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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

TRADES' OPPOSITION TO MOTION TO STRIKE

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

Action Filed: March 1, 2013

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I. SUMMARY OF ARGUMENT

Intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America (doing business in California as Association of California Insurance Companies), National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies (collectively the "Trades") ***sought and were granted*** leave to intervene in this action in order to challenge the Insurance Commissioner's rulings of law on questions significant to all property-casualty insurers regulated by the California Insurance Commissioner ("Commissioner"). The Commissioner announced those rulings in his opinion on an individual insurer's rate application, which happened to be submitted by Mercury Casualty Company (the "Opinion").[1] The aspects of the Opinion challenged by the Trades, however, are determinations on legal questions that affect all insurers required to obtain the Commissioner's prior approval of proposed insurance rates before those rates can be charged.

Those questions include:

The Constitutional standard limiting the Commissioner's authority to regulate rates. A century of federal jurisprudence, echoed by our California Supreme Court's decisions, underscores that the state's power to regulate price is limited by the federal and state constitutions – the state cannot restrict the prices charged by a regulated firm to prices that would be ***confiscatory***. The law is equally settled that to meet constitutional requirements price regulation must allow a regulated firm ***the opportunity to earn a fair rate of return***. In the Opinion, the Commissioner held that regulated insurers are not entitled to a rate that would allow them the opportunity to earn a fair rate of return. The only protection available to insurers, the Opinion holds, is against a rate that would place the entire, global conglomerate of which the insurer is a part in financial distress. The Trades challenge this holding.

The Constitutional validity of a rate regulatory process that requires hearings for an applicant to claim the benefit of a "constitutional variance" but denies the applicant the ability

[1] The Opinion is in the record in multiple places, including as Exhibit A to Mercury's Verified Petition For Peremptory Writ Of Mandate. To the extent necessary, the Trades request judicial notice of the Opinion.

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to put on a case. The Commissioner's regulations require a hearing whenever an applicant cannot achieve a non-confiscatory rate under the basic rating formula or the limited specific variances available, such that the applicant must invoke the variance set forth in 10 C.C.R. § 2644.27(f)(9) – the constitutional variance articulated in *20th Century Ins. Co. v. Garamendi*, 8 Cal. 4th 216 (1994) ("Variance 9"). In the Opinion, however, the Commissioner holds that the so-called "relitigation bar" precludes the applicant from putting on the case necessary to show that the rate order resulting from the basic formula would be confiscatory – that is, the Opinion holds that the applicant effectively cannot have a hearing. The "relitigation bar" (10 C.C.R. § 2646.4(c)) is nothing more than a restatement of the general rule that courts (and adjudicatory tribunals) cannot challenge the wisdom of a statute (or regulation). *20th Century*, 8 Cal. 4th at 311-13. As interpreted in the Opinion, the "relitigation bar" becomes a litigation bar. That is, while requiring a "hearing," the Commissioner denies a fair hearing. The Trades challenge that holding.

The correct interpretation of the excluded expense factor as it applies to "institutional advertising," and the constitutional validity of this burden on speech under the First Amendment. At the threshold, the Opinion misinterprets 10 C.C.R. § 2644.10 (excluded expense factor) as it pertains to "institutional advertising." The Trades challenge that interpretation. More importantly, the regulation violates the First Amendment due to the financial burden it places on protected speech, based on the content of that speech. The Trades challenge the Opinion's interpretation of the regulation, and the regulation itself.

The Commissioner's motion to strike the Verified Complaint in Intervention ("Complaint") is not well-taken, for the following reasons:

The motion is almost entirely based on the contention that several cited paragraphs contain legal argument or legal conclusions. Due to the nature of the Complaint, that is, of course the case, although it would be more accurate to describe the Complaint as stating, as facts, the parties' varying contentions on the questions of law presented by the Complaint. The only causes of action contained in the Complaint are for mandate and declaratory relief, challenging the Commissioner's interpretations, regulations, and actions as contrary to law and contrary to the

state and federal constitutions. Within such a complaint, the charging allegations serve the function of describing the law as the Trades believe it to be, and the Commissioner's errors of law and actions outside of his lawful authority. Unsurprisingly, these charging allegations can be characterized as "legal argument" and "legal conclusions." They are nonetheless appropriate to this form of complaint.

