AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS,	)	
Appellant,	)	
vs.	)	**Supreme Court No. SC89064**
DIRECTOR OF REVENUE and DIRECTOR OF INSURANCE,	)	
Respondents.	)	

REPLY BRIEF OF APPELLANT
AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS

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ARGUMENT

I. RESPONDENTS DIRECTOR OF REVENUE AND DIRECTOR OF INSURANCE ARE BARRED FROM ARGUING THAT STOP LOSS CONTRACTS ISSUED BY AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS ARE NOT REINSURANCE CONTRACTS. THE ADMINISTRATIVE HEARING COMMISSION DETERMINED THAT AMERICAN NATIONAL LIFE INSURANCE COMPANY OF TEXAS' STOP LOSS CONTRACTS WERE REINSURANCE AND THE RESPONDENTS FAILED TO TIMELY APPEAL THAT DETERMINATION.

A. Procedural Background and the Administrative Hearing Commission's Finding that the Contracts at Issue are Reinsurance

Appellant American National Life Insurance Company of Texas (herein, "American National") requested a refund of paid-under-protest premium taxes from Respondents Director of Revenue ("Department of Revenue") and Director of Insurance ("Department of Insurance") (Revenue Department and Insurance Department collectively, "Respondents"). Employers with self-funded health insurance programs contracted with American National for "stop loss" coverage. Respondents and American National disagree over whether the payments by employers to American National for "stop loss" coverage are subject to premium taxation.

The Administrative Hearing Commission (the "Commission") heard arguments and issued a decision on December 27, 2007 agreeing with American National that stop loss coverage sold by American National in Missouri is reinsurance. Specifically, "American National's standard contract for stop loss coverage repeatedly states that it is a contract of reinsurance, and we agree that is what the contract does." *See* Decision, item 6 of record on appeal at page 13. That ruling should have been dispositive of the case. The Commission, however, also held that the stop loss reinsurance was subject to premium tax under section 148.340 RSMo. In seeking this Court's review, American National declined to challenge the Commission's determination that the stop loss contracts are reinsurance contracts. American National brings only one point on appeal: that the Commission erred in holding that premium taxes may be levied on the stop loss reinsurance contracts. See Petition for Judicial Review at paragraphs 5 and 6.

B. The Commission's Finding that the Contracts at Issue are Reinsurance is Not Properly Before the Court

Respondents' Brief is largely an improper attack on the Commission's ruling that the stop loss contracts at issue are reinsurance. Respondents did not timely file a cross appeal (indeed, did not file any cross appeal) challenging the Commission's determination that the contracts at issue are reinsurance contracts. *See* Missouri Rule of Civil Procedure 81.04(b). American National objects to all arguments in Respondents' Brief seeking review of the Commission's determination that the contracts at issue are reinsurance contracts, and American

National asks the Court to disregard all such arguments pursuant to governing law. The general rule of appellate procedure is that, in the absence of a cross appeal, the reviewing court is concerned only with the complaint of the party appealing, and the opposing party who filed no appeal will not be heard to complain of any portion of the trial court's judgment adverse to him. *Goldberg v. State Tax Comm'n of Missouri*, 618 S.W.2d 635, 642 (Mo. 1981) (citations omitted).

In *Goldberg*, as here, this Court reviewed an administrative agency decision concerning liability for taxes. *See id.* at 636-38. The Court explained that "a petition for review in Missouri practice does not authorize the reviewing court to undertake a review on any basis within the scope of permissible judicial review . . . [but instead] the review is limited to issues properly raised by the petition for review." *Id.* at 643 (citing *Perez v. Webb.*, 533 S.W.2d 650, 655-56 (Mo. App. 1976)). This rule of law is firmly established. *See Mt. Vernon Car Mfg. Co. v. Hirsch Rolling Mill Co.*, 238 Mo. 669, 227 S.W. 67 (1920). The rule is applicable to all appellate review of administrative agency decisions (*e.g.*, *Goldberg*) as well as to disputes of every type. *See generally, Whoberry v. Whoberry*, 977 S.W.2d 946 (Mo. App. 1998) (family law dispute); *Paramount Sales Co., Inc. v. Stark*, 690 S.W.2d 500 (Mo. App. 1985) (commercial dispute under the UCC); *Burtrum v. U-Haul Co.*, 658 S.W.2d 70 (Mo. App. 1983) (employee-employer dispute).

