Harvey Rosenfield, SBN 123082
Pamela Pressley, SBN 180362
Laura Antonini, SBN 271658
CONSUMER WATCHDOG
2701 Ocean Park Blvd., Suite 112
Santa Monica, CA 90405
Tel. (310) 392-0522
Fax (310) 392-8874

Arthur D. Levy, SBN 95659
445 Bush Street
Sixth Floor
San Francisco, CA 94108
Tel. (415) 702-4550
Fax (415) 814-4080

Attorneys for Intervenor
CONSUMER WATCHDOG

BEFORE THE INSURANCE COMMISSIONER

OF THE STATE OF CALIFORNIA

In the Matter of: MERCURY INSURANCE COMPANY; MERCURY CASUALTY COMPANY; AND CALIFORNIA AUTOMOBILE INSURANCE COMPANY, Respondents.	CDI File No.: NC03027545 OAH No.: N2006040185 ALJ Assigned: Michael A. Scarlett **CONSUMER WATCHDOG'S POST-HEARING REPLY BRIEF**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

Cal. Gov. Code

Cal. Insurance Code

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

Mercury's Opening Brief covers the waterfront by raising every conceivable legal and technical argument to avoid liability, including unconstitutionality and statutory vagueness. Conspicuously missing from the brief, however, is any clear response to the overwhelming evidence that Mercury maintained its sham "broker" system for 20 years to enable its producers, and AIS in particular, to charge illegal "broker" fees. Notably, Mercury's main factual argument is based on denying that Mercury had a de facto agency relationship with AIS, directly contrary to the ALJ's ruling that AIS was a de facto agent by virtue of collateral estoppel under the *Krumme* Findings.

Mercury fails to rebut, and actually supports, the reality that the illegal fees charged by its de facto agents are "premium" subject to regulation under the prior approval and anti-discrimination rate statutes (Ins. Code §§ 1861.01(c), 1861.05(a)). In another attempt to relitigate the *Krumme* Findings and the ALJ's ruling on collateral estoppel, Mercury argues that the illegal agent fees are not "premium" because they were paid in exchange for some service other than the insurance coverage. This fails under the express conclusion in the *Krumme* Findings that Mercury's "brokers" transacted insurance on behalf of Mercury as agents, and the statutes, regulations, case law, and CDI forms requiring agent fees to be reported as premium. Even Mercury itself took the position in 2001 that agent fees were premium when it suited its interests to argue that the *Krumme* case should be dismissed and the rating issues determined by the Commissioner. Now that Mercury faces a substantial penalty in this action, it takes the opposition position.

Mercury's entire case rests upon estoppel, laches and due process defenses that it cannot factually or legally establish.

Mercury's estoppel and laches defenses hinge on Mercury's inaccurate story of its "reliance" on CDI. Mercury takes creative license with the evidence to try to show that it relied upon CDI communications to believe its "broker" scheme was lawful, but the undisputed evidence shows that Mercury ignored clear communications from CDI and orders from the court to stop its illegal practices until 2009. The evidence establishes that Mercury had notice of the illegality of its "broker" fee practices and chose to continue to litigate the issues in both the civil and administrative proceedings.

Mercury asks the ALJ to adopt the findings in, and dismiss the entire proceeding based on, ALJ Owyang's erroneous Proposed Decision, which was already ***rejected*** by the Commissioner. Mercury fails

to explain how its due process rights were violated here when Mercury had a full opportunity to present evidence and cross-examine witnesses at an APA-compliant hearing and the ALJ applied the pre-amendment version of the prepared direct testimony regulation. Also, Mercury's claims that CDI violated Government Code provisions on separation of functions principles and ex parte communications are based on incorrect interpretations of the facts and the law. Mercury does not establish that its due process rights were violated here. Even if Mercury could establish a prohibited ex parte communication occurred, which it has not, the remedy of dismissal is improper, since CDI's communications related to initiating a separate rulemaking proceeding, which had nothing to do with the underlying merits of the case.

Mercury has reached the end of the line. It can no longer avoid paying a penalty for charging its customers unapproved and unfairly discriminatory premiums. The interests of justice require the Commissioner to impose a substantial penalty on Mercury for its willful violations of Insurance Code sections 1861.01(c) and 1861.05(a).

ARGUMENT

I. MERCURY HAS FAILED TO OVERCOME THE OVERWHELMING EVIDENCE THAT IT ACTED WILFULLY IN USING A RATE OR RATING SYSTEM IN VIOLATION OF INSURANCE CODE SECTIONS 1861.01(c) AND 1861.05.

Mercury's gloss about why it shifted from an all agent to "broker" producer force in 1989,[1] relitigation of its relationship with AIS, and its rendition of the "operational changes" it made after the *Krumme* court rendered a permanent injunction against it in May 2003 (I2 ["*Krumme* Judgment"]) fail to refute the wealth of evidence establishing: Mercury charged well over 180,000 illegal agent fees (CWD OB at § III.A.), Mercury knew that, from July 1, 1996 through 2006, its "brokers" were charging fees to consumers at the point of sale, its "brokers" were de facto agents and that its de facto agents were illegally charging fees in violation of Insurance Code sections 1861.01(c) and 1861.05(a)[2] (*id.* at § III.B.1.), and that Mercury developed, maintained, and defended its illegal "broker" system with the

[1] Mercury claims the agent to "broker" "shift enabled Mercury to more easily sever its relationships with new less proven producers[,]" which served Mercury's supposed ultimate goal to improve the "proficiency of producers to provide complete and accurate information[.]" (Mercury OB at 1:12-24.) This is based on the testimony of Rich Wolak, who admitted he was not even in the marketing department in 1989, so his testimony is hearsay. (4/17/13 RT 109:23-110:20 [Wolak Redirect Exam.].) Mercury did not call anyone to testify to first-hand knowledge of the reasons for the "broker" system, even though its Senior Vice-President of Marketing, Bruce Norman, testified that he was in charge of implementing the change. (4/19/13 RT at 7:20 – 11:19 [Norman Direct Exam.].)

[2] All statutory references herein are to the Insurance Code unless otherwise stated.

specific intent to permit illegal agent fees to be charged to California consumers in violation of sections 1861.01(c) and 1861.05(a) (*id.* at § III.B.2.).

A. The Collateral Estoppel Ruling Precludes Mercury from Challenging That AIS Was Mercury's De Facto Agent.

The ALJ's ruling on the Department's Motion for Collateral Estoppel forecloses Mercury's attempts to argue anew in its Opening Brief that AIS was not a de facto agent and that collateral estoppel does not apply to the Mercury-AIS relationship. (Collateral Estoppel Ruling, Feb. 19, 2013, at 6-7, 10.) Mercury raised these same arguments in opposition to CDI's motion (Respondents' Opposition to the CDI's Motion for Collateral Estoppel, Aug. 12, 2011, at 6-9, 13-19), and the ALJ rejected both of Mercury's contentions. (Collateral Estoppel Ruling at 5-7.)

Mercury did not seek reconsideration of these rulings. To the contrary, Mercury consistently reassured the ALJ throughout the hearing that it was not relitigating the *Krumme* Findings (I1) and disclaimed any intention of doing so. This first came up during Mercury's examination of its own witnesses:

> MR. LEVY: My concern is very simple. I do not want testimony on the record by Mercury employees as to their understanding about practices of which they have no direct knowledge, as I think most of Mr. Norman's testimony about AIS has been, to be put on this record as proving what those practices were.
>
> ***That testimony ought to be limited to Mercury's state of mind. And the issue of willfulness, if that's the case, Your Honor, I agree with you that can come in.*** I just don't want to hear later there's all of this evidence about what AIS practices were coming out of the mouths of employees of people who were never employed.
>
> ADMINISTRATIVE LAW JUDGE SCARLETT: Fair enough, Mr. Levy.
>
> MR. WEINSTEIN: ***And we're not arguing de facto agency, Your Honor, we're arguing in response to his argument about willfulness, what our people were thinking at the time.***

(4/19/13 RT at 117:8-24 [Norman Cross-Exam.], emphasis added.)

In now arguing that AIS was not a de facto agent, Mercury relies nearly exclusively on the testimony of AIS executive Scott Boostrom. (Mercury OB at 37-42.) When CWD expressed concern during the hearing that Mercury might be using Mr. Boostrom's testimony to undercut the Collateral Estoppel Ruling, Mercury reassured the ALJ that Mercury was ***not*** relitigating *Krumme*:

> MR. LEVY: Well, when Mr. Tirador testified regarding his understanding of and Mr. Norman of the submission practices at AIS, the relevancy of that, Mercury's state of mind, which I agree is an issue in this case.
>
> ***But the actual practices of AIS, with respect to their applications process, it seems to me***

> ***to be an attempt to re-litigate the finding that AIS was a de facto agent to negate that finding, so I questioned the relevancy of it.***
>
> It's one thing to have testimony from Mercury as to its understanding, to prove its good faith and lack of willfulness. It's another thing to have AIS testimony which seems offered.
>
> ADMINISTRATIVE LAW JUDGE SCARLETT: What's the relevance, Mr. Kook?
>
> MR. KOOK: ***It still goes to state of mind, Your Honor, and this is why.*** Mercury, Mr. Wolak had testified -- I forget exactly if Mr. Tirador had done as well -- that they had an understanding of what AIS's practices were, the fact that they were using comparative raters in terms of determining, and obtaining a survey to figure out insurance options for an applicant. ***The fact that we get confirmation from AIS that that is the practice confirms, Your Honor, the reasonable state of mind, the fact that they did know about this and it wasn't a mistaken belief that that's what AIS did.***

(4/24/13 RT at 90:2-24 [Boostrom Direct Exam.], emphasis added.)

