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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

EDMUND G. BROWN, JR., ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Petitioner,

v.

DEBRA BOWEN, SECRETARY OF STATE OF THE STATE OF CALIFORNIA,

Respondent.

CHRISTINA L. WILSON, PROPONENT OF PROPOSITION 17, HARVEY ROSENFIELD, OPPONENT OF PROPOSITION 17, AND KEVIN HANNAH, ACTING STATE PRINTER OF THE STATE OF CALIFORNIA,

Real Parties in Interest.

CASE NO. 34-2010-80000458

REAL PARTY IN INTEREST ROSENFIELD'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ATTORNEY GENERAL'S PETITION FOR PEREMPTORY WRIT OF MANDATE AND IN REPLY TO REAL PARTY IN INTEREST WILSON'S OPPOSITION THERETO

(Proposition 17)

Date: March 12, 2010
Time: 9:00 a.m.
Dept.: 42
Judge: Hon. Allen H. Sumner
Action Filed: March 1, 2010

ELECTION WRIT
IMMEDIATE ACTION REQUESTED

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INTRODUCTION

Real Party in Interest Harvey Rosenfield supports the Attorney General's petition for writ of mandate to correct the clerical error that occurred in the transmission of the approved ballot title and summary for Proposition 17. As the Attorney General's writ petition explains, the Elections Code requires that the Ballot Pamphlet contain the Attorney General's official title and summary, not an unapproved, preliminary draft of the title and summary that was inadvertently transmitted to the Secretary of State's office. This Court should therefore issue the requested writ of mandate in order to ensure that the title and summary that appears in the Ballot Pamphlet is not "inconsistent with the requirements of [the Elections] [C]ode." (Elec. Code, § 9092.)

Real Party in Interest Christina Wilson, on behalf of Proposition 17's sponsor, Mercury Insurance Company ("Mercury"), "does not question the right of the Attorney General to amend his title and summary," either. (Real Party Wilson's Memorandum of Points and Authorities in Opposition to Attorney General's Petition for Peremptory Writ of Mandate ("RPI Wilson's Memo"), p. 1.) However, Real Party Wilson nevertheless opposes the Attorney General's petition for writ of mandate on the ground that "the offered amendment [is] false and misleading." (*Ibid.*) Indeed, Wilson goes beyond that, asking this Court *to strike the second bullet point from the Attorney General's title and summary in its entirety* on the ground that both the official *and* the preliminary versions of that text are allegedly false and misleading. (See *id.* at pp. 3, 5.)

Real Party Wilson's opposition represents yet another attempt by Mercury to prevent the voters from learning the truth about the true impact of Proposition 17 on California's motorists. Mercury does not object to the statement in the Attorney General's title and summary advising voters that Proposition 17 "[c]hanges current law *to permit insurance companies to offer a* ***discount*** to drivers who have continuously maintained their auto insurance coverage." (AG's Ballot Title and Summary, First Bullet [emphasis added], reprinted as Exh. B to Declaration of Stephen Acquisto in Support for Petition for Petition for Peremptory Writ of Mandate ("Acquisto Decl."); see also *id.*,

Exh. C.) But when the Attorney General advises voters in the same title and summary that Proposition 17 will likewise "allow insurance companies to ***increase*** cost of insurance to drivers who ***do not*** have a history of continuous insurance coverage" — an actuarially and legally mandated result of providing the promised new discounts — Mercury now suddenly objects.

Mercury's self-serving motives are so transparent and its legal arguments so feeble that this Court need not tarry long before rejecting them. In fact, the most challenging aspect of Real Party Wilson's arguments in opposition to the Attorney General's writ petition is trying to figure out what the grounds for those objections are in the first place. No matter how Mercury's arguments are parsed, however, they have no merit, and they certainly do not satisfy the stringent standard of proof that must be met before a court is authorized to substitute its judgment for that of the Attorney General in crafting the ballot title and summary.

