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24 BEFORE THE INSURANCE COMMISSIONER

25 OF THE STATE OF CALIFORNIA

26 In the Matter of:

27 MERCURY INSURANCE COMPANY;
28 MERCURY CASUALTY COMPANY; and
29 CALIFORNIA AUTOMOBILE
30 INSURANCE COMPANY,

31 Respondents.

32 } CDI File No.: NC03027545

33 } OAH No.: N2006040185

34 } ALJ Assigned: Steven C. Owyang

35 } **CONSUMER WATCHDOG'S RESPONSE TO
36 RESPONDENTS' MOTION FOR PROTECTIVE
37 ORDER**

38 } Pre-Hearing Conf. and MSC: February 23, 2009
39 } 1:30 p.m.

40 } Hearing Commencement Date: March 16, 2009

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48 ¹ Formerly The Foundation for Taxpayer and Consumer Rights

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1 **I. INTRODUCTION**

2 By its Motion for Protective Order (“MPO”), Mercury seeks to conceal from Consumer
3 Watchdog, a party in this proceeding, and the public evidence that the Department of Insurance (“the
4 Department”) has determined is appropriate to introduce as evidence at the hearing.² Granting
5 Mercury’s requests would thwart two of the core purposes underlying Proposition 103: public
6 participation in departmental proceedings and transparency. (See *State Farm Mut. Auto. Ins. Co. v.*
7 *Garamendi* (2004) 32 Cal.4th 1029, 1045 [interpreting Insurance Code section 1861.07 requiring
8 disclosure of all documents submitted to the Commissioner in a manner “consistent with Proposition
9 103’s goal of *fostering consumer participation*”].) As a party to this noncompliance action, Consumer
10 Watchdog must be accorded all the same rights as any other party to meaningfully participate in this
11 proceeding, including the right to receive the other parties’ hearing exhibits three business days before
12 the prehearing conference. Moreover, as discussed below, Mercury’s construction of Insurance Code
13 section 735.5 is contrary to the plain language of the statute and seeks to constrain the Commissioner’s
14 authority to use and make public Departmental examination reports in furtherance of this regulatory
15 action. Finally, any concerns regarding keeping the information confidential until the time that the
16 subject examination documents are admitted into evidence can be handled with a limited protective
17 order to allow Consumer Watchdog to receive the documents now in order to adequately prepare for the
18 evidentiary hearing commencing in just a few weeks.

19 **II. PROCEDURAL HISTORY**

20 The Department initiated the present noncompliance action against Mercury pursuant to
21 Insurance Code section 1858.1 on February 2, 2004. Mercury filed a Notice of Defense to the original
22 Notice of Noncompliance on February 24, 2004. The Department filed and served a First Amended
23 Notice of Noncompliance (“FANNC”) on March 22, 2006. To Consumer Watchdog’s knowledge,
24 Mercury did not file a Notice of Defense to the FANNC. Consumer Watchdog sought and was granted
25

26 _____
27 ² For purposes of this response, Consumer Watchdog assumes the Department is acting with the
28 authorization of the Commissioner to use the subject documents in furtherance of this noncompliance
proceeding initiated by the Commissioner. (See Notice of Noncompliance, Feb. 2, 2004 [“YOU ARE
HEREBY NOTIFIED that the Insurance Commissioner of the State of California (‘Commissioner’) has
good cause to believe...”].)

1 leave to intervene by order of the ALJ dated March 16, 2007. Relevant to Mercury’s Motion, the
2 FANNC alleges violations of Insurance Code sections 1861.01(c) and 1861.05 as follows:

3 From July 1, 1996, to April 11, 2003, Respondents willfully permitted their insurance
4 agents to charge “broker fees” to Respondents’ policyholders. In charging these fees,
5 Respondents’ agents acted in the course and scope of their agency. Under California law,
6 all payments by policyholders which are a part of the price of insurance, including all
7 sums paid to an insurance agent, are considered premium. Consequently, Respondents
8 constructively received the “broker fees” (i.e. premium) collected by their agents.
9 Respondents did not receive the Commissioner’s prior approval to charge or receive the
10 moneys constituting the “broker fees.” As a result of permitting its agents to charge and
11 collect the broker fees, Respondents constructively charged and collected premium in
12 excess of the rates approved for them by the Commissioner, in violation of section
13 1861.01(c). (FANNC, ¶3.)

