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14 IN THE SUPERIOR COURT OF CALIFORNIA
15
16 COUNTY OF SACRAMENTO

17 MERCURY CASUALTY COMPANY,
Petitioner and Plaintiff,
18 v.
19 DAVE JONES, IN HIS OFFICIAL CAPACITY
AS THE INSURANCE COMMISSIONER OF
20 THE STATE OF CALIFORNIA,
Respondent and Defendant.

22 CWD,
23 Intervenor.
24
25 PERSONAL INSURANCE FEDERATION OF
CALIFORNIA, et al. ("THE TRADES"),
26 Intervenor.

Case No. 34-2013-80001426
Assigned to: Hon. Shellyanne W.L. Chang, Dept. 24

**CONSUMER WATCHDOG'S OMNIBUS
REPLY IN SUPPORT OF MOTION FOR
ATTORNEYS' FEES AND EXPENSES
RESPONDING TO MERCURY'S AND THE
TRADES' OPPOSITIONS**

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1 **INTRODUCTION**

2 Neither Mercury nor the Trades dispute Consumer Watchdog’s (“CWD’s”) entitlement to fees for
3 its substantial contribution to the Court’s decision in this matter as the only other party other than
4 Mercury that was also a party in the underlying rate proceeding, nor do they object to the reasonableness
5 of the hourly rates charged. Instead, Mercury claims that CWD should request its fees from the
6 Commissioner, asserts that fees are not available under Code of Civil Procedure section 1021.5 because
7 they are available under Insurance Code section 1861.10(b), objects to the format of CWD’s billing
8 entries, and conclusively opines without any credible evidence that time spent on four tasks was
9 excessive. The Trades do not dispute any amount of CWD’s requested fees, but claim that they are not
10 liable for any portion of CWD’s fees. Each of these assertions is without merit, as discussed more fully
11 below, and CWD should be awarded the full amount of fees and expenses requested having substantially
12 contributed to the Court’s decision and prevailed against both Mercury and the Trades in this action.

13 **ARGUMENT**

14 **I. THE TRIAL COURT HAS JURISDICTION TO AWARD FEES UNDER INSURANCE**
15 **CODE SECTION 1861.10.**

16 Mercury argues “the Commissioner has exclusive jurisdiction over fee requests in rate
17 proceedings that originated before Commissioner, including requests for reimbursement of fees incurred
18 at the court level in writs of administrative mandamus,” claiming the Court lacks jurisdiction. (Mercury
19 Opp. at 3:22-25.) The plain language of section 1861.10 and case law provides otherwise.

20 The statute states: “*a court shall* award reasonable advocacy and witness fees and expenses to
21 any person who demonstrates that (1) the person represents the interests of consumers, and, (2) that he or
22 she has made a substantial contribution to the adoption of *any order . . . or decision by . . . a court.*”
23 (Ins. Code § 1861.10(b), emphasis added.) Contrary to Mercury’s contention, the statute itself expressly
24 requires that a court award reasonable advocacy and witness fees and expenses when the two statutory
25 conditions are met. (See *Assoc. of Cal. Ins. Cos. v. Poizner* (2009) 180 Cal.App.4th 1029, 1047.)

26 The statute contains no requirement that the request be made to the Commissioner for work done in a
27 writ proceeding before a court. Numerous courts have awarded attorneys fees under section 1861.10(b)
28

1 and Code of Civil Procedure section 1021.5 to CWD and other consumer intervenors.¹

2 Mercury derived its misleading interpretation that a fee request may only be made to the
3 Commissioner from its selective and incorrect reading of *Economic Empowerment Foundation v.*
4 *Quackenbush* (1997) 57 Cal.App.4th 677 (“*EEF*”). Taken in context, however, *EEF* cuts against
5 Mercury’s position. In that case, *EEF* attempted to bring a fee motion in the court in the first instance for
6 fees it incurred in a rate proceeding before the Department. (*Id.* at 680.) *EEF* did not seek any writ relief
7 in the court of the merits of the Commissioner’s decision on the rate application. As framed by the court,
8 the “threshold issue” was “one of jurisdiction: Is a claim for fees for intervention in an insurance rate
9 proceeding *originally cognizable in court?*” (*Id.* at 684, emphasis added.) Unremarkably, the *EEF* court
10 held that *EEF*’s sole remedy was to seek an award from the Commissioner for its work in rate proceeding
11 before the Department. (*Id.* at 690.) Nothing in the *EEF* decision states that an intervenor must submit a
12 fee request to the Commissioner for work performed in a writ action in which the court renders the final
13 decision, and indeed that issue was not before the court since no party had sought writ review of the
14 Commissioner’s rate orders. CWD has already sought from the Commissioner and been awarded its fees
15 for work it performed in the underlying rate proceeding in this matter. (4/7/15 Pressley Decl., ¶29.)
16 Thus, the *EEF* case has no application here.

