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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF SACRAMENTO

18 RYAN, LLC,

19 Plaintiff,

20 v.

21 GOVERNOR'S OFFICE OF BUSINESS
22 AND ECONOMIC DEVELOPMENT,

23 Defendant.

24 CASE NO.

25 **COMPLAINT FOR DECLARATORY
26 RELIEF**

27 **FILED**
28 Superior Court Of California,
Sacramento
08/20/2014
emedina
By _____, Deputy
Case Number:
34-2014-00167988

FILE BY FAX

1 Plaintiff Ryan, LLC (“**Ryan**”) alleges with knowledge as to its own acts, and on
2 information and belief as to all other matters as follows:

3 **SUMMARY OF ALLEGATIONS AND COMPLAINT**

4 1. This action concerns the unwarranted and illegal usurpation and abuse of
5 regulatory power by the Governor’s Office of Business and Economic Development (“**GO-**
6 **Biz**”).

7 2. GO-Biz has abused the emergency regulation rulemaking procedures in order to
8 insert regulatory requirements unrelated to the statutes providing GO-Biz’s regulatory authority.
9 In the guise of readopting an already adopted emergency regulation, GO-Biz has introduced new
10 language with a significantly different purpose and effect from the language originally adopted
11 through the emergency regulation procedures.

12 3. In 2013, the California Legislature implemented a new tax credit program—the
13 California Competes Tax Credit (“**Tax Credit**”)—in an effort to attract and retain valuable
14 businesses in the State of California. The Legislature permitted GO-Biz to prescribe regulations
15 necessary to carry out the purposes of the Tax Credit. GO-Biz therefore adopted emergency
16 regulations in early 2014 governing the Tax Credit.

17 4. In defiance of the Administrative Procedure Act, GO-Biz recently decided to
18 insert, under the guise of acting within its legal grant of power, regulatory requirements outside
19 any authority provided to GO-Biz. GO-Biz took a list of factors that the agency is required by
20 statute to review when allocating the Tax Credit to California taxpayers and arbitrarily and
21 capriciously inserted a requirement purporting to regulate the fee arrangements between
22 California taxpayers and the tax professionals assisting them.

23 5. The effect of GO-Biz’s arbitrary insertion of new, unfounded requirements is the
24 unwarranted limitation of the Tax Credit. GO-Biz ignores the conflicting Tax Credit provisions
25 in the Revenue and Taxation Code as well as conflicting provisions governing contingency fees
26 and professional conduct. GO-Biz’s extra-statutory limitation allows GO-Biz to deny the Tax
27 Credit to taxpayers who qualify under the statutory regime put in place by the Legislature.

1 6. GO-Biz's acts violate Federal and State Constitutional provisions.

2 7. Equity and justice require this Court to enjoin the enforcement of the illegal
3 Regulation adopted on August 18, 2014.

4 **NATURE OF ACTION AND PARTIES**

5 8. This is an action for declaratory relief brought under California Government Code
6 § 11350.

7 9. Plaintiff Ryan, LLC, a limited liability company, is a professional tax services
8 firm that represents taxpayers before GO-Biz. Ryan is based in Dallas, Texas and has offices in
9 Sacramento, San Diego, San Francisco, San Jose, Oakland, Carlsbad and Los Angeles.

10 10. Defendant the Governor's Office of Business and Economic Development is a
11 State agency subject to California's Administrative Procedure Act, codified at Government Code
12 §§ 11340-11361.

13 11. This is a suit for declaratory relief challenging the validity of the version of
14 California Code of Regulations title 10, § 8030 that became effective August 18, 2014 ("**2014**
15 **Regulation**") and seeking a declaration that Section 8030(g)(2)(H) of the 2014 Regulation is
16 invalid and illegal.

17 12. Ryan further requests a writ of mandate and an injunction restraining GO-Biz
18 from enforcing Section 8030(g)(2)(H) of the 2014 Regulation. *See* Cal. Civ. Proc. Code
19 § 1085(a).

20 13. The 2014 Regulation interferes with and impairs, or threatens to interfere with or
21 impair, a legal right or privilege of Ryan, and Ryan's clients, to seek, under Cal. Rev. & Tax.
22 Code §§ 17059.2 and 23689, the Tax Credit.

