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IN THE SUPERIOR COURT OF CALIFORNIA
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. ("THE TRADES"),
Intervenors.

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

**CONSUMER WATCHDOG'S NOTICE OF
MOTION AND MOTION FOR ATTORNEYS'
FEES AND EXPENSES; MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date Action Filed: March 1, 2013

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

1 TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on May 22, 2015, at 10:00 a.m., or as soon thereafter as the matter
3 may be heard, in Department 24 of the above-entitled court, located at the Gordon D. Schaber
4 Sacramento County Courthouse, 720 9th Street, Sacramento, California 95814, before the Honorable
5 Shellyanne W.L. Chang, Judge Presiding, Intervenor Consumer Watchdog will and hereby does move for
6 an order awarding Consumer Watchdog reasonable attorneys' fees and expenses incurred in the trial
7 court in this writ action in the amount of \$418,469.53. This motion is timely under California Rules of
8 Court, rules 3.1702(b)(1), 8.104(a)(1)(B) since the Court entered judgment in favor of Respondents and
9 Intervenor Consumer Watchdog on February 5, 2015, and notice of entry of judgment was served on the
10 parties by Respondent on February 9, 2015.

11 The motion will be and is made on the grounds that Consumer Watchdog is entitled to an award
12 of its reasonable attorneys' fees and expenses under Insurance Code section 1861.10(b) for having made
13 a substantial contribution to the Court's final Order and Judgment; or in the alternative, under Code of
14 Civil Procedure section 1021.5 as a successful party in this litigation, which resulted in the enforcement
15 of important rights affecting the public interest; and that the attorneys' fees and expenses requested are
16 reasonable.

17 Pursuant to Sacramento Superior Court Local Rule 1.06(a), the Court will make a tentative ruling
18 on the merits of this matter by 2:00 p.m., the court day before the hearing. The complete text of the
19 tentative rulings for the department may be downloaded off the court's website. If the party does not
20 have online access, they may call the dedicated phone number for the department as referenced in the
21 local telephone directory between the hours of 2:00 p.m. and 4:00 p.m. on the court day before the
22 hearing and receive the tentative ruling. If you do not call the court and the opposing party by 4:00 p.m.
23 the court day before the hearing, no hearing will be held.

24 This motion is based on this Notice of Motion and Motion, the attached Memorandum of Points
25 and Authorities and the accompanying Declarations of Pamela Pressley and Daniel Zohar, all papers and
26 pleadings herein, and upon such further argument and evidence as may be presented to this court.

MEMORANDUM OF POINTS AND AUTHORITIES

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INTRODUCTION

Intervenor Consumer Watchdog hereby submits this Motion for Attorneys' Fees and Expenses pursuant to Insurance Code section 1861.10, subdivision (b), and California Code of Civil Procedure section 1021.5. Consumer Watchdog meets the requirements for an award of its reasonable attorneys' fees and expenses under each of these two statutes because it made a substantial contribution to the Court's final Order and Judgment and it was a prevailing party in whose favor Judgment was entered. Accordingly, this Motion seeks compensation in the total amount of \$418,469.53 for the substantial contribution made by Consumer Watchdog to the Court's final Order and Judgment, including time spent preparing this Request, through April 7, 2015.

Consumer Watchdog has played an integral role in defending against Mercury's attempt to implement unjustified rates and its attacks on the prior approval regulatory regime ever since Consumer Watchdog challenged Mercury's 2009 homeowners insurance rate hike request almost six years ago. During the underlying rate proceeding, Consumer Watchdog substantially contributed to the development of the factual record, the countering of Mercury's various legal arguments, and the 130-page decision adopted by the Commissioner ordering Mercury to decrease its rates.

For the last two years, Consumer Watchdog defended that well-reasoned decision from assault, making a substantial contribution to this Court's final Order and Judgment in the process. Drawing from its familiarity with the underlying proceeding and its uniquely extensive knowledge of Proposition 103, Consumer Watchdog countered every single claim in dispute through both briefing and oral advocacy – successfully countering the wide array of legal arguments advanced by Mercury and the insurance industry trade groups ("the Trades"). Consumer Watchdog's advocacy resulted in a final Order and Judgment substantially adopting its positions and upholding the ordered rate decrease and the Commissioner's interpretation and application of the prior approval regulations.

In light of Consumer Watchdog's substantial contribution to the Court's final Order and Judgment and its success on each of Mercury's and the Trades' claims, Consumer Watchdog should be commensurately compensated for its investment of attorney time and resources in accordance with the evidence supporting this Motion. For the reasons discussed more fully below and as supported by the accompanying declarations of Pamela Pressley and Daniel Zohar, the total compensation that Consumer

1 Watchdog requests is fair and reasonable given the work required and the result achieved.

2 **BACKGROUND AND PROCEDURAL HISTORY**

3 On May 15, 2009, Mercury filed a rate application with the Department of Insurance
4 (“Department”) seeking to increase its overall homeowners insurance rates by approximately 3.9%. (AR
5 at 2049.) Consumer Watchdog petitioned for a hearing on this requested increase and intervened in the
6 rate proceeding. (*Id.*, fn. 15.) On May 13, 2011, the Commissioner, in response to Consumer
7 Watchdog’s petition, noticed a hearing. (*Id.* at 2049.) During the course of the administrative
8 proceeding, Mercury was afforded the opportunity to update its data and took the position that it was
9 entitled to an overall rate increase of 8.8% and that anything less would be confiscatory. (*Id.* at 2048–
10 50.) After a twelve-day hearing, an administrative law judge (“ALJ”) issued a 130-page proposed
11 decision that “conclude[d] that Mercury’s proposed rate increase of 8.8% [wa]s excessive” and ordered
12 Mercury to *decrease* its overall homeowners insurance rates by approximately 5.4%. (*Id.* at 2048.) The
13 Commissioner adopted the ALJ’s Proposed Decision on February 11, 2013 (“2013 Decision”). (*Id.* at
14 2037–2178.) The Commissioner awarded attorneys’ fees to Consumer Watchdog for its substantial
15 contribution to his 2013 Decision. (See Pressley Decl. ¶ 29.)