17 Moreover, Mercury’s argument ignores the fact that its Petition and Complaint and the Trades’
18 Complaint sought declaratory relief causes of action challenging the Commissioner’s interpretation and
19 application of rate regulations, 10 CCR § 2644.10(f) (excluded institutional advertising expenses) and 10
20 CCR § 2644.27(f)(3) (confiscation variance) and the Trades brought a facial challenge to 10 CCR §
21 2644.10(f). Courts have properly awarded fees under section 1861.10(b) for writ and declaratory relief
22 challenges to the Commissioner’s regulations. (See e.g., *Assoc. of Cal. Ins. Cos. v. Poizner* (2009) 180
23 Cal.App.4th 1029, 1054-55; CWD RJN, Exhs. 1-5.)

24 **II. CONSUMER WATCHDOG’ FEE MOTION IS TIMELY.**

25 Mercury claims CWD’s fee motion is untimely, citing to a regulation that applies to fee requests
26 submitted to the Department of Insurance Public Advisor after a decision by the Commissioner (10 CCR
27 § 2662.3), not to fee motions submitted to a court. (Mercury Opp. at 5-6.) CWD’s fee motion is timely

28 ¹ See, e.g., *Assoc. of Cal. Ins. Cos. v. Poizner*, *supra*, 180 Cal.App.4th 1029, 1054-55; CWD’s accompanying Request for Judicial Notice (“CWD RJN”), Exhs. 1-5.

1 under the applicable 60-day timeline contained in California Rules of Court, rules 3.1702(b)(1) and
2 8.104(a)(1)(B), providing for the filing of fee motions in the trial court. The Court entered judgment in
3 favor of Respondent and CWD on February 5, 2015, and notice of entry of judgment was served on the
4 parties by Respondent on February 9, 2015. CWD timely filed and served its fee motion within 57 days
5 of entry of judgment on April 7, 2015.

6 **III. CWD IS ENTITLED TO ITS FEES UNDER CODE OF CIVIL PROCEDURE SECTION**
7 **1021.5 IN ADDITION TO INSURANCE CODE SECTION 1861.10.**

8 Mercury claims that CWD is not entitled to any fees under Code of Civil Procedure section
9 1021.5 because the statute does not apply to writ actions arising out of rate proceedings. (Mercury Opp.
10 at 6-7.) The Trades also argue that section 1021.5 does not apply because section 1861.10 is the more
11 specific fee shifting statute. (Trades Opp. at 5-8.) Mercury and the Trades do not cite any cases that
12 have so held. Numerous cases have held that when more than one fee-shifting provision applies, fees
13 may be awarded under each.²

14 CWD's motion discussed how it meets each of the requirements of section 1021.5. Mercury
15 claims that CWD does not meet the "the necessity and financial burden of private enforcement"
16 requirement because fees are available under section 1861.10(b). (Mercury Opp. at 7:15-21.) Mercury's
17 unsupported claim is belied by the fact that courts award fees under section 1021.5 and other fee-shifting
18 statutes and do not view the availability of fees under one statute as a bar to awarding fees under another
19 (see fn. 2, *supra*).

20 The Trades assert that CWD does not meet the "necessity... of private enforcement" prong
21 because the Attorney General vigorously defended the Commissioner's decision. (Trades Opp. at 8, fn.
22 3.) California courts have rejected Petitioners' "after-the-fact", "but-for" test of necessity. (*City of Santa*
23 *Monica v. Stewart* (2005) 126 Cal.App.4th 43, 86-88.) In *City of Santa Monica*, the court held that
24 necessity is not determined "on an after-the-fact assessment of whether the intervenor's participation was

25 ² See, e.g., *Amaral v. Cintas Corp. No. 2* (2008) 163 Cal.App.4th 1157, 1174 [fees awarded under CCP §
26 1021.5 and transcript and translation expenses under CCP § 1033.5(c)(4)]; *Riverside Sheriffs' Ass'n v.*
27 *County of Riverside* (2007) 152 Cal.App.4th 414, 420 [Gov. Code § 3309.5 and CCP § 1021.5 not
28 mutually exclusive]; *Schmid v. Lovette* (1984) 154 Cal.App.3d 466 [fees awarded under both CCP §
1021.5 and 42 U.S.C. § 1988]; *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448
[same]; *Green v. Obledo* (1984) 161 Cal.App.3d 678, 682 [fees awarded under § 1021.5, Welf. & Inst.
Code § 10962 and 42 U.S.C. § 1988], cert denied, 474 U.S. 819.

1 ‘necessary’ to the successful result achieved.” (*Id.* at 88.) Instead, the court held that “[a] party who
2 satisfies the criteria for intervention and who contributes to the success of public interest litigation should
3 be entitled to an award of attorneys’ fees on the same terms as any other party.” (*Id.* at 87.) Nor does the
4 “necessity” factor involve speculation on whether the court would have reached the same result with the
5 public agency’s participation alone. (E.g., *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1769 [abuse of
6 discretion and “clearly speculative” to deny fees on ground that court would have reached same result
7 without aid of party’s attorney]; *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1299
8 [rejecting contention that defendant was not entitled to fees because court would have reached conclusion
9 it did without the defendant’s participation]; see also *Best v. California Apprenticeship Council* (1987)
10 193 Cal.App.3d 1448, 1468-1469 [rejecting contention that private enforcement was not “necessary”
11 because public enforcement was available and invoked through state agency].)

