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The Honorable Cindy L. Burdue
Hearing Scheduled: Oct. 8, 2008
With Oral Argument

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

In Re:

CHICAGO TITLE INSURANCE COMPANY,

An authorized insurer

Docket No. 2008-INS-0002
OIC No. D07-308

CHICAGO TITLE INSURANCE
COMPANY'S REPLY TO OFFICE OF
INSURANCE COMMISSIONER'S
RESPONSE TO MOTION FOR
SUMMARY JUDGMENT RE:
AGENCY LIABILITY

Chicago Title Insurance Company ("CTIC") hereby replies to the Response and Opposition to Chicago Title Insurance Company's Motion for Summary Judgment Re: Agency Liability (the "Response"), filed by the Washington Office of the Insurance Commissioner (the "OIC").

REPLY

CTIC's Motion for Summary Judgment Re: Agency Liability (the "SJ Motion") was limited to a single issue that is dispositive in this matter – whether CTIC is liable for the actions of an independent third-party title company, Land Title of Kitsap County, Inc. ("Land Title").

CTIC provided uncontroverted evidence as to the terms of the written agreement between CTIC and Land Title as well as uncontroverted evidence from both parties to that contract as to the

1 relationship and conduct of the parties. Under well established common law principles, when CTIC
2 does not have the contractual right to control the marketing practices of Land Title and does not in
3 practice, purport to control Land Title's business practices except in the area of underwriting, CTIC
4 is not liable for Land Title's alleged violations of WAC 284-30-800 (the "Inducement Regulation").

5 The OIC has responded with 35-pages of factual assertions, which are irrelevant to the
6 inquiry, and which fail to create an issue of fact that is material to the issue of vicarious liability.
7 Likewise, the OIC's legal argument is inapplicable to the issue of agency liability pending before
8 this Court.

9 An overriding principal is that because the OIC proposes to fine CTIC for the conduct of
10 another regulated entity, the OIC's action must be authorized by statute or by a rule duly
11 promulgated under the Administrative Procedures Act (SJ Motion at pp. 13-14.) The OIC has failed
12 to cite any statute or rule providing for such third party liability, nor has it responded to CTIC's
13 argument that it is entitled to summary judgment on such grounds.

14 A. There is no Statutory or Regulatory Basis for Third-Party Liability for Violations of
15 the Inducement Regulation.

16 The OIC argues that it has authority under statutes and regulations to fine a third-party, in
17 this case CTIC, for another company's violations of the Inducement Regulation but the sources of
18 authority for this extraordinary proposition cited by OIC are RCW 48.30.150 and WAC 284-30-800.
19 (Response at 2:18-19).

20 RCW 48.30.150 regulates illegal inducements by an "insurer, general agent, agent, broker,
21 solicitor, or other person. . . ." It is clear that both title companies, such as CTIC, and agents, such as
22 Land Title, are subject to the regulation - but nothing in the statute states that any regulated entity is
23 liable for the illegal conduct by any other regulated entity.

24 Likewise, the Inducement Regulation, which reads "[i]t is an unfair method of competition
25 and an unfair and deceptive act or practice for a title insurer or its agent, directly or indirectly, to
26

1 offer, promise, allow, give, set off, or pay anything of value exceeding twenty-five dollars”
2 WAC 284-30-800(2) (emphasis added), regulates both title insurers and agents but nothing in the
3 regulation states that one regulated entity is liable for illegal conduct by another regulated entity.

4 CTIC concurs that the Inducement Regulation is applicable to an underwritten title company
5 (“UTC”) such as Land Title as well as to an insurer such as CTIC. However, neither RCW
6 48.30.150 nor WAC 284-30-800(2) purport to define any circumstance under which a title insurer
7 may be liable for violations by its agents, nor does the OIC explain how these provisions could be
8 construed to impose third-party liability.

