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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

MERCURY CASUALTY COMPANY,

Petitioner and Plaintiff,

v.

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

Respondent and Defendant.

CONSUMER WATCHDOG,

Intervenor.

Case No. 34-2013-80001426
Assigned to: Hon. Eugene L. Balonon, Dept. 14

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

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TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. BACKGROUND: THE TRADES' INTEREST IN INTERVENING 4

A. The Role of The Trades And Their Members In The Development Of California Law Governing Insurance Rate Regulation. 4

B. The Confiscation Issues Presented Herein 5

1. The history of the formula and the "implied constitutional variance". 5
2. The current regulations are grounded in "the fair return principle". 7
3. The Commissioner's Order in Mercury's rate case incorrectly renounces the "fair return principle" and incorrectly replaces it with the financial distress test. 8

C. The Institutional Advertising Issue Presented Herein. 10

III. THIS MOTION FOR LEAVE TO INTERVENE SHOULD BE GRANTED PURSUANT TO CCP § 387 AND INSURANCE CODE § 1861.10(a). 12

A. The Trades Qualify For Intervention As Of Right Under CCP § 387(b) and Insurance Code § 1861.10(a). 12

B. This Proposed Intervention Is Also Appropriate Under CCP § 387(a). 13

IV. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

20th Century Ins. Co. v. Garamendi,
8 Cal. 4th 216 (1994) ..... passim

Assoc. of Cal. Ins. Cos. v. Poizner,
180 Cal. App. 4th 1029 (2009) 4

Birkenfeld v. City of Berkeley,
17 Cal. 3d 129 (1976) 10

Calfarm Ins. Co. v. Deukmejian,
48 Cal. 3d 805 (1989) ..... passim

Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York,
447 U.S. 557 (1980) 12

Duquesne Light Co. v. Barasch,
488 U.S. 299 (1989) 7

Environmental Protection Information Center v. Department of Forestry & Fire Protection
43 Cal. App. 4th 1011 (1996) 14

Geeslin v. State Farm Lloyds,
255 S.W.3d 786,795 (Tex. App. 2008) 7

Hodge v. Kirkpatrick Development, Inc.,
130 Cal. App. 4th 540 (2005) 13

Kavanau v. Santa Monica Rent Control Bd.,
16 Cal. 4th 761 (1997) 1, 2, 9

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001) 12

MacKay v. Superior Court,
188 Cal. 4th 1427 (2010) 4

Pennell v. City of San Jose,
485 U.S. 1 (1988) 9

Spanish Speaking Citizens' Foundation, Inc. v. Low,
85 Cal. App. 4th 1179 (2000) 4, 13, 14

State Farm Mutual Automobile Ins. Co. v. Garamendi,
32 Cal. 4th 1029 (2004) 4

State Farm Mutual Automobile Ins. Co. v. Quackenbush,
77 Cal. App. 4th 65 (2000) 4

STATUTES

CCP § 387 ..... 3, 12, 14

CCP § 387(a) 13

CCP § 387(b) 12, 13

CCP § 1094.5 14

Government Code § 11350 14

Ins. Code § 1858.6 12

Ins. Code § 1861.01 *et seq* 5, 12

Ins. Code § 1861.01(a) 5

Ins. Code § 1861.01(b) 5

Ins. Code § 1861.01(c) 5

Ins. Code § 1861.05(a) 11

Ins. Code § 1861.08 12

Ins. Code § 1861.09 12

Ins. Code § 1861.10(a) 12, 13

Ins. Code § 1861.10(b) 4

Ins. Code § 4010 12

OTHER AUTHORITIES

9 Witkin, Cal. Procedure, Administrative Proceedings § 130 (5th Ed. 2008) 14

C.C.R. § 2644.10(f) 3, 10

C.C.R. § 2644.27(f)(9) 2, 9

C.C.R. § 2645.9 6

Cal. Const. art. I § 7. 1

Cal. Const. art. I § 19. 1

U.S. Const. amend. V 1, 7

U.S. Const. amend. XIV 1, 7

I. INTRODUCTION

The case before this Court presents critical, constitutional questions which impact every insurer subject to "Proposition 103" rate regulation in this State. The Court's decision here will reach beyond this petitioner and the precise facts of this rate application. It will determine the standards applied to every insurer in diverse circumstances, and inform the Commissioner's application of each of the rate regulations. For this reason, it is vital for this Court to consider input provided by others who will be affected by its decision, gaining a broader perspective on these constitutional issues than afforded by one insurer in one rate application. It is also vital to the proposed intervenors' members that they are allowed input on the law that will be directly applied to their rate applications.