16 On March 1, 2013, Mercury filed its Writ Petition in this Court, seeking to vacate the
17 Commissioner’s 2013 Decision. (Notice of Entry of Order and Judgment, Ruling on Submitted Matter
18 and Order: Petition for Writ of Mandate and Complaint for Declaratory Relief and Injunctive Relief
19 (“June 2014 Ruling”), June 11, 2014, p. 3.) Shortly thereafter, on March 21, 2013, Consumer Watchdog
20 requested and was granted leave to intervene. (*Ibid.*)

21 The Trades also intervened and challenged the Commissioner’s 2013 Decision in a separate
22 complaint. (June 2014 Ruling, p. 3.)

23 On March 29, 2013, Mercury sought to stay the Commissioner’s 2013 Decision during the
24 pendency of this action. (See Minute Order, May 7, 2013, p. 1.) After Consumer Watchdog submitted a
25 brief opposing this stay request, and participated in oral argument on May 3, 2013, the Court denied
26 Mercury’s motion.¹ (*Ibid.*)

27 On March 28, 2014, the Insurance Commissioner moved the Court for a judgment on the
28

¹ The Department and Mercury agreed to a May 11, 2013 implementation date of the 5.4% rate decrease.

1 pleadings, arguing that Mercury’s challenge was mooted by approval of a rate increase in a separate
2 proceeding on Mercury’s 2013 homeowners insurance rate application. (See June 2014 Ruling, p. 3.)
3 Consumer Watchdog, which had participated in that proceeding, filed a brief in support of the
4 Commissioner’s motion. (*Ibid.*) This Court ruled that Mercury’s Writ Petition was not moot. (*Ibid.*)

5 On February 11, 2014, both Mercury and the Trades submitted their opening briefs on the merits.
6 (See June 2014 Ruling, pp. 1–2.) On April 7, 2014, Consumer Watchdog submitted a comprehensive
7 forty-page opposition brief addressing each of Mercury’s and the Trades’ claims. (See Consumer
8 Watchdog’s Opposition to Mercury’s and the Trade’s Opening Briefs (“CWD Opp. Br.”), Apr. 7, 2014.)
9 With respect to the confiscation variance under California Code of Regulations, title 10 (“10 CCR”),
10 section 2644.27, Consumer Watchdog argued that the Commissioner applied the correct legal standard by
11 balancing insurers’ interests against consumers’ interests and properly determined the ordered rate
12 decrease was not confiscatory (CWD Opp. Br., pp. 9–19, 24–25), that Mercury confused opportunity to
13 earn a fair return with entitlement to such a return (*id.* at 13–15), that Mercury sought to circumvent the
14 relitigation bar in order to introduce evidence of its preferred rate of return (*id.* at 25–27), that Mercury
15 otherwise failed to produce sufficient evidence showing entitlement to a confiscation variance (*id.* at 20–
16 24), and that simply holding a hearing did not violate Mercury’s due process right (*id.* at 27–28). On the
17 issue of Mercury’s excluded “institutional advertising” expenses, Consumer Watchdog argued that
18 advertising meeting either of two regulatory criteria (see 10 CCR § 2644.10(f)) qualifies as “institutional
19 advertising” (CWD Opp. Br., pp. 30–31), that Mercury’s advertising met each criterion (*id.* at 31–38),
20 that Mercury was therefore barred from passing such institutional advertising costs on to consumers (*id.*
21 at 28–29), and that this interpretation and application of the regulation did not violate the First
22 Amendment (*id.* at 38–40).

23 At the merits hearing on May 2, 2014, Consumer Watchdog counsel expounded on its briefing
24 and took an active role in responding to each of Mercury’s and the Trades’ arguments. Consumer
25 Watchdog discussed the proper balancing test for a confiscatory taking and applied the available evidence
26 to that test, pointed out the problems with Mercury’s analysis of the confiscation variance, noted that the
27 Trades improperly raised a due process claim that was not included in the complaint, and discussed the
28 non-applicability of the First Amendment to Mercury’s excluded advertising costs. (Hearing Tr., May 2,

2014, pp. 104–108, 122–123, 128.)

On June 11, 2014, this Court issued an order dismissing all of Mercury’s causes of action in its Writ Petition, and dismissing all but two of the Trades’ related writ and declaratory relief causes of action facially challenging 10 CCR § 2644.10(f), on which it initially declined to rule. (See June 2014 Ruling, pp. 19–20.) The Court’s order substantially tracked Consumer Watchdog’s arguments regarding the confiscation variance, including its determination that the Commissioner applied the correct legal standard when he concluded that the rate was not confiscatory (*id.* at 11–14), that Mercury’s and the Trades’ interpretations regarding the standard for confiscation was incorrect, (*id.* at 11–15), that Mercury’s attempt to use its own expense data was prohibited by the relitigation bar (*id.* at 14–15), and that Mercury failed to demonstrate evidence of confiscation (*id.* at 10–11). Furthermore, on the issue of institutional advertising expenses, the Court’s decision continued to follow many of the points in Consumer Watchdog’s briefing, including its holding that Mercury’s advertising only needed to meet one of two regulatory criteria in order to qualify as institutional advertising (*id.* at 16–17; see also 10 CCR § 2644.10(f)), that Mercury’s advertising was not aimed at obtaining business for a specific insurer (June 2014 Ruling, pp. 17–19), and that the associated costs could not be passed on to consumers (*ibid.*).