While the motion to strike is nominally directed to the entire Complaint, the motion does not identify any claimed objectionable allegations within the paragraphs stating the causes of action themselves, except for one sentence in one paragraph. Impliedly, then, the Commissioner concedes that none of the stated causes of action are affected by the motion to strike – the entire Complaint stands, whether or not the motion is granted. Without the challenged allegations, the subject matter of the Complaint would be less comprehensible to a judge on a first acquaintance with insurance rating, confiscation in the insurance rating context, the Commissioner's regulations, the context of the key governing cases which are part of the history of this action as well as controlling authority, and the consequences of the "excluded expense factor" (or even what is an "excluded expense factor"). But, each and every cause of action would remain, and the Trades' Petition for Writ of Mandate set for hearing on May 2, 2014 remains untouched.

The questions addressed by the Trades in their Complaint are exactly the questions the Trades represented, in their Motion for Leave to Intervene, they wished to address. The Trades submitted the proposed Complaint with the Motion for Leave to Intervene. After receiving these papers, the Commissioner filed a Statement of Non-Opposition to the Motion For Leave to Intervene. The Court granted the motion, allowing the Trades to bring the case described in the motion, and illustrated by the accompanying Complaint. There is no question that the Trades have already obtained a court order allowing them to bring the action delineated in the Complaint, which the Trades have now briefed, and the Court has set for hearing.

The Commissioner's motion to strike is not well-taken, and should be denied. Beyond that, however, it is not clear what the Commissioner intended by bringing it. Even if the motion were supportable – and it is not – it does not aid in resolution of the important questions before the Court, or this litigation, generally. The motion cannot represent a general policy to object to

complaints in intervention that state legal positions – or arguments or conclusions – given that the Commissioner did not move to strike Consumer Watchdog's complaint in intervention, which does not even state causes of action.

The motion should be denied.

II. BACKGROUND

A. The Trades' Unopposed Noticed Motion For Leave To Intervene

On April 29, 2013, the Trades filed a noticed motion for leave to intervene in this action along with their proposed complaint in intervention. Request For Judicial Notice And Declaration Of Vanessa Wells ("RJN") ¶ 2. The Notice of Motion and Motion For Leave To Intervene and proposed complaint in intervention were served by U.S. mail and e-mail on all parties, including counsel for the Commissioner. *Id.* The Trades' motion for leave to intervene was set for hearing on June 7, 2013. Initially, the Commissioner's counsel informed the Trades' counsel that the Commissioner planned to oppose the motion for leave to intervene. *Id.* But the Commissioner subsequently decided not to oppose intervention. Instead, on May 15, 2013, the Insurance Commissioner filed and served the Respondent Insurance Commissioner's Statement Of Non-Opposition To Trades' Motion To Intervene, which stated:

> Respondent Dave Jones, sued here in his official capacity as the Insurance Commissioner of the State of California (the "Commissioner"), hereby advises the Court, the Parties, and the Proposed Intervenors (self-designated as the "Trades") that the Commissioner does not oppose the Trades' Motion to Intervene, which has been set for a hearing on June 7, 2013.

Id.

On June 6, 2013, the Court (Judge Balonon presiding at that time) issued its tentative ruling granting the Trades' motion for leave to intervene. RJN ¶ 3.c. The tentative ruling stated, in relevant part:

> The Trades represent numerous insurers in California that must obtain insurance rate approvals from Respondent. The Trades served counsel for all parties with the motion and proposed complaint in intervention on April 26, 2013. None of the parties opposes the Trades' motion to intervene: Respondent has filed a Statement of Non-Opposition; Intervenor Consumer Watchdog has filed a response, stating that it does not oppose the motion; and Petitioner Mercury Casualty Company has filed no opposition or

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> other responsive pleadings. The Court **GRANTS** the Trades' unopposed motion for leave to intervene pursuant to Insurance Code section 1861.10(a) and Code of Civil Procedure section 387(b).

