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

In the Matter of

Docket No. 20-0257

**ARMED CITIZENS' LEGAL DEFENSE
NETWORK, INC.,**

**ARMED CITIZENS' LEGAL DEFENSE
NETWORK, INC.'S MOTION FOR
SUMMARY JUDGMENT**

Appellant.

Armed Citizens' Legal Defense Network, Inc. (hereinafter "ACLDN") hereby requests a ruling on summary judgment that ACLDN did not violate state insurance statutes as alleged by the Office of Insurance Commissioner ("OIC") in its Cease and Desist Order ("Order") dated March 26, 2020. ACLDN further asks that the Order be rescinded because, as a matter of law, sale of memberships to ACLDN is **not** insurance nor an insurance transaction. The OIC mistakenly interprets ACLDN's memberships as "insurance" or "insurance contracts," but Washington law and the definition of insurance distinguishes why ACLDN's funds available for members in assistance of legal costs is **not** insurance.

Very simply put, ACLDN has not violated insurance statutes and cannot be subject to OIC regulation of its non-insurance business. ACLDN is entitled to judgment.

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1 **I. INTRODUCTION AND FACTUAL BACKGROUND**

2 OIC’s action against ACLDN comes at the tail end of investigations against entities such
3 as the NRA, CCW Safe, USCCA. US Law Shield, and Firearms Legal Protection. Such
4 investigations were spring boarded by NY Governor’s letter to OIC regarding the NRA’s sale of
5 insurance policies. In many of these instances, there was an actual stated insurance policy being
6 sold, independent of any other product.
7

8 ACLDN’s similarity to NRA and CCW in perceived membership has resulted in OIC
9 confusing ACLDN’s membership sales with the sale of insurance policies by these
10 organizations. First, ACLDN does not sell an insurance policy. Funds available to members for
11 financial assistance with legal costs associated with an event of lawful self-defense are not a
12 contractual obligation upon the purchase of a membership. The purpose and benefits of the
13 membership first and foremost includes *education* regarding lawful use of force. Further,
14 members are provided an extensive and unique network of attorneys and use of force experts for
15 consultation, discussion, and potential use if needed (a much different benefit than financial
16 assistance).
17

18 ACLDN was established in 2008 to provide education in the lawful use of force (self-
19 defense) and assist in the legal fight against prosecution (criminal or civil) after a justifiable use
20 of force in self-defense. *Declaration of Marty Hayes ISO of Motion for Summary Judgment*
21 (*“Decl. M. Hayes”*), p 1, 3, ¶¶ 2, 11. The latter was and is to ensure that citizens engaged in
22 proper acts of self-defense are not unfairly treated by the justice system. Such assistance is in
23 the form of access to a network of attorneys, experts, and the possibility of financial assistance.
24 *Id.*, p 4, ¶¶ 14-16. Education is a priority of ACLDN to best ensure that the lawful use of force
25 is followed. In fact, with this education, a member is less likely to be involved. ACLDN states:
26

1 A Network member is probably the least likely gun owner to be involved in a
2 shooting or otherwise use deadly force. This is because of our aggressive
3 educational program that starts when you join the Network. A 253-page book
4 plus an informative series of nine educational video lectures is given to each new
5 member. Our member education commitment ensure that your understanding of
6 use of force is self defense is first class. Our content-rich on-line journal carries
7 on that mission each month.

8 *Id.*, p 4, ¶¶ 17-18, Ex. A.

9 ACLDN was founded by Mr. Marty Hayes, a well-trained, well-educated, and well-
10 accepted expert in the field of lawful use of force. The purpose of ACLDN is to educate and to
11 start a fund, which could be available for certain circumstances when someone needs assistance
12 to fight against unscrupulous or unjust prosecutions (civil or criminal) of lawful uses of force. It
13 was absolutely intended to not be insurance and detailed research was done to ensure that
14 ACLDN was not insurance. *Id.*, p 1-3, 9-13, ¶¶ 3-11, 49-66.

15 ACLDN membership benefits immediately available upon signing up are intended to
16 educate and assist members such that involvement in an incident is significantly reduced. These
17 educational benefits are then added to and supplemented on a monthly basis. Membership
18 benefits are described in three categories: (1) Education; (2) Legal Support when it is most
19 needed (and approved); and, (3) Network Affiliated Attorneys and Experts. ACLDN makes it
20 expressly clear that education is the priority, including teaching regarding the legal parameters
21 of use of force for self-defense, handling the aftermath of using force in self-defense, post self-
22 defense legal concerns, and articulating pre-assault indicators and how they influence the self-
23 defense decision-making process. *Id.*, p4-5, ¶¶ 19-20, Ex B.

24 The education provided by ACLDN is substantial and continuous. Upon signing up, the
25 member receives a 253-page book and nine educational videos, all focused on teaching material
26 aspects regarding the laws of self-defense and pragmatic issues pertaining to self-defense. *Id.*, p

1 5, ¶ 21. Thereafter, the ACLDN member has access to the ACLDN monthly journal, past and
2 current issues, which include educational articles, interviews, and updates. These educational
3 materials are drafted and compiled by nationally recognized experts in their fields. More
4 importantly, these educational materials (with exception of the e-journal) are *only* available to
5 ACLDN members. They are not commercially available. *Id.*, p 6, ¶¶ 26-26, Ex. C.

7 The network of affiliated attorneys and experts provides ACLDN members with on-
8 going access to trained, educated, and reputable individuals for consultations and advice as
9 needed or desired by the ACLDN member. Those attorneys and experts are part of the network
10 in order to make them available to ACLDN members. This network is separate from and not
11 contingent on the use of ACLDN funds, if they are determined to be available. ACLDN
12 members have direct access to the attorneys and experts. *Id.*, p 6, ¶ 23.