The Court should refuse to consider the Respondents' challenge to the Commission's finding that American National's stop loss contracts with employers are reinsurance contracts. Respondents knew American National did

not challenge the reinsurance finding, and neglected to file a cross appeal needed to properly raise this issue. *See Goldberg, supra;* Missouri Rule of Civil Procedure 81.04(b). Respondents purposely mischaracterize American National's position. According to Respondents: "American National attempts to misdirect the Court into, first, an examination of whether stop-loss insurance premium is reinsurance (which it is not). . ." Resp. Br. at 14. In fact, American National does not ask the Court to examine whether stop-loss insurance premium is reinsurance; American National agrees with the Commission's decision that the contracts are reinsurance and does not ask this Court to reexamine that finding.

In sum, Respondents should not be permitted to circumvent the rules of appellate procedure by interjecting arguments throughout their brief (and devoting an entire section of their brief) concerning whether stop loss contracts are reinsurance. The Commission made two distinct, separate rulings: (1) that these contracts are reinsurance (which was not appealed) and (2) that these reinsurance contracts are subject to premium tax (which American National now appeals). The Court should only review the issue raised by American National in its petition.

II. RESPONDENTS IMPROPERLY SEEK TO SHIFT THE BURDEN OF PERSUASION BY ARGUING THAT AMERICAN NATIONAL IS SEEKING A TAX "EXEMPTION."

Respondents, in an argument not raised before the Commission, contend that American National has the burden of showing that stop loss contracts are not

subject to premium taxation because American National is seeking a "tax exemption." This argument is wholly without merit because, unlike the examples Respondents provide, there is no tax exemption statute or rule at issue.

American National has cited the rule that tax statutes should be construed in favor of the taxpayer, both in its argument to the Commission and to this Court. *See* Appellant's Brief at 11. Now, Respondents accuse American National of seeking "to subvert the General Assembly's intent by creating a Court-ordered exemption . . . ." *See* Resp. Br. at 14.

The two cases cited by Respondents are inapposite because both decisions concerned *tax exemption* ***statutes.*** *See* Resp. Br. at 14 (citing *President Casino Inc.. v. Director of Revenue*, 219 S.W.3d 235 (Mo. 2007); *Salvation Army v. Hoehn*, 354 Mo. 107, 188 S.W.2d 826 (1945)). In both decisions, the court was called upon to construe tax exemption statutes. Section 148.340 RSMo is not a tax exemption statute; thus no tax exemption statute is at issue when determining whether premium taxes may be levied upon American National's stop loss coverage. *See* Section 148.340 RSMo.

III. RESPONDENTS DO NOT DEMONSTRATE THAT AMERICAN NATIONAL'S STOP LOSS CONTRACTS ARE SUBJECT TO PREMIUM TAXES.

The question in this case is whether Section 148.340 RSMo imposes premium tax on stop loss reinsurance purchased by employers from American National. Section 148.340 provides in pertinent part: "Every insurance company

or association not organized under the laws of this state, shall, as provided in section 148.350, quarterly pay tax upon the direct premiums received . . . ." The parties do not dispute, and the Commission recognized, that there is no relevant Missouri case law concerning "direct premiums received."

All of Respondents' arguments concerning whether payments from employers to American National are "direct premiums" boil down to the same argument: that such coverage is purportedly direct insurance rather than reinsurance. Respondents fail to acknowledge, and cannot rebut, that the coverage at issue must be either "insurance" or "reinsurance." Respondents are asking the Court to invent a new, third category of coverage that is not-quite-insurance, but also not-quite-reinsurance. In other words, Respondents ask the Court to find, without any supporting authority, that the coverage at issue is reinsurance, yet still paid for with direct premiums. American National asks the Court to decline the invitation.

A. In the Event the Court Considers the State's Arguments that the Stop Loss Contracts "Are Not Reinsurance," Respondents' Arguments Should Be Rejected

The Commission's decision, that American National's stop loss coverage is reinsurance, is supported by the stipulated facts and the applicable law. Even if this Court decides to revisit this issue, the Commission's holding that American National's stop loss coverage is "reinsurance" should not be disturbed.