23 14. Ryan is an "interested person" as the term is used in Cal. Gov't. Code § 11350
24 because it will be impacted by the 2014 Regulations. An interested person is one who is subject
25 to the regulation or affected by it. *Env'tl. Prot. Info. Ctr. v. Dep't of Forestry and Fire Prot.*, 50
26 Cal. Rptr. 2d 892, 896, 43 Cal. App. 4th 1011, 1017-18 (1996) ("a party may be an 'interested'
27 person for purposes of Government Code section 11350 if either it or its members is or may well
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1 be impacted by a challenged regulation"). As a tax consulting firm, Ryan derives substantial
2 income from representing California taxpayers with respect to income tax claims. Ryan often
3 utilizes success-based fee agreements that provide Ryan's clients will pay a specific percentage
4 of all assessment reductions, refunds, credits, and penalty and interest reductions. The 2014
5 Regulation impairs Ryan's privilege to conduct business and reduces the profitability of its
6 business.

7 15. The additional burdens, restrictions, and conditions on a taxpayer's rights to the
8 Tax Credit described herein uniquely impair Ryan's rights and business operations given the
9 nature of Ryan's business and success-based compensation agreements with taxpayers covering
10 income tax engagements.

11 16. Moreover, if Ryan itself sought the Tax Credit it could seek to obtain the services
12 of a professional under a contingent fee arrangement and its rights as a taxpayer are impaired by
13 the 2014 Regulation.

14 17. Venue is proper in this Court pursuant to Cal. Civ. Proc. Code § 395.

15 18. The amendment or expiration of the 2014 Regulation will not eliminate or moot
16 the justiciable controversy. *See, e.g., Cal. Med. Ass'n v. Brian*, 106 Cal. Rptr. 555, 563, 30 Cal.
17 App. 3d 637, 649-50 (1973). For this reason, Plaintiff seeks a declaratory judgment with respect
18 to the 2014 Regulation.

19 GENERAL ALLEGATIONS

20 19. In July of 2013, Assembly Bill Number 93 ("A.B. 93") introduced the Tax Credit.
21 Effective January 1, 2014, taxpayers may enter into a written agreement with GO-Biz to obtain a
22 credit against income tax. The Legislature envisioned the program as "an important tool to
23 attract and retain high-value employers." A.B. 93 § 1(f).

24 20. The Legislature empowered GO-Biz to enter into written agreements with
25 California taxpayers, which are then approved by a newly established committee, the California
26 Competes Tax Credit Committee. A.B. 93 §§ 18, 26. The written agreements allocate credit to
27 the taxpayer based on an employer's job creation and retention. *Id.* § 18. GO-Biz's power to
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1 allocate the Tax Credit to taxpayers is statutorily limited to “specified factors, including the
2 number of jobs the taxpayer will create or retain in the state and the amount of investment in the
3 state by the taxpayer.” *Id.*, Legislative Counsel’s Digest. The Legislature provided the list of
4 factors to be considered by GO-Biz when allocating the amount of the Tax Credit (“allocation
5 factors”). Cal. Rev. & Tax. Code §§ 17059.2(a)(2), 23689(a)(2).

6 21. The Legislature granted GO-Biz the authority to “prescribe rules and regulations
7 as necessary to carry out the purposes of this section. Any rule or regulation prescribed pursuant
8 to this section may be by adoption of an emergency regulation.” Cal. Rev. & Tax. Code
9 §§ 17059.2(h), 23689(h).

10 22. Six (6) months after A.B. 93 introduced the Tax Credit, GO-Biz issued
11 emergency regulations on the Tax Credit. Cal. Code Regs. tit. 10, §§ 8010-8070. These
12 regulations were due to be repealed by operation of law on August 20, 2014.