On November 20, 2014, the Trades sought to amend their complaint and introduce new claims facially challenging the requirement in 10 CCR § 2644.27(f)(9) of an administrative hearing before a neutral arbiter as too burdensome and violative of insurers’ due process rights. (See Notice of Entry of Order and Judgment, Ruling on Submitted Matter: Trades’ Motion for Leave to Amend Petition; Ruling on Merits of Trades’ Remaining Claims (“January 2015 Ruling”), Jan. 16, 2015.) On December 18, 2014, Consumer Watchdog filed an eight-page opposition to this motion. (See CWD Opp. to Trades’ Motion, Dec. 18, 2014.) Consumer Watchdog’s brief challenged the Trades’ untimely motion for leave to amend on the grounds that the motion was brought six months after a hearing on the merits (*id.* at 4–6), the motion improperly sought to introduce causes of action wholly different from the ones alleged in the complaint (*id.* at 7–8), and the motion failed to allege any facts in support of the Trades’ new legal theory (*id.* at 6–7).

On January 9, 2015, the Court heard arguments on the merits of the Trades’ remaining claims. Consumer Watchdog directly addressed the Trades’ First Amendment claims by arguing the institutional

1 advertising regulation does not prevent Mercury from choosing whether or not to advertise and does not
2 impose a financial penalty on insurers. (Hearing Tr., Jan. 9, 2015, pp. 16–18, 19–20.)

3 On January 16, 2015, the Court issued its ruling on the Trades’ motion and remaining claims
4 facially challenging 10 CCR 2644.10(f). The Court disposed of the Trades’ remaining claims, ruling – in
5 accordance with Consumer Watchdog’s oral argument and its earlier opposition brief – that 10 CCR
6 2644.10(f) did not violate the First Amendment. (January 2015 Ruling, pp. 4–6; accord CWD
7 Opposition to Opening Brief, pp. 38–40.) The Court also ruled that the Trades’ proposed amended
8 complaint improperly sought to introduce wholly different claims. (January 2015 Ruling, p. 3.)
9 Accordingly, the Court concluded “Respondent [Insurance Commissioner] and Consumer Watchdog
10 have the better argument” (*ibid.*) and denied the Trades’ Motion for Leave to Amend, and dismissed the
11 Trades’ remaining claims.

12 On February 5, 2015, the Court entered a final Order denying Mercury’s and the Trades’ writ
13 claims and dismissing their declaratory relief claims and entering judgment in favor of the Insurance
14 Commissioner and Intervenor Consumer Watchdog and against Mercury and the Trades. (Notice of
15 Entry of Order and Judgment, Feb. 9, 2015, p. 2 and Exhs. A and B.) The Notice of Entry of Order and
16 Judgment was served on the parties by Respondent on February 9, 2015.

17 ARGUMENT

18 **I. CONSUMER WATCHDOG IS ENTITLED TO ITS REASONABLE ATTORNEYS’ FEES** 19 **AND EXPENSES UNDER INSURANCE CODE SECTION 1861.10 FOR ITS SUBSTANTIAL** 20 **CONTRIBUTION TO THE COURT’S ORDERS DISMISSING MERCURY’S AND THE** 21 **TRADES’ CLAIMS.**

22 Proposition 103 provides for reasonable attorneys’ fees and expenses for consumer advocates who
23 make a substantial contribution to a final decision of a court. Insurance Code section 1861.10(b) states
24 that “a court shall award reasonable advocacy and witness fees and expenses to any person who
25 demonstrates that (1) the person represents the interests of consumers, and, (2) that he or she has made a
26 substantial contribution to the adoption of any order . . . or decision by . . . a court.” (Ins. Code §
27 1861.10(b).) Section 1861.10(b) allows insurance consumers to have their interests represented on an
28 equal basis with the interests of insurers and to enforce Proposition 103. Moreover, section 1861.10(b)
must be applied in a manner “which best facilitates compensation.” (*Economic Empowerment*
Foundation v. Quackenbush (1997) 57 Cal.App.4th 677, 686.) When the statutory criteria are met, an

award of reasonable attorneys' fees and expenses is mandatory.

Consumer Watchdog has met both requirements of section 1861.10(b). First, Consumer Watchdog "represents the interests of consumers" in upholding the Commissioner's 2013 Decision requiring Mercury to lower its homeowners rates, and its sole interest in this litigation was to ensure that the public's interest in fair rates was protected and advanced through the enforcement of Proposition 103 and the prior approval regulations. (See Pressley Decl., ¶¶ 2, 4; Consumer Watchdog's Complaint in Intervention, March 21, 2013, pp. 2–8.)

Second, Consumer Watchdog contributed substantially to the Court's final Order and Judgment entered against Mercury and the Trades in favor of the Commissioner and Consumer Watchdog. Consumer Watchdog initiated the administrative rate proceeding underlying this litigation and took a lead role in presenting evidence and arguments throughout those proceedings.² At the administrative level, Consumer Watchdog conducted discovery, briefed every substantive and procedural motion, presented expert testimony, cross-examined Mercury witness, and submitted comprehensive post-hearing briefs. Consumer Watchdog counsel's intimate familiarity with the underlying administrative proceedings and expertise in the legal issues raised by Mercury and the Trades, in turn, enabled Consumer Watchdog to provide this Court with informed and useful factual and legal arguments in its briefings and oral argument.