Mercury Casualty Company ("Mercury"), petitioner here, includes in its Verified Petition for Writ of Mandate And Complaint for Declaratory Relief and Injunctive Relief ("Petition") several issues of regulatory construction and application arising from the Insurance Commissioner's February 11, 2013 Order Adopting Proposed Decision in *In the Matter of the Rate Application of Mercury Casualty Company*, CDI File No. PA-2009-00009 (the "Order" or the "Commissioner's Order"). Central to each of those issues is the constitutional limit on the state's power to regulate price, derived from the takings and due process clauses and described generally as protection from "confiscation".[1] The scope of this constitutional protection is presented directly by Mercury's request that this Court review and correct the Commissioner's

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[1] *See 20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216, 291-292 (1994) (describing the derivation of confiscation principles from the Due Process Clause and the Takings Clause). The "Due Process Clause" is stated in the Fifth Amendment to the United States Constitution ("[n]o person shall . . . be deprived of life, liberty or property without due process of law"), repeated in the Fourteenth Amendment and expressly made applicable to the states thereby. The "Takings Clause" is contained in the Fifth Amendment ("nor shall private property be taken for public use without just compensation") and made applicable to the states through the Fourteenth Amendment ("[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"). While not mentioned in *20th Century*, the California Constitution likewise provides protection against denials of due process and uncompensated takings. *See Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 771 (1997) (due process, citing Cal. Const. art. I § 7), *see also* p. 773 (takings, citing Cal. Const. art. I § 19).

misapplication of "the implied constitutional variance" created by the California Supreme Court in *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994) and codified in 10 C.C.R. § 2644.27(f)(9). Petition ¶¶ 75-88. More fundamentally, it is the foundation on which the regulatory formula is built, as the Commissioner stressed in adopting the current rate regulations.

At the time the regulations were adopted, the Commissioner accepted "the fair return principle"[2] – described by the Commissioner as "an opportunity to earn a fair and reasonable rate of return"[3] – as that foundation. In the Order in Mercury's case, the Commissioner expressly renounces the fair return principle. In its place, the Commissioner sets up an illusory standard for constitutional protection, requiring that a rate order must produce financial distress for its impact to constitute confiscation. Moreover, that financial distress must be of such a nature that it is felt by "the insurer's enterprise as a whole" (Order p. 113). While it is not clear what "the insurer's enterprise as a whole" means, the Order subsequently states that "Mercury Casualty as a whole" must experience financial distress as a result of the rate order (Order p. 122). Finally, the Order requires that in attempting to meet this financial distress standard the insurer is bound to the default assumptions contained in the regulations and cannot present individualized evidence establishing that the default assumptions result in a confiscatory rate in the insurer's individual case. That is, in its application the standard is a pure tautology.

This illusory standard affords no protection against confiscation through price regulation for insurers writing insurance in California. What is more, it changes the interpretive framework for the entire regulatory scheme. An "opportunity to earn a fair and reasonable rate of return" drives a different notion of reasonableness than the financial distress standard. What is reasonable or "most actuarially sound" drives each regulatory selection in the rate formula, and each decision as to whether an applicant may be allowed a variance. Thus, the continued viability of the core "fair return principle" – expressly at issue here – impacts all insurers' rights under the

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[2] *Kavanau*, 16 Cal. 4th at 773; *see also id.* at 771-772 describing "the fair return principle" and citing *20th Century* and *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805 (1989).

[3] *See* Exhibit 1 to Declaration of Vanessa Wells (*Summary of and Response to Public Comment Received Prior To September 13, 2006 Public Comment Deadline*, p. 128.)

current regulatory structure.

