions and hospitality suites at conventions on three  
21 occasions, spending a total of more than \$13,000.<sup>9</sup>

22 The OIC Report also made clear that one of its key purposes was to put the title  
23 insurance industry on notice that the status quo must change and to instruct the industry about  
the laws related to inducements and incentives and how to conduct business within the  
confines of the law. The OIC Report also put the title insurance industry on notice that an  
enforcement program would be undertaken by the OIC, and that there would be consequences  
for those companies that failed in future efforts to comply with the illegal inducement laws.

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<sup>9</sup> See Tompkins Decl., Exhibit A at page 6. As indicated below, Chicago Title was given a copy of this report and was aware of its contents.

1           Moreover, following the investigation and issuance of its 2006 Report, the OIC issued  
2           Technical Assistance Advisory (“TAA”) 06-06 to title insurance companies, clearly stating  
3           the applicable law and offering additional compliance guidance.<sup>10</sup> The TAA referenced the  
4           findings of the investigation and provided notice that the OIC would not pursue an  
5           enforcement effort aimed at past violations, rather enforcement actions would proceed on a  
6           prospective basis. The TAA clearly outlined the OIC’s expectation for future compliance and  
7           provided ample warning to the title industry about penalties and sanctions that both  
8           companies and individuals could expect for future failures to follow the law.

8           **3.       Following issuance of the OIC’s 2006 Report, a subsequent investigation**  
9           **of the title industry uncovered continued illegal inducement violations by**  
10           **title insurers and their agents — including those at issue in this case.**

10           In 2007, the Commissioner issued a follow-up Report.<sup>11</sup> This Report noted that in the  
11           brief time that elapsed since the 2006 Report, “the agency waited three months and then  
12           targeted three title insurers scrutinized in the initial investigation for a spot check.” More of  
13           the same inducement violations were found. This time, however, the offending companies  
14           were fined, exactly as the present proceedings seek to do.<sup>12</sup> Once again, the Commissioner’s  
15           Report warned the title insurance industry that the “agency will maintain a random schedule  
16           of unannounced enforcement investigations in the future to ensure that title companies are  
17           complying with requirements for inducements and incentives, and maintaining appropriate  
18           documentation of these expenses.”

18           Later in 2007, the OIC made good on its promise. In particular, on or about May 15,  
19           2007, the OIC initiated a follow-up investigation of several title insurance companies,  
20           including Chicago Title’s agent title company Land Title at their business offices in  
21           Silverdale, Washington. What the OIC discovered resulted in the case presently before this  
22           tribunal.

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22           <sup>10</sup> Tompkins Decl., Exhibit B, *Technical Assistance Advisory 06-06*, dated November 1, 2006.

23           <sup>11</sup> See [http://www.insurance.wa.gov/news/news\\_release\\_content/2129-report\\_titlejuly2007.pdf](http://www.insurance.wa.gov/news/news_release_content/2129-report_titlejuly2007.pdf).

<sup>12</sup> See <http://www.insurance.wa.gov/oicfiles/orders/2007orders/D07-155.pdf> and  
<http://www.insurance.wa.gov/oicfiles/orders/2007orders/D07-154.pdf>.

1           **C. CHICAGO TITLE AND ITS PRODUCER,<sup>13</sup> LAND TITLE**

2           Chicago Title is an out-of-state corporation and is an insurance company duly  
3 authorized by OIC to issue title insurance policies and to transact title insurance in the State of  
4 Washington.<sup>14</sup> Land Title is a Washington corporation<sup>15</sup> and is Chicago Title's exclusive title  
5 insurance producer licensed and appointed<sup>16</sup> to transact Chicago Title's title insurance  
6 business in the Washington counties of Kitsap, Clallam, Jefferson, and Mason.<sup>17</sup>

7           Land Title has been appointed by only two insurers, Chicago Title and Security Union  
8 Title Insurance Company ("Security Union"),<sup>18</sup> both of which are owned by the same parent,  
9 Fidelity National Financial, Inc.<sup>19</sup>:

10           Security Union Title Insurance Company is a wholly owned subsidiary of  
11 Chicago Title and Trust Company ("Chicago Title Trust"), an Illinois  
12 corporation. CTIC [Chicago Title], a Missouri corporation, is also a wholly-

13 <sup>13</sup> The term "insurance producer" will replace the terms "agent" and "broker" effective July 1, 2009. *See* RCW  
14 48.17.010. Until then, the terms "agent" and "broker" describe the different "licensees," or persons licensed by  
15 OIC under the "Code" (Title 48 RCW) to transact insurance for duly authorized insurers.

16 <sup>14</sup> Singer Decl., **Exhibit A**, *OIC Printout of Authorized Companies*, printed September 19, 2008.

17 <sup>15</sup> Singer Decl. **Exhibit B**, *Washington Secretary of State Corporation printout*.

18 <sup>16</sup> Pursuant to RCW 48.17.160, before any title insurance licensee like Land Title may transact a title insurer's  
19 insurance, Washington requires the licensee to first become "appointed" by the insurer.

20 <sup>17</sup> Singer Decl., **Exhibit C**, *OIC Company Appointment List*, printed April 18, 2008, **Exhibit D**, *Chicago Title's*  
21 *answers to OIC's First Interrogatories and Requests for Production*, and **Exhibit E**, *Chicago Title's answers to*  
22 *OIC's Second Interrogatories and Requests for Production*. Land Title has been appointed by only two insurers,  
23 Chicago Title and Security Union Title Insurance Company, but as noted in footnote 18 *infra*, the latter of which  
was cancelled on the same day in 1994.

<sup>18</sup> Singer Decl., **Exhibit F**, *OIC Licensee Profile and Licensee Details*, printed April 18, 2008. According to this  
OIC record, Land Title has been appointed by Security Union, but that appointment was simultaneously  
cancelled on the same day in 1994. Thus, Land Title has only been legally authorized to issue one insurer's title  
insurance: Chicago Title's. While Chicago Title and Land Title's Gene Kennedy assert that Land Title has also  
entered into a private agency agreement with yet another insurer, Old Republic National Title Insurance  
Company ("Old Republic"), OIC records fail to show that Old Republic or any other insurer ever appointed  
Land Title pursuant to RCW 48.17.160. OIC would note in passing that if it is later determined that Land Title  
has ever transacted title insurance in an unauthorized manner by transacting insurance for an insurer when no  
valid appointment had first been made, such transaction could violate RCW 48.17.160 and could potentially  
subject both Land Title and such other such insurer to enforcement action by OIC.

<sup>19</sup> Chicago Title's website, <http://www.ctic.com/history7.asp>, states that Fidelity National Financial "is one of  
the nation's largest title insurance companies through its title insurance underwriters - Fidelity National Title,  
Chicago Title, Ticor Title, Security Union Title and Alamo Title - that issue approximately 28 percent of all title  
insurance policies in the United States."

1 owned subsidiary of Chicago Title Trust. Chicago Title Trust is a subsidiary  
2 of Fidelity National Financial, Inc., a holding company incorporated in the  
State of Delaware.<sup>20</sup>

3 While shares of Land Title stock are not publicly traded,<sup>21</sup> Security Union happens to own at  
4 least 45% of them, or 28,330 shares.<sup>22</sup> As a shareholder, Security Union “receives dividends  
5 and financial reports” from Land Title and “votes its shares as authorized.”<sup>23</sup> In addition to  
6 Security Union’s ownership of Land Title’s stock, since 2002 Land Title’s board of directors  
7 has had between 33% and 44% of its board membership consist of people who either work for  
or have worked for Fidelity National Financial or its subsidiaries.<sup>24</sup>

8 Aside from Land Title, Chicago has not appointed any other licensees to transact  
9 Chicago Title’s title insurance in the Washington counties where Land Title so acts.<sup>25</sup> Land  
10 Title is the only entity that solicits Chicago Title’s title insurance business in the counties of  
11 Kitsap, Clallam, Jefferson and/or Mason.<sup>26</sup> Chicago Title has no separate employees that  
12 solicit new title insurance business on Chicago Title’s behalf in these counties.<sup>27</sup> Chicago  
13 Title does not separately conduct any kind of advertising or marketing to grow its title  
insurance business in these counties.<sup>28</sup>

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18 <sup>20</sup> Singer Decl. **Exhibit D**, *Interrogatory answer no. 1 to OIC’s first interrogatories to Chicago Title*. See also  
Singer Decl. **Exhibit E**, *Interrogatory answer no. 26 to OIC’s second interrogatories to Chicago Title*.

19 <sup>21</sup> See Singer Decl. **Exhibit E**, *Interrogatory answer no. 12 to OIC’s second interrogatories to Chicago Title*.