Respondents fail to acknowledge that, under the American National stop loss coverage, the employees are the ultimate "insureds," the employers are the "insurers/reinsureds," and American National is the "reinsurer." Respondents do not dispute that American National's stop loss contracts are (1) written only with employers; (2) there is no contractual relationship between the insured employee and American National; (3) the employer or employer plan is directly liable for all benefits paid to employees; (4) American National does not make payments to the employee or to medical providers; (5) if the employer or employer's plan becomes insolvent, American National incurs no obligations or liability; (6) the employer or employer's plan retains significant risk and then cedes some of the risk to American National; and (7) the contract between employer and American National specifies that the coverage is "reinsurance." The relationship between the parties thus indicates that the coverage at issue is reinsurance.

In *Associated Industries, v. Angoff*, 937 SW2d 277, 283 (Mo App WD 1996) (quoting *Travelers Ins. Co. v. Cuomo* 14 F.3d 708 (2nd Cir. 1993), *rev'd on other grounds*, 514 U.S. 645, 115 S.Ct. 1671, 131 L.Ed.2d 695 (1995)), the court explained: "Self-insured employee benefit plans and their employer sponsors . . . often purchase stop loss insurance to protect themselves against excess or catastrophic losses. Unlike traditional group health insurance, stop loss insurance is akin to reinsurance in that it does not provide coverage directly to plan members or beneficiaries. Rather, most stop loss policies . . . provide coverage to the plan

itself if the total amount of claims paid by the plan exceeds the amount of anticipated claims by a specified sum."

Further, the contractual arrangement between American National and employers is consistent with Missouri courts' analysis of reinsurance. American National contracted with the employer to indemnify the employer against losses for large medical expenses incurred by the employer's employees. American National has no contract with the employees, has no direct relationship with the employee, and has no direct responsibility to the employee. "Ordinary contracts of reinsurance operate solely between the reinsurer and reinsured and are one of indemnity against loss." *First American Insurance Company v. Commonwealth General Insurance Company*, 954 S.W.2d 460, 465 (Mo. App. W.D. 1997) (citing *O'Hare v. Pursell*, 329 S.W.2d 614, 620 (Mo. 1959)). Reinsurance contracts "are generally contracts between the reinsured and the reinsurer with no privity between the original insured and the reinsurer." *First American*, 954 S.W. 2d at 465. "The liability of the reinsurer is solely and exclusively to the reinsured. The reinsurer has no contractual obligation with the original insured and is not liable to him." *O'Hare* 329 S.W.2d at 620.

"An ordinary contract of reinsurance is one of indemnity against loss, and no action will lie until the loss has been paid." *Id.* As the coverage provisions of American National's contract with the employers provide, the employer will be reimbursed only after the employer has paid the employees' benefits and submitted documentation.

Courts in other jurisdictions have examined stop loss contracts similar to those at issue here. In its primary brief, American National extensively discussed the holding in *BCBSM, Inc. v. Commissioner of Revenue*, 663 N.W.2d 531 (Minn. 2003). In *BCBSM*, the issue was, under Minnesota law, whether a premium tax applied to premiums received on employer stop-loss coverage when the employer self-funds health care coverage for its employees. "The question before us is whether premiums paid for stop loss coverage by employers who self fund their employees' health care costs are premiums paid on direct business." *BCBSM, Inc*., 663 N.W.2d at 532. The Minnesota court determined that the stop loss policies were "reinsurance" and not subject to premium tax.

Another court stated that, in the context of self-insured group health plans, "stop-loss insurance is akin to reinsurance in that it does not provide coverage directly to plan members or beneficiaries. Rather, most stop-loss policies . . . provide coverage to the plan itself if the total amount of claims paid by the plan exceeds the amount of anticipated claims by a specified sum." *Travelers Insurance Company v. Coumo*, 14 F.3d 708, 723 (2nd Cir. 1993), *rev'd on other grounds*, 514 U.S. 645, 115 S.Ct. 1671, (1995). In *Wolf v. Prudential Insurance Company*, 50 F.3d 793, 797 (10th Cir. 1995), the Court held "[t]he agreements provide a direct benefit to the Annuity Board [employer] by essentially reinsuring the Board for covered claims above a certain amount." In *Barhan v. Ry-Ron*, 121 F.3d 198, 202 (5th Cir. 1997), the Court agreed with "Allianz, the Plan's reinsurer" that "the reinsurance contract allows only the reinsured company to

bring a claim against the reinsurer [and] the original insureds [employees] have no basis for a claim against the reinsurer." *See also Jackson v. Truck Drivers' Union Local 42 Health and Welfare*, 933 F. Supp. 1124, 1131 (D. Mass. 1996) (regarding a self-insured medical benefit plan, "Stop-loss insurance is simply a form of reinsurance for self-insured plans.").

