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CERTIFICATION FROM THE UNITED STATES COURT OF  
APPEALS FOR THE NINTH CIRCUIT  
IN

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T-Mobile USA, Inc.,

Plaintiff-Appellant,

v.

Selective Insurance Company of America,

Defendant-Appellee.

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RESPONSE OF PLAINTIFF-APPELLANT T-MOBILE USA, INC. TO  
AMICUS CURIAE BRIEF OF AMERICAN PROPERTY CASUALTY  
INSURANCE ASSOCIATION

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## I. INTRODUCTION

Plaintiff-Appellant T-Mobile USA, Inc. (“T-Mobile” or “T-Mobile USA”) respectfully submits this response to the amicus submission of American Property Casualty Insurance Association (“APCIA”) in accordance with RAP 10.1(e).

APCIA’s submission primarily consists of the same arguments and citation to the same inapposite authority already relied upon by Selective – cases supporting the limited proposition that a COI is not the equivalent of an insurance policy, cases holding that the mere possession of a COI does not confer rights as an insured on a certificate holder, or cases involving COIs not issued by the agent of the insurer. As detailed in T-Mobile’s prior submissions to the Court, these arguments have no bearing on the actual issue presented by the certified question: the legal impact of the additional representations made by Selective’s agent within the 2012 COI and how to reconcile those representations with boilerplate disclaimers.

The limited authority actually on point cited by APCIA, *Bituminous Casualty Corp. v. Aetna Life & Casualty*, No. 2:96-2152, 1998 U.S. Dist. LEXIS 23161 (S.D.W.V. Sept. 24, 1998), provides scant reasoning for its holding and is distinguishable from this case for several reasons.

Finally, like Selective before it, APCIA fails to provide the Court with any rational justification or public policy in support of its position.

## II. ARGUMENT

### A. The Authority Cited by the APCIA Is Irrelevant or Distinguishable.

Like Selective's prior briefing to the Court, APCIA's submission primarily relies on arguments and precedent that have no bearing on the certified question, including: (1) argument and authority relating to the general statement that COIs are not the equivalent of insurance policies; (2) cases involving COIs that were not issued by an insurer's agent, meaning that they did not contain the type of binding representation actually at issue in this case;<sup>1</sup> or (3) cases that are distinguishable because they involved other types of insurance.<sup>2</sup>

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<sup>1</sup> See, e.g., *West American Ins. Co. v. Meridian Mutual Ins. Co.*, 230 Mich. App. 305, 307, 583 N.W.2d 548, 551 (1998) (COI "issued to a third party by an agent of the insured on behalf of the insured"); *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 312 (Tex. 2006) (insured's insurance broker issued COI listing manufacturer as an "additional insured" under insured's liability policy); *Progressive Cas. Ins. Co. v. Yodice*, 276 A.D.2d 540, 542, 714 N.Y.S.2d 715, 717 (2000) (COI "not binding" on insurer where the certificate "was prepared by [insured's] broker" because "an insurance broker is the agent of the insured," not the insurer) (internal quotation marks and citation omitted); *McKenzie v. New Jersey Transit Rail Operations, Inc.*, 772 F. Supp. 146, 148-49 (S.D.N.Y. 1991) (COI issued not by the insurer "but by a local insurance broker"; "[g]enerally, a local broker has no authority to bind an insurer"); *T.H.E. Ins. Co. v. City of Alton*, 227 F.3d 802, 804-05 (7th Cir. 2000) (no evidence that insured procured COI naming municipal certificate holder as additional insured from the insurer).

