IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

MERCURY CASUALTY COMPANY, Plaintiff, and Appellant, **v.** **DAVE JONES, in his official capacity as INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,** Defendant and Respondent, **CONSUMER WATCHDOG,** Intervener. **PERSONAL INSURANCE FEDERATION OF CALIFORNIA et al.,** Interveners.	Case No. C077116

Sacramento County Superior Court, Case No. 34-2013-80001426-CU-WM-GDS
Hon. Shelleyanne W.L. Chang, Judge

RESPONDENT INSURANCE COMMISSIONER'S MOTION TO DISMISS APPEAL

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TO THE HONORABLE PRESIDING JUSTICE VANCE W. RAYE AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, THIRD DISTRICT:

Pursuant to California Rules of Court, rule 8.57, subdivision (a), respondent Dave Jones, in his official capacity as the Insurance Commissioner of the State of California, moves to dismiss this appeal on the ground that it is taken from a non-final and thus non-appealable ruling, such that this Court does not have jurisdiction over the matter.

This motion is based on the accompanying Memorandum of Points and Authorities and Declaration of Stephen Lew with its attached exhibits, and the files and records in this case.

Dated: September 19, 2014

KAMALA D. HARRIS
Attorney General of California
PAUL D. GIFFORD
Senior Assistant Attorney General
DIANE S. SHAW
Supervising Deputy Attorney General
STEPHEN LEW
Deputy Attorney General

By: 
STEPHEN LEW

Attorneys for Respondent Dave Jones, in his Official Capacity as the Insurance Commissioner of the State of California

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Respondent Dave Jones, in his official capacity as the Insurance Commissioner of the State of California (the "Commissioner"), submits this Memorandum of Points and Authorities in support of his motion to dismiss this appeal by appellant and petitioner below Mercury Casualty Company ("Mercury"). Mercury does not appeal from either a final order or a final judgment, but from a non-final ruling by the superior court. That ruling directed counsel for the Commissioner to submit an order and a judgment to the court below to implement the ruling. Counsel for the Commissioner submitted a proposed order and a proposed judgment, but the superior court has not yet entered an order or judgment. Further, the court below subsequently modified the ruling from which Mercury appeals and has scheduled further proceedings in the case. For all these reasons, Mercury's appeal is premature and should be dismissed.

FACTS

Mercury purports to appeal from the document entitled "Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief and Injunctive Relief" entered June 11, 2014 by the superior court (the "Ruling"). The Ruling is attached to Mercury's Civil Case Information Statement filed with this Court. In this proceeding,

Mercury sought a writ of mandate pursuant to Code of Civil Procedure section 1094.5 either to set aside a February 2013 order by the Commissioner denying Mercury's application to increase its homeowner's insurance premiums and ordering a decrease in such premiums, or to grant Mercury's requested rate increase. (See Ruling at p. 1.) Mercury also joined its writ petition with a complaint for declaratory and injunctive relief. (See *id.* at pp. 1, 19-20.) Various trade associations (the "Trades") intervened in the proceeding to join Mercury in challenging the Commissioner's decision by also filing a writ petition (under Code of Civil Procedure section 1085) and complaint for declaratory relief. (*Id.* at pp. 1, 8.)[1] The Trades have not joined in Mercury's appeal and have in fact filed a response to Mercury's appeal in the trial court agreeing with the Commissioner that the Mercury appeal is premature. (See Exhibit E to the accompanying Declaration of Stephen Lew.)

In the Ruling, the court below denied Mercury's writ petition (Ruling at p. 1), dismissed Mercury's declaratory and injunctive relief claims as duplicative of its mandate claims (*id.* at p. 19-20), denied the Trades' writ petition as well (*id.* at p. 20), and declined to consider any of

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[1] The intervenor trade associations are: Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America, doing business as Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies. Consumer Watchdog intervened in support of the Commissioner.

the Trades' separate claims that had not been raised by Mercury in the ratemaking administrative proceedings (*id.* at pp. 8-9). Further, the superior court stated:

> Counsel for the Commissioner is directed to prepare a formal order, incorporating the Court's ruling as an exhibit thereto, and a separate judgment, submit them to the parties for approval as to form, and thereafter submit it to the Court for signature, in accordance with California Rules of Court, Rule 3.1312.

(*Id.* at p. 20.)

Counsel for the Commissioner complied with the superior court's directive, prepared a proposed Order and a proposed Judgment, circulated the documents to all parties, and lodged the documents with the superior court after Mercury and the Trades declined to approve them as to form. (Lew. Decl. ¶¶ 2, 3 and Exs. A, B & C.) The superior court has not signed either document (nor any other Order incorporating the Ruling or Judgment). (Lew. Decl. ¶ 4.)

Further, the court subsequently modified the Ruling. At a status conference on July 18, 2014, the superior court decided to modify the Ruling by setting January 9, 2015, as the date for a hearing regarding the additional claims by the Trades that were not disposed of by the Ruling. (See Minute Order dated July 18, 2014, attached as Exhibit D to the Lew

Declaration.)[2] While Mercury did not raise these issues (see Ruling at p. 8) and, while the Commissioner believes that Trades' claims are wholly without any merit, any ruling on these additional issues may impact the nature and scope of Mercury's arguments against the Commissioner's rate order that is the subject of this case.

ARGUMENT

MERCURY'S APPEAL IS PREMATURE; IT SHOULD BE DISMISSED

Code of Civil Procedure section 904.1 delineates the orders and judgments from which an appeal may be taken. The Ruling is not one of the specifically enumerated documents in section 904.1 from which an appeal may be taken. "A reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment." (*Griset v. Fair Political Practices Comm'n* (2001) 25 Cal.4th 688, 696 ["*Griset*"].)

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[2] The two issues to be heard by the superior court on January 9, 2015, are: (1) the Trades' writ and declaratory relief claims regarding whether section 2644.10 of title 10 of the California Code of Regulations, which excludes an insurer's expenses for "institutional advertising," as defined in the regulation, from the ratemaking calculation violates the First Amendment's free speech protections (see Ruling at pp. 8); and (2) the Trades' motion to file a first amended complaint to add an issue that it did not plead in its original complaint of whether the hearing requirement to obtain a confiscation variance set forth in section 2644.27, subdivision (f)(9) of title 10 of the California Code of Regulations violates due process. (See Ruling at p. 9; July 18, 2014 Minute Order.)

Section 904.1 effectively codifies the common law "one final judgment rule," which limits appeals to final judgments that dispose of an entire matter in controversy. (See, e.g., *Kinoshita v. Horio* (1986) 186 Cal.App.3d 959, 962-63 ["*Kinoshita*"].) "A judgment is the final determination of the rights of the parties in an action or proceeding." (Code Civ. Proc., § 577.) "A judgment is final when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined." (*Sullivan v. Delta Air Lines, Inc.* (1997) 15 Cal.4th 288, 304, internal quotations and citations omitted.) The rule aims to reduce litigation of issues that may become moot by the time a case terminates and to discourage the filing of frivolous appeals. (*Griset, supra*, 25 Cal.4th at p. 697.) As has been discussed, the "entire matter in controversy" has not yet been finally determined, with further proceedings scheduled in the case.

Moreover, the Trades and Mercury itself have argued that there can be but one final judgment in this case (see Lew Decl. Ex. C and its attachments and Ex. E.), citing the following:

> There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains.

(*Bank of America Nat. Trust & Savings Assn, v. Superior Court* (1942) 20 Cal.2d 697, 701, cited and quoted in *Griset, supra*, 25 Cal. 4th at p. 698;

Lew Decl. Ex. E at pp. 3-4.) But as explained above, no such final judgment has yet been entered.

An appellate court generally may not consider appeals arising from judgments that do not conform to the "one final judgment rule." In fact, when there is no order or judgment made appealable by the Code of Civil Procedure section 904.1, an appellate court is charged with the duty of raising the issue of jurisdiction on its own motion. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126; *Olson v. Cory* (1983) 35 Cal.3d 390, 398.)

"[E]xceptions to the one final judgment rule should not be allowed unless clearly mandated." (*Kinoshita*, *supra*, 186 Cal.App.3d at p. 967.) Some California courts have recognized an exception to the one final judgment rule for procedurally defective orders or judgments. (See, e.g., *Bank of California v. Thornton-Blue Pacific, Inc.* (1997) 53 Cal. App.4th 841 [an order was effectively a final judgment because there were no further issues requiring judicial consideration]; compare, e.g., *Henneberque v. City of Culver City* (1985) 172 Cal.App.3d 837, 841 [an order was not appealable because there were further issues for consideration].)

In contrast, when there is no final order or judgment yet, as here, courts have held that there is no basis for an appeal. "[W]here the trial court contemplates further orders or action on the mandamus petition[,] the order denying the petition [is] *not* appealable." (*Elmore v. Imperial*

Irrigation Dist. (1984) 159 Cal.App.3d 185, 191, italics original.) In one case, a minute order that stated "[c]ross-complainant to prepare judgment accordingly" was held not an appealable judgment. (*Davis v. Taliaferro* (1963) 218 Cal.App.2d 120,122.) The minute order's instruction to provide a subsequent order was crucial: "The order therefore clearly shows on its face that it was a mere preliminary entry authorizing the subsequent judgment, that it did not finally dispose of the matter, and that the minute order itself was not a final appealable order." (*Id.* at pp. 122-123; accord, *Laraway v. Pasadena Unified School Dist.* (2002) 98 Cal.App.4th 579, 583 [orders that contemplate "further action, such as the preparation of another order or judgment" are not appealable]; *Bailey v. County of El Dorado* (1984) 162 Cal.App.3d 94, 97-98 [minute order not appealable but appeal treated instead as a petition for writ of mandate or prohibition].) Likewise, statements of decision, to which the Ruling may be compared, are also not appealable. (*Apple, Inc. v. Franchise Tax Bd.* (2011) 199 Cal.App.4th 1, 13 ["an appeal can only be taken from a final judgment, not from a statement of decision"].)

And in *Phillips v. Phillips* (1953) 41 Cal.2d 869, the trial court issued a memorandum with findings of fact denying a divorce. The memorandum was not recorded as a judgment. (*Id.* at p. 873.) The Supreme Court held the appeal from the memorandum premature since the

trial court retained its jurisdiction to amend its findings of fact or legal analysis at any time up to the entry of a final judgment. (*Id.* at p. 874.) "[A]n appeal taken before entry of judgment does not confer jurisdiction upon the appellate court." (*Ibid.*)

Here, as discussed, in the Ruling the court below directed that both an order and a judgment be prepared; to date, neither has been entered. Rather, the superior court has subsequently modified the Ruling itself, and scheduled further proceedings that may arguably affect the issues on appeal and Mercury's position. Until such time that a final judgment is entered, there is no basis for appellate jurisdiction.

CONCLUSION

Mercury's filing of a Notice of Appeal is premature because the superior court has not yet entered any final judgment, has subsequently modified the ruling that Mercury seeks to appeal, and has scheduled future proceedings.

Dated: September 19, 2014

KAMALA D. HARRIS
Attorney General of California
PAUL D. GIFFORD
Senior Assistant Attorney General
DIANE S. SHAW
Supervising Deputy Attorney General
STEPHEN LEW
Deputy Attorney General

By: 
STEPHEN LEW

Attorneys for Respondent Dave Jones, in his Official Capacity as the Insurance Commissioner of the State of California

DECLARATION OF STEPHEN LEW

I, STEPHEN LEW, hereby declare:

1. I am an attorney duly admitted to practice in the State of California. I am a Deputy Attorney General with the Office of the Attorney General, California Department of Justice. The Office of Attorney General represents the respondent Dave Jones in his official capacity as the Insurance Commissioner of the State of California (the "Commissioner"). I am the attorney assigned to represent the Commissioner in this matter. I am thus familiar with the proceedings and the pleadings that have been filed in this proceeding. I have personal knowledge of the facts stated in this Declaration and if called as a witness I could and would testify competently thereto. I submit this declaration pursuant to rule 8.57, subdivision (a) of the California Rules of Court in support of the Commissioner's Motion to Dismiss Appeal.

