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10 Pacific Association of Domestic Insurance
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11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 FOR THE COUNTY OF SACRAMENTO

13 MERCURY CASUALTY COMPANY,

14 Petitioner and Plaintiff,

15 v.

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

18 Respondent and Defendant.

19
20 CONSUMER WATCHDOG,

21 Intervenor.

22 PERSONAL INSURANCE FEDERATION
OF CALIFORNIA, et al.,

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

**TRADES' RESPONSE TO
RESPONDENT'S OBJECTIONS TO
REQUEST FOR JUDICIAL NOTICE
AND DECLARATION OF VANESSA
WELLS IN SUPPORT OF PETITION
FOR WRIT OF MANDAMUS
(COMPLAINT IN INTERVENTION
FIRST, THIRD, FIFTH, SEVENTH, AND
NINTH CAUSES OF ACTION)**

Date: May 2, 2014
Time: 11:00 a.m.
Dept.: 24

Action Filed: March 1, 2013

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I. SUMMARY

The bulk of the Commissioner's combined objections to Mercury's and the Trades' separate requests for judicial notice are directed to Mercury's requests. As described below, the Commissioner only attempts to object to two of the documents attached to the Trades' request for judicial notice ("Trades' RJN"), and the objection is so vague and amorphous that it is impossible to tell precisely what is being objected to. The objections are defective on multiple levels and should be overruled.

In support of their Opening Brief, the Trades requested judicial notice of three documents: 1) the Commissioner's November 5, 2013 Order Adopting Proposed Decision in Mercury's underlying rate case (Exhibit 1 to the Trades' RJN); 2) excerpts from the Summary of and Response to Public Comments Received Prior To September 13, 2006 on the prior approval rate regulations (Exhibit 2 to the Trades' RJN); and 3) the original regulations for prior approval rate review under Proposition 103 (Exhibit 3 to the Trades' RJN). The Commissioner expressly does not object to Exhibit 1 of the Trades' RJN. *See* Respondent's Objections To Requests For Judicial Notice at p.2, lines 10-11. And the Commissioner only objects to the Trades' Exhibits 2 and 3 "to the extent they seek to violate the hearsay rule." *Id.* at p.2, lines 9-11. But the Commissioner does not specify how or why he contends that judicial notice of any pertinent part of Exhibit 2 or 3 would transgress the hearsay rule, if he even does. That is because it would not. The Commissioner's amorphous, erroneous objections should be overruled as to both Exhibits 1 and 2 of the Trades' RJN, as explained more specifically below.

II. SPECIFIC RESPONSES

A. Response to Objection to Exhibit 2 (Excerpted Summary of Responses)

As stated above, Exhibit 2 to the Trades' RJN consists of excerpts from the Commissioner's Summary of and Responses to Public Comments Received Prior To September 13, 2006 on the prior approval rate regulations. As an initial matter, the Trades note that the Commissioner inconsistently has joined in Consumer Watchdog's Request for Judicial Notice, which also requests judicial notice of portions of the same rulemaking record. *See* Consumer

1 Watchdog’s Request for Judicial Notice, p.1, lines 10-12, p. 3, lines 23-25, and Exhibit 5
2 (requesting judicial notice of pages 1 and 80 of the Commissioner’s Summary of and Response to
3 Public Comments Received Prior To September 13, 2006). The Commissioner cannot have it
4 both ways—objecting to judicial notice of the document when the Trades submit it but joining in
5 judicial notice of essentially the same document when Consumer Watchdog requests it.

6 But, regardless, the Trades plainly request judicial notice of these rulemaking excerpts for
7 what they say on their face, and the positions the Commissioner took therein, not for the truth of
8 matters asserted. That is a proper use and subject of judicial notice. *See, e.g., Friends of Sierra*
9 *Madre v. City of Sierra Madre*, 25 Cal. 4th 165, 186 n.15 (2001) (judicial notice taken of
10 agency’s summary of and responses to public comment from a rulemaking file as “part of the
11 official statement of regulatory intent”); *Wolfe v. State Farm Fire & Casualty Co.*, 46 Cal. App.
12 4th 554, 567 and n.16 (1996) (“[W]e are permitted to take judicial notice of the records and files
13 of an administrative board...and may even take judicial notice of a position taken by a party
14 during a previous administrative hearing....Accordingly, we take notice of the fact that this
15 defense was asserted by respondents.”).