<sup>2</sup> See, e.g., *See, e.g., Atlas Assur. Co. v. Harper, Robinson Shipping Co.*, 508 F.2d 1381, 1386 (9th Cir. 1975) (involving marine cargo insurance policy); *Penske Truck Leasing Co. v. Home Ins. Co.*, 251 A.D.2d 478, 478-80, 674 N.Y.S.2d 400 (N.Y. App. 1998) (commercial automobile policy); *Kaufman v. Puritan Ins. Co.*, 126 A.D.2d 702, 702, 511 N.Y.S.2d 307, 308 (N.Y. App. 1987) (commercial property policy); *Sears, Roebuck & Co. v. Mutual Fire Marine & Inland Ins. Co.*, 1988 WL 105346 (N.D. Ill. Oct 3, 1988) (product liability policy); *Bailey v.*

APCIA's primary argument – the assertion that COIs are not the equivalent of insurance policies – is irrelevant for the reasons already detailed in T-Mobile's prior briefing: (1) the boilerplate disclaimer language in the 2012 COI was not intended to address the type of additional affirmative representations made by Selective's agent here; (2) the only way to harmonize the language of both the general disclaimer and the specific representation at issue under Washington law is to limit the reach of the disclaimer to the circumstance that it was intended to address – a situation where a party claims insured status solely by virtue of possession of a COI; (3) limiting the reach of the disclaimer language at issue does not in any way contravene this Court's 1986 ruling in *Postlewait*, as *Postlewait* did not include a COI issued by an authorized agent and did not address the type of additional, affirmative representation at issue in the certified question; and (4) holding Selective to its authorized agent's representations in the 2012 COI is consistent with the long-standing principle of Washington law that an insurer is bound by the acts of its agent when the agent is acting within the scope of its authority – authority that the Ninth Circuit's Certification Order found to exist and asks the Court to assume for purposes of answering

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*Netherlands Ins. Co.*, 615 F. Supp. 2d 1332, 1335-37 (M.D. Fla. 2009) (commercial automobile policy).

the certified question. See T-Mobile Opening Brief at 29-39; T-Mobile Reply Brief at 11-22.

In short, while general disclaimers may operate to limit the rights conferred by a party's mere possession of a COI, Selective's agent's additional affirmative representation within the 2012 COI that "T-Mobile USA" was "an additional insured" is binding on Selective. The vast majority of argument and authority set out in APCIA's submission do not address that issue and are irrelevant to the certified question.<sup>3</sup>

The one case cited by APCIA that does actually address the issue before the Court, *Bituminous Casualty Corp. v. Aetna Life & Casualty*, is readily distinguishable for several reasons.

First, as noted by APCIA itself, the *Bituminous* decision was based on the very same outdated New York precedent previously cited by Selective – *American Ref-Fuel Co. of Hempstead v. Resource Recycling*,

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<sup>3</sup> It is worth noting that several of the inapposite cases APCIA cites appear to actually support T-Mobile's position because they only involved the question of whether the COIs at issue could modify the terms of coverage – and in fact assumed that the certificate holder was an additional insured. See, e.g., *Pekin Ins. Co. v. Am. Country Ins. Co.*, 213 Ill. App. 3d 543, 547-48, 572 N.E.2d 1112 (1991) (COI naming general contractor additional insured under subcontractor's insurance policy afforded coverage, but that coverage was subject to all of the terms and exclusions within the subcontractor's policy); *Am. Country Ins. Co. v. Kramer Bros., Inc.*, 298 Ill. App. 3d 805, 810-11, 699 N.E.2d 1056 (Ill. Ct. App. 1998) (same); *City of Alton*, 227 F.3d at 804-05 (municipal certificate holder entitled to additional insured coverage under vendor's policy, but COI made clear that such coverage was limited by exclusions set forth in the underlying policy).