2. Attached here as Exhibits A and B, respectively, are true and correct conformed copies of : (a) the [Proposed] Order Denying Petitions For Writ Of Mandate And Dismissing Plaintiff's Complaint For Declaratory Relief And Injunctive Relief (the "Proposed Order"); and (b) the [Proposed] Judgment (the "Proposed Judgment") that I prepared and caused to lodged with the Superior Court on June 27, 2014. I prepared and lodged the Proposed Order and the Proposed Judgment pursuant to

directive set out at page 20 of the "Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief and Injunctive Relief" entered June 11, 2014 by the Superior Court (the "Ruling").

3. Prior to lodging these documents and as also directed by the Superior Court, I circulated them to all parties in the case for their approval as to form. Only intervenor Consumer Watchdog approved as to form the Proposed Order and the Proposed Judgment. Attached here as Exhibit C is a true and correct conformed copy of my letter to the Superior Court dated June 27, 2014, advising the court that I had circulated the Proposed Order and the Proposed Judgment to all parties and that only Consumer Watchdog approved as to form the proposed documents. Attached to my letter are responses I received from the other parties regarding the Proposed Order and the Proposed Judgment.

4. To date, the Superior Court has not signed either the Proposed Order or the Proposed Judgment, nor any other Order incorporating the Ruling or Judgment

5. Attached here as Exhibit C is a true and correct copy of a Minute Order in this case dated July 18, 2014 that was downloaded from the web site of the Sacramento County Superior Court.

6. Attached here as Exhibit D is a true and correct copy of a

pleading entitled "Intervenors' Response to Mercury Casualty Company's Notice of Appeal (Third Appellate District Appellate Case No: C077116) that was served on me by counsel for intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America, doing business as Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies.

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

Executed on September 19, 2014, in Los Angeles, California.

STEPHEN LEW

EXHIBIT A

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.

PERSONAL INSURANCE FEDERATION OF CALIFORNIA et al.,

Intervenors.

Case No. 34-2013-80001426-CU-WM-GDS

Assigned to Judge Shelleyanne W.L. Chang, Dept. 24

[PROPOSED] ORDER DENYING PETITIONS FOR WRIT OF MANDATE AND DISMISSING PLAINTIFF'S COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

Writ Hearing Date and Time

Date: May 2, 2014
Time: 11:00 A.M.
Dept.: 24

Action Filed: March 1, 2013

The Petition for a Preemptory Writ of Mandate (i.e., the First Cause of Action of the Verified Petition for a Preemptory Writ of Mandate Under CCP § 1094.5, Gov't Code § 11523, and Insurance Code § 1858.6; and Complaint for Declaratory Relief and Injunctive Relief [the "Petition and Complaint"]) (the "Mercury Petition") filed by Petitioner and Plaintiff Mercury Casualty Company ("Mercury") and the Petition for Writ of Mandate (i.e., the First, Third, Fifth,

Seventh, and Ninth Causes of Action of the Verified Complaint in Intervention) (the "Trades Petition") filed by Intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America dba Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies (collectively, the "Trades") both came on for hearing on May 2, 2014, in Department 24 of the above-entitled Court before the Honorable Shellyanne W.L. Chang, Judge presiding. Richard G. De La Mora and Spencer Y. Kook of Barger & Wolen LLP appeared on behalf of Mercury; Vanessa O. Wells of Hogan Lovells US LLP appeared on behalf of the Trades; Deputy Attorney General Stephen Lew appeared on behalf of Respondent and Defendant Dave Jones, sued here in his official capacity as Insurance Commissioner of the State of California; and Pamela Pressley and Laura Antonini appeared on behalf of Intervenor Consumer Watchdog.

The Court, having read and considered the papers filed by all of the parties regarding the Mercury Petition and the Trades Petition, and having heard the arguments of counsel, and for the reasons set forth in the Court's Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief dated June 11, 2014, a true and correct copy of which is attached hereto as Exhibit "A" and incorporated by reference herein, and for good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that

1. The Mercury Petition is DENIED.

2. Mercury's Complaint for Declaratory Relief and Injunctive Relief (i.e., the remaining Second Cause of Action of the Petition and Complaint) is DISMISSED in its entirety.

3. The Trades Petition is DENIED.

IT IS SO ORDERED.

Dated: June ___, 2014

HON. SHELLYANNE W. L. CHANG
JUDGE OF THE SUPERIOR COURT

Presented by:

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Attorney General of California
MOLLY K. MOSLEY
W. DEAN FREEMAN
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CONSUMER WATCHDOG

BY: _____
PAMELA PRESSLEY

Attorneys for Intervenor Consumer Watchdog

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CONSUMER WATCHDOG

BY: Pamela Pressley
PAMELA PRESSLEY

Attorneys for Intervenor Consumer Watchdog

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE: JUDGE:	June 11, 2014 HON. SHELLEYANNE W. L. CHANG	DEPT. NO.: CLERK:	24 E. HIGGINBOTHAM

MERCURY CASUALTY COMPANY, Petitioner and Plaintiff, vs. DAVE JONES, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA, Respondent and Defendant. CONSUMER WATCHDOG, Intervenor. PERSONAL INSURANCE FEDERATION OF CALIFORNIA, et al. Intervenors.	Case No.: 34-2013-80001426

Nature of Proceedings:	Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief and Injunctive Relief

On May 1, 2014, the Court issued a tentative ruling on Petitioners' Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, and pertinent claims in Intervenors' Petition for Writ of Mandate. The parties appeared for oral argument on May 2, 2014, and were represented by counsel as stated on the record. After oral argument, the Court took the matter under submission.

Having further considered the matter, the Petition is **DENIED**.

Petitioner, Mercury Casualty Company (Petitioner or Mercury) seeks a writ of mandate either setting aside the February 2013 order of Respondent State Insurance Commissioner (Commissioner or Respondent) or granting Mercury its requested rate increase and related declaratory and injunctive relief. Interventor trade associations[1] (the Trades) join Mercury in challenging the Commissioner's decision.

[1] Intervenors are: Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America, doing business as Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies.

Mercury and the Trades[2] challenge the decision on two bases: (1) the Commissioner's order requiring Mercury to decrease its rates is invalid because it is confiscatory and does not allow Mercury a fair rate of return, and (2) the Commissioner improperly excluded all of Mercury's advertising expenses from the Commissioner's ratemaking calculation.

I. FACTUAL AND PROCEDURAL BACKGROUND

The pertinent facts are largely undisputed.

Pursuant to Proposition 103, the Commissioner must approve property and casualty insurance rates set by an insurer. The parties refer to this rate-setting as the "prior approval" process. (Ins. Code, § 1861.01(c).) On May 15, 2009, Mercury filed an application with the Department of Insurance (DOI) to increase rates for its Homeowners' Multi-Peril line of insurance, RFB App. No. 09-3851 (Rate Application). (AR, 20.) Specifically, Mercury sought to increase rates in three separate lines: HO-3 (residential homeowners' insurance), HO-4 (tenants' insurance), and HO-6 (condominium owners' insurance). (AR, 2048.) Mercury sought an overall rate increase of 6.9%, and alternatively, an increase of 8.8% if its request for a variance were granted. (AR, 2048.)

The administrative proceedings following Mercury's Rate Application lasted nearly four years. After extensive evidentiary hearings, the administrative law judge (ALJ) issued a proposed decision on September 27, 2012. (AR, 1880.) The Commissioner rejected the ALJ's proposed decision and ordered the ALJ to take additional evidence on Mercury's investment income and rate of return. (AR, 1880-84.) After an inquiry from the ALJ, the Commissioner rescinded this request and stated that its previous order could be "disregarded." (AR, 1939.) The ALJ issued another proposed decision on January 28, 2013, which was adopted by the Commissioner on February 11, 2013 (Order). (AR, 1973, 2037-2178.)

The Commissioner's Order concluded that Mercury's proposed overall rate increase of 8.8% was excessive. (AR, 2174.) It ordered Mercury to *decrease* its HO-3 rates by 8.18%, and allowed increases of 4.32% and 29.44% in its HO-4 and HO-6 lines, respectively.[3] (AR, 2174.) It is the 8.18% decrease that is the subject of the Petition.

As stated in the Order, the ALJ made particular findings that affected how the ordered rates were calculated. In particular, the ALJ found that all of Mercury's advertising expenses were "institutional advertising," such that these expenses could not be considered in setting the rate (AR, 2173.) The ALJ also found that Mercury was not entitled to certain "variances," from the ratemaking formula, including the "confiscation variance." (10 Cal. Code Regs., § 2644.27, subdivision (f)(9).) (AR, 2174.)

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[2]As Mercury and the Trades advance similar arguments contesting the Commissioner's decision, this ruling shall refer to Mercury and the Trades as "Petitioners," when applicable.

[3] Because the premiums in HO-3 lines outnumber those in the HO-4 and HO-6 lines, Mercury contends that the effect of the Order requires it to decrease its overall rates by approximately 5%. (Petition, ¶¶ 2-3.)

The Petition was filed on March 1, 2013. Later that month, the Court granted Intervenor Consumer Watchdog's (CW) unopposed motion for leave to intervene. On May 7, 2013, this Court denied Mercury's ex parte application for a stay of the Order. On June 18, 2013, the Court granted the unopposed motion to intervene of the Trades.

On March 28, 2014, Respondents, joined by CW, moved for judgment on the pleadings against Mercury, on the basis that the Petition was moot. The basis for this motion was that the rates set by the Commissioner's Order were no longer effective. This is because Mercury and the Commissioner settled another prior rate approval action and entered into a November 2013 stipulation approving an 8.26% rate increase for Mercury's 2013 Homeowner's Multi-Peril rate application. Respondents also moved to strike the Trade's complaint in intervention or portions thereof.

The Court denied both motions. The Court found that the Petition was not moot, because Petitioner decreased its rates under February 2013 Order for a period of about 6 months, until the stipulated rate increase took effect in November 2013. Thus, a court decision setting aside the February 2013 order on the basis that the rates were "confiscatory" could provide the basis for a future administrative adjustment of Mercury's rates. Additionally, the Court found that the matters raised by the Petition were not moot in that they involved issues of broad public interest that are likely to recur.

Mercury and the Trades have filed two separate petitions for writs of administrative mandamus or mandate, and complaints for declaratory relief (Petitions). Mercury and the Trades have purported to set for hearing the mandate/mandamus claims *only* for May 2, 2014, and no party has objected. Accordingly, in this proceeding, the Court will consider the mandamus claims filed by Mercury, and where relevant, the mandate claims of Trades. The Court does *not* consider claims for declaratory relief filed by the Trades. As discussed later, the declaratory relief claims filed by Mercury are denied.

II. LEGAL BACKGROUND

a. Proposition 103 and Regulation of Insurance

In 1988, California voters enacted Proposition 103, which dramatically changed regulation of property-casualty insurance rates. Prior to Proposition 103 insurers could set rates in a competitive market.

Among other things, Proposition 103 required insurers to "rollback" insurance rates 20% below 1987 levels for one year, starting November 1988. (*20th Century Ins. Co. v. Garamendi* (*20th Century*) (1994) 8 Cal.4th 216, 239-240.) Insurers could only obtain relief from the 20% rollback if they could show that they were "substantially threatened with insolvency." (Ins. Code, § 1861.01, sub. (b).) This is known as the "insolvency standard."

