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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

THE ASSOCIATION OF CALIFORNIA INSURANCE COMPANIES, THE PERSONAL INSURANCE FEDERATION OF CALIFORNIA, THE AMERICAN INSURANCE ASSOCIATION, AND THE PACIFIC ASSOCIATION OF DOMESTIC INSURANCE COMPANIES, Petitioners and Plaintiffs, vs. STEVE POIZNER, Insurance Commissioner of the State of California; and CALIFORNIA DEPARTMENT OF INSURANCE, Respondents and Defendants.	CASE NO.: BS109154 Hon. James C. Chalfant **PETITIONERS' AND PLAINTIFFS' OPPOSITION TO FTCR'S MOTION FOR AWARD OF ATTORNEYS FEES** Date: July 25, 2008 Time: 9:30 a.m. Dept: 85 Complaint Filed: May 25, 2007 [*Filed Concurrently With*: Declaration of Michael A. S. Newman]

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1. INTRODUCTION

The Foundation For Taxpayer and Consumer Rights ("FTCR") is not entitled to attorney fees in this matter, either under Cal. Code Civ. Proc. § 1021.5 or Cal. Ins. Code § 1861.10. The FTCR has not shown, and cannot show, that the financial burden of its private enforcement makes an award appropriate or that it has presented non-frivolous and non-duplicative information which substantially contributed to the results of the subject action.

California law is clear that to obtain attorney fees pursuant to section Cal. Code of Civil Proc. § 1021.5, FTCR must show that the cost of its legal victory transcended its personal interest in the matter – in other words, the cost of participating in the action exceeds the economic benefit it will enjoy from prevailing therein. Here, FTCR's pecuniary interest in this matter clearly outstrips its cost of prosecuting it. The defeat of Petitioners'[1] writ petition means big money for the FTCR, as the decision allows the FTCR as a consumer group to participate in and be paid for fees and costs expended in connection with review of the rate applications filed with the Department of Insurance. Indeed, the FTCR admitted this fact in its July 2007 filing with the court and asserting that intervention in this action was based on its strong pecuniary interest in ensuring that it obtained compensation for its frequent intervention in insurance rate applications.
Such strong financial interest in the result of this action should prevent it from being entitled to fees. Rather, the FTCR must be content to enjoy the bounty that will now flow to it from intervening in rate applications.

Furthermore, even if FTCR had no pecuniary interest in this matter, it would still not be entitled to fees, as there was no "necessity" for its involvement in the case. The FTCR's efforts were clearly duplicative of the Attorney General's.

Likewise, it is clear that the FTCR cannot obtain fees under Cal. Ins. Code § 1861.10, since under that section awards of attorney fees are allowed only in proceedings "permitted or established pursuant" to Chapter 9 of the Insurance Code.[2] The present action was initiated pursuant to Cal. Gov. Code § 11342.2, not Chapter 9, and thus does not constitute such a proceeding. Furthermore, the FTCR would not be entitled to the award of such fees pursuant to section 1861.10 for the independent reason that its efforts were duplicative of the Attorney General's and therefore did not substantially contribute to the outcome of this case.

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[1] "Petitioners" herein consist of the Association of California Insurance Companies; The Personal Insurance Federation of California; The American Insurance Association; and The Pacific Association of Domestic Insurance Companies.

[2] Chapter 9 consists of Sections 1850.4-1861.16 of the California Insurance Code.

The FTCR has no right to receive attorney fees in this action, and its application should be denied.

2. PROCEDURAL BACKGROUND

Plaintiffs filed this action on May 25, 2007. The FTCR filed its complaint in intervention on August 10, 2007. Plaintiffs filed their opening brief on October 1, 2007. The Insurance Commissioner and the FTCR filed their opposing briefs on December 7, 2007. Plaintiffs filed their reply briefs on January 3, 2008. The hearing on this matter took place on March 7, 2008, resulting in the denial of Plaintiffs' writ petition.

The question in this matter was purely legal: Did Sections 2651.1, 2661.1, 2661.3, 2662.1, 2662.3, and 2662.5 of Title 10 of California Code of Regulations violate California law?

Because of FTCR's block-billing practices, it is virtually impossible to determine exactly how much time was spent at each task, but it appears that Pamela Pressley alone billed nearly 100 hours of attorney time preparing FTCR's 15-page opposition brief and accompanying papers, and 203 hours total on the case in total, with the other two attorneys in this matter spent an additional 76 hours on the case. [Pressley Decl., Exh. 1a]. This attorney bill was generated in a writ proceeding that did not even require the analysis of an administrative record – let alone discovery, meet and confer letters, mediation, jury instructions, pretrial filings, motions in limine, witness preparation, or trial. From FTCR's point of view, this case primarily involves the research and filing of a single opposition brief involving purely legal issues.