9 RCW 48.30.010, which provides the statutory authority for the OIC’s promulgation of the
10 Inducement Regulation, authorizes the OIC to impose a fine on the “person violating the regulation.”
11 This statute, which specifically addresses remedies and penalties for unfair practices, provides that
12 “[i]f the commissioner has cause to believe that any person is violating any such regulation¹, the
13 commissioner may order such person to cease and desist therefrom. . . . [and] he or she may be fined
14 by the commissioner a sum not to exceed two hundred and fifty dollars for each violation committed
15 thereafter. RCW 48.30.010(5). The OIC has not, and cannot, point to any statute or regulation²
16 which grants it the authority to fine a party other than the one which violated the Inducement
17 Regulation.

18 Having failed to point to any statute or regulation which could reasonably be interpreted to
19 authorize the imposition of third-party liability, the OIC makes the fall-back argument that it has the
20 authority to fine underwriters because, almost two decades ago, it sent letters to various title insurers
21 articulating its contention that underwriters are liable for violations of the Inducement Regulation
22

23 ¹ the Inducement Regulation is one “such regulation” promulgated under this provision’s grant of the
24 authority to the OIC to regulated unfair or deceptive trade practices in insurance. *See* WAC 284-30-
800.

25 ² As addressed in the SJ Motion, the OIC could, presumably, adopt a rule that provides for such
26 third-party liability. Adoption of such a rule, would, however, require that the OIC conform with the
statutory requirements of the rule-making process, which would provide for, among other things,
public input and comment.

1 committed by UTCs.³ This argument is wholly without merit because the OIC never formalized its
2 position by adopting a rule as required by the APA. Indeed, the OIC did not even publish its
3 position in the Washington State Registrar as required for its position become an interpretive or
4 policy statement.⁴

5 B. The OIC is not Entitled to Deference.

6 Through this proceeding, the OIC is seeking to impose liability that is not grounded in statute
7 or regulation. The OIC asks that the Court to ignore this fundamental and fatal flaw, and grant
8 deference to the OIC's self-proclaimed authority to fine non-violators for violations of the
9 Inducement Regulation committed by others. In effect, the OIC requests that the Court grant it *carte*
10 *blanche* to determine the scope of its own authority and to allow it to act without judicial oversight.
11 There is no legal basis for such expansive deference and, moreover, the OIC's implication that
12 deference, even where it is appropriate, precludes judicial review is erroneous.⁵

13 In this case, no deference is appropriate. The cases which the OIC cites for the proposition
14 that it is entitled to deference are inapposite or support the proposition that the OIC is not entitled to

15 _____
16 ³ Moreover, *Bailey v. Allstate Insurance Co.*, 73 Wn. App. 442, 869 P.2d 1110 (1994), to which the
17 OIC cites for the proposition that the Court should provide deference to that letter, is wholly
18 inapplicable. In *Bailey*, the Court was addressing which of two statutory provisions relating to
19 cancellation of insurance policies was applicable to an automobile insurance policy – one that
20 required 45-days notice, and one that required 20-days notice and specifically referenced automobile
21 insurance. The court determined that the later-adopted, and more specific, statute governed, and
22 noted that its ruling was consistent with a letter issued by the OIC. *Bailey*, 73 Wn. App. at 447. The
23 *Bailey* opinion in no way addresses the issue of whether an OIC letter that is not consistent with
24 express statutory provision can create authority to fine a regulated entity for conduct of another
25 regulated entity.

26 ⁴ “Whenever an agency issues an interpretive or policy statement, it **shall** submit to the code reviser
for publication in the Washington State Register a statement describing the subject matter of the
interpretive or policy statement, and listing the person at the agency from whom a copy of the
interpretive or policy statement may be obtained.” RCW 34.05.230 (emphasis added).

⁵ *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 136 Wn.2d 38, 44,
959 P.2d 1091 (1998) (“it is ultimately for the court to determine the purpose and meaning
of statutes, even when the court's interpretation is contrary to that of the agency charged
with carrying out the law.”); *Utter v. Dep't of Soc. & Health Servs.*, 140 Wn. App. 293,
300, 165 P.3d 399 (2007) (“we are not bound by an agency's interpretation of a statute”).