> [ADMINISTRATIVE LAW JUDGE SCARLETT:] But again, to the extent that your intent is to try and establish a different relationship than the relationship that's been defined in *Krumme*, that's going to be somewhat problematic and that's not going to find its way into a factual finding in my decision.
>
> MR. WEINSTEIN: ***And, Your Honor, we're not trying to take on the Krumme decision -***
>
> ADMINISTRATIVE LAW JUDGE SCARLETT: Okay.
>
> MR. WEINSTEIN: -- ***through de facto agency***.
>
> ADMINISTRATIVE LAW JUDGE SCARLETT: All right.

(*Id*. at 94:12-21, emphasis added.)

In sum, the entire hearing was predicated on the ALJ's Collateral Estoppel Ruling. The ALJ and CWD justifiably relied on the ruling and Mercury's repeated assurances during the hearing. It is simply too late to change the rules of the road post-hearing.

B. Mercury Did Not Implement Material Changes to Its Relationship with "Brokers" Following the 2003 Krumme Judgment.

Mercury argues that its 2003 and 2005 "operational changes" prove that its "brokers" were not de facto agents. (Mercury OB at 42-44.) To the contrary, Mercury's evasive response to the *Krumme* Judgment proves Mercury's willfulness, driven by its need to maintain its profits by feeding AIS's appetite for illegal "broker" fees. (CWD OB at 12-18.)

In April 2005, Judge Dondero resoundingly rejected Mercury's operational changes. (CWD OB at 15-16.) The *Krumme* court rejected virtually every feature of Mercury's proposed 2005 program as a continuation of the status quo. (See these attached as Ex. A.) The *Krumme* court's clearly expressed views are nevertheless compelling validations that Mercury's post-Judgment foot-dragging evidences a

willful refusal to abandon its "broker" system. (CWD OB at 16-17.)[3]

Judge Dondero's recognition of Mercury's resistance to change is significant for this case. If Mercury would not change its ways ***in response to an Injunction from a Superior Court following a trial***, how can its "estoppel" claims – that Mercury would have stopped enabling illegal "broker" fees if Mr. Tomashoff had only been clearer in his 1997 and 1998 letters, or if CDI had only prosecuted Mercury right after the January 2000 meeting – be believed in this proceeding?

II. MERCURY'S ILLEGAL AGENT FEES WERE PREMIUM SUBJECT TO PRIOR APPROVAL AND THE PROHIBITION AGAINST UNFAIRLY DISCRIMINATORY RATES.

Mercury first begins its discussion of the substantive allegations in this matter at page 29 of its Opening Brief by defining "premium" as "monies paid in exchange for 'insurance coverage' or 'cost of insurance'" (Mercury OB at 29:22 – 30:9), stringing together quotes from non-California specific insurance law treatises.[4] Even if these general definitions were controlling, Mercury utterly fails to explain how the illegal agent fees paid by its customers fall outside its general definition. Mercury baldly asserts that "'[b]rokers fees' … are unrelated to the transfer of risk to an insurer" and "[s]uch fees were not paid to an insurer in exchange for Mercury's agreement to provide coverage." (Mercury OB at 31:26 – 32:1.) Contrary to Mercury's unsupported assertions, however, *the illegal fees collected by its agents certainly could not have been paid in exchange for any true broker services, since the fees were paid to* ***agents*** *of Mercury, not true* ***brokers***. Moreover, Mercury's discussion entirely ignores the California regulation defining premium as "***the final amount charged to an insured for insurance*** after applying all applicable rates, factors, modifiers, credits, debits, discounts, surcharges***, fees charged by the insurer and all other items which change the amount the insurer charges to the insured***" (10 CCR § 2360.0,

---

[3] Mercury argues, as it did at the hearing, that the court in Krumme "never concluded that Mercury had violated the court's injunction." (Mercury's OB at 44:6-7.) The court's rulings were in response to *Mercury's* 2005, 2007, and 2009 motions to vacate the injunction. (R162, R166, R171.) The court denied Mercury's motions three separate times because Mercury had not changed its "broker" practices pursuant to the court's rulings. (I5, I329, I330.)

[4] As conceded by Mercury's expert witness, to the extent any general actuarial principles conflict with California law, the applicable California statutes and regulations must be followed. (Bass PDT at 6:22-24 ["An actuary is always required to comply with governing statutes and regulations, even if they are inconsistent with actuarial ratemaking principles and standards."].) Thus, even if it could somehow be argued that the meaning of "premium" in the non-California specific secondary sources on which Mercury relies are inconsistent with 10 CCR § 2360.0, the definition of "premium" in the California regulation is controlling here.

emphasis added), the statute, regulation, and rate application forms requiring all miscellaneous fees to be reported in an insurer's rate application (Ins. Code § 1861.05(b); 10 CCR § 2648.4(a); R90_3), as well as the Commissioner's official pronouncement that ***"[s]hould an insurer authorize its agents to collect 'fees' such fees would have to be reported as premium by the insurer, and would, of course, have to comply with the anti-discrimination statutes.***" (I128 at 792, emphasis added.)

A. California Case Law Relied upon by Mercury Confirms That the Illegal Fees Charged by Mercury's Agents are "Premium."

Mercury attempts to analogize its illegal agent fees to fees paid in exchange for the benefit of paying premiums in installments, which courts in two cases held were not "premium." Mercury's discussion of these cases relies on its faulty premise that "broker" fees are not "premium." (See Mercury OB at 29:7 ["'Broker Fees' Are Not a Part of the 'Cost of Insurance'"], 32:22 ["'broker fees' would not be considered 'premium' or 'rate' in the rate context"].) Whether *legitimate* broker fees paid by consumers in exchange for broker services by true brokers are considered premium is irrelevant here, since the fees at issue have already been adjudged to be *illegal* "broker" fees charged by Mercury's *agents* acting on behalf of Mercury and not by brokers acting on behalf of consumers. (See Collateral Estoppel Ruling at 5-10; I1 at 9-11, ¶¶1, 4, 7), 13-14, ¶¶13, 15, 16.) In short, Mercury's unsupported assumption that its illegal agent fees were paid in exchange for some benefit or service other than receiving insurance coverage from Mercury is nothing more than an attempt to relitigate the *Krumme* Findings and this tribunal's Collateral Estoppel Ruling.

When it suited Mercury's interests to support its argument that the *Krumme* case should be dismissed on the ground that the allegations concerned rating issues within the exclusive jurisdiction of CDI, Mercury itself took the position in 2001 that "***[i]t has long been settled that amounts paid to the insurer's agents as part of an insurance transaction constitute part of the price for the insurance: i.e., part of the premium"*** and concluded that "***whether the brokers collected fees as "agents" of Mercury or Mercury collected the fees itself, the fees unquestionably constitute part of the premium as a matter of law*** [citations omitted]." (I327 at 3017, emphasis added; see also *id.* at 3019, emphasis added ["***if the brokers were acting as Mercury's agents so that the fee is attributable to Mercury, it is part of the premium***"].) Because Mercury's de facto agents have already been determined to be transacting insurance on behalf of Mercury, the court decisions upon which Mercury now relies confirm that the fees

they charged were premium.

In *In re Ins. Installment Fee Cases* (2012) 211 Cal.App.4th 1395, the appellate court held that State Farm's installment fees did not constitute premium, reasoning:

> Because the installment fee is consideration for a benefit separate from the insurance rather than an "'amount paid for certain insurance for a certain period of coverage'" [citation omitted], it is not premium.

(*Id.* at 1407.) The court's reasoning was thus based in part on the premise that the installment fees were paid in exchange for some benefit other than the insurance coverage received. Unlike the installment fees there, Mercury's illegal "broker" fees did not afford any such benefit to its customers. As has already been determined by the *Krumme* court and the Collateral Estoppel Ruling, Mercury's agents were ***prohibited by law*** from charging "broker" fees and in charging such illegal fees, "the 'brokers' were acting and do act in the capacity of an insurance agent on behalf of Mercury when transacting Mercury insurance, and therefore not in the capacity of an insurance broker." (I1 at 16, ¶16); Collateral Estoppel Ruling at 10 ["the *Krumme* court's determination that Respondents' 'brokers' were actual or de facto insurance agents acting on behalf of Mercury was argued and litigated and is subject to collateral estoppel"].) Accordingly, any contention by Mercury that its customers somehow received a benefit from paying these "broker" fees is specious. Therefore, *In re Ins. Installment Fee Cases* supports a finding that the illegal agent fees paid by Mercury insureds were additional premium paid in exchange for receiving an insurance policy from Mercury.