13 23. Section 8030 of title 10 of the California Code of Regulations provides a more
14 detailed description of the application process required of taxpayers when seeking to enter into
15 an agreement with GO-Biz. GO-Biz breaks the application process down into two phases. The
16 first phase envisions an “automated” review of the taxpayer’s written application by GO-Biz.
17 Cal. Code Regs. tit. 10, § 8030(g)(1). Phase II provides for a more extensive evaluation of
18 applicants who successfully move beyond Phase I. *Id.* § 8030(g)(2). Subsection (g)(2) lists eight
19 allocation factors. When originally adopted, the eight factors were, in essence, restatements of
20 the eleven allocation factors provided for in Cal. Rev. & Tax. Code §§ 17059.2(a)(2),
21 23689(a)(2).

22 24. On August 8, 2014, GO-Biz published, under the emergency readoption
23 procedure, a new version of the emergency regulations in title 10, §§ 8010 to 8070.

24 25. The published version introduced new language into Section 8030(g)(2)(H).
25 Section 8030(g)(2)(H) originally allowed for “any other information requested in the
26 application.” GO-Biz added language requiring taxpayers to submit information on contingent
27 fee agreements with any tax professionals working with them on the Tax Credit. Specifically,
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1 GO-Biz has demanded information on “the fee arrangement between the applicant and any
2 consultant, attorney, tax practitioner, or any other third party that prepared or submitted the
3 application, or provided any services related to the credit.” Cal. Code Regs. tit. 10,
4 § 8030(g)(2)(H).

5 26. Beyond demanding information not authorized by the statutes it purports to
6 implement, Section 8030(g)(2)(H) continues by imposing a cap on contingent fee arrangements.

7 27. When published on August 8, GO-Biz limited the contingent fee arrangement to
8 “the industry standard hourly rate for such services.” Ryan submitted a comment to the Office of
9 Administrative Law on August 13 disputing GO-Biz’s right to regulate private third-party fee
10 arrangements and explaining that no such standard rate existed.

11 28. When approved on August 18, the emergency regulation had been amended to
12 state: “Any contingent fee arrangement must result in a fee that is less than or equal to the
13 product of the number of hours of service provided to the applicant and a reasonable hourly rate
14 for such services.” *Id.* The amendment merely changed the words “industry standard” to
15 “reasonable” and ignored GO-Biz’s lack of authority to regulate fee agreements.

16 29. The Legislature has recently and repeatedly demonstrated that it does not intend
17 to ban contingency fee arrangements in tax matters.

18 30. In 2011, Senator Lois Wolk introduced Senate Bill Number 342 (“S.B. 342”),
19 which would have banned **any** person from charging a contingent fee for **any** tax-related
20 services, including matters before the Board of Equalization, the Franchise Tax Board, or the
21 Assessment Appeals Board. The failed S.B. 342 went so far as to impose a penalty equal to the
22 greater of \$5,000 or the amount of the contingency fee on anyone who violated the proposed
23 law. Less than three months after its introduction, S.B. 342 died in the Senate Judiciary
24 Committee.

25 31. In 2013, Senator Wolk again tried and failed to restrict contingency fee
26 arrangements, this time limited to fees for services rendered in connection with a tax credit
27 relating to an enterprise zone and other targeted tax areas. Senate Bill Number 434 (as amended
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1 Apr. 1, 2013) (“S.B. 434”). Senator Wolk amended S.B. 434 to prohibit contingent fees and to
2 impose a penalty on anyone violating the proposed law. Again, the bill stalled in the Senate.
3 The Legislature still had no intent to restrict fees in tax matters.

4 32. Notably, in its Bill Analyses of both S.B. 342 and S.B. 434, the Senate
5 Governance and Finance Committee, which Senator Wolk chaired, relied on the Internal
6 Revenue Service’s Circular 230 as the basis for the contingency fee ban. Sen. Gov. & Fin.
7 Comm., Bill Analysis, S.B. 342, at *1 (Apr. 25, 2011); Sen. Gov. & Fin. Comm., Bill Analysis,
8 S.B. 434, at *3-4 (Apr. 24, 2013). On July 16, 2014, the District Court of the District of
9 Columbia invalidated the contingency fee ban in Circular 230 and enjoined the IRS from
10 enforcing the restrictions. *Ridgely v. Lew*, No. 1:12-cv-00565, 2014 WL 3506888 (D.D.C. July
11 16, 2014). The court found that the IRS’s ban on contingency fees was both without authority
12 and caused the plaintiff—incidentally, a Principal of Ryan, LLC—to suffer irreparable
13 injury. *Id.* at *14. Circular 230 provides no basis for restricting contingency fees.