1 deference. The OIC, for example, cites *Waste Mgmt. of Seattle, Inc. v. Util. & Transp. Comm'n*, 123
2 Wn.2d 621, 869 P.2d 1034 (1994), a case in which the Court stated that an agency's interpretation of
3 a statute is not entitled to deference if a statute is unambiguous or if the interpretations conflicts with
4 the statute:

5 [a]bsent ambiguity, however, there is no need for the agency's expertise in
6 construing the statute. Furthermore, we will not defer to an agency determination
7 which conflicts with the statute.

8 *Waste Mgmt.*, 123 Wn.2d at 628 (citing *Pasco v. Public Empl. Relations Comm'n*, 119
9 Wn.2d 504, 509, 833 P.2d 381 (1992); *Cowiche Canyon Conservancy v. Bosley*, 118
10 Wn.2d 801, 815, 828 P.2d 549 (1992). The *Waste Mgmt.* court further held that the court
11 retains the ultimate authority to interpret statute. *Id.*

12 It also bears noting that in *Waste Mgmt.* the court rejected the Washington Utilities
13 and Transportation Commission ("WUTC") contention that even though it lacked statutory
14 authority to review financial records of affiliates of regulated companies, it had authority
15 to do so under its general rate-making authority to establish just, fair, reasonable, and
16 sufficient rates. *Id.* at 635-7. Much like the WUTC, the OIC argues that its "broad
17 regulatory responsibilities" grant it powers not provided in statute or regulation. Like the
18 WUTC in *Waste Mgmt.*, the OIC is not entitled to deference in this case.

19 The remainder of cases which the OIC cites are unpersuasive and inapposite, in
20 that they all involve issues of interpretation or the application of a statute, not the validity
21 of agency actions taken in the absence of statutory authority. In *Keller* the court deferred
22 to a city attorney's decision that an improvement to a manufacturing facility did not
23 constitute an unlawful "enlargement" of a non-conforming use under the zoning statutes.
24 *Keller v. Bellingham*, 92 Wn.2d 726, 731, 600 P.2d 1276 (1979). In *Morin*, the court
25 granted deference to the building inspector's determination that a tire-capping facility was
26 a permitted use under a zoning ordinance. *Morin v. Johnson*, 49 Wn.2d 275, 300 P.2d 569

1 (1956). In *Hayes*, the court deferred to the Shoreline Hearing Board's decision that it
2 could vacate a permit for a solid waste fill under a regulation stating that fill materials
3 should be of a quality not to create water quality problems, without evidence of the
4 potential for harm to adjacent waters. *Hayes v. Yount*, 87 Wn.2d 280, 552 P.2d 1038
5 (1976). In *Washington Indep. Tel. Ass'n*, the court found the WUTC's determination that
6 U.S. Cellular Corporation qualified as an "eligible telecommunications carrier" under the
7 federal regulation setting forth the requirements for such a designation, was entitled to
8 deference. *Washington Indep. Tel. Ass'n v. WUTC*, 110 Wn. App. 498, 41 P.3d 1212
9 (2002), *affirmed*, 149 Wn.2d 17, 65 P.3d 319 (2003). In *Retail Store Employees Union*,
10 the Court granted deference to the OIC's interpretation of the meaning of the term
11 "ownership" under a statute which required ratings organizations to be administered by a
12 trustee. *Retail Store Employees Union v. Wash. Surveying & Rating Bureau*, 87 Wn.2d
13 887, 558 P.2d 215 (1976).

14 At best, the cases cited by the OIC support an argument that it may be entitled to
15 some deference in the applicability of the Inducement Regulation, i.e., what actions
16 constitute violations. It cannot, and has not, however, cited a single case that stands for the
17 proposition that an agency is entitled to deference in determining whether it can impose
18 vicarious liability in the absence of a statute or regulation providing for such liability – for
19 the simple reason that, as argued in the SJ Motion, such imposition of vicarious liability
20 requires an agency to promulgate a rule under the Administrative Procedure Act. SJ
21 Motion at pp. 13-15. Two cases cited by the OIC for the proposition that it is entitled to
22 deference, *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 428, 799 P.2d 235 (1990)
23 and *Federated American Ins. Co. v. Marquardt*, 108 Wn.2d 651, 654, 741 P.2d 18 (1987)
24 underscore this point. Both cases involved challenges to duly promulgated regulations
25 alleged to have been promulgated without statutory authority and alleged to be
26

1 constitutionally flawed; neither case dealt with deference to a regulator based on a position
2 propounded without statutory or regulatory basis.⁶

3 The OIC is not entitled to deference in everything that it does, and it certainly is
4 not entitled to deference when engaging in impermissible *de facto* rulemaking.