Mercury's reliance on the Commissioner's opinion in *Williams v. Interinsurance Exch. of the Auto Club* (Super. Ct. San Diego County, 2006, No. GIC 836845) (Mercury OB at 31:2 – 32:4; R159) and the Court of Appeal decision in that case, *Auto Club v. Superior Court* (2007) 148 Cal.App.4th 1218 (Mercury OB at 30:21-25), also misses the mark. On referral from the trial court, the Commissioner held that premium finance charges were premium (R159_15), and the trial court agreed (*Auto Club v. Superior Court*, *supra*, 148 Cal.App.4th at 1224). The Court of Appeal reversed the trial court's decision and held that the premium finance charges were not "premium" for purposes of inclusion on the policy declarations page under section 381. (*Id*. at 1238.)

Auto Club, like *In re Ins. Installment Fee Cases*, does not support Mercury's contentions that its illegal agent fees are not premium subject to prior approval for at least two reasons: (1) Mercury's illegal

agent fees were not paid for any benefit such as paying in installments; and (2) even installment fees must be reported either as "premium" or as "ancillary income" in a rate application submitted to the Commissioner for prior approval under section 1861.01. (10 CCR § 2644.13 ["premium finance revenues" included in definition of "ancillary income"]; R159_6 [Commissioner's decision in *Williams* discussing CDI's treatment of installment fees in rate approval as either premium or ancillary income].)

Similarly, even if the "broker" fees were not considered "premium" for purposes of disclosure on the policy declarations page under section 381, like installment fees, they still were required to be disclosed in a rate application as miscellaneous fees. (10 CCR § 2648.4(a); e.g., R90_3 [form CA-RA8, Application for Approval of Insurance Rates]; see also Lastofka Additional PDT at 3:8-10; 3:18-19.) Because Mercury failed to report and obtain prior approval of its illegal agent fees, it was barred from charging its customers such fees. (Ins. Code § 1861.01(c).) To allow otherwise would mean that Mercury and other insurers could escape liability for violations of sections 1861.01(c) and 1861.05(a) and allow their policyholders to be subjected to additional, unapproved premium charges simply by permitting their agents to collect the illegal and unfairly discriminatory fees rather than collecting them themselves. This is contrary to the letter and spirit of Proposition 103.[5]

B. Mercury's Reliance on a 1997 "Advisory Letter" for its Contention That "Premiums" Exclude "Broker" Fees is Misplaced.

Mercury's discussion of a 1997 letter authored by CDI staff attorney John Tomashoff ("1997 Tomashoff letter") likewise does not advance its position. Mercury seeks to ignore the pronouncements in the Commissioner's official Bulletin 80-6, which provide: "The California courts have held that all payments by the insured which are part of the cost of insurance are premium, ***including any and all sums paid to an insurance agent,***" and "[t]he foregoing should leave no doubt that ***all sums collected by insurance agents constitute taxable premium and must be reported as such***." (I128 at 791, emphasis added; Mercury OB at 32:5-16.) Instead, Mercury asserts that the 1997 Tomashoff letter addressed to an insurance producer (not Mercury) somehow rejected and overrode the official Bulletin issued by the

[5] As discussed in CWD's Opening Brief (at 28-30), *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305 and *Metropolitan Life Ins. Co. v. State Bd. of Equalization* (1982) 32 Cal.3d 649 also support a finding that the fees at issue here are premium. In those cases, the courts defined premium as "the total amount the insureds were required to pay to obtain insurance coverage" including "additional assessments" and "miscellaneous charges." (*Troyk*, *supra*, 171 Cal.App.4th 1305, 1324-25; *Metropolitan Life Ins. Co.*, *supra*, 32 Cal.3d 649, 660.)

Commissioner. (Mercury OB at 32:15-16.) The 1997 letter itself, however, expressly disclaimed that "the contents of this letter constitute neither statute, unless specifically referenced otherwise, nor regulation." (R6_1.)

Even if the 1997 letter was an official pronouncement of the Commissioner, however, it only serves to *support* the conclusion that Mercury should have reported the illegal agent fees as premium. The 1997 letter clearly states, "If the service being provided by the agent *does* constitute the 'transaction of insurance,' the agent may not charge a fee for that service." (R6_3.) If there were any doubt that the Mercury de facto agents were transacting insurance, the court in *Krumme* resolved it by expressly finding that Mercury's "brokers" transacted insurance on behalf of Mercury. (I1 at 10, ¶14; *id.* at 13-14, ¶¶15, 16, 17.) Therefore, the illegal "broker" fees could not have been paid for any "service" other than the transaction of insurance and as such should have been reported as premium.

C. Milo Pearson's Testimony Carries No Weight.

Milo Pearson's opinion as to the meaning of premium under Proposition 103 (Mercury OB at 32:19 – 33:3) is entitled to little, if any, weight here. Mr. Pearson is not an actuary, cannot provide a legal conclusion, and he only worked with CDI until 1996, prior to the relevant period covered by this noncompliance proceeding. Thus, he never reviewed Mercury's rate applications during the relevant time period or participated in the market conduct exams that revealed Mercury's violations of the rating statutes. His opinions have never been formally adopted by the Commissioner and are flatly refuted by the formal positions taken by the Commissioner and CDI in Bulletin 80-6, the regulations defining premium, and the rate filing instructions. As discussed above and in CWD's Opening Brief, under the statutes, regulations, and forms delineating a complete rate application, all such agent fees are premium and must be reported in an insurer's rate filing submitted for prior approval.

D. AIS's Practices Do Not Support Mercury's Contentions.

Mercury contends that "AIS' view toward its broker fees confirms that such fees have nothing to do with the 'cost of insurance.'" (Mercury OB at 33:8-9.) AIS's "view" is irrelevant, and more critically, the ALJ has already ruled that Mercury is collaterally estopped from relitigating the issue of AIS's statusas a "broker". (Collateral Estoppel Ruling at 6-7, 10.) If this issue is to be reconsidered, which

Mercury never requested, CWD and CDI should be afforded the opportunity to present rebuttal evidence.[6]

E. That the Illegal Fees Were Collected by Mercury's Agents Rather than Mercury Itself Does Not Exculpate Mercury from its Rating Violations.

Mercury argues that because the illegal "broker" fees were not "revenue" to Mercury, it did not evade the prior approval process. (Mercury OB at 33-35.) This argument fails on several grounds. First, as discussed above, Mercury's contention that "[n]o provision in the Rate Statutes, prior approval regulations or the CDI's rate filing instructions calls for the disclosure of fees charged by brokers or de facto agents for services provided to customers" (Mercury OB at 33:28 – 34:2) is based on the faulty premise that the fees were paid for "broker" services. Once again, Mercury's agents were not "insurance brokers" acting on behalf of Mercury customers; they were agents acting on behalf of Mercury. (I1 at 13-14, ¶16.) Accordingly, it is irrelevant whether legitimate broker fees actually provided to true brokers for actual broker services must be disclosed in a rate application.

Second, as discussed in CWD's Opening Brief (at 26:20 – 27:17) and above, section 1861.05(b), 10 CCR § 2648.4(a), and the CDI rate application forms specifically required any amounts collected as part of premium or charged to policyholders as miscellaneous fees to be disclosed in a complete rate application submitted to CDI for prior approval. (10 CCR § 2648.4(a); e.g., R90_3; Lastofka Additional PDT at 3:2-26.)

Third, the Second Amended Notice of Noncompliance ("SANNC") in this matter did not allege that the rates that were approved for Mercury were excessive or inadequate under section 1861.05(a) and the corresponding regulations. Accordingly, Mercury's argument that accounting for the fees as revenue

---

[6] While Mercury claims that "Mercury will issue a policy … regardless of whether a broker fee may have been owed to a broker or a so-called *de facto agent*" (Mercury OB at 33:8-9), ***there is no evidence in the record to establish that a policyholder who paid an illegal agent fee was informed that he or she could still have received a policy without paying the fee***. As an AIS witness testified, 99% of AIS transactions resulted in AIS customers paying the illegal fee. (4/19/13 RT at 185:1-4, 185:9 – 186:6 [Napolitano Redirect Exam.] [only in extenuating circumstances, such as an AIS employee making a "grievous error" during the quote process or an applicant submitting a payment to AIS in an envelope after hours, would an applicant not pay a "broker" fee when obtaining coverage]; 4/24/13 RT at 119:23 - 120:2-13 [Boostrom Cross-Exam.].) From the consumer's perspective then, the premium AIS customers were charged included such fees as part of the total amount that they paid to obtain an insurance policy from Mercury. (See *Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1324 [interpreting "premium" "from the perspective of the consumer (i.e., the insured)" as "the total amount [they] were required to pay to obtain insurance coverage"].)

to Mercury in assessing its rates would have resulted in inadequate rates is irrelevant. The crux of Mercury's violations as alleged in the SANNC and established by the evidence is that some of its customers were charged premiums that included illegal fees added on top of the approved rates and premiums for those customers. This resulted in over 180,000 violations of section 1861.01(c) for charging unapproved premiums in the marketplace and section 1861.05(a) for charging unfairly discriminatory premiums.

Finally, Mercury's argument that it should not be held accountable for the acts of its agents also fails as a matter of law as it ignores basic agency principles and is flatly refuted by the following authorities:

- The *Krumme* court already determined that in charging the illegal "broker" fees, Mercury's producers were acting as agents of Mercury in the course and scope of their agency. (I1 at 13, ¶15; I1 at 16-17, ¶24.) Mercury is collaterally estopped from relitigating this issue. (Collateral Estoppel Ruling at 5-6, 14.)

