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20 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
21 FOR THE COUNTY OF SACRAMENTO

22 MERCURY CASUALTY COMPANY,  
23  
24 Petitioner and Plaintiff,  
25  
26 v.

27 DAVE JONES, IN HIS OFFICIAL  
28 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  
CONSUMER WATCHDOG'S  
MOTION FOR ATTORNEYS' FEES  
AND EXPENSES**

Date: May 22, 2015  
Time: 10:00 a.m.  
Dept.: 24

Action Filed: March 1, 2013

By Fax

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1       **I. INTRODUCTION**

2           As a precautionary measure, the Trades<sup>1</sup> submit this opposition to Consumer  
3 Watchdog's Motion requesting an award of attorney's fees and expenses, although the  
4 Motion is not asserted against the Trades. Neither the Notice of Motion nor the  
5 supporting documentation ever disclose against whom an award of attorney's fees and  
6 expenses is sought. Given that the controlling statute – Insurance Code § 1861.10(b) –  
7 specifies that when the “advocacy occurs in response to a rate application, the award shall  
8 be paid by the applicant”, and given that Consumer Watchdog's intervention in this action  
9 is clearly in response to a rate application, the statute may supply notice to the  
10 “applicant”.

11           But the Trades are not “applicants”. Like Consumer Watchdog, the Trades are  
12 intervenors under a special statute intended to encourage broad public participation in rate  
13 proceedings, thus ensuring an accountable Commissioner.

14           Thus, so far as appears, Consumer Watchdog's motion is not made against the  
15 Trades. If Consumer Watchdog *intended* to bring a motion against the Trades, they failed.  
16 The Trades are not named. There is no basis stated for seeking attorney's fees against the  
17 Trades, which are not “applicants”. There is no amount sought against the Trades. There  
18 is a complete failure of *notice*, a fundamental and necessary attribute of due process.

19           One might speculate that Consumer Watchdog intended to seek attorney's fees  
20 against the Trades under Code of Civil Procedure (“CCP”) § 1021.5, since Consumer  
21 Watchdog argues that CCP § 1021.5 applies in addition to Insurance Code § 1861.10(b).  
22 But if that was Consumer Watchdog's intent, it does not say so. Further, under settled  
23 California law, CCP § 1021.5 does not apply where there is a specific fee-shifting statute  
24 applicable to the motion, as there is here. And, the specific direction contained in  
25

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26           <sup>1</sup> Consistent with the practice throughout this litigation, the “Trades” refers to Personal  
27 Insurance Federation of California, Property Casualty Insurers Association of America (doing  
28 business in California as Association of California Insurance Companies), American Insurance  
Association, National Association of Mutual Insurance Companies, and Pacific Association of  
Domestic Insurance Companies.

1 Insurance Code § 1861.10(b) that awards must be paid by “the applicant” when advocacy  
2 is “in response to a rate application” acts as a shield precluding recovery from the Trades,  
3 who are not “applicants”, which cannot be circumvented simply by citing an additional  
4 statute.

5 Moreover, supposing Consumer Watchdog intends to move against the Trades,  
6 there is no authority for recovering an award of attorney’s fees against other intervenors.  
7 Allowing such an award would discourage public participation, thereby thwarting the  
8 purpose of the special intervention statute intended to *encourage* public participation.

9 The Trades note that Proposition 103 expressly created a Fund to pay for the  
10 expenses of administering and enforcing its rate regulatory scheme. Since the beginning,  
11 intervenor awards have been paid out of that Fund, when the advocacy is not in response  
12 to a rate application. If Consumer Watchdog wishes to seek an award from a source other  
13 than the “applicant”, the Proposition 103 Fund is the available alternative.