5 C. The OIC's Legal Argument Regarding Vicarious Liability is Fatally
6 Flawed.

7 1. The OIC's case law on imputation of knowledge is inapplicable.

8 In the absence of statutory or regulatory support for the OIC's contention that
9 CTIC may be fined for conduct of Land Title, the OIC seeks to establish liability based on
10 a convoluted application of common-law agency principles. The OIC relies primarily on
11 *American Fidelity & Casualty Co. v. Backstrom*, 47 Wn.2d 77, 287 P.2d 124 (1955), a
12 case that addresses the issue of when an agent's *knowledge* can be imputed to a principal.
13 In *Backstrom*, American Fidelity & Casualty Company ("AFCC") was asked to transfer
14 liability coverage for certain farm equipment from a policy that had been issued to a Mr.
15 Montgomery, to a policy issued to a Mr. Backstrom, who intended to purchase the
16 equipment. The coverage was transferred, but prior to the sale of the equipment, an
17 employee of Mr. Montgomery was involved in a collision. AFCC denied coverage
18 because the named insured was not the owner of the equipment at the time of the accident.
19 The question before the court was whether AFCC was deemed to have knowledge of the
20 fact that the equipment was still owned by Mr. Montgomery, and estopped from denying
21 coverage under Mr. Backstrom's policy. The Court held that because AFCC's agent, with
22 whom Mr. Backstrom and Mr. Montgomery dealt, had knowledge of the ownership of the
23

24 ⁶ The presumption of validity standard of review with respect to promulgated rules has been
25 superseded by statute. *Washington Indep. Tel. Ass'n. v. WUTC*, 110 Wn. App. 498, 41 P.3d 1212
26 (2002), *affirmed*, 149 Wn.2d 17, 65 P.3d 319 (2003) (agency action is arbitrary and capricious if it is
willful and unreasoning and taken without regard to the attending facts and circumstances), citing
RCW 34.05.570.

1 equipment, AFCC was deemed to have such knowledge. The OIC also relies on *Miller v.*
2 *United Pac. Cas. Ins. Co.*, 187 Wash. 629, 60 P.2d 714 (1936), a case in which an insurer
3 attempted to deny coverage under an automobile policy on the grounds that the insured did
4 not own the vehicle. The court imputed the agent's knowledge of ownership to the
5 insurer. *Miller*, 187 Wash. at 641.

6 The matter currently before this Court does not involve issues of whether CTIC
7 should be deemed to have knowledge of some fact known to Land Title, nor does it
8 involve issues of whether CTIC can disavow a contract negotiated by Land Title. As such,
9 it is difficult to fathom under what theory the OIC believes these cases, and the two law
10 review articles cited by the OIC⁷, have any relevance to the current inquiry.

11 Were the OIC proposing to fine CTIC for disavowing coverage under title
12 insurance policies issued by Land Title when Land Title had knowledge of facts that made
13 the denial improper, the law argued by the OIC may have relevance. In this matter,
14 however, the OIC is attempting to fine CTIC for legal misdeeds allegedly committed by
15 Land Title.

16 Under the facts of this case, the common law principal of vicarious liability are
17 applicable – and as set forth in the SJ Motion, Washington law is absolutely clear that a
18 principal is only subject to vicarious liability for the acts of an agent if the principal has the
19 right to control the actions that give rise to the liability. *Kroshus v. Koury*, 30 Wn. App.
20 258, 263, 633 P.2d 909 (1981) (citing Restatement (Second) of Agency, §250 (1958)) (the
21 label “agent” does not *per se* create vicarious liability); *Stephens v. Omni Ins. Co.*, 138
22 Wn. App. 151, 153 P. 3d 10 (2007), *review granted on other issues*, 180 P.3d 1291 (April
23 1, 2008).