- The Commissioner's Bulletin 80-6 confirms that agent fees are subject to the rate statutes, whether they are collected by the agent or Mercury:

> General rules of agency law prohibit an agent from charging sums not authorized by the agent's principal. ***Should an insurer authorize its agents to collect "fees" such fees would have to be reported as premium by the insurer, and would, of course, have to comply with the anti-discrimination statutes***. Therefore, an insurer cannot permit each of its agents to determine which fees that agent will charge because to do so would surely result in rate discrimination.

(I128 at 792, emphasis added.)

- The court's holding in *Troyk*, *supra*, 171 Cal.App.4th 1305 is also instructive. There, the Court of Appeal concluded that a service charge paid to a third party was part of "premium" (e.g., *id.* at 1315) concluding "***it is irrelevant that [the third party], instead of [Farmers] directly received the service charge***." (*Id.* at 1324, emphasis added.)

For all the foregoing reasons and those discussed in CWD's Opening Brief, Mercury's illegal agent fees were premium, and by not obtaining the Commissioner's prior approval and thereafter charging its policyholders the illegal, unapproved fees in varying amounts over 180,000 times in the marketplace, Mercury violated the prior approval requirements of section 1861.01(c) and the prohibition

against unfairly discriminatory rates under section 1861.05(a).

F. The Rate Statutes Are Sufficiently Defined by Regulations, Case Law, CDI Bulletins, and the Rate Application Instructions and Forms.

The rate statutes are not unconstitutionally vague since their terms are defined by regulations, case law, CDI bulletins, and rate application instructions and forms, all of which provide significant clarity as to how fees charged by an insurer's agent are regulated under the statutes. (See, e.g., *American Civil Liberties U. of So. Cal. v. Board of Education* (1963) 59 Cal.2d 203, 218 [statute not unconstitutionally vague if its terms may be made reasonably certain by reference to other definable sources]; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 435; *Mason v. Office of Administrative Hearings* (2001) 89 Cal.App.4th 1119, 1125-1127.) Even Mercury understood and took the position that agent fees were premium in 2001. (I327 at 3017-3019.) Moreover, the case law relied upon by Mercury refutes its vagueness claims since the conduct prohibited under the statutes is, with reference to other sources, understandable. (See *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090 [preliminary injunction provision was not unconstitutionally vague when read in context]; *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1106-1107 [city ordinance was not unconstitutionally vague because it sufficiently defined the offense such that ordinary people can understand what conduct is prohibited]; *Hand v. Board of Examiners* (1977) 66 Cal.App.3d 605, 622 [phrase in statute failed on its face to provide a standard by which conduct could be uniformly judged, but the required specificity was provided by common knowledge of members of the regulated vocation].) Given the number of sources defining the premium, and including agent fees in that definition, Mercury cannot claim it was without notice of the conduct prohibited under the statutes.

III. CONTRARY TO MERCURY'S CONTENTIONS, CDI IS NOT BARRED OR ESTOPPED FROM SEEKING PENALTIES IN THIS NONCOMPLIANCE PROCEEDING.

A. Mercury's "Broker" Fees Were Not Approved for Use by the Commissioner.

Section 1858.07(b) does not apply here to prevent the imposition of a penalty since Mercury's "broker" fees were *never* "approved for use by the commissioner in accordance with the provisions of this chapter" (Mercury OB at 16:3-7).

Mercury is not immunized from liability under section 1858.07(b) because its rate applications were approved between 1996 and 2006. ***Mercury never disclosed or obtained approval of the illegal***

"broker" fees. (See I1 at 8, ¶50); Collateral Estoppel Ruling at 14-15; 4/30/13 RT at 47:14-20, 45:10-2 [Edwards Direct Exam.]; R90 - R154; Bass PDT at 10:2-6.) As Mercury points out, Mike Edwards, CDI's Rate Filing Bureau Chief responsible for Mercury's rate applications during the noncompliance period, testified that he was never informed that Mercury was charging "broker" fees. (Mercury OB at 7:3-10; 4/30/13 RT at 38:24 – 39:12 [Edwards Direct Exam.].) CDI relies on the information in the rate application provided by the insurance company under penalty of perjury when determining whether the proposed rates are excessive, inadequate or unfairly discriminatory. (4/30/13 RT at 48:15 – 49:2 [Edwards Cross-Exam.]; 4/26/13 RT at 49:11-14 [Lastofska Redirect Exam.]; *Id.* at 49:18-21.)

Mercury cites to immaterial testimony that ***fees charged by true brokers*** do not have to be disclosed in a rate application (Mercury OB at 16:13-15). The Collateral Estoppel Ruling prevents Mercury from even arguing that the "broker" fees were charged by true brokers. (Collateral Estoppel Ruling at 5-9.) As discussed in CWD's Opening Brief (§§ II.A-E), and above, fees charged by ***agents*** are premium and must be disclosed in a rate application for review and approval by CDI.

Accordingly, because Mercury never obtained CDI's approval to charge the illegal "broker" fees, Mercury cannot avoid liability under section 1858.07(b).

B. The Eighth Amendment Does Not Bar CDI from Seeking Penalties in This Proceeding, and CDI Never "Permitted" Mercury's Illegal "Broker" Fees.

CDI is not barred from seeking civil penalties against Mercury under the Eighth Amendment. None of the cases on which Mercury relies even suggests that ***no*** penalty be imposed under the circumstances. (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 731 [remanding the case to resolve factual issues relevant to whether the imposed fine was unconstitutionally excessive]; *Hale v. Morgan* (1978) 22 Cal.3d 388 [remanding the case to determine the appropriate size of fine]; *Walsh v. Kirby* (1974) 13 Cal.3d 95, 106 [remanding the case "for reconsideration of the penalty"].) Further, mitigation would be unwarranted here, since, as discussed below in section IV.D.2, CDI never "permitted" Mercury's illegal "broker" fee practices.

Furthermore, there is no evidence that the Commissioner deviated in any way from section 1858.1 in issuing the 2004 Notice of Noncompliance ("2004 NNC"). Section 1858.1 requires the Commissioner to issue a notice of noncompliance "[i]f after examination of an insurer….or upon the basis of other information … the commissioner has good cause to believe" an insurer is violating the rating laws. There

is no time limitation in the statute from when the Commissioner develops "good cause" to when he must issue a notice of noncompliance. Here, rather than immediately initiating a formal action against Mercury, CDI gave Mercury every chance to voluntarily correct its practices, but Mercury refused to do so. CDI put Mercury on notice of the violations in the 1998 FRUB Report (R67), the 2000 draft Notice of Noncompliance (R8 ["2000 Draft NNC"]), and finally, after Mercury continued the illegal "broker" fee practices even after the court ordered it to stop, the Commissioner issued the 2004 NNC with "good cause" based on the FRUB Report and "other information," including the *Krumme* Findings and *Krumme* Judgment in 2003. In sum, the Commissioner proceeded exactly as required by the statute.

C. Mercury's Estoppel and Laches Claims Are Not Cognizable Defenses In This Noncompliance Proceeding.

Agency estoppel or laches cannot immunize a practice that is prohibited by statute. Even if Mercury could point to some specific act of CDI or the Commissioner that evidences that its "broker" fees were approved, Mercury would not be immunized from statutory penalties for its noncompliance. Neither the Commissioner nor any CDI employee has the power to approve rates or conduct that violates the law.[7] Indeed, an administrative agency simply does not have the authority to ***approve*** an insurer practice that violates a state law; such an approval would be *ultra vires*. (See, e.g., *Assoc. for Retarded Citizens v. Dept. of Development Svcs.* (1985) 38 Cal.3d 384, 391; *AICCO v. Insurance Company of North America* (2001) 90 Cal.App.4th 579.)

Moreover, as the California Supreme Court has stated, "[estoppel] ordinarily will not apply against a governmental body except in unusual instances when necessary to avoid grave injustice and when the result will not defeat a strong public policy." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 793 [finding that plaintiff had "not demonstrated that grave injustice would result from the delay that occurred in imposing discipline" and that "[a]pplication of the equitable estoppel doctrine would work to defeat the strong public policy of regulating the architectural profession"]; see also *County of Orange v. Carl D.* (1999) 76 Cal.App.4th 429, 438, quoting *In re Monigold* (1988) 205

[7] The Commissioner exercises the powers conferred upon him by statute and, as the California Supreme Court has held, "such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as *may fairly be implied* from the statute granting the powers." (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 824, italics in original.) The Insurance Code does not confer the power to "approve" otherwise illegal acts, and such power cannot "fairly be implied" from the Code.

Cal.App.3d 1224, 1228 ["Estoppel will not stand against a government agency 'if the result will be the frustration of a strong public policy'"].)