12 The Court is already well aware of the independent contributions and quality of CWD’s
13 participation through counsel, summarized in CWD’s moving papers, which include consulting with the
14 Attorney General throughout the case on factual and legal issues based on its participation in the rate
15 proceeding below, briefing every disputed claim, appearing and arguing at every hearing, and having its
16 positions adopted in the Court’s final decision and judgment entered in its favor. (4/7/15 Pressley Decl.,
17 ¶¶8, 32-39.) On this record and under a proper application of the relevant case law, CWD has met the
18 “necessity” requirement of section 1021.5.

19 **IV. CWD’S TIME RECORDS ARE PROPERLY DOCUMENTED.**

20 Mercury claims the Commissioner’s regulation applicable to fee requests submitted to the
21 Department (10 CCR § 2662.3)³ prohibits “block billing,” which Mercury defines as “separate tasks []
22 grouped in single entry.” (Mercury Opp. at 7:25-27.)⁴ Contrary to Mercury’s contention, CWD’s billing

23 _____
24 ³ This regulation does not apply to fee requests to a court, but even if it were to be applied here, CWD’s
25 records comply. The regulation calls for “a detailed description of services and expenditures” (10 CCR §
26 2662.3(b)(1)), which is precisely what CWD’s motion, declarations, and time records provide. It requires
27 “legible time and/or billing records, created as soon as possible after the work was performed, which
28 show the date and the exact amount of time spent on each specific task.” (10 CCR § 2662.3(b)(2).) The
Commissioner has previously approved numerous CWD fee requests with the submission of time records
including entries similar to those submitted in this proceeding as being in compliance with this
requirement. (See Supp. Pressley Decl., ¶5.)

⁴ Mercury attempts to rely on a document (Wall Decl., Exh. A), which it implies is an official statement
of the California State Bar on “block billing,” but the document itself states: “Points of view or opinions

1 records properly document the work it performed in this proceeding.⁵ The records of CWD and Zohar
2 Law Firm contain detailed, *contemporaneous daily time entries*, which describe all the specific tasks
3 performed by each attorney and advocate. (Supp. Pressley Decl., ¶3.) The practice of listing multiple
4 related tasks in time entries is not only acceptable, it is *the standard practice* used by both non-profit and
5 private firms and has been found acceptable by the Commissioner and courts in determining to award
6 CWD its fees and expenses in past proceedings. (*Id.*, ¶¶3-4.)

7 In fact, courts in California have expressly held that an attorney’s declaration describing the tasks
8 performed, without breaking down the time spent on each task, is sufficient information for a trial court
9 to determine whether the attorney’s time was reasonably spent in the proceeding. (See e.g., *Nightingale v.*
10 *Hyundai Motor Am.* (1994) 31 Cal.App.4th 99, 103.) Indeed, attorneys’ fees may be awarded under
11 California law even when there are *no* contemporaneous time records. (See e.g., *Wershba v. Apple*
12 *Computer, Inc.* (2001) 91 Cal.App.4th 224, 255 [“California case law permits fee awards in the absence
13 of detailed time sheets”]; *Steiny & Co. v. Ca. Elec. Supply Co.* (2000) 79 Cal.App.4th 285, 293 [same];
14 *Weber v. Langholz* (1995) 39 Cal.App.4th 1578, 1587 [fees awarded on the declaration of counsel];
15 *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095, fn. 4 [fees awarded based on reconstructed
16 records].)

17 Other than baldly claiming some of CWD’s time entries were “block billed,” Mercury does not
18 dispute that the attorneys’ fees and expenses recorded and documented in the declarations of CWD
19 counsel and attached contemporaneous time records were actually expended. Accordingly, CWD should
20 be awarded its requested fees and expenses in their entirety based on the time records and declarations of
21 its attorneys as submitted with its fee motion. Nevertheless, CWD counsel have revised their time entries
22 that Mercury claims were “block billed” to include a further breakdown of the time spent on specific
23 tasks. (See Supp. Pressley Decl., ¶7 and Exhs. 1a-d [revised time records].)

25 expressed in this document are those of the Committee on Mandatory Fee Arbitration. They have not
26 been adopted or endorsed by the State Bar’s Board of Governors and do not constitute the official
27 position or policy of the State Bar of California.” Neither the document nor its contents are judicially
noticeable and thus the document and any arguments made in reliance on it should be stricken.

28 ⁵ Moreover, a review of the time entries listed in the Boyko Declaration, Exhibit B, as “block billed”
reveals that many only contained single tasks or related tasks. (See Supp. Pressley Decl., fn. 1; Exhs. 1a-
1d.)

1 **V. MERCURY FAILED TO DISCLOSE THE FEES, RATES, AND COSTS IT EXPENDED IN**
2 **THE PROCEEDING.**

3 While Mercury seeks to strictly apply 10 CCR § 2662.3 to CWD’s time records, it fails to comply
4 with 10 CCR § 2662.3(g), which states in full: “Any party questioning the market rate or reasonableness
5 of *any amount* set forth in the request shall, at the time of questioning the market rate or reasonableness
6 of that amount, provide a statement setting forth *the fees, rates, and costs it expects to expend in the*
7 *proceeding.*” (Emphasis added.) An insurance company ought not to be able to throw its own vast
8 resources into a proceeding, and then be heard to complain about the fees incurred by a consumer
9 organization in the same proceeding without revealing the total amount it expended on that proceeding.
10 Rather than providing the fees, rates, and costs it expended, Mercury makes generalized, unsubstantiated
11 remarks that, in its opinion, CWD spent too much time on particular tasks. If 10 CCR § 2662.3 is
12 applied, Mercury’s objections should be rejected on this ground.