14 33. The statutes governing the Tax Credit do not provide GO-Biz with the authority
15 to limit contingency fee agreements, and the Legislature has refused to restrict contingency fee
16 agreements. In defiance of GO-Biz’s lack of authority to regulate fee agreements, GO-Biz has
17 inserted a regulatory requirement regarding fee agreements through inappropriate and illegal use
18 of an emergency readoption proceeding.

19 34. The demanding process required of taxpayers who wish to receive the Tax Credit
20 may make hourly work expensive for the taxpayer, especially when considering many applicants
21 are denied the credit and would, under the regulation, have been forced to pay an hourly rate.

22 **THE 2014 REGULATION VIOLATES THE ADMINISTRATIVE PROCEDURE**
23 **ACT, STATE LAW, AND STATE AND FEDERAL CONSTITUTIONAL LAW.**

24 I. **The 2014 Regulation Violates the Administrative Procedure Act.**

25 35. The rulemaking power of an administrative agency does not permit the agency to
26 exceed the scope of authority conferred on the agency by the Legislature.

1 **A. The 2014 Regulation Conflicts with Statute and is Therefore Invalid.**

2 36. GO-Biz’s rulemaking power is limited by California Revenue and Taxation Code
3 §§ 17059.2 and 23689. These sections give California taxpayers the right to seek the Tax Credit.

4 37. Sections 17059.2(a)(2) and 23689(a)(2) give GO-Biz the responsibility for
5 allocating the Tax Credit to taxpayers and specifies the allocation factors to be considered by
6 GO-Biz when allocating the amount of the credit. Cal. Rev. & Tax. Code § 17059.2(a)(2) (“The
7 amount of credit allocated to a taxpayer . . . shall be based on the following factors:”); *id.*
8 § 23689(a)(2) (“The amount of credit allocated to a taxpayer . . . shall be based on the following
9 factors:”).

10 **i. The 2014 Regulation Impairs the Scope of the Statutes Governing the Tax Credit.**

11 38. It is black letter law that “[a]dministrative regulations that alter or amend the
12 statute or enlarge or impair its scope are void and courts not only may, but it is their obligation to
13 strike down such regulations.” *Morris v. Williams*, 433 P.2d 697, 707, 67 Cal. 2d 733, 748 (Cal.
14 1967). “No regulation adopted is valid or effective unless consistent and not in conflict with the
15 statute and reasonably necessary to effectuate the purpose of the statute.” Cal. Gov’t Code
16 § 11342.2.

17 39. The 2014 Regulation is therefore invalid because it alters California Revenue and
18 Taxation Code § 17059.2, impairing the scope of its application to taxpayers seeking to utilize
19 the Tax Credit. In particular, Section 8030(g)(2)(H) of the 2014 Regulation imposes an
20 allocation factor for Tax Credit applicants that exceeds the requirements specified in California
21 Revenue and Taxation Code §§ 17059.2 and 23689:

22 (H) Any other information requested in the application;
23 including, but not limited to, **the fee arrangement between the**
24 **applicant and any consultant, attorney, tax practitioner or any**
25 **other third party that prepared or submitted the application,**
26 **or provided any services related to the credit. Any contingent**
27 **fee arrangement must result in a fee that is less than or equal**
28 **to the product of the number of hours of service provided to**
 the applicant and a reasonable hourly rate for such services.

 40. Section 8030(g)(2)(H) of the 2014 Regulation expressly alters the application of
California Revenue and Taxation Code §§ 17059.2 and 23689, imposing additional burdens,

1 conditions, and restrictions on Tax Credit applicants in excess of the provisions of California
2 Revenue and Taxation Code §§ 17059.2 and 23689. The subsection conflicts with the statutes it
3 purports to effectuate and is in no way necessary to effectuate the statutes' purpose.