14 Because Respondents’ agents charged broker fees of varying amounts, Respondents
15 insureds were subjected to unfair rate discrimination, in violation of section 1861.05(a).
16 Respondents willfully permitted the rate discrimination to occur. (FANNC, ¶4.)

17 The FANNC further alleges that the foregoing allegations “establish that Respondents willfully used a
18 rate, rating plan or rating system in violation of Chapter 9 of Part 2 of Division 1 of the Insurance Code,
19 and provide grounds for a fine of \$10,000 for each policy in which a Respondent permitted a broker fee
20 to be charged by one of its agents, pursuant to section 1858.07(a).”

21 Mercury served discovery requests upon the Department on April 28, 2006 and March 23, 2007.
22 (Declaration of Pamela Pressley (“Pressley Decl.”), ¶2.) The Department served its responses to these
23 requests on January 17, 2007 and April 16, 2007, respectively. (*Ibid.*) On September 17, 2007, as part
24 of its production in response to these discovery requests, the Department produced to Mercury and
25 Consumer Watchdog an examination report by the Field Rating and Underwriting Bureau (FRUB)
26 regarding Mercury Insurance Group dated February 18, 1999 with an October 20, 2000 Addendum.
27 (*Ibid.*)

28 On review of that 2000 Addendum, which stated that the Department would verify during the
next FRUB exam that Mercury had implemented resolutions that are described in the 1999 FRUB
examination report and 2000 addendum, counsel for Intervenor, sent an email to counsel for the
Department on September 24, 2007 inquiring as to whether any such subsequent exam report existed,
which would be responsive to Mercury’s discovery requests, and how Consumer Watchdog could obtain
a copy. (*Id.* at ¶3.) Counsel for the Department then contacted Mercury’s counsel and informed him of

1 Consumer Watchdog’s counsel’s inquiry, stated that he believed subsequent FRUB exams and related
2 documents were relevant to the issues in this proceeding, and asked whether Mercury had any objection
3 to production of the relevant documents to Consumer Watchdog. (*Ibid.*) To date any such subsequent
4 FRUB exam and related documents have not been produced to Consumer Watchdog, but Consumer
5 Watchdog is informed based on a meet and confer teleconference of the parties that the Department
6 intends to use those documents as evidence in this matter. (*Ibid.*) Accordingly, Consumer Watchdog
7 maintains that all documents the Department intends to introduce must be provided to Consumer
8 Watchdog as part of the required exchange of exhibits in this proceeding. (*Ibid.*) On February 6, 2009,
9 Mercury filed its Motion for Protective Order seeking to prevent production of the subject FRUB
10 documents to Consumer Watchdog until such time as the documents are actually admitted at the hearing.
11

12 **III. LEGAL ARGUMENT**

13 **A. Consumer Watchdog As Intervenor is a Full Party to the Proceeding, with All the 14 Rights of Any Other Party.**

15 Consumer Watchdog was granted leave to intervene in this noncompliance action by order of the
16 ALJ on May 16, 2007 pursuant to Insurance Code section 1861.10(a), which affords “any person” the
17 right to “initiate or intervene in any proceeding permitted or established pursuant to this chapter
18 [Chapter 9 of Part 2 of Division 1 of the Insurance Code], challenge any action of the commissioner
19 under this article [Article 10 of Chapter 9, enacted by Proposition 103], and *enforce any provision of*
20 *this article.*” This proceeding is an enforcement action brought by the CDI pursuant to Insurance Code
21 section 1858.1, and hence is a proceeding both “permitted” and “established” by Chapter 9. Moreover,
22 like the Department, FTCR seeks to “enforce” Insurance Code sections 1861.01 and 1861.05, enacted by
23 Proposition 103, against Mercury.