3. LEGAL ARGUMENT

A. FTCR Has Not Satisfied The Elements For Recovery Of Attorneys Fees Under Section 1021.5

The common law doctrine of the "private attorney general" is codified in section 1021.5 and represents an exception to the American rule that each party pays his or her own attorney's fees. *See Woodland Hills Residents Ass'n. Inc. v. City Council*, 23 Cal. 3d 917, 933 (1979); *Crawford v. Board of Education*, 200 Cal. App. 3d 1397, 1405 (1998). As noted by the Court of Appeal in *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629, 634 (1998), "[u]nderlying the private attorney general doctrine is the recognition that privately initiated lawsuits often are essential to effectuate fundamental public policies embodied in constitutional or statutory provisions, and without some mechanism authorizing a fee award, such private actions often will as a practical matter be infeasible." However, as recognized in *Flannery*, "the Legislature did not intend to authorize an award of fees under section 1021.5 in every lawsuit enforcing a constitution or

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statutory right." *Id.* at 636. *See also Baxter v. Salutary Sportsclubs, Inc.*, 122 Cal. App. 4th 941, 945-46 (2004).

Pursuant to Cal. Code Civ. Proc. § 1021.5, attorney fees may not be awarded unless "the necessity and financial burden of private enforcement . . . are such as to make the award appropriate." *Concerned Citizens of La Habra v. City of La Habra*, 131 Cal. App. 4th 329, 334 (2005). The Court has the discretion to award fees ***only*** if all of the elements above are satisfied. In awarding fees "the trial court must realistically and pragmatically evaluate" whether this requirement has been met. *Id.*

Courts have read "the ***necessity*** and ***financial burden*** of private enforcement" requirement to comprise two distinct elements, each of which must be met if attorney fees are to be awarded. Thus, the movant must prove both that the *financial burden* of private enforcement justifies the award of attorney fees, and that the *necessity* of private enforcement, as opposed to public enforcement, justifies such award. *Arnold v. California Exposition and State Fair*, 125 Cal. App. 4th 498, 511 (2004) (attorney fees cannot be awarded unless movant can satisfy the requirement that the ***financial burden*** of private enforcement justifies the award.); *Committee To Defend Reproductive Rights v. A Free Pregnancy Center*, 229 Cal. App. 3d 633, 639 (1991) (attorney fees cannot be awarded unless movant can prove the necessity of private, as opposed to public, enforcement).

FTCR is not entitled to attorney fees pursuant to section 1021.5 unless it can satisfy ***both*** the financial burden and necessity prongs. Here, it can satisfy neither.

(1) FTCR Does Not Satisfy The Financial Burden Element

Pursuant to the "financial burden" element, "[a]n award of attorney fees under Code of Civil Procedure section 1021.5, requires that the claimant show the cost of its legal victory transcended its personal interest." *Caloca v. County of San Diego*, 102 Cal. App. 4th 433, 447 (2002)(citation omitted); ("The basic legal standard for applying the financial burden criterion involves a realistic and practical comparison of the litigant's person interest with the cost of the suit."); *Williams v. San Francisco Board of Permit Appeals*, 74 Cal. App. 4th 961, 967 (1999) (an award of 1021.5 fees is appropriate only when "the necessity of pursing the lawsuit placed a burden on the plaintiff '***out of proportion to his individual stake in the matter.***'") (emphasis in original; citations omitted). This element relates to the underlying purpose of 1021.5, which is to provide incentive for the plaintiff vindicate the public interest where "his or her own financial stake in the outcome would not by itself constitute an adequate incentive to litigate." *Nelson v. County of Los Angeles*, 113 Cal. App.

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4th 783, 795 (2003). As explained in *Punsly v. Ho*, 105 Cal. App. 4th 102, 117 (2003), it is the task of the trial court to "seek to implement the underlying policy goal of the section, to allow 'an incentive for the pursuit of public interest-related litigation that might otherwise have been too costly to bring.'"

Determining whether the cost of legal victory transcends personal interest requires a commonsense and practical analysis of the circumstances. *See Punsly*, *supra*, at 117. Thus, courts have refrained from establishing rigid rules regarding the nature of the private interest of the litigating party that is weighed against the cost of the suit. Consequently, the private interest "does not necessarily have to be purely economic; the interest there being asserted" may be non-economic, personal, environmental and even aesthetic in nature. *Williams*, *supra*, at 968; *Punsly*, *supra*, at 117-118. Of course, pecuniary interests are without question the kind of interest that can defeat the ability to recover 1021.5 fees. And, as discussed below, courts have consistently denied fees to those who have participated in litigation that has improved or increased their opportunity to strive or compete for pecuniary rewards. *See, e.g., Arnold v. California Exposition and State Fair*, 125 Cal. App. 4th 498 (2004); *United Systems of Arkansas v. Stamison,* 63 Cal. App. 4th 1001 (1998).