B. Section 376.1010 RSMo Demonstrates that Stop Loss Coverage is Reinsurance

Respondents quote a portion of Section 376.1010 RSMo providing: "A multiple employer, self-insured health plan shall maintain aggregate excess stop-loss coverage and individual excess stop-loss coverage provided by an insurer licensed by the state to write accident and health insurance on a direct basis . . . ." Respondents misconstrue this provision to mean that payments received by American National for stop loss coverage must be "direct premiums." The statute, however, actually demonstrates that the Legislature considered stop loss coverage to be reinsurance. If stop loss coverage were "direct insurance" with "direct premiums," the clause "provided by an insurer licensed by the state to write accident and health insurance on a direct basis . . ." would be unnecessary because Missouri law already requires a company to be licensed to write accident and health insurance in the state.

Section 376.1010 RSMo only describes the entity through which a multiple employer self-insured health plan may acquire stop-loss coverage. The Legislature, through this statute, recognizes the distinction between stop loss

coverage and direct insurance. If stop loss coverage had been considered direct insurance, the Legislature would not need to enact a statute requiring a multiple employee plan to purchase stop loss coverage from insurers licensed to write insurance on a direct basis. Insurance carriers writing only reinsurance in this state, on the other hand, are not required to be licensed in Missouri. Plainly, the General Assembly was concerned about unlicensed reinsurers.

In construing a statute, a court must look at the plain meaning and must presume that the enactment was not without purpose. *Wollard v. The City of Kansas City*, 831 S.W.2d 200, 204 (Mo. 1992). If stop loss coverage were "direct insurance," the portion of the statue quoted by Respondents would be rendered unnecessary and meaningless. The statute has meaning, however, because stop loss coverage is reinsurance.

Tellingly, Respondents do not mention, much less apply, any rules of statutory construction to show that the quoted sound bite from Section 376.1010 RSMo requires that the insurance company provide direct insurance. Neither have Respondents provided any legislative history even hinting that Section 376.1010 RSMo stands for the proposition that payments for stop loss coverage are "direct premiums" under Section 148.340 RSMo.

In sum, Section 376.1010 RSMo only requires that the multiple employer self-insured health plan purchase stop loss coverage from an insurer licensed in Missouri. Whatever the legislative's underlying concerns, the conclusion that stop

loss coverage is considered reinsurance can be gleaned from applying basic rules of statutory construction. *See Wollard,* 831 S.W.2d at 203-04.

C. Premium Cannot Be Both Direct Premium and Reinsurance Premium

Respondents argue, without supporting authority, that determining whether American National's stop loss coverage is reinsurance does not dispose of this case because a "reinsurance premium" can simultaneously be a "direct premium." Respondents cite two cases that purportedly support their contention that payments for the reinsurance at issue are direct premiums. *See* Resp. Br. at 11. Both decisions, however, fundamentally turned on the issue of whether or not the coverage was reinsurance. There are only two options for premiums: either direct premiums or reinsurance premiums. Respondents do not demonstrate that there is a third option where reinsurance premium is also direct premium.

The facts and issues in the first decision, *Mississippi Insurance Guar. Ass'n v. MS Cas. Ins. Co.*, 947 So.2d 865, 873-74 (Miss 2006), have nothing in common with American National's circumstances other than the bare fact that one insurer, when assuming all of the liabilities of another insurer, used the term "reinsurance" and called the agreement an "assumption reinsurance agreement." The court noted the distinction between an insurer that becomes directly liable to the ultimate insured, and a reinsurer such as American National where there exists no privity between the ultimate insured and the reinsurer. The court explained, "[t]he contracts between Legion and MS Casualty and American Reliable were titled