ARGUMENT

I. THIS COURT HAS NO AUTHORITY TO STRIKE OR ORDER ANY CHANGES IN THE BALLOT TITLE AND SUMMARY ABSENT CLEAR AND CONVINCING PROOF THAT THE ATTORNEY GENERAL'S LANGUAGE IS FALSE, MISLEADING, OR BIASED

Real Party Wilson briefly glides over the stringent standard that governs this Court's review of her challenge to the Attorney General's title and summary, but that standard is especially important given the manner in which Wilson has chosen to pursue her objections in this case. As Wilson notes in her opposition memorandum, "As a general rule, the title and summary prepared by the Attorney General are *presumed accurate*, and substantial compliance with the 'chief purposes and points' is sufficient." (RPI Wilson's Memo, p. 2 [quoting *Amador Valley Jt. Union High School Dist. v. State Bd. of Equalization* ("*Amador Valley*") (1978) 22 Cal.3d 208, 243 (emphasis added)].) *Amador Valley* and subsequent cases have elaborated that "if reasonable minds may differ as to the sufficiency of the summary, it should be held sufficient." (*Amador Valley*, 22 Cal.3d at p. 243; accord, *Horneff v. City and County of San Francisco* (2003) 110

Cal.App.4th 814, 820.) "Only in a clear case should a title . . . [or summary] be held insufficient." (*Ibid.* [quoting *Epperson v. Jordan* (1938) 12 Cal.2d 61, 66].) As one court of appeal recently admonished, under this deferential standard of review, trial courts must be very careful not to substitute their own judgment for that of the party who is authorized by law to prepare the title and summary for a ballot measure:

> "To comply with the election statutes, the ballot title need not be the 'most accurate,' 'most comprehensive,' or 'fairest' that a skilled wordsmith might imagine. The title need only contain words that are neither false, misleading, nor partial. The title adopted by the city council meets that standard, and the judiciary is not free to substitute its judgment given its deferential standard of review." (*Martinez v. Superior Court* (2006) 142 Cal.App. 1245, 1248 [citations omitted].)

Real Party Wilson's challenge to the Attorney General's title and summary in the present case falls far, far short of the burden the law imposes upon her. As noted, the Elections Code requires her to establish by "*clear and convincing proof* that the material in question is false, misleading, or inconsistent with the requirements" of the code (Elec. Code, § 9092 [emphasis added]), yet Wilson has — once again — not even bothered to adduce *any evidence*, much less the required *clear and convincing proof*, to support her challenge. There is no declaration from an actuary, no citation to judicial authority — just two-and-a-half pages of unsupported argument from her attorney and a quotation taken from the Insurance Commissioner's website that, in its full context, actually refutes her principal contention.

Real Party Wilson's "request" to strike the second bullet point in its entirety from the Attorney General's title and summary — even from the preliminary draft version that had inadvertently been submitted to the Secretary of State — must be denied for an additional, jurisdictional reason. This Court has no authority to grant such relief absent the filing of a proper petition or cross-petition for writ of mandate pursuant to Elections Code section 9092. Real Party Wilson cannot — as she has attempted to do here — simply file an opposition to the Attorney General's writ petition, and in the course of doing so, casually request that the Court also strike language from the title and summary

displayed by the Secretary of State that she did not heretofore challenge. Perhaps some formalities may be excused in light of the expedited nature of these proceedings, but the jurisdictional requirement of the proper filing of a petition for writ of mandate is not one of them.

II. REAL PARTY WILSON'S CHALLENGE TO THE ATTORNEY GENERAL'S TITLE AND SUMMARY IS SUBSTANTIVELY WITHOUT MERIT

On the merits, Real Party Wilson objects to the inclusion of the following statement in the Attorney General's title and summary:

> "~~May~~ Will allow insurance companies to increase cost of insurance to drivers who do not ~~qualify for the discount~~ have a history of continuous coverage."

