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

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 CONSUMER WATCHDOG,

20 Intervenor.

21 PERSONAL INSURANCE FEDERATION
OF CALIFORNIA, et al.,

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

**TRADES' OBJECTIONS TO
CONSUMER WATCHDOG'S REQUEST
FOR JUDICIAL NOTICE IN
OPPOSITION TO MERCURY'S AND
THE TRADES' OPENING BRIEFS**

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

Action Filed: March 1, 2013

1 Intervenor Personal Insurance Federation of California, American Insurance Association,
2 Property Casualty Insurers Association of America dba Association of California Insurance
3 Companies, National Association of Mutual Insurance Companies, and Pacific Association of
4 Domestic Insurance Companies (the "Trades") hereby object to the request for judicial notice
5 submitted by Intervenor Consumer Watchdog ("CW"), as follows:

6 **I. Objection to Exhibit 1 (National Association of Insurance Commissioners,**
7 **Report on Profitability by Line by State in 2012, 2013)**

8 Exhibit 1 to CW's request for judicial notice consists of an NAIC Report on insurer
9 profitability by line by state in 2012 and 2013. The Trades acknowledge that Exhibit 1 is what
10 CW says it is. But, while the Trades acknowledge that this type of document might be subject to
11 judicial notice under proper circumstances, it is not relevant here and thus not judicially
12 noticeable. *See Gbur v. Cohen*, 93 Cal. App. 3d 296, 301 (1979) ("[J]udicial notice, since it is a
13 substitute for proof, is always confined to those matters which are relevant to the issue at hand.");
14 Evidence Code § 350 ("No evidence is admissible except relevant evidence.")

15 CW contends that the document is relevant to show that California property/casualty
16 insurers had a high average return on net worth in the homeowners line and all lines combined for
17 2003-2012, and thus purportedly profited under the Prior Approval Regulations. The Trades do
18 not agree that CW's conclusion flows from the data shown in the document, and there is no
19 evidence presented to bridge that leap. The report is irrelevant as incapable of supporting CW's
20 argument.

21 Further, whether or not insurers had a high average return on net worth is irrelevant to the
22 issues before the Court. What matters and what is before the Court is the proper legal standard
23 for determining confiscation—a purely legal issue on which the parties have differing positions.
24 No conclusion can be drawn from this document as to how it has anything to do with the proper
25 test for confiscation, and CW does not explain how it ties in to the confiscation test. Since
26 relevance is a fundamental prerequisite to judicial notice and this document has no discernible
27 relevance to this case, CW's request for judicial notice of Exhibit 1 must be denied.

1 **II. Objections to Exhibits 2 and 3 (Mercury Casualty Company's Annual Statement**
2 **and A.M. Best Financial Strength Rating of Mercury Casualty Company)**

3 Exhibits 2 and 3 pertain specifically to Mercury. Consequently, for efficiency's sake, the
4 Trades have left it to Mercury to brief the objections to these Exhibits and hereby join in
5 Mercury's objections to Exhibits 2 and 3.

6 **III. Partial Objection to Exhibit 4 (Excerpts from Insurance Commissioner's**
7 **Summaries and Responses to Public Comments, California Department of**
8 **Insurance Rulemaking File RH-291 initiated in 1991, Vols. 6, 7, and 10)**

9 As with Exhibit 1, the Trades acknowledge that this document is what CW says it is and
10 that, in general, these types of excerpts from a rulemaking record are properly judicially
11 noticeable. In fact, the Trades agree that the Court should take judicial notice of p. 4_000003
12 (Volume 6/Comment 1) of Exhibit 4 since it is directly relevant to the confiscation standard at
13 issue here. Specifically, on page 4_000003 of Exhibit 4, the Commissioner states:

14 "Total-rate-of-return methodology" focuses directly on the
15 relationship between pricing and profit and regulates rates on the
16 basis of the ultimate profitability of rates to the insurer, where
17 profitability is calculated on the basis of the return on the
18 investment. As set forth in *Calfarm*, each insurer must be given the
19 opportunity to earn a fair profit. The investment, or equity, must be
 measured because what is or is not deemed to be a "fair profit" (i.e.,
 what level of profit the insurer will be entitled to earn), will be
 gauged by the amount of the insurer's equity or investment in the
 business enterprise.

20 That is directly relevant to the fair rate of return principle the Trades have established applies as
21 the correct standard limiting governmental power in the area of price control.

22 But the Trades object to judicial notice of p. 4_000001 (Volume 7/Comment No. 1) of
23 Exhibit 4—which discusses cross-subsidies divorced from any readily discernible context—as
24 irrelevant, lacking in foundation, and unduly prejudicial, misleading and lacking in probative
25 value. It is impossible to tell from Page 4_000001's discussion of cross-subsidies in what context
26 that discussion takes place—whether it addresses a complaint specific to the rollback, or prior
27 approval, and what was the nature of the complaint. It could not be said, simply from the excerpt
28 provided, that the Commissioner was advocating massive cross-subsidies by requiring that (for

1 example) profits on auto lines be used to absorb losses on the homeowner's line, such that rates
2 for the auto line remain high in order to subsidize low homeowner's rates. There is no internal
3 evidence of such an intent, or any other specific point the Commissioner intended to make.
4 Further, to the extent CW purports to suggest that this discussion shows a position by the
5 Commissioner supportive generally of cross-subsidies as appropriate and lawful under
6 Proposition 103, that ship sailed with *Spanish Speaking Citizens Foundation, Inc. v. Low*, 85 Cal.
7 App. 4th 1179, 1226 (2001) ("We can conceive of no interpretation of 'arbitrary insurance rates,'
8 and Petitioners offer none, as anything other than rates which do not reflect the cost of providing
9 insurance."). See also discussion at p. 18 lines 2-24 of the Trades' Opening Memorandum.

10 As noted, the Trades generally support presentation of the rulemaking record as
11 constituting the "legislative history" of a body of regulations. The rulemaking record can be
12 helpful in providing evidence of the regulator's intent in adopting regulations, can be helpful in
13 determining the regulator's "longstanding" interpretation of a regulation and statute, and can even
14 be helpful in determining the validity of the Commissioner's legal interpretations, given an
15 intervening development in a body of law, in the courts. But an excerpt cannot serve these
16 functions unless the record is excerpted broadly enough to understand the context of a particular
17 passage in the record.

18 For all these reasons, the Trades support judicial notice of page 4_000003 of Exhibit 4,
19 but respectfully pray that the Court decline to take judicial notice of page 4_000001.

20 Dated: April 17, 2014

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21
22 By: 

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