Mercury has failed to show that "grave injustice" would result from the imposition of a penalty here. That the courts in *Krumme* found Mercury's practices illegal and enjoined Mercury from permitting the illegal "broker" fees establishes that this is not a case in which the adjudged law violator – Mercury – can make any claim of "grave injustice." Also, estoppel should not apply against CDI since it would defeat the public policy of regulating insurance companies. (See *Caminetti v. State Mut. Life Ins. Co.* (1942) 52 Cal.App.2d 321, 324 ["[i]t is settled law of California that the business of insurance is one affected with a public interest"].)[8]

D. Mercury Fails to Establish the Elements of Equitable Estoppel.

Even if estoppel and laches were cognizable defenses, Mercury fails to carry its burden of establishing the necessary elements of either.[9] (See *State Compensation Ins. Fund v. Workers' Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 16 [party asserting the existence of an estoppel has the burden of establishing all the elements thereof; *Miller v. Eisenhower Medical Center* (1980) 27 Cal.3d 614, 624 [elements of laches must be affirmatively demonstrated].) To establish equitable estoppel against CDI, Mercury must show that CDI "***misrepresented or concealed material facts*** with knowledge of the truth, and with an intent to induce the other party's act or reliance" and that "[c]onversely, the other party [Mercury] ***must have been permissibly ignorant of the true facts***, and ***must have been induced to act or rely*** on the public entity's statement or concealment." (*County of Orange v. Carl D.*, *supra*, 76

---

[8] Laches likewise does not apply to this noncompliance proceeding. (See CDI OB at 34:21-28.) There is no applicable statute of limitations here and, contrary to Mercury's contention, courts do not "borrow" a statute of limitations where one does not exist in order to apply laches to an administrative agency acting for the public welfare. (*Id.* at 35:1-26.)

[9] Mercury fails to establish the elements of laches: CDI did not unreasonably delay this case, and Mercury was not prejudiced as a result of CDI initiating this action in 2004. (See § III.B. and D.1-2 below; CDI OB at 36:15-37:15.) The 1998 FRUB Report, the 2000 Draft NNC, and the *Krumme* case put Mercury on clear notice of a continuing legal challenge to its sham "broker" system; Mercury vigorously defended its sham "broker" system in the courts for nearly 10 years; Mercury had every incentive to develop, preserve, and present evidence in the *Krumme* case; and Mercury's "faded memories" claim (Mercury OB at 27) is without merit, as it is speculative and based only on cumulative or "confirming" evidence of Mercury's own contentions. For example, Mercury claims that testimony by Kerry Shapiro, a former AIS employee, could have helped its case, but makes absolutely no showing that Mr. Shapiro could not have been produced (or his testimony via deposition obtained pursuant to Gov. Code § 11511) or that his evidence would have materially affected any issue.

Cal.App.4th at 438, fn 4, citing *City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 488, emphasis added; *id.* at 438-439 [estoppel requires "affirmative representation or acts by the public agency inducing reliance by the claimant"].) There can be no estoppel where one of these elements is missing. (See, e.g., *California Cigarette Concessions v. Los Angeles* (1960) 53 Cal.2d 865, 869 [no showing of facts known to defendant but unknown to plaintiff and no showing that defendant's conduct induced plaintiff to rely thereon]; *Henry v. Los Angeles* (1962) 201 Cal.App.2d 299, 308 [no showing of misrepresentation or concealment, only mutual mistake of law].)

1. Mercury Presented No Evidence That CDI Misrepresented or Concealed Material Facts with Knowledge of the Truth and with an Intent to Induce Mercury's Reliance.

There is no evidence that CDI "misrepresented or concealed material facts with knowledge of the truth," made any "affirmative representations," or engaged in any "acts inducing reliance." (*County of Orange v. Carl D.*, *supra*, 76 Cal.App.4th at 438, fn 4.) Mercury bases its estoppel defense on the alleged lack of clarity in the law distinguishing brokers and agents prior to 2000; CDI's alleged failure "to give the 'ample notice' it promised to provide to advise Mercury of any further actions it believed Mercury needed to take" following the January 2000 meeting (Mercury OB at 20:22-25, 21:5-6; R9_2); the absence of the "broker" fee issue in the 2002 examination (*id.* at 21:14-16; R68)[10]; and 1997 and 1998 letters from Jon Tomashoff (R6, R7), which were not addressed to Mercury or to its practices and were written *before* the 1998 FRUB Report (R67) and the 2000 Draft NNC condemning Mercury's specific rating practices (R8). (Mercury OB at 20:17 - 23:21.)

Even taken at face value, Mercury's allegations do not demonstrate any affirmative misrepresentation or concealment of a material fact by CDI. In fact, the 1998 FRUB Report and the 2000 Draft NNC condemning Mercury's illegal "broker" fees practices were statements that CDI affirmatively *did not* approve of Mercury's conduct and should have induced Mercury to change its practices to comply with the law. Therefore, because Mercury has not met this first element, its equitable estoppel defense fails in its entirety. (See *Hughes v. Board of Architectural Examiners*, *supra*, 17 Cal.4th 763, 794.)

[10] Mercury's "broker" fee practices were not reviewed during the 2002 examination because the issue had been referred to the legal department for resolution. (Amended Prepared Rebuttal Testimony of Tracy Stevenson, Oct. 15, 2013, at 2:9-11, 3:4-7; 6/5/13 RT at 18:9 – 22:8 [Stevenson Cross-Exam.].)

2. Mercury Has Not Proven Reliance.

Mercury's estoppel defense also fails on the second element: Mercury cannot establish that it was "permissibly ignorant of the true facts" and "induced to act or rely on [CDI's] statement or concealment." (*County of Orange v. Carl D.*, *supra*, 76 Cal.App.4th at 438, fn. 4.) Mercury claims "reliance" entirely on a fictitious "agreement" with CDI. Mercury ***asserts*** reliance, but submits no evidence to prove it.

Without citing to any evidence or testimony, Mercury claims that it relied on statements in 1997 and 1998 letters from Jon Tomashoff in designating its de facto agents as "brokers" and allowing them to charge fees. (Mercury OB at 23:11-13; R6, R7.) Neither of the letters, however, were addressed to anyone at Mercury. (R6_1, R7_4.) Neither of the letters discussed Mercury's practices. There is no evidence that anyone at Mercury received, read, or knew of the existence of the 1997 and 1998 letters. Thus, Mercury cannot claim that it relied on the 1997 and 1998 letters.

Moreover, the law regarding the distinction between brokers and agents was not "ambiguous," "unclear," and "uncertain" prior to 2000. (Mercury OB at 2:19 – 4:4, 19:1-15.) Mercury cites no evidence that it relied on any ambiguity in the law in maintaining its "broker" system; it does not point to any particular aspect of the law that was unclear. The evidence shows that CDI clearly communicated to Mercury CDI's understanding of the law. The 1998 FRUB Report's conclusions that Mercury's "brokers" were de facto agents charging consumers illegal "broker" fees in violation of section 1861.05(a) and the 2000 Draft NNC's allegations that the "broker" fees violated sections 1861.01 and 1861.05(a) informed Mercury that CDI considered Mercury's conduct illegal under the rate statutes. (R67_7, R8_5.)

Again, ***without citing to any evidence***, Mercury claims that CDI and Mercury "agreed [at the January 2000 meeting] that a legislative solution was the appropriate solution to resolve the broker issue." (Mercury OB at 20:27-28.) Mercury relies on this fictional "agreement" with CDI to claim it had a "reasonable basis for believing that the CDI considered the 'broker issues' resolved." (Mercury OB at 21:2-3, 20:15-16.) Yet, Kenneth Kitzmiller, Mercury's former Vice President of Underwriting who was present at the January 2000 meeting, testified that he was never told by CDI that the issue was resolved. (RT 4/25/13 at 119:13-16 [Kitzmiller Redirect Exam.].) Moreover, CDI's letter to Mr. Kitzmiller

summarizing the January 2000 meeting completely refutes that Mercury could have had any reasonable basis to believe that the "broker" issue was resolved:

> Mr. McClaran [of CDI] requested that Mercury write a response to the draft Notice of Noncompliance. As part of Mercury's response, Mr. Joseph [of Mercury] proposed to include a statement of Mercury's intention a) to draft a bill that defines agents and brokers and b) to invite the California Insurance Department to work with Mercury in drafting the proposed bill. [¶] Mr. McClaran stated that the California Insurance Department will give Mercury ample notice ***if it determines that, after receiving Mercury's response to the draft Notice of Noncompliance, other action needs to be taken.***

(R9_2, emphasis added.) This letter confirms that no "agreement" was reached between Mercury and CDI to "resolve" the "broker" issue since after the meeting, CDI once again communicated to Mercury its expectation that Mercury submit a written response to the 2000 Draft NNC.

Significantly, CDI opposed Mercury's Assembly Bill ("AB") 2639, further refuting Mercury's claim that it had an agreement with CDI regarding a "legislative solution." (See I133 at 852 ["[t]his bill, sponsored by the Mercury Casualty Company, would functionally blur the clear, long-established legal distinctions between 'agents' and 'brokers,' which would create needless consumer confusion and enforcement nightmares for the Department."].) Mercury claims AB 2639 clarified the law (Mercury OB at 5; 4/19/13 RT 136:2-137:24 [Norman Redirect Exam.]), but the 2000 amendment was immaterial to the "broker" issue raised by CDI. (See R10, R13) Therefore, Mercury did not rely on any ambiguity in the pre-2000 law.

