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Insurers Association of America dba Association of  
9 California Insurance Companies, National  
Association of Mutual Insurance Companies, and  
10 Pacific Association of Domestic Insurance  
Companies

11  
12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
13 FOR THE COUNTY OF SACRAMENTO

14 MERCURY CASUALTY COMPANY,

15 Petitioner and Plaintiff,

16 v.

17 DAVE JONES, IN HIS OFFICIAL  
CAPACITY AS THE INSURANCE  
18 COMMISSIONER OF THE STATE OF  
CALIFORNIA,

19 Respondent and Defendant.

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22 CONSUMER WATCHDOG,

23 Intervenor.

24 PERSONAL INSURANCE FEDERATION  
OF CALIFORNIA, et al.,

25 Intervenor.  
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Case No. 34-2013-80001426  
Hon. Shellyanne W.L. Chang, Dept. 24

**REQUEST FOR JUDICIAL NOTICE AND  
DECLARATION OF VANESSA WELLS  
IN SUPPORT OF THE TRADES'  
OPPOSITION TO MOTION TO STRIKE  
AND RESPONSE TO MOTION FOR  
JUDGMENT ON THE PLEADINGS**

Date: March 28, 2014  
Time: 10:00 a.m.  
Dept.: 24

Action Filed: March 1, 2013

1 I, Vanessa Wells, hereby declare as follows:

2 1. I am an attorney licensed to practice in the State of California. I am a partner at  
3 the law firm of Hogan Lovells US LLP and counsel for intervenors Personal Insurance Federation  
4 of California, American Insurance Association, Property Casualty Insurers Association of  
5 America (doing business in California as Association of California Insurance Companies),  
6 National Association of Mutual Insurance Companies, and Pacific Association of Domestic  
7 Insurance Companies (collectively, "the Trades") in this action. I am providing this declaration  
8 in support of the Trades' opposition to the Insurance Commissioner's motion to strike the Trades'  
9 Complaint in Intervention and the Trades' response to the Insurance Commissioner's motion for  
10 judgment on the pleadings, and this request for judicial notice in support of those briefs.

11 2. On April 26, 2013, the Trades brought an *ex parte* application for an order  
12 shortening time for hearing on the Trades' motion for leave to intervene in this case, which the  
13 Court granted and of which the Trades respectfully request judicial notice. Petitioner and  
14 Plaintiff Mercury Insurance Company and Respondent and Intervenor Consumer Watchdog  
15 advised that they would not oppose the Trades' *ex parte* application and agreed to the Trades'  
16 proposed briefing schedule for the motion for leave to intervene. The Respondent Commissioner  
17 indicated at that time, however, that he *would* oppose the motion for leave to intervene. The  
18 Trades then filed and served on all parties by U.S. mail and e-mail their noticed motion for leave  
19 to intervene, along with their proposed complaint in intervention. The Commissioner ultimately  
20 decided not to oppose the Trades' intervention in this action. Instead, on May 15, 2013, the  
21 Commissioner filed the Respondent Insurance Commissioner's Statement Of Non-Opposition To  
22 Trades' Motion To Intervene.

23 3. To the extent necessary, the Trades respectfully request that the Court take judicial  
24 notice of the following additional court records from this action:

- 25 a. The Trades' Notice of Motion and Motion for Leave to Intervene filed April  
26 29, 2013;
- 27 b. The Declaration of Vanessa Wells and Exhibits thereto in support of the  
28 Trades' Motion for Leave to Intervene;

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- c. The Commissioner's Statement of Non-Opposition filed May 15, 2013;
- d. The Court's Tentative Ruling on the Trades' Motion for Leave to Intervene dated June 6, 2013;
- e. The Court's Order Granting the Trades' Motion for Leave to Intervene filed June 18, 2013; and
- f. Consumer Watchdog's Complaint in Intervention filed March 27, 2013.