Proposition 103 also implemented the "prior approval" system, which required the Commissioner to approve any insurance rate adjustment in a rate-making process. (*See*

Ins. Code, § 1861.05.) The Commissioner may neither require insurers to charge "excessive" rates nor subject insurers to "inadequate" rates.[4] (*20th Century, supra*, 8 Cal.4th at p. 243; Ins. Code, § 1861.05, subd. (a).) Under the prior approval ratemaking process, the Commissioner determines the bounds of such "excessive" and "inadequate" rates: the maximum and minimum permitted earned premium. (*20th Century, supra*, 8 Cal.4th at p. 254.) Insurers may charge any rate between this range of "excessive" and "inadequate" rates. (*Ibid.*)

The parties cite heavily to two cases interpreting Proposition 103 and, in the case of *20th Century*, its implementing regulations: *Calfarm Insurance Company v. Deukmejian* (*Calfarm*) (1989) 48 Cal.3d 805, and *20th Century, supra*, 8 Cal.4th at 263.

In *Calfarm*, the insurance industry challenged the constitutionality of Proposition 103 immediately after its passage. The California Supreme Court largely upheld Proposition 103 and the 20% rollback requirement. (*Id.* at p. 815.) However, it held that Proposition 103's "insolvency standard"—wherein an insurer could only receive a relief from the 20% rollback if "threatened with insolvency"—was unconstitutional. This is because the "insolvency standard" could not "conform to the constitutional standard of a fair and reasonable return." (8 Cal.4th at p. 818.) For example, companies that were not threatened with insolvency could nonetheless be subject to "confiscatory" rates in violation of the Constitution. (*Ibid.*)

Although the Court invalidated the "insolvency standard," it left untouched the "general standard for rate adjustment" set out in Insurance Code section 1861.05[5] and affirmed that this statute "provide[d] a constitutionally valid standard for rate adjustment." (*Id.* at p. 822-823.) Because an "inadequate" rate under Section 1861.05 was necessarily a "confiscatory" rate, the statute required rates to be "fair and reasonable" and prohibited confiscatory rates. (*Ibid.*)

After *Calfarm*, the Commissioner adopted "Prior Approval Regulations" to implement Proposition 103.

These regulations established procedures to calculate whether rates were "excessive" or "inadequate" under Section 1861.05. (*See* 10 Cal. Code Regs., §§ 2641.1-2644.67.) The regulations also included comprehensive formulas for the upper and lower boundaries of the "excessive-inadequate" range: the "maximum permitted earned premium" and "minimum permitted earned premium" (maximum PEP and minimum PEP). (10 Cal. Code Regs., § 2644.2, 2644.3.) The regulations also allowed insurers to seek "variances" from the maximum or minimum PEP derived from the rate-setting formula. (10 Cal. Code Regs., § 2644.27(f)(1)-(9).)

In his first "rollback exemption order" made after a hearing, the Commissioner ordered 20th Century Insurance to refund each insured 12% of the "rollback year" premium rather

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[4] Insurance Code section 1861.05, subdivision (a) provides in pertinent part: "No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory or otherwise in violation of this chapter...."

[5] Unless otherwise indicated, all future statutory references shall be to the Insurance Code.

than 20%. (*20th Century, supra*, 8 Cal.4th at p. 263.) 20th Century Insurance petitioned for a writ of mandate, joined by the majority of the property-casualty insurance industry. The trial court ruled largely 20th Century's favor. The California Supreme Court did not, and held that the application of the rollbacks to 20th Century were not invalid. Among other things, the Court found that:

- The regulations implementing the ratemaking formula were valid. The Commissioner could set rates by a formula rather than on a case-by-case basis, and the insurer was not entitled to an "individualized" hearing outside the regulations to determine its rollback liability. (*20th Century, supra*, 8 Cal.4th at p. 324.)

- The trial court erroneously found that "confiscation," *does not* require "deep financial hardship." (*Id.* at pp. 320, 324.)

- "Confiscation is judged with an eye toward the regulated firm as an enterprise. In this context, it depends upon the condition of the insurer as a whole, and not on the fortunes of any one or more of its [insurance] lines." (*Id.* at p. 322.)

- The regulations' "relitigation bar"[6] does not allow a regulated entity to introduce evidence to challenge the premises of the regulatory formula. The trial court erroneously determined that the relitigation bar operated to bar the insurer from presenting proof of confiscation. (*Id.* at pp. 257, 311-312, 324.)

- Whether the insurer's rollback order is unjust and unreasonable and therefore "confiscatory," depends upon balancing the interests of the insurer and insured consumers. (*Id.* at p. 325.)

- Although a regulated industry has an "interest" in its cost of capital, it has no right to it, and it has no constitutional right to a profit or right against a loss. (*Id.* at pp. 320-321, 326.)

b. Price Control Regulation

A brief discussion of background law governing price control measures is warranted. These principles apply to regulated entities such as Mercury that challenge the price control laws or a specific rate order. (*20th Century, supra*, 8 Cal.4th 319.)

"When a regulation is challenged as violative of the takings clause as applied, the question is whether, in the particular case, its terms set a rate that is unjust and unreasonable and hence confiscatory." (*20th Century, supra*, 8 Cal.4th at 318 (emphasis added).) When a rate order itself is challenged as violative of the takings clause, 'the question is whether that order 'viewed in its entirety' meets the [relevant] requirements .... Under the ... standard of 'just and reasonable' it is the result reached not the method

[6] The "relitigation bar" appears at 10 Cal. Code Regs., § 2646.4, subdivision (e).

employed which is controlling. [Citations.]" (*Ibid.* (citing *Federal Power Comm'n v. Hope Natural Gas Co.* (*Hope*) (1944) 320 U.S. 591, 602).)

"Judicial inquiry as to whether or not a rate is just and reasonable is necessarily difficult." (*20th Century, supra*, 8 Cal.4th a p. 318.) "[N]either law nor economics has yet devised generally accepted standards for the evaluation of rate-making orders ...." (*Id.* (citing *Permian Basin Area Rate Cases* (1968) 380 U.S. 747, 790).)

Accordingly, "[j]udicial inquiry as to whether or not a rate is just and reasonable is also limited. Indeed, it 'is at an end' '[i]f the total effect of the rate order cannot be said to be unjust and unreasonable .... The fact that the method employed to reach that result may contain infirmities is not then important....[H]e who would upset the rate order ... carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences." (*20th Century, supra* 8 Cal.4th at p. 318-319 (citing *Hope* 320 U.S. at p. 602).)

"The *Hope* court identified one situation in which 'he who would upset the rate order' could not bear that 'heavy burden.' Rates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return ...." (*20th Century, supra* 8 Cal.4th at p. 319 (citing *Hope* 320 U.S. at p. 605).) "More simply, 'a company [cannot] complain if the return which was allowed made it possible for the company to operate successfully.'" (*20th Century, supra* 8 Cal.4th at p. 318-319 [citation omitted].)

In setting rates for regulated entities, the regulator is *not* bound to use any single formula or combination of formulas. The regulator's rate-making function involves making "pragmatic adjustments." (*Hope, supra*, 320 U.S. at p. 602; *20th Century, supra*, 8 Cal.4th at 216.) Additionally, the regulator's fixing of "just and reasonable rates" involves a balancing of investor and consumer interests. (*Hope, supra*, 320 U.S. at p. 602.)

III. ANALYSIS

a. Requests for Judicial Notice

The Court makes the following rulings on the requests for judicial notice filed in support of (1) Mercury's Opening Brief, (2) the Trades' Opening Brief, (3) CW's Opposition Brief, and (4) the Commissioner's Opposition Brief:

As to CW's Request for Judicial Notice, Exhibits 1, 2, and 3, are **DENIED** and Exhibits 4 and 5 are **GRANTED**. As to the Trades' Request for Judicial Notice, Exhibits 1, 2, and 3 are **GRANTED**. The Commissioner's Request for Judicial Notice, Exhibit 1, is **GRANTED**.

As to Mercury's Request for Judicial Notice, Exhibits 1, 5 and 6 are **GRANTED**. The parties dispute whether the Court may take notice of Exhibits 2, 3, and 4, prior non-precedential decisions of the Insurance Commissioner. The Commissioner objects on the

basis that the exhibits are irrelevant and inconsistent with a position adopted by the Trades. However, Mercury attaches these exhibits not to show that the Commissioner's application of the law is binding, but to show how the Commissioner has applied regulations in previous instances. The Court of Appeal has held that this information is relevant in an administrative proceeding on an insurer's rollback liability. (*RLI Insurance Group v. Superior Court* (1996) 51 Cal.App.4th 415, 435.) Accordingly, the Court **GRANTS** the request as to Exhibits 2, 3, and 4.

b. Standard of Review

Mercury seeks review of the Commissioner's Order pursuant to Code of Civil Procedure section 1094.5, which requires Mercury to show that the Commissioner abused his discretion. "Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (Code Civ. Proc, § 1094.5(b).) Section 1858.6. also requires the Court to apply its independent judgment in reviewing the Order. This statute provides in part:

> "Any finding, determination, rule, ruling or order made by the commissioner...shall be subject to review by the courts of the State and proceedings on review shall be in accordance with the provisions of the Code of Civil Procedure....[T]he court is authorized and directed to exercise its independent judgment on the evidence and unless the weight of the evidence supports the findings, determination, rule, ruling or order of the commissioner, the same shall be annulled." (Ins. Code, § 1858.6.)

"The independent judgment standard requires the trial court to accord a strong presumption of correctness to the Commissioner's findings, and the burden of proof rests on the party challenging those findings, but ultimately the trial court is free to reweigh the evidence and substitute its own findings." (*State Farm Mut. Auto. Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 71.)

The parties dispute the degree of judicial deference owed to the Commissioner's interpretation of his regulations implementing Proposition 103. "The Commissioner's interpretations are to be respected, though they are not binding... An administrative agency's interpretation of its own regulation deserves substantial weight, even if it amounts to a 'litigating position.' On the other hand, it is well settled that the interpretation of a regulation, like the interpretation of a statute, is a question of law ultimately decided by the courts. [Citation.] The level of deference due to an agency's regulatory interpretation turns on a legally informed, commonsense assessment of its merit in the context presented." (*State Farm Mutual Auto. Ins. Co. v. Quackenbush* (1999) 77 Cal.App.4th 65, 75 (citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14).)

c. The Trades' Petition and Complaint in Intervention

The Trades filed a Petition for writ of mandate and complaint for declaratory relief in intervention. The Trades do not brief their claims for declaratory relief and the Court does not consider them.

The Trades do not seek review of the Commissioner's Order under Code of Civil Procedure section 1094.5, but rather seek a writ of mandate pursuant to Civil Procedure section 1085 to compel the Commissioner to interpret the regulations in a lawful and constitutional manner. Accordingly, the standards of review for the Trades' Petition and Mercury's petition are materially different. Without addressing the differing standards of review, the Trades' memorandum of points and authorities (MPAs) merely advances arguments as to why the Commissioner's Order was invalid. Because the Court denies Mercury's Petition and concludes that the Order was valid, it also concludes that the Trades' arguments fail under the more deferential standard of review applicable to "traditional" mandate petitions.

Additionally, the Trades advance certain arguments in the MPAs attacking the Commissioner's decision in Mercury's rate application that were not raised by Mercury or in the administrative proceedings below. The Court stated in its tentative ruling that it would not consider these additional claims.

At oral argument, Counsel for the Trades opposed the Court's decision and requested that it be allowed to argue the merits of the points raised separately in its MPAs. The Trades reiterated this request in a May 14, 2014 letter to the Court, and requested the Court to set a further hearing to allow the Trades to address these arguments. Respondent urged the Court to disregard the Trades' letter. The Court denies the Trades' request. The Court will not rule on the Trades' separate claims raised in the MPAs, as detailed below, and will not consider further oral argument.