The Commissioner's Order includes an additional error of law with substantial impact, in its incorrect construction of the regulation describing expenses excluded from the rate calculation. One such excluded expense is the expense associated with "institutional advertising", 10 C.C.R. § 2644.10(f). The Order recites a common understanding of "institutional advertising" versus "product advertising", then abandons that common understanding in its construction of the regulation. The Order's tortured construction of an awkwardly worded regulation would label virtually all advertising as "institutional advertising," when it plainly is not. Because of the way the excluded expense factor operates within the formula, labeling typical product advertising expense as excluded "institutional advertising" expense can drive the ultimate rate indicated by the regulatory formula up by several percentage points. The Order's construction of the regulation is wrong on the face of the regulation, unsupported in the record, and, at bottom, an unconstitutional, content-based burden on protected commercial speech.

The trade associations seeking to intervene in this action – Personal Insurance Federation of California ("PIFC"), American Insurance Association ("AIA"), Property Casualty Insurers Association of America dba Association of California Insurance Companies (PCI/ACIC), National Association of Mutual Insurance Companies ("NAMIC"), and Pacific Association of Domestic Insurance Companies ("PADIC") (collectively the "Trades") – represent the majority of the insurers in this State subject to Proposition 103. As it will determine the standards that apply to all of "Proposition 103" rate review, the Court's decision on the constitutional issues presented by this action will profoundly affect the rights of the Trades and their members. The Trades and their members have made an affirmative effort to coordinate in intervening in this action to avoid multiple interventions, thereby allowing the action to proceed efficiently. Accordingly, the Trades move this Court for leave to intervene, in order that the Trades may protect their rights and the rights of member companies, and to benefit the process by offering a broader perspective on these constitutional questions.

This motion is supported not only under the general intervention statute California Code of Civil Procedure ("CCP") § 387, but also by a statute specific to "Proposition 103" rate review:

Insurance Code § 1861.10(b). The Trades respectfully request that the Court grant this motion.

II. BACKGROUND: THE TRADES' INTEREST IN INTERVENING

A. The Role of The Trades And Their Members In The Development Of California Law Governing Insurance Rate Regulation.

The Trades represent a diverse group of insurers which collectively write most of the property/casualty insurance in California, specifically the insurance regulated by Proposition 103.[4] Some members of the Trades are among the largest writers of personal lines insurance in the country and in California, for example State Farm Mutual Automobile Insurance Company and its affiliates.[5] Other members write a relatively small portion of the market. All have a direct interest in a fair and legal system of rate regulation.

The Trades and their members have played a major role in the development of California law concerning Proposition 103 since that initiative was enacted by the voters in November, 1988. The Trades, with their members, have actively participated in every workshop and every rulemaking proceeding considering an appropriate regulatory system for implementing the prior approval rate mandate adopted by Proposition 103. Specifically relevant here, the Trades participated in every session of every kind relating to adoption of the current regulations. Moreover, the Trades and their members have contributed in every major court action construing the Proposition. *See, e.g., State Farm Mutual Automobile Ins. Co. v. Garamendi*, 32 Cal. 4th 1029 (2004); *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994); *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805 (1989); *MacKay v. Superior Court*, 188 Cal. 4th 1427 (2010); *Assoc. of Cal. Ins. Cos. v. Poizner*, 180 Cal. App. 4th 1029 (2009); *State Farm Mutual Automobile Ins. Co. v. Quackenbush*, 77 Cal. App. 4th 65 (2000); *Spanish Speaking Citizens' Foundation, Inc. v. Low*, 85 Cal. App. 4th 1179 (2000) (as intervenors). The Trades and their members have prevailed in some cases and not in others. However, through this participation, the Trades have

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[4] As a matter of candor, PIFC discloses that Mercury is one of its members. Mercury, however, is involved in this action to represent its own rights as to the specific rate order issued by the Commissioner. It does not appear in a representative capacity on behalf of PIFC or its fellow PIFC members.

[5] *See* Exhibit 2 to Declaration of Vanessa Wells.

gained a depth of knowledge, experience, and insight with regard to California's rating system which is rare and valuable to this Court.

B. The Confiscation Issues Presented Herein

1. The history of the formula and the "implied constitutional variance".

Some history is helpful in understanding the nature and overwhelming importance of the constitutional issues presented by the Mercury Petition.