16 Moreover, as discussed in paragraph 5 (p.3) of the Trades’ RJN, the Commissioner’s
17 responses contained in these excerpts from the prior approval rulemaking record constitute *party*
18 *admissions*. *See* cases cited at p. 3, lines 9-18 of the Trades’ RJN, which the Commissioner
19 ignores. They therefore constitute an exception to the hearsay rule. *See* Evidence Code § 1220.

20 In addition, the same excerpted document previously was submitted and filed in this case
21 as Exhibit 1 to Ms. Wells’ April 26, 2013 declaration in support of the Trades’ motion for leave
22 to intervene and, most recently, as Exhibit A to the Request for Judicial Notice and Declaration of
23 Vanessa Wells in support of the Trades’ opposition to the Commissioner’s motion to strike and
24 motion for judgment on the pleadings, of which the Trades duly requested judicial notice.
25 Neither the Commissioner, nor any other party, objected to admission of the document as
26 evidence, and consequently, any objection is waived. *See Platzer v. Mammoth Mountain Ski*
27 *Area*, 104 Cal. App. 4th 1253, 1260-61 (2003) (“[F]ailure to object at all waives the defect.”).
28 *See also Schein v. Holbrook*, 111 Cal. App. 2d Supp. 972, 973 (1952) (“We also know from our

1 own records, of which we can take judicial notice...that appellants have made no application to
2 us for relief from their default in complying with any of these rules....”) (citation omitted). What
3 is more, less than two weeks ago, the Court granted the Trades’ unopposed RJN in support of
4 their opposition to the motion to strike and motion for judgment on the pleadings, and thus took
5 judicial notice of the same excerpted Summary of and Responses to Public Comments. Court’s
6 April 8, 2014 Ruling on Submitted Matter at p. 2. For all these reasons, the objection must be
7 overruled.

8 **B. Response to Objection to Exhibit 3 (Original Prior Approval Regulations)**

9 As stated above, Exhibit 3 to the Trades’ RJN consists of the original prior approval rate
10 regulations. Those regulations constitute a type of California law (or former law) that is, by
11 statute, expressly subject to both mandatory and permissive judicial notice. *See* Evidence Code
12 § 451(b) (mandatory judicial notice of matters made a subject of judicial notice under
13 Government Code §§ 11343.6 and 11344.6, both of which include regulations) and Evidence
14 Code § 452(b) (permissive judicial notice of “[r]egulations...issued by or under the authority
15 of...any public entity in the United States). The original prior approval regulations are not
16 reasonably subject to dispute, nor does the Commissioner claim they are. They are properly
17 judicially noticed.

18 Moreover, the Trades do not seek to have judicial notice taken of the truth of matters
19 stated in the original prior approval regulations. Rather, the Trades request judicial notice for
20 what the regulations say on their face, i.e., their contents. It is perfectly proper, and indeed
21 mandatory, for the Court to take judicial notice of the contents of regulations. *See* Gov’t Code §§
22 11343.6(d) (“The courts shall take judicial notice of the contents of the certified copy of each
23 regulation...”) and 11344.6 (“The courts shall take judicial notice of the contents of each
24 regulation which is printed or which is incorporated by appropriate reference into the California
25 Code of Regulations as compiled by the office.”). The meritless objection must be overruled.
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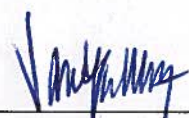
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III. CONCLUSION

For all the foregoing reasons, the Trades respectfully submit that the Commissioner's objections to the Trades' RJN should be overruled in their entirety.

Dated: April 17, 2014

HOGAN LOVELLS US LLP

By: 

Vanessa Wells
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Personal Insurance Federation of
California, American Insurance
Association, Property Casualty Insurers
Association of America dba Association of
California Insurance Companies, National
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