20 <sup>22</sup> See Singer Decl. **Exhibit D**, *Interrogatory answer no. 1 to OIC’s first interrogatories to Chicago Title*, and  
**Exhibit E**, *Interrogatory answer no. 12 to OIC’s second interrogatories to Chicago Title*. However, this does  
not include any other shares that may be owned by other persons or entities that have some other connection to  
Chicago Title, Fidelity National Financial, Inc., or any entity associated with either.

21 <sup>23</sup> See Singer Decl. **Exhibit D**, *Interrogatory answer no. 1 to OIC’s first interrogatories to Chicago Title*.

22 <sup>24</sup> See Singer Decl. **Exhibit E**, *Interrogatory answer no. 11 to OIC’s second interrogatories to Chicago Title*.

23 <sup>25</sup> See Singer Decl. **Exhibit E**, *Interrogatory answer no. 2 to OIC’s second interrogatories to Chicago Title*.

24 <sup>26</sup> See Singer Decl. **Exhibit E**, *Interrogatory answer no. 2 to OIC’s second interrogatories to Chicago Title*.

25 <sup>27</sup> See Singer Decl. **Exhibit E**, *Interrogatory answer no. 2 to OIC’s second interrogatories to Chicago Title*.

26 <sup>28</sup> See Singer Decl. **Exhibit E**, *Interrogatory answer no. 13 and 14 to OIC’s second interrogatories to Chicago  
Title*.

1 Land Title has agreed<sup>29</sup> to transact title insurance business for Chicago Title only and  
2 for “no other title insurance company.”<sup>30</sup> Land Title’s website home page indicates that its  
3 “National Website” is the Chicago Title website.<sup>31</sup>

4 Pursuant to its “issuing agency agreement” with Chicago Title, Land Title has been  
5 required to forward “annually” to Chicago Title a copy of Land Title’s “balance sheet and  
6 profit and loss statement.”<sup>32</sup> It also requires Land Title to allow Chicago Title to freely  
7 access, review and examine, without restriction, “all accounts, books, ledgers, searches,  
8 abstracts and other records which relate to the title insurance business carried on by [Land  
9 Title] for [Chicago Title].”<sup>33</sup> In turn, Chicago Title is required to provide Land Title with  
10 Chicago Title’s “Agency manual, underwriting manual, underwriting memos, and  
underwriting rules and regulations” with which Land Title must comply.<sup>34</sup>

11 The “issuing agency agreement” between Chicago Title and Land Title also provides  
12 that Land Title agrees to indemnify Chicago Title for any “losses” Chicago Title incurs or is  
13 liable for based on the acts of Land Title.<sup>35</sup> Such losses include “all loss, cost or damage”  
14 incurred by Chicago Title, “including attorney’s fees, caused by” certain types of events.<sup>36</sup>  
15 One such event is “[a]ny act, or failure to act, of [Land Title], or its employee(s), officer(s), or  
16 attorney(s) which results in [Chicago Title] being liable for bad faith, unfair claim practice or  
17 punitive damage.”<sup>37</sup> Another is “[a]llegations, against *either* [Chicago Title] or [Land Title],  
by reason of the activities of [Land Title], its agents, servants and employees, of fraud,

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19 <sup>29</sup> This private 1992 entitled “issuing agency agreement” was entered into between Land Title and Chicago Title.  
The OIC was not a party to this agreement.

20 <sup>30</sup> See Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement §4(A)*. And as indicated in  
footnote 15, *supra*, Land Title is also only legally authorized to transact Chicago Title’s title insurance business.

21 <sup>31</sup> Singer Decl. Exhibit H, *website printout*. Land Title’s website home page contains a hypertext link,  
“National Website,” which links to <http://www.ctic.com/>, which is Chicago Title’s website.

22 <sup>32</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 4(M)*.

23 <sup>33</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 11*.

<sup>34</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 8(E)*.

<sup>35</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 9*.

<sup>36</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 9(B)*.

<sup>37</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 9(B)(7)*.

1 conspiracy, or failure to comply with any Federal *or State Law or regulation*, including  
2 securities laws.”<sup>38</sup> (Emphasis added.) Pursuant to this private agreement, Chicago Title also  
3 required Land Title to notify its fidelity bond or errors and omissions insurer for any claim in  
4 which Land Title may be liable to Chicago Title.<sup>39</sup>

5 Chicago Title has also provided OIC with a 2005 written guarantee in which Chicago  
6 Title promised it would accept any and all financial responsibility “for any fraudulent or  
dishonest acts committed by” its agent, Land Title.<sup>40</sup>

#### 7 D. FACTS LEADING UP TO THE INSTANT NOTICE OF HEARING ALLEGATIONS

8 Following up on its 2006 report, in May of 2007 the OIC reviewed Land Title records  
9 covering the period of December 1, 2006 through March 30, 2007.<sup>41</sup> As detailed in the Notice  
10 of Hearing, this uncovered many, if not all, of the same kinds of inducement violations found  
11 concerning Chicago Title in the 2006 report, including co-advertising, sports tickets, and a  
12 golf tournament.<sup>42</sup> Prior to then, both Land Title and Chicago Title had been aware of OIC’s  
13 2006 report and other pertinent materials relating to the proscription of inducements,  
14 including materials posted on the Washington Land Title Association (“WLTA”) website.<sup>43</sup>  
15 Yet, Chicago Title took no action either in response to the OIC’s 2006 report, or since 1990,  
to ensure that Land Title was complying with WAC 284-30-800.<sup>44</sup>

16 Although Chicago Title’s private “insuring agency agreement” required Chicago Title  
17 to provide Land Title with all of Chicago Title’s manual, instructions, underwriting memos,

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18 <sup>38</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement §9(B)(8)*.

19 <sup>39</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement 4(O)*.

20 <sup>40</sup> Singer Decl., Exhibit I, *Letter from Chicago Title to OIC*, dated August 23, 2005.

21 <sup>41</sup> See Singer Decl., Exhibit J, May 15, 2007 letter to Land Title. While Chicago Title’s motion could be read to  
22 suggest that this review was a complete surprise to Chicago Title and that it hadn’t known anything about it until  
long afterward (“the OIC never even contacted [Chicago Title] during the course of the Land Title  
investigation”), such a suggestion would be misleading. Within a week of OIC’s initiation of its record review,  
Chicago Title was already well aware of it. See Singer Decl., Exhibit K, May 22, 2007 e-mail letter from  
Fidelity National employee (and Land Title board member) Chet Hodgson to Chicago Title’s Kevin Chiarello.

23 <sup>42</sup> See Notice of Hearing filed in this matter.

<sup>43</sup> See Singer Decl. Exhibit E, Interrogatory answer no. 19, 20 and 22 to OIC’s second interrogatories to  
Chicago Title.

<sup>44</sup> Singer Decl. Exhibit E, Interrogatory answer no. 18 and 19 to OIC’s second interrogatories to Chicago Title.

1 and underwriting rules and regulations with which Land Title would be expected to comport  
2 its activities, since 1990 Chicago Title never provided any such materials to Land Title.<sup>45</sup>  
3 And although Chicago Title retained the right under this “insuring agency agreement” to  
4 examine all relevant records of Land Title to ensure that Land Title’s activities complied with  
5 WAC 284-30-800, Chicago Title chose to not ever examine Land Title’s marketing practices  
6 — not even after Chicago Title received and knew of OIC’s 2006 report.<sup>46</sup> Likewise,  
7 although Chicago Title’s “insuring agency agreement” required Land Title to provide Land  
8 Title balance sheets and profit and loss statements, when OIC asked for such documents  
9 Chicago Title could not locate any.<sup>47</sup>

9 In September of 2007, following the investigation, the OIC issued a proposed Consent  
10 Order Levying a Fine to Chicago Title.<sup>48</sup> After Chicago Title refused, on January 25, 2008,  
11 the OIC issued a Notice of Hearing with the same violations in the proposed Consent Order.<sup>49</sup>

### 12 III. EVIDENCE RELIED UPON

13 This Response Brief is based upon the Declarations of Carol Sureau, Jim Tompkins,  
14 and Alan Michael Singer filed herewith, and the pleadings and documents already on file.

### 15 IV. LEGAL AUTHORITY AND ARGUMENT

#### 16 A. THE SUMMARY JUDGMENT STANDARD.

17 It is well-settled that summary judgment is appropriate only when there is no genuine  
18 issue of material fact and the moving party is entitled to judgment as a matter of law. CR  
19 56(c); *Stenger v. State*, 104 Wn. App. 393, 398, 16 P.3d 655 (2001).