FTCR has a clear pecuniary interest in the instant litigation, as the defeat of Petitioners' writ petition has significantly increased FTCR's opportunity to make money. FTCR's own declarations clearly explain how it is this action will translate to increased potential for pecuniary rewards. "In just the last five years," Pamela Pressley reports in her declaration in support of the instant motion, "FTCR has intervened in over two dozen rate proceedings that have resulted in savings of over one billion dollars in annual premiums for consumer policyholders." [Pressley Decl., ¶ 27, page 13:7-8]. "Of these proceedings," Ms. Pressley states, "only three were decided after formal hearing. The remaining proceedings, totaling in savings of $688 million, were resolved without a formal hearing." [Pressley Decl., ¶ 28, page 14:13-17]. Now, with the defeat of Petitioners' writ application, FTCR will seek to receive attorney fees for ***all*** rate applications wherein it participates – in the past five years, this would include the three applications that were resolved after a formal hearing, ***and the 21 (or more) that were resolved without hearings***. In other words, if the past five years' experience is any guide, it can be predicted that FTCR will see something in the vicinity of an 800% rise in the number of application proceedings wherein it can be compensated for its intervention. FTCR has generated an attorney bill of $118,000 in the present action, which required little more than the drafting of an opposition to Petitioners' brief.

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There can be no doubt, therefore, that the Commissioner's victory has given FTCR the opportunity to receive similar fee award many times over. In short, a "realistic and practical comparison of the [FTCR's] personal interest with the cost of the suit" shows that FTCR did not need the promise of 1021.5 fees in order to entice it to bring this suit. It has now been given an unrestricted license to prospect for gold.

If there can be any remaining doubt that this case means big money to FTCR, it should be dispelled by FTCR's own arguments in favor of its intervention in this action. Back in July 2007, when the FTCR applied to intervene, it argued that its unique pecuniary interest in the result warranted intervention:

> "FTCR is a frequent intervenor in Departmental proceedings, whose right to compensation Petitioners seek to curtail in this action. Thus FTCR has a direct pecuniary interest in the subject matter of the litigation . . . If insurers' petition is successful, FTCR stands to receive no compensation for the considerable time spent by its attorneys and experts for its participation in rate proceedings that conclude without formal hearing. Thus, an unfavorable disposition of this matter will impair and impede FTCR's interests in being compensated for its advocacy work . . . . FTCR has a direct financial interest in the denial of the instant writ petition . . ."

[FTCR's Ex Parte Application to Intervene, filed July 26, 2007, at page 10-12]. As the above discussion demonstrates, the FTCR will enjoy a substantial financial benefit in the denial of the writ petition by dramatically increasing its opportunity to receive fee awards in the future.

Where a litigant participates in an action in order to achieve a result that gives it the opportunity to strive or compete for future pecuniary gain, 1021.5 fees are not appropriate. Thus, in *Arnold v. California Exposition and State Fair*, 125 Cal. App. 4th 498 (2004), Arnold, a harness operator, initiated an action to challenge a contract entered into between defendants and a second harness operator, arguing that competitive bidding was required under law in order to award such a contract. Arnold prevailed in the action. *Id.* at 502-504. Arnold applied for 1021.5 fees. The trial court held, and the court of appeal affirmed, that Arnold was not entitled to 1021.5 fees because the relief he sought would give him "the ***opportunity*** to compete for a potentially lucrative future public contract with Cal Expo." *Id.* at 510. (emphasis added). As the Court in *Arnold* explained, "[t]he basic legal standard for applying the financial burden criterion involves a realistic and practical comparison of the litigant's personal interest with the cost of the suit. . . The issue, in short, is whether the cost of the litigation is out of proportion to the litigant's stake in the litigation." *Id.* at 511. A "realistic and practical" look at the evidence showed that Arnold had run harness racing operations in the past, and it was therefore clear, the court concluded, that he wanted to do so again. Thus, his financial interest in the litigation, which gave him the opportunity to compete for such a

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contract with Cal Expo, was "specific, concrete, and significant, and based on objective evidence." *Id.* at 511.

Similarly, in *United Systems of Arkansas v. Stamison,* 63 Cal. App. 4th 1001 (1998), a disappointed bidder, United Systems of Arkansas ("USA"), brought a writ of mandate after another bidder was awarded a contract to provide products to the Department of Motor Vehicles. The court of appeal held that USA was correct in its assertion that the contract was awarded in an improper manner. However, the court nonetheless held that USA was not entitled to 1021.5 attorney fees because it had brought suit "in order to ***have a chance*** at obtaining a contract worth almost half a million dollars. As such, this suit does not meet the requirements of section 1021.5." *Id.* at 1013 (emphasis added). As in *Arnold*, it is clear that litigation that opens up the opportunity to strive or compete for pecuniary gain will defeat the burden prong, even if pecuniary recovery is not certain or guaranteed, and even if further future work or effort is required to obtain such benefits.

