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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

STATE FARM GENERAL INSURANCE COMPANY, Petitioner and Plaintiff, **v.** **DAVE JONES, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA; and Does 1-50,** Respondents and Defendants.	Case No. 37-2016-00041469-CU-MC-CTL **RESPONDENT'S OPPOSITION TO STATE FARM'S APPLICATION FOR (1) A TEMPORARY EXTENSION OF STATUTORY AUTOMATIC STAY UNTIL A NOTICED MOTION MAY BE HEARD, OR (2) AN ORDER SHORTENING TIME** Date: December 8, 2016 Time: 8:45 a.m. Dept: 69 Judge: The Hon. Katherine Bacal Trial Date: None set. Action Filed: November 23, 2016

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INTRODUCTION

Respondent and Defendant Dave Jones, sued here in his official capacity as the Insurance Commissioner for the State of California ("Respondent" or "Commissioner"), opposes the ex parte request of Petitioner and Plaintiff State Farm General Insurance Company ("Petitioner" or "State Farm") for a temporary order staying or an order shortening time to hear a motion to stay the Commissioner's Order Adopting Revised Proposed Decision issued November 7, 2016 ("Rate Order")[1] in the prior approval homeowners rate proceeding entitled *In the Matter of the Rate Application of State Farm General Insurance Company*, File No. PA-2015-00004 (the "Rate Proceeding").

As a preliminary matter, the Commissioner was served with State Farm's voluminous Application one and a half days before the scheduled ex parte hearing, and thus the Commissioner has not been given an adequate, let alone full, opportunity to respond to the 200 pages of documents served on him.[2]

What the Commissioner can discern is that State Farm has not met its burden of demonstrating that there is a basis for an interim stay. State Farm has cited no authority, and the Commissioner is not aware of any, that would authorize the court to issue an ex parte temporary stay pending a regularly noticed motion.

State Farm's ex parte application and memorandum of points and authorities in support of its ex parte application essentially make two arguments: (1) State Farm cannot timely comply with the rate order; and (2) the Department *could* initiate an enforcement action against State Farm for non-compliance. As set forth below, neither constitutes good cause for ex parte relief.

Additionally, the court should not issue any stay of the Rate Order pending its review of the Petition for the following reasons: (1) State Farm fails to meet the requirements of Code of Civil Procedure section 1094.5, subdivision (h)(1) for the issuance of a stay because public

[1] State Farm has attached a copy of the Rate Order as Exhibit A to the Petition in this matter.

[22] In this opposition to State Farm's ex parte application, the Commissioner does not purport to provide a complete response to State Farm's draft motion for stay and supporting documents, attached as an exhibit. Should such a motion be filed, the Commissioner reserves the right to fully and timely respond to it on the merits.

interest will suffer; (2) the court lacks jurisdiction to grant a stay because State Farm admits that it cannot comply with the Commissioner's order, a fact that was not disclosed at the administrative hearing; and (3) it is uncertain whether this court is the proper venue under Code of Civil Procedure section 393.

FACTUAL AND REGULATORY BACKGROUND

This matter arises out of a homeowner's prior approval rate application, file no. 14-8381, originally submitted by Petitioner to the California Department of Insurance on December 4, 2014, requesting an overall rate increase of +6.9% for its California homeowners line. The Department reviewed the Application, determined that a rate *decrease*, not an increase, was required, and so informed State Farm. After settlement talks failed, the Department issued a Notice of Hearing on June 22, 2015, informing Petitioner that its then-current homeowners rates would be excessive by *at least 6.6%* as of July 15, 2015 and that Petitioner would owe refunds with interest for any excessive rates charged after July 15, 2015.

Following discovery and multiple days of in-person testimony by numerous witnesses in November 2015 and rebuttal testimony during January 2016, the Commissioner adopted the Department's Administrative Law Judge (second) proposed decision on November 7, 2016. The Rate Order requires State Farm to reduce its homeowner's insurance rates by an overall 7% and requires State Farm to refund customers who were overcharged from July 15, 2015, when State Farm began collecting the premiums from its policyholders. State Farm has not filed a petition for reconsideration. (Cal. Code Regs., tit. 10, §§ 2659.1, 2659.2.)