14 The ACLDN's Legal Defense Fund ("Fund") is what is concerning to OIC. Contrary to
15 those concerns, the Fund is not insurance.

16 The purpose of establishing the fund was to battle unmeritorious prosecutions for lawful
17 acts of self-defense. The Network was conceptualized while the founder was attending law
18 school between 2003 and 2007. *Id.*, p 2-3, ¶¶ 9-11. The purpose of the Network was to combat
19 a growing nationwide political issue regarding the possession and use of weapons, being played
20 out by elected prosecutors filing criminal complaints against those lawfully using firearms in
21 self-defense. *Id.*, p 4, ¶¶ 15-16. ACLDN expressly states:

23 The Network is an organization of gun owners pooling their
24 strength to protect one another when a member comes under
25 scrutiny of the legal system after acting in self-defense. Just as the
26 earliest labor unions were mere groups of workers joined together
to prevent abuse of individual workers, Network members have
joined, not because they expect to use deadly force in self-defense,
but because they are well aware of the abuses the legal system can

1 enact against the innocent man or women forced to defend self or
2 family.

3 *Id.*, p 4, ¶ 18, Ex. A. ACLDN goes on to state:

4 We welcome new members from amongst armed citizens who
5 share our vision of educated and trained armed citizens standing
together to prevent unmeritorious legal action after self-defense.

6 *Id.*, p 9, ¶ 46, Ex. F. These unmeritorious legal actions are those brought by elected officials
7 seeking to satisfy their political base in a fight against lawful possession of firearms. The right
8 to carry a firearm is a hot political issue, discussed by politicians in every election, whether
9 local or national. Unmeritorious legal actions against those lawfully using firearms in self-
10 defense are politically motivated. By use of the Fund, ACLDN’s intention is to combat these
11 politically motivated actions. *Id.*, p 13, ¶ 67.

12
13 *Whether* a member is deemed to qualify for access to the Fund is determined solely by
14 ACLDN. There are no contractual standards which *require* any funds to be provided by
15 ACLDN. *IF* a member is deemed worthy of assistance from the Fund, the ACLDN web site
16 and member benefits explain how these funds would be extended. The Fund is never provided
17 to the ACLDN member, they are paid directly to vendors assisting the ACLDN member. *Id.*, p
18 7, ¶¶ 30-36.

19
20 Distinct from other membership organizations that are selling insurance products, an
21 ACLDN member requests for a payment from the Fund and then undergoes a review process
22 prior to ACLDN drawing monies from the Fund on behalf of the member. An ACLDN
23 advisory board member reviews an application to determine whether, in ACLDN’s view, there
24 is legitimate claim of self-defense. ACLDN’s membership benefits description makes the
25 limitation of the benefit clear, available to only those persons involved in “justifiable use of
26

1 force” and there is a showing that “use of force was a legitimate case of self defense.” *Id.*, p 8,
2 ¶¶ 37-38; p 5, ¶ 20, Ex. B.

3 In description of the Fund, ACLDN states:

4 “This benefit is subject to a review of facts of the case as known at the
5 time and a determination it was a legitimate act of self defense.”

6 *Id.*, p 8, ¶ 40, Ex. D.

7 This limitation is reiterated and expanded upon by the President of ACLDN when
8 addressing assistance with bail:

9 “Granting assistance is subject to the same requirement as awarding Legal
10 Defense Funds. In other words, there must be sufficient evidence to make
11 a reasonable argument that the use of force incident was self defense. Just
12 as we would not agree to fund the legal defense of someone who actually
13 committed a murder, we would also not assist that person in gaining his or
her freedom from jail. *We will need to be convinced* that your use of force
was a self-defense incident.”

14 *Id.*, p 8, ¶¶ 41-42, Ex. E.

15 Moreover, if facts are learned or discovery, which results in ACLDN determining a self
16 defense claim, is not legitimate, ACLDN will immediately cease funding. *Id.*, p 8, ¶ 44.

17 It is undeniably clear that Funds made available to ACLDN members is upon the *sole*
18 *discretion* of ACLDN and its advisory board.¹ There is no contractual right to the Funds. Such
19 is made further explicitly clear by ACLDN:

21 **“What We Are Not**

22 First off, we are NOT insurance! There is no insurance component in our
23 member benefits.”

24 *Id.*, p 9, ¶¶ 45-46, Ex. F. It simply could not be clearer that ACLDN membership does NOT
25 come with a right to the Fund, but only the right to apply for the Fund and be subject to the sole
26

¹ In eleven years, only 22 applications have been granted access to the Funds.

1 discretion of ACLDN and its advisory board.

2 Financial support for the Fund comes from five key sources: (1) Dues allocation
3 (ACLDN commits to 25% of membership dues to donate to the Fund²); (2) Corporate
4 Donations (some corporations make direct financial donations while others donate products and
5 services which are auctioned off and 100% proceeds donated to the Fund); (3) Bequests (some
6 individuals provide for donations in their estate planning); (4) Individual donations (individuals
7 including members and member friends make direct contributions to the Fund; and, (5) ACLDN
8 donations (in addition to % of member dues, ACLDN provides additional donations to the
9 Fund). *Id.*, p 6, ¶ 29.

11 Membership in ACLDN requires only three things: (1) a clean criminal history; (2)
12 being of 18 years of age; and, (3) being a legal United States resident. There is no underwriting
13 activity or risk assessment when signing up as a member. If you are a law-abiding adult legal
14 U.S. resident you can purchase a membership with ACLDN. *Id.*, p 5, ¶ 22.