13 **VI. CWD’S EXPENDED HOURS WERE REASONABLE GIVEN THE AMOUNT OF WORK**
14 **AND COMPLEXITY OF THE ISSUES INVOLVED.**

15 Mercury asserts in sweeping statements that *some* of the time pertaining to certain tasks
16 performed by CWD counsel was excessive. (Mercury Opp. at 10-14.) Contrary to Mercury’s
17 contentions, CWD counsel worked diligently and efficiently throughout the course of this action,
18 dividing up tasks performed by each attorney, to successfully brief and defend against both Mercury and
19 the Trades’ claims and ultimately prevailed on each cause of action. (4/7/15 Pressley Decl., ¶8.)

20 Absent “circumstances rendering the award unjust, an ... award should ordinarily include
21 compensation for *all* the hours *reasonably spent.*” (*Center for Biological Diversity v. County of San*
22 *Bernardino* (2010) 185 Cal.App.4th 866, 897, emphasis in original [citing *Ketchum v. Moses* (2001) 24
23 Cal.4th 1122, 1133].)

24 CWD’s motion and supporting declarations of counsel provide a detailed description of the work that was
25 actually and necessarily performed to defeat Mercury’s and the Trades’ writ petitions and complaints and
26 to prepare this fee motion. An attorney’s declaration identifying the work performed, hourly rates, and
27 total fees incurred is *prima facie* evidence that the costs, expenses, and services listed were necessarily
28 incurred. (E.g., *Hadley v. Krepel* (1985) 167 Cal.App.3d 677, 682.) Moreover, Mercury ignores the fact
that CWD eliminated hours from its fee request that represented excessive or duplicative efforts. (4/7/15
Pressley Decl., ¶5 [“In preparing their respective time records for this submission, CWD’s attorneys

1 exercised billing judgment and eliminated time entries where appropriate.”]; Zohar Decl., ¶10.) The
2 hours for all tasks, as submitted in CWD’s fee request, therefore *do* reasonably reflect a “careful
3 compilation of the time spent” in determining CWD’s “lodestar.” (See *Press v. Lucky Stores, Inc.* (1983)
4 34 Cal.3d 311, 322.)

5 “In challenging attorney fees as excessive because too many hours of work are claimed, it is the
6 burden of the challenging party to point to the specific items challenged, with a sufficient argument and
7 citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do
8 not suffice.” (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass’n* (2008) 163
9 Cal.App.4th 550, 564; see also Richard M. Pearl, *California Attorney Fee Awards* (Third Ed.), § 9.90.)

10 As the Ninth Circuit has observed:

11 By and large, the court should defer to the winning lawyer's professional judgment as to
12 how much time he was required to spend on the case; after all, he won, and might not
13 have, had he been more of a slacker.

14 (*Moreno v. City of Sacramento* (9th Cir. 2008) 534 F.3d 1106, 1112 [reversing a district court’s 25
15 percent reduction of plaintiffs’ lodestar amount].)

16 Mercury fails to meet the standards required to rebut the reasonableness of CWD counsel’s
17 claimed hours. Most of Mercury’s objections amount to simply listing the number of hours expended by
18 CWD on four “projects” and then summarily concluding that the hours were “unnecessary” or
19 “excessive.” (Mercury Opp. at 11:6-13:24.) ***Because Mercury failed to provide the Court with any***
20 ***credible evidence or different estimates of reasonable fees, its conclusory objections should be rejected.***

21 (See *Premier Medical Management Systems, Inc. v. California Ins. Guarantee Ass’n, supra*, 163
22 Cal.App.4th 550, 564; *Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 986 [noting trial
23 court’s dissatisfaction with defendant’s failure to “quantitatively analyze plaintiff’s billing records in
24 order to submit different estimates of reasonable fees”].)⁶

25 ⁶ Mercury’s generalized “vague” and “duplicative” objections likewise fail to meet its burden of rebutting
26 the reasonableness of CWD’s hours with objections to specific hours. Other than identifying a few time
27 entries of Ms. Pressley (Opp. at 10 [citing Ms. Pressley’s entries from 3/31/14 through 4/7/14 describing
28 tasks performed as “edit brief” or “edit opposition” and her 3/28/14 entry listing tasks as “review and
reply to email re argument”; “conference with Cathy Lee”; “email to co counsel”; “teleconference with
D. Hilla; and “draft brief opposition”]), Mercury does not cite any other specific time entries that it
claims are vague. Contrary to Mercury’s contentions, the cited entries *do* provide sufficient detail as to
the work that was performed. CWD is not required to disclose attorney work product or privileged

1 Contrary to Mercury’s conclusory opinions about the time necessary for CWD to prevail in this
2 matter, the hours expended on the four “projects” that Mercury challenges were reasonable and
3 appropriate to the tasks completed (see Supp. Pressley Decl., ¶8):