## 14 II. BACKGROUND

### 15 A. Procedural Background

16 In 2009, Mercury Casualty Company (“Mercury”) filed a rate application seeking a  
17 modest increase in its homeowner’s insurance rates. Declaration of Vanessa Wells and  
18 Request for Judicial Notice (“Wells Decl.”), ¶ 2. Consumer Watchdog petitioned for a  
19 hearing on Mercury’s rate application. *Id.* at Exh. A-2 ¶ 2. The Commissioner noticed a  
20 hearing on the rate application. Wells Decl. ¶ 2. On February 11, 2013, the Insurance  
21 Commissioner issued a final administrative order on that rate application, requiring an  
22 overall 5% rate decrease. *Id.* Mercury sought review of that rate order in this court, filing  
23 a petition for writ of administrative mandamus and complaint for declaratory relief against  
24 the Insurance Commissioner. *Id.* ¶ 3.

25 In response, Consumer Watchdog filed an *ex parte* application for leave to  
26 intervene. Wells Decl. ¶ 3 and Exhs. A-1 and A-2. The Court granted the application. *Id.*

27 Subsequently, concerned with the Commissioner’s rulings of law set forth in the  
28 Mercury Decision and their industrywide impact, the Trades filed a motion for leave to

1 intervene herein, in order to represent the rights of their members in connection with the  
2 questions of constitutional law presented by this case. Wells Decl. ¶ 4. The  
3 Commissioner and Consumer Watchdog submitted statements of non-opposition, and the  
4 Court granted the motion. *Id.* and Exh. B p. 1.

5 Following substantial briefing and hearing, the Court entered judgment in favor of  
6 the Insurance Commissioner and Consumer Watchdog and against Mercury and the  
7 Trades. Wells Decl. ¶ 5.

8 Consumer Watchdog then filed this motion, seeking an award of advocacy fees in  
9 the form of attorney's fees and costs. Consumer Watchdog filed the motion in blank; that  
10 is to say, it did not state against whom the motion is filed. That information is not  
11 provided in the "Notice", or anywhere else in the filed papers.

#### 12 **B. Relevant Legal Framework**

13 This action is one for review of a Proposition 103 rate order issued by the  
14 Commissioner on Mercury's rate application, and one presenting questions concerning  
15 constitutional limits on Proposition 103 rate regulation. "Proposition 103" was adopted in  
16 1988, for the stated purpose "to protect consumers from arbitrary insurance rates and  
17 practices, to encourage a competitive insurance marketplace, *to provide for an*  
18 *accountable Insurance Commissioner*, and to ensure that insurance is fair, available, and  
19 affordable for all Californians." Ballot Pamp., Gen. Elec. (Nov. 8, 1988) ("Prop 103  
20 Ballot Pamphlet"), Exh. C to Wells Decl., p. 99, Section 2 (emphasis added).

21 A key feature of Proposition 103 is that insurers must, under the statutes adopted  
22 by the Proposition, file a rate application and obtain prior approval of any rate change  
23 before it can be implemented. Ins. Code § 1861.01(c). A rate application may be  
24 approved by the Commissioner, or the Commissioner may notice a hearing to determine  
25 whether the proposed rate meets the statutory standard. Ins. Code §§ 1861.05(c);  
26 1861.05(a). Any hearing is conducted under Government Code Administrative  
27 Procedures Act statutes. Ins. Code § 1861.08. A party disagreeing with the  
28 Commissioner's final order may seek judicial review. Ins. Code § 1861.09.

1 The administrative proceeding resulting in the Commissioner's order dated  
2 February 11, 2013 was a proceeding on a rate application under Insurance Code §§  
3 1861.01(c), 1861.05, and 1861.08. Mercury's petition seeking review was filed under the  
4 authority of Insurance Code § 1861.09.

5 Proposition 103 includes provisions allowing for public participation, as part of the  
6 purpose "to provide for an accountable Insurance Commissioner". These provisions allow  
7 "any person" to "initiate or intervene in any proceeding permitted or established pursuant  
8 to this chapter . . . ." Ins. Code § 1861.10(a). Consumer Watchdog and the Trades are all  
9 intervenors under this provision. All are here to ensure "an accountable Insurance  
10 Commissioner".