According to Wilson, the statement (in either version) is either "false and misleading" (see RPI Wilson's Memo, p. 3, line 13) or it is impermissibly "argumentative" (*id.*, p. 3, line 20; *id.*, pp. 4-5). Real Party Rosenfield has difficulty deciphering what the precise basis of Real Party Wilson's arguments are from her brief, so out of an abundance of caution, we shall respond to each paragraph of her argument in turn.

Wilson first contends that both versions of the statement are false and misleading because "the cost of insurance is a function of rates" (*id.*, p. 3, line 14), which rates must be approved by the Insurance Commissioner (*id.*, p. 3, line 16), and "the statement is simply false" (*id.*, p. 3, lines 18-19) because Proposition 17 does not "contain any language purporting to direct the Insurance Commissioner how to establish auto insurance rates" (*id.*, p. 3, lines 17-18). Truly, Real Party Rosenfield does not understand what Wilson is trying to argue here; perhaps the Attorney General or the Court can make it out, but it honestly exceeds Real Party Rosenfield's grasp.

Real Party Rosenfield *does know* that there is ***absolutely nothing false*** about the Attorney General's statement. It merely advises the voters that Proposition 17 will allow insurance companies to increase the insurance premiums they charge to drivers (i.e., "increase the cost of insurance *to drivers*") who have not been continuously covered (i.e.,

"who do not have a history of continuous coverage").[1] That statement is demonstrably true. As has been extensively briefed in the companion case of *Wilson v. Bowen* (Sacto. Super. Case No. 34-2010-80000455), it is ***irrefutable*** both as an actuarial and as a legal matter, that *an insurer cannot give one customer a discount without simultaneously giving some other customer a surcharge*. (See, e.g., Declaration of J. Robert Hunter in *Wilson v. Bowen*, ¶ 17 ["Like Senate Bill 841, Proposition 17's new continuous coverage rating factor creates new surcharges on those without prior insurance to offset the new discounts for those with prior insurance."]; *id.*, ¶¶ 18-19, 22; *Foundation for Taxpayers and Consumers Rights v. Garamendi* ("*FTCR*") (2005) 132 Cal.App.4th 1354, 1366 ["By allowing insurers to grant a discount on the basis of whether an applicant was previously insured by any insurer, Sen. Bill 841 . . . would permit insurers to surcharge previously uninsured drivers to fund discounts for drivers with prior or persistent insurance."]; *id.* at p. 1367 ["The premiums for policyholders who, because of their characteristics, do not qualify for a particular discount must be *surcharged* in an amount *equal to the total of the discounts* given to the policyholders that qualified for the discount."] [emphasis in original].)

If, in her attack on this statement, Real Party Wilson is suggesting that it is "false and misleading" because it is the Insurance Commissioner, not the insurance companies, who would establish the companies' auto insurance rates, that's just poppycock. As Hunter explains in his declaration, the insurance company proposes the premiums it wants

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[1]Although Real Party Wilson does not make any distinction between the two versions in her objections, the official version of the Attorney General's title and summary is more accurate than the unapproved draft version in that Proposition 17 definitely "will" allow insurance companies to increase the cost of insurance to drivers who do not have a history of continuous coverage and hence do not qualify for the initiative's new "continuous coverage" discount. While it is true that not all insurance companies will necessarily choose to take advantage of the authority given to them by Proposition 17 to impose such increases, it is not accurate to say that the initiative "may" allow them to do so; the initiative definitely "will" allow insurance companies to impose the new surcharges, even if only some companies "may" choose to do so.