The Trades request judicial notice of the above court records from this case (cited in paragraphs 2 and 3 herein) to show the history of the Trades' intervention in this action, including the Court's rulings and the Commissioner's prior actions and positions regarding the Trades' motion for leave to intervene, all of which are relevant to establishing that the Commissioner's motion to strike the Trades' Complaint In Intervention lacks merit and should be denied. These court records from this case are properly the subject of judicial notice under Evidence Code § 452(d) (permitting judicial notice of the "[r]ecords of...any court of this state"). See *In re D.R.*, 185 Cal. App. 4th 852, 858 n.3 (2010) (taking judicial notice of minute order from trial court proceedings); *Glendale Redevelopment Agency v. County of Los Angeles*, 184 Cal. App. 4th 1388, 1395 n.3 (2010); *Munn v. Briggs*, 185 Cal. App. 4th 578, 583 n.1 (2010) (taking judicial notice of notice of ruling following hearing on a demurrer); *Mack v. State Bar of Cal.*, 92 Cal. App. 4th 957, 961 (2001) ("We may take judicial notice of the records of a California court."). See also *Gackstetter v. Market St. Ry. Co.*, 10 Cal. App. 2d 713, 716 (1936) ("It is an established principle that courts may take judicial knowledge of their own proceedings in the same case.").

In addition, the Respondent Insurance Commissioner's Statement of Non-Opposition to Trades' Motion to Intervene and statements made therein are subject to judicial notice as a party admissions. See *Wilkinson v. Zelen*, 167 Cal. App. 4th 37, 43 (2008) ("in ruling on a demurrer, the court may 'take judicial notice of a party's earlier pleadings and positions...'"); *Eells v. Rosenblum*, 36 Cal. App. 4th 1848, 1853-54 (1995) ("In reviewing the sufficiency of a complaint against a general demurrer...courts may properly take judicial notice of a party's earlier pleadings and positions as well as established facts from both the same case and other cases.") (citations omitted); *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 877 (1992) (same); *Moore v.*

1 *Powell*, 70 Cal. App. 3d 583, 586 n.2 (1997) (statements made in briefs treated as “admission” or  
2 “stipulation” by party); *Rodas v. Spiegel*, 87 Cal. App. 4<sup>th</sup> 513, 518 (2001) (“We also may, and  
3 shall, take judicial notice of admissions in plaintiff’s opposition to the demurrer.”).

4 4. In support of their opposition to the Commissioner’s motion to strike and their  
5 response to the Commissioner’s motion for judgment on the pleadings, the Trades also request  
6 judicial notice of an excerpted copy of the Commissioner’s Summary of and Response to Public  
7 Comment Received Prior to September 13, 2006 Public Comment Deadline, CDI File No.  
8 RH05042749, Prior Approval Regulations, a true and correct copy of which is attached hereto as  
9 Exhibit A. This document, which was retrieved at my direction from the California Department  
10 of Insurance’s website, is available at <http://www20.insurance.ca.gov/pdfREG/90430.pdf>. The  
11 document previously was submitted and filed in this case as Exhibit 1 to my April 26, 2013  
12 declaration in support of the Trades’ motion for leave to intervene, of which the Trades have  
13 requested judicial notice. Neither the Commissioner, nor any other party, objected to admission  
14 of the document as evidence, and consequently, any objection is waived. *See Platzer v.*  
15 *Mammoth Mountain Ski Area*, 104 Cal. App. 4<sup>th</sup> 1253, 1260-61 (2003) (“[F]ailure to object at all  
16 waives the defect.”). *See also Schein v. Holbrook*, 111 Cal. App. 2d Supp. 972, 973 (1952) (“We  
17 also know from our own records, of which we can take judicial notice...that appellants have  
18 made no application to us for relief from their default in complying with any of these rules....”)  
19 (citation omitted).