11 Insurance Code § 1861.10(b) is a fee shifting statute. It is a statutory command  
12 altering the American Rule that a party litigant must pay its own attorney's fees, win or  
13 lose. Under Insurance Code § 1861.10(b):

14 The commissioner or a court shall award reasonable advocacy  
15 and witness fees and expenses to any person who  
16 demonstrates that (1) the person represents the interests of  
17 consumers, and, (2) that he or she has made a substantial  
18 contribution to the adoption of any order, regulation, or  
19 decision by the commissioner or a court. *Where such  
20 advocacy occurs in response to a rate application, the award  
21 shall be paid by the applicant.* (emphasis added)

### 19 C. The Proposition 103 Fund

20 Proposition 103 provides for a "recoupment fee", charged to insurers regulated  
21 under Proposition 103, intended to ensure that Proposition 103 would be self-funded. *See*  
22 *Prop. 103 Ballot Pamphlet, p. 99, Section 1* ("Insurance companies shall pay a fee to  
23 cover the cost of administering these new laws so that this reform will cost taxpayers  
24 nothing"). The fund created by the Department of Insurance with those recoupment fees  
25 is described as the "Proposition 103 recoupment fee assessment fund", or simply the  
26 "Prop 103 Fund". *See Recoupment Fee Assessment for Fiscal Year 2014-15 and exhibits*  
27 *thereto available at [28  
HOGAN LOVELLS US  
LLP  
ATTORNEYS AT LAW  
SILICON VALLEY](http://www.insurance.ca.gov/0250-insurers/0300-insurers/0200-</a></i></p></div><div data-bbox=)*



1 bulletings/prop-103-recoup/, a true and correct copy of which is attached to the Wells  
2 Decl. as Exhibit D. The Department publishes a report with the “Proposition 103  
3 Recoupment Fee Assessment” every year, showing the expenditures made out of the Prop  
4 103 Fund. *See* Exh. D.

5 The Department publishes, as an “Addendum to Proposition 103 Recoupment Fee  
6 Assessment Report”, an “Informational Report on the CDI Intervenor Program”. *See*  
7 Informational Report on the CDI Intervenor Program of intervenor compensation for  
8 years 2003-2014 available at [http://www.insurance.ca.gov/01-consumers/150-other-](http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/report-on-intervenor-program.cfm)  
9 [prog/01-intervenor/report-on-intervenor-program.cfm](http://www.insurance.ca.gov/01-consumers/150-other-prog/01-intervenor/report-on-intervenor-program.cfm), a true and correct copy of which is  
10 attached to the Wells Decl. as Exhibit E. This Addendum Report shows all of the fee  
11 awards made by the Department, individually by year, in chart form. *See* Informational  
12 Report at pp. 1-12. The chart shows, as to each award of fees, the source of the fees: i.e.,  
13 whether the award was paid by the Company (the applicant/insurer), or whether it was  
14 paid out of the Prop 103 Fund. *Id.* As demonstrated by the Addendum Report, as a  
15 general rule, where the matter was a rate application, the award of fees was paid by the  
16 applicant/company, and when the matter was anything but a rate application, the award  
17 was paid out of the Prop 103 Fund. *See* Informational Report at pp. 5-12.

### 18 III. ARGUMENT

#### 19 A. Any Entitlement To A Fee Award Consumer Watchdog May Have 20 Is Governed by the Express Fee-Shifting Statute: Insurance Code § 21 1861.10(b). Code of Civil Procedure § 1021.5 Does Not Apply.

22 Consumer Watchdog purports to base its motion on both Insurance Code §  
23 1861.10(b), and Code of Civil Procedure (“CCP”) § 1021.5. As a matter of law, CCP §  
24 1021.5 does not apply. Any right to an award of fees Consumer Watchdog may claim is  
25 controlled by Insurance Code § 1861.10(b).