As in *Arnold* and *United Systems of Arkansas*, FTCR's interest in the present litigation is clear and compelling as the action has vastly increased its ability to make money. If anything, FTCR is far more certain to see money than was Arnold or United Systems of Arkansas. In those two cases, the parties seeking attorney fees were, respectively, competing for individual contracts, which they might easily have lost out to another bidder; still, the court found their interest disqualified them for 1021.5 fees. FTCR has a far clearer and surer financial interest in the present litigation, as, by its own report, it is constantly involved in rate proceedings, and it can be predicted that dozens of opportunities to make money will arise as a result of this lawsuit. At very least, it is clear that FTCR anticipates this to be the case. That is, purportedly, why FTCR had standing to intervene – because, by its own allegations, it stood to lose substantial sums if the writ prevailed. Once again, a "realistic and practical" look at the situation shows that FTCR's anticipated future awards far exceeded the cost of the suit. Again, FTCR needed no promise of 1021.5 fees to encourage it to pursue this suit.

Faced with its clear inability to satisfy the burden requirement, FTCR resorts to sophistry, arguing that its pecuniary interest in this litigation should be ignored by this Court because its actions in the present case have only given it the opportunity to strive for future fee awards, and have not guaranteed them.[3] "In other words," the FTCR argues, "FTCR's prevailing in this action

[3] Strangely, FTCR's argument that it meets the financial burden element of section 1021.5 is consigned to a mere footnote in its brief (Opening Brief, at page 7-8, fn. 5). This is not a footnote issue. FTCR ***cannot*** obtain attorney fees under section 1021.5 unless it can prove that it satisfies this element. *Arnold*, *supra*, at 11.

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has not absolutely secured it any future pecuniary gain, and even if FTCR were to obtain a future fee award . . . it would only be receiving that monetary sum to compensate it for work its attorneys perform in the future." [Opening Brief, at page 8:19-21]. FTCR's argument is directly contradicted by the rules of *Arnold* and *United Systems of Arkansas*, *supra*, which do not make an exception to the burden rule where the litigation creates an opportunity to compete for pecuniary rewards, rather than guaranteeing a particular sum.

Furthermore, FTCR's argument that prospective attorney fees in rate proceedings will depend upon FTCR's future advocacy work and proof of desert is a red herring. In *Arnold* and *United Systems of Arkansas*, the movants' future enjoyment of pecuniary benefits depended upon the efficacy of future endeavors in competing with other competitors for contracts, and yet the court found the pecuniary interest sufficiently real to deny attorney fees. Likewise, here the fact that FTCR's future fees will depend upon future work does not change the fact that this litigation has resulted in a significant increase in the number of opportunities FTCR will have to obtain such fees, far in excess of the amount it has expended in this procedurally simple case. Under the reasoning of *Arnold* and *United Systems of Arkansas*, therefore, fees must be denied.

FTCR's citation to *Citizens Against Rent Control v. City of Berkeley*, 181 Cal. App. 3d 213 (1986), for the proposition that "speculative" pecuniary gain is insufficient to justify the denial of 1021.5 fees is misplaced. There, Citizens Against Rent Control ("CARC"), a political group formed to oppose a Berkeley ballot measure that would enact rent control, challenged a law that limited the individual contributions to political campaigns to $250 per person. *Id.* at 220. As CARC had received several contributions well in excess of $250, CARC was required, under the campaign finance ordinance, to pay $18,600 to the city treasury. *Id.* CARC sought and obtained a temporary restraining order prohibiting enforcement of the campaign finance ordinance. *Id.* The ballot measure that would have enacted rent control was in fact defeated in the election two weeks after CARC had initiated the lawsuit attacking the campaign contribution ordinance. *Id.* Later, in 1979, rent control was enacted by Berkeley. *Id.* at 230. Nevertheless, CARC continued its lawsuit challenging the campaign finance law, which went to the California Supreme Court, and eventually found its way to the U.S. Supreme Court, which vindicated CARC's position in 1981. *Id.* at 221. CARC sought over $200,000 in attorney fees. *Id.*

In opposing the motion for attorney fees, City of Berkeley argued that the cost of the victory did not transcend the personal stake of CARC because its individual members attacked the campaign finance law in order to defeat rent control, which in turn would erode their property

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values. The Court of Appeal rejected this argument, noting that the connection between CARC's attack on the finance law and the benefits from defeating rent control were so convoluted as to be negligible. Moreover, the purported financial incentive behind CARC's litigation evaporated before the matter even went to appeal, as rent control had become a reality in Berkeley in 1979, and the appeal continued for years thereafter. Notwithstanding the fact that rent control was no longer a viable issue, CARC "continued to defend their judgment before both the state and federal high courts" until their ultimate victory in 1981. "***On these facts***," the court of appeal was careful to say, City of Berkeley's argument "disintegrates into a claim that property owners are cut off from the benefits of section 1021.5 whenever they pursue litigation that might someday help them further or secure their property interests. The claim is untenable." *Id.* at 231 (emphasis added).