24 _____
25 ⁷ The OIC quotes from an article written by Deborah A. DeMott, *When Is a Principal Charged With*
26 *an Agent's Knowledge*, 13 Duke J. Comp. & Int'l L. 291, 319 (2003) and an article by Marin R.
Scordato, *Evidentiary Surrogacy and Risk Allocation: Understanding Imputed Knowledge and*
Notice in Modern Agency Law, 10 Fordham J. Corp. & Fin. L. 129 (2004).

1 Even when imputation of knowledge is relevant, “[t]he law imputes to the
2 principal, and charges him with, all notice or knowledge relating to the subject-matter of
3 the agency which the agent acquires or obtains while acting as such agent and within the
4 scope of his authority.” *Backstrom*, 47 Wn.2d at 82 (emphasis added). As Washington
5 courts have observed⁸, Land Title is not an insurance agent in the traditional sense; it does
6 not solicit insurance business for an insurer for a commission. Land Title is a title
7 company and performs all of the functions of a title company except underwriting, a
8 service which it has contracted with CTIC (or, alternatively, Old Republic) to provide. In
9 marketing, Land Title is not acting as an agent for CTIC – it is marketing its own services⁹
10 on its own behalf. Moreover, there is absolutely nothing in the Issuing Agency Agreement
11 (“Agreement”) which permits Land Title to market on CTIC’s behalf. The Agreement
12 prohibits Land Title from using the name of CTIC in any of its advertising or printing
13 other than to indicate its authority to issue policies underwritten by CTIC.

14 Ex. A, ¶6.C. to Randolph Dec.

15 D. The OIC has Failed to Create a Material Issue of Fact for Trial.

16 The purpose of summary judgment is to avoid a useless trial when there is no
17 genuine issue of any material fact. *Seven Gables Corp. v. MGM/UA Entertainment Co.*,
18 106 Wn.2d 1, 12, 721 P.2d 1 (1986) (citing *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d
19 596, 602, 611 P.2d 737 (1980)). The burden is on the party opposing summary judgment
20 to set forth specific facts showing there is a genuine issue for trial or have summary
21 judgment entered against it. *Id.* (citing CR 56; *LaPlante v. State*, 85 Wash.2d 154, 158,
22 531 P.2d 299 (1975)). In an attempt to create the appearance of an issue of material fact,
23 the OIC has engaged in hyperbole, mudslinging, and has distorted the truth, however even

24 _____
25 ⁸ *First American Title v. Department of Revenue*, 144 Wn.2d 300, 304, 27 P.3d. 604 (2001).

26 ⁹ Land Title owns its own title plant and conducts its own title searches. Land Title prepares its own abstracts of title. Land Title offers escrow services, and retains 100% of the fees arising from such services.

1 if one accepts the veracity of its allegations, it has provided no evidence that CTIC has the
2 right to control Land Title's marketing practices.

3 1. The OIC's assertions on the nature of the title insurance market and
4 the 2006 OIC Report are totally irrelevant.

5 The OIC spends four pages describing its view of how the title insurance market is
6 modeled and the OIC's 2006 investigation which resulted in the report "An Investigation
7 into the Use of Incentives and Inducements by Title Insurance Companies" (the "OIC
8 Report"). Although the OIC Report is interesting, it is of no relevance to the question of
9 whether CTIC can be held liable for the acts of Land Title and is offered by the OIC solely
10 in a misguided effort to smear the title insurance industry and CTIC. While the OIC
11 Report put the title industry on notice that it would enforce the Inducement Regulation,
12 nothing in the OIC Report nor the Technical Assistance Advisory 06-06 ("TAA") (Ex. B
13 to Thompkins Dec.) says anything that bears on the liability of an underwriter for the
14 alleged misconduct of a UTC.

15 Moreover, the OIC Report does not constituted admissible evidence to the extent
16 offered for the truth of its assertions; it consists entirely of hearsay. While there is an
17 exception to the hearsay rule for public records, the OIC Report does not qualify for the
18 exception:

19 [t]o be admissible as a public record, the document must contain facts, not
20 conclusions involving the exercise of judgment or discretion or the
21 expression of opinion. Also, the subject matter of the record must relate to
22 facts which are of a public nature, the record must be retained for the
benefit of the public, and there must be express statutory authority to
compile the record.