26 In California, as in the United States generally, a party litigant must bear its own  
27 costs of representation. This is known as the “American Rule”. *See Adoption of Joshua*  
28 *S.*, 42 Cal. 4th 945, 954 (2008). Typically, the American Rule controls, unless there is a

1 statute expressly shifting attorney's fees. See CCP § 1021 (codifying the American Rule).

2 California created a common law exception to the American Rule, allowing for an  
3 award of attorney's fees when a plaintiff has acted as a "private attorney general". See  
4 *Trope v. Katz*, 11 Cal. 4th 274, 279 (1995) (noting that the California Supreme Court has  
5 relied upon its inherent authority to adopt three common law exceptions to the American  
6 Rule: the common fund, substantial benefit, and private attorney general theories), citing  
7 *Serrano v. Priest*, 20 Cal. 3d 25 (1977) (in which the California Supreme Court adopted  
8 the private attorney general theory as a basis for awarding attorney's fees). Ultimately,  
9 the Legislature codified the rules governing awards under the private attorney general  
10 doctrine within CCP § 1021.5. See *Bell v. Vista Unified School Dist.*, 82 Cal. App. 4th  
11 672, 689 (2000).

12 In this case, there is an express fee-shifting statute: Insurance Code § 1861.10(b).  
13 As the courts have explained, the private attorney general doctrine was developed as a  
14 common law doctrine adjusting the rights of party litigants *in the absence of* a specific  
15 fee-shifting statute, and CCP does not apply when there exists a specific, fee-shifting  
16 statute applicable to that specific case. As the court in *Bell* explained:

17 Bell's reliance on *Code of Civil Procedure section 1021.5*, as  
18 an independent basis for sustaining the trial court's award . . .  
19 is misplaced. Code of Civil Procedure section 1021.5,  
20 authorizing private attorney general fees, codifies the private  
21 attorney general doctrine . . . [B]ecause section 54960.5  
22 expressly provides statutory authorization for recovery of  
23 attorney fees and costs for Brown Act violations, the trial  
24 court improperly relied alternatively on *Code of Civil  
25 Procedure section 1021.5*.

26 82 Cal. App. 4th at 689 (italics in original). This principle was affirmed as recently as  
27 2013, in *Community Youth Athletic Center v. City of National City*, 220 Cal. App. 4th  
28 1385 (2013). Following *Bell*, the Court held:

Code of Civil Procedure section 1021.5 will not provide an  
independent basis for an attorney fee award, when there are  
already existing specific statutory fees provisions that apply . . .

1 220 Cal. App. 4th at 1442 (*italics in original*).<sup>2</sup>

2 Consumer Watchdog bases its contrary position on three aged cases from the  
3 1980s, citation to which it relegates to a footnote. Those cases do not support application  
4 of CCP § 1021.5 here, particularly not in a manner inconsistent with Insurance Code §  
5 1860.10(b). All three cases involved attorney's fees awards sought under Federal Civil  
6 Rights laws – 42 USC § 1988 – and CCP § 1021.5. In the only one of the three opinions  
7 with any remotely relevant discussion, the Court repeatedly underscored the identity  
8 between awarding attorney's fees under section 1988 and CCP § 1021.5. *Schmid v.*  
9 *Lovette*, 154 Cal. App. 3d 466, 475- 79 (1984). In context, the Court's statement that  
10 plaintiff was "independently" entitled to attorney's fees under CCP § 1021.5 simply  
11 meant that CCP § 1021.5 – with a purpose and requirements identical to 42 USC § 1988 –  
12 would also support an attorney's fees award. The Court did not consider a fee-shifting  
13 statute with different requirements and limitations from CCP § 1021.5, or purport to hold  
14 that CCP § 1021.5 could be used to circumvent limits in an express fee-shifting statute.  
15 The other two cases cited by Consumer Watchdog simply recite that the motion at issue  
16 sought fees under § 1988 as well as CCP § 1021.5. *See Best v. Cal. Apprenticeship*