to charge its customers (i.e., "the cost of insurance to drivers") by first setting a statewide rate level for each particular line of insurance and coverage, which is equal to the amount of money overall that the insurer needs to collect for the particular coverage in California; this statewide rate level, divided by the number of policyholders, constitutes the average or "base rate" for all policyholders of that company. For auto insurance, the company then submits a rating plan, which is its plan to divide its policyholders into various permissible classifications based upon lawful "rating factors," such as driving safety record, annual mileage, years of driving experience, and any of the "optional" rating factors approved by the Insurance Commissioner pursuant to Proposition 103; individual customers will pay more or less than the statewide "base rate" based upon the classifications to which they are assigned using these rating factors, but the classification system must not, overall, prospectively produce more revenue or less revenue for the company than the statewide rate level. In other words, the rating plan must be "revenue neutral." (See Hunter Decl., ¶ 18; see generally *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4th 968, 992-993 [explaining the two-step process involved in calculating automobile premiums in California].)

Throughout this entire process, the Insurance Commissioner has the authority to "approve" or disapprove an insurance company's requested statewide rate level (pursuant to Insurance Code section 1861.05), as well as its rating or classification plan (per Insurance Code section 1861.02), but it is the insurer who selects and proposes both the rate level and the rating plan in the first instance. Moreover, in granting his approval or disapproval, the Insurance Commissioner is constrained by the terms of the Insurance Code. He has no authority to disapprove an insurer's application to use a requested rate level unless it is "excessive, inadequate, unfairly discriminatory or otherwise in violation of [the Insurance Code]." (Ins. Code, § 1861.05, subd. (a).) Likewise, the Commissioner has no authority to disapprove an insurance company's rating plan application if it complies with Insurance Code section 1861.02 and the Department's auto rating factor regulations.

By amending the Insurance Code and authorizing insurance companies to offer applicants or insureds a continuity discount "*notwithstanding* subdivision (c) of section 1861.02, and *in addition to* discounts permitted or required by law or regulation" (Proposition 17, proposed Ins. Code, § 1861.024, subd. (a) [emphasis added]), Proposition 17 *changes the law* and *will allow* insurance companies to do something that they are now prohibited from doing by Proposition 103 and the Commissioner's auto rating factor regulations — using the length of time that an applicant or an insured has been continuously covered with *any insurer* as a rating factor for reducing or increasing auto insurance premiums (i.e., the "cost of insurance to drivers"). The Attorney General's title and summary is thus completely accurate.

Real Party Wilson next contends that the second bullet point is "argumentative," because "it is not certain how many currently uninsured drivers would be affected by Proposition 17" (RPI Wilson's Memo, p. 3, lines 20-22), since "those uninsured drivers who receive policies from companies that will not grant portable persistency [Mercury's euphemism for the initiative's new "continuous coverage" rating factor] are not affected" (*id.*, p. 3, lines 24-26). So what? The Attorney General's title and summary does not purport to say anything about how many drivers would be affected by Proposition 17 — by receiving *either* discounts or surcharges. Whether it turns out to be millions of drivers or only two drivers who receive such discounts and offsetting surcharges, the title and summary accurately states that Proposition 17 "changes current law to permit insurance companies to offer a *discount* to drivers who have continuously maintained their auto insurance coverage" and to "allow insurance companies to *increase* the cost of insurance to drivers who do not have a history of continuous insurance coverage." (See AG's Title and Summary for Proposition 17, reprinted as Exh. B to Acquisto Decl.)

Appearing to elaborate on its "argumentative" point, Real Party Wilson then observes that the auto insurance premium that any driver ultimately pays will depend upon a number of mandatory and optional rating factors, not just the "persistency" or the "continuous coverage" rating factors, so that — as the Insurance Commissioner noted in

his response to the Legislative Analyst — "there is no way of predicting the precise impact a specific factor (in this case, continuous prior coverage) will have on each of the insurers' customers until the insurer submits specific data to the Department of Insurance." (RPI Wilson's Memo, p. 4, lines 1-14 [quoting from Insurance Commissioner's "Continuous Coverage Discount Initiative Impact on Rates," reprinted as Exh. 3 to Wilson's Appendix of Exhibits in *Wilson v. Bowen*].) Once again, the response is "so what?" The Attorney General's title and summary does not purport to say anything about what impact Proposition 17 will have on any particular driver's auto insurance premium. Rather, the title and summary simply describes — 100% accurately — how Proposition 17 proposes to *change the law*: It will allow insurance companies both to "offer a discount" to some drivers and to "increase [the] cost of insurance" to other drivers based upon whether they have continuously maintained auto insurance coverage or not. Indeed, as the passage from the Insurance Commissioner that Real Party Wilson conveniently neglects to quote in her brief explains:

> "An initiative measure has qualified for the ballot that may change how premiums are calculated for a large number of California automobile owners. It does so by proposing to allow automobile insurance companies to do something that under current law they cannot do, which is, offer a discount to new policyholders who were previously insured by another insurance company if they have maintained their automobile insurance coverage without a break in coverage of more than 90 days within the last five years before switching to the new company. . . .
>
> "California automobile ratemaking is unique in many ways. However, the nature of applying discounts and surcharges is not unique and reflects a basic principle of insurance ratemaking. This basic ratemaking principle is 'zero-sum' in the following sense: Every automobile insurer must have an approved 'rate plan' that establishes its average premium. Within that rate plan, every 'discount' requires a corresponding 'surcharge' so that every factor influencing a rate will balance evenly over an insurer's book of business. . . .
>
> "The Continuous Coverage Auto Insurance Discount Act, as revised and submitted on September 2, 2009, is subject to this principle. That is, if an insurer offers a continuous coverage discount for some drivers it will result in a surcharge for other drivers. This is because automobile

> insurance discounts and surcharges must offset one another so that each rating factor applied by an insurer is evenly balanced within the insurer's rating plan." ("Continuous Coverage Discount Initiative Impact on Rates," reprinted as Exh. 3 to Wilson's Appendix of Exhibits in *Wilson v. Bowen*].)

CONCLUSION

Some 75 years ago, in *Clark v. Jordan* (1936) 7 Cal.2d 248, 251, the Supreme Court admonished that the title for a ballot measure would be misleading and unlawful if it "includes 'all the sweet and excludes all the bitter.'" Yet that is just what Real Party in Interest Wilson and Mercury want to achieve with their opposition to the Attorney General's writ petition in this case: They want the Attorney General's title and summary for Proposition 17 to include "all the sweet" — the initiative's offer of a new discount to drivers who have continuously maintained insurance coverage with any insurance company — while excluding "all the bitter" — any mention of the corresponding surcharges that would be imposed on those drivers who have not continuously maintained insurance coverage. Real Party Wilson's objections to the Attorney General's proposed title and summary must be overruled, and the Petition for Writ of Mandate requested by the Attorney General should be granted.

Date: March 10, 2010

Respectfully Submitted,

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Michael J. Strumwasser

By _____
Fredric D. Woocher

Attorneys for Real Party in Interest Harvey Rosenfield

PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Re: *Brown v. Bowen,*
Sacramento County Superior Court Case No. 34-2010-80000*458*

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 10940 Wilshire Boulevard, Suite 2000, Los Angeles, California 90024.

On **March 10, 2010**, I served the foregoing document(s) described as **Real Party in Interest Rosenfield's Memorandum of Points and Authorities in Support of Attorney General's Petition for Writ of Mandate and in Reply to Real Party in Interest Wilson's Opposition Thereto** on all appropriate parties in this action, as listed below, by the method stated.

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☐ If fax service is indicated, by facsimile transmission this date to the fax number stated, to the attention of the person named, pursuant to Code of Civil Procedure section 1013(f).

☒ If U.S. Mail service is indicated, by placing this date for collection for mailing true copies in sealed envelopes, first-class postage prepaid, addressed to each person as indicated, pursuant to Code of Civil Procedure section 1013a(3). I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on **March 10, 2010**, at Los Angeles, California.

Paula M. Klein