On October 20, 2000, CDI issued an addendum to the 1998 FRUB Report ("2000 Addendum") again expressing its expectation that Mercury respond to the 2000 Draft NNC. (R67_10.) The 2000 Addendum noted that CDI had not yet received a written response from Mercury to the 2000 Draft NNC, and "CDI contacted Mercury [] to learn the status of Mercury's written response and was advised that ***Mercury thought*** that its obligation to send a written response had been fulfilled by the passage of Assembly Bill 2639, which Mercury supported." (R67_11, emphasis added.) The 2000 Addendum further stated, "***Mercury will contact the CDI's Legal Division to discuss the matter further***." (*Ibid.*, emphasis added.) As these statements make clear, CDI did not consider Mercury's beliefs regarding AB 2639 to be a "resolution" to the 2000 Draft NNC. Mercury never provided a formal written response to the 2000 Draft NNC. (R9; R67_10-11.)

Even after the *Krumme* case was filed in 2000, which put Mercury on additional notice of an ongoing legal challenge to its sham "broker" system, and well past 2003 when the *Krumme* Findings and Judgment were issued against Mercury requiring Mercury to stop charging illegal "broker" fees, Mercury continued its practices. (I1, I2; CWD OB at 13:12 – 15:12.) Mercury continued to permit its de facto agents to charge "broker" fees after CDI filed the 2004 NNC. Mercury took no corrective actions during the pendency of this noncompliance proceeding until it was forced to do so by the courts in 2005 (I4, I5), and it was not until 2009 when AIS became Mercury's appointed agent that Mercury finally abandoned its "broker" system (4/17/13 RT at 60:18-19 [Wolak Cross-Exam.]). These facts show that Mercury had no intention of changing its practices in reliance on any Departmental action or statement.

In sum, Mercury's disregard of CDI's 1998 warning in the FRUB Report, the 2000 Draft NNC and 2000 Addendum, and the 2004 NNC negates any inference that Mercury actually relied on any "green lights" from CDI. Mercury disregarded all of these *red lights* from CDI and simply continued to facilitate the charging of illegal "broker" fees to its customers. Mercury's decision was based on serving its own interests, not on anything CDI said or did. Mercury's reliance claim is unproven, and the actions of CDI affirmatively condemning Mercury's practices confirm that it is a sham.

IV. MERCURY'S DUE PROCESS ARGUMENTS ARE WITHOUT MERIT.

A. Mercury Had a Full Opportunity to Be Heard and Present Evidence in an APA Hearing.

Without presenting any new evidence on these issues, Mercury seeks to reinstate ALJ Owyang's erroneous January 31, 2012 Proposed Decision ("ALJ Owyang's Proposed Decision") dismissing the case based on his misapplication of the ex parte communication and separation of powers provisions of the Government Code, issues which were never tried, briefed, or argued by the parties, and finding that Mercury was somehow denied due process and a fair hearing even though no evidence had been admitted, no witnesses had yet been examined, and no hearing on the substantive allegations in the SANNC had yet occurred.[11] Pursuant to Government Code section 11517(c)(2)(D), and 10 CCR §

[11] ALJ Owyang's Proposed Decision was based in part on his erroneous interpretation of 10 CCR § 2614.13 ("the PDT regulation"), and his refusal to apply a 2010 amendment to that regulation properly adopted in a separate rulemaking proceeding and approved by the Office of Administrative Law, which clarified the original intent of the regulation as not applying to adverse witness testimony. As ALJ Scarlett followed Judge Owyang's ruling applying the pre-amendment version of the PDT regulation (Transcript of Hearing on Motions, Jan. 15, 2013, at 100:4-18, 104:4-8, 105:10-16; Order Regarding Respondents' Motions to Strike the Department and Intervenor's Prehearing Direct Testimony, Mar. 20,

2614.24, the Commissioner rightfully *rejected* ALJ Owyang's Proposed Decision and referred the matter back to the ALJ with instructions to take evidence, hold a hearing, and issue a proposed decision on the substantive allegations of the SANNC. (Commissioner's Order Rejecting Proposed Decision, Mar. 31, 2012 at 2:1-9.)[12]

Mercury has now had a full opportunity to present evidence in a full-fledged APA hearing. Indeed, the APA, which has been held to apply to this noncompliance proceeding in addition to CDI's procedural regulations for noncompliance proceedings, affords Mercury all the due process rights that are required, including the opportunity to be heard and to present and rebut evidence, and the right to "cross-examine opposing witnesses on any matter relevant to the issues...." (See Gov. Code § 11513(b); Telephonic Trial Setting Conference Order and Scheduling Order, Dec. 19, 2012, at 2.) During the evidentiary hearing, Mercury was heard, presented and rebutted evidence, and cross-examined witnesses on the merits of the noncompliance proceeding. Therefore, Mercury's request to dismiss the proceeding pursuant to the findings in ALJ Owyang's Proposed Decision should be denied.

B. ALJ Owyang's Ruling That CDI Failed to Maintain a Separation Between Its Investigator, Prosecutor, Rule-Maker, and Adjudicator Functions Was Incorrect and Properly Rejected by the Commissioner.

Government Code section 11425.30(a) provides in relevant part that "a person may not serve as [the decision-maker] in ***an adjudicative proceeding***" when "the person has served as investigator, prosecutor, or advocate ***in the proceeding or its preadjudicative stage***." (Emphasis added.) ALJ Owyang's Proposed Decision erroneously found – without the benefit of any briefing – that CDI somehow violated this provision by conducting a separate ***rulemaking*** proceeding to amend the PDT regulation. (See ALJ Owyang's Proposed Decision at 17-18.) This ruling was incorrect on the facts and the law. No CDI advocate in this noncompliance proceeding or its preadjudicative stage has served as decision-maker in this ***adjudicative proceeding***. Mercury cannot point to one CDI attorney or advocate

---

2013, at 1-2.), any claims by Mercury that its case was somehow prejudiced by the 2010 amendment have no merit.

[12] Mercury filed a petition to vacate the Commissioner's order rejecting ALJ Owyang's Proposed Decision and dismiss the SANNC entirely. (Verified Petition for Writ of Mandate Pursuant to Code of Civil Procedure sections 1085 and 1094.5, and Complaint for Declaratory Relief or Any Other Appropriate Relief, *Mercury Ins. Co., et al. v. Dave Jones, etc.* (Super. Ct. Los Angeles County, Apr. 19, 2012, BS137151).) The trial court denied Mercury's petition. (Court's Ruling on Respondent's Demurrer Heard on September 12, 2012, *Mercury v. Jones*, Sep. 14, 2012, at 4, 7.) In a nonpublished decision, the Court of Appeal affirmed. (*Mercury Ins. Co. v. Jones* (Apr. 26, 2013, B244204) 2013 WL 1777781.)

who has served as the decision-maker in this adjudicative proceeding. Indeed, only Commissioner Jones has served as decision-maker in this adjudicative proceeding by making the decision to ***reject*** ALJ Owyang's Proposed Decision and send the matter back to OAH for further proceedings. Moreover, the Commissioner has not at any time served as investigator, prosecutor, or advocate in the noncompliance proceeding or its preadjudicative stage, and he will be the ultimate decision-maker after the final Proposed Decision on the merits is submitted to him by ALJ Scarlett. These facts are fatal to Mercury's arguments and soundly defeat any claim of violation of the separation of functions requirement under Government Code section 11425.30(a).

Moreover, section 11425.40 of the APA specifically anticipates that an agency head who serves as decision-maker in a matter might have "participated in the drafting of laws or regulations or in the effort to pass or defeat laws or regulations, the meaning, effect, or application of which is in issue in the proceeding," and provides that this is not sufficient cause to disqualify the agency head for bias, prejudice, or interest in the proceeding.

C. ALJ Owyang's Ruling Purporting to Dismiss the Noncompliance Proceeding on the Grounds That CDI Engaged in Ex Parte Communications with the Commissioner Was in Error and Properly Rejected by the Commissioner.

Government Code section 11430.10(a) provides: "While the proceeding is pending there shall be no communication, direct or indirect, regarding any issue in the proceeding, to the presiding officer from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." Government Code section 11430.10 also applies to the decision-maker, here Commissioner Jones. (Gov. Code § 11430.70.) The rule "applies only in administrative adjudication proceedings; ***it does not apply in rulemaking proceedings***." (Cal. Law Revision Comm. com., West's Ann. Gov. Code (1995 ed.) foll. § 11430.70, p.724, emphasis added, attached as Ex. B for the ALJ's convenience.)[13]

[13] See also Michael Asimow, Toward A New California Administrative Procedure Act: Adjudication Fundamentals (1992) 39 UCLA L. Rev. 1067, 1139, emphasis added. ("[A]n agency may well have other matters underway with respect to which such contacts are perfectly proper. For example, there might be a pending rulemaking proceeding involving issues of interest to parties who are also engaged in a pending adjudication before the agency. Clearly, a party should not be precluded from participating in the rulemaking proceeding. ***The ex parte provision is intended not to put adjudicators (especially agency heads) into an ivory tower, but to shield them from communications that could affect a pending adjudication.***) Professor Asimow "was retained by the [Law Revision] Commission as its principal advisor in reviewing the APA and proposing reforms [that led to the current Government Code

CDI fully responded to ALJ Owyang's February 24, 2011 Order, disclosing on the record the communications it had with former Commissioner Poizner and his staff during the pendency of this matter. (Mercury Oct. 16, 2013 RON, Exs. K [Decl. of Adam M. Cole in Support of the Department of Insurance's Response to the Administrative Law Judge's February 24, 2011 Order re Ex-Parte Communications, Mar. 24, 2011], L [Letter from Adam Cole to ALJ Owyang regarding ex parte communications, Apr. 26, 2011].) The declaration of CDI General Counsel Adam Cole ("Cole Declaration") confirms that no CDI attorney involved in the prosecution of the noncompliance proceeding had any direct communications with current Commissioner Dave Jones, or former Commissioner John Garamendi, during the proceeding "regarding any issue in this proceeding, including the PDT issue and Section 2614.13." (Mercury RON, Ex. K at ¶¶2, 3.) Other than the permissible direct communications counsel for CDI had with former Commissioner Poizner during a settlement conference with all parties present, CDI had no direct communication with former Commissioner Poizner "regarding any issue in this proceeding, including the PDT issue and Section 2614.13." (*Id.* at ¶¶4-5.)