17  
18 <sup>2</sup> In *Riverside Sheriff's Association v. County of Riverside*, 152 Cal. App. 4th 414 (2007),  
19 the court held that CCP § 1021.5 can apply where there is a fee-shifting statute applicable to a  
20 narrow class of cases that may arise in the specific statutory context, but not to others, *assuming*  
21 *CCP § 1021.5 is not inconsistent with the express fee-shifting statute*. 152 Cal. App. 4th at 419-  
22 20. This is consistent with *Community Youth*, which, indeed, considered whether attorney's fees  
23 could be awarded to the extent the action before it went beyond the scope of the operative,  
24 specific fee-shifting statutes in that case. 220 Cal. App. 4th at 1448. This authority, however,  
25 does not support Consumer Watchdog's reliance on CCP § 1021.5. This action *is not* outside the  
26 scope of Insurance Code § 1861.10(b) – that statute *does* provide for fee-shifting awards to  
27 intervenors in court actions reviewing final administrative rate orders.

28 Moreover, CCP 1021.5 may well be inconsistent with Insurance Code § 1861.10(b), for the  
purpose Consumer Watchdog may have in relying upon CCP § 1021.5. There is some authority  
allowing joint and several liability for fee awards under CCP § 1021.5. *See, e.g., Rider v. Cnty. of*  
*San Diego*, 11 Cal. App. 4th 1410, 1416 (1993); *Cal. Trout, Inc. v. Superior Court*, 218 Cal.  
App. 3d 187, 212 (1990). That is inconsistent with Insurance Code § 1861.10(b), which requires  
that an "applicant" pay the award when the advocacy is "in response to a rate application". This  
statutory requirement acts as a shield to the Trades, as to any attempt to compel contribution from  
them. Consequently, *Riverside Sheriff's* also requires that Consumer Watchdog's motion be  
determined under the specific authority of Insurance Code § 1861.10(b).

1 *Council*, 193 Cal. App. 3d 1448 (1987); *Green v. Obledo*, 161 Cal. App. 3d 678 (1984).

2 Whatever right Consumer Watchdog may have to a fee-shifting award in this case  
3 is controlled by Insurance Code § 1861.10(b). Consumer Watchdog cannot expand its  
4 rights beyond those allowed by Insurance Code § 1861.10(b) by resort to CCP § 1021.5.<sup>3</sup>

5 **B. To the Extent Consumer Watchdog May Intend To Pursue Its**  
6 **Motion Against The Trades, It Has Failed To Provide Notice.**

7 Consumer Watchdog does not name any responding parties in its Notice of Motion.  
8 Against whom, then, is it seeking an award of fees? Consumer Watchdog's papers  
9 nowhere answer that question. The "Notice" broadly announces to "all parties" and their  
10 attorneys of record that Consumer Watchdog is making the motion, but it never states  
11 against whom it is seeking relief.

12 Insurance Code § 1861.10(b) expressly requires that, where "advocacy is in  
13 response to a rate application, the award shall be paid by the applicant." Indisputably,  
14 "advocacy" on review of a rate application is "in response to a rate application". See  
15 *Economic Empowerment Foundation v. Quackenbush*, 57 Cal. App. 4th 677, 681, 688  
16 (1997) (noting that "a single rate proceeding" can "encompass[] advocacy before both the  
17 Department and the court" when "a rate decision is subjected to judicial review").  
18 Specifically here, Consumer Watchdog explained to the Court that it wished to intervene  
19 to continue its task from the administrative proceeding, even asserting that it should be  
20 considered a "real party". Wells Decl. ¶ 3 and Exh. A-1, p. 1 and n.1. That is to say,  
21 Consumer Watchdog's "advocacy" here is in response to a rate application. It could be  
22 that the statute supplies the missing notice, as to "the applicant".

