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22 THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS

23 BEFORE THE INSURANCE COMMISSIONER  
24 OF THE STATE OF CALIFORNIA

25 In the Matter of: ) CDI Case No.: NC03027545  
26 MERCURY INSURANCE COMPANY; ) OAH No.: N2006040185  
27 MERCURY CASUALTY COMPANY; and ) THE FOUNDATION FOR TAXPAYER AND  
28 CALIFORNIA AUTOMOBILE ) CONSUMER RIGHTS' PETITION TO  
INSURANCE COMPANY, ) INTERVENE AND NOTICE OF INTENT TO  
Respondents. ) SEEK COMPENSATION  
) [Ins. Code §1861.10; Cal. Code Regs, tit. 10, §§  
) 2661.2 and 2661.4]  
) Hearing Date: September 17, 2007  
) 9:00 a.m.  
) Pre-Hearing and Mandatory  
) Settlement Conference: August 6, 2007  
) 1:30 p.m.

1 THE FOUNDATION FOR TAXPAYER AND CONSUMER RIGHTS (FTCR) hereby petitions  
2 to intervene in the above-referenced proceeding before the California Department of Insurance (CDI)  
3 pursuant to section 1861.10 of the Insurance Code and gives notice that it intends to seek compensation  
4 for its advocacy and witness fees and expenses. This petition is based on the facts as set forth herein and  
5 the accompanying verification of Pamela Pressley.

6  
7  
8 I.

9 PETITIONER

10 1. Petitioner, The Foundation for Taxpayer and Consumer Rights (FTCR), is a nonprofit,  
11 nonpartisan public interest corporation organized to represent the interests of taxpayers and consumers.  
12 A core focus of FTCR's advocacy is the representation of the interests of insurance consumers and  
13 policyholders in matters before the Legislature, the courts, and the CDI, particularly as they relate to the  
14 implementation and enforcement of Proposition 103, which includes the Insurance Code provisions  
15 alleged to have been violated in this matter.

16 2. FTCR's founder authored Proposition 103 and led the successful campaign for its  
17 enactment by California voters in 1988. FTCR's staff and the outside persons with whom it consults  
18 include some of the nation's foremost consumer advocates and experts on insurance ratemaking matters.

19 3. FTCR has served as a public watchdog with regard to insurance rates and insurer rollback  
20 liabilities under Proposition 103 by: monitoring rollback settlements and the status of the rollback  
21 regulations, reviewing and challenging rate and class plan applications made by insurers, participating in  
22 hearings before the CDI, and educating the public concerning industry underwriting and rating practices  
23 and their rights under Proposition 103 and other provisions of state law. FTCR has also appeared as  
24 amicus curiae in matters involving the interpretation and application of Proposition 103 and the  
25 Insurance Code.

26 4. FTCR has intervened in several proceedings before the CDI related to the implementation  
27 and enforcement of Proposition 103's reforms, including but not limited to: (i) REB-5184, regarding  
28 State Farm's rollback liability; (ii) RH-318 and IH-93-3-REB, regarding regulations to implement

1 Insurance Code section 1861.02's provisions on rating factors for personal automobile insurance; (iii)  
2 RH-339 and RH-341, regarding procedural rules for rate hearings and for intervention; (iv) PA-95-0057-  
3 00 regarding Safeco's Earthquake Rate Application; (v) Consolidated hearing numbers PA-97-0077-00,  
4 PA-97-007800, and PA-97-007900 regarding State Farm's, Allstate's and Farmers' automobile class  
5 plans respectively; (vi) PA-97-0072, regarding the California Earthquake Authority's rate application;  
6 (vii) RH-346, regarding regulations governing Advisory Organization Manuals; (viii) IH-97-0017-REB,  
7 regarding prior approval regulations, and IH-0017-TF, Prior Approval Task Force; (ix) IH-97-0018-  
8 REB; (x) RH-402 (initiated by FTCR), regarding regulations defining the optional automobile rating  
9 factor of persistency and the conflict of certain rating factors with Ins. Code § 1861.02(c); (xi) RH-  
10 01015532, regarding accident verification regulations; (xii) RH-01018834, regarding auto rating factors  
11 weighting methodologies; (xiii) PA-02025379, regarding SCPIE's medical malpractice insurance rate  
12 application; (xiv) RH-03026431, RH-03026432, and RH-05042665, regarding Low Cost Automobile  
13 Insurance Rates and Coverages; (xv) RH-03029826, regarding the automobile insurance rating factors;  
14 (xvi) PA-04036735, regarding the medical malpractice insurance rate application of The Medical  
15 Protective Company; (xvii) PA04039736, regarding American Casualty's medical malpractice rate  
16 application; (xviii) PA04041210, regarding Safeco's 2004 earthquake rate application; (xix)  
17 PA05045074, regarding Medical Protective's 2005 medical malpractice insurance rate application; (xx)  
18 NC03029253 regarding the rates, rating plans or rating systems of Farmers Insurance Exchange, et al.;  
19 (xxi) PA06093080, PA06093079, PA06093078, and PA06092759, regarding the homeowners rates of  
20 Safeco, Allstate, Fire Insurance Exchange, and State Farm; (xxi) PA-2006-00006 and PA-2007-00004,  
21 regarding Allstate's homeowners and private passenger auto insurance rates, among other proceedings.  
22 In each of these proceedings that have proceeded to a final decision in the last five years (listed as (xi)-  
23 (xvii), and (xix)), the Commissioner found that FTCR made a substantial contribution, meaning that its  
24 participation was separate and distinct from any other party and that it presented relevant issues,  
25 evidence and arguments that resulted in more credible, non-frivolous information being available to the  
26 Commissioner in making his final decision.