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20 <sup>45</sup> Singer Decl. **Exhibit G**, *Chicago Title / Land Title issuing agency agreement § 8(E)* and Singer Decl. **Exhibit**  
21 **E**, answer no. 28 to OIC’s second interrogatories to Chicago Title.

22 <sup>46</sup> Singer Decl. **Exhibit E**, answer no. 29 to OIC’s second interrogatories to Chicago Title (“None of [Chicago  
23 Title’s] audits examine Land Title’s marketing practices, or its giving of inducements, payments, or rewards.”);  
*see also* answer nos. 18 and 19 to OIC’s second interrogatories to Chicago Title.

<sup>47</sup> Singer Decl. **Exhibit E**, response no. 14 to OIC’s second requests for production to Chicago Title.

<sup>48</sup> See Singer Decl., **Exhibit L**, September 14, 2007 letter to Chicago Title enclosing OIC Proposed Consent  
Order D07-308.

<sup>49</sup> OIC Notice of Hearing to Chicago Title, dated January 25, 2008, on file.

1 In considering such a motion, the court must consider all facts and evidence presented,  
2 and the reasonable inferences therefrom, in a light most favorable to the nonmoving party.  
3 *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). In considering the facts,  
4 such “[f]acts asserted by the nonmoving party and supported by affidavits or any other proper  
5 evidentiary material must be taken as true.” *State ex rel. Bond v. State*, 62 Wn.2d 487, 491,  
6 383 P.2d 288 (1963). However, conclusory statements of fact will not suffice for summary  
7 judgment proceedings. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 359, 753  
8 P.2d 517 (1988); *Parking v. Colocousis*, 53 Wn. App. 649, 651-52, 769 P.2d 326 (1989). And  
9 unsupported conclusional statements and legal opinions cannot be considered in a motion for  
10 summary judgment.<sup>50</sup> *Odessa Sch. Dist. 105 v. Insurance Co. of America*, 57 Wn. App. 893,  
11 899, 791 P.2d 237 (1990) (legal opinions cannot be considered); *Carr v. Deking*, 52 Wn. App.  
12 880, 886, 765 P.2d 40 (1988), *review denied*, 112 Wn.2d 1019 (1989) (“unsupported  
13 conclusional statements cannot be considered by a court in a motion for summary judgment.”)

14 If, after considering all the facts and evidence “reasonable persons might reach  
15 different conclusions, the motion should be denied.” *Klinke v. Famous Recipe Fried Chicken,*  
16 *Inc.*, 94 Wn.2d 255, 256-57, 616 P.2d 644 (1980). Even if the basic facts are not in dispute,  
17 summary judgment is also improper if those facts are reasonably subject to conflicting or  
18 different inferences, including “as to ultimate facts such as intent, knowledge, good faith,  
19 negligence, et cetera.” *Preston v. Duncan*, 55 Wn. 2d 678, 681-82, 349 P.2d 605 (1960);  
20 *Coffel v. Clallam County*, 58 Wn. App. 517, 520, 794 P.2d 513 (1990). All inferences should  
21 be given to the non-moving party, especially when the moving party is in possession of the  
22 means to disclose or hide facts. “Summary judgment may also not be appropriate when material

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23 <sup>50</sup> Chicago Title’s motion is supported by declarations from Mr. Randolph and Mr. Kennedy, but each contains inadmissible conclusory statements and opinions. For example, the Kennedy declaration at ¶ 9 line 13 asserts Chicago Title “does not [...] exercise any control”; coincidentally, the Randolph declaration at ¶ 8 line 3 contains the same statement. Such statements are inadmissible, should be stricken, and should not be considered.

1 facts are particularly within the knowledge of the moving party.” *Gingrich v. Unigard Sec.*  
2 *Ins. Co.*, 57 Wn. App. 424, 788 P.2d 1096 (1990).

3 Here, Chicago Title erroneously assumes that tort principles of vicarious liability,  
4 independent contractor, and agency law govern. Starting from that erroneous assumption, and  
5 based on inadmissible conclusory remarks, incorrect factual assertions, and selective  
6 references to a private agreement, Chicago Title argues that it is entitled to summary judgment  
7 dismissal because it has no right to control Land Title’s marketing practices. Chicago Title  
8 also argues that OIC has no authority or basis to impute Land Title’s actions to Chicago Title.  
9 Both arguments should be rejected. First, OIC is authorized to take this action. For that  
10 reason alone, the motion should be denied. Second, even if, *arguendo*, the law of the case  
11 were whether Chicago Title had any right to control Land Title, viewing the evidence in the  
12 light most favorable to the OIC the facts establish that such a right did exist. For that reason  
13 also, the motion should be denied.

14 **B. THE OIC IS AUTHORIZED TO ACT AGAINST CHICAGO TITLE IN THIS MATTER.**

15 **1. As a preliminary matter, the OIC’s interpretation of its broad authority to**  
16 **act against Chicago Title here is entitled to considerable deference.**

17 As a preliminary matter, when considering the OIC’s authority under Title 48 RCW  
18 and Title 284 WAC in this matter, it is essential for this tribunal to afford OIC’s interpretation  
19 the considerable deference that Washington courts have said it must be afforded in its  
20 interpretation of WAC 284-30-800. *Keller v. Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276  
21 (1979); *Morin v. Johnson*, 49 Wn.2d 275, 279, 300 P.2d 569 (1956).

22 “Where the legislature charges an agency with the administration and enforcement of  
23 a statute, we give the agency’s interpretation of the statute, as well as the agency’s own rule,  
“great weight in determining legislative intent.” *Waste Mgmt. of Seattle, Inc. v. Util. &*  
*Transp. Comm’n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994) (citing *Pasco v. Public Empl.*  
*Relations Comm’n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992)). “Similarly, the United States  
Supreme Court has shown ‘great deference’ to the interpretation given a statute by the agency

1 charged with its administration and stated “[w]hen the construction of an administrative  
2 regulation rather than a statute is in issue, deference is even more clearly in order.” *Hayes v.*  
3 *Yount*, 87 Wn.2d 280, 289, 552 P.2d 1038 (1976) (citing *Udall v. Tallman*, 380 U.S. 1, 16, 13  
4 L. Ed. 2d 616, 85 S. Ct. 792 (1965); and *Zuber v. Allen*, 396 U.S. 168, 192-93, 24 L. Ed. 2d  
5 345, 90 S. Ct. 314 (1969)). Pursuant to RCW 48.02.060, the OIC is charged with enforcing  
6 Titles 48 RCW and 284 WAC, thus entitling OIC’s interpretation of its authority under these  
7 Titles to considerable deference.

8 OIC’s interpretation is also entitled to great deference because OIC has both expertise  
9 in a specialized area and quasi-judicial functions in that area. “When the agency has expertise  
10 in a specialized field of law and has quasi-judicial functions in that field,” the courts will  
11 “accord substantial weight to its construction of statutory words, phrases, and legislative  
12 intent.” *Washington Indep. Tel. Ass’n v. WUTC*, 110 Wn. App. 498, 508, 41 P.3d 1212  
13 (2002), *affirmed*, 149 Wn.2d 17, 65 P.3d 319 (2003). In addition, the court “must  
14 give substantial deference to a regulatory agency’s judgment about how best to serve the  
15 public interest.” *Washington Indep. Tel. Ass’n*, 110 Wn. App. at 516. This applies  
16 particularly to the Commissioner, who pursuant to RCW 48.01.030 exists to further the public  
17 interest through the regulation of insurance and insurance transactions under the Code:

18 The business of insurance is one affected by the public interest, requiring that  
19 all persons be actuated by good faith, abstain from deception, and practice  
20 honesty and equity in all insurance matters. Upon the insurer, the insured, their  
21 providers, and their representatives rests the duty of preserving inviolate the  
22 integrity of insurance.

23 RCW 48.01.030.

Consistent with RCW 48.01.030’s expression of public policy, the Washington  
Supreme Court has recognized that the Code’s grant of authority and discretion in the  
Commissioner is “broad” and “varied”:

The following are among the general and specific powers vested in the  
Commissioner. RCW 48.02.060(2) states the Commissioner “shall enforce the  
provisions of this [insurance] code.” *To aid the Commissioner in this task, he*

1 *is given broad power to effectuate the provisions of the code through rules*  
2 *and regulations.* RCW 48.02.060(3)(a). In addition, the Commissioner is  
3 empowered to conduct investigations to determine whether any person has  
4 violated any provision of the code (RCW 48.02.060(3)(b)), and may conduct  
5 examinations, investigations, and hearings for the efficient administration of  
6 any provision of the code. RCW 48.02.060(3)(c). The Commissioner is also  
7 given additional *broad and varied* powers to enforce the provisions of the  
8 code. RCW 48.02.080(1) provides the Commissioner may prosecute an action  
9 in court to enforce an order made by him pursuant to a code provision. RCW  
10 48.02.080(2) requires the Commissioner to certify violations of penal  
11 provisions of the code to the appropriate local prosecutor. RCW 48.02.080(3)  
12 provides that if the Commissioner has cause to believe any person is violating  
13 or is about to violate any provision of the code or any regulation or order of the  
14 Commissioner, the Commissioner may issue a cease and desist order and bring  
15 court action to enjoin the violation.