The Trades challenge the Commissioner's Order regarding "institutional advertising" expenses because he compared advertising for insurance expenses to advertising to public utility cases, and because he interpreted the regulations in a manner that violated the First Amendment. As Mercury did not raise these challenges in the administrative proceedings, Mercury could not raise them here.

At oral argument, the Trades averred that it was appropriate for the Court to consider the Trades' challenge the Commissioner's Order on this basis, notwithstanding Mercury's decision not to do so. The Trades cite *Bodinson Manufacturing Company v. California Employment Commission* (1941) 17 Cal.2d 321 for the proposition that an affected entity aggrieved by an agency's action may challenge it. However, *Bodinson* did not address this in the context of an intervening party that wishes to raise new and additional challenges.

"As a general rule an intervener takes the suit as he finds it [Citation] and he cannot avail himself of irregularities the original parties have expressly or impliedly waived."

(*Hospital Council of Northern California v. Superior Court* (1973) 30 Cal.App.3d 331, 336.) The intervener is "bound by the record of the action at that time." (*Ibid.*) The Court finds the reasoning in *Hospital Council* persuasive, and declines to consider arguments raised by Trades that were not, and could not be raised by Petitioners in this litigation.

Additionally, the Trades argue that the hearing requirement to obtain a variance violates an insurer's due process rights. An independent ground exists to disregard this claim: it appears nowhere in the Trade's Complaint in Intervention and the Court will not entertain it.

d. Whether the Rate Order is Confiscatory

In issuing the Order, which required Mercury to decrease rates in its HO-3 line by approximately 8%, the Commissioner determined that Mercury did not qualify for a "confiscation variance." Petitioners argue that (1) Mercury did qualify for the confiscation variance, but (2) the Commissioner applied the wrong standard in determining whether Mercury qualified and (3) the Commissioner prevented Mercury from showing that it could qualify. Thus, Petitioners argue, the Order is invalid.

i. Background—How the Commissioner Sets Rates

As discussed earlier, the Commissioner uses a formula to determine the maximum and minimum permitted earned premium, which define the bounds of "excessive" and "inadequate" (or confiscatory) rates. (10 Cal. Code Regs., §§ 2644.2, 2644.3.)

The rate regulations are purposefully formulaic, to allow the Commissioner to manageably determine insurance rates:

> [The ratemaking method] may implicate formulaic ratemaking (see *Permian Basin Area Rate Cases* (1968) 390 U.S. 747, 768-770) using data reflecting the condition and performance of a group of regulated firms…It is not subject to piecemeal examination: "The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result. The Constitution is not designed to arbitrate these economic niceties." [Citation.] And, of course, courts are not equipped to carry out such a task. [Citation.] "[S]o long as rates as a whole afford [the regulated firm] just compensation for [its] over-all services to the public," they are not confiscatory. [Citation.] That a particular rate may not cover the cost of a particular good or service does not work confiscation in and of itself. [Citation.] (*20th Century, supra*, 8 Cal.4th at p. 293.)

The ratemaking formula takes into consideration projected losses, projected expenses, projected income, and uses broad assumptions and "plug-in" data to represent variables in the formula. For example, the regulations define how variables, such as "losses," are

calculated. (10 Cal. Code Regs., §§ 2644.4; 2644.7.) The regulations also use for the "expenses" variable the average of industry-wide expenses by line of insurance, rather than the insurer's actual expenses.[7] (10 Cal. Code Regs., § 2644.12.)

The regulations also allow "variances" from the rate set by the ratemaking formula: that the maximum or minimum permitted earned premium set by the formula be adjusted. (10 Cal. Code Regs., § 2644.27.) One such variance is the "confiscation variance."[8] The basis for a confiscation variance occurs when:

> [] the maximum permitted earned premium would be confiscatory as applied. This is the constitutionally mandated variance articulated in *20th Century v. Garamendi* (1994) 8 Cal.4th 216 which is an end result test applied to the enterprise as a whole. Use of this variance requires a hearing pursuant to [Regulation] 2646.4. (10 Cal. Code Regs., § 2644.27(f)(9).)

The applicant requesting the variance must identify the amount of the variance and the "applicable component" of the ratemaking formula, set forth the expected result that the variance would have if granted compared to the result if the variance were denied, and "identify the facts and their source justifying the variance request and provide the documentation supporting the amount of the change to the component of the ratemaking formula." (10 Cal. Code Regs., § 2644.27, subd. (b).)

ii. The Commissioner Properly Determined that Mercury Must First Demonstrate Evidence of Confiscation Before Entertaining Whether to Grant it the Confiscation Variance

The ALJ found that Mercury did not qualify for a confiscation variance from the rate set by the formula, because Mercury did not make a *prima facie* showing that the applying formula to yield the rate decrease would cause Mercury to suffer "deep financial hardship" to its "enterprise as a whole." (AR, 2164.) Rather, the Commissioner found that the rate set by the formula would permit Mercury to earn a profit and maintain its financial integrity. (Id.) Thus, the rate set by the formula was not "confiscatory" and Mercury was not entitled to the "confiscation variance." (AR, 2163.)

The parties first take issue with the Commissioner's requirement that the applicant make a prima facie showing of confiscation before it entertains the question of whether a variance is necessary.

Mercury and the Trades make similar arguments against this requirement. The Trades contend that this threshold *prima facie* confiscation showing is unreasonable because sometimes applying the standard formula may not show that a rate order is confiscatory; in some cases an insurer can only show confiscation if it uses its own data. Mercury does not argue that it cannot show confiscation under the standard formula, but argues that the

[7] This "expense variable" is also called the "efficiency standard."
[8] The "confiscation variance" is also referred to as "Variance 9."

Commissioner prevented it from using data which Mercury claims would have shown confiscation.

However, *20th Century* supports the Commissioner's approach: a variance is "available to the individual insurer *on proof of confiscation*, that is to say, on proof that the regulations in question would otherwise be confiscatory as applied." (*20th Century, supra,* 8 Cal.4th at p. 312 (emphasis added); *see also* 10 Cal. Code Regs., § 2644.27, subd. (b) [requiring the applicant to submit evidence in support of its request].) Because the ratemaking formula derives from the regulations, it was reasonable for the Commissioner to require Mercury to first make a *prima facie* showing that applying the ratemaking formula would result in confiscation.

Further, given the complex and time-consuming nature of the ratemaking process, the applicant must do more than simply allege that it needs a variance to trigger the Commissioner's duty to entertain whether one is warranted.

Thus, the Commissioner properly determined that Mercury was required to make a *prima facie* showing of confiscation before the Commissioner considered whether Mercury was eligible for a confiscation variance.

iii. The Commissioner Applied the Correct Standard for Confiscation

Mercury claims that the Commissioner applied the wrong standard to assess whether Mercury could show confiscation to entitle Mercury to a variance. Mercury asserts that the Commissioner should have assessed whether Mercury could earn a "fair rate of return" under the rate order, and not whether the company would suffer "deep financial hardship to its enterprise as a whole." Similarly, the Trades assert that the Commissioner cannot deprive an applicant of a rate that affords the applicant the opportunity to earn a fair rate of return on the regulated investment.

Petitioners' dispute with the Commissioner's Order centers on how the Commissioner determines that a proposed rate order is confiscatory. Petitioners argue that the "fair rate of return" test is applicable to show confiscation, not "deep financial hardship." Mercury describes the "fair rate of return test" as whether the applicant's ability to earn a return is commensurate with the returns on investments in other similar risky enterprises. (Mercury Opening Brief pp. 18-19 (citing *Hope*, supra, 329 U.S. at p. 603; *Permian Basin, supra*, 390 U.S. at 790-91.)

The parties devote a substantial amount of briefing as to which of these tests applies. The Commissioner and CW argue that *20th Century* establishes that confiscation requires a showing of "deep financial hardship." The Court agrees that *20th Century* sets forth the test for confiscation as "deep financial hardship."

20th Century held that an insurer can threaten confiscation only when it demonstrates that the maximum permitted rate prevents it from "operating successfully" during the period

of the rate and subject to the then-existing market conditions; in such circumstances, the insurer experiences "deep financial hardship" from the total effect of the rate. (*20th Century, supra*, 8 Cal.4th at pp. 295-299.)

The California Supreme Court considered federal case law in defining the standard by which an insurer could show confiscation: "[r]ates which enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed certainly cannot be condemned as invalid, even though they might produce only a meager return ...," (*20th Century, supra*, 8 Cal.4th at p. 295 (citing *Hope*, supra, 320 U.S. at p. 605).) "'[A] company [cannot] complain if the return which was allowed made it possible for the company to operate successfully.'" (*Ibid.* (citing *Market Street R. Co. v. Railroad Comm'n of California* (1945) 324 U.S. 548, 566).)

20th Century cited *Hope* and observed that the regulated entity may experience "deep financial hardship" "when it does not earn enough revenue for both 'operating expenses' and 'the capital costs of the business,' including 'service on the debt and dividends on the stock,' of a magnitude that would allow a 'return to the equity owner' that is 'commensurate with returns on investments in other enterprises having corresponding risks" and "sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.'" (*20th Century, supra*, 8 Cal.4th at p. 296 (citing *Hope, supra*, 320 U.S. at p. 603) (emphasis added).) Accordingly, absent this "deep financial hardship," an entity cannot complain that a rate is confiscatory. (*Ibid.*)

20th Century made clear that confiscation "does *not* arise...whenever a rate simply does not 'produce [] a profit which an investor could reasonably expect to earn in other businesses with comparable investment risks and which is sufficient to attract capital.'" (*20th Century, supra*, 8 Cal.4th at pp. 298-299.) An insurer has an interest in profit, but it is not a right that it can demand. "It is only one variable in the "constitutional calculus of reasonableness." (*Ibid.* (citing *Permian Basin Area Rate Cases, supra*, 390 U.S. at p. 769).)

Thus, confiscation arises when a regulated entity cannot earn enough revenue for its operating expenses and business costs, not when a rate does not produce profit that the entity could reasonably expect to earn in similar business.

Mercury and the Trades cite *Calfarm*'s rejection of the "insolvency standard," and other federal cases to argue that the standard for confiscation is not "deep financial hardship" but "fair rate of return." However, *20th Century* represents the California Supreme Court's most recent, comprehensive articulation of the standard for confiscation in insurance rollback cases. The other cases cited by Petitioners do not persuade the Court that the Commissioner applied the wrong standard in this proceeding.

Petitioners seek to distinguish *20th Century* by arguing that confiscation standard set therein applies only to insurance "rollback" proceedings, and not rate-setting proceedings.

Petitioners note that variables in the "rollback" formula are derived from past, actual events. In contrast, because the ratemaking formula is forward-looking, some variables therein are represented by generic, industry-wide data.

Although *20th Century* considered "rollback" proceedings, it addressed Proposition 103 and its implementing regulations in a lengthy decision spanning over 100 pages. *20th Century* considered in detail how the Proposition 103 regulations work and how they apply to prior approval and rollback proceedings. Additionally, federal case law, considered and cited by *20th Century,* approves the regulator's use of "generic" industry-wide data in setting price control regulations.

The Court concludes that the California Supreme Court did not intend to set forth two different standards to show confiscation depending upon the specific nature of the proceedings before the Commissioner. (*20th Century*, *supra*, 8 Cal.4th at p. 293 (citing *Permian Basin Area Rate Cases, supra*, 390 U.S. at p.768-770).)

Mercury also cites prior non-precedential decisions of the Commissioner to argue that the Commissioner did not always apply the "deep financial hardship test" when considering confiscation. However, the fact that the Commissioner may have acted differently in other non-precedential decisions (many of which did not involve rate-setting) does not meet Mercury's "heavy burden" of showing that the Commissioner's rate order was unconstitutionally confiscatory.