ARGUMENT

I. STATE FARM IS NOT ENTITLED TO A STAY UNDER CODE OF CIVIL PROCEDURE SECTION 1094.5, SUBDIVISION (H)(1) BECAUSE THE PUBLIC INTEREST WILL SUFFER IF THE RATE ORDER IS STAYED

The court should not grant an ex parte stay the Commissioner's Rate Order pending a review of the Petition. Under Code of Civil Procedure section 1094.5, subdivision (h)(1), the Court shall not impose any stay of an administrative order "unless the court is satisfied that the public interest will not suffer and that the … agency is unlikely to prevail ultimately on the merits." Additionally, before imposing a stay California courts interpreting section 1094.5 have

also required petitioners to demonstrate both (1) a showing of irreparable harm; and (2) a reasonable prospect of success on the merits of the underlying claims. (*Bd. of Medical Quality Assurance v. Super. Ct. (*1980) 114 Cal.App.3d 272, 276 [requiring more than a conclusion that a *possible* viable defense exists].)

Here, Petitioner cannot make any of the required showings. There are approximately 1.7 million State Farm current and former policyholders in California who directly benefit from the Commissioner's Rate Order, both by having excessive premiums refunded to them as well as by having their current rates reduced to non-excessive levels. The Commissioner has determined that State Farm has been charging these consumers excessive rates in violation of Insurance Code section 1861.05(a) since July 15, 2015. Proposition 103 expressly vests the authority to review property and casualty insurance rates with the Commissioner to prevent insurers from charging, *inter alia*, excessive rates. (See *Amwest Surety Ins. Co. v. Wilson* (1995) 11 Cal.4th 1243, 1258-1259 ("*Amwest*"), declined to extend on other grounds by *Cates Constr. Inc. v. Talbot Partners* (1999) 21 Cal.4th 28.) While State Farm may file a subsequent rate application for a rate increase in the future should it be entitled to additional premiums, these 1.7 million consumers cannot be made whole during the time excessive rates remain in effect. Further, to the extent consumers attrite from contracting with State Farm, State Farm loses the ability to provide relief after trial on the merits here. Accordingly, it is against the public interest not to give effect to the Commissioner's Rate Order that State Farm implement an immediate rate decrease of 7% and issue refunds with interest of excessive rates charged since July 15, 2015.

A. A stay of State Farm's obligation to stop overcharging consumers and immediately implement the required 7% rate decrease would be against the public interest.

Allowing State Farm to continue to charge consumers rates deemed excessive by the Commissioner would cause increasing harm to increasing numbers of consumers and is against the public interest. Proposition 103, which State Farm rails against in its moving papers, is a consumer-protection and insurer-protection statutory system, which the voters decreed, and the Supreme Court has affirmed, subjects property and casualty rates in California to the Commissioner's jurisdiction to ensure that rates are not "excessive, inadequate, [or] unfairly

discriminatory." (Cal. Ins. Code, §1861.05, subd. (a).) The "excessive" prohibition protects consumers, while the "inadequate" prohibition protects insurers, and the rate-making formula incorporates both. Here, the Commissioner determined that the Department staff's prospective assessment that State Farm's rates would become excessive to 1.7 million of its ratepayers on July 15, 2015 was correct, and the Commissioner therefore ordered a refund to that date, and a reduction in rates moving forward.

While State Farm contends that it is now unable to timely comply and that provides is basis for emergency relief, State Farm neglects that it failed to exhaust its administrative remedies. State Farm's employee Karen Terry says that State Farm would need (1) a minimum of 70 days to implement the 7% rate reduction, and (2) an additional eight months to issue the required refunds of rate overcharges since July 15, 2015. (Terry Declaration at ¶¶ 5-6.) In other words, even if State Farm had been immediately willing to comply with the Rate Order as issued on November 7, 2016, it contends that it would not have had time to do so. But, instead of bringing this issue to the Commissioner's attention, either during the course of the lengthy rate hearing or on reconsideration (see, Cal. Code Regs., tit. 10, §§ 2659.1, 2659.2), State Farm has instead chosen to wait until five days before the order takes effect, to raise this issue, ex parte, to the court in the first instance. State Farm's failure to seek timely consideration or reconsideration of its alleged technical limitations are not a proper basis for an emergency order delaying the implementation of the Commissioner's Rate Order.