The voters enacted "Proposition 103" in November, 1988. Proposition 103, primarily, regulates rates and premiums for most insurance in California. *See generally* Insurance Code Div. 1 Part 2 Chapter 9 Article 10, §§ 1861.01 *et seq*. Proposition 103 included two phases. The first phase went into effect immediately and for one year, requiring insurers to "roll back" rates to 80% of 1987 rates. Ins. Code § 1861.01(a). The second phase went into effect one year after passage of Proposition 103, and required that insurers obtain the Commissioner's prior approval before implementing any new rate. Ins. Code § 1861.01(c).

Seven insurance companies and a trade group petitioned the California Supreme Court for relief from the "rollback" provision of Proposition 103 immediately upon adoption of the initiative. *See Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d at 812, 814. The petitioners contended, among other things, that the mandatory rollback rate (80% of 1987 rates) presented a substantial risk of confiscation, and that the alleged provision for relief – allowing relief only if the insurer was "threatened with insolvency" as a result of the rollback rate (Ins. Code § 1861.01(b)) – did not afford sufficient relief to render the rollback constitutional.

In large part, the California Supreme Court agreed. It held that "[t]he risk that the rate set by the statute is confiscatory as to some insurers from its inception is high enough to require an adequate method for obtaining individualized relief." *Calfarm*, 48 Cal. 3d at 820. Further, the Court held that the "threatened with insolvency" standard included within the initiative was constitutionally defective:

> The insolvency standard of subdivision (b) refers to the financial position of the company as a whole, not merely to the regulated lines of insurance. [footnote omitted] Many insurers do substantial business outside of California, or in lines of insurance within this state which are not regulated by Proposition 103. If an insurer had substantial net worth, or significant income from sources unregulated

> by Proposition 103, it might be able to sustain substantial and continuing losses on regulated insurance without the danger of insolvency. In such a case, the continued solvency of the insurer could not suffice to demonstrate that the regulated rate constitutes a fair return.

Id. at 818-819. Based on this analysis, the Court concluded that the "threatened with insolvency" standard was unconstitutional because it was not sufficient to protect "safely solvent" insurers from confiscation, i.e., the denial of the opportunity to earn a fair return. *Id.* at 819.

The Court then effectively re-drew the "rollback" phase of Proposition 103 rate regulation, turning it into a rebate rather than a prospective rate, based, however, on a post-period analysis of the minimum non-confiscatory rate for the "rollback" period. The Court announced that insurers were permitted to file for and charge the rate they believed appropriate for the one year rollback period, subject to a requirement that the insurer pay a "rollback refund" if it were later determined that the insurer had charged a rate higher than the minimum non-confiscatory rate. *Calfarm*, 48 Cal. 3d at 825.

Ultimately, the Commissioner developed a regulatory formula intended to determine the minimum non-confiscatory rate. The regulatory formula made gross assumptions and included "plug in" numbers based on industry averages. The regulations, however, allowed "variances" from the rate set by the regulatory formula. The regulations included a further formula to determine whether or not the insurer owed a rollback refund based on a comparison of the rates actually charged during the rollback period and the minimum non-confiscatory rates, which was to be calculated and paid out on a gross, all-lines basis. *See* 10 C.C.R. § 2645.9.

In *20th Century v. Garamendi*, the California Supreme Court considered a challenge to the regulatory formula brought by 20th Century and industry supporters, five years after the rollback was supposed to have been accomplished. The California Supreme Court upheld the regulatory system as constitutionally adequate, because the regulatory system allowed "variances" from the result produced by the formula to allow sufficient flexibility to take into account situations in which the regulatory formula might produce a confiscatory result. *20th Century*, 8 Cal. 4th at 298, 309, 311-313 (repeatedly holding that any tendency of the regulations to produce a confiscatory rate could be avoided by application of the variances, including the "separate and independent

constitutionally mandated 'variance'").