16 There are no indemnification provisions of ALCDN memberships. If judgment is
17 assessed against an ACLDN member, ACLDN does NOT pay for the judgment. *Id.*, p 9, ¶ 48.

18 The cease and desist order prohibits all membership sales in Washington, which
19 prohibits citizens access to the educational and network benefits as well as the Fund. Such is
20 overly and unduly expansive even if the Fund were properly deemed insurance (it is not).

22 II. LAW AND ARGUMENT

23 Summary judgment is appropriate when there is no genuine issue as to any material fact
24 in the case and a party is entitled to a judgment as a matter of the law. *Young v. Key*
25 *Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). To prevail on summary

26 _____
² ACLDN initial donated 20% of member dues to the Fund. Unilaterally, ACLDN increased this amount to 25%.

1 adjudication, ACLDN must first show that there is no material factual issue. *LaPlante v. State*,
2 85 Wn.2d 154, 158, 531 P.2d 299 (1975). Once ACLDN meets that initial burden, inquiry
3 shifts to the OIC as the party who will have the burden of proof at a hearing. *Young*, 112 Wn.2d
4 at 225. Summary judgment should be granted unless the OIC shows the existence of each
5 element essential to its case, on which it will bear the burden of proof at a hearing. *Id.*, citing
6 *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). OIC's inability to prove an essential
7 element of its case renders all other facts immaterial, requiring judgment in ACLDN's favor.
8
9 *Id. all.*

10 **A. There are No Disputed Material Facts at Issue Here.**

11 For purposes of this motion, all material *facts* laid out in the OIC Order are undisputed.
12 Relevant to the instant motion ACLDN agrees upon the following from the Cease and Desist
13 Order: (1) ACLDN is not an authorized insurer in the State of Washington (Basis No. 1); (2)
14 ACLDN provides members with access to attorneys, experts, and educational materials (Basis
15 No. 8); (3) ACLDN has goals of helping members in a legal fight after justifiable use of force
16 by paying for services and to educate members and the gun-owning public (Basis No. 7); (4)
17 ACLDN collects membership fees from members and then ACLDN allocates 25% of the fees to
18 the Fund (Basis No. 9); (5) ACLDN membership consists of over 17,000 members (Basis No.
19 10); (6) ACLDN Fund has grown to over two million dollars (Basis No. 11); (7) When applied
20 for and approved, ACLDN will pay attorneys' fees and legal expenses after a self-defense
21 incident (Basis Nos. 13-15); (8) since 2008, ACLDN has sold 2,559 memberships in
22 Washington (Basis No. 16); (9) ACLDN membership fees are computed only based upon time
23 and number of memberships purchase, with no underwriting function alter the price of a
24 membership (Basis No. 19); and (10) ACLDN has received 25 applications for Fund allocation
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1 nationwide, 22 of which received funding. There were two applications in Washington, with
2 one receiving \$2,000. (Basis Nos. 20-21).

3 OIC's findings, however, fail to properly and adequately describe ACLDN's function
4 and its purpose. As outlined above, the Fund is comprised of more than just a portion of
5 member fees. It is comprised of several different manners of donations. In addition,
6 membership in ACLDN does *not* obligate ACLDN to make any payments to members. Rather,
7 ACLDN has sole discretion in determining when to disburse the Fund and to whom. Further,
8 the purpose of the Fund was and is to combat political actions. None of these facts may be
9 contested. While not stated by OIC in the Cease and Desist Order, they are completely
10 represented on the ACLDN web site, and true.

11
12 The dispute here is purely legal, not factual. The legal issue is the definition of
13 "insurance" and whether the sale of ACLDN memberships with benefit of *potential* access to
14 the Fund for purposes of supporting acts of self-defense is the sale of "insurance."
15

16 **B. Defining Insurance.**

17 The definition of insurance is at the forefront of this case. Across the country, the
18 analysis of what is "insurance" has been the subject of many appellate cases, legal opinions, and
19 treatises. The question of what defines insurance is often intricate and answers can be unclear.
20 In Washington, the legislature has defined insurance as:

21 Insurance is a contract whereby one undertakes to indemnify another or
22 pay a specified amount upon determinable contingencies.

23 RCW 48.01.040.³

24 However, the succinct nature of the definition should not be interpreted as simplicity.

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³ The same language as West Virginia's statute, W. Va. Code § 33-1-1.

1 The definition of insurance is far from simple.⁴ 1 Appleman on Insurance Law & Practice Sec.
2 1.3. As Learned Hand said, a universal definition of “insurance” would be “mythically prolix,
3 and fantastically impractical.” *Sinrom v. Pennsylvania R.R.*, 61 F.2d 767, 771 (2nd Cir. 1932).
4 Questions remain: what does it mean to indemnify, what is a specified amount, what is a
5 determination contingency, and what truly qualifies as insurance.
6

7 There is little court guidance on the application of RCW 48.01.040 since its amendment
8 in 1947, but previous Washington court interpretation of Washington’s statutory insurance
9 scheme have yet to be overruled, are not in direct conflict with the language of RCW 48.01.040,
10 and have been affirmed by federal courts since the amendment.

11 “Insurance is a contract by which the one party, in consideration of a price paid to him
12 adequate to the risk, becomes security to the other that he shall not suffer loss, prejudice, or
13 damage by the happening of the perils specified to certain things which may be exposed to
14 them.” *Physicians' Def. Co. v. Cooper*, 199 F. 576, 579-80 (9th Cir. 1912). The essential
15 elements of an insurance contract are: 1) an insurer, 2) consideration, 3) a beneficiary, and 4) a
16 hazard or peril insured against. *Babcock v. ING Life Ins. & Annuity Co.*, No. 12-CV-5093-
17 TOR, 2013 U.S. Dist. LEXIS 1035, at 25 (E.D. Wash. Jan. 2, 2013), citing *State v. Universal*
18 *Service Agency*, 87 Wash. 413, 424, 151 P. 768 (1915).
19
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21 In addition, insurance contracts *must* involve *both* risk-shifting and risk-distributing.