Additionally, State Farm's argument that it cannot implement the rate decrease in less than 70 days defeats the claim for an emergency stay or an order shortening time: No rate-reduction or refund will happen before the time in which a properly noticed motion can be filed and heard. Conversely, the stay itself will no-doubt be followed by a claim for an additional 70-day delay after the hearing on the stay is denied.

Moreover, State Farm has had ample notice that the Commissioner believed its rate would become excessive by at least 6.6% effective July 15, 2015, and that it would owe refunds to consumers if it continued to charge what would become excessive rates after that date. Specifically, on June 22, 2015, the Commissioner issued the Notice of Hearing in this matter,

stating:

> Under Proposition 103 and applicable rate regulations, including CCR §2641.1 et seq., **Applicant's current homeowners rate will be excessive by 6.6% commencing July 15, 2015.** Under CIC §1861.05(a) excessive rates shall not remain in effect. Accordingly, effective July 15, 2015, Applicant must reduce its rates by 6.6% or any other amount by which they are determined through this proceeding to be excessive.
>
> To the extent Applicant charges excessive rates after July 15, 2015, and before implementing any rate change ordered as a result of this proceeding **Applicant will owe refunds retroactive to July 15, 2015** to its homeowners policyholders who pay the excessive rates.

(Notice of Hearing, p. 3 (emphasis added).)

Thus, State Farm is not surprised that the Commissioner's Rate Order requires it to reduce rates by 7% overall and issue refunds back to July 15, 2015. It has been on express notice since at least June 23, 2015, that the Department believed the rates to be excessive and that refunds would be owed if excessive rates were thereafter charged. State Farm should have implemented measures in anticipation of a possible adverse ruling during the course of the hearing, to be able to timely comply if so required, and if it was unable to do so, it should have brought the issue to the Commissioner's attention.

Nor should the court give credence to State Farm's allegations about the meet and confer regarding a stay prior to the motion, as if the Department staff somehow delayed in any response. In fact, when State Farm's counsel opened the dialogue on November 16, 2016, about various stays with the Commissioner's staff, the Department advised State Farm's counsel on November 18, 2016 – two days later – that the Department could not agree to a stay of the 7% immediate rate reduction because it would be against the public interest to deny relief to consumers who have been paying and continue to pay excessive rates. The Department did, however, offer to consider State Farm's request for a stipulated stay of the refund *if* State Farm agreed to implement the 7% rate reduction, and could satisfy the Commissioner's concerns that the identity of the members of the class of 1.7 million ratepayers could be preserved so they could receive what they are entitled to if the Commissioner prevails in this proceeding, and that those ratepayers not be prejudiced by the Rate Order's nominal interest rate on the refunds (which the Commissioner imposed based on historical returns but which did not contemplate prospective

litigation or rising interest rates), and that the stay not provide an incentive for State Farm to delay resolution of the case and thereby obtain a profit from the funds that were ordered to be returned to consumers. State Farm rejected the Department's offer on November 23rd.[3]

Nor does the fact that the Department hypothetically could initiate an enforcement action support ex parte relief, since no enforcement action has been initiated. State Farm submits no evidence that an enforcement action has even been threatened, and State Farm cannot rely upon such a potential threat as a basis for emergency relief. Indeed, even were the Department to initiate a proceeding, the Department would provide State Farm "a reasonable time", but not less than 10 days, to correct any noncompliance (Ins. Code, § 1858.1), and thereafter, the Department could issue a notice of hearing on any continuing noncompliance, but on not less than 30-days notice (Ins. Code, § 1858.2, subd. (a).) Thus, at a statutory minimum, State Farm would have 40 days before a hearing could commence to adjudicate charges of non-compliance.