Interestingly, the avenue by which the California Supreme Court achieved this result was to recognize an "implied constitutional variance" that would allow insurers the opportunity to present evidence that the formula would create a confiscatory result as it operated in a particular case. 8 Cal. 4th at 313. As interpreted by the Court, if the formula would produce a confiscatory result for whatever reason, that result could be adjusted under the "implied constitutional variance". That is to say, an unconstitutional result could be avoided, because the result of the methodology would always be reviewable under the implied constitutional variance.

In *20th Century*, the California Supreme Court expressly applied U.S. Constitutional law in defining and applying the confiscation standard. *See, e.g.,* 8 Cal. 4th at 291-292 (identifying the Fifth and Fourteenth Amendments to the U.S. Constitution as the source for the protection against confiscation). The Supreme Court of the United States has consistently upheld and applied the "fair return principle" as the applicable standard in price control cases. *See, e.g., Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) ("whether a particular rate is 'unjust' or 'unreasonable' will depend to some extent on what is a fair rate of return given the risks under a particular rate-setting system, and on the amount of capital upon which the investors are entitled to earn that return.").[6]

2. The current regulations are grounded in "the fair return principle".

The regulations considered in the *20th Century* case were intended to be applicable to both rollbacks and "prior approval" rate regulation, with different temporal-specific components adopted by the Commissioner. The Commissioner, however, never adopted the necessary components for the prior approval phase.

Thus, the Commissioner – recognizing the need for clarity – adopted a new set of regulations effective in April, 2007. The regulations utilized the model approved in *20th Century*

[6] As the Order attempts to isolate insurance rate cases from other contexts in which the California Supreme Court indisputably applied the "fair return principle", it is worth noting that Texas has also applied the fair rate of return standard in the insurance rate regulation context. *See Geeslin v. State Farm Lloyds*, 255 S.W.3d 786,795 (Tex. App. 2008) ("A rate that does not allow for a reasonable rate of return is confiscatory and unconstitutional." – holding Texas scheme unconstitutional).

consisting of default assumptions subject to variances. The Commissioner took his obligations and the role of the variances seriously, announcing:

> The *20th 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 *20th Century* relied on variances as an extremely important protection against confiscation. Both the *Calfarm* and *20th 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. (*20th Century*, (quoting *Calfarm*), 8 Cal. 4th 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.***

See Exhibit 1 to Declaration of Vanessa Wells (*Summary of and Response to Public Comment Received Prior To September 13, 2006 Public Comment Deadline*, p. 128) (emphasis added). That is, the current regulatory model incorporates the "fair return principle" as its cornerstone.

3. The Commissioner's Order in Mercury's rate case incorrectly renounces the "fair return principle" and incorrectly replaces it with the financial distress test.

The Commissioner issued his Order on Mercury's rate application on February 11, 2013, approximately 20 months after issuing the notice of hearing on the rate application. The Order requires Mercury to reduce its overall homeowner's insurance rate by approximately 5%, in response to Mercury's application for a 3.9% increase. Petition ¶¶ 2, 15.

The Commissioner's Order holds that an insurer does not have a right to the opportunity to earn a fair rate of return on its investment in a regulated line of insurance in California. Order pp. 123-126. The Commissioner's Order holds that an insurer gains constitutional protection only if it can prove that a rate order (which, by definition, is directed to a single line of insurance within California) will cause financial distress to the entire company nationwide. Order p. 118. The opinion reasons:

- The "fair rate of return" standard is articulated in *Calfarm* not *20th Century*, and *20th Century* "modified" *Calfarm* (Order pp. 123-124) (suggesting that *20th*

Century "modified" *Calfarm* to the point of effectively reinstating the "threatened with insolvency" standard held unconstitutional in *Calfarm*);

- The California Supreme Court opinions construing the confiscation standard subsequent to *20th Century* are inapplicable because they are rent control cases and rent control cases are different (Order pp. 125-126) (although *20th Century* cites and follows *Pennell v. City of San Jose*, 485 U.S. 1 (1988), a rent control case, and the California Supreme Court cases applying the confiscation standard in the rent control context cite *20th Century* (and *Calfarm*) for the "fair return principle")[7];
- *20th Century* uses the terms "deep financial hardship" and "inability to operate successfully". (Order p. 112.) These terms seem to describe financial distress (although these terms are used as terms of art within the *20th Century* opinion, 8 Cal. 4th at 296, to mean lack of an opportunity to earn a fair return); and
- *20th Century* held that the question of whether the rollback refund was confiscatory had to be judged based on the "enterprise as a whole" (Order p. 123) (with no articulated consideration of the distinction between a refund order awarding an all-lines rollback refund and a rate order that approves a prospective rate for a single line of insurance in California).