Consumer Watchdog's written and oral advocacy substantially contributed to the Court's Order and Judgment denying Mercury's Writ Petition and the Trades' Complaint in Intervention. Consumer Watchdog briefed every motion before this Court, as more fully discussed in Section III.A, *infra*. Consumer Watchdog submitted a thorough forty-page brief on the merits, which discussed and refuted each of Mercury's and the Trades' arguments on thirteen causes of action. (See Writ Petition [alleging three causes of action]; Verified Complaint in Intervention, June 21, 2013 [alleging ten causes of action].) Consumer Watchdog appeared and took an active role in oral argument at four hearings before the Court, including the two merits hearings held on May 2, 2014 and January 9, 2015 at which it

² In addition to the proceedings underlying this action, Consumer Watchdog has initiated and intervened in more than 75 proceedings before the Department of Insurance related to the implementation and enforcement of Proposition 103. Consumer Watchdog's staff and consultants include some of the nation's foremost consumer advocates and experts on insurance ratemaking matters. (Pressley Decl., ¶¶ 9-26.)

1 responded to the oral argument of Mercury’s and the Trades’ counsel. (Minute Order, May 3, 2013, p. 1
2 [hearing regarding Mercury’s request to stay the Commissioner’s Order and the Trades’ intervention];
3 Minute Order, March 28, 2014, p. 1 [hearing regarding the Commissioner’s motion for judgment on the
4 pleading and motion to strike the Trades’ complaint in intervention]; Minute Order, May 2, 2014, p. 1
5 [hearing regarding the merits of Mercury’s Writ Petition]; Judgment, Feb. 5, 2015, p. 2 [discussing the
6 hearing regarding the Trades’ motion for leave to amend and the merits of the Trades’ remaining
7 claims].)

8 Ultimately, Consumer Watchdog prevailed completely against all of Mercury’s and the Trades’
9 causes of action, and against each of their legal arguments. As discussed in the Background and
10 Procedural History section *supra*, this Court’s rulings on the merits substantially tracked and adopted
11 Consumer Watchdog’s arguments with respect to the legal standard for confiscation, the legal standard
12 for institutional advertising costs, the applicability of the relitigation bar to Mercury’s attempt to
13 introduce its own expense data, the insufficiency of Mercury’s evidence of confiscation, the sufficiency
14 of the evidence establishing that Mercury’s advertising costs were in fact institutional advertising costs
15 that could not be passed on to consumers, the Trades’ First Amendment facial challenge to the regulation
16 excluding these institutional advertising costs, and the Trades’ attempt to amend their complaint long
17 after a merits hearing had occurred. (Compare CWD Opp. Br., pp. 9–19, 24–25, with June 2014 Ruling,
18 pp. 11–14; CWD Opp. Br., pp. 13–15, with June 2014 Ruling, pp. 11–15; CWD Opp. Br., pp. 25–27,
19 with June 2014 Ruling, pp. 14–15; CWD Opp. Br., pp. 20–24, with June 2014 Ruling, pp. 10–11; CWD
20 Opp. Br., pp. 30–31, with June 2014 Ruling, pp. 16–17; CWD Opp. Br., pp. 31–38, with June 2014
21 Ruling, pp. 17–19; CWD Opposition to Opening Brief, pp. 28–29, with June 2014 Ruling, pp. 17–19;
22 CWD Opp. Trades’ Motion, pp. 7–8, with January 2015 Ruling, p. 3; CWD Opp. Br., pp. 38–40, with
23 January 2015 Ruling, pp. 4–6.)

24 In sum, Consumer Watchdog substantially contributed to the Court’s final Order adopting its
25 positions and Judgment entered in its favor as demonstrated by the work performed by its counsel as
26 described in the Background and Procedural History section, *supra*, and Section III.A., *infra*, the record
27 in this case, and the supporting Pressley and Zohar Declarations and time records attached as exhibits
28 thereto. As such, Consumer Watchdog is entitled to its reasonable attorneys fees and expenses under

1 section 1861.10(b).

2 **II. CONSUMER WATCHDOG IS ALSO ENTITLED TO AN AWARD OF ATTORNEYS' FEES**
3 **AND EXPENSES UNDER CODE OF CIVIL PROCEDURE SECTION 1021.5 AS A**
4 **PREVAILING PARTY IN THIS ACTION.**

5 In addition to meeting the requirements of Insurance Code section 1861.10(b), Consumer
6 Watchdog is entitled to an award of its attorneys' fees and expenses pursuant to Code of Civil Procedure
7 section 1021.5. Fee shifting statutes that encourage private parties to enforce public rights are
8 cumulative, not exclusive. Where more than one provision applies, fees will be awarded under each.³
9 Section 1021.5 provides in pertinent part:

10 Upon motion, a court may award attorneys' fees to a successful party against one or more
11 opposing parties in any action which has resulted in the enforcement of an important right
12 affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary,
13 has been conferred on the general public or a large class of persons, (b) the necessity and
14 financial burden of private enforcement, . . . are such as to make the award appropriate, and
15 (c) such fees should not in the interest of justice be paid out of the recovery, if any.⁴

16 The fundamental objective of statutes such as section 1021.5 is "to encourage suits enforcing
17 important public policies by providing substantial attorney fees to successful litigants in such cases."
18 (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1289; e.g., *Woodland Hills Residents Ass'n, Inc. v. City*
19 *Council (Consolidated Resources, Inc.)* (1979) 23 Cal.3d 917, 933.) This objective applies equally when
20 a defendant or defendant-intervenor, such as Consumer Watchdog here, successfully defends and
21 advances critical rights of consumers and the public by ensuring faithful enforcement of Proposition
22 103's rate regulation statutes and regulations. (See, e.g., *City of Santa Monica v. Stewart* (2005) 126
23 Cal.App.4th 43, 87 [an intervenor "who satisfies the criteria for intervention and who contributes to the
24 success of public interest litigation should be entitled to an award of attorneys' fees on the same terms as
25 any other party"]; *Hull v. Rossi* (1993) 13 Cal.App.4th 1763, 1766–68 [successful defendants as well as
26 successful plaintiffs may be entitled to attorney fees under section 1021.5]; *Crawford v. Board of Educ.*
27 (1988) 200 Cal.App.3d 1397, 1407, 1410 [defendant-Intervenor who "contribute in a significant way to
28 the vindication of an important constitutional or statutory right" may be entitled to fees under section