4 • Researching, drafting, and editing a 40-page merits brief responding to claims and arguments of
5 both Mercury’s and the Trades’ opening briefs, which total 78-pages combined (245 hours). Contrary to
6 Mercury’s assertion, CWD could not simply replicate its briefing in the administrative proceeding below,
7 as both Mercury and the Trades (who were not parties below) raised novel and complex due process and
8 1st Amendment constitutional legal arguments and discussed cases that were not briefed below and that
9 were different from each other. (Supp. Pressley Decl., ¶8.) This required CWD to research the caselaw
10 relied upon by Mercury and the Trades, craft and tailor its arguments in response, and edit the end
11 product into a comprehensive and comprehensible 40-page brief. (*Ibid.*) CWD also had to review and
12 summarize the extensive record and proceedings below. (*Ibid.*) The staffing of this time was reasonable
13 and appropriate as the bulk of it was incurred by a junior attorney, Ms. Antonini (billing at a rate of \$350
14 per hour). (*Ibid.*)

15 • Drafting a response to the Insurance Commissioner’s motion for judgment on the pleadings (83.3
16 hours). Again, the bulk of this time was incurred by a junior attorney, Ms. Lee (billing at a rate of \$350
17 per hour). As an intervenor supporting the Commissioner’s defense in this writ action and the a party in
18 the proceeding below, CWD had a right to file a response in support of this motion, which, if successful,
19 could have disposed of the case. (Indeed, Mercury responded to CWD’s brief in a subsequent reply filed
20 on March 21, 2014.) (Supp. Pressley Decl., ¶8.) This time was reasonably and necessarily incurred, and
21 courts do not reduce fee awards for time spent on unsuccessful motions or legal theories. (*Sokolow v.*
22 *San Mateo* (1989) 213 Cal.App.3d 231, 250 [“Attorneys generally must pursue all available legal
23 avenues and theories in pursuit of their clients’ objectives; it is impossible, as a practical matter, for an
24

25 communications such as topics of communications with counsel about strategy or legal arguments. The
26 only entries that Mercury specifically identifies as “duplicative” are the 3/28/14 and 1/9/15 hearing
27 entries by CWD attorneys who chose to appear or listen telephonically rather than in person to limit
28 travel time and expenses (totaling 2.6 hours). (Mercury Opp. at 12:20-23; 13:15-17) Given that Mercury
had two attorneys *who appeared in person* at every hearing, this objection should be rejected. (See, e.g.,
Probe v. State Teachers’ Retirement System (9th Cir. 1986) 780 F.2d 776, 785 [finding that sending more
than one attorney to a hearing did not constitute an unnecessary duplication of effort].)

1 attorney to know in advance whether or not his or her work on a potentially meritorious legal theory will
2 ultimately prevail”].)

3 • Drafting and arguing opposition to the Trades’ motion for leave to amend and additional claims
4 (65.1 hours). Contrary to Mercury’s description, these hours included time preparing for and arguing at
5 the January 9, 2015 hearing *on the merits* of the Trades’ remaining claims attacking the institutional
6 advertising regulation on 1st Amendment grounds, not just the opposition to the Trades’ motion for leave
7 to amend, and other necessary tasks performed before and after that briefing and hearing. The time
8 entries of Ms. Pressley cited by Mercury (Wall Decl., ¶8 [referencing 7/18/14-1/26/15 time entries of Ms.
9 Pressley (Exh. 1a to Pressley Decl.)]), included time incurred preparing for and participating in a court
10 status conference on 7/18/14 and researching issues raised therein (2.2 hours), meeting and conferring
11 with counsel for the Trades and the Commissioner on proposed briefing and scheduling and case status
12 (4.8 hours from 7/21-11/19/14); reviewing the Trades’ motion for leave to amend, drafting an opposition,
13 preparing for and appearing at the January 9 merits hearing on the Trades’ remaining claims (36.9 hours
14 from 11/21/14-1/9/15); and reviewing, editing and conferring about the proposed judgment and order and
15 conferring internally about CWD’s hourly rates for the fee motion (1.1 hours on 1/22 and 1/26/15). It
16 was entirely appropriate for Ms. Pressley to expend this time as the lead CWD attorney in this matter
17 who argued at both merits hearings; moreover, no other junior attorney was available to perform this
18 work. (Supp. Pressley Decl., ¶8.) As the attorney who argued the merits of the Trades’ remaining
19 claims, Ms. Pressley’s 7.5 hours (1/8/15 entry) expended on diligently reviewing the court’s tentative,
20 reviewing the briefing and cases, and preparing for the hearing on this merits issue (not the motion for
21 leave to amend as Mercury mistakenly states) was entirely reasonable, especially given the success of
22 CWD in prevailing against the Trades on these claims.