*Inc.*, 248 A.D.2d 420, 423, 671 N.Y.S.2d 93 (N.Y. App. 1998).<sup>4</sup> See *Bituminous* at 1998 U.S. Dist. LEXIS 23161 at \*12-14. As noted in T-Mobile's prior briefing, the reasoning of *American Ref-Fuel* (issued in March of 1998) was implicitly rejected just months after the *Bituminous* decision (issued in September of 1998) by the November 1998 decision in *Lenox Realty Inc. v. Excelsior Insurance Company*, 255 A.D.2d 644, 645-46, 679 N.Y.S.2d 749 (N.Y. App. 1998). *Lenox* held that an insurer was estopped from denying coverage to a certificate holder where its agent issued a certificate indicating that the recipient was an additional insured in spite of the same type of boilerplate disclaimer at issue in this case. See *Lenox*, 255 A.D.2d at 646, 679 N.Y.S.2d 749 (rejecting insurer's argument based on disclaimer language indicating that the certificate "does not amend, extend or alter the coverage afforded by the policies below" and holding that the disclaimer "does not alter our conclusion that equitable estoppel applies" and holding that insurer was estopped from denying the

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<sup>4</sup> While primarily relying on *American Ref-Fuel*, APCIA and the *Bituminous* court also referenced three additional cases, all of which are also distinguishable because they did not involve representations made by an insurer's agent. See *Penske Truck Leasing Co., LP*, 251 A.D.2d at 479, 674 N.Y.S.2d 400 (making no reference to any representation of additional insured status in relevant COI); *McKenzie v. N.J. Transit Rail Ops., Inc.*, 772 F. Supp. 146, 148-49 (S.D.N.Y. 1991) (relevant COI issued by broker with "no authority to bind [the] insurer"; *McGill v. Polytechnic Univ.*, 235 A.D.2d 400, 401-02, 651 N.Y.S.2d 992 (N.Y. App. 1997) (making no reference to any representation of additional insured status in relevant COI or indicating who issued that COI).

COI holder's status as an additional insured). In sum, *Bituminous* is based almost exclusively on an outdated and now incorrect statement of New York law.

Second, the *Bituminous* Court did not substantively address either of the two issues underlying the certified question. The *Bituminous* opinion does not address the construction issue before the Court: again, how courts should reconcile the general disclaimer with the more specific representation of additional insured coverage. In contrast, Washington law is clear that a specific representation will trump a general disclaimer like that at issue here. *See Ohio Sec. Ins. Co. v. Axis Ins. Co.*, 190 Wn.2d 348, 353, 413 P.3d 1028 (2018) (specific language governs over general language); *see also Foote v. Viking Ins. Co.*, 57 Wn. App. 831, 834-35, 790 P.2d 659 (1990) (“[I]n the case of conflict the specific or exact term is more likely to express the meaning of the parties with respect to the situation than the general language.” (quotation omitted)).

Nor did the *Bituminous* decision substantively address the issue of estoppel – a doctrine that this Court has made clear is designed to prevent the very type of inequity at issue in this case given that it is undisputed that Selective's own agent (via the representations that it made in the 2012 COI) was the root cause of any confusion about which T-Mobile entity was the correct additional insured for purposes of tendering T-Mobile Northeast's

claim for defense costs.<sup>5</sup> Indeed, the only reference in *Bituminous* to estoppel is a single passing reference to the *American Ref-Fuel* court’s “analysis” of the issue – the bald conclusion that applying estoppel would have allegedly resulted in an “expansion” of coverage in that case. That justification for rejecting estoppel simply does not apply here, as the Court can answer the certified question in the affirmative by holding that Selective is either: (1) estopped from raising the Tender Defense because the record before the Court proves that Selective failed to assert that defense in a timely fashion and that failure clearly prejudiced T-Mobile; or (2) more narrowly, estopped from contesting an otherwise binding representation made by its agent in the 2012 COI based on the boilerplate disclaimers present in the COI. In other words, the Court need only determine that VDG’s affirmative representations in the 2012 COI are binding for purposes of estopping Selective from raising a technicality with regard to T-Mobile’s *tender* – the fact that it referenced “T-Mobile USA” instead of “T-Mobile NE.”