The present situation is analogous to *Arnold* and *United Systems of Arkansas*, not to *Citizens Against Rent Control v. City of Berkeley*. Here, unlike CARC, FTCR stands to enjoy a substantial and direct pecuniary gain from this litigation. Its interest in this case is not like the abstract and distant pecuniary interests of the members of CARC, for whom the litigation "might someday help them further or secure their property interests." Rather, like the movants in *Arnold* and *United Systems of Arkansas*, FTCR is striving for a concrete economic advantage – i.e., the ability to receive fees where none had been possible before, in the context of proceedings in which FTCR is by its own admission a frequent intervenor.

Finally, FTCR should not be given a pass on the burden requirement merely because of its self-serving statement that its "primary motivation was to vindicate important statutory rights." In *Planned Parenthood v. City of Santa Maria*, 16 Cal. App. 4th 685 (1993), the clinic, Planned Parenthood, challenged a grant of money that was conditioned on a clinic not performing abortions. While acknowledging that the matter implicated the constitutional right to privacy, the court nonetheless could not avoid the conclusion that obtaining of grant money was the primary goal of Planned Parenthood in the action, and thus denied the requested attorney fees. *Id.* at 691. In so ruling, the Court distinguished *Planned Parenthood v. Aakhaus*, 14 Cal. App. 4th 162, 173 (1993), where attorney fees were awarded to a clinic that brought an action the primary goal of which was to prevent harassment of its abortion patients that violated their constitutional right to privacy. Here, as in *Planned Parenthood v. City of Santa Maria*, the collection of money by the FTCR is the declared primary goal of this action, and FTCR cannot avoid the strictures of section 1021.5 with a self-serving statement that its individual receipt of such money will benefit the public. This is essentially an argument that the FTCR is immune from the burden requirement of section 1021.5 as

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long as it can claim it is serving the public interest. Nothing in statutory or case law supports such a claim.

Therefore, FTCR cannot satisfy the burden element of 1021.5 and its request for fees must be denied.

(2) FTCR Cannot Establish That Private Enforcement Was Necessary

In order to recover their fees and expenses as "private attorneys general" under section 1021.5, Intervenors must prove that "the necessity of private enforcement makes the award appropriate." *National Parks and Conservation Ass'n. v. County of Riverside*, 81 Cal. App. 4th 234, 238 (2000). As the California Supreme Court has observed, "[t]his factor looks to the adequacy of *public* enforcement and seeks economic equalization of representation in cases where private enforcement is necessary." *Hewlett v. Squaw Valley Ski Corp.*, 54 Cal. 4th 499, 544-45 (1997) (Emphasis in original.)

"The private attorney general theory is based in part on the supposition that even in cases in which public enforcement is possible, public agencies are often unwilling or incapable because of insufficient staffing to protect important rights." *Wal-Mart Real Estate Business Trust v. City Council*, 132 Cal .App. 4th 614, 624 (2005). The trial court "must carefully walk the line between unreasonably transmuting section 1021.5 into an unwarranted cornucopia of attorney fees for those who intervene in, or initiate litigation against, private parties under the guise of benefiting the public interest while actually performing duplicative, unnecessary, and valueless services; and providing appropriate compensation under that statute in cases where the colitigating private party does render necessary, significant services of value and benefit to the public." *Committee To Defend Reproductive Rights v. A Free*, 229 Cal. App. 3d 633, 643 (1991). As the *Committee* court explained:

> Important factors the trial court should address in determining if the services of the private party were necessary, so as to support that ultimate finding, are these: (1) Did the private party advance significant factual or legal theories adopted by the court, thereby providing a material non de minimis contribution to its judgment, ***which were nonduplicative of those advanced by the governmental entity***? (2) Did the private party produce ***substantial evidence significantly contributing to the court's judgment*** which was not produced by the governmental entity, and which was neither duplicative of nor merely cumulative to the evidence produced by the governmental entity?
>
> In short the necessity element is not to be determined simply by the form of such private services. A private litigant's theories or argument, while literally different from those advanced by the governmental entity, may or may not lack significance in contributing to the result obtained.