³ See *Schmid v. Lovette* (1984) 154 Cal.App.3d 466 [fees awarded under both § 1021.5 and 42 U.S.C. § 1988]; *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448; *Green v. Obledo* (1984) 161 Cal.App.3d 678, 682 [fees awarded under § 1021.5, Welf. & Inst. Code § 10962 and 42 U.S.C. § 1988], cert denied, 474 U.S. 819.

⁴ There was no recovery in this action, and accordingly the last factor is not present here.

1021.5].)

A. Consumer Watchdog Was a Successful Party in This Action.

Section 1021.5 requires that the party seeking a fee award be “successful.” “It is settled, however, that a party need not prevail on every claim presented in an action in order to be considered a successful party within the meaning of the section.” (E.g., *Wallace v. Consumers Cooperative of Berkeley, Inc.* (1985) 170 Cal.App.3d 836, 846.)

Here, however, Consumer Watchdog prevailed completely against each of Mercury’s and the Trades’ causes of action and legal arguments. (See Section I, *supra* [discussing this Court’s ruling in favor of the Commissioner and Consumer Watchdog and Consumer Watchdog’s substantial contribution to that ruling].) The Court’s Judgment, entered on February 5, 2015, entered judgment in favor of Consumer Watchdog and against Mercury and the Trades. Consumer Watchdog is thus a “successful” party within the meaning of Code of Civil Procedure section 1021.5 and is entitled to an award of attorneys’ fees and expenses. (See, e.g., *Wallace, supra*, 170 Cal.App.3d at 844-846.)

B. The Litigation Vindicated Important Rights Affecting the Public Interest.

Section 1021.5 also requires that the litigation result in the “enforcement of an important right affecting the public interest.” (Code Civ. Proc. § 1021.5.) The rights may be statutory or constitutional, and they are not confined to any particular subject or field. “In litigation concerning the application of statutorily based rights in these various fields, past decisions suggest that in determining the ‘importance’ of the particular ‘vindicated’ right, courts should generally realistically assess the significance of that right in terms of its relationship to the achievement of fundamental legislative goals.” (*Woodland Hills Residents Ass’n, supra*, 23 Cal.3d at 935.)

This litigation and Consumer Watchdog’s representation vindicated one of the key purposes underlying Proposition 103 enacted by the People of California in 1988 – to ensure “fair” insurance rates through the public oversight and enforcement of Insurance Code section 1861.05(a)’s prohibition against “excessive” rates and the prior approval rate regulations that govern all automobile and homeowners insurance policies in the State of California. Indeed, the voters exercised their constitutional power of initiative statute to enact Proposition 103 and Insurance Code section 1861.05 (Ballot Pamp., Gen. Elec. (Nov. 8, 1988) text of Prop. 103, § 1, p. 99) with the intent of discarding the previous “open competition” system and adopting the current system of prior approval. (*20th Century Ins. Co. v. Garamendi* (1994) 8

1 Cal.4th 216, 240.)

2 As the courts have recognized, “[t]he apparent purpose of the prior-approval provision embodied
3 in section 1861.01, subdivision (c), and 1861.05 is to prevent future abuses in setting insurance rates, by
4 requiring the commissioner to determine whether a proposed rate change is fair and reasonable before it
5 is implemented.” (*Amwest Sur. Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1263, emphasis omitted.) The
6 Commissioner’s 2013 Decision was an exercise of this authority. In Mercury’s petition to this Court,
7 however, Mercury essentially challenged the Commissioner’s assessment of a “fair and reasonable” rate.
8 The writ challenges brought by Mercury and the Trades against the Commissioner sought to overturn the
9 Commissioner’s interpretation and application of the regulations governing section 1861.05’s
10 “excessive” standard, and this litigation therefore vindicated homeowners’ rights to fair insurance rates
11 by upholding the Commissioner’s 2013 Decision and interpretation of the rate regulations implementing
12 section 1861.05(a).

13 **C. The Litigation Conferred a Significant Benefit on a Large Class of Persons.**

14 As the statutes and case law make clear, the benefit a particular lawsuit confers on a large class of
15 persons may be “significant” within the meaning of section 1021.5 whether the benefit is pecuniary or
16 non-pecuniary, conceptual or concrete, direct or indirect. (E.g., Code Civ. Proc. § 1021.5(a); *Woodland*
17 *Hills Residents Ass’n, supra*, 23 Cal.3d at 939 [benefit need not be tangible, but may flow from “the
18 effectuation of a fundamental . . . statutory policy”].) Whether a significant benefit has been conferred on
19 a large class of persons is likewise determined from “a realistic assessment, in light of all the pertinent
20 circumstances, of the gains which have resulted in a particular case.” (*Id.* at 939.)

21 Mercury’s and the Trades’ claims attacked one of the core provisions of Proposition 103.
22 Consumer Watchdog’s successful defense ensured that the prior approval regulations defining section
23 1861.05’s excessive standard would not be diluted by a relaxed confiscatory taking standard or perverted
24 so that consumers must pay insurance companies’ institutional advertising expenses. This successful
25 defense of Proposition 103’s prior approval statutes and regulations benefits not only Mercury’s 290,000
26 homeowners’ policyholders who saved over \$16 million in premiums, but also California’s 24 million
27 drivers and approximately 21 million homeowners who must purchase insurance.