The tentative ruling also gave notice that the ruling would become the Court's final ruling if no party contacted the Court by 4:00 p.m. on June 6, 2013 to request that the Court proceed with the scheduled hearing on June 7, 2013. No party contacted the Court. Therefore, on June 18, 2013, the Court entered its Order granting the Trades' motion for leave to intervene. RJN ¶ 3.d. The Order granting leave to intervene reiterated the language of the Tentative Ruling quoted above and directed that: "The complaint in intervention shall be filed by June 21, 2013". No party sought reconsideration of or otherwise objected to the Order granting leave to intervene and directing the Trades to file the Complaint.

Pursuant to the Court's Order, the Trades filed the Complaint on June 21, 2013. As explained in Section I. above, the Complaint contains causes of action for mandate and declaratory relief challenging the Commissioner's legal interpretations on legal questions that affect all insurers subject to prior approval rate review.

B. The Commissioner's Motion To Strike

Almost two months after the Trades filed their Complaint, the Commissioner filed this motion to strike, on August 13, 2013. In the motion to strike, the Commissioner asserted for the first time that the entire Complaint, or alternatively, certain allegations therein, should be stricken as improper legal argument and as purportedly expanding the scope of the action. Notably, the Commissioner did not contend that the proposed Complaint In Intervention expanded the scope of the action at the time the Trades moved for leave to intervene. *See* RJN ¶ 2. Nor did the Commissioner move to strike Consumer Watchdog's Complaint In Intervention, which contains only argument and does not purport to state any causes of action. *See* RJN ¶ 3.e.

III. THE STANDARD FOR A MOTION TO STRIKE

California law and policy require courts to construe pleadings "liberally . . . with a view to substantial justice . . . ." C.C.P. § 452. Consequently, in general, "motions to strike are disfavored". ROBERT WEIL & IRA BROWN, JR., CALIFORNIA PRACTICE GUIDE CIVIL PROCEDURE

BEFORE Trial Ch. 7 (I)-B (Rutter Group 2013) at 7:197.

A motion to strike can only be used to strike an entire complaint where the complaint is "not drawn or filed in conformity with the laws of this state, a court rule, or an order of the court." C.C.P. § 436 (b). Motions to strike are not appropriate as a tool to eliminate an entire cause of action. That is because, in contrast to a demurer or motion for judgment on the pleadings, the purpose of a motion to strike is not to address substantive defects. *See Quiroz v. Seventh Ave. Ctr.*, 140 Cal. App. 4th 1256, 1281 (2006) ("[I]t is improper for a court to strike a whole cause of action of a pleading under Code of Civil Procedure section 436 . . . . While under section 436, a court at any time may, in its discretion, strike portions of a complaint that are irrelevant, improper, or not drawn in conformity with the law, matter that is essential to a cause of action should not be struck and it is error to do so."); *Clements v. T.R. Bechtel Co.*, 43 Cal. 2d 227, 242 (1954) (motion to strike portions of complaint that were essential to plaintiff's cause of action to foreclose mechanic's lien should not have been granted); ROBERT WEIL & IRA BROWN, JR., CALIFORNIA PRACTICE GUIDE CIVIL PROCEDURE BEFORE TRIAL CH. 7(I)-B at 7:188.5. Moreover, although in certain circumstances a motion to strike can be directed to a portion of a cause of action, "such use of the motion to strike should be cautious and sparing" as there is no "procedural 'line item veto' for the civil defendant." *PH II, Inc. v. Superior Court*, 33 Cal. App. 4th 1680, 1683 (1995).

Importantly, the Commissioner has filed only a motion to strike. He has not filed a demurrer or motion for judgment on the pleadings. Nor has he asserted in his motion to strike that there is any substantive defect in any of the causes of action contained in the Trades' Complaint, which indeed he cannot.