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Id. at 642-643 (emphasis added). In so commenting, the court also observed in footnote 12: "Section 1021.5 was urged on the Senate Judiciary Committee as, inter alia, providing fees in 'public interest litigation' for private attorneys in 'a miniscule percentage of the cases that now are in the courts or are likely to be in the courts.' (Hearings on Sen. Bill No. 664 before the Sen. Com. on the Judiciary (Sept. 22, 23, 1975) p. 47 et seq)"

FTCR added nothing of value to the proceedings that was different from what the Commissioner's attorneys offered. The deputy Attorney General appeared at every stage of these proceedings to defend the positions of the Insurance Commissioner as to the changes to regulations which the Commissioner adopted. While FTCR filed its opposition brief together with an extensive and entirely superfluous declaration (which the Court said that it disregarded as mere "argument"), its substantive contribution to this case (i.e, the legal discussion of the meaning of Cal. Ins. Code § 1861.10) was duplicative of the Attorney General's efforts. As such, they fail to meet the "necessity" element of section 1021.5.

Hewlett v. Squaw Valley Ski Corp., 54 Cal. App. 4th 499 (1997), cited by FTCR for the proposition that fees can be awarded notwithstanding involvement of a public attorney, is instructive because of its clear differences from the present case. In *Hewlett*, the Placer County Deputy District Attorney submitted a declaration admitting that the scope of the litigation was simply too much for his office to handle. *Id.* at 545. To the contrary, this was not a case that imposed such a burden on the Attorney General that he could not adequately defend the Commissioner or the Department of Insurance. As the Court is aware from the hearings in this action, and as reflected in the filings, the Commissioner has been thoroughly and competently represented by the Attorney General. FTCR cannot and does not contend otherwise.

California law is clear that no fees are warranted under section 1021.5 merely because a party assisted in achieving the outcome. As the court in *Crawford, supra,* 200 Cal. App. 3d at 1407, (cited by FTCR) observed: "If a lawsuit is successful, but the intervener contributed little or nothing of substance in producing that outcome, then fees should not be awarded." Likewise, in *Ciani v. San Diego Trust and Savings Bank*, 25 Cal. App. 4th 563 (1994), a request for fees under section 1021.5 was denied because the active prosecution of dispositive issues by the State negated the necessity of the efforts of the co-litigating plaintiff.

Contrary to FTCR's argument, Petitioners do not challenge the claim for attorney's fees merely because of the presence of the Attorney General in this proceeding. Rather, as noted in

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County of Humboldt v. Swoap, 51 Cal. App. 3d 442, 445 (1975), "[i]n determining the value of legal services rendered to an intervener-recipient, the courts should insure that a recipient's legal representative is not compensated for making a merely nominal appearance ***or by duplicating the efforts of the Attorney General*** . . ."[4]

Here, it is clear that FTCR added very little that was not provided by the Attorney General. The FTCR made essentially all of the same arguments in this case as made by the Attorney General. Both FTCR and the Commissioner cited most of the same cases and made the same points. For instance:

- The Department and the Foundation both claimed that the word "proceeding" is broad and without limitation, and can mean "any act" that is part of a larger action. (See e.g., FTCR's Opposition, pp. 8 and 10; Respondent's Opposition, p.7)
- Both argued that if the drafters of the law meant "hearing," they would have used that term. (See e.g., FTCR's Opposition, p. 9; Respondent's Opposition, p.8)
- Both couched the application review process as a "pre-hearing negotiation," which leads to "settlement" without hearing. (See e.g., FTCR's Opposition, pp. 5-6; Respondent's Opposition, p.9)
- Both argued that the Commissioner has broad discretion to interpret and implement the insurance laws, including to determine what a "proceeding" is. (See e.g., FTCR's Opposition, pp. 14-15; Respondent's Opposition, p. 8-9)
- Both emphasized that the purpose of Proposition 103 was to encourage consumer participation in rating matters. (See e.g., FTCR's Opposition, pp. 12-13; Respondent's Opposition, pp. 9-10)
- Both claimed that the Commissioner's decision not to hold a hearing is a "decision" within the meaning of CIC § 1861.10(a). (See e.g., FTCR's Opposition, p. 11; Respondent's Opposition, p.14)
- Both provided detailed discussions of the Department's informal "practice" of permitting consumer groups to interject during the Department's administrative review of a rate application. (See e.g., FTCR's Opposition, pp. 1 and 5-6; Respondent's Opposition, p. 11. See also Declarations of Mohr and Pressley).

[4] In that case, while the request for an award of fees was approved, such award was based on the specific fee-sharing mechanism found in Welfare and Institutions Code section 12962, not the generic private attorney general statute, section 1021.5.

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Some work of the FTCR differed from the Attorney General's, but it was uniformly perfunctory and unhelpful to the Court. For example, the hours the FTCR billed for drafting the Declaration of Pamela Pressley in support of its Opposition, and responding to Plaintiff's objections to this document, were essentially gratuitous and useless.[5] The Declaration largely purported to describe the good works that FTCR allegedly performed under the banner for Proposition 103 and Cal. Ins. Code § 1861.10, but added nothing to the legal questions before the Court. As the Court concluded, it did not rely on that data for its holding, characterizing it as mere "argument". Declaration of Michael A. S. Newman ("Newman Decl"), Exh. "A" (Transcript of Writ Hearing, March 7, 2008), at 2:24-28 ("And it's also true that I didn't need the evidence to rule this, and that I didn't consider the evidence.")