16 (Emphasis added.) *Retail Store Employees Union v. Wash. Surveying & Rating Bureau*, 87  
17 Wn.2d 887, 898-99, 558 P.2d 215, 222 (1976).

18 Other Code provisions further reflect the broad regulatory responsibilities bestowed  
19 upon the Commissioner. In RCW 48.05.030 and RCW 48.05.110, the Code prohibits insurers  
20 from transacting insurance within the scope of the Code unless the Commissioner has issued  
21 it a "Certificate of Authority." To qualify for such Certificate, insurers "must" transact or  
22 propose to transact "*only such insurance as meets the standards and requirements of this*  
23 *code,*" and must also "*[f]ully comply with, and qualify according to, the other provisions of*  
*this code.*" (Emphasis added.) RCW 48.05.040(3) and (4). The Code grants the  
Commissioner the authority to issue, amend, suspend, or even revoke an insurer's Certificate.  
RCW 48.05.110, RCW 48.05.120, RCW 48.05.140. In "addition to or in lieu of the  
suspension, revocation, or refusal to renew" a Certificate, the Code also authorizes and grants  
the Commissioner the discretion to "levy a fine upon the insurer in an amount not less than  
two hundred fifty dollars and not more than ten thousand dollars." RCW 48.05.185.

Finally, where a commissioner is entrusted with such broad discretion and  
responsibility in administering a law, such as here, a greater reliance than usual is placed upon  
his administrative statutory interpretation. *Store Employees Union v. Wash. Surveying &*

1 *Rating Bureau*, 87 Wn.2d 887, 898, 558 P.2d 215 (1976); *Bailey v. Allstate Ins. Co.*, 73 Wn.  
2 App. 442, 447, 869 P.2d 1110 (1994).

3 **2. OIC may fine title insurers/principals for their agent's/producer's inducements.**

4 **a. Under RCW 48.30.150, WAC 284-30-800, and other Code provisions, the**  
5 **Commissioner acts within his authority by fining title insurers/principals**  
6 **whose agents/producers commit inducement violations.**

7 The Code specifically provides that "[n]o insurer, general agent, agent, broker, solicitor,  
8 or other person shall, as an inducement to insurance, or in connection with any insurance  
9 transaction, provide in any policy for, or offer, or sell, buy, or offer or promise to buy or give,  
10 or promise, or allow to, or on behalf of, the insured or prospective insured in any manner  
11 whatsoever . . . [a]ny prizes, goods, wares, or merchandise of an aggregate value in excess of  
12 twenty-five dollars." RCW 48.30.150.

13 The Commissioner implemented RCW 48.30.150 in duly enacted regulation, WAC  
14 284-30-800, entitled "Unfair practices applicable to title insurers and their agents," which  
15 provides, in pertinent part:

16 (1) RCW 48.30.140 and 48.30.150, pertaining to "rebating" and "illegal  
17 inducements," are applicable to title insurers and their agents. Because those  
18 statutes primarily affect inducements or gifts to an insured and an insured's  
19 employee or representative, they do not directly prevent similar conduct with  
20 respect to others who have considerable control or influence over the selection of  
21 the title insurer to be used in real estate transactions. As a result, insureds do not  
22 always have free choice or unbiased recommendations as to the title insurer  
23 selected. To prevent unfair methods of competition and unfair or deceptive acts  
or practices, this rule is adopted.

(2) It is an unfair method of competition and an unfair and deceptive act or  
practice for a title insurer or its agent, directly or indirectly, to offer, promise,  
allow, give, set off, or pay anything of value exceeding twenty-five dollars,  
calculated in the aggregate over a twelve-month period on a per person basis in  
the manner specified in RCW 48.30.140(4), to any person as an inducement,  
payment, or reward for placing or causing title insurance business to be given to  
the title insurer.

(3) Subsection (2) of this section specifically applies to and prohibits  
inducements, payments, and rewards to real estate agents and brokers, lawyers,  
mortgagees, mortgage loan brokers, financial institutions, escrow agents, persons  
who lend money for the purchase of real estate or interests therein, building  
contractors, real estate developers and subdividers, and any other person who is

1 or may be in a position to influence the selection of a title insurer, except  
2 advertising agencies, broadcasters, or publishers, and their agents and  
distributors, and bona fide employees and agents of title insurers, for routine  
advertising or other legitimate services.

3 Together, RCW 48.30.150 and WAC 284-30-800 prevent *both* title insurers *and* their  
4 agents/producers for the unfair practice of providing anything of value in excess of \$25 in a  
5 12-month period to any person as an inducement, payment or reward for placing or causing  
6 title insurance business to be given to the insurer or agent.

7 WAC 284-30-800(1) plainly states that the illegal inducement statutes “are applicable  
8 to *title insurers and their agents.*” (Emphasis added.) WAC 284-30-800(1). WAC 284-30-  
9 800(2) also plainly states that it is an unfair and deceptive act or practice for “a *title insurer or*  
10 *its agent, directly or indirectly,* to offer, promise, allow, give, set off, or pay anything of value  
exceeding twenty-five dollars. . . .” (Emphasis added.) WAC 284-30-800(2).

11 To enable the Commissioner to carry out his or her duties and enforce the provisions  
12 of the Code, the Code broadly authorizes the Commissioner to conduct “hearings, in addition  
13 to those specifically provided for, useful and proper for the efficient administration of any  
14 provision of this code.” RCW 48.02.060(3)(c). The Code even more broadly grants the  
15 Commissioner the “authority expressly conferred upon him by or reasonably implied from the  
16 provisions of this code.” RCW 48.02.060(1).

17 WAC 284-30-800 also bolsters the conclusion that the OIC acts well within its broad  
18 grant of authority by fining title insurers for their agents’ inducement activities. This  
19 conclusion is supported by the language of WAC 284-30-800(1) itself, which offers an  
20 explanation of the unfair practice that it proscribes. It explains that because payments of more  
21 than \$25 per year “to others who have considerable control or influence over the selection of  
22 the title insurer to be used in real estate transactions” could result in an unfair practice of  
23 “insureds [] not always hav[ing] free choice or unbiased recommendations as to the title  
insurer selected,” title insurance must not be allowed to be transacted under such  
circumstances. WAC 284-30-800(1). If such payments are tolerated, the integrity of the

1 insurance transactions will be rendered suspect, at best — which would fail to meet RCW  
2 48.01.030's duty imposed on each title insurer "*and their representative*" to "abstain from  
3 deception, and practice honesty and equity in all insurance matters" so as to preserve  
4 "inviolate the integrity of insurance."

5 Similarly, RCW 48.05.040 also bolsters the conclusion that the OIC acts well within  
6 its broad grant of authority by fining title insurers for their agents' inducement activities. This  
7 provision requires *all* insurers — including title insurers — to only:

8 Transact or propose to transact in this state insurances authorized by its charter,  
9 *and only such insurance as meets the standards and requirements of this*  
code; and [f]ully comply with, and qualify according to, the other provisions of  
this code.

10 (Emphasis added.) RCW 48.05.040(3) and (4). The plain meaning of this language is that  
11 insurers may not transact insurance that does not meet "the standards and requirements" of the  
12 Code — which includes, of course, RCW 48.30.150 and WAC 284-30-800. When RCW  
13 48.05.040 and WAC 284-30-800 are read together, they prohibit title insurers from  
14 transacting title insurance — including through their agents like Land Title who may do much  
15 of the actual transacting — when "others who have considerable control or influence over the  
16 selection of the title insurer to be used in real estate transactions" have received a thing of  
value in excess of \$25 per year. WAC 284-30-800(1).