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<sup>5</sup> See *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 10, 206 P.3d 1255 (2009) (estoppel remedy exists to “create a strong incentive for the insurer to act in good faith, and protects the insured against the insurer’s bad faith conduct” (quotation omitted)). As noted in T-Mobile’s prior briefing, the undisputed record before the Court confirms that Selective’s agent issued the 2012 COI, that it identified “T-Mobile USA Inc., its Subsidiaries and Affiliates” as “additional insured[s],” that T-Mobile tendered the claim to Selective on behalf of “T-Mobile USA” as a direct result of and in reliance upon those representations in the 2012 COI, and that Selective’s own claims handler admitted under oath that T-Mobile’s reliance on those representations was reasonable. ER 831; ER 121-22; ER 1021.

Estopping Selective from raising that technicality with T-Mobile's tender does not in any way result in a substantive expansion of coverage, as the underlying claim – coverage for *T-Mobile NE's* defense costs – remains the same regardless of which T-Mobile entity tendered that claim.

The complete absence of any substantive analysis of these critical issues in *Bituminous* is telling, as it does not appear that any court has ever cited the *Bituminous* decision in relation to the issues before the Court. It is the very definition of an outlier, especially when viewed in the context of the legion of cases from other jurisdictions that support answering the certified question in the affirmative. Again, those cases confirm that insurers are bound by the affirmative representations of their agents in COIs and cannot escape liability based on general disclaimer language like that at issue.<sup>6</sup> Those courts have based their holding on the basic proposition

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<sup>6</sup> See, e.g., *West Am. Ins. Co. v. J.R. Const. Co.*, 777 N.E.2d 610, 615, 334 Ill.App.3d 75 (Ill. App. 2002) (insurer bound by representation of insurer's agent in COI that claimant was an additional insured despite identical disclaimer language); *Mtn. Fuel Supply v. Reliance Ins. Co.*, 933 F.2d 882, 889 (10th Cir. 1991) (insurer bound by representation in COI that plaintiff was an additional insured despite disclaimer stating that it "does not amend, extend or otherwise alter the terms and conditions of the insurance coverage in the policies above"); *Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Prop. & Cas. Co.*, 482 N.W.2d 600, 603 (N.D. 1992) (insurer bound by COI stating plaintiff was additional insured despite disclaimer language, noting that a COI "is an insurance company's written statement to its customer that he has insurance coverage, and the insurance company is estopped from denying coverage that the Certificate of Insurance states is in effect"); *Lenox Realty*, 679 N.Y.S.2d at 750-51 (insurer estopped from denying coverage as a result of plaintiff's reliance on COI issued by broker with authority to bind the insurer despite presence of disclaimer

that an insurer is estopped from claiming that disclaimer language vitiates more specific, affirmative representations like those made by Selective's agent here.<sup>7</sup> Given this Court's past pronouncements that insurers are bound by the express representations of their agents, this state's long-standing rule of construction requiring courts to adopt a reading of insurance documents that gives life to all language contained therein, and the fact that this Court has repeatedly confirmed that specific representations trump general ones like the disclaimers at issue, this Court's prior rulings clearly support that same conclusion. *See, e.g., Cambridge Townhomes, LLC v. Pacific Star Roofing, Inc.*, 166 Wn.2d 475, 487, 209 P.3d 863 (2009); *Allstate Ins. Co. v. Huston*, 123 Wn. App. 530, 541-42, 94 P.3d 358 (2004).

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language); *Marlin v. Wetzel Cty. Bd. of Educ.*, 569 S.E. 2d 462, 472 (W. Va. 2002) (same); *10 Ellicott Sq. Court Corp. v. Mtn. Valley Indem. Co.*, No. 07-cv-053S, 2010 WL 681284, \*9-11 (W.D.N.Y. Feb. 19, 2010) (plaintiff entitled to coverage based on insurer's authorized agent's issuance of COI despite disclaimer language and despite lack of qualifying construction contract under additional insured endorsement).