Finally, the regulation defining the confiscation variance defines the variance as "the constitutionally mandated variance articulated in *20th Century*...which is an end result test applied to the enterprise as a whole." (10 Cal. Code Regs., § 2644.27(f)(9).) The test for confiscation set forth in *20th Century* is "deep financial hardship." The regulation does not reference any other test for confiscation.

Here, the Commissioner denied use of a confiscation variance because it found, after applying the ratemaking formula, that Mercury would not suffer financial hardship; it would profit even with a proposed 8.18% decrease to its HO-3 rates.

The Commissioner found that the regulatory "formula results in at least $1.8 million profit from Mercury's California homeowner's line [of insurance]" and that "Mercury fail[ed] to demonstrate that the total effect of such a profit is unjust." (AR, 2164.) The Order noted that while "perhaps not generating the profit margin Mercury desires, Mercury failed to demonstrate the rate decrease will impair the company's financial integrity." (AR, 2164-2165.) The Commissioner noted that Mercury maintained an A+ financial strength rating with AM Best from 2006 through 2010, California operations showed a "robust policyholder surplus in 2010, and that Mercury issued dividends over the last 5 years totaling nearly $5 billion. While acknowledging that confiscation is determined prospectively, the Commissioner noted that Mercury had not exhibited any signs of financial distress, or indicated that past rates weakened the company's financial integrity. (AR, 2165.)

Having reviewed the Order, the Court agrees that (1) the Commissioner properly concluded that the test for confiscation is "deep financial hardship" required by *20th Century*, and (2) Mercury did not demonstrate "deep financial hardship" to support its request for a confiscation variance.

Rather, Mercury argues that the Commissioner should have applied a different standard. Mercury appears to fault the Commissioner because the rate ordered would not allow it to 'produce [] a profit which an investor could reasonably expect to earn in other businesses with comparable investment risks and which is sufficient to attract capital.'" (*20th Century, supra*, 8 Cal.4th at pp. 298-299.) However, this is not evidence of confiscation. Accordingly, Mercury has not shown that the Commissioner applied the incorrect standard, and thus erroneously denied its request for a variance.

iv. The Commissioner Correctly Ruled that Mercury's Attempt to Use its Own Expense Data to Show Confiscation, Amounted to "Relitigation"

Mercury attempted to introduce evidence of its own expenses to show that, if its expenses were substituted as a variable in the ratemaking formula, Mercury would suffer confiscation from the rate order. The Commissioner barred Mercury from presenting this evidence, under the "relitigation bar." Petitioners argue that the Commissioner improperly denied Mercury the ability to present evidence of confiscation.

The "relitigation bar" appears at 10 Cal. Code Regs., § 2646.4, which pertains to hearings on individual insurer's rates. It states:

> Relitigation in a hearing on an individual insurer's rates of a matter already determined either by these regulations or by a generic determination is out of order and shall not be permitted. However, the [ALJ] shall admit evidence he or she finds relevant to the determination of whether the rate is excessive or inadequate (or, in the case of a proceeding under Article 5, relevant to the determination of the minimum nonconfiscatory rate), whether or not such evidence is expressly contemplated by these regulations, provided the evidence is not offered for the purpose of relitigating a matter already determined by these regulations or by a generic determination. (10 Cal. Code Regs., § 2646.4, subd. (c).)

The California Supreme Court interpreted the "relitigation bar" in *20th Century* to mean that it is improper relitigation for an insurer to request that the ALJ "entertain the question of whether the underlying [regulations] are sound...Otherwise standardless, ad hoc decisionmaking would result." (*20th Century, supra*, 8 Cal.4th at p. 312.)

Petitioners respond that they are not inviting the ALJ to question whether the pertinent regulations are sound, rather, they argue that Mercury should be allowed to present its evidence that is relevant to confiscation—e.g., whether the rate is excessive or

inadequate. However, the "relitigation bar" requires the ALJ to admit evidence that he or she—not the insurer—finds to be relevant to confiscation. (10 Cal. Code Regs., § 2646.4, subd. (c)); *20th Century, supra*, 8 Cal.4th at p. 257 (noting that the ALJ "effectively lifted the 'relitigation bar' to allow [the insurer] to introduce evidence to challenge the premises of the rate regulations, 'accord[ing] it the opportunity to present evidence ... on every issue that it contended was material.'").)

Moreover, the ratemaking formula, and the variables used therein (such as expenses) are established by the regulations. Thus, Mercury's request to substitute its own expenses in the formula would effectively relitigate "a matter already determined either by [the] regulations or by a generic determination." (10 Cal. Code Regs., § 2646.4, subd. (c).)

Here, the Court finds that the ALJ properly determined that the evidence Mercury proposed to submit was not relevant to confiscation, because Mercury did not make a prima facie showing of confiscation. The ALJ rejected Mercury's argument that "any analysis of confiscation must permit an insurer to apply cost and expense amounts different from those provided by the regulatory formula." (AR, 2166.) Accordingly, Mercury's attempt to admit that evidence amounted to challenging or "relitigating" the regulations used to set the ratemaking formula. Therefore, Mercury has not shown that the ALJ improperly applied the relitigation bar in these proceedings.

e. It is Irrelevant Whether the Ratemaking Formula is "Tautological"

Mercury challenges the Commissioner's refusal to consider in the ratemaking formula Mercury's actual expected losses, expenses and returns by attacking the formula itself. Petitioners argue that the Commissioner adopted a "tautological" test for confiscation, because the test is nothing more than a restatement of the formula and its components, and the components do not vary. In *20th Century*, the petitioners made a similar argument that the regulations for the ratemaking formula for rollbacks were "recursive." The California Supreme Court responded as follows:

> To be sure, the ratemaking formula is indeed "recursive." But contrary to the superior court's evident belief and the insurers' vigorously urged position, that is no vice. The adjective is not pejorative. It is merely descriptive. Simply put, it means in this context that the value solved for figures in the solution itself. For example, an insurer desires to determine the rate it must charge its insureds to net $100 after paying a 20 percent commission to its agents. It uses the following "recursive" formula, in which "*r*" REFERS TO THE RATE TO BE CHARGED: $r = \$100 + 0.2r$; $r\ 0.2r = \$100$; $0.8r = \$100$; $r = \$125$. In and of itself, "recursiveness" is not objectionable. (*20th Century, supra*, 8 Cal.4th at p. 288.)

Mercury argues that the test is infirm because Mercury can "never show" confiscation if it cannot use its own loss and return estimates in the formula. However, the relevant inquiry is whether the insurer can make a *prima facie* showing of "deep financial

hardship" to its enterprise as a whole under the ratemaking formula. If it can, then the insurer can obtain a variance and use its actual data.

The ratemaking formula is not unconstitutionally tautological because Mercury cannot use its own data in the formula to show confiscation.

To conclude, Petitioners have not shown that the Commissioner abused his discretion in setting Mercury's rates under the Order or that the Order should be annulled under Section 1858.6. The Commissioner appropriately applied the "deep financial hardship" test for confiscation and determined that Mercury had not made a *prima facie* showing of confiscation under the proposed rate decrease. Accordingly, Mercury was not entitled to a variance to present its own data in the ratemaking formula. Moreover, the Commissioner did not abuse his discretion in applying an unconstitutionally "tautological" ratemaking formula, and appropriately disallowed Mercury from presenting data under the "relitigation bar."

f. Insurance Commissioner Properly Excluded Mercury's Advertising Expenses from the Ratemaking Calculation

The "prior approval" regulations disallow the Commissioner from considering certain "excluded expenses" in the ratemaking calculation. (10 Cal. Code Regs., § 2644.10.) "Excluded expenses" include excessive executive compensation, "institutional advertising expenses, political contributions and lobbying, bad faith judgments, costs of unsuccessful defense of discrimination claims, fines and penalties, and payments to affiliates in excess of fair market value. (*Ibid.*)

Accordingly, regulated insurers have an interest in insuring that their advertising expenses are *not* excluded from the ratemaking calculation. Here, the Commissioner determined that Mercury's entire advertising budget was excluded from its rate application. (AR, 2148.)

Petitioners contend that the decision is erroneous because the Commissioner misinterpreted the regulation defining "institutional advertising," and because Mercury's advertising met the definition under the regulation. The Court rejects these arguments.

i. The Commissioner Properly Interpreted the Regulation Governing Institutional Advertising

The regulations define "institutional advertising," as it pertains to "excluded expenses" as follows:

> "Institutional advertising" means 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. (10 Cal. Code Regs., § 2644.10, subd. (f).)

Petitioners contend that the Commissioner can consider advertising "institutional advertising," only if *both* criteria are met: (1) it is not aimed at obtaining business for a specific insurer, *and* (2) does not provide consumers with information pertinent to the decision to buy the insurance product. Thus, advertising that meets only "one prong" of this test, is not "institutional advertising," and the Commissioner must consider these advertising expenses in setting a rate. This argument is not well-taken.

First, the Commissioner's interpretation of the regulation is supported by the clear language thereof: "institutional advertising" is advertising meeting the criteria set forth in the regulation. The regulations do not require that only advertising meeting *both* criteria be considered "institutional advertising" and thus excluded from the ratemaking calculation.

Second, the Commissioner's interpretation is reasonable and consistent with Proposition 103's goals of consumer protection. Proposition 103 seeks to set insurance rates based on "risks or operations in [California]" (*See* Cal. Code Regs., § 2641.2), so that California consumers do not inadvertently fund nationwide "operations" or advertising campaigns by the insurers.

The Commissioner's order defined institutional advertising as "image advertising." This type of advertising enhances a company's reputation or improves name recognition and may benefit the company's shareholders. However, it does not assist insurance consumers. Companies may use institutional advertising to promote a series of products or to promote a product on a nationwide basis. (See AR, 2138.)

The intent behind regulation 2644.10, subdivision (f) is to limit the types of advertising expenses that could be factored into the calculation of rates paid by consumers. Petitioners' interpretation would greatly expand the scope of advertising that must be factored into the ratemaking formula. It would include all advertising directed at garnering business for a "specific insurer," whether or not it benefitted the consumer (e.g., by providing consumers helpful information about the product). In contrast, the Commissioner's interpretation of the regulation limits insurers from including all manner of advertising. The Court finds that the Commissioner's interpretation of "institutional advertising" was reasonable and supported by Proposition 103 and its regulations.

Thus, if Mercury wished to include its advertising expenses in the ratemaking calculation, it was required to show that (1) its advertising was aimed at obtaining business for a specific insurer *and* (2) provided consumers with information pertinent to the decision whether to buy the insurer's product.

ii. The Commissioner Properly Concluded that the Mercury's Advertising did not Issue from a "Specific Insurer"

The Commissioner first concluded that Mercury's advertising expenses were excluded from the calculation, because Mercury did not show that the advertising was aimed at obtaining business for a "specific insurer." (10 Cal. Code Regs., § 2641.2.) Rather, the

expenses Mercury submitted reflected advertising on behalf of the organization as a whole, and not for a specific affiliate or company within Mercury. (AR, 2142145.)

The dispute is whether the term "specific insurer" means only the rate applicant (in this case, Mercury Casualty Company) or whether it encompasses advertising on behalf of a group of affiliated entities, which are not rate applicants.

First, this regulation distinguishes between a "specific insurer" and an "insurance group." (*See* 10 Cal. Code Regs., § 2644.10, subd. (b) [excluding executive compensation in "insurer's five highest-paid policymaking positions in each 'insurance group'"], subd. (f) [referring to "specific insurer" in institutional advertising definition].) When different words are used in adjoining subdivisions of a statute that was enacted at the same time, this fact raises a compelling inference that a different meaning was intended. (*See People v. Childs* (2013) 220 Cal. App.4th 1079, 1102.) Accordingly, by using the terms "specific insurer" and "insurance group" within the same regulation, the Court infers that the Commissioner intended to give these terms different meanings. Had the Commissioner intended to include affiliate or group advertising in the ratemaking calculations (e.g., require consumers to bear these costs) he could have eliminated the reference to "specific insurer" and used the term "insurance group."