IV. ARGUMENT

A. There Is No Basis For Striking The Trades' Entire Complaint.

Although the Commissioner did not oppose the Trades' intervention, the Commissioner now asserts that the Trades' entire Complaint should be stricken because it "includes improper legal argument and conclusions rather than allegations of fact." Commissioner's Notice of Motion, p. 2, lines 13-14. At the threshold, many of the specifically identified paragraphs the

Commissioner challenges as containing "improper legal argument and conclusions" actually are statements of fact. *See* discussion in Section IV.B. below. But it is not necessary for the Court to examine the Complaint at this level. As explained in Section I. above, the Trades challenge the Commissioner's rulings of law and regulatory interpretations evidenced by the Commissioner's Order on Mercury's rate application. The Trades' statements of what the law is, versus the Commissioner's incorrect interpretations stated in the Mercury Opinion, properly frame the Trades' challenge to the Commissioner's legal interpretations that affect the Trades' members. As Witkin relatedly explains:

> Where a complaint seeks to enjoin enforcement of a statute or ordinance on the ground of unconstitutionality, it is scarcely possible to avoid the use of conclusions of law, and they are usually upheld by calling them allegations of fact. Thus, in *Davis v. San Diego* (1939) 33 C.A.2d 190, 91 P.2d 640, allegations that a certain section of an ordinance "was enacted for regulatory purposes," but that the intent of the defendant city is now to enforce it "as a license for revenue only," were proper. (33 C.A. 2d 192.)

4 WITKIN, CAL. PROC. 5TH PLEAD, § 387 (2008) at 525-26.

For instance, in *Californians for Native Salmon & Steelhead Ass'n v. Dep't of Forestry*, 221 Cal. App. 3d 1419, 1427 (1990), the plaintiffs, without challenging a specific decision, sought declaratory relief concerning the agency's alleged policy of ignoring or violating applicable regulations. Similar to the nature of the Trades' allegations, the complaint "alleged a CDF policy to (1) issue responses after the notice of THP approval and (2) to fail to assess cumulative impacts in THPs," and further alleged that the plaintiffs and the CDF "dispute whether CDF is engaged in conduct or has established policies in violation of applicable statutes, regulations, and judicial decisions." *Id.* The Court of Appeal held that these allegations were proper and stated a claim for declaratory relief, explaining: "[c]learly the allegations of appellants' complaint sufficiently set forth an actual controversy over significant aspects of the respondents' legally mandated duties." *Id.*

Further, as courts repeatedly have noted, the distinction between conclusions of law and ultimate facts is frequently unclear. As the California Supreme Court explained in reversing an order sustaining a demurrer premised on pleading an alleged conclusion of law:

> The sustaining of the demurrer to the second cause of action cannot be justified on the ground that the allegation that the housing accommodations were "publicly assisted" was merely a conclusion of law. The distinction between conclusions of law and ultimate facts is not at all clear and involves at most a matter of degree....For example, the courts have permitted allegations which obviously included conclusions of law and have termed them "ultimate facts" or "conclusions of fact"...

Burks v. Poppy Const. Co., 57 Cal. 2d 463, 473-74 (1962) (internal citations omitted). The Court went on to explain that, "[i]n permitting allegations to be made in general terms the courts have said that the particularity of pleading required depends upon the extent to which the defendant in fairness needs detailed information that can be conveniently provided by the plaintiff, and that less particularity is required where the defendant may be assumed to possess knowledge of the facts as least equal, if not superior, to that possessed by the plaintiff." *Id.* at 474. The Court determined that "[i]n accordance with these principles it may be alleged generally, in the terms of the statute, that housing accommodations are 'publicly assisted.'" *Id. Accord, Doheny Park Terrace Homeowners Ass'n, Inc. v. Truck Ins. Exch.*, 132 Cal. App. 4th 1076, 1098-99 (2005); *Perkins v. Superior Court,* 117 Cal. App. 3d 1, 6 (1981).