<sup>7</sup> *See, e.g., Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Inc. Co. of Ga.*, 337 F.Supp.2d 1339, 1355-56 (N.D. Ga. 2004) (estopping insurer from disputing representation by authorized agent that certificate holder was additional insured, while noting that identical disclaimer language to 2012 COI made certificate holder "an additional insured under defendants' policies *with coverage to the extent of the policies as they existed at that time*" (emphasis added)); *Bucon, Inc. v. Penn. Mfg. Ass'n Ins. Co.*, 151 A.D.2d 207, 210-11, 547 N.Y.S.2d 925 (N.Y. App. Div. 1989) (identical disclaimer language "could only have been reasonably interpreted by plaintiff as referring to terms and conditions of the coverage actually provided both Marker and plaintiff under the policy and any exclusions from such actual coverage, not a warning that an examination of the policy would negate the existence of *any* coverage for plaintiff, the very fact certified to by PMA" (emphasis in original)).

Third, on the final point noted above, APCIA's position also fails to address this Court's decision in *Fittro v. Lincoln Nat'l Life Ins. Co.*, 111 Wn.2d 46, 50-54, 757 P.2d 1374 (1988), submitted by T-Mobile as additional authority and discussed in the amicus curiae brief of the Associated General Contractors of Washington ("AGC"). *Fittro* addressed the legal impact of "standard boiler-plate" disclaimer language in a COI issued for a group health insurance policy, disclaimers similar to those at issue here indicating that the COI "was not an insurance policy and did not alter or amend the provisions of the policy." *Fittro*, 111 Wn.2d at 52, 757 P.2d 1374. This Court faced the question of whether those general disclaimers trumped a more specific but conflicting representation in the relevant COI – that the duration of coverage was different from that set forth in the underlying policy. *Id.* Finding that standard boilerplate disclaimers like that at issue here created "a trap" for recipients of COIs that contained conflicting representations, this Court refused to enforce them, holding instead that more specific representations contained within the COI trumped the disclaimers as a matter of Washington public policy. *Id.* at 50-54, 757 P.2d 1374 (noting that "[a] clear majority of those courts that have considered similar disclaimer provisions in other certificates have *not* given effect to the disclaimer and have instead enforced the broader coverage suggested in the certificate," and holding that, "as a matter of public policy,

insurance companies . . . will be held to the terms it chooses to place in the certificate” (emphasis in original)).

Fourth, APCIA fails to provide any reasoned explanation of why answering the certified question in the affirmative will create what it describes as “chaos” in the insurance industry any different from that allegedly already existing under Washington law that holds insurers to the representations of their agents. Insurers engage agents to act on their behalf in virtually every aspect of their business and this Court has repeatedly and consistently held that the representations of those agents are binding on insurers as a result. *See, e.g., Chicago Title Ins. Co. v. Wash. St. Office of Ins. Comm’r*, 178 Wn.2d 120, 309 P.3d 372 (2013). Treating representations made by insurer’s agents in COIs the same as any other representation made by an insurer’s agent will not create “chaos,” a fact evidenced by jurisdiction after jurisdiction that has already endorsed the holding sought by T-Mobile in this case. Balanced against APCIA’s lack of concrete examples is the extreme prejudice that would impact literally thousands of Washington insureds and businesses if they are suddenly told they cannot rely on the COIs issued by insurers and their agents, as evidenced by AGC’s amicus submission in this case.

At the end of the day, the ultimate question before the Court is which party should bear the brunt of any mistakes allegedly made by an insurer’s

agent in a COI – the insurer that engaged the agent at issue, failed to properly supervise the activities of that agent, and failed to review the contents of a COI drafted by that agent before the agent provided it to a third party that the agent knew was relying on its contents, or the innocent recipient of that COI that relied on the representations contained therein? Washington law, equity, and simple fairness dictate that those representations are binding on insurers operating within Washington.

### III. CONCLUSION

For the reasons set forth above and in T-Mobile’s prior briefing, T-Mobile respectfully requests that the Court answer the certified question in the affirmative and hold that Selective is bound by its authorized agent’s affirmative representation in the 2012 COI, estopping Selective from challenging T-Mobile USA’s ability to tender the claim at issue for T-Mobile Northeast’s defense costs.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of April, 2019.

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