The Commissioner properly concluded that Mercury's advertising was not directed at a "specific insurer."

The advertising did not refer to Mercury Casualty Company, the rate applicant, but rather "Mercury Insurance Group," a name under which Mercury Casualty Company and its affiliates advertise. (AR, 2139, 2142-2143.) "Mercury Insurance Group" includes all 22 affiliates that make up "Mercury General Corporation." (AR, 2145.)

The Commissioner found that: Mercury Insurance Group is not a legal entity in any state and not a licensed insurer in California; Mercury General Corporation's advertising department supports all Mercury affiliates; Mercury guides all prospective customers to one telephone number; Mercury does not allocate advertising expenditures to specific insurance affiliates; Mercury's advertising department does not distinguish between insurance entities when generating advertising campaigns; and all Mercury companies shared a common website that identifies the company as "Mercury Insurance Group." (AR, 2139-2140.) The total advertising for Mercury General Corporation was $26, $27, and $30 million a year for 2008, 2009, and 2010, respectively. (AR, 2140.)

Mercury does not dispute these findings. Rather, it argues that the entire advertising expenses attributable to "Mercury Insurance Group" are advertising expenses of a "specific insurer" under the regulations.

Mercury has not demonstrated that the Commissioner's order was invalid on this basis.

The Commissioner's interpretation of the regulation's term "specific insurer" was reasonable. The advertising did not relate specifically to Mercury Casualty Company, the

rate applicant. Rather it related a large group of affiliates, that were not applying for a rate reduction, and that may or may not do business in the state. Accordingly, the Commissioner's interpretation protects consumers from underwriting advertising expenses of other entities that may not operate in California, and were not applying for the rate adjustment.

Mercury argues that these concerns are not present, because it "only accounted for its fairly allocated share of advertising expenses that were spent on group advertising in California." (Reply Brief, p. 15:14-15.) Mercury argues that the Commissioner's interpretation penalizes insurers advertising under a group name, which it claims is a more efficient means of advertising that will lower rates for consumers. Mercury also points to Proposition 103's goals of protecting insurers from inadequate or confiscatory rates.

Mercury argues that a *more reasonable* interpretation of "specific insurer" includes companies that, *unlike Mercury*, engage in business unrelated to insurance. For example, advertising that only mentions the name of such company.

In sum, Mercury's arguments reduce to a dispute that its interpretation of the regulation is more reasonable than that of the Commissioner. However, the fact that another interpretation of the regulation may exist is not enough to show that the Commissioner's interpretation is incorrect or unreasonable.

Mercury also argues that the Commissioner incorrectly excluded all of its advertising expenses, because at least some of Mercury's advertising provided consumers with information pertinent to the decision whether to buy the insurer's product. (10 Cal. Code Regs., § 2644.10, subd. (f).) However, even if this were the case, the Commissioner found that all of Mercury's advertising was not aimed at obtaining business for a "specific insurer." Accordingly, the advertising was excluded from the rate calculation. (*Id.*)

IV. DISPOSITION

Mercury has not briefed several of its mandamus claims in the Petition. The Court considers Mercury to have abandoned those claims and they are denied.

Additionally, Mercury's Petition brings declaratory relief claims that essentially duplicate the mandamus claims, and a claim for injunctive relief that is ancillary to the mandate claims. The resolution of the mandamus claims necessarily disposes of the declaratory and injunctive relief claims. Further, the declaratory relief claims challenge the Commissioner's "interpretation" and "application" of the regulations in the rate proceeding. Declaratory relief is not appropriate to review an administrative decision. (*Walter Leimert Co. v. Calif. Coastal Commn.* (1983) 149 Cal.App.3d 222, 225, 230-231

(citing *State of California v. Superior Court (Veta)* (1974) 12 Cal.3d 237, 249).) Accordingly, Mercury's claims for declaratory and injunctive relief are dismissed.[9]

Mercury's Petition for Writ of Mandate is **DENIED**, and all claims in its Complaint for Declaratory Relief are **DISMISSED**. The Trades' claims in its Petition for Writ of Mandate are **DENIED**.

Counsel for the Commissioner is directed to prepare a formal order, incorporating the Court's ruling as an exhibit thereto, and a separate judgment, submit them to the parties for approval as to form, and thereafter submit it to the Court for signature, in accordance with California Rules of Court, Rule 3.1312.

Date: June 11, 2014

Shelleyanne W.L. Chang
Judge of the Superior Court of California
County of Sacramento

[9] Because Mercury's claims for declaratory relief are dismissed, this moots Respondent's motion to for a protective order quashing discovery requests served by Mercury in furtherance of its declaratory relief claims. Accordingly, the Court vacates the hearing set for Respondent's motion, set for June 27, 2014 at 11:00 a.m.

Declaration of Mailing

I hereby certify that I am not a party to the within action and that I deposited a copy of this document in sealed envelopes with first class postage prepaid, addressed to each party or the attorney of record in the U.S. Mail at 720 Ninth Street, Sacramento, California.

Dated: June 11, 2014

E. Higginbotham, Deputy Clerk **/s/ E. Higginbotham**

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DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Mercury Casualty Company v. Dave Jones, et al.**
Sacramento Superior Court Case No. **34-2013-80001426**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the Federal Express overnight courier service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On June 27, 2014, I served the attached **[PROPOSED] ORDER DENYING PETITIONS FOR WRIT OF MANDATE AND DISMISSING PLAINTIFF'S COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 27, 2014, at Los Angeles, California.

KATHI PALACIOS
Declarant

Kathi Palacios
Signature

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SERVICE LIST
Mercury Casualty Company v. Dave Jones, et al
Sacramento Superior Court Case No. 34-2013-80001426

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Attorneys for Intervenor Consumer Watchdog

EXHIBIT B

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.

PERSONAL INSURANCE FEDERATION OF CALIFORNIA et al.,

Intervenors.

Case No. 34-2013-80001426-CU-WM-GDS

Assigned to Judge Shelleyanne W.L. Chang, Dept. 24

[PROPOSED] JUDGMENT

Writ hearing: May 2, 2014
Action Filed: March 1, 2013

The Petition for a Preemptory Writ of Mandate (i.e., the First Cause of Action of the Verified Petition for a Preemptory Writ of Mandate Under CCP § 1094.5, Gov't Code § 11523, and Insurance Code § 1858.6; and Complaint for Declaratory Relief and Injunctive Relief [the "Petition and Complaint"]) (the "Mercury Petition") filed by Petitioner and Plaintiff Mercury Casualty Company ("Mercury") and the Petition for Writ of Mandate (i.e., the First, Third, Fifth,

Seventh, and Ninth Causes of Action of the Verified Complaint in Intervention) (the "Trades Petition") filed by Intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America dba Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies (collectively, the "Trades") both came on for hearing on May 2, 2014, in Department 24 of the above-entitled Court before the Honorable Shellyanne W.L. Chang, Judge presiding. Richard G. De La Mora and Spencer Y. Kook of Barger & Wolen LLP appeared on behalf of Mercury; Vanessa O. Wells of Hogan Lovells US LLP appeared on behalf of the Trades; Deputy Attorney General Stephen Lew appeared on behalf of Respondent and Defendant Dave Jones, sued here in his official capacity as Insurance Commissioner of the State of California; and Pamela Pressley and Laura Antonini appeared on behalf of Intervenor Consumer Watchdog.

Pursuant to the Court's "Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief And Injunctive Relief" entered June 11, 2014, and the "Order Denying Petitions For Writ Of Mandate And Dismissing Plaintiff's Complaint For Declaratory Relief And Injunctive Relief" entered June __, 2014,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Judgment is entered in favor of Respondent and Defendant Dave Jones, Insurance Commissioner of the State of California, and Intervenor Consumer Watchdog and against Petitioner and Plaintiff Mercury Casualty Company on all of Mercury's Causes of Action in the Petition and Complaint, and against Intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America dba Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies on the Trades Petition.

2. The Mercury Petition is DENIED.

3. Mercury's Complaint for Declaratory Relief and Injunctive Relief (i.e., the remaining Second and Third Causes of Action of Mercury's Petition and Complaint) is DISMISSED in its entirety.

5. The Trades Petition is DENIED.

6. To the extent the Court ultimately determines that costs should be awarded, Defendant/Respondent and Intervenor are awarded costs in the amount of $_____; and

5. Any requests for attorneys' fees and expenses shall be presented by appropriate motion.

Dated: June ___, 2014

_____
HON. SHELLYANNE W. L. CHANG
JUDGE OF THE SUPERIOR COURT

Presented by:

KAMALA D. HARRIS
Attorney General of California
MOLLY K. MOSLEY
W. DEAN FREEMAN
DIANE S. SHAW
Supervising Deputy Attorneys General
SERAJUL ALI
Deputy Attorney General

BY: _____
STEPHEN LEW
Deputy Attorney General

Attorneys for Respondent and Defendant Dave Jones, Insurance Commissioner of the State of California

APPROVED AS TO FORM AND CONTENT

BARGER & WOLEN LLP

BY: _____
SPENCER Y. KOOK

Attorneys for Petitioner and Plaintiff Mercury Casualty Company

[SIGNATURES CONTINUED ON NEXT PAGE]

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Mercury Casualty Company v. Dave Jones, et al.**
Sacramento Superior Court Case No. **34-2013-80001426**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the Federal Express overnight courier service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On June 27, 2014, I served the attached **[PROPOSED] JUDGMENT** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 27, 2014, at Los Angeles, California.

KATHI PALACIOS
Declarant

Signature

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SERVICE LIST
Mercury Casualty Company v. Dave Jones, et al
Sacramento Superior Court Case No. 34-2013-80001426

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EXHIBIT C

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State of California
DEPARTMENT OF JUSTICE

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June 27, 2014

VIA FACSIMILE

Honorable Shelleyanne W.L. Chang
Judge of the Superior Court
Gordon D. Schaber Sacramento County Courthouse
Fourth Floor, Department 24
720 9th Street
Sacramento, California 95814

RE: *Mercury Casualty Company v. Dave Jones et al.*,
Sacramento County Superior Court Case No. 34-2013-80001426

Dear Judge Chang:

As directed by the Court in its Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief dated June 11, 2014 (the "Ruling"), we are lodging the following documents with the Court for its signature:

1. [Proposed] Order Denying Petitions For Writ Of Mandate And Dismissing Plaintiff's Complaint For Declaratory Relief And Injunctive Relief (the "Proposed Order"); and

2. [Proposed] Judgment (the "Proposed Judgment").

We have drafted these documents to reflect what the Court stated in its Ruling, as we understand it. As also directed by the Court in the Ruling (at p. 20) and in accordance with Local Court Rule 2.07, we incorporated the Ruling as Exhibit A to the Proposed Order, and we submitted both documents to all parties for their approval as to form on June 18, 2014 (see attached as Exhibit A to this letter a true and correct copy of my June 18, 2014 e-mail to all parties [without the e-mail's attached Proposed Order and Proposed Judgment]).

As of the date of this letter, only Intervenor Consumer Watchdog has approved as to form the Proposed Order and the Proposed Judgment. Intervenor Trade Groups have declined to approve as to form the Proposed Order and the Proposed Judgment in a letter from their counsel to me dated June 23, 2014, for the reasons stated in that letter. (A true and correct copy of the letter is attached as Exhibit B.) In correspondence to the Court (on June 18 and 20, 2014), counsel for the Trade Groups has requested a status conference to discuss "how to conclude this case so there is one final judgment." Petitioner and plaintiff Mercury Casualty Company

("Mercury") also has not approved as to form the Proposed Order and the Proposed Judgment. Counsel for Mercury has advised me, in response to my inquiry, that Mercury agrees with the position taken by the Trade Groups regarding the Proposed Judgment. (See attached as Exhibit C hereto a true and correct copy of the e-mail thread between Mercury's counsel and myself.)