Moreover, California law establishes that the proper vehicles for challenging the Commissioner's rulings of law in this circumstance are a petition for writ of mandate (C.C.P. § 1085—ordinary mandate) and complaint for declaratory relief (C.C.P. § 1060) (Gov't Code § 11350—regulations only).[2] A petition for writ of mandate and complaint for declaratory relief can be combined in one pleading. *See, e.g., Howard Jarvis Taxpayers Ass'n v. City Of La Habra,*

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[2] *See, e.g., Bodinson Mfg. Co. v. California Emp't Comm'n*, 17 Cal. 2d 321, 329 (1941) (mandate appropriate to review acts and decisions of administrative agencies); *Walker v. County of Los Angeles*, 55 Cal. 2d 626, 636-37 (1961) (regulated entity may seek a judicial declaration as to the correctness of an interpretation of law asserted by the regulating agency); *Simi Valley Adventist Hosp. v. Bonta*, 81 Cal. App. 4th 346 (2000) (methodology used by State Department of Health Services in computing aspects of Medi-Cal reimbursement subject to challenge by petition for mandate or action for declaratory relief); *Alameda Cnty. Land Use Ass'n v. City of Hayward*, 38 Cal. App. 4th 1716, 1723 (1995) ("An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute whether a public entity has engaged in conduct or established policies in violation of applicable law."); *Californians for Native Salmon & Steelhead Ass'n*, 221 Cal. App. 3d at 1427 ("Declaratory relief is appropriate to obtain judicial clarification of the parties' rights and obligations under applicable law.").

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25 Cal. 4th 809, 812-813, 821 (2001); *Walker v. County of Los Angeles*, 55 Cal. 2d at 629. Thus, the Trades' Complaint setting forth causes of action in mandate and declaratory relief plainly is the correct instrument for bringing this challenge, and the Commissioner does not contend otherwise. Further, the Complaint was filed pursuant to the Court's Order granting leave to intervene and directing the Trades to file their complaint in intervention. The Trades' Complaint thus properly complies with California pleading rules for bringing this type of action and with this Court's Order.

The Commissioner's cases are inapposite and do not support granting the motion to strike.

Muller v. Robinson, 174 Cal. App. 2d 511 (1959) did not involve a motion to strike. In *Muller*, the court affirmed an order *denying leave to intervene* in an action concerning title to property where the title issue raised by the proposed intervenor had previously been litigated to conclusion in another action and the intervention would have "completely changed the nature of the main action." *Id.* at 515-16. If that is the argument the Commissioner wished to make, he should have opposed intervention. Moreover, it is clear from comparison of the Trades' Memorandum In Support of their Petition for Writ of Mandate and Mercury's Memorandum in Support of Its Petition for Writ of Mandate that the Trades' Complaint does not "completely change the nature of the main action." To the extent the Trades seek review of the Commissioner's rulings in the broader context of the rate review process to which their members are generally subject, that was plain from the first sentences of the Trades' memorandum in support of their motion for leave to intervene – a motion the Commissioner chose not to oppose.

Doe v. City of Los Angeles, 42 Cal. 4th 531 (2007) involved a demurrer challenging the pleading of a statute of limitations defense under a specific statute regarding pleading notice of child sexual abuse. There is no discernible connection between that sad case and this.

Burke v. Superior Court, 71 Cal. 2d 276 (1969) involved the propriety of interrogatories inquiring into legal contentions and conclusions. The discussion in footnote 4, cited by the Commissioner, actually supports the Trades. In footnote 4, the Court stated that the petitioners' "necessary allegation that a successful defense of the action on the promissory note was the only way to discharge the attachment is an example the type of conclusory allegation *frequently*

permitted in California as an exception to the general rule that a complaint must contain only allegations of ultimate facts as opposed to allegations of evidentiary facts or of legal conclusions or arguments" (emphasis added).

Baroldi v. Denni, 197 Cal. App. 2d 472 (1961) discussed the particularized pleading requirements for fraud, not at issue here.