23 • Meeting and conferring with Commissioner’s counsel, and drafting a proposed briefing schedule
24 (7.5 hours). These hours included only 2.7 hours of Ms. Pressley’s time conferring with the
25 Commissioner’s counsel regarding scheduling conflicts, and reviewing and editing the draft proposed
26 schedule, plus 4.8 hours of Ms. Antonini’s time researching local court rules regarding setting hearings
27 and briefing schedules on writ petitions, drafting and editing the proposed schedule statement. (Supp.
28 Pressley Decl., ¶8, Exhs. 1a and 1c [7/16/13 and 7/18/13 entries].) This time was reasonably and

1 necessarily incurred because Mercury’s counsel failed to consult with other parties’ counsel before
2 setting a hearing date on its writ petition as required by Sacramento County Superior Court Local Rule
3 2.26(E). (*Ibid.*)

4 **VII. CWD’S EXPENSES ARE SUFFICIENTLY DOCUMENTED.**

5 The declarations of counsel filed in support of CWD’s motion sufficiently documented the
6 expenses incurred by CWD and Zohar Law Firm, broken down by expense category. (Pressley Decl.,
7 ¶28 [\$15,858.20];⁷ Zohar Decl., Exh. 1, p. 6 [\$48.83].) Exhibit 2 to the original and supplemental
8 Pressley Declarations submitted in support of CWD’s fee motion is the billing statement from its
9 actuarial consultant, Allan I. Schwartz, who was also an expert witness in the administrative proceeding
10 below. Mr. Schwartz’s billing statement (totaling \$10,725.00 in expert fees) includes a breakdown by
11 task of the 16.5 hours Mr. Schwartz expended providing actuarial analysis in this proceeding responding
12 to claims made by Mercury and the Trades. Exhibit 3 to the accompanying supplemental Pressley
13 Declaration is a printout from CWD’s internal expense accounting records providing a further breakdown
14 of its other claimed litigation expense items incurred by category and date (totaling \$5,133.20 for
15 postage/delivery, printing/reproduction, attorney filing service/Court Call fees, and travel to hearings.) If
16 the Court requires further documentation of expenses, CWD will so provide.

17 **VIII. THE TRADES ARE JOINTLY LIABLE FOR CWD’S FEES.**

18 The Trades’ argument that they were not provided sufficient notice that fees could be awarded
19 against them, even though they were a party against whom judgment was entered, is easily rebutted.
20 CWD addressed its motion to “ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD,” timely
21 served its moving papers on the Trades’ counsel, and the Trades responded to the motion with an
22 opposition brief. On these facts, there is no question that the Trades had adequate notice.

23 The Trades’ only substantive argument as to why they should not pay any portion of CWD’s fees
24 is their claim that Insurance Code section 1861.10(b) only allows fee awards to be paid by rate applicants
25 in rate proceedings or by the Department’s “Proposition 103 Fund.” Both of these arguments fail under
26 the plain language of the statute and case law interpreting it.

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⁷ This amount includes \$10,725.00 in expert fees, and \$5,133.20 in other litigation expenses.

1 Section 1861.10(b) applies by its own terms to both administrative and court proceedings: “[t]he
2 Commissioner *or a court* shall award reasonable advocacy and witness fees and expenses.” (Emphasis
3 added.) While the statute does require that “[w]here such advocacy occurs in response to a rate
4 application, the award shall be paid by the applicant[,]” contrary to the Trades’ argument, the statute does
5 *not* say that fees cannot be awarded against insurance trade organizations who bring their own writ and
6 declaratory relief causes of action against the Commissioner and have judgment entered against them.
7 Nor does the statute say that intervenor fees are to be paid by the Fund in all proceedings other than those
8 arising from rate applications. Rather, the statute does not specify who shall be required to pay the fee
9 award in proceedings other than rate proceedings. The necessary implication is that in all other
10 proceedings, the decision is committed to the discretion of the Commissioner or to the court, as
11 applicable. The reading of the statute was explicitly confirmed by the California Court of Appeal:

12 Insurance Companies^[8] do not persuade us that even if the [fee] award stands, the
13 Department, and not they, should pay it. Their position is not supported by the last
14 sentence of subdivision (b) of section 1861.10, stating that ‘[w]here such advocacy occurs
15 in response to a rate application, the award shall be paid by the applicant.’ That sentence
16 means that where the conditions for compensation are met *in response to a rate*
17 *application*, the award must be paid by the insurer. ***But in all other circumstances,***
18 ***whether the award is payable by the insurer is discretionary.***

19 (*Assoc. of Ca. Ins. Cos. v. Poizner, supra*, 180 Cal.App.4th 1029, 1055, emphasis added.)

20 The *ACIC* court also rejected the Trades’ argument that in all proceedings other than rate
21 proceedings, fees must be awarded from the Department Fund:

22 Citing section 12979, Insurance Companies assert that the award should be paid by the
23 Department because the Department can recoup administrative and operational costs
24 from insurers through assessing filing fees against insurers.^[9] But section 12979 deals
25 only with administrative and operational costs of the Department, not awards of
26 compensation for expenses of interveners such as FTICR. As Insurance Companies fail to

27 ⁸ “Insurance Companies” was the court’s shorthand for four of the five insurance trade associations who
28 also intervened in this action: The Association of California Insurance Companies, The Personal
Insurance Federation of California, The American Insurance Association, and The Pacific Association of
Domestic Insurance Companies. Collectively, the Trades represent virtually every property casualty
insurer in California.

⁹ Section 12979 provides: “Notwithstanding the provisions of Section 12978, the commissioner shall
establish a schedule of filing fees to be paid by insurers to cover any administrative or operational costs
arising from the provisions of Article 10 (commencing with Section 1861.01) of Chapter 9 of Part 2 of
Division 1.”