Proposition 103 was founded on the premise that the Commissioner acts to protect the public interest by regulating property and casualty rates and preventing insurers from charging, *inter alia*, excessive rates. Disregarding the Commissioner's findings here, in a summary ex parte proceeding – that an immediate 7% rate decrease is warranted –would contravene the public's purpose in passing Proposition 103 in 1988 and therefore be against the public interest.[4]

Specifically, one of the main goals supporting the passage of Proposition 103 in 1988 was to increase consumer protection: "'Enormous increases in the cost of insurance have made it both unaffordable and unavailable to millions of Californians. The existing laws inadequately protect consumers and allow insurance companies to charge excessive, unjustified and arbitrary rates.'" (*Amwest, supra,* at p. 1258 (quoting from Proposition 103 initiative).) Accordingly, the

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[3] Furthermore, the Department agreed to allow time for a noticed motion regarding State Farm's companion litigation, to maintain the documents that were the subject of the rate hearing confidential, pending a ruling on a noticed motion.

[4] Likewise, the Sacramento Superior Court refused to stay the Commissioner's homeowners rate decrease order in *Mercury Casualty Co. v. Dave Jones, Insurance Commissioner of the State of California*, File No. 34-2013-80001426-CU-WM-GDS, because "the court [wa]s not satisfied that Petitioner has met its burden of establishing that a stay is not against the public interest." Although this ruling is not precedent, it may be helpful to this Court here because it is the most recent rate proceeding to be reviewed by petition for writ of mandate.

California Supreme Court expressly found that one of the two major purposes of Proposition 103 was to authorize the Commissioner to "approve . . . rates prior to their use." (*Id.* at p. 1259.)

Here, the Commissioner has evaluated State Farm's rate application and rate request in great detail, including holding a lengthy rate hearing. It is against the public interest to summarily contravene the Commissioner's authority on an ex parte basis to regulate rates and allow State Farm to continue to charge more than 1.7 million consumers insurance rates that the Commissioner has evaluated and found to be excessive by 7%.

B. A stay of State Farm's obligation to issue immediate refunds of premium overcharges dating back to July 15, 2015, would also be against the public interest.

Allowing State Farm to refuse to issue immediate refunds of premiums that the Commissioner found excessive would also harm consumers and be against the public interest.

First, the class of California consumers to whom State Farm owes refunds will become increasingly hard to locate through the passage of time. State Farm has already been charging excessive rates since July 15, 2015, i.e., for the past 17 months. State Farm has an annual retention rate of approximately 87%. (Ex. 1, page 15, admitted into evidence at the Rate Proceeding.) This means that approximately 13% of its policyholders terminate their relationship with State Farm every year, due to natural attrition and other causes. The Department estimates that since July 15, 2015, the date the Commissioner determined that State Farm's then-in effect homeowners rates were excessive by 7% overall, more than 300,000 consumers may have terminated their business relationship with State Farm.

To the best of the Department's knowledge, these 300,000 consumers may be completely unaware they were overcharged by State Farm and are presently owed refunds. They may have moved out of state or otherwise changed addresses, understandably without staying in contact with their former insurer, State Farm, and may therefore never receive the refunds they are owed. Accordingly, even if refunds are timely issued in accordance with the Commissioner's Rate Order, there are already approximately 300,000 consumers who are at risk of never receiving their money. And that class of consumers that would be harmed by a stay increases every day.

Nor can State Farm's vague reference to the "escheat process" provide meaningful relief

to consumers. (Karen Terry Declaration, p.3, ¶9.) Even if those consumers could subsequently be identified and learn that they might have a claim for "abandoned" property, foisting the additional burden upon them of navigating that process and nullifying their ongoing right to interest, would be patently unfair. Ironically, the fact that State Farm is "familiar" with the escheat process for the purpose of issuing premium refunds "in the ordinary course of business" validates the harm a stay will cause to consumers. It also shows that refunding premium consistent with the order may not be as far "outside the normal processes of [State Farm's] business" as alleged, and for which no proper foundation has been established in the declaration. (Cf., Ibid., p.2, ¶6.)