23 *State v. Phillips*, 94 Wn. App. 829, 834, 974 P.2d 1245 (1999).

24 Simply put, the OIC Report and allegations of violations by CTIC not at issue in
25 this case are irrelevant. Even if one assumes that every allegation in the OIC Report is
26 correct, such allegations do not create a basis for imposition of liability on CTIC for Land

1 Title's alleged violations.

2 2. The OIC's allegations regarding the relationship between CTIC and
3 Land Title are misleading, inaccurate, and irrelevant.

4 In an effort to defeat summary judgment, the OIC throws everything against the
5 wall and hopes something will stick, however the OIC's factual allegations are either not
6 supported by any evidence or entirely irrelevant.

7 a. Land Title does not solicit CTIC's business.

8 The OIC repeatedly makes the conclusory assertion that Land Title solicits CTIC's
9 business in Kitsap, Clallam, Jefferson, and Mason Counties. The Court, however, is not
10 required to accept as true "a legal conclusion couched as a factual allegation." *Papason v.*
11 *Allain*, 478 U.S. 265, 286 (1986). Nor is the Court required to accept the truth of
12 conclusory allegations. *In re Gilead Sciences Securities Litigation*, 536 F.3d 1049, 1057
13 (9th Cir. 2008).

14 The evidence is uncontroverted; Land Title is not authorized to "solicit" business
15 for CTIC nor to use CTIC's name in its advertising.¹⁰ The undisputed testimony of D.
16 Gene Kennedy, president of Land Title, confirms that Land Title does not, in fact, solicit
17 business for CTIC or, for that matter, use its name in advertising.

18 6. Land Title employs sales personnel which market its services to potential
19 customers in Kitsap County.

20 7. In its marketing materials, Land title does not promote its relationship with
21 CTIC. In fact, it does not mention CTIC at all in its marketing materials, samples of which
are attached to the Kennedy Decl. as Exhibits A-E.

22 8. Land Title markets to promote its own business, not the business of CTIC.

23 9. CTIC does not pay Land Title for its services nor pay any of Land Title's
24 expenses. CTIC does not play any role in or exercise any control over Land Title's business
25 operations or finances. CTIC does not provide any advice to Land Title on compliance with

26 ¹⁰ Agreement at ¶3 Authority of Issuing Agent and ¶6.G. Prohibited Acts of Issuing Agents., Ex. A
to Randolph Dec.

1 the Inducement Regulation. CTIC does not have any input in, or oversight of, Land Title's
2 marketing practices or procedures.

3 CTIC's sole role is to underwrite the liability for policies issued by Land Title, in
4 exchange for which it receives a payment equal to 12% of the premium which Land Title
5 charges for issuance of the policy. Simply put, there is no evidence to support the notion
6 the somehow Land Title exists to market for CTIC.

7 Moreover, the assertion is absolutely irrelevant. As discussed in the SJ Motion and
8 under the case law cited therein, the question of vicarious liability rests on whether CTIC
9 exercised control over Land Title's marketing practices, not on whose business Land Title
10 was soliciting. Even were Land Title soliciting business for CTIC, CTIC is not subject to
11 vicarious liability for Land Title's marketing practices unless the OIC can establish that
12 CTIC controlled Land Title's marketing practices. *Stephens*, 138 Wn. App. 151.

13 b. Security Union's interest in Land Title is irrelevant.

14 The OIC attempts to make an issue out of that fact that Security Union Title
15 Insurance Company ("Security Union"), a sister-company of CTIC, owns a minority of
16 the outstanding shares of Land Title stock. The OIC goes as far to make the assertion that
17 Land Title and CTIC are "owned by the same parent company" ("Response at 2:6), a
18 statement which is blatantly false based on uncontradicted evidence. *See* Declaration of
19 Madeline Barewald.