- 1 • Defense #2 - whether any person at the CDI “approved” of Mercury’s conduct, and if so, what  
2 legal effect, if any, that “approval” has on the alleged violations of law;
- 3 • Defense # 3 - whether the Commissioner “waived” his jurisdiction over the matters at issue  
4 “when he permitted the Superior Court to render a judgment in the *Krumme [v. Mercury Ins. Co.,*  
5 *et al.*, S.F. Super. Ct. No. 313367] case”; and
- 6 • Defense # 4 – whether the Commissioner and the CDI are “estopped” from pursuing this action  
7 due to any prior action or inaction on the part of any employee at the CDI.

8 The voters specifically envisioned that insurers would attempt to undermine Proposition 103 in  
9 administrative and judicial proceedings by seeking to limit its scope and reduce the authority it provides  
10 to the Insurance Commissioner. That is why they authorized their representatives to intervene in  
11 administrative and judicial matters such as this pursuant to Insurance Code section 1861.10(a). By  
12 intervening in this proceeding, FTCR also seeks to defend the authority of the Insurance Commissioner  
13 to prohibit unlawful practices and to undertake enforcement actions in this and similar proceedings.

14 9. If intervention is granted, FTCR plans to submit briefing, oral argument, testimony (if  
15 necessary), and documentary evidence on the issues raised in this proceeding, and participate fully in all  
16 aspects of discovery and any evidentiary hearings.

17 IV.

18 POSITION OF PETITIONER

19 10. The CDI has alleged that similarly situated policyholders have received dissimilar  
20 treatment and have been charged rates in excess of those approved by the Commissioner. More  
21 specifically, Mercury is alleged to have willfully permitted its agents to charge brokers’ fees in varying  
22 amounts, which caused similarly situated policyholders to be charged unfairly discriminatory rates in  
23 violation of Insurance Code section 1861.05(a) and to have thereby constructively charged and collected  
24 premiums in excess of the rates approved by the Commissioner in violation of section 1861.01(c). The  
25 Amended Notice alleges, among other allegations, that:

- 26 • From July 1, 1996, to April 11, 2003, Respondents willfully permitted their  
27 insurance agents to charge “broker fees” to Respondents’ policyholders. In  
28 charging these fees, Respondents’ agents acted in the course and scope of their

1 agency. Under California law, all payments by policyholders which are a part of  
2 the price of insurance, including all sums paid to an insurance agent, are  
3 considered premium. Consequently, Respondents constructively received the  
4 “broker fees” (i.e. premium) collected by their agents. Respondents did not  
5 receive the Commissioner’s prior approval to charge or receive the moneys  
6 constituting the “broker fees.” As a result of permitting its agents to charge and  
7 collect the broker fees, Respondents constructively charged and collected  
8 premium in excess of the rates approved for them by the Commissioner, in  
9 violation of section 1861.01(c). (Amended Notice, ¶3.)

- 10 • Because Respondents’ agents charged broker fees of varying amounts,  
11 Respondents[?] insureds were subjected to unfair rate discrimination, in violation  
12 of section 1861.05(a). Respondents willfully permitted the rate discrimination to  
13 occur. (Amended Notice, ¶4.)