D. The Necessity and Financial Burden of Private Enforcement by Consumer Watchdog Make the Award Appropriate.

Consumer Watchdog was a participant in the administrative rate proceeding that resulted in the Commissioner's rate order challenged by Mercury and the Trades. (AR at fn. 15.) Consumer Watchdog actively participates in rate proceedings and its counsel has extensive knowledge regarding the substantive and procedural provisions of the prior approval statutes and regulations. (Pressley Decl., ¶¶ 9-26.) As the Court's grant of intervention recognized, Consumer Watchdog's participation to enforce the prior approval statutes and regulations and defend against the insurance industry's actions for declaratory and injunctive relief was necessary.⁵

Likewise, the financial burden of this litigation stands far out of proportion to any individual stake in the matter. Consumer Watchdog represents California's consumers, and undertook the financial risk of this action, foregoing other important public-interest work, because of the threat that Mercury's and the Trades' actions posed to consumers. Where, as here, Consumer Watchdog received no monetary recovery and its primary motivation was to vindicate important statutory rights such as the enforcement of Proposition 103's prior approval provisions, the financial burden requirement is met. (E.g., *Planned Parenthood v. Aakhus* (1993) 14 Cal.App.4th 162, 173.)⁶

⁵ Under Code of Civil Procedure section 1021.5, the necessity of private enforcement does not turn on whether a governmental entity has also filed suit or defends the suit. (See, e.g., *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 544-546 [rejecting argument that fee movant's enforcement was not necessary and affirming the trial court's award of fees notwithstanding involvement by the county deputy district attorney]; *Crawford v. Board of Education, supra*, 200 Cal.App.3d 1397, 1407 [fee awards are proper, as here, to "parties who, at some point during the course of public interest litigation, intervene and contribute in a significant way to the vindication of an important constitutional or statutory right"]; *Committee to Defend Reproductive Rights v. A Free Pregnancy Center* (1991) 229 Cal.App.3d 633 [awarding fees to plaintiffs under Code Civ. Proc. § 1021.5 where district attorney filed similar but not identical action which was consolidated]; cf. *County of Humboldt v. Swoap* (1975) 51 Cal.App.3d 442 [awarding fees to intervenors under Welf. & Inst. Code § 10962 where intervenor recipients of aid to families with dependent children joined with state agency as defendants against plaintiff county's petition to reduce benefits].)

⁶ To the extent that any pecuniary interest might be present, the relevant question is whether "the cost of the legal victory transcends [his or her] personal interest in the subject of the suit." (*Planned Parenthood v. Aakhus, supra*, 14 Cal.App.4th 162, 173.) Clearly that requirement is met in this case, where Consumer Watchdog's counsel's lodestar for professional services far exceeds any pecuniary benefit to Consumer Watchdog since Consumer Watchdog received no monetary recovery in this litigation whatsoever. (See *ibid.*)

1 For the reasons set forth above, Consumer Watchdog satisfies each of the criteria for entitlement to
2 an award of attorneys' fees and expenses under Code of Civil Procedure section 1021.5, and thus should
3 be awarded its reasonable attorneys' fees and expenses in this action.

4 **III. THE AMOUNT REQUESTED FOR ATTORNEYS' FEES AND EXPENSES IS**
5 **REASONABLE AND PROPER UNDER THE SETTLED STANDARDS FOR COMPUTING**
6 **FEE AWARDS.**

7 Regardless of whether attorneys' fees are awarded under Insurance Code section 1861.10(b) or
8 Code of Civil Procedure section 1021.5, under California law, once the Court determines that the
9 prevailing party is entitled to attorneys' fees, it must compensate it for all time reasonably expended upon
10 achieving the desired relief. (E.g., *Serrano v. Priest* (1977) 20 Cal.3d 25, 48; *Serrano v. Unruh* (1982)
11 32 Cal.3d 621, 624, 633, 639; see also *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1131-1132
12 [summarizing California law on lodestars and multipliers].) Insurance Code section 1861.10(b) likewise
13 requires an award of all "reasonable advocacy and witness fees" once the requirements of the statute are
14 met, including making a substantial contribution. (Ins. Code § 1861.10(b).)

15 To accomplish this purpose, California courts employ the "lodestar" and "multiplier" method to
16 determine fee awards. The court first computes the "lodestar" – the number of hours reasonably
17 expended by each attorney, multiplied by the prevailing market rate for the professional services of each.
18 For public-interest attorneys, the reasonable hourly rates are the prevailing market rates of private
19 attorneys of comparable skill, qualifications, and experience. (E.g., *Serrano v. Unruh, supra*, 32 Cal.3d
20 at 643; *San Bernardino Valley Audubon Soc'y, Inc. v. County of San Bernardino (Gold Mountain*
21 *Memorial Park, Inc.)* (1984) 155 Cal.App.3d 738; *Margolin v. Regional Planning Comm'n* (1982) 134
22 Cal.App.3d 999, 1004.) The court then multiplies the "lodestar" by a "multiplier" to account for various
23 additional factors relating to the litigation, such as the degree of success and the contingent risk of non-
24 recovery. The "lodestar" times the "multiplier" yields the total fee award. (E.g., *Serrano v. Priest,*
25 *supra*, 20 Cal.3d at 48-49; *Serrano v. Unruh, supra*, 32 Cal.3d at p. 643; *Ketchum v. Moses, supra*, 24
26 Cal.4th at 1131-32.) Even though it was 100% successful in prevailing against Mercury and the Trades,
27 Consumer Watchdog is not seeking a multiplier in this case.