Respectfully,

STEPHEN LEW
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

/sl

cc: Vanessa Wells (via e-mail and U.S. Mail)
Richard De La Mora (via e-mail and U.S. Mail)
Spencer Y. Kook (via e-mail and U.S. Mail)
Harvey Rosenfield (via e-mail and U.S. Mail)
Pamela Pressley (via e-mail and U.S. Mail)
Daniel Y. Zohar (via e-mail and U.S. Mail)
Serajul Ali (via e-mail)
Daniel Goodell (via e-mail)

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Letter to Court1.doc

EXHIBIT A

Stephen Lew

From:	Stephen Lew
Sent:	Wednesday, June 18, 2014 11:29 AM
To:	Richard De La Mora; Spencer Kook; Vanessa Wells; Brown, Victoria C. (victoria.brown@hoganlovells.com); Pam Pressley; Laura Antonini; Cathy Lee; Harvey Rosenfield; Daniel Zohar; Todd Foreman (tforeman@zoharlawfirm.com)
Cc:	Serajul Ali; Dean Freeman; Diane Shaw; Nikki McKennedy
Subject:	Mercury Casualty Company v. Jones
Attachments:	orderwrits1.doc; judgment1.doc

In accordance with the Court's Ruling on June 11, 2014, attached for your review and comment are the following documents:

[PROPOSED] ORDER DENYING PETITIONS FOR WRIT OF MANDATE AND DISMISSING PLAINTIFF'S COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

[PROPOSED] JUDGMENT

If the documents are acceptable as to form and content, please sign where indicated and e-mail your signatures back to me.

Thank you.

Stephen Lew
Deputy Attorney General
California Department of Justice
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EXHIBIT B

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June 23, 2014

By Electronic Mail and Federal Express

Stephen Lew
Deputy Attorney General
California Department of Justice
300 South Spring Street, Ste. 1702
Los Angeles, California 90013

Re: Mercury Casualty Co. v. Dave Jones
Case No. 34-2013-80001426

Dear Mr. Lew:

I am responding on behalf of the Trades to your request for approval as to form of the Proposed Order and Proposed Judgment. I cannot approve the proposed rulings as to form.

The defect relates to the concern as to which the Trades have requested a status conference. The Court's Order expressly finds that her rulings dispose of Mercury's claims for declaratory relief as well as Mercury's claims for relief by way of administrative mandamus. In contrast, the Order appears to leave open the Trades' causes of action for declaratory relief. If that is the case, there cannot be a judgment entered against the Trades.

"A judgment is the final determination of the rights of the parties in an action or proceeding." Cal. Code Civ. Proc. § 577; *see also Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 698 (2001) ("As we observed earlier, a judgment is a final determination of the rights of the parties."). Thus, until all of the causes of action asserted by the Trades in their complaint in intervention are resolved, there cannot be a judgment against the Trades. As explained by the California Supreme Court:

> There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains.

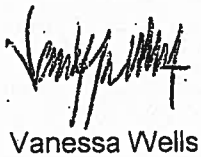
Bank of Am. Nat. Trust & Sav. Ass'n v. Superior Court, 20 Cal. 2d 697, 701 (1942), cited and quoted in *Griset*, 25 Cal. 4th at 698.

It may well be that the Court intended the Order as to the Trades to extend to the causes of action for declaratory relief. If that is the case, we believe that the Order should be amended to clarify that

intent. If the Court deliberately left the declaratory relief causes of action open, then we need to know that, as well, and we need to determine how those causes of action can be expeditiously resolved.

As it stands, however, we cannot approve the Proposed Order or the Proposed Judgment. The Proposed Order recites that the Trades' petition for writ of mandate is denied – disposing of the causes of action sounding in mandate – but does not reach the causes of action for declaratory relief. The Proposed Judgment purports to enter judgment against the Trades. These proposals are inconsistent. We cannot know in what way the inconsistency should be resolved until the Court clarifies its intent.

Sincerely yours,



Vanessa Wells

Partner
vanessa.wells@hoganlovells.com
D 650.463.4022

cc: All Counsel (see attached service list)

PROOF OF SERVICE

I, Ramona Altamirano, declare:

I am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within action. My business address is Hogan Lovells US LLP, 4085 Campbell Avenue, Suite 100, Menlo Park, California 94025.

On June 23, 2014, I served a true copy of the following document(s):

Letter to Stephen Lew

on the interested parties in this action by the following means:

[ ] **BY MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service in the ordinary course of business on the same day that this declaration was executed. I know that the envelopes were sealed, with postage fully prepaid, and placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Menlo Park, California.

[X] **BY OVERNIGHT DELIVERY**: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed in the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[ ] **BY HAND**: by causing personal delivery by an agent of _____, of the document(s) listed above to the person(s) at the address(es) as set forth above.

[X] **BY ELECTRONIC SERVICE [E-MAIL]**: I caused the documents to be sent to the persons at the electronic notification addresses listed in the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on June 23, 2014 at Menlo Park, California.

Ramona Altamirano

Ramona Altamirano

SERVICE LIST

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Stephen J. Green Deputy Attorney General California Department of Justice 1300 I Street Sacramento, CA 94244-2550 Telephone: (916) 445-5367 Facsimile: (916) 327-2247 Steven.Green@doj.ca.gov	*Attorneys for Respondent and Defendant Dave Jones, Insurance Commissioner of the State of California*
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Attorneys for Intervenor Consumer Watchdog

EXHIBIT C

Stephen Lew

From: Kook, Spencer Y. <skook@bargerwolen.com>
Sent: Thursday, June 26, 2014 11:54 AM
To: Stephen Lew
Cc: De La Mora, Richard G.; Kook, Spencer Y.
Subject: RE: Mercury Casualty Company v. Jones

Hi Stephen

It would appear that the concern raised by Vanessa is a valid one. We are not quite sure how there can be a judgment (under the one judgment rule) if the court did not dispense with all the claims at issue. What are your thoughts on this?

From: Stephen Lew [mailto:Stephen.Lew@doj.ca.gov]
Sent: Thursday, June 26, 2014 11:47 AM
To: De La Mora, Richard G.; Kook, Spencer Y.
Subject: FW: Mercury Casualty Company v. Jones

Do you intend on providing any comments or changes to the attached documents, or signing either or both of them? Thanks.

Stephen Lew
Deputy Attorney General
California Department of Justice
300 S. Spring Street, Suite 1702
Los Angeles, CA 90013
Tel.: (213) 897-8526
Fax: (213) 897-5775
Stephen.Lew@doj.ca.gov

From: Stephen Lew
Sent: Wednesday, June 18, 2014 11:29 AM
To: Richard De La Mora; Spencer Kook; Vanessa Wells; Brown, Victoria C. (victoria.brown@hoganlovells.com); Pam Pressley; Laura Antonini; Cathy Lee; Harvey Rosenfield; Daniel Zohar; Todd Foreman (tforeman@zoharlawfirm.com)
Cc: Serajul Ali; Dean Freeman; Diane Shaw; Nikki McKennedy
Subject: Mercury Casualty Company v. Jones

In accordance with the Court's Ruling on June 11, 2014, attached for your review and comment are the following documents:

[PROPOSED] ORDER DENYING PETITIONS FOR WRIT OF MANDATE AND DISMISSING PLAINTIFF'S COMPLAINT FOR DECLARATORY RELIEF AND INJUNCTIVE RELIEF

[PROPOSED] JUDGMENT

If the documents are acceptable as to form and content, please sign where indicated and e-mail your signatures back to me.

Thank you.

DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER

Case Name: **Mercury Casualty Company v. Dave Jones, et al.**
Sacramento Superior Court Case No. **34-2013-80001426**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with the Federal Express overnight courier service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On June 27, 2014, I served the attached **LETTER TO THE COURT FROM DEPUTY ATTORNEY GENERAL STEPHEN LEW DATED JUNE 27, 2014** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 27, 2014, at Los Angeles, California.

KATHI PALACIOS
Declarant

Signature

LA2013508809
ltrctpos.doc

SERVICE LIST
Mercury Casualty Company v. Dave Jones, et al
Sacramento Superior Court Case No. 34-2013-80001426

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EXHIBIT D

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SACRAMENTO
GORDON D SCHABER COURTHOUSE

MINUTE ORDER

DATE: 07/18/2014 TIME: 09:00:00 AM DEPT: 24

JUDICIAL OFFICER PRESIDING: Shelleyanne W L Chang
CLERK: E. Higginbotham
REPORTER/ERM:
BAILIFF/COURT ATTENDANT:

CASE NO: **34-2013-80001426-CU-WM-GDS** CASE INIT.DATE: 03/01/2013
CASE TITLE: **Mercury Casualty Company vs. Dave Jones, Insurance Commissioner of the State of California**
CASE CATEGORY: Civil - Unlimited

EVENT TYPE: Status Conference - Writ of Mandate

APPEARANCES
Vanessa O Wells, counsel, present for Intervenor(s).
Pamela Pressley, counsel, present for Intervenor(s) telephonically.
Spencer Kook, counsel, present for Petitioner, telephonically.
Serajul Ali, counsel, present for Respondent

Nature of Proceedings: Status Conference

The Court held a status conference to discuss the disposal of claims not addressed by the Court's June 2010 Ruling on Submitted Matter. Counsel for the parties were present as stated on the record.

The Court set the following matters for hearing on January 9, 2015, at 10:00 a.m. (1) the additional claims by interveners Trades, which were not disposed of in the Court's June 2010 Ruling on Submitted Matter, and (2) the Trade's motion to file a first amended Complaint. The Court will also entertain argument from the parties regarding the ability of the Trades to argue these claims before the Court.

The parties agreed to meet and confer about a briefing schedule, and what additional briefs, if any, would be filed.

EXHIBIT E

HOGAN LOVELLS US LLP
Vanessa O. Wells (Bar No. 121279)
Victoria C. Brown (Bar No. 117217)
Jenny Q. Shen (Bar No. 278883)
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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.

PERSONAL INSURANCE FEDERATION OF CALIFORNIA, et al.,

Intervenors.

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

INTERVENORS' RESPONSE TO MERCURY CASUALTY COMPANY'S NOTICE OF APPEAL (THIRD APPELLATE DISTRICT APPELLATE CASE NO: C077116)

Action Filed: March 1, 2013

Intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurance Association of America doing business as Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies (the "Trades") hereby respond to the Notice of Appeal filed by Mercury Casualty Company ("Mercury") on August 7, 2014.

The reason that the Trades are filing a response – an unusual move – is that the filing of an appeal by Mercury but not by the Trades could lead to confusion. The Trades would like to address that potential. While the Trades fully understand the caution that must be exercised with respect to a jurisdictional deadline, the Trades believe that Mercury's precautionary filing, while prudent, was not necessary. The Trades further believe that this action can be most efficiently resolved through the appellate phase if the Court of Appeal is made aware at the outset of the entirety of the proceeding that will ultimately be presented to it.

I. THE REASON FOR THE TRADES' RESPONSE

Mercury's Notice of Appeal states that it is taken from the Court's Ruling on Submitted Matter and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief dated June 11, 2014 (the "June Ruling"). The June Ruling directed that a formal order and judgment be crafted and circulated for approval. Due to subsequent events, this did not occur, and no formal order or judgment was ever executed or entered.