In contrast, State Farm stands to receive a windfall through further delay. The Commissioner's Rate Order requires that State Farm issue refunds with 2.25% simple interest per annum until paid. The Commissioner based the 2.25% interest rate expressly on State Farm's representation that 2.25% was "the interest rate it earned on investments purchased with excess premiums" from July 15, 2015 through August 11, 2016. (Rate Order, attached as Ex. A to Petition, at pp. 73, 79.) But, the longer State Farm wrongfully withholds consumers' money, the more interest – at an increasing interest rate – State Farm will earn. This is particularly true since interest rates have recently been climbing and are expected to increase further over at least the next year. In other words, State Farm again stands to profit through delay of implementation of the Commissioner's Rate Order requiring that it issue immediate refunds of overcharged premiums with interest. This too is against the public interest.

II. STATE FARM'S EX PARTE APPLICATION FAILS TO DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS

Since State Farm failed in its ex parte applicant and supporting points and authorities to present arguments of its likelihood of success on the merits of the writ petition, it should be deemed waived in this proceeding. Without waiving the objection, or purporting to provide a complete response in this opposition, the Commissioner draws the Court's attention to two arguments upon which the bulk of State Farm's writ petition like.

First, Insurance Code section 1861.05, subdivision (a), expressly requires that the

Commissioner shall not approve excessive rates *nor* allow them to remain in effect:

> No rate shall be approved or remain in effect which is excessive, inadequate, unfairly discriminatory, or otherwise in violation of the law.

The California Supreme Court "expressly held" that in addition to the authority to review and approve rates prior to their use, Proposition 103 also vests the Commissioner with authority to require insurers to issue refunds if the Commissioner finds an insurer has been charging an excessive rate. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 825 ("*Calfarm*"); see also, *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 315 ("In *Calfarm*, we expressly held that 'insurer[s] must refund excess premiums collected [for the rollback year] with interest" (emphasis omitted).) Although State Farm may attempt to distinguish *Calfarm* by arguing that the California Supreme Court's holding was in the context of rate rollbacks under Proposition 103, any such distinction is without significance. Applying section 1861.05(a), the *Calfarm* Court also held:

> After [November 8, 1989] insurance rates subject to Proposition 103 must be approved by the commissioner prior to their use,[5] but, as we have explained, the commissioner can approve an interim rate pending her final decision. *If the commissioner finds . . . some other rate less than the insurer charged, is fair and reasonable, the insurer must refund excess premiums collected with interest.*

(*Calfarm* at p. 825 (emphasis added).) Thus, the California Supreme Court has already rejected this argument.

Second, State Farm is not likely to prevail on the merits with respect to its investment-income arguments. The issue of whether State Farm should be treated – for ratemaking purposes – as a separate and independent company, unrelated to its parent company and other group affiliates, was extensively litigated in the underlying rate hearing, and rejected by the Commissioner. The Department submitted abundant evidence to show the thorough and complex inter-relationship between State Farm General and the State Farm Group, and how it was

[5] Insurance Code section 1861.01(c) states: "Commencing November 8, 1989, insurance rates subject to this chapter must be approved by the commissioner prior to their use."

consistent with California ratemaking laws (as well as the requirements of the National Association of Insurance Commissioners (NAIC)[6], regarding the filing of insurer group consolidated annual statements), to evaluate State Farm's actual investments in the context of the overall State Farm Group's investment strategy. The Administrative Law Judge (ALJ) found, and the Commissioner agreed, that there was "extensive authority for the term 'insurer' encompassing insurers within a group for the purpose of ratemaking." (Rate Order at p. 42.) Thus the Commissioner did not err in applying the Projected Yield Regulation (Cal. Code Regs., tit. 10, § 2644.20, subd. (a)) as written. Nor is this ruling novel or a surprise to State Farm, as State Farm implies. Section 2644.20 was adopted in 2007, and State Farm does not support why its decision now to essentially launch a facial challenge to those 10-year old regulations justifies a stay of an order in the public interest.