24 “The right to intervene, whether conditional or unconditional, is the right to become a party to
25 pending litigation.” (*Savaglio v. Wal-Mart Stores, Inc.* (2007) 149 Cal.App.4th 588, 602.) As a full
26 party, an intervenor is afforded all the rights and remedies of any party to the matter. (See, e.g., *ibid.*;
27 *California Golf, LLC v. Cooper* (2008) 163 Cal.App.4th 1053, 1061, fn. 11.) Under these established
28 principles allowing Consumer Watchdog to participate as a full party in this proceeding to enforce the
Insurance Code against Mercury, Consumer Watchdog must be afforded the same rights as Mercury and

1 the CDI to obtain copies of all documents that the parties intend to introduce as exhibits at the hearing.
2 Under section 1026(e) of title 1 of the California Code of Regulations (“CCR”) and the Amended Notice
3 of Prehearing Conference and Mandatory Settlement Conference dated August 2, 2007, the deadline for
4 exchange of all exhibits is 3 business days before the prehearing conference.³ The purpose of this
5 requirement is to allow the parties sufficient time to prepare their case prior to the hearing
6 commencement date, which is scheduled to begin on March 16, 2009. Contrary to Mercury’s claims,
7 Consumer Watchdog will be prejudiced if it is not allowed to see any FRUB documents that the parties
8 seek to introduce “until after [they are] determined to be relevant, deemed admissible and actually used
9 at trial” (Mercury Motion for Protective Order (“MPO”) at 13:8-11) as Mercury suggests. Given that
10 Consumer Watchdog, who has intervened on the side of the Commissioner, will likely have to present
11 its case before Mercury, Consumer Watchdog would be severely prejudiced if it has only a few days or
12 hours to review these documents that may have a significant bearing on the issues to be determined in
13 this case. Thus to avoid any prejudice and undue surprise, Consumer Watchdog must be afforded the
14 same rights as all parties and is entitled to receive copies of all exhibits the parties intend to introduce at
15 the time that all exhibits are exchanged by the parties.

16
17 **B. Mercury’s Narrow Reading of Insurance Code section 785.5 Is Not Supported by the**
18 **Plain Language of the Statute.**

19 Insurance Code section 785.5(a) provides, in full:

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

26 Mercury focuses solely on the verb “use” and concludes, based upon its own narrow reading, that “use”
27 must mean “actually introduce as an exhibit in the regulatory action”. Breaking the section down, as
28 discussed herein, the statute permits the Commissioner to use in any way or make public any document

³ By stipulation, the parties have agreed to extend this deadline to Friday, February 20, 2009.

1 or information discovered during the course of any examination so long as the use or public disclosure
2 advances a legal or regulatory action that the Commissioner in his discretion determines is appropriate.

3 1. Use means to employ or put something into service.

4 “In interpreting the meaning of a statute [courts] begin, as [they] *must*, with the language used.
5 Under familiar rules of construction, words in a statute must be given the meaning they bear in ordinary
6 usage.” (*Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 91, emphasis added.) The
7 *American Heritage Dictionary* (4th ed. 2006) contains 16 separate definitions for “use”, the first of
8 which is “to put into service or apply for a purpose; employ.”

9 Here, Mercury argues nonsensically, relying upon no authority, that use means “actual use” not
10 “future intent to use”. (MPO at 11:5-6.) The real question is what constitutes the scope of the
11 Commissioner’s authority to “use” the subject documents in furtherance of this proceeding. Mercury’s
12 unstated answer to this question is that “use” means “formally introduce and have admitted as an
13 exhibit”. (See, e.g., 11:8-9 [arguing that “listing the FRUB report as a potential exhibit on an exhibit list
14 (to date which hasn’t happened) also does not make it ‘used.’”].) There is nothing in the statute that
15 indicates the limitation suggested by Mercury, especially given the statute’s use of the phrase “in the
16 furtherance of” as discussed below.

17 Applying the normal definition of “use”, though, results in a much broader interpretation. If the
18 Commissioner “puts [the FRUB report] into service” or “employs” the FRUB report in this proceeding
19 by producing it as an exhibit, then he is using the FRUB report. Therefore, the Commissioner’s decision
20 to provide the document to Consumer Watchdog, a party to the proceeding, as part of the required pre-
21 hearing exhibit exchange is “putting it into service.”

22 2. Mercury’s reading of the statute renders the phrase “*in the furtherance of a*
23 *regulatory action*” surplusage.