Moran v. Bonynge, 157 Cal. 295 (1910) involved a demurrer to a complaint in intervention concerning a determination under Political Code statutes to the parties' respective rights to purchase certain state lands. The Court affirmed an order sustaining a demurrer to the complaint in intervention because the intervenor did not plead sufficient required facts to show qualification to purchase the land and the issue was foreclosed by a final judgment in another case. Not only does this ancient authority have no discernible relationship to this case, the Commissioner (again) should have opposed intervention, if he believed intervention by the Trades, to raise the disclosed issues, was inappropriate.

The Trades' Complaint plainly is drawn and filed in conformity with California law and with this Court's Order granting leave to intervene. It should not be stricken.

B. The Individual Paragraphs/Allegations The Commissioner Identifies Are Proper And Should Not Be Stricken.

The individual paragraphs and allegations identified in the Commissioner's motion are proper and should not be stricken for the same reasons discussed above in Section IV.A. That is, they contain statements of fact (or ultimate fact) and, in any event, are proper in this type of action challenging the Commissioner's legal interpretations and determinations on legal questions. Specifically:

Paragraph 3: This paragraph describes the nature of the action and the relief the Trades seek. In addition to the rote argument that this description constitutes legal argument and legal conclusions, the Commissioner complains that the Trades have not provided a cite for the use of the term "safety valve". There is no requirement that a pleader provide a source for a quote used in a complaint, and the Commissioner cites to none. The "safety valve" quote, however, is plainly recognizable from the Commissioner's Summary of And Response To Public Comment

received Prior To September 13, 2006, a passage from which is quoted in full at ¶ 29 of the Complaint *with* citation. *See* RJN ¶ 4 and Ex. A.

Paragraph 7: This paragraph also appears in the section of the Complaint describing the nature of the action. It alleges facts, or ultimate facts, not legal conclusions. The Commissioner repeats his complaint that no source is provided for the "quotes". Obviously, the Commissioner must recognize that the terms "variances" and "most actuarially sound" come from his own regulations. While these terms do constitute quotations from the regulations, the use of quote marks in paragraph 7 is to denote terms of art within the framework of the regulations. Indeed, "most actuarially sound" is a vague and variable standard *coined by the Commissioner*, with no antecedent within the actuarial lexicon. The Trades place the term within quotes to ensure it is understood that the words are not of their choice, and that the Trades do not suggest that these words could convey meaning in common parlance or within the actuarial profession. Mercury challenges this standardless standard in its petition for writ of mandate and complaint for declaratory relief.

Paragraphs 24 and 25: These paragraphs are contained in the general allegations concerning confiscation. They likewise allege fact, or ultimate fact, concerning the California Supreme Court's holdings in the seminal Proposition 103 case *Calfarm Ins. Co. v. Deukmejian*, 48 Cal. 3d 805 (1989). These background allegations describe what the California Supreme Court held and did in *Calfarm*. They explain the Proposition 103 statutory scheme and the application of confiscation concepts within that context. They are relevant to the legal issues concerning confiscation raised in the Trades' Complaint and are proper for this type of challenge.

Paragraph 72: This paragraph is contained in the general allegations for the "institutional advertising" causes of action. The allegations of paragraph 72 are factual in nature. They describe regulation § 2644.10 (which creates the "excluded expense factor," makes "institutional advertising" expense part of that factor, and defines "institutional advertising"). They further describe what the Opinion says and does. They also describe the nature of insurance companies as compared to public utilities, and the nature of insurers' advertising expenses. Moreover, it is

proper in this type of legal challenge for the Trades to allege what the Commissioner contends the law is and why the Trades contend the Commissioner's interpretation of the law is incorrect.

Further, this is the paragraph addressing the Opinion's superficial treatment of First Amendment concerns as inapplicable because the regulation (according to the story written in the Opinion) does not preclude speech, but merely designates advertising expense as chargeable to either a "shareholder" account or "ratepayer" account. Correction of this fiction (derived from public utility regulation) is critical to the further correction of the Opinion's dismissal of the First Amendment violation wrought by the regulatory burden placed on speech, by 10 C.C.R. § 2644.10(f).