In addition, the Court did not rely on information submitted or arguments made by the FTCR which were not duplicative of those from the Department. The Court's written decision did not cite any cases cited solely by the FTCR in support thereof. The Court cited cases cited by the Attorney General. In fact, the Court's ruling exclusively references language from the ***Respondent's*** Opposition. There is no part of the Court's decision or analysis that can be traced to anything that the FTCR added, which was not already argued by the Commissioner. It is clear from the Oppositions and the Court's written ruling that the judge would have had the same information that formed the basis of his opinion regardless of whether the FTCR participated in this matter or not.

Indeed, the Court explained that it believed this case to be "simple" and "straightforward," and that its decision was based on its interpretation of the plain meaning of the statute. (Newman Decl., Exh. A, at 15:8-9.) It does not appear that FTCR's submission added significant nuance or detail that was important to the Court's determination.

In short, far from fulfilling the necessary role of acting as a private attorney general, the FTCR's actions were duplicative of those of the **real** Attorney General. FTCR's participation in this action required more work by the Plaintiffs and the Court, but added nothing unique to the Court's determination on the merits. Just as they have failed to satisfy the burden element, they have also failed to establish that the "necessity of private enforcement" justifies fees under section 1021.5. Failure to satisfy either element disqualifies the FTCR from receiving fees. Here, as

[5] Because of FTCR's block-billing practices, it is impossible to tell exactly how much time was spent on the declaration alone.

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demonstrated herein, neither requirement is met. As such, no award of fees under section 1021.5 is appropriate.

B. FTCR Is Not Entitled To Attorney Fees Under Insurance Code Section 1861.10

FTCR claims that it is also entitled to fees under Cal. Ins. Code § 1861.10(b), which provides that consumer groups are entitled to an award of fees if they (1) represent the interests of consumers; and (2) make a substantial contribution to the adoption of an order or decision by this court in a proceeding permitted or established under Chapter 9 of the Code. The FTCR is not entitled to fees under section 1861.10(b) because the present matter is not a matter within the scope of Chapter 9. Moreover, as discussed *supra*, the FTCR has not shown that it substantially contributed to the court's order. All of its contribution was duplicative of work done by the Department.

The FTCR is not intervening in a proceeding "permitted or established pursuant" to Chapter 9 of the Code. Petitioners' action challenging the Amended Regulations arises under the Administrative Procedure Act under the Government Code, not the Insurance Code. Under § 11342.2 of the Government Code, when an agency, by the express or implied terms of a statute, has the authority to adopt regulations, "no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." Section 11350 permits interested persons to challenge any regulations on the grounds that they do not meet the requirements of § 11342.2. Petitioner brought this action under these statutes, not Chapter 9 of the Insurance Code.

Even if the writ petition was an action under Chapter 9 of the Code, the Foundation would not be entitled to the award because it clearly did not contribute any information or argument to the court, which was not already submitted by the Department. A "substantial contribution" is defined to mean that:

> "the intervenor substantially contributed, as a whole, to a decision, order, regulation, or other action of the Commissioner by presenting relevant issues, evidence, or arguments which were ***separate and distinct*** from those emphasized by the Department of Insurance staff or any other party, such that the intervenor's participation resulted in more relevant, credible, and ***non-frivolous information*** being available for the Commissioner to make his or her decision than would have been available to the Commissioner had the intervenor not participated. ...." (Emphasis added). 10 CCR § 2661.1(k).

Regulation section 2662.5(b) further specifies that:

> "***To the extent the substantial contribution claimed by a petitioner***, intervenor or participant ***duplicates the substantial contribution of another party*** to the proceeding and

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was not authorized in the ruling on the Petition to Intervene or Participate, the petitioner's, intervenor's or participant's ***compensation may be reduced***. Participation by the Department of Insurance staff does not preclude an award of compensation, so long as the petitioner's, intervenor's, or participant's substantial contribution to the proceeding does not merely duplicate the participation by the Department of Insurance's staff. In assessing whether there was duplication, the Commissioner will consider ***whether or not the petitioner, intervenor or participant presented relevant issues, evidence, or arguments which were separate and distinct from those presented by any party or the Department of Insurance staff***." (Emphasis added).