20 The excerpted Summary of and Response to Public Comments document, (Exhibit A  
21 hereto and previously attached as Exhibit 1 to my April 26, 2013 declaration in support of the  
22 Trades’ motion for leave to intervene and also as Exhibit 2 to my February 11, 2014 declaration  
23 in support of the Trades’ Petition for Writ of Mandate), properly is the subject of judicial notice  
24 as a court record in this case under Evidence Code § 452(d). *See* cases cited above in paragraph  
25 7. In addition, the document is properly judicially noticeable as an “official act” pursuant to  
26 Evidence Code § 452(c). *See Walt Rankin & Assocs., Inc. v. City of Murrieta*, 84 Cal. App. 4<sup>th</sup>  
27 605, 623-24 and n.12 (2000) (taking judicial notice of Insurance Commissioner’s official web  
28 site, which “allows anyone to determine whether a company is an admitted insurer or not”);

1 *People v. Crusilla*, 77 Cal. App. 4<sup>th</sup> 141, 147 (1999) (taking judicial notice of a publication of the  
2 California Attorney General’s Office “as an official act of a government agency”); *Rodas v.*  
3 *Speigel*, 87 Cal. App. 4<sup>th</sup> 513, 518 (2001) (“Official acts include records, reports and orders of  
4 administrative agencies.”). The document also is judicially noticeable under Evidence Code §  
5 452(h) (“[f]acts and propositions that are not reasonably subject to dispute and are capable of  
6 immediate and accurate determination by resort to sources of reasonably indisputable accuracy”).  
7 *See Peretto v. Dep’t of Motor Vehicles*, 235 Cal. App. 3d 449, 452 n.2 (1991) (taking judicial  
8 notice of a publication of U.S. Dept. of Transportation, Nat’l Highway Traffic Safety  
9 Administration pursuant to Evidence Code § 452 (h)); *Matchett v. Superior Ct.*, 40 Cal. App. 3d  
10 623, 627 n.2 (1974) (judicial notice taken of accreditation criteria published by the Joint  
11 Commission on Accredited Hospitals pursuant to Evidence Code § 452 (h)).

12         5.         The Trades have met the requirements for mandatory judicial notice under  
13 Evidence Code section 453, which provides:

14                 The trial court shall take judicial notice of any matter specified in Section 452 if a party  
15 requests it and:

- 16                 (a) Gives each adverse party sufficient notice of the request, through the pleadings or  
17 otherwise, to enable such adverse party to prepare to meet the request; and  
18                 (b) Furnishes the court with sufficient information to enable it to take judicial notice of  
19 the matter. (Emphasis added.)

20 *See Ventura Cnty. Deputy Sheriffs’ Ass’n v. Bd. of Retirement*, 16 Cal. 4<sup>th</sup> 483, 502 n.22 (1997)  
21 (“Plaintiffs’ request complied with Evidence Code section 453. This court is therefore required to  
22 take judicial notice of the items.”); *O’Keefe v. Atascadero Cnty. Sanitation Dist.*, 21 Cal. App. 3d  
23 719, 728 (1971) (“Here, the trial court was required to take judicial notice because respondents  
24 requested it, gave appellant sufficient notice of the request and furnished the Court with sufficient  
25 information to enable it to take judicial notice.”).

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27                 I declare under penalty of perjury under the laws of the State of California that the  
28 foregoing is true and correct and that this declaration was executed on March 17, 2014, at Menlo

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Park, California.

By:   
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Vanessa Wells

# **EXHIBIT A**

# SUMMARY OF AND RESPONSE TO PUBLIC COMMENT RECEIVED PRIOR TO SEPTEMBER 13, 2006, PUBLIC COMMENT DEADLINE

## Introductory, Concluding, and/or General Remarks Not Specific to a Particular Section

Commentor: Sherman Sitrin, on behalf of American International Group (AIG), September 12, 2006, Cover page;  
Mary B. Gaillard, on behalf of AIG, page 1;  
Oral statements by Sherman Sitrin and Mary Gaillard, AIG, September 13, 2006, transcript pages 36-37.

Summary: Introductory comments.

Response: Because this portion of the comment is not specifically directed at the Commissioner's proposed revised regulations or to the procedures followed in proposing the revised regulations, no response is necessary. To the extent the comment generally describes the focus of the comments, a detailed response is provided below in connection with the summary of and response to the more detailed comment.