17 In interpreting and enforcing RCW 48.30.150 and WAC 284-30-800, the  
18 Commissioner has made his position clear: insurers/principals will be held liable for the acts  
19 of their agents under WAC 284-30-800. And the Commissioner has *repeatedly* informed title  
20 insurers of this position — *for decades*, in fact. For example, in a near global title industry  
21 letter dated November 1, 1989, the OIC informed the Presidents of (1) Transamerica Title  
22 Insurance Company, (2) Chicago Title Insurance Company, (3) Commonwealth Land Title  
23 Insurance Company, (4) Commonwealth Title Insurance Company, (5) First American Title  
Insurance Company, (6) Lawyers Title Insurance Corporation, (7) Mason County Title  
Insurance Company, (8) Security Union Title Insurance Company, (9) Stewart Title Guaranty

1 Company, (10) Ticor Title Insurance Company, and (11) Title Insurance Company of  
2 Minnesota, that illegal inducements would not be tolerated and that title insurers are liable for  
3 any activity conducted by their agents:

4 *Title insurers are liable for any activity conducted by their agents regarding*  
5 *this regulation [WAC 284-30-800], whether the title insurers have knowledge*  
6 *of the activity or not.*<sup>51</sup>

7 Similarly, in another letter dated January 12, 1993, former Insurance Commissioner Dick  
8 Marquardt informed the President of Commonwealth Title that insurers are responsible for the  
9 acts of their agents under RCW 48.30.140, RCW 48.30.150, and WAC 284-30-800:

10 *The insurance companies are responsible for the acts of their agents and*  
11 *shall have the responsibility for informing all of their agents as to the contents*  
12 *of this letter.*<sup>52</sup>

13 As indicated, the Insurance Commissioner's interpretation of the Insurance Code and  
14 the duly promulgated rules enacted thereunder is entitled to great deference and should be  
15 favored, particularly given the Commissioner's expertise in this area, the broad grant of  
16 authority granted to him to effectively regulate insurance and insurance transactions, and the  
17 Commissioner's strongly worded legislative mandate under RCW 48.01.030 to protect the  
18 public interest by preserving inviolate the integrity of insurance and all insurance matters. *See*  
19 *RCW 48.01.030; see also, e.g., Omega Nat'l Ins. Co., 115 Wn.2d at 427; Federated American*  
20 *Ins. Co., 108 Wn.2d at 654; Keller, 92 Wn.2d at 731; Morin, 49 Wn.2d at 279; and Sureau*  
21 *Decl. (describing the Commissioner's broad authority and discretion). Because the facts*  
22 *demonstrate that the Commissioner has acted well within his broad authority, the*  
23 *Commissioner's interpretation of the Code provisions underlying this authority is entitled to*

51 Singer Decl., Exhibit M, *Letter from OIC to David R. Porter et al.*, dated November 1, 1989 (emphasis added). This letter was also subsequently posted on the Washington Land Title Association ("WLTA") website: <http://www.wltaonline.org/download/State%20Laws.%20Regulations.%20and%20Commissioner%20Opinions/1989%20OIC-%20Interpretation%20of%20Inducement%20Regulations.pdf>.

52 Singer Decl., Exhibit N, *Letter from OIC to Commonwealth*, dated January 12, 1993 (emphasis added). This letter too was subsequently posted for all to see on the WLTA website: <http://www.wltaonline.org/download/State%20Laws.%20Regulations.%20and%20Commissioner%20Opinions/1993%20OIC-%20Providing%20to%20Employees%20Customers%20Assist.pdf>.

1 great deference, and the OIC has taken this same position consistently for decades, ever since  
2 WAC 284-30-800 was enacted, Chicago Title's motion for summary judgment should be  
3 denied.

4 These facts are similar to the situation in *Bailey v. Allstate Ins. Co.*, *supra*. There, the  
5 Court of Appeals considered the effect of certain amendments made to two provisions in the  
6 Insurance Code, RCW 48.18.290 and RCW 48.18.291, on combination homeowners auto  
7 insurance policies. *Bailey*, 73 Wn. App. at 447. The Commissioner wrote a letter in response  
8 to an inquiry asking about the effect of the amendments, and in the letter the Commissioner  
9 provided his administrative statutory interpretation of the changes made. The Court of  
10 Appeals found that the Commissioner's letter was entitled to deference:

11 Our decision is consistent with a letter issued by the Insurance Commissioner  
12 in response to an inquiry about the effect of the 1985 amendments to RCW  
13 48.18.290 and RCW 48.18.291 on combination homeowners auto insurance  
14 policies. Deference to agency interpretation of a statute is appropriate when the  
15 agency is charged with responsibility for administering that statute. *Multicare  
16 Med. Ctr. v. Department of Social & Health Servs.*, 114 Wn.2d 572, 589, 790  
17 P.2d 124 (1990). In 1985 the Legislature simultaneously changed the  
18 cancellation notice requirement of RCW 48.18.290 from 20 to 45 days and  
19 also added the words "wholly or in part" to RCW 48.18.291. Laws of 1985, ch.  
20 264, §§ 17, 18. Before these amendments, both RCW 48.18.290 and RCW  
21 48.18.291 required 20 days' notice, so there was never any confusion as to  
22 how much cancellation notice an insurer had to give. In his letter, the  
23 Commissioner advised that combination policies are subject to the 20-day  
cancellation notice requirement of RCW 48.18.291 because that statute's 1985  
amendment makes its provisions applicable to policies involving *any* use of a  
private auto. Thus, even the homeowner part of a combination policy is not  
enough to bring that policy under the 45-day notice requirement of RCW  
48.18.290. The Commissioner tacitly determined that the subject of a policy's  
coverage, not its cancellation provision, dictates the applicable statute, a  
position which supports our decision.

20 *Bailey*, 73 Wn. App. at 447-48. Likewise here, the Commissioner's present action against  
21 Chicago Title is well taken and entitled to great deference. For all of these reasons, Chicago  
22 Title's summary judgment motion should be denied.

1                   **b. Washington law makes clear that the acts of an agent are imputed to the**  
2                   **principal — and this rule applies to title insurers and their agents.**

3                   In its Motion, Chicago Title argues that summary judgment is proper because it cannot  
4                   be held vicariously liable for the acts of its agents. But Chicago Title's argument is based  
5                   upon the inapplicable legal theory of vicarious tort liability — and this is not a tort case.  
6                   Washington law makes clear that a title insurer like Chicago Title can be held liable in an  
7                   administrative insurance proceeding such as this under the agency principle of imputation.

8                   For example, in *American Fidelity and Casualty Company v. Backstrom*, 47 Wn.2d  
9                   77, 287 P.2d 124 (1955), the Washington Supreme Court held that the law imputes to the  
10                  principal the acts of his agent. In *Backstrom*, an individual was appointed by an insurer to be  
11                  a limited agent with the authority to solicit business on behalf of the insurer and receive and  
12                  forward premium payments, but not to bind risk to the insurer. *Id.* at 79. At some point, the  
13                  agent sold a policy and informed the insurer of the facts relating to the policy and  
14                  recommended a course of action that the company followed. A claim was later made against  
15                  the policy and the insurer sought to deny coverage on grounds the agent's actions were not  
16                  imputed to the insurer and not binding. The Court disagreed and held the agent was acting  
17                  within his scope of authority, despite his limited appointment agency and lack of authority to  
18                  bind the insurer.

19                  In making its decision, the *Backstrom* Court, citing its prior decision in *Miller v.*  
20                  *United Pacific Casualty Company*, 187 Wn. 629, 60 P.2d 714 (1936), articulated the general  
21                  rule of imputation, which applies to this case:

22                  The law imputes to the principal, and charges him with, all notice or  
23                  knowledge relating to the subject-matter of the agency which the agent  
                  acquires or obtains while acting as such agent and within the scope of his  
                  authority, which he may previously have acquired, and which he then had in  
                  mind, or which he had acquired so recently as to reasonably warrant the  
                  assumption that he still retained it. Provided, however, that such notice or  
                  knowledge will not be imputed: (1) Where it is such as it is the agent's duty  
                  not to disclose, (2) Where the agent's relations to the subject-matter are so  
                  adverse as to practically destroy the relation of agency, and (3) Where the

1 person claiming the benefit of the notice, or those whom he represents,  
2 colluded with the agent to cheat or defraud the principal.

3 *Backstrom*, 47 Wn.2d at 82, quoting *Miller*. Ultimately, in both *Backstrom* and *Miller*, legal  
4 mistakes were made by insurance agents, which the insurers attempted to disavow after  
5 claims were made on the policies. In neither case were the agents deceitful or in collusion  
6 with the insureds. In neither case were the agents specifically authorized to make the  
7 mistakes. Nevertheless, in both cases, Washington courts affirmed the general rule that the  
8 agents' knowledge and actions were imputed to the insurers even though the insurers knew  
9 nothing of the mistakes.

10 As to the nature of the acts of Land Title on behalf of Chicago Title, none of the three  
11 *Backstrom* exceptions apply to this case. And the law is clear that if none of the exceptions  
12 apply, the acts of the agent are imputed to the principal, regardless of fault, knowledge, or  
13 control. Ultimately, regardless of the facts, because none of the *Backstrom* exceptions apply  
14 in this case, the controlling rule of law provides that the acts of the agent (i.e., Land Title) are  
15 imputed to the title insurer/principal (i.e., Chicago Title), regardless of any extraneous factors  
16 like fault, knowledge, or control.