'assumption reinsurance agreements.' However, the phrase is misleading. There is no precedent from this Court that defines direct insurance." *Mississippi Insurance*, 947 So.2d at 873. (internal citation omitted). The Mississippi court next quoted the United States Supreme Court: "Reinsurance comes in two basic types, assumption reinsurance and indemnity reinsurance. In the case of assumption reinsurance, the reinsurer steps into the shoes of the ceding company with respect to the reinsured policy, assuming all its liabilities and its responsibility to maintain required reserves against potential claims. The assumption reinsurer thereafter receives all premiums directly and becomes directly liable to the holders of the policies it has reinsured. In indemnity reinsurance, which is at issue in this case, it is the ceding company that remains directly liable to its policy-holders, and that continues to pay claims and collect premiums. The indemnity reinsurer assumes no direct liability to the policyholders. Instead, it agrees to indemnify, or reimburse, the ceding company for a specified percentage of the claims and expenses attributable to the risks that have been reinsured, and the ceding company turns over to it a like percentage of the premiums generated by the insurance of those risks." *Id.* (citing *Colonial Am. Life Ins. Co. v. Commissioner*, 491 U.S. 244, 247 (1989)).

The *Mississippi Insurance* court continued, "The agreements are clearly direct insurance. Legion stepped into the shoes of MS Casualty and American Reliable. None of the terms and conditions of the contracts changed; but instead, the names of the parties were simply substituted. The reserves were transferred to Legion; and the policyholders began paying premiums to Legion. The risk was entirely upon Legion; therefore Legion was *directly liable*. Thus, we find that the

agreements constituted direct insurance rather than reinsurance." *Id*. (internal citation omitted) (emphasis in the original).

Respondents do not deny that American National has no direct liability to the insured employees under the stop loss contracts at issue. A Plan remains directly liable to its insureds, and the Plan continues to pay claims and administer the coverage. American National's only responsibility is to reimburse the Plan for claims above a set amount. Such coverage is reinsurance under the reasoning applied by the Mississippi Supreme Court.

The second case cited by Respondents likewise does not support their argument. *See In re Mission Ins. Co.*, 112 N.M. 433, 816 P.2d 502 (1991). Respondents argue that "[t]he [*Mission Insurance*] court's description of excess workers' compensation policies . . . describes American National's stop-loss policies." *See* Resp. Br. at 12. While both the *Mission Insurance* contracts and the American National contracts concerned excess loss coverage, that is where any similarity ends. The facts underlying *Mission Insurance* are easily distinguishable from the facts presented to this Court concerning American National's health benefits stop loss reinsurance coverage.

Mission Insurance Company never treated the policies as reinsurance. Mission employees testified that the contracts were never considered reinsurance policies, and that Mission was not set up to write reinsurance. Rather, Mission wrote excess workers' compensation insurance for self-insured employers and, even in liquidation, Mission treated these policies as direct insurance. Further,

Mission employees testified Mission Insurance Company thought it was supposed to pay premium tax on the policies. Conversely, American National *is* set up to write reinsurance, the contracts were labeled as reinsurance, American National has never believed that it was required to pay premium tax on its reinsurance contracts, and American National has always treated these contracts as reinsurance.

There is a much more significant difference between the *Mission Insurance* contracts and the American National contracts: Under the workers' compensation statute at issue in *Mission Insurance*, the employer *was specified by statute* as the insured. *See Mission Ins.,* 816 P.2d at 504 (citing NMSA 1978, 52-1-4). In the instant case, the employer voluntarily establishes the health benefits programs for its employees. In American National's circumstance, the employer is the insurer, with the employees/beneficiaries the insureds; this relationship exists whether or not the employer decides to purchase stop-loss reinsurance coverage. Respondents have not disputed that Missouri has no statute requiring an employer to create a health benefits plan or a statute requiring an employer to purchase stop loss coverage.

Mission Insurance involved an excess loss contract for a self-insured workers' compensation program. The Supreme Court of New Mexico cited and relied upon an Iowa Supreme Court decision. *See Iowa Contract Workers' Compensation Group v. Iowa Insurance Guaranty Association*, 437 N.W.2d 909 (Iowa 1989). The Iowa Supreme Court, in another decision, noted that "the term

'reinsurance' has been used so loosely by lawyers, courts and writers that much confusion has now arisen as to what the term actually connotes." *Iowa Mut. Tornado Ins. Ass'n v. Timmons*, 252 Iowa 163, 174, 105 N.W.2d 209, 215 (1960) (citing *Appleman Insurance Law and Practice*, pages 433, 434). The court held that determining whether or not a contract is reinsurance is "dependent upon the question of direct liability or privity between the company and the insured." *Id.* (citing 29A Am.Jur., 1960 Ed., Insurance, section 1757, 831). This oft-repeated standard highlights the difference between the excess coverage on a self-insured workers' compensation program (casualty insurance), and the excess loss coverage provided here to self-insured health benefit plans. More specifically, this standard finds the former to be insurance and the latter to be reinsurance.