14 Petitioner intends to introduce evidence that Mercury acted willfully in enabling de facto agents  
15 to charge illegal broker fees and to support the CDI in obtaining the requested civil penalties and  
16 such other remedies as may be imposed by the Commissioner in this regard.

17 11. If these allegations against Mercury are proven true, Mercury has violated California law  
18 as set forth in the Notice. Specifically, the allegations, if true, demonstrate that Mercury has violated  
19 provisions of the Insurance Code, including but not limited to sections 1861.05 and 1861.01, enacted by  
20 Proposition 103, that prohibit excessive and unfairly discriminatory rates, premiums and practices, and  
21 which require insurers to obtain the prior approval by the Commissioner of the rates charged their  
22 policyholders.

23 12. Mercury’s asserted “defenses” that the Commissioner is “estopped” or has otherwise  
24 “waived” his authority to bring this action under the relevant statutes or “approved” of Mercury’s  
25 conduct are incorrect as a matter of law. As FTCR will demonstrate, Mercury’s attempt to evade the  
26 jurisdiction and authority of the Commissioner and the Department of Insurance is contrary to  
27 Proposition 103 and other provisions of the Insurance Code. It is also FTCR’s position that were  
28 Mercury to succeed in this attempt to escape accountability for its illegal conduct, personal lines

1 insurance policyholders would be placed at risk, and the express statutory protections enacted by the  
2 voters through Proposition 103 would be effectively negated. Mercury’s arguments are a baseless  
3 assault on the regulatory regime enacted by the voters over eighteen years ago when the substantive  
4 provisions of the insurer-friendly McBride-Grunsky Insurance Regulatory Act of 1947, and its  
5 accompanying case law, were gutted and superseded by Proposition 103.

6 13. FTCR reserves the right to address other relevant issues raised in this proceeding as it  
7 develops.

8 V.

9 AUTHORITY FOR PETITION TO INTERVENE

10 14. The authority for this petition is Insurance Code section 1861.10(a), titled “Consumer  
11 Participation,” which grants “any person” the right to “initiate or intervene in any proceeding permitted  
12 or established pursuant to this chapter [Chapter 9 of Part 2 of Division 1 of the Insurance Code],  
13 challenge any action of the commissioner under this article [Article 10 of Chapter 9, enacted by  
14 Proposition 103], and enforce any provision of this article.” This proceeding is an enforcement action  
15 brought by the CDI pursuant to Insurance Code section 1858.1, and hence is a proceeding both  
16 “permitted” and “established” by Chapter 9. Moreover, like the Department, FTCR seeks to “enforce”  
17 Insurance Code sections 1861.01 and 1861.05, enacted by Proposition 103, against Farmers. This  
18 petition is also authorized by California Code of Regulations, title 10, § 2661.2.

19 VI.

20 PARTICIPATION OF FTCR

21 15. FTCR verifies that, in accordance with California Code of Regulations, title 10, §§  
22 2661.4 and 2661.3(b), it will be able to attend and participate in this proceeding without unreasonably  
23 delaying this proceeding or any other proceedings before the Insurance Commissioner.

24 VII.

25 INTENT TO SEEK COMPENSATION

26 16. FTCR and its counsel intend to seek compensation in this matter. The Commissioner has  
27 awarded FTCR compensation for its reasonable advocacy and witness fees and expenses in past  
28

1 departmental proceedings. Its intervenor eligibility status is current and effective for two years from the  
2 most recent finding of eligibility issued by the Commissioner on July 14, 2006.

3 17. The estimated budget in this proceeding is attached hereto as Exhibit A. This estimated  
4 budget is based on several factors including: (1) the technical and legal expertise needed to address  
5 these issues; (2) its current best estimate of the time needed to participate effectively in these  
6 proceedings, taking into account the time already expended by FTCR counsel and an estimate of time  
7 needed to complete remaining tasks; and (3) past experience in similar rulemaking proceedings before  
8 the CDI. The estimated budget is reasonable and the staffing level is appropriate, given the expertise  
9 that FTCR's counsel brings to these proceedings. The budget presented in the attached Exhibit is a  
10 preliminary estimate, and FTCR and its counsel reserve the right to amend its proposed budget as its  
11 expenses become more certain, or in its request for final compensation. FTCR and its counsel will give  
12 notice of such modifications as soon as practicable after it discovers the need to revise its estimates, and  
13 shall comply with the budget revision requirements in the relevant intervenor regulations.