The other paragraphs the Commissioner briefly mentions at the end of his memorandum (¶¶ 4, 26, 27, 28, 29, 30, 32, 56 (1st sentence only-per notice of motion), 67-71, 73 and 74) likewise contain allegations of fact or ultimate fact and are proper allegations for mounting this type of legal challenge. See discussion and cases cited in Section IV. A. Moreover, in violation of California Rules of Court, rule 3.1322(a), the Notice of Motion does not "quote in full" the single sentence of Paragraph 56 sought to be stricken. There thus is no basis for striking any of these identified paragraphs/allegations. The Commissioner's motion should be denied.

C. Even If Some Or All Of The Identified Paragraphs Are Stricken, All Causes Of Action Remain.

The Commissioner has not moved to strike any cause of action, which, indeed, he cannot. *See* discussion and authorities in Section III. Instead, all but one of the allegations the Commissioner specifically identifies in his motion to strike are within the general allegations sections of the Trades' Complaint. The only allegation the Commissioner has moved to strike that is contained within a cause of action is the first sentence of paragraph 56, which is part of the Fifth Cause of Action for writ of mandate directed to the regulatory scheme. That sentence (which is not quoted in the Notice of Motion) states: "Price control regulation that proceeds by way of formulaic assumptions can be constitutional, but only if the regulatory mechanism is capable of accommodating adjustments that may be necessary in an individual case to avoid confiscation." That sentence is one of fact, or ultimate fact, concerning *what the law is*, and, in

any event, is a proper allegation for this type of challenge. But even if that sentence were omitted, the Fifth Cause of Action still would contain sufficient allegations providing notice of the claim and still would be intact. And, if the sentence is deemed essential to the cause of action, it cannot properly be stricken. *See* discussion and authorities in Section III.

Similarly, even without the general allegations the Commissioner improperly seeks to strike, there are sufficient allegations remaining to apprise the Commissioner of the Trades' claims and to support each cause of action. And, as stated above, if any paragraph or allegation is deemed essential to any cause of action, it is not properly stricken. Thus, even if some or all of these paragraphs/allegations are stricken, the causes of action nonetheless remain.

D. The Motion To Strike Is An Improper End-Run Around The Court's Order Granting Leave To Intervene.

1. The Court already held that the Trades can bring this action.

Regardless of whether any portion of the Complaint is stricken, the Trades still have the right to bring this action. As recounted in Section II.A., the Court granted the Trades' noticed motion for leave to intervene—concluding that the Trades' members have sufficient interest in the Commissioner's legal interpretations that they have the right to bring a complaint in intervention challenging those interpretations. The Court also directed the Trades to file their complaint in intervention submitted to the Court in connection with their motion for leave to intervene, which the Trades did. The Commissioner's after-the-fact motion to strike cannot subvert or obliterate the Trades' unopposed Court-ordered right to bring this challenge.

2. The Commissioner has waived objection to the Trades' intervention.

Relatedly, although the Commissioner had the opportunity to do so, the Commissioner expressly did not oppose the Trades' motion for leave to intervene or proposed complaint in intervention submitted with that motion. Nor did the Commissioner request a hearing after the Court issued its Tentative Ruling granting the motion. The arguments the Commissioner now makes, including alleged improper expansion of the Mercury action, could have been raised in opposition to the Trades' noticed motion for leave to intervene, but were not. Having failed to oppose the Trades' intervention at the earliest opportunity, the Commissioner has waived the

ability to do so now. *See* ROBERT WEIL & IRA BROWN, JR., CALIFORNIA PRACTICE GUIDE CIVIL PROCEDURE BEFORE TRIAL CH. 2 at 2:446 ("Any objection to the intervention is deemed waived, unless raised by the existing parties at their earliest opportunity to do so. [See *Bloom v. Waxman* (1941) 48 CA2d 646, 120 P2d 509, 510])."

V. CONCLUSION

For all of the reasons set forth above, the Trades respectfully request that the Court deny the Commissioner's motion to strike the Trades' Complaint in all respects.

Dated: March 17, 2014

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By: _____
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