24 “Significance should be given, if possible, to every word of an act. Conversely, a construction
25 that renders a word surplusage should be avoided.” (*Delaney v. Superior Court* (1990) 50 Cal.3d 785,
26 798-799, citation omitted.) Here Mercury argues that section 735.5 only discusses the Commissioner’s
27 authority to “use” a document as a formal exhibit in a legal or regulatory action. If the Commissioner so
28 uses the document, according to Mercury, and if appropriate, the Commissioner may make it public.
This construction ignores the phrase “in the furtherance of a regulatory action”, making it surplusage,

1 which must be avoided according to statutory construction principles. Thus, Mercury’s interpretation
2 should be avoided, and the statute should be given its proper meaning as discussed below.

3 3. “In furtherance of” means “helping forward” or “advancing.”

4 The American Heritage Dictionary (4th ed. 2006) defines “furtherance” as “[t]he act of
5 furthering, advancing, or helping forward.” Thus, pursuant to the plain language of Insurance Code
6 section 735.5, the Commissioner may use and make public any final or draft examination report and
7 related documents so long as it furthers a legal or regulatory action that the Commissioner deems
8 appropriate.

9 Moreover, courts have interpreted similar language as having a broad reach. For example,
10 similar “in furtherance of” language in the hearsay exception allowing admission of statements “made
11 by the declarant while participating in a conspiracy to commit a crime or civil wrong and *in furtherance*
12 *of* the objective of that conspiracy” (Evid. Code § 1223(a)) has been interpreted by the California
13 Supreme Court to include a statement to a third party to avoid the scene of a planned crime as being
14 uttered “in furtherance of” the conspiracy. (*People v. Sanders* (1995) 11 Cal.4th 475, 516.) To be “in
15 furtherance of” a conspiracy, the hearsay statement just needs to be in support of the conspiracy and
16 does not have to be uttered during the commission of the act. By analogy, the Commissioner in
17 contemplating bringing an enforcement proceeding against an insurer based on that insurer’s
18 noncompliance record could determine in his discretion that it was appropriate to use and make public
19 “information discovered [] during the course of any [FRUB] examination” in order to gather more
20 evidence from individual members of the public who may have been harmed by the insurer’s practices.
21 Such use and public disclosure, according to the plain language of section 735.5(a) and courts’
22 interpretations of the phrase “in furtherance of,” would certainly be in furtherance of a regulatory action,
23 even if done prior to and not during the actual noncompliance evidentiary hearing. Mercury’s attempt to
24 constrain the Commissioner’s discretion is contrary to subdivision (a)’s directive that “[n]othing
25 contained in this article shall be construed to limit the commissioner’s authority” and thus should be
26 rejected.

1 4. Mercury’s argument regarding the construction of “or” does not make sense and
2 supports making the report public.

3 “It has long been recognized that the Legislature occasionally uses the word ‘and’ when it means
4 ‘or’ and that such an error may be rectified by judicial construction.” (*Utility Cost Management v. East*
5 *Bay Mun. Utility Dist.* (2000) 79 Cal.App.4th 1242, 1250.) Mercury argues that since the statute used
6 the conjunction “and” between use and make public, then the Commissioner does not have the discretion
7 to make a document public unless and until he “uses” it. This makes no sense. Read another way,
8 Mercury’s argument is that he cannot take one action without the other, but must use and make public
9 any examination documents simultaneously. A more logical reading is that the Commissioner has the
10 authority to take both actions: (1) “to use” any such documents *and*, (2) “if appropriate, to make public”
11 any such documents. There is no wording in the statute to suggest that his authority is constrained to
12 doing both at the same time. Thus, substituting the word “or” for the word “and” in this context would
13 not change the meaning or scope of the Commissioner’s authority to take both actions and is appropriate
14 under rules of statutory construction.

15 5. Mercury’s “discretion” argument misreads the statute.

16 Mercury also suggests that the last clause of subdivision (a), “which the commissioner may, in
17 his or her discretion, deem appropriate” applies to the “use and, if appropriate, make public” section of
18 the statute. (MPO at 14-17.) This also does not follow from a plain reading of the language of the entire
19 sentence. The clause obviously applies to the phrase “legal or regulatory action”. Thus, the statute is
20 discussing the Commissioner’s authority to use and make public documents in furtherance of *legal or*
21 *regulatory actions which the Commissioner may, in his or her discretion, deem appropriate.* Here, the
22 Commissioner has already exercised his discretion to pursue a regulatory action. Thus, the
23 Commissioner may use and make public the FRUB documents in furtherance of this action.