14  
15 WHEREFORE, petitioner respectfully requests that the Administrative Law Judge GRANT  
16 FTCR's petition to intervene in the above-captioned proceeding pursuant to Insurance Code section  
17 1861.10(a), having all the rights and responsibilities accorded any other party to the proceeding.

18 DATED: March 27, 2007

19 Respectfully submitted,  
20 Harvey Rosenfield  
21 Pamela Pressley  
22 THE FOUNDATION FOR TAXPAYER AND  
23 CONSUMER RIGHTS

24 LEVY RAM & OLSON LLP  
25 Arthur D. Levy

26 LAW OFFICES OF NORMAN GOLDMAN  
27 Norman Goldman

28 By:

  
Pamela Pressley  
Attorneys for THE FOUNDATION FOR TAXPAYER  
AND CONSUMER RIGHTS



1                   **VERIFICATION OF PAMELA PRESSLEY IN SUPPORT OF FTCR'S PETITION TO**  
2                   **INTERVENE AND NOTICE OF INTENT TO SEEK COMPENSATION**

3  
4 I, Pamela Pressley, verify:

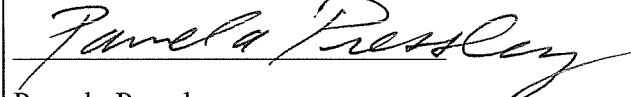
5           1.       I am an attorney employed by The Foundation for Taxpayer and Consumer Rights. If  
6 called as a witness, I could and would testify competently to the facts stated in this verification.

7           2.       I personally prepared the pleading titled, "The Foundation for Taxpayer and Consumer  
8 Rights' Petition to Intervene and Notice of Intent to Seek Compensation" filed in this matter. All of the  
9 factual matters alleged therein are true of my own personal knowledge, or I believe them to be true after  
10 I conducted some inquiry and investigation.

11           3.       Pursuant to Cal. Code of Regulations, title 10, § 2661.4, FTCR attaches as Exhibit A its  
12 estimated budget in this proceeding.

13 I declare under penalty of perjury under the laws of the State of California that the foregoing is true and  
14 correct.

15 Executed on March 27, 2007 at Santa Monica, California.

16   
17 Pamela Pressley

1 EXHIBIT A

2 PRELIMINARY BUDGET

3 Case No. NC-03027545

4 OAH No. N2006040185

5 ITEMS

ESTIMATED COST

6 1. Attorneys

7 Pamela Pressley @ \$395 per hour, 100 hours ..... \$39,500.00

- 8 • Draft and edit petition to participate; confer with FTCCR counsel and outside experts  
9 regarding legal and evidentiary issues; brief legal issues; participate in discovery and  
preparation for evidentiary hearing as necessary; prepare request for compensation.

10 Harvey Rosenfield @ \$550 per hour, 50 hours ..... \$27,500.00

- 11 • Draft and edit petition to participate; supervise FTCCR and outside counsel and participate  
in strategy discussions; brief legal issues, particularly relating to Proposition 103.

12 Arthur Levy @ \$550 per hour, 100 hours ..... \$55,000.00

- 13 • Act as lead litigation attorney in all aspects of pre-hearing discovery, motions,  
14 preparation and participation in evidentiary hearing including any examination of  
witnesses and post-hearing briefing; participate in strategy discussions with FTCCR and  
15 other outside counsel.

16 Amy Chen @ \$250 per hour, 25 hours ..... \$6,250.00

- 17 • Perform legal research and writing tasks as needed.

18 Norman Goldman @ \$475 per hour, 75 hours ..... \$35,625.00

- 19 • Act as co-counsel in all aspects of pre-hearing discovery, motions, preparation and  
20 participation in evidentiary hearing including any examination of witnesses and post-  
hearing briefing; participate in strategy discussions with FTCCR and other outside counsel.

21 2. Paralegal

22 Maria Lopez @ 125 per hour, 50 hours ..... \$6,250.00

- 23 • Perform litigation support and document retrieval

24 Office Expenses (Photocopies, facsimile,  
25 telephone calls, postage, etc.) ..... \$5,000.00

26 Transportation

27 Ground transportation; airfare ..... \$5,000.00

28 TOTAL ESTIMATED BUDGET: \$180,125.00



1 SERVICE LIST

2 *In the Matter of Mercury Ins. Co., et al.*

3 Case No. NC-03027545

OAH No. N2006040185

4 Person Served

Method of Service

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