17 Moreover, the Washington Legislature knew how to explicitly reject *Backstrom's* rule  
18 of imputation of an agent/ licensee's knowledge and notice to the licensee's principal — but it  
19 chose not to with respect to title insurance in the Insurance Code. For example, the legislature  
20 chose to do so in Chapter 18.86 RCW, dealing with real estate brokerage relationships:

21 **RCW 18.86.100. Imputed knowledge and notice.**

22 (1) Unless otherwise agreed to in writing, a principal does not have knowledge  
23 or notice of any facts known by an agent or subagent of the principal that are  
not actually known by the principal.

(2) Unless otherwise agreed to in writing, a licensee does not have knowledge  
or notice of any facts known by a subagent that are not actually known by the  
licensee. This subsection does not limit the knowledge imputed to a real estate  
broker of any facts known by an associate real estate broker or real estate  
salesperson licensed to such broker.

1 There is a “presumption that the Legislature does not engage in unnecessary or meaningless  
2 acts.” *Bailey v. Allstate Ins. Co.*, 73 Wn. App. 442, 446-47, 869 P.2d 1110 (1994), citing  
3 *State v. McCullum*, 98 Wn.2d 484, 493, 656 P.2d 1064 (1983).

4 Could imputing liability for an agent’s actions to the title insurer/principal seem like a  
5 harsh result for the principal? Well, the principal may think so — and apparently Chicago  
6 Title does here. But as Duke University Professor Deborah A. DeMott explained, while to  
7 some the imputation rule may seem harsh, it protects the greater good by its operation:

8 Basic agency doctrines are not fault-based; the legal consequences of an  
9 agent’s actions are attributable to a principal even when the principal was  
10 without fault in selecting or monitoring the agent. Basic agency doctrines also  
11 operate on an all-or-nothing basis; either the legal consequences of an agent’s  
12 actions are attributable to the principal, or they are not. If an agent acts with  
13 actual or apparent authority on behalf of a principal, the principal is bound by  
14 what the agent did, even when the principal did not realize any benefit as a  
15 result. Thus, agency doctrines may strike some as unduly severe and  
16 unmodulated by concern for the specifics of individual cases. Some may be  
17 troubled by the conclusion that an agent may have acted “on behalf of” a  
18 principal when, in fact, the principal did not benefit as a consequence of the  
19 agent’s actions.<sup>53</sup>

20 The facts of this case mitigate any perceived harshness here. Chicago Title has always  
21 had the unfettered right to scrutinize every conceivable financial and other marketing expense  
22 record Land Title has to ensure that it is transacting Chicago Title’s title insurance business in  
23 a manner that meets the standards and requirements of RCW 48.30.140-150 and WAC 284-  
30-800. Chicago Title privately contracted with Land Title to give Chicago Title the right to  
demand that Land Title annually provide it with information showing all of Land Title’s  
marketing efforts and expenses. That agreement also required Chicago Title to provide

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<sup>53</sup> Singer Decl., Exhibit O, Deborah A. DeMott, *Article: When Is a Principal Charged With An Agent’s Knowledge?*, 13 Duke J. Comp. & Int’l L. 291, 319 (2003). In this case, any perceived harshness is lessened by the fact that Chicago Title’s private “issuing agency agreement” with Land Title contains indemnification language. See Singer Decl., Exhibit G, *Chicago Title / Land Title issuing agency agreement § 9* (contemplating that Land Title must reimburse Chicago Title for all losses it incurs by reason of any Land Title acts or omissions that violate state laws or state regulations.) Thus, Chicago Title’s agreement with Land Title appears to allow Chicago Title to look to its agent Land Title for reimbursement of all fine amounts it pays to the OIC because of Land Title’s illegal inducement activity. In fact, this indemnification provisions appear to highlight that Chicago Title contemplated and understood that it could be held liable for Land Title’s regulatory violations.

1 guidance to Land Title in how Land Title would be expected to comport its business to meets  
2 the standards and requirements of Washington law and Chicago Title's expectations. Yet,  
3 Chicago Title failed to do any of this. Chicago Title knew about the problem of inducement  
4 activity in the industry — including problems with Chicago Title itself — from the  
5 Commissioner's clear and detailed 2006 report. Yet, Chicago Title did *nothing* in response to  
6 this report. Chicago Title does no marketing at all in Land Title's counties, and is completely  
7 reliant upon Land Title to make Chicago Title money by bringing in new title insurance  
8 business. Yet, Chicago Title chose to turn a blind eye to the illegal inducement activity that  
9 OIC had told Chicago Title about and had warned Chicago Title could result in future  
enforcement actions.

10 Other sound reasons for imposing imputation against Chicago Title here have been  
11 recognized by other scholars. Professor Marin R. Scordato, *Article: Evidentiary Surrogacy*  
12 *And Risk Allocation: Understanding Imputed Knowledge And Notice In Modern Agency Law*,  
13 10 Fordham J. Corp. & Fin. L. 129 (2004) recognized that in a number of compelling  
14 circumstances, imputation makes particularly good sense, such as the one articulated in the  
Restatement, from which he quoted:

15 The rules designed to promote the interests of these enterprises are necessarily  
16 accompanied by rules to police them. It is inevitable that in doing their work,  
17 either through negligence or excess of zeal, agents will harm third persons or  
18 will deal with them in unauthorized ways. *It would be unfair for an enterprise*  
19 *to have the benefit of the work of its agents without making it responsible to*  
20 *some extent for their excesses and failures to act carefully.* The answer of the  
21 common law has been the creation of special agency powers or, to phrase it  
22 otherwise, the imposition of liability upon the principal because of  
23 unauthorized or negligent acts of his servants and other agents. These powers  
or liabilities are created by the courts primarily for the protection of third  
persons, either those who are harmed by the agent or those who deal with the  
agent. In the long run, however, they inure to the benefit of the business world  
and hence to the advantage of employers as a class, the members of which are

1 plaintiffs as well as defendants in actions brought upon unauthorized  
2 transactions conducted by agents. (Emphasis added)<sup>54</sup>

3 This resembles the Chicago Title situation, where for decades Chicago Title has reaped the  
4 benefit of its agent/producer Land Title's marketing activities, at least some of which  
5 allegedly violated WAC 284-30-800. But, as indicated, even after Chicago Title learned of  
6 the inducement problems from the OIC's 2006 report, Chicago Title still did nothing to ensure  
7 that the title insurance business it was transacting through Land Title met the standards and  
8 requirements of Washington law. In such a circumstance, as Professor Scordato emphasized,  
9 "it would be unfair for an enterprise to have the benefit of the work of its agents without  
10 making it responsible to some extent for their excesses and failures to act carefully."

11 Professor Scordato made further equally persuasive and pertinent observations  
12 explaining why imputation to Chicago Title makes such good sense:

13 Given that the principal is the one who generally selects and hires the agent,  
14 who monitors the agent's activity and compensates him, who has the power to  
15 terminate the agency and on whom the agent may depend for future references  
16 and referrals, it is, in general, the principal who is in the best position to  
17 manage the risk of a possible failed transmission.<sup>55</sup>

18 Professor Scordato later mirrored this sentiment, having noted it in a tentative draft comment  
19 to Section 5.03 of the Restatement. The Professor said its inclusion amounted to a "source of  
20 optimism":

21 Imputation creates incentives for a principal to choose agents carefully and to  
22 use care in delegating functions to them. Additionally, imputation encourages a  
23 principal to develop effective routines for the transmission of material facts,  
while discouraging practices that isolate the principal from facts known to an  
agent. ... Imputation thus recognizes the efficiencies to be achieved in many  
situations when parties communicate through agents instead of through direct  
principal-to-principal communication.<sup>56</sup>

<sup>54</sup> Singer Decl., Exhibit P, Marin R. Scordato, *Article: Evidentiary Surrogacy And Risk Allocation: Understanding Imputed Knowledge And Notice In Modern Agency Law*, 10 Fordham J. Corp. & Fin. L. 129, 149, fn. 82 (2004), quoting *Restatement (Second) of Agency* § 8A cmt. a (1958) (emphasis in original).

<sup>55</sup> Singer Decl., Exhibit P, Scordato, *Evidentiary Risk*, 10 Fordham J. Corp. & Fin. L. at 150.

<sup>56</sup> Singer Decl., Exhibit P, Scordato, *Evidentiary Risk*, 10 Fordham J. Corp. & Fin. L. at 160, quoting *Restatement (Third) of Agency* § 5.03 cmt. b (Tentative Draft No. 3, 2002).