1 provide any authority that the statute is intended to shift liability for compensation from
2 insurers to the Department, their assertion is without merit.

3 (*Ibid.*)

4 Thus, the Court of Appeal upheld the fee award against insurance trade associations who brought
5 writ and declaratory relief causes of action against the Commissioner challenging his intervenor
6 regulations. (*Ibid.*) Accordingly, in this writ proceeding in which insurance trade associations brought
7 their own independent claims against the Commissioner and judgment was entered against them, the
8 Court clearly has the authority and the discretion under section 1861.10(b) to award fees payable by the
9 Trades.

10 The Trades claim that the public policy underlying section 1861.10 would be thwarted if fees
11 were awarded against them. (Trades Opp. at 10-11.) The opposite is true. As courts have recognized,
12 “[t]he purpose of intervenor fees is evidently to encourage *consumers* to participate in insurance rate
13 proceedings by compensating them for their contribution” and courts “should seek an interpretation of [§
14 1861.10] *which best facilitates compensation.*” (*EEF, supra*, 57 Cal.App.4th 677, 686, emphasis added,
15 citing *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 836.) Awarding intervenor fees to persons
16 who “represent the interests of consumers” allows consumers to have their interests in enforcing
17 Proposition 103’s prohibition against excessive rates represented on an equal basis with the interests of
18 insurers. This purpose would be obliterated if the insurance industry trade associations were allowed to
19 throw their vast resources into litigation to overturn the Commissioner’s ordered rate reductions and the
20 rate regulations enforcing Proposition 103’s prohibition against excessive rates, causing consumer
21 representatives to incur more time and expense in defense, but then not be required to pay their fair share
22 of those fees.¹⁰

23 Here, a substantial amount of research and merits briefing was performed by CWD counsel in
24 response to the Trades’ novel claims. (Supp. Pressley Decl. ¶9.) Moreover, virtually *all* of CWD
25 counsel’s hours expended between approximately 7/13/14 and 1/9/15 was incurred in response to the
26 Trades’ motion for leave to amend and in relation to the further 1/9/15 merits hearing on their separate

27 ¹⁰ The Trades’ claim they intervened to “further the public interest” by “rais[ing] important constitutional
28 questions” (Trades Opp. at 11:1-12.), yet their causes of action were ostensibly aimed at protecting their
insurance industry members’ ability to charge higher rates by allowing them to obtain higher rates of
return through the “confiscation” variance and to include the cost of institutional advertising, such as
sports sponsorships, in consumers’ premiums.

1 claims facially challenging the excluded institutional advertising expense regulation (totaling
2 approximately \$31,250 in fees). (Supp. Pressley Decl., ¶9, Exhs. 1a-c.) There is no legitimate reason
3 why the Fund should bear those costs rather than the Trades themselves.

4 The Trades are also jointly liable for payment of CWD’s attorneys’ fees and expenses under Code
5 of Civil Procedure section 1021.5, which simply requires that CWD demonstrate that it was a prevailing
6 party as against “one or more opposing parties” (here, Mercury and the Trades). The Trades do not
7 dispute that CWD has made such a showing.¹¹

8 **IX. CWD SUPPLEMENTS THE AMOUNT REQUESTED TO INCLUDE HOURS INCURRED**
9 **ON THIS REPLY AND THE COURT’S HEARING.**

10 CWD supplements the amount requested to include the hours reasonably and necessarily incurred
11 to prepare a reply responding to Mercury’s and the Trades’ opposition papers, as well as an estimate of
12 hours to be incurred for the Court’s hearing. (Supp. Pressley Decl., ¶10; Exhs. 1(a)-(d) [revised].) In
13 summary, CWD requests that the Court award it \$426,370.00 in attorney fees and \$15,907.03 in
14 reasonable expenses (Exh. A hereto [revised summary of fees and expenses].) Claiming fees incurred on
15 reply is reasonable and appropriate under both section 1861.10(b) and Code of Civil Procedure section
16 1021.5.¹²

17 **CONCLUSION**

18 WHEREFORE, CWD respectfully requests, for the reasons stated above, that the Court award it
19 \$442,277.03 in reasonable attorneys’ fees and expenses, plus interest from the date of the Court’s
20 decision.

25 ¹¹ The Trades expressly acknowledge that there is “authority allowing joint and several liability for fee
26 awards under CCP § 1021.5. *See, e.g., Rider v. Cnty. of San Diego*, 11 Cal. App. 4th 1410, 1416 (1993);
27 *Cal. Trout, Inc. v. Superior Court*, 218 Cal.App. 3d 187, 212 (1990).”

28 ¹² “[A]bsent circumstances rendering the award unjust, fees recoverable under section 1021.5 ordinarily
include compensation for all hours reasonably spent, including those necessary to establish and defend
the fee claim.” (*Serrano v. Unruh* (1982) 32 Cal.3d 621, 639; see also 10 CCR § 2661.1(d) [allowing
costs incurred in preparing a request or amended request for award].)