22
23 ⁴ The concept of insurance traces back 5,000 years to the ancient practices of the Babylonians and contracts of
24 “bottomry,” where investors would loan money at extremely high interest rates for merchant shipping. If a vessel
25 sank or was seized by pirates, the entire debt was forgiven. The investors earned enough on successful shipping to
26 cover the losses. Thus, there was both risk distribution and a transference of the risk from the merchant to the
investors. The concept was later adopted by the Phoenicians, Greeks, and Romans. In the mid-Thirteenth Century,
the Lombards from Italy (northern Italy shipping merchants) brought insurance to England by founding trading
houses in England, located on “Lombard Street.” Thereafter maritime insurance spread throughout England and
Europe. Over time, lines of insurance slowly expanded beyond maritime shipping, such as fire insurance after the
London fire of 1666. Now, the insurance industry is one of the most prominent in the world. 1 New Appleman on
Insurance Law Library Edition § 1.02.

1 “Risk-shifting” means that one party “shifts” his risk of loss to another party, while “risk-
2 distributing” means that the assuming party distributes potential liability among others. Certain
3 contracts may be “risk-shifting,” if one party takes on risk of another’s loss, but unless that
4 party “distributes” the risk among others, the contract lacks an essential element of insurance.
5 *In re Estate of Smiley*, 35 Wash. 2d 863, 867, 216 P.2d 212, 214 (1950), citing *Helvering v. Le*
6 *Gierse*, 312 U.S. 531 (other citations omitted); *Amerco, Inc. v. Comm'r IRS*, 979 F.2d 162, 165
7 (9th Cir. 1992), citing *Beech Aircraft Corp. v. United States*, 797 F.2d 920, 922 (10th Cir.
8 1986); *see also* Robert E. Keeton and Alan I. Widiss, *Insurance Law* § 1.3(b)(2) (1988)
9 (Without “risk-shifting” and “risk-distribution” both present, a contract may not be deemed a
10 contract of insurance.)
11

12 Washington Court’s definition of insurance and interpretation of the insurance statutes is
13 consistent with interpretations of legal scholars and courts throughout the country. There is no
14 one bright line test to determine insurance, but consistently, three concepts are central to an
15 insurance contract: risk, risk transference, and risk distribution. Robert H. Jerry, II, 1 New
16 Appleman on Insurance Law Library Edition § 1.03[1]. Insurance is an arrangement for the
17 transfer and distribution of risk, with the risk being the principal object and purpose of the
18 arrangement(contract). *Id.* at § 1.03[2], citing Robert E. Keeton, *Insurance Law* 2 (1971).
19

20 While the transfer of risk is at the forefront of an insurance contract, many if not most
21 contracts allocate risk in some manner. To be a contract of insurance, the primary purpose of
22 the contract is to *transfer* risk. *Id.* at § 1.03[2].
23

24 Many states choose to legislate the definition of insurance, as has Washington, whose
25 statutory language is precisely the same as West Virginia. Other states include languages that
26 are similar variations. If applied literally, these statutory definitions would cause many

1 relationships not normally understood as insurance contracts to be subject to state insurance
2 regulations.⁵ Therefore, courts are called upon to interpret and apply the statutes. *Id.* at §
3 1.03[3][b].

4 The Substantial Control Test was one adopted earliest by the Courts, which conforms to
5 the classical definition of insurance: the transfer and distribution of a risk of loss upon the
6 happening of a fortuitous event.⁶ A fortuitous event is defined as an event or occurrence which
7 is beyond the substantial control of the insured. *Eric Mills Homes, Appleman On Insurance*
8 *Law & Practice* § 1.4[A]. In fact, “risk” connotes uncertainty in the sense that the loss must be
9 one that is uncertain to occur or unpredictable AND *outside the substantial control of the*
10 *parties to the contract.*⁷ *Eric Mills Homes, Appleman on Insurance* § 1.04[A]; *William R.*
11 *Vance, The Handbook on the Law of Insurance* 1-2 (Buist M. Anderson ed. 1951).

12 The substantial control test has five elements: (1) The insured possesses an interest of
13 some kind susceptible to pecuniary estimation (an insurable interest); (2) the insured is subject
14 to a risk of loss through destruction or impairment of the insurable interest by a fortuitous peril;
15 (3) the insurer assumes that risk of loss; (4) the insurer assumes that risk as a part of a general
16 scheme to distribute the loss among a large group of people bearing similar risks; and, (5) as
17 consideration for the insurer’s promise to assume the risk, the insured pays a premium.⁸ *Id.*
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21 ⁵ For instance, not all warranties or exclusive repair agreements are deemed insurance, even though the contracts
22 involved a transfer and distribution of risk.

23 ⁶ Some courts have applied a Primary Object and Purpose test, which determines whether the *indemnification*
24 portion of a contract renders a contract insurance. This test is specific to indemnification. As this case does not
25 involved indemnification, See Section II.C.2.a., *supra*, this test is not discussed here.

26 ⁷ As discussed later, the ACLDN Funds are available to members that have engaged in a legitimate act of self-
defense. The act of self-defense is an intentional act, and thus within the control of the member. An act of self-
defense is not a fortuitous event.