28 For the successful results summarized above, Consumer Watchdog incurred and requests

\$418,469.53 in attorneys' fees and expenses (as of April 7, 2015)⁷ based upon the contemporaneous time records and declarations establishing counsel's prevailing market rates and its out-of-pocket expenses incurred. (See Exhibit A attached [Summary of Fees and Expenses].)

A. The Number of Hours Incurred is Reasonable.

The hours summarized in Exhibit A include time spent on the following tasks:

- Reviewing and analyzing Mercury's lawsuit and supporting exhibits, filed March 1, 2013;
- Consulting throughout with the Commissioner's counsel about the underlying rate proceeding and the complex legal issues presented therein;
- Preparing an ex parte application to intervene, which was granted over Mercury's objections;
- Preparing a detailed complaint in intervention summarizing the background of Proposition 103 and the prior approval rate regulation regime (Ins. Code § 1861.05; 10 CCR § 2644.27), the procedural history of the underlying, four-year-long rate proceeding, and the infirmities contained within Mercury's Writ Petition;
- Researching and preparing a response to the legal arguments posed by the Trades in their Motion to Intervene, filed May 24, 2013;
- Researching and preparing a response in support of the Commissioner's Motion for Judgment on the Pleadings, filed March 17, 2014;
- Researching and preparing Consumer Watchdog's 44-page opposition brief addressing the merits of Mercury's Writ Petition and the Trades' Complaint;
- Preparing for and successfully arguing against the merits of the petition for writ of mandate at the Court's hearing on May 2, 2014;
- Researching and preparing Consumer Watchdog's opposition to the Trades motion to amend their complaint, filed on December 18, 2014;
- Preparing for and successfully arguing against the remainder of the Trades' arguments at the Court's hearing on January 9, 2015; and
- Researching and preparing this motion for an award of attorneys' fees and expenses.

(Pressley Decl., ¶ 8.)

⁷ Consumer Watchdog will supplement these amounts as necessary in its reply papers to reflect additional hours which may be incurred in support of its fee motion. (Pressley Decl., ¶¶ 6, 27-28.)

1 The hours are fully documented in detailed time records attached to the accompanying
2 Declarations of Pamela Pressley and Daniel Zohar. (See Pressley Decl., Exhs. 1a-1d; Zohar Decl., Exh.
3 1.) Under the applicable standard, counsel are entitled to be compensated “for all time reasonably
4 expended in pursuit of the ultimate result achieved, in the same manner that an attorney traditionally is
5 compensated by a fee-paying client for all time reasonably expended on a matter.” (*Serrano v. Priest*,
6 *supra*, 20 Cal. 3d at 48.)

7 **B. The Hourly Rates Requested Are Reasonable and Prevailing Market Rates for Consumer**
8 **Watchdog’s Counsel.**

9 For public interest attorneys, the reasonable hourly rates are the prevailing market rates of private
10 attorneys of comparable skill, qualifications, and experience. (E.g., *Serrano v. Priest*, *supra*, 20 Cal.3d at
11 48; *Serrano v. Unruh*, *supra*, 32 Cal.3d at 643.) The Commissioner’s intervenor regulations similarly
12 define “market rate” for purposes of intervenor compensation awards as “the prevailing rate for
13 comparable services in the private sector in the Los Angeles and San Francisco Bay Areas.” (10 CCR §
14 2661.1(c).)

15 The declarations accompanying this motion establish the market rates for Consumer Watchdog’s
16 counsel in this matter. Uniformly, the declarants establish that the 2015 prevailing market rates for the
17 professional services of Consumer Watchdog’s attorneys are: \$675 per hour for Harvey Rosenfield (36
18 years of experience), \$575 per hour for Pamela Pressley (19 years of experience), \$350 per hour for
19 Laura Antonini (4 years of experience), and \$350 per hour for Cathy Lee (4 years of experience) and for
20 co-counsel Zohar Law Firm’s attorneys: \$600 for Daniel Y. Zohar and \$475 per hour for Todd M.
21 Foreman – provided that full and regular payment were guaranteed by contract, not contingent upon
22 success or results. (Pearl Decl., ¶¶ 8-13; accord Pressley Decl., ¶¶ 3-8; Zohar Decl., ¶ 3-7.)⁸

23 Independent expert Richard Pearl’s⁹ declaration discusses the prevailing market rates for attorneys
24 of comparable skill, qualifications, and experience. (Pearl Decl., ¶¶ 8-11.) The 2015 hourly rates of

25 ⁸ Hourly rates awarded in other litigation to the same attorney are also relevant to determining the
26 prevailing market rate for counsel’s services. (E.g., *Margolin v. Regional Planning Comm’n*, *supra*, 134
27 Cal.App.3d at 1005.) The current hourly rates sought in this motion are consistent with hourly rates
28 awarded counsel in other proceedings. (Pressley Decl., ¶¶ 12, 17, 21, 26.)

⁹ Mr. Pearl is the author of the Continuing Education of the Bar’s treatise on attorneys’ fees in California
and has testified as an independent expert witness on behalf of both fee claimants and those opposing fee
applications. (Pearl Decl., ¶¶ 2-7.)

Consumer Watchdog and Zohar Law Firm counsel are well within the range of the market rates that Mr. Pearl's declaration details for attorneys of comparable years of experience. (See Pearl Decl., ¶¶ 8-9, 11-12.) Moreover, payment was not guaranteed, compensation was instead entirely contingent, and thus these hourly rates instead fall well *below* prevailing market rates for contingency work. (See Pearl Decl., ¶¶ 12-14; see also *Ketchum v. Moses*, *supra*, 24 Cal.4th at 1132-1133 [multiplier for contingent risk brings financial incentives for attorneys enforcing important rights into line with regular payments made on fee-for-services basis].) As Mr. Pearl attests, the hourly rates set forth above are those charged where full payment is expected promptly upon the rendition of the billing and without consideration of factors other than hours and rates. If any substantial part of the payment were to be deferred for any substantial period of time, for example, the fee arrangement would be adjusted accordingly to compensate the attorneys for those factors. (Pearl Decl., ¶ 14; accord *Ketchum v. Moses*, *supra*, 24 Cal.4th at 1132-1234.)