20 Even were the OIC attempting to fine Security Union, rather than CTIC, the fact
21 that Security Union owns shares of Land Title and, as such, has the right to receive
22 dividends and annual financial reports, and to vote its shares would be insufficient to
23 impute liability. A corporation is a legal entity separate and distinct from its shareholders,
24 even when there is a sole shareholder, and barring exceptional circumstances where
25 grounds for piercing the corporate veil are present, a shareholder has no liability for the
26

1 obligations of a corporation. *Truckweld Equip. Co., Inc. v. Olson*, 26 Wn. App. 638, 644,
2 618 P.2d 1017 (1980). No such exceptional circumstances are alleged by the OIC

3 Simply put, the fact that a sister-company of CTIC owns a minority of the shares of
4 Land Title is of no bearing on this Court's inquiry. The same is true of the fact that some
5 members of Land Title's board of directors are employees of the Fidelity National
6 Financial family of companies. The OIC cites no case law, the CTIC's counsel was unable
7 to locate any, that supports the proposition that a company can be held vicariously liable
8 for the misdeeds of another company by virtue of the fact that some of its employees sit on
9 the board of the alleged wrongdoer.

10 c. The OIC's allegations regarding manuals and guidelines are
11 misleading and irrelevant.

12 The OIC paraphrases the CTIC-Land Title Agreement in an effort to create a false
13 inference. The OIC asserts that CTIC failed to provide "manuals, instructions,
14 underwriting memos, and underwriting rules" to Land Title in violation of the
15 requirements of the written agreement. Response at 11:16-17, 12:1-2. The provision to
16 which the OIC refers, Section 8(E), provides the CTIC will provide Land Title with "its
17 agency manual, underwriting manual, underwriting memos, and underwriting rules and
18 regulations which may now or hereafter be promulgated."¹¹. In the context of a
19 relationship in which CTIC is insuring the risk for insurance policies written by Land
20 Title, it is logical that Land Title would be expected to comport with CTIC underwriting
21 standards. Indeed, under Section 4(B) of the Agreement, Land Title is to "process
22 applications for title insurance . . . in full compliance with instructions, rules, and
23 regulations of [CTIC]." The provision of the Agreement to which the OIC refers has
24 absolutely nothing to do with marketing.

25
26 ¹¹ A copy of the Agreement is appended to the Declaration of Don Randolph as Exhibit A.

1 The fact that CTIC has the contractual right under the Agreement to provide
2 guidance to Land Title on underwriting standards has absolutely no bearing on whether the
3 CTIC has the right to control Land Title's marketing practices.¹² The agreement between
4 Land Title and CTIC relates to underwriting, not to other aspects of Land Title's business,
5 such as its practices in marketing its services.

6 d. Other "factual" allegations made by the OIC are irrelevant to the
7 Court's inquiry.

8 The OIC's Response is replete with other "factual" allegations which have no
9 bearing on the issue of CTIC's ability to control the marketing practices of Land Title and,
10 to the extent true, are not material with respect to the issue of CTIC liability for alleged
11 misconduct by Land Title. The OIC asserts that vicarious liability can be imposed because
12 Land Title's website has a link to CTIC's website as its "national website," or because
13 Land Title has agreed to indemnify CTIC if CTIC suffers losses for various specified acts
14 of Land Title¹³, or because CTIC has the right to examine Land Title's books and records
15 related to its title insurance business¹⁴, or because CTIC, in accordance with the
16 requirements imposed by RCW 48.29.155, has provided a guarantee up to \$250,000 for
17 any fraudulent or dishonest acts of employees, officers, or owners in connection with

18 _____
19 ¹² It also bears noting that the interrogatory response referenced by the OIC (response to
20 interrogatory no. 28), attached to the Singer Decl. as Exhibit G does not indicate that CTIC never
21 provided Land Title with underwriting materials. The answer was specifically limited to memos,
22 manuals, and guidelines related to compliance with the Inducement Regulation.

23 ¹³ The OIC misleadingly asserts that Land Title has agreed to indemnify CTIC for the "acts of Land
24 Title" without clarifying that the indemnification provision is limited to losses incurred by CTIC as a
25 result of Land Title's negligence in issuance title assurances, performing escrow services, or for acts
26 of fraud, dishonesty, or defalcation. Agreement at §9(B).