In the context of casualty or workers compensation insurance, the employer sets aside a pool of funds from which to pay property or liability losses that it may suffer. With self-insurance, there is no spreading the risk of loss among entities or persons, and no agreement to indemnify another. The employer is merely assuming the risk of funding its own liabilities. The employer sets aside funds sufficient to pay the employer's statutory liability to employees or else is required to purchase direct insurance. Under the New Mexico Workers Compensation Act, the employer must either prove to the Workers Compensation Administration "that the employer is either financially solvent and can bear the costs of claims without resort to insurance coverage, or that the employer has purchased

insurance for the purpose of *insuring* against such claims." *Mission Ins.*, 816 P.2d at 504 (emphasis added) (citation omitted).

An analogy is illustrative: An employer that undertakes to self-insure its own property against risk of damage by definition is not an insurer. If, however, that same employer undertook to self-insure the property of its employees, such as their cars and homes, the employer would be acting as an insurer. This same rule applies in the context of accident and health coverage, only the "property" that the employer is insuring is the employee's health. American National's stop loss coverage is reinsurance and there is no precedent for finding that reinsurance premium can ever be direct premium. The Court should therefore reject the Respondents' strained argument.

IV. RESPONDENTS FAIL TO REBUT AMERICAN NATIONAL'S EQUAL PROTECTION CLAIMS.

Respondents contend that the federal and state equal protection provisions are not implicated because the state has a "reasonable basis" for discriminating against American National's stop loss reinsurance. According to Respondents, because premium taxes are not being paid by the employer, the state should be allowed to tax the employer's payments for stop loss reinsurance coverage. Respondents, however, fail to acknowledge that federal law prohibits the state from imposing premium tax on self-insured employee health plans.

The federal Employee Retirement Income Security Act of 1974 ("ERISA") recognizes that ERISA plans, such as the employee benefits plans at issue here, are by definition engaged in the business of insurance. ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). While 29 U.S.C. § 1144(b)(2)(A) exempts from ERISA preemption state laws that regulate insurance, section 1144(b)(2)(B) prohibits a state from using that exemption to regulate self-funded ERISA health plans, such as those at issue here, by deeming them to be insurance companies. The United States Supreme Court has recognized that the so-called "deemer clause" is needed to stop states from regulating, under the insurance-regulation exception to ERISA preemption, self-funded ERISA Plans that "engage in the same sort of risk pooling arrangements as separate entities that provide

insurance to an employee benefit plan." *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329, 336 n.1 (2003).

Thus, even though they are "insurers," ERISA plans and ERISA-plan employers cannot be "regulated by" the Department of Insurance – including the collection of premium taxes. The Department of Insurance's inability to tax the direct premiums does not alter American National's status as belonging to the class of taxpayers known as "reinsurers." Singling out payments for the reinsurance provided by American National for taxation, and not taxing other reinsurance, violates the equal protection provisions of both federal and state constitutions.

CONCLUSION

The Court should not consider whether the stop loss coverage being sold by American National in Missouri is reinsurance because the Commission has already made that determination and the issue is not properly before the Court. In any event, the Court should not reverse the decision of the Commission finding that stop loss coverage being sold by American National in Missouri is reinsurance. The Court should also find that these contracts are not subject to premium tax under Section 148.340 RSMo.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

COMES NOW counsel for Appellant and for their Certificate of Compliance, states as follows:

1. The undersigned does hereby certify that Reply Brief of Appellant filed herein complies with the page limits of Rule 84.06(b) and contains 5,160 words of proportional type.

2. Microsoft Word was used to prepare the Reply Brief of Appellant.

3. The undersigned does hereby certify that the diskette provided with this notification has been scanned for viruses and is virus-free.

CERTIFICATE OF SERVICE

I hereby certify that I served a copy of the foregoing document by mailing a true copy thereof on this 13th day of June, 2008 via prepaid U. S. Mail to:

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