23 The Trades, however, are not "applicants". They are left to speculate as to whether

24 <sup>3</sup> In any event, Consumer Watchdog does not meet CCP § 1021.5's requirement of  
25 "necessity", in this case. As the California Supreme Court has confirmed, for an award to be  
26 made under CCP § 1021.5, private enforcement must have been necessary due to insufficient  
27 public enforcement. *In Re Conservatorship of Whitley*, 50 Cal. 4th 1206, 1214-15 (2010) (an  
28 award of attorney's fees is not appropriate where the public rights in question were adequately  
vindicated by governmental action). In this case, the Commissioner vigorously defended his  
Opinion and Order on the rate application. Consumer Watchdog was given the *right* to intervene,  
but there was no *necessity* of private enforcement.

1 this motion is even asserted against them. To be sure, under Insurance Code §  
2 1861.10(b)'s provisions, the Trades cannot be compelled to pay an award of advocacy  
3 fees in response to a rate application, and Consumer Watchdog's advocacy here is in  
4 response to a rate application. But does Consumer Watchdog intend some argument that  
5 the Trades are also liable, despite that limitation? If so, under what authority? Is that the  
6 reason Consumer Watchdog (incorrectly) resorts to CCP § 1021.5, as well as the specific  
7 and applicable fee-shifting statute? Does Consumer Watchdog (incorrectly) assume it can  
8 get an order making Mercury, the Commissioner, and the Trades all jointly and severally  
9 liable, despite the command in § 1861.10(b) that the applicant must pay for advocacy in  
10 response to a rate application?<sup>4</sup> Consumer Watchdog's motion papers are silent on these  
11 questions.

12 Under fundamental due process principles, the Trades cannot be required to  
13 speculate as to their potential exposure in this motion based on the pattern of the tea  
14 leaves. Due Process requires *notice*. See, e.g., *Lambert v. People of the State of Cal.*, 355  
15 U.S. 225, 228 (1957) ("Engrained in our concept of due process is the requirement of  
16 notice. Notice is sometimes essential so that the citizen has the chance to defend charges.  
17 Notice is required before property interests are disturbed, before assessments are made,  
18 before penalties are assessed"); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S.  
19 306, 314 (1950) ("An elementary and fundamental requirement of due process in any  
20 proceeding which is to be accorded finality is notice reasonably calculated, under all the  
21 circumstances, to apprise interested persons of the pendency of the action and afford them  
22 an opportunity to present their objections.").

23 To borrow a phrase, an "elementary and fundamental" requirement of "notice" is  
24 that it must identify the party or parties against whom an order to pay money is sought.  
25 "[C]onstitutional principles of due process require a notice of motion to identify the  
26 persons against whom monetary sanctions are being sought." *Cromwell v. Cummings*, 65

27  
28 <sup>4</sup> See discussion in Footnote 2, *supra*.

1 Cal. App. 4th Supp. 10, 13 (1998). *Cf.* Cal. Rules of Court 2.112, requiring a plaintiff to  
2 state the party or parties named as defendants as to each separate cause of action.

3 If Consumer Watchdog believes the Trades should be liable for an award, it has to  
4 say so – this is the basic concept of “notice”. Notice is absent here. Consumer Watchdog  
5 does not declare its motion to be against the Trades, supplies no theory under which the  
6 Trades could be liable despite that mandate in § 1861.10(b) that the applicant must pay  
7 where advocacy is in response to a rate application, and fails to quantify any sum it may  
8 contend it may claim against the Trades. The law precludes double secret motions,  
9 particularly where the moving party seeks a monetary award, which may be substantial  
10 (again – we don’t know).

11 As against the Trades, Consumer Watchdog’s motion fails to meet even the most  
12 rudimentary requirement of due process. It must be denied.