Thus, the Order incorrectly construes a constitutional standard that is at the heart of the current rate regulatory system.

During the course of the Mercury proceeding, the Administrative Law Judge ("ALJ") struck or sustained objections to virtually all of Mercury's evidence submitted in an attempt to prove up the "implied constitutional variance" of 10 C.C.R. § 2644.27(f)(9). This variance is intended to allow an applicant to show that, in a particular case, the formula has not operated to allow the applicant a constitutionally valid rate – i.e., a rate that is not confiscatory. The ALJ's rulings applied the "relitigation bar" of § 2646.4(c), interpreting that bar to preclude *both*

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[7] *See, e.g., Kavanau*, cited *supra* in footnote 2.

Mercury's legal argument regarding the proper constitutional standard (Order pp. 113, 118, 123), *and* Mercury's evidence that would be relevant and admissible to establish that the rate order would be confiscatory *if* Mercury were correct in its legal argument (Order pp. 121-122).

This application of the "relitigation bar" is not only incorrect, it renders the process incapable of allowing for relief from a confiscatory rate. As applied, this process is unconstitutional in its own right. *See e.g. Birkenfeld v. City of Berkeley*, 17 Cal. 3d 129, 169 (1976) ("The mechanism [for protecting regulated entities from a confiscatory price control] is sufficient for the required purpose only if it is capable of providing adjustments in maximum rents without a substantially greater incidence and degree of delay than is practically necessary.") (citing *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591 (1926)); *20th Century*, 8 Cal. 4th at 313 (finding that the existence of "a separate and independent constitutionally mandated 'variance' . . . available to the individual insurer on proof of confiscation . . ." saved the rollback regulations from constitutional invalidity by providing "a variance sufficient to accommodate" proof of confiscation, which was not barred by the "relitigation bar").

Mercury's Petition challenges the Order's holdings relating both to the Commissioner's interpretation of the confiscation standard and the Order's application of the relitigation bar. Petition, ¶¶ 75-88. The Trades seek to intervene here so that they may also make those challenges. Ultimately, the legal interest of the Trades and their members in those standards – which will equally apply to all insurers, including every Trade member – is just as strong as that of Mercury. It simply happens that these issues reach this Court in the context of a rate order directed to Mercury.

C. The Institutional Advertising Issue Presented Herein.

One of the substantial contributors to the Mercury rate order was the imposition of an exceptionally large excluded expense factor. This derived significantly from the Commissioner's interpretation and imposition of the regulation calling for exclusion of "institutional advertising" expense, defined in the regulation as "advertising not aimed at obtaining business for a specific insurer and not providing consumers with information pertinent to the decision whether to buy the insurer's product." *See* 10 C.C.R § 2644.10(f). After correctly describing the general concept of

"institutional advertising" as "'image' advertising which strives to enhance a company's reputation or improve corporate name recognition" (Order p. 93), the Order incorrectly construes § 2644.10(f) to sweep in virtually all advertising.

At the threshold, the Order completely misreads the regulation. The regulation defines "institutional advertising" – for which expenses are excluded – by what it is not. Advertising ***is*** institutional advertising if it is ***not*** "A" and ***not*** "B". The converse being true, if advertising ***is*** "A" or ***is*** "B" it ***is not*** institutional advertising. The Order misreads the regulation, as if it were written to define ***includable*** advertising expense as that expense for advertising meeting two criteria: criteria A and criteria B. *See* Order pp. 102-103. The Order's obsessive focus on the word "and" contained in the regulation and rote application of a statutory interpretation principle seems to have obscured the plain meaning of the regulation, apparent on its face.

Further, the Order appears to require that advertising ***specifically name*** a specific insurer, by its formal name, to be advertising "aimed at obtaining business for a specific insurer". That is not a stated requirement. Advertising can be aimed at obtaining business for a specific insurer without formally identifying the specific insurer who will get the business. If advertising promotes "Mercury homeowner's insurance", it is "aimed at obtaining business for" Mercury Casualty Company, the "Mercury" company writing homeowner's business in California.