1 This makes sense, just as Professor Scordato observed, and it makes particular sense when  
2 applied against Chicago Title here. Chicago Title is in the best position to select and hire its  
3 title insurance agent/producer. Imputation creates incentives for a principal like Chicago Title  
4 to choose agents carefully and to use care in delegating functions to them. It also would  
5 encourage Chicago Title to develop “effective routines for the transmission of material facts,  
6 while discouraging practices that isolate the principal from facts known to an agent.” After  
7 all, Chicago Title already has an agreement that, as indicated, authorizes it to so monitor Land  
8 Title’s marketing activities, both through periodic audits and through information required  
9 from Land Title (but apparently never asked for) annually. It just appears that in the past,  
10 Chicago Title has chosen to do nothing, even when confronted with the reality of inducements  
11 in Washington. And it also makes particular sense to apply imputation to Chicago Title, who  
12 “communicate[s] through agents instead of through direct principal-to-principal  
13 communication.”

14 Chicago Title tries to avoid this imputation, and consequently its own responsibilities,  
15 by raising two different, but equally absurd arguments. First, Chicago Title argues that its  
16 private “issuing agency agreement” somehow precludes this matter. Such an argument seeks  
17 to undermine the Commissioner’s regulatory responsibilities with a private, independent  
18 agreement to which the Commissioner was not a signatory. Such an argument should be  
19 rejected as absurd. After all, if regulated entities could so escape regulation simply by  
20 entering into private agreements with third parties, the important public interests and purposes  
21 advanced by such regulation would be vastly undermined, if not thwarted outright. Second,  
22 Chicago Title argues that this action should not be allowed because Chicago Title does not  
23 market its title insurance, Land Title is the only one that markets — and it supposedly only  
does so for itself — and its private “issuing agency agreement” purportedly prevents Land  
Title from using Chicago Title’s name in advertising or printing other than to indicate that  
Land Title is a policy-issuing agent of Chicago Title. This argument defies reality and should  
be rejected as equally absurd. What about the reality that since Chicago Title and Land Title

1 entered into this private "issuing agency agreement" in 1992, Land Title has written title  
2 insurance policies for no other title insurer? What about Land Title's website that proclaims  
3 Land Title's "national website" happens to also be Chicago Title's? The reality is that since  
4 1992, Land Title has been Chicago Title's exclusive agent/producer. The reality is that  
5 Chicago Title is a member of a group of companies that writes 28% of all title insurance  
6 transacted in the United States. Chicago Title's argument seeks to defy reality. Apparently it  
7 wants us to conclude that it is reasonable and normal for it to *not* conduct any marketing  
8 designed to generate new title insurance business for itself. Chicago Title argues that Land  
9 Title markets not for Chicago Title, but solely for itself. Again, such is patently absurd and  
10 defies reality. Since 1992, Land Title and Chicago Title have symbiotically worked together.  
11 Land Title has marketed and generated new Chicago Title title insurance business, and  
12 Chicago Title has in return provided Land Title with the access to an authorized title insurer  
13 holding the Certificate of Authority needed to issue title insurance. Since 1992, Land Title  
14 has marketed not only for itself, but effectively for both entities.

15 Because the imputation rule also authorizes the OIC's action against Chicago Title  
16 here, for this reason also the motion for summary judgment should be denied.

17 **c. Washington law also authorizes the imposition of fines against a principal  
18 for the acts of its agent under the principle of apparent authority.**

19 Yet another reason to deny Chicago Title's Motion for Summary Judgment is that  
20 Washington law also provides that an insurer/principal may be "bound by acts or  
21 representations of its agent which are within the scope of his apparent authority,  
22 notwithstanding the fact that they may be in violation of private instructions or limitations  
23 upon his authority." *Fanning v. Guardian Life Ins. Co. of America*, 59 Wn.2d 101, 104-105,  
366 P.2d 207 (1961) (citing *Restatement (Second) of Agency*, § 8.) Similarly, the vast  
majority of secondary legal authorities provide that the insurer/principal generally has  
responsibility for the acts of its agents — even if those acts are forbidden or not intended.  
*See, e.g.,* Thomas V. Harris, *Washington Insurance Law*, § 57.2 (Bender 2007); *Appelman on*

1 *Insurance Law and Practice*, § 44.7 (Matthew Bender 2008); Deborah A. DeMott, *Article:*  
2 *When Is a Principal Charged With An Agent's Knowledge?*, 13 Duke J. Comp. Int'l L 291  
3 (2003). "Among the matters of fact to be considered in determining if an agent's conduct,  
4 although not authorized, is nevertheless within the scope of her agency are the time, place and  
5 purpose of the act, and whether or not the master had reason to expect that such an act would  
6 be done." *Cameron v. Downs*, 32 Wn. App. 875, 881, 650 P.2d 260 (1982) (citing  
7 Restatement (Second) of Agency § 229 (1958).)

8 Applying this law to the instant case, it is unequivocally the case that Chicago Title  
9 had every reason to expect that Land Title would solicit, advertise, and market Chicago  
10 Title's policies as an inextricable part of their symbiotic title insurance relationship. After all,  
11 such acts were essential to generating business for both Chicago Title and Land Title.  
12 Chicago Title admits that no one else marketed Chicago Title's title insurance. Certainly  
13 Chicago Title didn't. That left all necessary and appropriate marketing efforts to be carried  
14 out exclusively by Land Title. As mentioned, Land Title's website tells the public that its  
15 "National Website" is Chicago Title's website. Land Title is Chicago Title's exclusive agent.  
16 Chicago Title is the only insurer with any valid appointment for Land Title. Land Title  
17 transacts title insurance for no other title insurer. Chicago Title is the only one of the two that  
18 can issue a policy of title insurance, as it is the only entity among the two holding a Certificate  
19 of Authority from OIC. Chicago Title was, and remains, well aware of the competitive nature  
20 of the title insurance business and the marketing techniques (i.e., reverse competition) used in  
21 the title industry for decades. And despite Chicago Title's attempts in the Motion for  
22 Summary Judgment to distance itself from Land Title, from common ownership to board  
23 members to the exclusivity of the relationship between the two entities Chicago Title and  
Land Title do not act in isolation — the inescapable truth is that they act in concert to sell  
more and more of Chicago Title's title insurance to Washington consumers.

As a practical matter, Chicago Title's ability to profit from the sale of its title  
insurance, as well as Land Title's commissions, both depend upon having customers to whom

1 they sell Chicago Title's title insurance policies. Despite any terms of any private "insuring  
2 agency agreement" with Land Title, Chicago Title left it solely to Land Title to drum-up  
3 business. If Land Title violated an administrative rule in the process of marketing this title  
4 business, then the imputation rule forecloses Chicago Title's ability to insulate itself from the  
5 regulatory consequences of this arrangement's failure to meet the standards and requirements  
6 under the Insurance Code. Since the principle of apparent authority also authorizes OIC's  
7 action here, for this reason also Chicago Title's motion should be denied.

8 **d. The cases cited by Chicago Title on the various inapplicable tort liability  
9 theories are inapposite, and even support the OIC's position.**

10 At pages 8 and 9 of its motion, Chicago Title relies on numerous inapposite cases. All  
11 are of little to no value here. They are simply all tort cases interpreting the principle of  
12 vicarious tort liability, as opposed to insurance regulatory matters.

13 Similarly, Chicago Title's reliance on the case of *Fidelity Title Co. v. State of Wash.*  
14 *Dept. of Revenue*, 49 Wn. App. 662, 745 P.2d 530 (1987) is equally unhelpful. Its chief  
15 purpose was not to merely state that title insurance agents "generate business for their own  
16 account rather than for an insurer" as Chicago Title implies. While it is true that the *Fidelity*  
17 *Title* Court observed that the title insurance agent in that case generated business for its own  
18 account, the Court also observed that the agent similarly generated business for the title  
19 insurer's account as well. In the very next sentence, in fact, the Court noted that the agent  
20 also "places" business with the agent's appointing title insurer so it could "underwrite the  
21 slight risk that Fidelity has not properly done its work." *Id.* at 669-70. The Court also made  
22 clear that while it was convinced the Legislature "did not intend that title insurance agents be  
23 classified as insurance agents," the court only said this was true "for B&O tax purposes." *Id.*  
24 Thus, Chicago Title's suggestion that *Fidelity Title's* reasoning applies to this insurance  
25 regulatory matter is simply not supported by *Fidelity Title*.

26 Yet, to the extent *Fidelity Title* does offer any guidance in this matter, it actually  
27 supports the OIC's position. In particular, after the *Fidelity Title* court discussed the unique

1 nature of the title insurance industry, the court agreed with Fidelity's contention that "its  
2 business is *identical* with that of a title insurer's branch office." (Emphasis added.) *Id.* at  
3 665-66. This would support the conclusion that the Commissioner may take enforcement  
4 action against Chicago Title for the illegal inducements undertaken by its agent, Land Title.