C. The Attorneys' Expenses Are Reasonable.

Consumer Watchdog incurred documented litigation expenses in the amount of \$15,858.20 as of April 7, 2015, to prosecute this matter. (See Exh. A attached [Summary of Fees and Expenses]; Pressley Decl., ¶ 27-28.) This total covers court filing fees, attorney filing service fees, travel to court hearings, printing and reproduction, and postage and overnight mail. (Pressley Decl., ¶ 27-28.) These expenses were reasonably necessary to the conduct of this litigation. (See *ibid.*) It is the prevailing market practice to bill clients for such out-of-pocket expenses incurred in connection with handling litigation (Pressley Decl., ¶ 28), and such costs are routinely awarded pursuant to Code of Civil Procedure section 1032 and Insurance Code section 1861.10(b). (See Code Civ. Proc. § 1033.5 [items allowable as costs under Code Civ. Pro. § 1032 include filing fees and "[a]ny other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal"]; Ins. Code § 1861.10(b) ["a court shall award reasonable advocacy *and witness fees and expenses*..."].)¹⁰

CONCLUSION

WHEREFORE, Intervenor Consumer Watchdog respectfully requests, for the reasons stated above, that the Court award it \$418,469.53 in reasonable attorneys' fees and expenses (as of April 7, 2015, to be supplemented with the additional attorneys' fees and expenses incurred on a reply

¹⁰ See also, Cal. Code Regs., tit. 10, § 2662.1(d) (defining "Other Expenses" to include, but not be limited to "travel costs, transcript charges, postage charges, overnight delivery charges, telephone charge and copying expenses").

1 memorandum and the court hearing), plus interest from the date of the Court's decision.

2 Dated: April 7, 2015

Respectfully Submitted,

3
4 Harvey Rosenfield
5 Pamela Pressley
6 Laura Antonini
7 CONSUMER WATCHDOG

8 Daniel Y. Zohar
9 ZOHAR LAW FIRM, P.C.

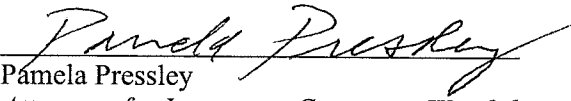
10 
11 Pamela Pressley
12 *Attorneys for Intervenor Consumer Watchdog*

EXHIBIT A

EXHIBIT A
SUMMARY OF FEES AND EXPENSES

<u>ITEMS</u>	<u>COST</u>
<u>Consumer Watchdog Fees</u> (Detailed in Billing Records attached as Exhibit 1a-d to Pressley Decl.)	
<u>Attorneys</u>	
Harvey Rosenfield @ \$675 per hour, 105 hours	\$70,875.00
Pamela Pressley @ \$575 per hour, 296.1 hours	\$170,257.50
Laura Antonini @ \$350 per hour, 284.8 hours.....	\$99,680.00
Cathy Lee @ \$350 per hour, 147.5 hour	\$51,625.00
Consumer Watchdog Fees	\$392,437.50
<u>Consumer Watchdog Expenses</u>	
Postage and delivery	\$781.71
Printing / Reproduction	\$21.29
Attorney Services / CourtCall.....	\$2,138.30
Travel.....	\$2,191.90
Expert Witness Fees – AIS Risk Consultants, Inc. (Detailed in Exhibit 2 to Pressley Decl.)	
Allan I. Schwartz @ \$650 per hour, 16.5 hours	\$10,725.00
Consumer Watchdog Expenses	\$15,858.20
<u>Zohar Law Firm Fees</u>	
Daniel Y. Zohar @ \$600 per hour, 10.7 hours	\$6,420.00
Todd Foreman @ \$475 per hour, 7.8 hours.....	\$3,705.00

Zohar Law Firm Fees.....\$10,125.00

Zohar Law Firm Expenses

Legal Research Fees\$40.83

Printing / Reproduction\$8.00

Zohar Law Firm Expenses.....\$48.83

TOTAL ADVOCACY AND WITNESS FEES: \$418,469.53

State of California, City of Santa Monica, County of Los Angeles

CONSUMER WATCHDOG'S NOTICE OF MOTION AND MOTION FOR ATTORNEYS' FEES AND EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT;


**DECLARATION OF DANIEL ZOHAR IN SUPPORT OF CONSUMER WATCHDOG'S
MOTION FOR ATTORNEYS' FEES AND EXPENSES; and**

upon the persons named in the attached service list, in the following manner:

1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.
2. If marked EMAIL, by electronic mail transmission this date to the email address stated.
3. If marked U.S. MAIL or OVERNIGHT or HAND DELIVERED, by placing this date for collection for regular or overnight mailing true copies of the within document in sealed envelopes, addressed to each of the persons so listed. I am readily familiar with the regular practice of collection and processing of correspondence for mailing of U.S. Mail and for sending of Overnight mail. If mailed by U.S. Mail, these envelopes would be deposited this day in the ordinary course of business with the U.S. Postal Service. If mailed Overnight, these envelopes would be deposited this day in a box or other facility regularly maintained by the express service carrier, or delivered this day to an authorized courier or driver authorized by the express service carrier to receive documents, in the ordinary course of business, fully prepaid.

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

Executed on April 7, 2015, at Santa Monica, California.


Jason Roberts

SERVICE LIST

Person Served

Method of Service

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