24 **C. The Technical Rules of Evidence Do Not Apply to this Proceeding.**

25 Mercury also contends that the evidence submitted as Exhibit A to the Declaration of Spencer Y.
26 Kook under seal is irrelevant and of little probative value at least in part because “the FRUB report is
27 not a conclusive finding of any wrongdoing on the part of Mercury.” While it is impossible for
28 Consumer Watchdog to provide a full analysis without having seen the relevant documents, Mercury
 applies an incorrect standard. Pursuant to Government Code section 11513(c),

1 The hearing need not be conducted according to technical rules relating to evidence and
2 witnesses, except as hereinafter provided. Any relevant evidence shall be admitted if it is
3 the sort of evidence on which responsible persons are accustomed to rely in the conduct
4 of serious affairs, regardless of the existence of any common law or statutory rule which
5 might make improper the admission of the evidence over objection in civil actions.

6 So long as the FRUB report is “the sort of evidence on which responsible persons are accustomed to rely
7 in the conduct of serious affairs” and it is relevant, the FRUB report is admissible in this proceeding.

8 Without having seen the content of the documents, it is impossible for Consumer Watchdog to gauge the
9 full scope of their relevance. Based on the limited discussion of the documents in Mercury’s papers,
10 however, Consumer Watchdog submits that at the very least such documents would be evidence of
11 Mercury’s past history of noncompliance, which would be relevant to the penalty determination in this
12 proceeding. Moreover, contemporaneous reports of Mercury’s practices by Department FRUB
13 examiners based on their extensive review is exactly the sort of evidence that responsible persons,
14 including the Commissioner, are accustomed to rely upon in prosecuting a noncompliance action.⁴

15 **D. Any Concerns of Confidentiality With Regard to Disclosure of the Documents to
16 Consumer Watchdog as a Party to this Proceeding May Be Addressed With a Limited
17 Protective Order.**

18 Section 735.5(c) states that any document or information disclosed to the Commissioner in the
19 course of an examination “shall be given confidential treatment and are not subject to subpoena and
20 shall not be made public by the commissioner or any other person, except to the extent provided in
21 subdivision (a) or (b).” Sharing the FRUB report with Consumer Watchdog now at the time exhibits are
22 being exchanged by the parties in preparation for the hearing pursuant to a limited protective order is not
23 prohibited by section 735.5(c) as it is not “made public” and is given “confidential treatment.”

24 Respondents have presented no authority or argument against such treatment.⁵

25 ⁴ The documents may also show that the Department has not – contrary to the estoppel argument
26 Mercury attempts in its summary judgment/adjudication motion – acquiesced in or conveyed to Mercury
27 that it did not intend to challenge Mercury’s illegal conduct.

28 ⁵ To be clear, Consumer Watchdog does not believe the FRUB documents should remain confidential
after they are introduced into evidence in this proceeding. The commissioner has the authority to make
them public pursuant to Insurance Code section 735.5(a) and the Government Code requires that the
hearing be “openly” conducted. (See, e.g., Gov. Code §§ 11425.10(a)(3), 11425.20.)

1 **IV. CONCLUSION**


2 As discussed above, "use" in Insurance Code section 735.5 includes any use in the furtherance of
3 a regulatory action. Even if Mercury's narrow reading is correct, Mercury does not contest that the
4 Commissioner has the right to introduce the FRUB report as an exhibit. The specific regulations of this
5 proceeding require that if the Commissioner intends to introduce the FRUB report, it must be
6 "exchanged between the parties at least 3 business days before the prehearing conference." (1 CCR §
7 1026(e).) Exchange with Consumer Watchdog in the furtherance of this regulatory proceeding does not
8 violate section 735.5(c) and complies with the procedural regulations applicable to this proceeding.
9 For all the foregoing reasons Mercury's Motion for Protective Order must be denied.

10 DATED: February 20, 2009

Respectfully submitted,
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