Likewise, the Commissioner did not exceed his authority when ordering refunds in this matter. The California Supreme Court previously held that rate refunds to consumers are prospective where the rates were charged "pending a determination of their legality":

> The rate regulations as to rollbacks may properly be considered prospective. The "fixing of a rate and the reducing of that rate are prospective in application ...." [citations omitted] The ordering of a refund of rates is "akin to a reduction in rates," when, as here, the rates in question were charged "pending a determination of [their] legality ...." [citations omitted] It follows that the ordering of a refund of rates is itself prospective.

(*20th Century Co. v. Garamendi* (1994) 8 Cal.4th 216, 281.)

Thus, as long as the effective date for a rate indication occurs *after* the end date of the historical data period underlying the rate indication (or, the "experience period"), an actuary is able to perform a prospective ratemaking analysis which projects experience for the policy period, based on the historical period. Here, based on the effective date of July 15, 2015, all

[6] "The National Association of Insurance Commissioners (NAIC) is the U.S. standard-setting and regulatory support organization created and governed by the chief insurance regulators from the 50 states, the District of Columbia and five U.S. territories. Through the NAIC, state insurance regulators establish standards and best practices, conduct peer review, and coordinate their regulatory oversight. NAIC staff supports these efforts and represents the collective views of state regulators domestically and internationally. NAIC members, together with the central resources of the NAIC, form the national system of state-based insurance regulation in the U.S." (http://naic.org/index_about.htm.)

parties stipulated, and the ALJ ordered, to an updated data cut-off date of December 31, 2014. In other words, the rate that was determined to be appropriate as of July 15, 2015, was based on data through December 31, 2014. The ALJ determined, and the Commissioner agreed, that this was consistent with the practice of *prospective* ratemaking. The fact that refunds are ordered does not make the ratemaking process itself retroactive.

III. SAN DIEGO COUNTY IS NOT THE PROPER VENUE FOR THIS ACTION

State Farm makes a conclusory allegation that venue is proper in San Diego County under Code of Civil Procedure sections 393 and 401. Under Code of Civil Procedure section 393, venue is the county where the cause of action arose against the public officers for acts undertaken in their official capacity. Here, the Commissioner is the public officer ultimately responsible for the actions that caused this suit and he is headquartered in Sacramento.

Additional facts relevant to venue include that State Farm submitted its rate application in San Francisco, the approximately 17-month Rate Proceeding including all hearings, testimony, and appearances took place in San Francisco, the ALJ's proposed decisions were both issued in San Francisco, and the Commissioner's order was issued in Sacramento. Additionally, the State Bar of California identifies David P. Grow as "State Farm Insurance['s]" California "Registered In-house Counsel" and lists his official address as Sacramento. (See http://members.calbar.ca.gov/fal/Member/Detail/801511.) Further, State Farm General's agent for service of process is also located in Sacramento. (See http://kepler.sos.ca.gov/.) No acts or omissions that are alleged by State Farm occurred in San Diego. The Commissioner intends to file a separate motion for change of venue, but hereby lodges his preliminary objections.

CONCLUSION

For the foregoing reasons, this court should deny State Farm's application for ex parte relief, both as to the temporary stay, and the order shortening time.

Dated: December 8, 2016

Respectfully Submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: State Farm General Insurance Co. v. Dave Jones
Superior Court of California, County of San Diego
Case No. 37-2016-00041469-CU-MC-CTL

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

On December 8, 2016, I served the attached **RESPONDENT'S OPPOSITION TO STATE FARM'S APPLICATION FOR (1) A TEMPORARY EXTENSION OF STATUTORY AUTOMATIC STAY UNTIL A NOTICED MOTION MAY BE HEARD, OR (2) AN ORDER SHORTENING TIME** by transmitting a true copy via electronic mail, addressed as follows:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 8, 2016, at Fullerton, California.

Lisa W. Chao
Declarant

/s/ Lisa W. Chao
Signature

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