The Cole Declaration and April 26, 2011 letter also confirmed that CDI did not have any indirect communication with the Commissioner regarding any substantive issue in the case. According to Chief Counsel Cole's April 26, 2011 letter, he obtained the approval of former Commissioner Poizner's Special Counsel and Chief of Staff to initiate a rulemaking proceeding, stating that both were "authorized to approve rulemaking files on Commissioner Poizner's behalf." (Mercury RON, Ex. L at 4.) Chief Counsel Cole's letter also confirmed that "neither of [the Commissioner's advisors] at any time spoke to Commissioner Poizner about the PDT rulemaking." (*Ibid.*) Chief Counsel Cole's letter contains no further discussion of the content of the communications he had with former Commissioner Poizner's Special Counsel and Chief of Staff. Thus, there is absolutely no evidence in the record to establish that Chief Counsel Cole had any "indirect" communication with former Commissioner Poizner about any

---

provisions on ex parte communications]." (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* ("*Quintanar*") (2006) 40 Cal.4th 1, 9, fn. 5.) The California Supreme Court "has found Professor Asimow's work on administrative law for the Commission highly persuasive." (*Ibid.*)

issue in the proceeding,[14] and there is absolutely no evidence that CDI had any direct or indirect communications with Commissioner Jones.

Chief Counsel Cole's communication with the Commissioner's advisors regarding opening a rulemaking proceeding does not invoke the ex parte rules, since the ex parte rules only apply in "administrative adjudication proceedings" and not "rulemaking proceedings." (See Ex. B [Cal. Law Revision Comm. com., *supra*, foll. § 11430.70, p. 724].) If the ex parte rules applied to bar communications about initiating rulemaking proceedings, as Mercury suggests, an agency could never implement a rulemaking proceeding regarding a procedural rule that will apply to all adjudicatory proceedings while any adjudicatory proceeding is pending. This is not the case. Indeed,

> [i]t is important to recognize that agencies, unlike courts, perform many functions besides adjudication. Agency heads or staff may be simultaneously engaged in rulemaking, informal adjudication, planning for the future, advising the public, negotiating with the governor or the legislature over budget or legislative changes, or numerous other chores. In many instances, these activities may involve the same legal issues and even the same parties that are also involved in pending adjudicatory disputes before the agency. An individual should not be viewed as becoming an adversary in a particular case simply because that person has engaged in nonadjudicatory activity involving the same issues or the same persons.

(Asimow, *supra,* at 1176.) As is evident from the Law Revision Commission Comment and Professor Asimow's comments, application of the ex parte rules to rulemaking proceedings would hamstring an agency into never being able to adopt or amend any procedural rules.

Even if the communication Mr. Cole had with former Commissioner Poizner's advisors could be construed as "indirect" communications with the Commissioner under Government Code section 11430.10, which it cannot, the appropriate remedy is disclosure of the communication and an opportunity for the parties to comment. Mercury had notice of the communication and ample opportunity to comment on it.

Unlike the challenged communications here, the communications at issue in the cases on which Mercury relies to support dismissal (*Quintanar*, *supra*, 40 Cal.4th 1; *Rondon v. Alcoholic Beverage*

[14] Contrary to Mercury's contentions (Mercury OB at 12:16 – 13:1), because this is Mercury's affirmative defense, as with its other defenses, the burden is on Mercury to prove that a prohibited ex parte communication took place, not on the CDI to disprove it. (*Morris v. Williams* (1967) 67 Cal.2d 733, 760.) Mercury cannot rely on mere conjecture to prove its defense, especially when it seeks to dismiss the entire proceeding.

Control Appeals Board ("*Rondon*") (2007) 151 Cal.App.4th 1274; *Chevron Stations, Inc. v. Alcoholic Beverage Control Appeal Board* ("*Chevron*") (2007) 149 Cal.App.4th 116; Mercury OB at 13:5-6), involved substantive issues in noncompliance proceedings. Accordingly, the Court of Appeal in Mercury's writ action expressly *rejected* Mercury's argument that "the commissioner was obligated to approve [ALJ Owyang's] proposed decision and dismiss the noncompliance action as recommended or limit its remand to further findings on the due process violations[,]" finding Mercury's reliance on *Quintanar, Rondon*, and *Chevron* "misplaced[.]" (*Mercury Insurance Company v. Jones* (Apr. 26, 2013, B244204) 2013 WL 1777781 at *6-7.) The Court reasoned:

> [*Quintanar, Rondon*, and *Chevron*] were based on ex parte communications concerning the *merits* of a final decision by an administrative agency to revoke a license. These cases addressed the appropriate remedy for a final decision in which ex parte communications were made about the *merits* to the decision maker following full blown hearings. This case, however, raises two different issues: (1) an ex parte communication in the rule making process concerning presentation of evidence; and (2) an exhaustion of administrative remedies for failure to obtain a final decision. …The cited cases did not hold an ex parte communication in the rule making process concerning the use of evidence excuses a party from exhausting available administrative remedies. The cited cases also did not purport to hold that, once an administrative law judge makes due process and Administrative Procedure Act findings, the decision maker is bound by them.

(*Id.* at *7.) Accordingly, the ALJ cannot *dismiss* the proceeding based on ALJ Owyang's erroneous findings as Mercury requests.

D. The 1998 and 2002 FRUB Reports Were Made Public Consistent with Insurance Code Section 735.5(a).

Contrary to Mercury's claims, the 1998 and 2002 FRUB Reports that Darrel "H" Woo, the CDI attorney responsible for compliance with the Public Records Act ("PRA"), provided to a San Francisco Chronicle Reporter in response to her January 5, 2010 PRA Request were made public consistent with section 785.5(a). That section provides:

> Nothing contained in this article shall be construed to limit the commissioner's authority to use and, if appropriate, to make public, any final or preliminary examination report, any examiner or company workpapers or other documents, or any other information discovered or developed during the course of any examination in the furtherance of any legal or regulatory action which the commissioner may, in his or her discretion, deem appropriate.

Pursuant to the plain language of section 735.5(a), the Commissioner has the authority to both "use" and "make public" any final or draft examination report and related documents so long as it furthers a legal or

regulatory action which the Commissioner, in his discretion, deems appropriate.

Here, the Commissioner exercised his discretion to initiate a regulatory action under section 1858 et seq. Thus, the Commissioner had the authority "to use" ***and*** "to make public" the FRUB documents in furtherance of this action.

In any event, Mercury does not provide any evidence that any prohibited ex parte communications by CDI with the Commissioner occurred in relation to the release of the FRUB documents. Nor has Mercury shown any violation of separation of functions occurred. CDI counsel have not and will not serve as the decision-maker in this adjudicatory proceeding, and Commissioner Jones has not served as a prosecutor in the proceeding.

V. CONCLUSION

For all the reasons set forth above and in CWD's Opening Brief, Mercury must be held liable for its willful evasion of the requirements of Insurance code sections 1861.01(c) and 1861.05(a) perpetrated through its illegal "broker" fee rating scheme. While the evidence in this case supports a penalty of over $1.8 billion, Consumer Watchdog submits that a penalty of $20 million would serve the interests of justice and requests that the ALJ so recommend in a proposed decision to the Commissioner.

Dated: November 15, 2013

Respectfully Submitted,

Harvey Rosenfield
Pamela Pressley
Laura Antonini
CONSUMER WATCHDOG

Arthur D. Levy

BY: Pamela Pressley

Pamela Pressley
Attorneys for Intervenor CONSUMER WATCHDOG

EXHIBIT A

Mercury's 2005 "Operational Changes" [Per Mercury's Opening Brief at 43:2-28, Tirador , Mar. 15, 2013, PDT at 7:10-24]	***De Facto* Agency Features Left Intact**	***Krumme* Court's Response**
"Revision of Mercury's broker contract"; "In placing business with Mercury, brokers acted on behalf of their customers/clients, not on behalf of Mercury"	"Broker" authority to submit applications remained substantially identical to agent's authority: Mercury required both "brokers" and agents to "present applications for insurance for such classes of risks as Company may offer *as specified in written or electronic instruction in manuals, software, forms or applications*." (4/18/13 RT at 68:15-18; 78:25-79:19; I146, I149, emphasis added.) Sliding scale and contingent commissions continued identically for "brokers" and agents alike. (I146; I149.)	The Court found that Mercury "brokers" continued to engage in "front line underwriting" for Mercury, and that Mercury rewarded them for their skill and proficiency in providing this service. (I5 at 50, lines 1-13.) The Court expressly disapproved Mercury's continued use of sliding scale and contingent commissions. (*Id.*)
"Creation of a broker manual"	Mercury proposed separate, but virtually identical, "Agent" and "Broker" manuals. (4/18/13 RT at 70:24-71:13, 72:11-16; I4 at 41, I32, I33; *see also* 4/16/13 RT at 9:13-10:1.)	The Court ruled that the detailed manuals Mercury proposed were inconsistent with Mercury's assertion that the "brokers" were not performing underwriting services. (I5 at 50-51.) The Court directed Mercury to simplify its "broker" manuals to eliminate "broker" underwriting. (I5 at 51, lines 7-14.)