¹⁴ "Control is not established if the asserted principal retains the right to supervise the asserted agent
merely to determine if the agent performs in conformity with the contract. Instead, control
establishes agency only if the principal controls the manner of performance...." *Uni-Com Northwest,
Ltd. v. Argus Publ'g Co.*, 47 Wash. App. 787, 796-97, 737 P.2d 304 (1987) (quoting *Bloedel
Timberlands Dev., Inc. v. Timber Indus., Inc.*, 28 Wash. App. 669, 674, 626 P.2d 30 (1981)).

1 escrows for which Land Title has issued a CTIC policy¹⁵. Indeed, the mere existence of
2 such a written guarantee contradicts the OIC's assertion of general agency liability by
3 CTIC for Land Title; a written guarantee would be unnecessary if general agency liability
4 existed.

5 None of these allegations bear even the remotest relevance to the issue of whether
6 CTIC has the right or ability to control Land Title's marketing practices. Even if one
7 assumes that each and every of these allegations is true, they do not create an issue of fact
8 with respect to CTIC's control of Land Title's marketing.

9 II. CONCLUSION

10 The OIC's 35-page Response raises every conceivable argument in an effort to
11 survive summary judgment. The OIC does not, however, point to a single fact of any
12 relevance that raises a question as to the only issue before the Court - whether CTIC
13 controlled Land Title's marketing practices. Because it is the OIC's burden to establish
14 the existence of a relationship sufficient to impose vicarious liability (*Bergin v. Thomas*,
15 30 Wn. App. 967, 970, 638 P.2d 621 (1981)), and because it has failed to meet its burden,
16 CTIC is entitled to judgment as a matter of law.

17 In its misguided effort to impose third-party liability, the OIC requests that the
18 Court ignore the lack of statutory or regulatory authority for its effort to fine one party for
19 alleged violations by another. If the Court declines, as it must, to grant the OIC complete
20 deference, the OIC asks that the Court to ignore corporate formalities and to impose
21 vicarious liability because a company which is not a party to this proceeding owns a
22 minority interest in the stock in Land Title.

23
24 ¹⁵ This assertion is particularly disingenuous in that, as the OIC is well-aware, this limited
25 guarantee, which clearly does not cover the claim here at issue, was required by the OIC
26 and Washington law as a prerequisite to Land Title being licensed by the OIC to conduct
business.

1 In a final effort to avoid summary judgment, the OIC argues that summary
2 judgment should be denied, despite its failure to meet its evidentiary burden, because
3 “many facts related [to] . . . the “right of control” . . . have not yet been revealed.”
4 Response at 33:7-13. The burden is on the party opposing summary judgment to set forth
5 specific facts showing there is a genuine issue for trial or have summary judgment entered
6 against it. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 12, 721 P.2d
7 1 (1986) (citing CR 56; *LaPlante v. State*, 85 Wash.2d 154, 158, 531 P.2d 299 (1975)).
8 Pursuant to the agreed Stipulation and Order to Amend First Pre-Hearing Order entered by
9 this Court, the discovery cutoff with respect to Phase I on the issue of CTIC liability for
10 Land Title marketing practices was August 29, 2008. The OIC is not entitled to defeat
11 summary judgment based on a vague assertion that it will may somehow uncover
12 unknown evidence which it failed to present in its brief.

13 For the reasons stated herein, CTIC is entitled to summary judgment, and
14 respectfully renews its request that the Court dismiss this proceeding.

15 DATED this 1st day of October, 2008.

17 K & L GATES LLP

18 
19 By _____

Kimberly W. Osenbaugh, WSBA # 5307

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CERTIFICATE OF SERVICE

The undersigned declares under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party-to or interested-in the above-entitled action, and competent to be a witness herein.

On the date below, I caused to be served:

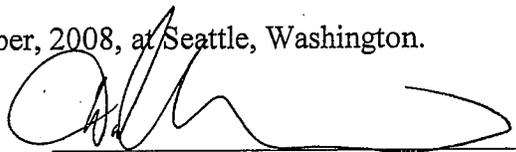
- *Chicago Title Insurance Company's Reply To Office of Insurance Commissioner's Response to Motion for Summary Judgment*

in the manner indicated:

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EXECUTED this 1st day of October, 2008, at Seattle, Washington.



David C. Neu