⁸ Here, the ACLDN membership fails all elements of the test: (1) there is no articulable insurable interest (like loss to
property); (2) the member is not subject to risk by a fortuitous peril, as self-defense is an intentional act and not
fortuitous; (3) ACLDN does NOT assume the risk, as there is no promise to “coverage” or access to the Funds, such
access is fully discretionary by ACLDN; (4) the Funds are not only ACLDN contributions from memberships, but

1 The language of RCW 48.01.040 does not apply to ACLDN memberships. The sale of
2 the memberships simply is not a transaction of insurance. OIC cannot establish the essential
3 elements of insurance as (1) there is no promise to pay by ACLDN, thus no transfer of risk; (2)
4 There is no indemnification; (3) There is no specified amount payable upon determinable
5 contingencies; and, (4) The event is within the substantial control of the member. Finally, to the
6 extent that there is an insurance element determined in the ACLDN membership, such is self-
7 insurance which inherently is not insurance.
8

9 **C. The OIC Cannot Show the Essential Elements of “Insurance.”**

10 OIC has claimed ACLDN memberships violate 2 insurance statutes: RCW 48.05.030
11 (transacting insurance without certificate of authority); and RCW 48.15.020(1) (solicitation or
12 transacting insurance business by unauthorized insurer prohibited). To prove these violations
13 and uphold its Order, the OIC must establish the essential element of insurance at issue.
14 Because ACLDN’s memberships do not involve “insurance,” the entire OIC Order is legally
15 flawed.
16

17 **1. There can be No Contract for Insurance because there is No Obligation**
18 **for ACLDN to Grant Access to the Fund, and thus no assumption or**
19 **transfer of a risk.**

20 Whether viewing insurance from the standpoint of RCW 48.01.040 or the Substantial
21 Control Test, a consistent and key aspect of insurance is a promise to pay upon a loss. It is this
22 promise that is the sole basis of the transfer or shift of a risk from one to another. Here,
23 ACLDN makes no such promise upon the sale of an ACLDN membership. Access to the Funds
24 is not based upon a promise but rather based upon full and complete discretion by ACLDN to
25

26 also from its own money as well as corporate donations via auctions and estate donations; (5) there is no promise,
thus no consideration for assumption of risk, and the membership benefit provides direct access to educational
materials and experts.

1 determine whether a particular case or situation is worthy of the Funds. Essentially, the Fund is
2 a charitable fund established from contributions of ACLDN, ACLDN members, corporations,
3 and other donations.

4 There is no obligation for ACLDN to provide funds to any member. That access to the
5 Funds is at the sole discretion of ACLDN is made clear by the terms listed on the Web site,
6 including the President’s letter which explicitly states that access to the Funds is discretionary.
7 Further, that there is no obligation by ACLDN is further emphasized as the ACLDN member is
8 *explicitly* told that an ACLDN membership is not insurance. While Washington case law says a
9 statement that a relationship is not insurance does not *by itself* render a contract to not be
10 insurance, the fact that the ACLDN member is specifically informed of this clarifies the
11 relationship for the member that there is no right to the Funds and access is unilaterally
12 discretionary on the part of ACLDN. In examining the character of a “promise,” that ACLDN
13 makes these clear statements is further emphasis of ACLDN’s position that ACLDN does NOT
14 promise access to the Funds. In *McCarty v. King County Medical Serv. Corp.*, 26 Wn.2d 660,
15 684 (1946), while ruled a statement within contract that the contract is not insurance is not
16 solely determinative, the nature of the contract is determined based upon its contents – meaning
17 the entire writing.

18 OIC asserts that ACLDN Fund is framed as a promise, not optional discretionary
19 decisions by ACLDN. See OIC Reply in Opposition of Motion to Stay Cease and Desist Order,
20 p 11, 1 3-5. However, OIC ignores the clear language of ACLDN’s web site and membership
21 benefits. Each of the passages quoted by OIC explains what assistance is available *after* a case
22 is accepted by ACLDN (with unfettered discretion) as having access to the Fund.
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26 Given that ACLDN does not have an obligation to grant any member access to the Fund

1 there can simply be no transfer of the risk. A transfer of risk inherently mandates that there be
2 an obligation to pay a claim. Absent an obligation, the “risk” stays with the member.

3 As there is no transfer of risk to ACLDN via a membership, the sale of memberships is
4 not insurance.

5 **2. There can be No Contract for Insurance because there is no**
6 **Indemnification nor Payment Upon Determinable Contingencies.**

7 Washington defines insurance as a contract “whereby one undertakes to indemnify
8 another or pay a specified amount upon determinable contingencies.” RCW 48.01.040.
9 ACLDN’s memberships do not meet either definition.

10 **a. There is No Indemnification in ACLDN Membership.**

11 Indemnification is the predominant basis of most insurance contracts, except for life
12 insurance. *McCarty v. King County Medical Serv. Corp*, 26 Wn.2d at 685, citing *Physicians*
13 *Defense Co. v. O-Brien*, 100 Minn. 490, 111 N.W. 396 (1907). ACLDN’s memberships do not
14 provide members with any indemnification.
15

16 Indemnification is not defined by the statute. Words in a statute are given their ordinary
17 and common meaning if not defined otherwise in the statute. *John H. Sellen Constr. Co. v.*
18 *Dep’t of Revenue*, 87 Wn.2d 878, 882 (1976). Indemnification is defined as:

- 19
20 1. To reimburse (another) for a loss suffered because of a third party’s act
21 or default. 2. To promise to reimburse (another) for such a loss. 3. To give
(another) security against such a loss.