As highlighted in the Notice of Appeal, Mercury nonetheless appealed from the interim order contained in the June Ruling due to a concern with a special rule for appealing orders granting or denying writ petitions. As explained in *Public Defenders' Organization v. County Of Riverside*, 106 Cal. App. 4th 1403, 1409 (2003), the special rule for appealing orders on writ petitions is as follows:

> Generally, only judgments may be appealed (Code Civ. Proc., § 904.1, subd. (a)(1).). 'A judgment is the final determination of the rights of the parties in an action or proceedings.' (*Id.*, § 577.) Petitions for extraordinary writs, such as petitions for writs of mandate, are special proceedings. (*Id.*, § 1067 et seq.) Accordingly, an order granting or denying a petition for an extraordinary writ constitutes a final judgment for purposes of an appeal, even if the order is not accompanied by a separate formal judgment.

HOGAN LOVELLS US LLP
ATTORNEYS AT LAW
SILICON VALLEY

The Trades understand the good and prudent lawyering underlying Mercury's caution. But, as set forth below, the Trades believe that the special rule for appealing orders denying writ petitions is inapplicable here for two reasons. First, the June Ruling is not a final order. Second, the special rule does not apply when, as here, the writ petition is combined with a declaratory relief action. Consequently, in the circumstances presented here, the applicable rule is the general rule requiring a judgment as a prerequisite to an appeal.

Moreover, whatever may be the case with respect to Mercury, the circumstances applicable to the Trades present a clear situation in which there has yet to be one final judgment. Certain of the Trades' causes of action remain to be determined at the January 9, 2015 hearing. The time for the Trades to file a Notice of Appeal has yet to be triggered.

II. THE JUNE RULING FROM WHICH MERCURY APPEALED

The June Ruling denied Mercury's Petition for Writ of Mandate and dismissed all claims in Mercury's Complaint for Declaratory Relief. While the June Ruling also denied the Trades' mandamus claims contained in their Complaint In Intervention, the June Ruling left open certain of the Trades' declaratory relief claims.

The June Ruling also directed the Commissioner to prepare a proposed formal order and separate judgment to be circulated for approval as to form and then submitted to the Court for signature. Although the Commissioner prepared and circulated a proposed formal order and judgment, they were not approved by the Trades or Mercury, and no final order or judgment was ever signed or entered. Instead, the Court held a status conference on July 18, 2014 to discuss disposition of the Trades' additional claims that were not resolved by the June Ruling. At the July 18 status conference, the Court scheduled a further hearing on January 9, 2015 to resolve the Trades' remaining claims. Additionally, the Court authorized the Trades to file a motion to file a first amended complaint, also set for hearing on January 9, 2015. *See* July 18, 2014 Minute Order attached hereto as Exhibit A.

III. WHY THE SPECIAL WRIT APPEAL RULE DOES NOT APPLY

A. The June Ruling Is Not A Final Order

To invoke the special rule for appealing writ orders, there must be a final order. The June

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SILICON VALLEY

Ruling itself indicates that it is not final because, among other things, it directed that there be a signed formal order and separate judgment, which remain pending.

The Court's July 18 Minute Order following the status conference also makes clear that the June 11 Ruling is not final (at least as to the Trades). The July 18 Minute Order states that the status conference was held "to discuss the disposal of claims ***not addressed*** by the Court's June 20[14] Ruling on Submitted Matter". *Id.*, emphasis added. The Minute Order further states that the Court "set the following matters for hearing on January 9, 2015, at 10:00 a.m. (1) ***the additional claims by interveners Trades, which were not disposed of in the Court's June 20[14] Ruling on Submitted Matter***, and (2) the Trade's motion to file a first amended Complaint". *Id.*, emphasis added. Since the June Ruling is not final, it cannot be construed as a judgment from which an appeal can be taken. That is because, as stated in Section I., with certain delineated exceptions not applicable here, an appeal requires and is taken from a judgment. C.C.P. § 904.1(a). "A judgment is the final determination of the rights of the parties in an action or proceeding." C.C.P. § 577; *see also Griset v. Fair Political Practices Comm'n*, 25 Cal. 4th 688, 698 (2001) ("As we observed earlier, a judgment is a final determination of the rights of the parties.").

B. The Special Rule Does Not Apply Where The Writ Claims Are Joined With Claims For Declaratory Relief.

Moreover, the special writ appeal rule does not apply where, as here, a writ petition is joined with claims for declaratory relief (or other claims) that were not resolved by the order denying the writ petition. That is because for an appeal to be ripe, there must be **one** final judgment that encompasses all the parties' claims. The California Supreme Court made this plain more than 70 years ago:

> There cannot be a separate judgment as to one count in a complaint containing several counts. On the contrary, there can be but one judgment in an action no matter how many counts the complaint contains.

Bank of Am. Nat. Trust & Sav. Ass'n v. Superior Court, 20 Cal. 2d 697, 701 (1942), cited and

quoted in *Griset*, 25 Cal. 4th at 698.[1]

Because not all the combined writ and declaratory relief claims between the parties were resolved and there never was entry of a final order and separate judgment, the June Ruling is not a final appealable judgment, at least not as to the Trades. Consequently, the jurisdictional deadline for appeal in Rule of Court 8.104(c) of 180 days after entry of judgment (or 60 days after service of a "Notice of Entry" of judgment) never commenced running as to any party. Thus, the Trades believe that the Court did not intend the June 11 Ruling to be a final order and that any appeal at this juncture is premature.

IV. THE SPECIAL RULE DOES NOT APPLY TO THE TRADES

Even if the special writ appeal rule were to apply as to Mercury and the June Ruling is ripe for appeal as to Mercury, the June Ruling does not constitute a final judgment ripe for appeal as to the Trades. As the July 18 Minute Order makes plain, the one final judgment requirement is not met as to the Trades. To the contrary, because the Trades have additional declaratory relief claims joined with the writ claims that are yet to be ruled upon, at this juncture there is not and cannot be one final judgment as to the Trades, required for appeal. *See* authorities cited at p. 3 and footnote 1.

Moreover, since there has not been (and could not have been) entry of judgment as to the Trades, the 180-day jurisdictional time period for filing a notice of appeal after entry of judgment certainly never commenced as to the Trades.

---

[1] *See also Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 743 (1994) ("[W]e hold that an appeal cannot be taken from a judgment that fails to complete the disposition of all the causes of action between the parties even if the causes of action disposed of by the judgment have been ordered to be tried separately, or may be characterized as 'separate and independent' from those remaining."); *Griset*, 25 Cal. 4th at 697 ("Unless the order [denying petition for writ of mandate] also resolved plaintiffs' other three causes of action [for declaratory and injunctive relief], there would not be a final determination of the parties' rights and thus the order could not be an appealable judgment."); *Nerhan v. Stinson Beach County Water District*, 27 Cal. App. 4th 536 540 (1994) ("Although a petition for writ of mandate is a special proceeding, and '[a] judgment in a special proceeding is the final determination of the rights of the parties therein[]" (§ 1064), we conclude *Morehart* holds that absent unusual circumstances, the denial of a petition for writ of mandate is not appealable if other causes of action remain pending between the parties.").

HOGAN LOVELLS US LLP
ATTORNEYS AT LAW
SILICON VALLEY

Dated: September 5, 2014

HOGAN LOVELLS US LLP

By: _____

Vanessa Wells
Attorneys for Intervenors
Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America dba Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies

PROOF OF SERVICE

I, DeDe Salvi, declare:

I am employed in the County of San Mateo, State of California. I am over the age of eighteen years and not a party to the within action. My business address is Hogan Lovells US LLP, 4085 Campbell Avenue, Suite 100, Menlo Park, California 94025.

On September 5, 2014, I served a true copy of the following document(s):

INTERVENORS' RESPONSE TO MERCURY CASUALTY COMPANY'S NOTICE OF APPEAL (THIRD APPEALLATE DISTRICT APPELLATE CASE NO.: C077116)

on the interested parties in this action by the following means:

[X] **BY MAIL**: I am readily familiar with the business practice for collection and processing correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service in the ordinary course of business on the same day that this declaration was executed. I know that the envelopes were sealed, with postage fully prepaid, and placed for collection and mailing on this date, following ordinary business practices, in the United States mail at Menlo Park, California.

[ ] **BY OVERNIGHT DELIVERY**: I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons listed in the attached service list. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

[ ] **BY HAND**: by causing personal delivery by an agent of _____, of the document(s) listed above to the person(s) at the address(es) as set forth above.

[X] **BY ELECTRONIC SERVICE [E-MAIL]**: I caused the documents to be sent to the persons at the electronic notification addresses listed in the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed on September 5, 2014 at Menlo Park, California.

DeDe Salvi

SERVICE LIST

Richard De La Mora Spencer Y. Kook Peter Sindhuphak Barger & Wolen LLP 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 Telephone: (213) 680-2800 Facsimile: (213) 614-7399 rdelamora@bargerwolen.com skook@bargerwolen.com psindhuphak@bargerwolen.com	*Attorneys for Petitioner and Plaintiff Mercury Casualty Company*
Stephen J. Green Deputy Attorney General California Department of Justice 1300 I Street Sacramento, CA 94244-2550 Telephone: (916) 445-5367 Facsimile: (916) 327-2247 Steven.Green@doj.ca.gov	*Attorneys for Respondent and Defendant Dave Jones, Insurance Commissioner of the State of California*
Stephen Lew Deputy Attorney General California Department of Justice 300 South Spring Street, Suite 1702 Los Angeles, CA 90013 Telephone: (213) 897-8526 Facsimile: (213) 897-5775 Stephen.Lew@doj.ca.gov	*Attorneys for Respondent and Defendant Dave Jones, Insurance Commissioner of the State of California*
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Attorneys for Intervenor Consumer Watchdog

Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Mercury Casualty Company v. Dave Jones, Insurance Commissioner*
Ct. App. Case No.: **C077116**

I declare:

I am an attorney duly admitted to practice law in the State of California and am a Deputy Attorney General in the Office of the Attorney General. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On September 19, 2014, I served the attached **RESPONDENT INSURANCE COMMISSIONER'S MOTION TO DISMISS APPEAL** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 19, 2014, at Los Angeles, California.

KATHI PALACIOS
Declarant

Kathi Palacios
Signature

SERVICE LIST
Mercury Casualty Company v. Dave Jones, et al
Court of Appeal Case No. C077116

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Attorneys for Intervener Consumer Watchdog

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, THIRD APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C077116
ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*: KAMALA D. HARRIS, Attorney General of California STEPHEN LEW, Deputy Attorney General, State Bar No. 81205 300 S. Spring Street, Suite 1702 Lns Angeles, CA 90013 TELEPHONE NO.: (213) 897-8526 FAX NO. *(Optional)*: (213) 897-5775 E-MAIL ADDRESS *(Optional)*: steph.lew@doj.ca.gov ATTORNEY FOR *(Name)*: Respondent Dave Jones, Insurance Commissioner	Superior Court Case Number: 34-2013-80001426 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: MERCURY CASUALTY COMPANY RESPONDENT/REAL PARTY IN INTEREST: DAVE, JONES, Insurance Comms'r	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS *(Check one)*: ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): Respondent Dave Jones, Insurance Commissioner

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: September 19, 2014

STEPHEN LEW
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
Judicial Council of California
APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
www.courtinfo.ca.gov

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *Mercury Casualty Company v. Dave Jones, Insurance Commissioner*
Ct. App. Case No.: **C077116**

I declare:

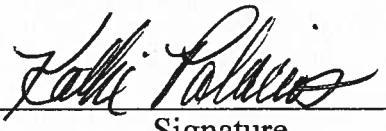
I am an attorney duly admitted to practice law in the State of California and am a Deputy Attorney General in the Office of the Attorney General. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On September 19, 2014, I served the attached **CERTIFICATE OF INTERESTED ENTITIES OR PERSONS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

[SEE ATTACHED SERVICE LIST]

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 19, 2014, at Los Angeles, California.

KATHI PALACIOS
Declarant



Signature

SERVICE LIST
Mercury Casualty Company v. Dave Jones et al.
Court of Appeal Case No. C077116

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