Thus, substantial contribution is measured by the presentation of relevant and non-frivolous information. Such information cannot be duplicative of the contribution made by the Commissioner or another party to the proceeding. Under the regulation, the FTCR is not entitled to fees if the same issues, arguments and information would have been presented in the proceeding whether or not it participated. In addition, any award of fees may be reduced to the extent that the FTCR presented data or arguments that are duplicative of that presented by the Commissioner. As discussed more fully in the previous section, virtually every contribution of the FTCR to this matter, other than those contributions (such as the Declaration of Pamela Pressley) that were entirely frivolous, was duplicated by the Attorney General. Thus, even if the FTCR were, in principle, entitled to fees under section 1861.10, such fees would have to be severely, if not entirely, reduced because they were duplicative of the Commissioner's work in this matter.

C. No Multiplier Should Be Applied To Any Fee Award In This Case

FTCR is not entitled to any fees in this action. It is likewise clear that, even if fees were appropriate, certainly no multiplier should be applied. For one thing, FTCR's bill is already surprisingly large for so simple a case. FTCR has purportedly expended 270 lawyer hours on a case that involved no discovery, no trial, no witness preparation, no travel – little more than the drafting of a single 15 page opposition to a single 12 page brief involving purely legal issues that essentially duplicated the efforts of the Attorney General.

Furthermore, case law militates against the award of a multiplier in the present case. In *Flannery v. California Highway Patrol*, 61 Cal. App. 4th 629 (1998), the Court of Appeal reviewed the refinement of case law as to claims for multipliers. It noted the United States Supreme Court's caution in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), that many of the factors argued regarding fee adjustment (up or down) are "subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate." *Flannery* at 644. That court noted that in *Blum v. Stenson*, 465 U.S. 886 (1984), the U.S. Supreme Court "stressed that the product of the calculation is not simply an initial estimate of the final award; instead, when the applicant has claimed the rate and

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number of hours are reasonable, the resulting product is *presumed* to be the reasonable fee contemplated. ***The court also limited the factors to be considered in determining whether to adjust that lodestar amount, holding that the novelty and complexity of the issues, the special skill and experience of counsel, the quality of representation, and the results obtained are fully reflected in the lodestar and cannot serve as independent bases for increasing the award.***" (Bold emphasis added.) *Flannery, supra* at 644. Finally, the court in *Flannery* observed that the statutory basis for the fee award, in that case Government Code section 12965, like Insurance Code section 1861.10(b) here, allows only an award of "reasonable attorneys fees, ***not reasonable fees plus a windfall***." *Id.*

More recently, in *Ketchum v. Moses*, 24 Cal. 4th 1122 (2001), the California Supreme Court advised that a multiplier is the exception, not the rule, explaining at page 1139:

> "[A] trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party."

Here, the FTCR has spent what appears to be an excessive amount of time producing work that to a very large extent duplicates the efforts of the Attorney General. Awarding a multiplier here is unnecessary and, in effect, would amount to imposition of punishment on the losing parties. A positive multiplier should therefore not be applied.

4. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the instant motion for attorney fees be denied in its entirety.

Dated: July 14, 2008

BARGER & WOLEN LLP

By: Robert W. Hogeboom

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: Barger & Wolen LLP, 633 West Fifth Street, 47th Floor, Los Angeles, California 90071-2043.

On **July 14, 2008**, I served the foregoing document(s) described as **PETITIONERS' AND PLAINTIFFS' OPPOSITION TO FTCR'S MOTION FOR AWARD OF ATTORNEYS FEES** on the interested parties in this action by placing [ ] the original [X] a true copy thereof enclosed in sealed envelope addressed as stated below:

SEE ATTACHED SERVICE LIST

[X] **BY E-MAIL**

[X] I served the above-entitled document(s) by e-mail and .pdf attachment through the office e-mail service for Barger & Wolen LLP.

[X] **OVERNIGHT DELIVERY**

[X] I am "readily familiar' with the firm's practice of collection and processing correspondence for overnight delivery. Under that practice it would be deposited in a box or other facility regularly maintained by the express service carrier, or delivered to an authorized courier or driver authorized by the express service carrier to receive documents, in an envelope or package designated by the express service carrier with delivery fees paid or provided for, addressed to the person on whom it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; otherwise at that party's place of residence.

[ ] **BY PERSONAL SERVICE**

[ ] I caused such envelope to be delivered to a commercial messenger service with instructions to personally deliver same to the offices of the addressee on this date.

[ ] **BY FACSIMILE**

[ ] By transmitting an accurate copy via facsimile to the person and telephone number as follows: **Christine Zarifian (Fax No. 213-897-5775); Pamela Pressley (Fax No. 310-392-8874)**

[X] **(STATE)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed at Los Angeles, California on **July14, 2008.**

MELANIE A. TAVERA
(Name)

(Signature)

SERVICE LIST

The Association of California Insurance Companies, et al. v. Steve Poizner, et al.
Los Angeles Superior Court; Case No. BS 109154

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