22 Black’s Law Dictionary Seventh Edition.

23 Simply, “indemnity” refers to compensation necessary to reimburse an insured’s loss. 1
24 New Appleman on Insurance Law Library Edition § 1.05[4]. When an insured suffers a loss,
25 the insurer pays proceeds to offset that loss. *Id.* A clear example of indemnity is property
26 insurance, where damaged property can be specifically valued and the insured is reimbursed

1 that value. Contrarily, life insurance is not really indemnification, where an insured can
2 purchase as high a value as the insurance company will sell, not based upon an actual value of a
3 life.⁹ Id.

4 Here, there is no indemnification. First, there is no “loss” and no “loss suffered because
5 of a third party’s act.” Clearly, there is no direct damage to the member or member’s property,
6 which is indemnified or any judgment upon the member which is indemnified. Moreover, the
7 Fund is not based upon a “loss” at all. ACLDN may offer financial assistance with the retention
8 of an attorney in one of several potential stages, immediately after an incident where self-
9 defense is used, after police contact a member, after criminal charges are filed, or after a civil
10 lawsuit is filed. At any of these stages, there is not a “loss” suffered because of a third party’s
11 act or default.
12

13 Attorneys’ fees are a choice, not a loss caused by another – that is certainly the case
14 when a member could qualify for the Fund before ever being contacted by the police or a
15 prosecutor’s office. Further, a subject could decide to represent themselves or qualify for a
16 public defender, thereby incurring no legal expenses at all, or Funds could be available before
17 there is any court proceedings even contemplated. Access to the Fund for attorneys’ fees is not
18 based upon a loss, but rather based upon ACLDN’s belief that a certain situation warrants
19 sufficient funding to ensure there is no miscarriage of justice and/or to fight against
20 unmeritorious prosecutions (civil or criminal). It is clear that the Fund is available to fight
21 government injustice – it is a political statement.
22

23 Second, as explained more below, the approval for ACLDN funds is based upon the
24 member’s intentional act of self-defense – not the act of a third party. While the incident may
25

26

⁹ In Washington, life insurance is an agreement to pay a specified amount upon a determination contingency.

1 have been started by the act of a third party, it is not the third party's act which results in
2 ACLDN's approval of funds. It is the intentional act of the member in response as an
3 intervening cause. (The member had a clear choice in how to respond.)

4 OIC asserts ACLDN offers to indemnify members against legal expenses, applying the
5 definition of indemnify as "1a. to secure or protect against hurt of loss or damage. . . b. to
6 exempt from penalties or liabilities," citing *Webster's Third New International Dictionary of the*
7 *English Language* 1147 (2002). See OIC Response In Opposition to Appellants Motion to Stay,
8 p 10, l 16-17, fn. 1.

10 Even using OIC's asserted definition, there is no "loss," "damage," "penalties," or
11 "liabilities." Incurring legal expenses as a result of an act of self-defense cannot be defined as
12 any of these. The subject (member) is certainly at choice as to whether to incur legal expenses.
13 Moreover, that these expenses may be incurred is due to the act of the subject, not due to the act
14 of a third party.

16 ACLDN membership does not indemnify a member.¹⁰ Access to the Funds does not
17 indemnify a member. OIC's assertion otherwise is misguided and an inappropriate application
18 of the term and concept of "indemnification."

19 **b. Access to the Fund Does Not Pay a Specified Amount Upon**
20 **Determinable Contingencies.**

21 ACLDN's membership fails to meet the second definition of insurance under
22 Washington statutes for two reasons. First, there is no specified amount; and second, there is no
23 determinable contingency.

25 ¹⁰ Presiding Officer recognized that the ACLDN memberships did not involve indemnification in the Order on
26 Motion for Stay. In analyzing whether OIC had presented a prima facie case of insurance, the Presiding Officer
expressly reference "payment of specified amount upon a determinable contingency." Order, p 8. There was no
reference to indemnification.

1 The statute does not define “specified amount” thus it is left to its common ordinary
2 meaning. OIC asserts in its Reply in Opposition to Stay Cease and Desist Order (p 9-10), and
3 this Presiding Officer commented in its Order Denying Stay (p 8), that ACLDN offers to pay a
4 specified amount when stating payment may be made “up to \$25,000” to the member’s attorney
5 and for bail assistance. However, this phrase is misunderstood and the concept of “specified
6 amount” is misapplied.
7

8 “Specified amount” means exactly that – *specified*. This means that the *exact* amount is
9 expressed or stated. That is not the case here. A common example of a specified amount would
10 be a life insurance policy where the insurer pays a set amount upon the untimely death of the
11 insured. Here, there is no exact amount stated, inherent in the phrase “up to.” Additionally,
12 there is no limit of amount that ACLDN may be willing to offer to assist for attorneys’ fees.
13 The “up to \$25,000” refers specifically to funds that could be offered immediately, with more to
14 come if needed and approved. To say that “up to \$25,000” in this context completely
15 contradicts the term “specified amount.”¹¹
16

17 There is also no “determinable contingency,” as asserted by OIC. The Presiding Officer
18 found in the Order Denying Stay that there is prima facie evidence that ACLDN is paying upon
19 a determinable contingency. However, such is based upon a “prima facie” showing and not a
20 detailed analysis of “determinable contingency.”
21

22 There is no statutory definition of “determinable contingency.” Hence, one must turn to
23 the common meaning of these words. Websters Online Dictionary defines “determinable” as:

24 “capable of being determined, definitely ascertained, or decided upon.”
25

26 ¹¹ This same reasoning applies to “up to \$25,000” for assistance with bail. There is no specified amount. This language is no longer present on the ACLDN website.