Mercury's 2005 "Operational Changes" [Per Mercury's Opening Brief at 43:2-28, Tirador , Mar. 15, 2013, PDT at 7:10-24]	***De Facto* Agency Features Left Intact**	***Krumme* Court's Response**
"Revision of Mercury's procedures for binding" "Brokers had no authority to effect or bind coverage for any application, renewal or endorsement, and that coverage is only bound when Mercury issued a policy number, binder number or other written or electronic acknowledgment"	Left "broker" binding procedures substantially intact because "manual" binding was technologically obsolete by 2003.[1] (CWD Opening Brief at 13-15.)	The Court dismissed Mercury's emphasis on the supposed automatic character of its electronic submission software ("Quicksilver") by noting that the same system had been in place for at least three years prior to the 2003 *Krumme* Judgment. (Ex. I-5 at p. I49, lines 8-22; p. 51, lines 3-7.)

[1] "Manual" binding enabled a producer to "bind" coverage at the point of sale without submitting an application. Because of the prevalence of electronic submissions by 2003, this was primarily used when the Mercury electronic application system was "down." (4/17/13 RT 107:10-108:2 [Wolak Cross-Examination].) To address "brokers'" need to instantly bind coverage when the Mercury system was down, Mercury implemented "telebinding" in July 2003. (4/16/13 RT 145:1-147:5 [Wolak Direct Examination]; I239; 4/17/13 RT 107:24-108:5 [Wolak Cross-Examination]; 4/19/13 RT 181:15-182:24 [Napolitano Cross-Examination].) Telebinding allowed producers to bind coverage by leaving minimal information on a telephone voicemail line, without having to submit an application. (*Id*.) In December 2003, Mercury replaced telebinding with "web binding," which enabled binding by simply submitting "minimal information" over the internet. (4/16/13 RT 148:3-150:15 [Wolak Direct Examination]; I44, I287; 4/17/13 RT 108:6-21 [Wolak Cross-Examination].) Because telebinding and web binding allowed binding without the application being submitted, they were functionally equivalent to manual binding authority.

Mercury's 2005 "Operational Changes" [Per Mercury's Opening Brief at 43:2-28, Tirador , Mar. 15, 2013, PDT at 7:10-24]	***De Facto* Agency Features Left Intact**	***Krumme* Court's Response**
"Limitation of broker training to online submission of applications and placements of coverage with Mercury"	Mercury continued to insist on the right to enforce the rules in the manuals (4/16/13 RT at 11:9-12:20); continued the practice of issuing M-19s and listing "binding errors" for brokers, and AIS in particular (4/17/13 RT at 158:18-160:22, I66, I67, I276, I279, I285, I286, I305, I307, I309).	The Court directed Mercury to end the marketing supervision system that "advance[s] threats of financial consequences such as reduced commissions and/or termination as a sanction for poor broker performance in 'front line underwriting' and prevention of losses by Mercury." (I5 at 51, lines 15-22.)
"Elimination of broker binding"	*See* "Revision of Mercury's procedures for binding," above.	See "Revision of Mercury's procedures for binding," above.
"Elimination of all services rendered on behalf of Mercury except as permitted under Section 1732 of the California Insurance Code"	So general as to be operationally meaningless.	The Court criticized Mercury's continued de facto control over "brokers" through its closed application process and the overhanging power to terminate "brokers." (I5 at 50, lines 14-23.) The Court directed Mercury to implement the "open application procedure allowing any licensed broker, as well as Mercury agent, to submit insurance applications," which became known as "take all brokers."

EXHIBIT B

West's Annotated California Codes
Government Code (Refs & Annos)
Title 2. Government of the State of California
Division 3. Executive Department (Refs & Annos)
Part 1. State Departments and Agencies (Refs & Annos)
Chapter 4.5. Administrative Adjudication: General Provisions (Refs & Annos)
Article 7. Ex Parte Communications (Refs & Annos)

West's Ann.Cal.Gov.Code § 11430.70

§ 11430.70. Agency heads or other persons with power to hear or decide

Effective: March 22, 2010
Currentness

(a) Subject to subdivisions (b) and (c), the provisions of this article governing ex parte communications to the presiding officer also govern ex parte communications in an adjudicative proceeding to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated.

(b) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized ratemaking proceeding if the content of the communication is disclosed on the record and all parties are given an opportunity to address it in the manner provided in Section 11430.50.

(c) An ex parte communication to the agency head or other person or body to which the power to hear or decide in the proceeding is delegated is permissible in an individualized determination of an application for site certification pursuant to Chapter 6 (commencing with Section 25500) of Division 15 of the Public Resources Code, that is before the State Energy Resources Conservation and Development Commission, if the communication is made by an employee of another state agency and is made for the purpose of enabling the presiding officer to effectively manage the proceeding.

Credits
(Added by Stats.1995, c. 938 (S.B.523), § 21, operative July 1, 1997. Amended by Stats.2009-2010, 8th Ex.Sess., c. 9 (S.B.34), § 4, eff. March 22, 2010.)

Editors' Notes

LAW REVISION COMMISSION COMMENTS

1995 Addition

Under Section 11430.70, this article is applicable to the agency head or other person or body to which the power to act is delegated. For an additional limitation on communications between the presiding officer and agency head, see Section 11430.80.

Section 11430.70 applies only in administrative adjudication proceedings; it does not apply in rulemaking proceedings. Cf. Sections 11405.20 ("adjudicative proceeding" defined); 11405.50 ("decision" defined). See also Sections 11400 (administrative adjudication provisions); 11410.10 (application of chapter). While subdivision (b) permits ex parte communications to the agency head in an individualized ratemaking proceeding, it does not require an agency head to accept ex parte communications.

Moreover, an agency may provide greater limitations on acceptance of ex parte communications than would be permitted by this provision. See Section 11425.10(b) & Comment (administrative adjudication bill of rights). [25 Cal.L.Rev.Comm. Reports 711 (1995)].

Notes of Decisions (1)

West's Ann. Cal. Gov. Code § 11430.70, CA GOVT § 11430.70
Current with urgency legislation through Ch. 800 of 2013 Reg.Sess., all 2013-2014 1st Ex.Sess. laws, and Res. Ch. 123

End of Document

PROOF OF SERVICE
[BY OVERNIGHT OR U.S. MAIL, FAX TRANSMISSION, EMAIL TRANSMISSION AND/OR PERSONAL SERVICE]

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

I am employed in the City of Santa Monica and County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action. My business address is 2701 Ocean Park Blvd., Suite #112, Santa Monica, California 90405, and I am employed in the city and county where this service is occurring.

On November 15, 2013, I caused service of true and correct copies of the document entitled

CONSUMER WATCHDOG'S POST-HEARING REPLY BRIEF

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

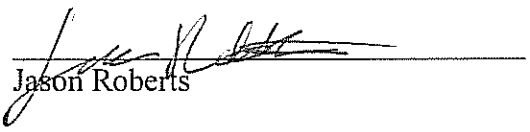
1. If marked FAX SERVICE, by facsimile transmission this date to the FAX number stated to the person(s) named.

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 November 15, 2013, at Santa Monica, California.



Jason Roberts

SERVICE LIST

Person Served	Method of Service
Richard G. DeLaMora Spencer Y. Kook James C. Castle Barger & Wolen LLP 633 West Fifth Street, 47th Floor Los Angeles, CA 90071 Tel. No.: (213) 680-2800 Fax No.: (213) 614-7399 rdelamora@bargerwolen.com skook@bargerwolen.com jcastle@bargerwolen.com	_____ FAX _____ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED ___X__ EMAIL
James Stanton Bair, III Jennifer McCune Elizabeth Mohr Adam M. Cole California Department of Insurance Rate Enforcement Bureau 45 Fremont street, 21st Floor San Francisco, CA 94105 Tel. No.: (415) 538-4116 Fax No.: (415) 904-5490 bairs@insurance.ca.gov mccunej@insurance.ca.gov Elizabeth.mohr@insurance.ca.gov Adam.cole@insurance.ca.gov	_____ FAX _____ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED ___X__ EMAIL
Arthur D. Levy 445 Bush Street, 6th Floor San Francisco, CA 94108 Tel. No.: (415) 702-4550 Fax No.: (415) 814-4080 arthur@yesquire.com	_____ FAX _____ U.S. MAIL _____ OVERNIGHT MAIL _____ HAND DELIVERED ___X__ EMAIL