Commentor: Mary B. Gaillard, on behalf of AIG, September 12, 2006, page 1;  
William K. Johanneson, on behalf of Farmers Insurance Group, September 13, 2006, page 2.

Summary: "One-size-fits-all" and non-pliable methods have the potential to result in the unfair treatment of insurers. In turn, this treatment creates a disincentive for insurers to compete to provide the best possible products to consumers.

Response: The "one-size-fits-all" argument was rejected by the California Supreme Court in *20<sup>th</sup> Century*. Indeed, both the *Calfarm* and *20<sup>th</sup> Century* courts made it clear that the Commissioner has the legal authority to take those steps reasonably necessary to make the job of rate regulation manageable. (*20<sup>th</sup> Century*, (quoting *Calfarm*) 8 Cal. 4<sup>th</sup> 216, 245; 32 Cal. Rptr. 807, 824.) With that said, the regulation is replete with revisions, as is explained in detail herein, allowing for the application of company-specific data. And, as is also explained in detail herein, various constitutional safety-valves, known as variances, have been revised or added to the regulations to increase flexibility. All told, what detractors have referred to as the "cookie-cutter" characteristic of the regulations has been addressed.

Commentor: Mary B. Gaillard, on behalf of AIG, September 12, 2006, Page 1; oral statement of Mary Gaillard (AIG), transcript, pages 37-38;  
William K. Johanneson, on behalf of Farmers Insurance Group, September 13, 2006, page 2.

Summary: The use of industry averages and one ratemaking methodology for all lines of business seems to contradict the Casualty Actuarial Society's "Statement of Principles



The 20<sup>th</sup> Century Court emphasized the importance of variances and stated time and time again that the variances expressly provided for in the regulations are the final mechanism for rate adjustments necessary to avoid confiscation before the final rate determination is made. The Commissioner recognizes the importance of variances and is fully cognizant that the Court in 20<sup>th</sup> Century relied on variances as an extremely important protection against confiscation. Both the *Calfarm* and 20<sup>th</sup> Century Courts made it clear that the Commissioner has the legal authority to take those steps reasonably necessary to make the job of rate regulation manageable. (20<sup>th</sup> Century, (quoting *Calfarm*) , 8 Cal. 4<sup>th</sup> 216, 245; 32 Cal. Rptr. 807, 824.) The Commissioner is also aware that insurers must be allowed an opportunity to earn a fair and reasonable rate of return. Variances are important as the constitutional safety valves. However, a variance cannot be created for every possible contingency. The Commissioner has determined that variances must be carefully considered, otherwise the exceptions will swallow the rule making meaningful rate regulation impossible. And the opposite is also true. The regulations must contain enough of these safety valves to ensure insurers may avoid confiscation.

Commentor Mary B. Gaillard, on behalf of AIG, September 12, 2006, page 5 – 6.

Summary: A variance should be added for “demonstrated changes in the company distribution systems.”

Response: Section 2644.12(b) provides that efficiency standard shall be set separately for each insurance line, and separately for insurers distributing through independent agents and brokers, through exclusive agents, and through employees of the insurer selling insurance on a direct basis. The October 5 version of the regulations adds language indicating that for an insure using more than one distribution system, the efficiency standard shall consist of an average weighted by earned premium for each distribution system. This new language should address the concerns expressed in the comment.

Commentor Mary B. Gaillard, on behalf of AIG, September 12, 2006, pages 5-6.

Summary: A variance should be added where “the insurer employs the same methodology in setting rate levels as when calculating its reserves, and the methodology in Section 2644.6 would, if utilized, yield substantial differences to the financial statements.

Response: This comment is rejected for the reasons set forth in connection with similar comments made by the commentor regarding section 2644.6 above.

Commentor Mary B. Gaillard, on behalf of AIG, September 12, 2006, pages 5-6.

Summary: A variance should be added where there is “rapid growth or reduction in a book of business.”

Response: The situation as described in the comment would likely be addressed by