1 Black' Law Dictionary defines contingency as:

2 "An event that may or may not occur; a possibility. 2. The condition of being
3 dependent upon chance, uncertainty."

4 The Washington Supreme Court has affirmed the definition of "contingency" as being
5 dependent upon chance. In *Mendoza v. Rivera-Chavez*, 140 Wn.2d 659, 99 P.2d 29 (2000), the
6 court was presented the question of whether an insurance company must pay after an auto
7 collision while the insured was fleeing from the commission of a felony. The Court stated:

8 "Insurance is by its nature prospective and not retrospective, as can be
9 seen from the statutory definition of an insurance contract as "a contract
10 whereby one undertakes to indemnify another or pay a specified amount
11 upon determinable *contingencies*." RCW 48.01.040 (emphasis added). *See*
12 *also State v. Universal Serv. Agency*, 87 Wash. 413, 424, 151 P. 768
13 (1915) (including as part of the definition of an insurance contract "a
14 hazard or peril insured against whereby the insured or his beneficiary *may*
15 suffer loss or injury" (emphasis added)); 1 ERIC MILLS HOLMES &
16 MARK S. RHODES, *HOLMES'S APPLEMAN ON INSURANCE*, 2D §
1.3, at 13 (1996) ("An insurance agreement is an aleatory contract.
Aleatory is derived from the Latin 'alea' meaning dice. An insurer's
promise is conditioned upon the occurrence of an uncertain, fortuitous
event, that is, a chance event.").

17 *Id.* at 669.

18 The concept of fortuity as a requirement for insurance is well-established and consistent
19 throughout the nation. "One of the fundamental assumptions deeply embedded in insurance law
20 is the principle that an insurer will not pay for a loss unless the loss is 'fortuitous,' meaning the
21 loss must be accidental in some sense. The public policy underlying the fortuity requirement is
22 so strong that if the insurance policy itself does not expressly require that the loss be accidental
23 courts should imply such a requirement." 1 Appleman on Insurance Law Library Edition § 1.05,
24 citing *Westfield Ins. Co. v. Chico*, 2016 U.S. Dist. LEXIS 117175 (N.D.W. Va 2016); *Delgado*
25 *v. Interinsurance Exch. Of Auto. Club*, 211 P.3d 1083 (Cal. 2009); and *Waller v. Truck Ins.*
26

1 *Exch.*, 900 P.2d 619, 626 (Cal. 1995).

2 This nature of what a self-defense incident is, a contingency versus intentional act,
3 seems to be at the heart of the disagreement between the OIC and ACLDN. Self-defense is
4 NOT a contingent act, but an intentional act.

5 The application of the fortuity principle has been applied to self-defense cases. In
6 *Delgado*, the plaintiff (assaulted by a homeowner) sued the homeowner's insurance company
7 alleging that the act should be deemed accidental because the homeowner unreasonably
8 perceived the need to engage in self-defense and in doing so injured the plaintiff. The Court
9 found that the act by the homeowner was an intentional act, regardless of error, and intentional
10 acts are not covered by insurance.

11
12 ACLDN'S willingness to pay the upfront attorneys' fees for a member is not
13 conditioned upon the occurrence of an uncertain, fortuitous event, that is, a chance event, or an
14 event that may or may not occur. It is a request from a dues paying member after they
15 *voluntarily and intentionally* used force in self-defense, and are requesting ACLDN assistance
16 with legal expenses to justify the act in court. That an act is intentional and voluntary means
17 that it is not contingent.

18
19 Washington state statutes regarding lawful use of force make it clear that such an act is
20 an intentional act, including RCW 9A.16.10 (Definitions) and RCW 9A.16.020 (Use of Force –
21 When Lawful). These statutes make it clear that the act of use of force is lawful when the
22 person makes a judgment to determine what force is necessary and reasonable, and a purposeful
23 decision at the time of the act regarding what force to be used and when to use it.

24
25 Similarly, RCW 9A.16.050 (Homicide – By other person – When Justifiable) and
26 Washington Pattern Jury Instructions (WPIC 16.02) make it clear that in order for an act of

1 deadly force to be lawful, one must decide that their life is at stake and then make an intentional
2 decision to use a degree of force in response.

3 An act of self-defense CANNOT be categorized as a contingent act, because a
4 contingent act, (see above definitions) is dependent upon chance or circumstances *not under the*
5 *actor's control*. Clearly, a decision to use force is within the actor's control. The analysis of
6 whether force is appropriate and the level of force that is appropriate is within the actor's
7 control. If ACLDN offered benefits dependent upon being a crime victim, (payment if you are
8 injured or killed because of criminal violence) THAT would be a determinable contingency.
9 ACLDN does not do so, but rather offers potential assistance *if* the member has intentionally
10 engaged in the lawful use of force *and* desires to defend such action.

11
12 The concept that self-defense is an intentional act and not a determinable contingency or
13 an insurable act is not new. In California, it is well settled that an intentional act, including self-
14 defense, is not an insurable act. *See Jacobs v. Fire Ins. Exchange*, 36 Cal. App. 4th 1258 (1995).
15 Moreover, the fortuity principle has been deemed central to the notion of what constitutes
16 insurance. Appleman on Insurance Law & Practice § 1.4[A]; New Appleman on Insurance Law
17 Library Edition § 1.05[2]. An act is not an insurable act unless it is "fortuitous," meaning
18 accidental in some sense. The concept of fortuity is basic to insurance law. New Appleman on
19 Insurance Law Library Edition § 1.05[2], *citing Waller v. Truck Ins. Exch.*, 900 P.2d 619, 626
20 (Cal. 1995); *Westfield Ins. Co. v. Chico*, 2016 U.S. Dist. LEXIS 117175 (N.D.W. Va. 2016).
21
22

23 It should be objectively clear: ACLDN provides an opportunity for assistance when a
24 member has engaged in an intentional act (of self-defense) and such act is being challenged in
25 court. ACLDN does not, and does not even suggest, that it will provide any assistance for any
26 other act.