13 **C. There Is No Authority For An Award Of Attorneys’ Fees In Favor**  
14 **Of One Intervenor Against Others.**

15 Consumer Watchdog and the Trades are all present in this case under a unique  
16 statute providing for broad intervention – Insurance Code § 1861.10(a). This unique statute  
17 helps to fulfill the purpose of Proposition 103 to “provide for an accountable Insurance  
18 Commissioner”. Prop. 103 Ballot Pamphlet, p. 99, Section 2., Exh. B to Wells Decl..  
19 Certainly, in this case, the Trades’ participation in advocating for constitutional limits on  
20 the Commissioner’s authority serves the purpose of “provid[ing] for an accountable  
21 Insurance Commissioner”.

22 Should Consumer Watchdog seek an award as against the Trades, allowing such an  
23 award would run directly counter to the purpose of the special intervention statute,  
24 Insurance Code § 1861.10(a). As recognized by the American Rule, if attorneys’ fees were  
25 to shift simply because a court finds against a party in an individual case, potential litigants  
26 would be chilled from bringing meritorious actions. *See Joshua S.*, 42 Cal. 4th at 954. That  
27 impact is particularly dissonant with a statute intended to encourage broad public  
28 participation.

1 Even under CCP § 1021.5, the California Supreme Court has held that there is a  
2 silent requirement that a party against whom attorney's fees are awarded must have "done  
3 something to adversely affect the public interest." *Joshua S.*, 42 Cal. 4th at 954. Thus, an  
4 award may not be imposed against one "who has done nothing to curtail a public right other  
5 than raise an issue in the context of private litigation that results in important legal  
6 precedent." *Id.* at 956. Similarly, what the Trades have done in this case is to raise  
7 important constitutional questions – *furthering* the public interest.

8 There is no lawful basis for an intervenor to seek an award of fees against other  
9 intervenors. To the contrary, such an award would run counter to public policy and the  
10 purpose of Proposition 103 to encourage broad public participation in rate proceedings, thus  
11 ensuring an accountable Commissioner. Consumer Watchdog cannot obtain an award of  
12 fees against the Trades.

13 **D. Attorneys' Fees Awards Are Paid Out Of The Prop 103 Fund, When**  
14 **Not Paid By An Applicant.**

15 There is a further reason why the Trades could not be liable for an award of  
16 advocacy fees in this action. This further point need not be reached, because it is  
17 abundantly clear that Insurance Code § 1861.10(b) requires that awards for advocacy fees  
18 incurred in response to a rate application must be paid by the applicant, the motion is  
19 defective for failure to provide notice, and the law does not support awarding fees against  
20 intervenors appearing to raise important constitutional questions. Nonetheless, the Trades  
21 perceive a potential for misunderstanding of a limited ruling made by one Court in the  
22 absence of a necessary record, and believe that ruling and the proper construction of §  
23 1861.10(b) should be clarified here.

24 This issue requires some background:

25 There exists an established Prop 103 Fund, paid for by assessments to insurers  
26 regulated under Proposition 103. *See* Wells Decl. Exhs. D-E and ¶¶ 7-9. This Fund is used  
27 to pay the expenses of administering and enforcing Proposition 103. *Id.* at Exh. D, pp. 6, 8-  
28 12. Ever since there were proceedings to interpret, administer, and enforce Proposition

1 103, advocacy awards have been paid to intervenors out of this Fund, in cases not involving  
2 a rate application. Wells Decl. ¶¶ 8-9. To select an example appearing to represent the  
3 highest fee awards issued, in the case ultimately styled *State Farm Mutual Automobile*  
4 *Insurance Company v. Garamendi*, 32 Cal. 4th 1029 (2004), the awards of fees to the  
5 intervenors in that case were paid out of the Prop 103 Fund. Wells Decl. ¶ 8 and Exh. E at  
6 pp. 11-12.

7 Insurance Code § 1861.10(b) provides that awards shall be paid by “applicant[s]”  
8 when the “advocacy” is “in response to a rate application”. The statute is silent as to source  
9 of an award in other cases. Given the existence of the Prop 103 Fund, and its long-  
10 established purpose of paying intervenor awards in cases not involving “applicants”, the  
11 most lucid interpretation of the statute is that in cases not involving applicants an award is  
12 to be paid out of the Prop 103 Fund. This interpretation is consistent with the fact that the  
13 Fund is paid for by the industry generally, based on recoupment fees, and that the amount  
14 necessary to support the Fund is based in part on the historic award of intervenor fee  
15 awards out of the Fund. See Wells Decl. ¶¶ 7-9 and Exhs. D and E.