Throughout, the Order is heavily influenced by the public utility model and public utility cases. But insurance companies are not public utilities. They are competitors in a voluntary market. The price regulation to which they are subject is not utility price regulation. As pertinent here, insurers are simply subject to the standard that their rates may not be "excessive" or "inadequate". Ins. Code § 1861.05(a). Advertising expense is a reasonable and accepted cost of doing business, and is ***the insurer's*** expense. This expense is not "passed on" or "chargeable" to the "ratepayer" (Order pp. 97, 101), any more than in the purchase of a bottle of aspirin or box of cornflakes.

The Order's stated governmental purpose for the regulation – to assign to shareholders the expense of advertising that benefits shareholders – derives from the public utility model and has no place in the insurance market. A large part of the insurance market is composed of mutual

insurers, which have no shareholders. *See, e.g.,* Ins. Code § 4010.

Further, the regulation on its face is a content-based regulation that seeks to chill and burden constitutionally protected commercial speech. As noted, the asserted governmental purpose for burdening certain commercial speech is unsupported. Consequently, this restriction on speech cannot stand. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 553-554 (2001) affirming continued application of "intermediate scrutiny" test, announced in *Central Hudson Gas & Electric Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557 (1980).

The Trades' members stand to suffer considerable harm based on this regulation. As it is now interpreted to apply a major financial penalty, the Trades' members will be harmed, by either reducing commercial speech to avoid a financial penalty, or suffering the penalty.

III. THIS MOTION FOR LEAVE TO INTERVENE SHOULD BE GRANTED PURSUANT TO CCP § 387 AND INSURANCE CODE § 1861.10(a).

A. The Trades Qualify For Intervention As Of Right Under CCP § 387(b) and Insurance Code § 1861.10(a).

CCP § 387(b) provides that a court "shall" permit a person leave to intervene "[i]f any provision of law confers an unconditional right to intervene" upon that person, and the person makes a timely application for leave to intervene. Insurance Code § 1861.10(a) provides that "[a]ny person may initiate or intervene in any proceeding permitted or established pursuant to this chapter, challenge any action of the commissioner under this article, and enforce any provision of this article." "[T]his chapter" is Chapter 9 of Division 1, Part 2 of the Insurance Code, and "this article" is Article 10 of Division 1, Part 2, Chapter 9. The rate regulatory statutes adopted by Proposition 103 appear in Article 10. *See* Ins. Code § 1861.01 *et seq*. Section 1861.10(a) is a statute "confer[ring] an unconditional right to intervene" in the class of actions defined in the statute.

Mercury's Petition is brought pursuant to Insurance Code §§ 1861.08, 1861.09, and 1858.6, among other statutes. Mercury Petition, ¶ 11. All of these Insurance Code statutes appear in Chapter 9. Sections 1861.08 and 1861.09 are in Article 10, and § 1861.09 directs that review of a rate order issued under § 1861.08 may be had as described in § 1858.6. Plainly, the action commenced by Mercury with the filing of its petition is a "proceeding" to which §

1861.10(a) applies.

Further, PIFC, AIA, PCI, PADIC and NAMIC are "persons". The statutory scheme contains no limitation on the ordinary meaning of the term "person", which, ordinarily, includes organizational and incorporated persons as well as natural persons. Indeed, Consumer Watchdog's Application For Leave To Intervene describes numerous interventions by organizations, including the intervention by PIFC members State Farm and Farmers in the case *Spanish Speaking Citizens' Foundation, Inc. v. Low*, 85 Cal. App. 4th 1179 (2000). Consumer Watchdog Application p. 8; *see also Spanish Speaking Citizens*, 85 Cal. App. 4th at 1209 (noting the grant of leave to intervene to State Farm and Farmers).

That is, Insurance Code § 1861.10(a) confers upon the Trades an unconditional right to intervene in this proceeding.