5 Moreover, while Chicago Title attempts to distance itself from Land Title by arguing  
6 that it should not be responsible for its agent's acts because Land Title markets its own  
7 services separate and apart from Chicago Title's title insurance, *Fidelity Title* undercuts this  
8 argument by explaining how the relationship between the two (i.e., title insurer/principal-  
9 agent) is much closer. Close enough, in fact, that the Court likened the relationship to a  
10 marriage:

11 Insurer-agent arrangements thus involve marriages of a sort between the  
12 agent's title plant and personnel and the insurer's financial -- and therefore risk  
13 underwriting -- capacity.

14 *Id.* The court then went on to state that this "marriage" was so close, in fact, that there was no  
15 difference in the functional method employed by the two types of entities engaged in the title  
16 insurance business—the difference, if any, was in form. *Id.* Thus, to the extent *Fidelity Title*  
17 applies here at all, it actually supports the OIC's action against Chicago Title.

18 **e. In any event, even if, *arguendo*, this tribunal considers whether Chicago  
19 Title had a "right of control," the facts show that Chicago Title did have  
20 such a right, or, at best, when viewed in a light most favorable to the OIC,  
21 the facts are disputed, warranting denial of the motion.**

22 While Chicago Title has raised arguments based on inapposite principles of vicarious  
23 tort liability, tort liability based on an "independent contractor" analysis, and other tort  
liability theories, all of which are inapposite in the administrative / regulatory context here,  
the facts also show that Chicago Title *did* have a "right to control" Land Title such that its  
motion should be denied on this basis as well. Alternatively, viewed in a light most favorable  
to the OIC, there remain genuine issues of material fact (assuming, *arguendo*, the inapposite  
"control" arguments are considered), also precluding summary judgment.

Chicago Title and Land Title share the same corporate connections. Employees of

1 Chicago Title's parent company hold more than a third of Land Title's board positions. A  
2 large stake of shares in Land Title stock (almost half) are owned by one of the parent's  
3 subsidiaries — which previously also appointed Land Title as its agent as well. These all  
4 support an inference that Chicago Title had some right to control Land Title.

5 Chicago Title's private agency agreement authorizes Chicago Title to closely  
6 scrutinize all aspects of Land Title's title insurance solicitation activities, and even grants  
7 Chicago Title the right to essentially cancel its relationship with Land Title if Chicago Title  
8 determines that Land Title is transacting Chicago Title's title insurance in a manner  
9 inconsistent with the standards and requirements of the Code — including WAC 284-30-  
800.<sup>57</sup> This too supports an inference that Chicago Title had some right to control Land Title.

10 Although Chicago Title's private "insuring agency agreement" required Chicago Title  
11 to provide Land Title with all of Chicago Title's manual, instructions, underwriting memos,  
12 and underwriting rules and regulations with which Land Title would be expected to comport  
13 its activities, since 1990 Chicago Title never provided any such materials to Land Title.<sup>58</sup>  
14 And although Chicago Title retained the right under this "insuring agency agreement" to  
15 examine all relevant records of Land Title to ensure that Land Title's activities complied with  
16 WAC 284-30-800, Chicago Title chose to not ever examine Land Title's marketing practices  
17 — not even after Chicago Title received and knew of OIC's 2006 report.<sup>59</sup> Likewise,  
18 although Chicago Title's "insuring agency agreement" required Land Title to provide Land  
19 Title balance sheets and profit and loss statements, when OIC asked for such documents

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21 <sup>57</sup> Of course, Chicago Title is also always free to cancel its appointment of Land Title as its agent, and to choose  
22 to appoint another licensee/agent to transact Chicago Title's title insurance business in a manner that meets the  
standards and requirements of Titles 48 RCW and 284 WAC.

23 <sup>58</sup> Singer Decl. Exhibit G, *Chicago Title / Land Title issuing agency agreement § 8(E)* and Singer Decl. Exh \_\_, answer no. 28 to OIC's second interrogatories to Chicago Title.

<sup>59</sup> Singer Decl. Exhibit E, answer no. 29 to OIC's second interrogatories to Chicago Title ("None of [Chicago Title's] audits examine Land Title's marketing practices, or its giving of inducements, payments, or rewards."); see also answer nos. 18 and 19 to OIC's second interrogatories to Chicago Title.

1 Chicago Title could not locate any.<sup>60</sup> Again, these facts also support an inference that  
2 Chicago Title had some right to control Land Title.

3 All of these facts are inconsistent, at best, with the suggestion that Chicago Title had  
4 no right of control, though they do suggest that Chicago Title failed to exercise the right of  
5 control that it has. Since the facts show, when viewed in a light most favorable to OIC, that  
6 Chicago Title *did* have a right to control Land Title with respect to the relevant conduct at  
7 issue here, for this reason also Chicago Title's motion should be denied.

8 Alternatively, the motion should also be denied because many facts related to  
9 *Hollingberry* factors and the "right of control" arguments that Chicago Title raised in its  
10 motion have not yet been revealed but are exclusively within the control of the moving party.  
11 Such facts relating to "control" that have yet to be revealed include the day-to-day  
12 interactions between the entities and their employees, any testimony whatsoever from Land  
13 Title relating to the question about whom they were marketing for, facts regarding the  
14 premium dollars Land Title generated for Chicago Title since 1992, relevant non-written  
15 information exchanged between the entities, etcetera. Much of this evidence and information  
16 is exclusively in Chicago Title's control. "Summary judgment may also not be appropriate  
17 when material facts are particularly within the knowledge of the moving party." *Gingrich*, 57  
18 Wn. App. at 429. While Chicago Title offered declarations from witnesses broadly declaring  
19 that Chicago Title "does not control" Land Title, such conclusory statements are inadmissible.  
20 *Carr*, 52 Wn. App. at 886. As indicated, even if the basic facts are not in dispute, summary  
21 judgment is also improper if those facts are reasonably subject to conflicting or different  
22 inferences, including "as to ultimate facts such as intent, knowledge, good faith, negligence,  
23 et cetera." *Preston*, 55 Wn. 2d at 681-82; *Coffel*, 58 Wn. App. at 520. For all of these  
reasons, the motion should be denied.

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<sup>60</sup> Singer Decl. Exhibit E, response no. 14 to OIC's second requests for production to Chicago Title.

1           **3. Chicago Title’s final argument, that the OIC’s action constitutes “impermissible**  
2           **de facto rulemaking,” provides no basis for summary judgment dismissal.**

3           Chicago Title’s final argument is that OIC’s attempt to hold Chicago Title “civilly or  
4           criminally liable [...] because it has, over the years, sent ‘advisory’ letters to various title  
5           insurers stating that it contends underwriters are liable for violations of the Inducements  
6           Regulation committed by UTCs” amounts to “impermissible de facto rulemaking,” warranting  
7           dismissal. However, Chicago Title misapprehends the facts and confuses the issues.

8           As indicated, for several reasons, the OIC is authorized to take the present regulatory  
9           action against Chicago Title. First, under RCW 48.30.150, WAC 284-30-800, and other Code  
10          provisions, the Insurance Commissioner acts within his or her authority by fining title  
11          insurers/principals whose agents/producers commit inducement violations. Second,  
12          Washington law makes clear that the acts of an agent are imputed to the principal, such as  
13          between title insurers and their agents/producers. Third, Washington law also makes clear  
14          that the acts of an insurance agent are imputed to the insurer/principal under the principle of  
15          apparent authority. Fourth, though the question of whether Chicago Title had a “right to  
16          control” is not the proper or applicable inquiry governing this matter, even if it were, the facts  
17          show that such control existed, or that sufficient factual dispute exists to warrant denying the  
18          motion. Misapprehending this, Chicago Title incorrectly, and in a confusing manner, seeks to  
19          conflate the issue into whether OIC’s action is “impermissible, de facto rulemaking.”

20          None of the cases cited by Chicago Title in support of its argument are applicable.  
21          The OIC has not engaged in impermissible rulemaking. The only rule at issue, WAC 284-30-  
22          800, has been duly enacted and properly promulgated, and its validity is in no way at issue.  
23          Quite simply, Chicago Title’s argument is meritless and should be rejected.

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V. CONCLUSION

Based on the foregoing, the OIC respectfully requests that this tribunal enter an Order denying Chicago Title's Motion for Summary Judgment.

DATED this 24<sup>th</sup> day of September, 2008.

OFFICE OF INSURANCE COMMISSIONER

By: 

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Staff Attorney  
Legal Affairs Division