1 Here, there is no specified amount to be paid and there is no determinable contingency.
2 As such, ACLDN memberships are not insurance.

3 **3. The “Risk” Here is in Substantial Control of the Member, Thus There is**
4 **No Insurance.**

5 Pursuant to the Substantial Control Test, the risk of loss must be upon the happening of a
6 fortuitous event – which is defined as an event or occurrence which is beyond the substantial
7 control of the party. *Id.* at §1.4[A]; Eric Mills Homes, Appleman on Insurance Sec 1.04[A];
8 William R. Vance, The Handbook on the Law of Insurance 1-2 (Buist M. Anderson ed. 1951).

9 Under the five elements of the test (See Section II.B., *infra*), the risk of loss must occur
10 by the happening of a fortuitous peril. This requires the loss to occur as a result of something
11 beyond the “insured’s” control.
12

13 Here, as explained in Section II.C.2.b. above (contingent act), whether an ACLDN
14 member engages in an act of self-defense is *absolutely and unequivocally* within the control of
15 the member. The Fund is available to those members that have engaged in a lawful act of self-
16 defense and may need assistance in defending that intentional act. Given it is their intentional
17 act which grants them opportunity for assistance from the Fund, and they are inherently in
18 control of an intentional act, the Fund does not apply to a fortuitous peril. As such, the ACLDN
19 membership cannot constitute insurance.
20

21 **4. To Extent Any Insurance Element, Such is Self-Insurance.**

22 The Washington State Supreme Court has specifically held that self-insurance is not
23 deemed insurance under RCW 48.01.040 and, therefore, excluded from regulation of RCW
24 Title 48. *Kyrkos v. State Farm Mutual Automobile Insurance Company*, 121 Wash.2d 669, 674
25 (1993); *Everett Concrete Prods., Inc. v. Department of Labor & Indus.*, 109 Wash. 2d 819, 822
26

1 (1988). Specifically, the Court in *Kyrkos* held that by its very nature, self-insurance does not
2 involve ‘this’ type of third-party arrangement. *Id.*

3 The Washington State Supreme Court held in *Stamp v. Department of Labor and*
4 *Industries*, 122 Wash.2d 536 (1993), that the *Kyrkos* Court was essentially conclusive as to the
5 nature of self-insurance and reiterated the *Kyrkos* Court’s holding stating that by its very nature,
6 self-insurance does not involve the third party arrangement as contemplated by RCW 48.01.040.
7 *Id.* at 542. Further, the Stamp Court stated that although the *Kyrkos* opinion deals with self-
8 insurance in the automobile liability insurance situation, there is no principled reason to treat
9 such an arrangement differently in the workers’ compensation arena. *Id.* at 543. Likewise, there
10 is no principled reason to treat such an arrangement differently as it pertains to bail bond
11 companies.
12

13 Courts in West Virginia, with the same statutory definition of “insurance,” have also
14 consistently held that self-insurance is not insurance. There, “self-insurance” has been defined
15 as an entity or company which sets aside a special fund to meet losses and pay valid claims,
16 instead of insuring against such losses and claims through an insurance policy. *Hawkins v. Ford*
17 *Motor Co.*, 211 W. Va. 487, 491, 566 S.E.2d 624 (2002); *Jackson v. Donahue*, 193 W.Va. 587,
18 457 S.E.2d 524 (1995).
19

20 Here, if it were determined that the ACLDN membership offered insurance by way of
21 access to the Fund, such should be deemed self-insurance. ACLDN is a membership-based
22 organization. It is a community of like-minded people that have decided to join together. This
23 group then sets aside certain monies, and raises monies through other means (donations, estate
24 donations, and corporate fund raising), for purposes of providing financial assistance for
25 members in certain circumstances. If there is an insurance element here, such is exactly self-
26

1 insurance.

2 **III. CONCLUSION**

3 ACLDN memberships are not insurance, despite OIC's determination and insistence
4 otherwise. First, the memberships fail in a crucial aspect of *all* insurance contracts. There is no
5 transfer of risk to ACLDN. ACLDN is free upon its sole unfettered discretion to decline any
6 application for access to the Fund.

7
8 Second, while most insurance contracts are contracts of indemnity, ACLDN
9 memberships provide no indemnification. There is no loss for which the member is being
10 reimbursed. Rather, there is potential access to assistance with the funding of legal costs,
11 should a member decide to incur legal costs.

12 Third, ACLDN memberships do not provide specified payments upon a determinable
13 contingency. There is no specified amount nor is there an ability to calculate a specified
14 amount. Quite importantly, a determinable contingency cannot exist because an act of self-
15 defense is an intentional act. Fortuity is a long-standing tenant of insurance law. Intentional
16 acts are not insurable events.

17
18 Fourth, consistent with the concept of fortuity, the "risk" of an act of self-defense is
19 within the substantial control of the member. Thus, ACLDN membership is not insurance

20 Fifth, even if there were an element of insurance determined in ACLDN memberships,
21 ACLDN and its members would be self-insured which is inherently not insurance.

22
23 For these reasons, it is respectfully requested that the Presiding Officer grant summary
24 judgment that the ACLDN memberships are not insurance and overturn OIC's Cease and Desist
25 Order.

1 Dated this 12th day of August 2020.

2 **FREEMAN LAW FIRM, INC.**

3
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