Further, this intervention is timely. At this stage, Mercury has filed the Petition, Consumer Watchdog has sought and been granted leave to intervene, and Mercury has filed its motion for a stay of the rate order pending a decision by this Court on the merits of the Petition. The hearing on the motion for stay is set for May 3, 2013. The administrative record has not yet been prepared and lodged with the Court. The schedule is not yet set for briefing and hearing of the merits of the Petition. That is to say, the matter is in the early stages, and the Trades' entry into the case will not cause disruption.

Consequently, the Trades meet the requirements for intervention as of right under CCP § 387(b).

B. This Proposed Intervention Is Also Appropriate Under CCP § 387(a).

This Court has discretion under CCP § 387(a) to allow a non-party to intervene if "(1) the proper procedures have been followed; (2) the nonparty has a direct and immediate interest in the action; (3) the intervention will not enlarge the issues in the litigation; and (4) the reasons for the intervention outweigh any opposition by the parties presently in the action." *Hodge v. Kirkpatrick Development, Inc.*, 130 Cal. App. 4th 540, 547 n. 2 (2005). The Trades have followed the correct procedures in applying for leave to intervene in this case, and propose to intervene as to matters affirmatively included within Mercury's Petition, thereby satisfying criteria (1) and (3).

As to criterion (4), the Trades can address this factor once the nature of any objection is disclosed. As to criterion (3), it is helpful to consider the nature of the case.

The action commenced by Mercury is a special proceeding brought under CCP § 1094.5 seeking review of an administrative order. Mercury Petition, ¶ 1. In addition to ruling on Mercury's specific rate application, the Order interprets regulatory, statutory, and constitutional law, and in so doing articulates legal standards that will be applicable in all rate applications. The Mercury Petition of course seeks review of the Commissioner's determination on its own rate application. But, the Mercury Petition also seeks review of the legal interpretations described in that case, and the legal standards created by those interpretations. The Court's review extends to those legal questions.

The Trades' interest here is in challenging legal standards and interpretations announced in the Mercury Order. The Trades are directly interested in those standards and interpretations because those standards and interpretations are applicable to future rate applications of the Trades' members. The Trades could challenge the legal standards announced by the Commissioner in the Mercury Order through their own petition for traditional mandamus and complaint for declaratory relief. *See Spanish Speaking Citizens*, 85 Cal. App. 4th at 1208 (describing actions brought by four consumer groups, three cities and one county challenging auto rating factor regulations as interpreted by the Commissioner in an administrative decision);[8] *see also* 9 Witkin, Cal. Proc. 5th (2008) Admin. Proc. § 130, p. 1256 ("A person aggrieved by an agency determination has a right to independent judicial review of questions of law, such as those dealing with the interpretation and application of statutes or judicial precedents.") (*citing, inter alia, Spanish Speaking Citizens*, 85 Cal. App. 4th at 1216). Thus, the Trades have precisely the "direct and immediate interest" envisioned by CCP § 387.

Finally, while not a criterion for permissive intervention, the Trades' participation will benefit the process. Mercury's focus will inherently be on the specific facts of its own rate case.

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[8] *See also Environmental Protection Information Center v. Department of Forestry & Fire Protection,* 43 Cal. App. 4th 1011, 1017 (1996) (organization has standing to challenge regulations under Government Code § 11350 – 1018 if it or its members "is or may well be impacted by a challenged regulation.").

However, the Court's decision on the legal questions the Trades seek to address will have a much broader application than to the specific rate order at issue here. Through its intervention, the Trades can bring that broader perspective. The Trades further note that Consumer Watchdog has already been granted permission to intervene. The Trades' intervention will provide a necessary balance.

IV. CONCLUSION

The case before this Court presents significant constitutional questions of vital concern to all insurers subject to the Proposition 103 rate regulatory system. The Trades represent the majority of California insurers subject to Proposition 103, entities that are consistently involved in rate proceedings under that system. The Trades and their members have long and deep experience with this system of rate regulation, and the Trades' participation in this case will aid the Court's resolution of the significant questions of law presented. The Trades respectfully request that this Court grant their motion for leave to intervene and permit filing of their Proposed Complaint in Intervention.[9]

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Respectfully submitted,

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[9] *See* Exhibit 3 to Declaration of Vanessa Wells