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Dated: May 15, 2015

Respectfully Submitted,

Harvey Rosenfield
Pamela Pressley
Laura Antonini
Consumer Watchdog

Daniel Y. Zohar
ZOHAR LAW FIRM, P.C.

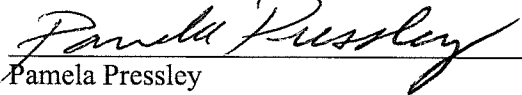

Pamela Pressley
Attorneys for Intervenor Consumer Watchdog

EXHIBIT A

EXHIBIT A
REVISED SUMMARY OF FEES AND EXPENSES

<u>ITEMS</u>	<u>COST</u>
<u>Consumer Watchdog Fees¹</u>	
<i>(Through fee motion filing date 4/7/2015)</i>	
<u>Attorneys</u>	
Harvey Rosenfield @ \$675 per hour, 100.5 ² hours.....	\$67,837.50
Pamela Pressley @ \$575 per hour, 296.1 hours	\$170,257.50
Laura Antonini @ \$350 per hour, 284.8 hours.....	\$99,680.00
Cathy Lee @ \$350 per hour, 147.5 hours.....	\$51,625.00
<i>(From 4/8/2015 through 5/15/2015)</i>	
Harvey Rosenfield @ \$675 per hour, 7.1 hours	\$4,792.50
Pamela Pressley @ \$575 per hour, 28.1 hours	\$16,157.50
Laura Antonini @ \$350 per hour, 3.7 hours.....	\$1,295.00
<i>(Estimated time to prepare/appear at 5/22/2015 Fee Motion Hearing)</i>	
Pamela Pressley @ \$575 per hour, 8 hours	\$4,600.00
Consumer Watchdog Fees	\$416,245.00
<u>Consumer Watchdog Expenses³</u>	
Postage and Delivery	\$781.71
Printing / Reproduction	\$21.29

¹ Detailed in Billing Records attached as Exhibit 1a-d to Supp. Pressley Decl.

² This amount was reduced by 4.5 hours for correction to 3/6/13 time entry.

³ Postage and Delivery, Printing / Reproduction, Attorney Service / Courtcall and Travel Expenses detailed in Exh. 3 to Supp. Pressley Decl.

Attorney Services / Courtcall	\$2,138.30
Travel.....	\$2,191.90
Expert Witness Fees – AIS Risk Consultants (Detailed in Exhibit 2 to Supp. Pressley Decl.) Allan I. Schwartz @ \$650 per hour, 16.5 hours	\$10,725.00
Consumer Watchdog Expenses	\$15,858.20

Zohar Law Firm Fees

Daniel Y. Zohar @ \$600 per hour, 10.7 hours	\$6,420.00
Todd Foreman @ \$475 per hour, 7.8 hours.....	\$3,705.00
Zohar Law Firm Fees.....	\$10,125.00

Zohar Law Firm Fees

Legal Research Fees	\$40.83
Printing / Reproduction	\$8.00
Zohar Law Firm Expenses.....	\$48.83

<u>TOTAL ADVOCACY AND WITNESS FEES:</u>	<u>\$442,277.03</u>
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1 **PROOF OF SERVICE**
2 **[BY OVERNIGHT OR U.S. MAIL, FAX TRANSMISSION,**
3 **EMAIL TRANSMISSION AND/OR PERSONAL SERVICE]**

4 **State of California, City of Santa Monica, County of Los Angeles**

5 I am employed in the City of Santa Monica and County of Los Angeles, State of California. I am
6 over the age of 18 years and not a party to the within action. My business address is 2701 Ocean
7 Park Blvd., Suite #112, Santa Monica, California 90405, and I am employed in the city and county
8 where this service is occurring.

9 On May 15, 2015, I caused service of true and correct copies of the document entitled

10 **CWD'S OMNIBUS REPLY IN SUPPORT OF MOTION FOR ATTORNEYS' FEES AND**
11 **EXPENSES RESPONDING TO MERCURY'S AND THE TRADES' OPPOSITIONS**

12 **CONSUMER WATCHDOG'S REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF**
13 **MOTION FOR AN AWARD OF ATTORNEYS' FEES AND EXPENSES**

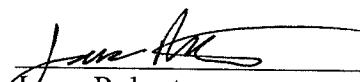
14 **SUPPLEMENTAL DECLARATION OF PAMELA PRESSLEY IN SUPPORT OF**
15 **CONSUMER WATCHDOG'S MOTION FOR ATTORNEYS' FEES AND EXPENSES**

16 upon the persons named in the attached service list, in the following manner:

- 17 1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to
18 the person(s) named.
- 19 2. If marked EMAIL, by electronic mail transmission this date to the email address stated.
- 20 3. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for
21 collection for regular or overnight mailing true copies of the within document in sealed envelopes,
22 addressed to each of the persons so listed. I am readily familiar with the regular practice of collection
23 and processing of correspondence for mailing of U.S. Mail and for sending of Overnight mail. If
24 mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business
25 with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a
26 box or other facility regularly maintained by the express service carrier, or delivered this day to an
27 authorized courier or driver authorized by the express service carrier to receive documents, in the
28 ordinary course of business, fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 15, 2015, at Santa Monica, California.



Jason Roberts

SERVICE LIST

Person Served

Method of Service

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