16 The Trades recognize that the Court in *Association of California Insurance*  
17 *Companies v. Poizner*, 180 Cal. App. 4th 1029 (2009) found that § 1861.10(b)’s provision  
18 for awards to be paid by the applicant, and silence as to the question of who shall pay in  
19 other cases, means that in all other cases the award shall be paid as determined by the court  
20 in its discretion. 180 Cal. App. 4th at 1055. In that case, the Court interpreted Insurance  
21 Code § 1861.10(b) without the benefit of evidence (or, as far as appears, discussion)  
22 explaining the role of the Prop 103 Fund. The Court addressed a contention that the  
23 advocacy fees should be awarded against the Commissioner, because the Commissioner  
24 had the power to assess the industry to pay for them. *ACIC v. Poizner*, 180 Cal. App. 4th at  
25 1055. The Court rejected that argument on the grounds that the Commissioner is  
26 authorized to assess fees only for “administrative and operational costs of the Department,  
27 not awards of compensation for expenses of interveners . . . .” *Id.*

28 As the record on this motion clearly shows, the Prop 103 Fund *does* cover “awards



1 of compensation for expenses of interveners . . . .” The Court in *ACIC v. Poizner* lacked  
2 the record the Trades have presented here. Its holding rests on a failure of proof.

3 The argument here, in any event, is not the same as in *ACIC v. Poizner*. The Trades  
4 do not argue that there should be an award against the Commissioner, who can then assess  
5 the industry to pay for it. The point, made by the Trades, is that there *does* exist a Prop 103  
6 Fund, one of the purposes of which *is* to pay intervenor awards; fees are assessed for this  
7 purpose, and, when Section 1861.10(b) is read against this backdrop, the natural reading of  
8 that provision is that the default source of fee awards is the Prop 103 Fund, when advocacy  
9 is other than in response to a rate application.

10 Regardless, *ACIC v. Poizner* does not read on this case, one way or another. There  
11 was no rate application involved in that action. Rather, petitioners challenged regulations  
12 broadening the “proceedings” in which intervenors could claim compensation.  
13 Consequently, the mandate that fees for advocacy in response to a rate application be paid  
14 by the applicant was not triggered. Further, the fees awarded by the Court were not against  
15 intervenors raising important constitutional questions, but against the petitioners who  
16 initiated the case. The Trades address the case here simply because the Court’s ruling,  
17 issued without a record, could be read as inconsistent with the interpretation of the source  
18 of fee awards under § 1861.10(b) since enactment, and it is appropriate to make the effort  
19 to correct the problem.

#### 20 IV. CONCLUSION

21 Consumer Watchdog does not make this motion against the Trades. There is no  
22 inherent aspect to it that would supply the requisite Notice of an attempt to obtain an order  
23 seeking an award of money – a fundamental mandate of Due Process. The Trades are not  
24 “applicants”, thus, there is no statutory warning that may substitute for actual notice by  
25 Consumer Watchdog that something is sought against the Trades. Indeed, the requirement  
26 that any award be paid by the “applicant” shields the Trades from any order that they must  
27 pay an award, because the Trades are not “applicants”.

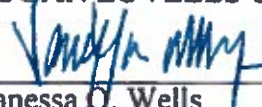
28 Particularly given the chilling effect an award of fees against the Trades would

1 have on the public participation Proposition 103 was intended to promote, this  
2 fundamental defect in this motion, as against the Trades, cannot be overlooked. To the  
3 extent Consumer Watchdog secretly intends this motion to be asserted against the Trades,  
4 it should be denied.

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Dated May 11, 2015

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