4 41. Specifically, Section 8030(g)(2)(H) of the 2014 Regulation requires a taxpayer to
5 include in its application for the Tax Credit information detailing fee arrangements with any third
6 party assisting the taxpayer with its application. Moreover, it restricts fee arrangements by
7 imposing limitations on the resulting fee. These requirements are not stated in or in any respect
8 authorized by California Revenue and Taxation Code §§ 17059.2 and 23689.

9 42. When a taxpayer applies for the Tax Credit and GO-Biz determines the taxpayer's
10 fee arrangement with its tax professional is non-compliant with Section 8030(g)(2)(H) of the
11 2014 Regulation, GO-Biz may cite the 2014 Regulation in order to refuse the taxpayer
12 application of the Tax Credit. The taxpayer is therefore left with no ability to use the Tax Credit
13 despite its ability to meet the statutory requirements.

14 43. The list of factors provided in California Revenue and Taxation Code
15 §§ 17059.2(a)(2) and 23689(a)(2) is exclusive. GO-Biz is required under statute to allocate the
16 Tax Credit based on the allocation factors enumerated in the California Revenue and Taxation
17 Code. The statute does not authorize GO-Biz to impose further factors upon taxpayers that
18 otherwise qualify for the credit.

19 **ii. The 2014 Regulation is Not Reasonably Necessary to Effectuate the Purpose of the**
20 **California Competes Tax Credit.**

21 44. The 2014 Regulation illegally alters Sections 17059.2 and 23689 of the California
22 Revenue and Taxation Code and impairs the scope of the Sections' application to qualifying
23 taxpayers. The ultimate result of the increased burden and restrictions imposed by Section
24 8030(g)(2)(H) of the 2014 Regulation is to limit taxpayers' ability to qualify for the Tax Credit
25 in a way never contemplated by the Legislature when enacting Sections 17059.2 and 23689 of
26 the Revenue and Taxation Code.

1 45. The Legislature intended “to attract and retain high-value employers” by allowing
2 businesses to “publicly apply for tax credits *allowed on the basis of job creation and retention*
3 *standards.*” A.B. 93 § 1(f).

4 46. Moreover, the Legislature has acted as recently as July 3, 2014, amending
5 Sections 17059.2 and 23689 without anywhere addressing the use of professionals to apply for
6 the Tax Credit, much less the fee arrangements of taxpayers with those tax professionals. *See*
7 Assembly Bill 2389 §§ 4, 6.

8 47. Imposing a fee restriction on professionals assisting taxpayers in the application
9 process contradicts legislative intent. It illegally limits taxpayers’ ability to apply for the Tax
10 Credit and prevents taxpayers who qualify under the statute from using the Tax Credit.

11 48. California Revenue and Taxation Code §§ 17059.2(a)(2) and 23689(a)(2) require
12 allocation of the Tax Credit to be based on eleven factors. The allocation factors directly relate
13 to the Legislature’s stated goals of attracting and retaining employers and providing a credit
14 based on job creation and retention by those employers. The requirement contemplates the
15 taxpayer’s application describing why the taxpayer is a “high-value employer” deserving of the
16 Tax Credit incentive, for example by describing the importance of the industry of the taxpayer
17 and the employees currently and likely to be employed by the taxpayer. Revenue and Taxation
18 Code §§ 17059.2(a)(2) and 23689(a)(2) do not require taxpayers to describe the information
19 requested in Section 8030(g)(2)(H) of the 2014 Regulation when providing information used to
20 decide the taxpayer’s ability to qualify for the Tax Credit.

21 49. GO-Biz has, in the 2014 Regulation, inserted a completely new restriction,
22 interfering with the rights of a business to freely contract with needed professionals, a right that
23 has previously enabled small businesses to hire tax professionals, such as Ryan, to navigate the
24 complex statutory and regulatory process required when applying for the Tax Credit. *See Cal.*
25 *Code Regs. tit. 10, § 8030(g)(2)(H).* The fee restriction conflicts with the Legislature’s intent to
26 make access to the credit available to small business, an intent reflected in the requirement that
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1 25% of the Tax Credit be allocated to “small business.” Cal. Rev. & Tax. Code §§ 17059.2(g)(2),
2 23689(g)(2).

3 **B. The 2014 Regulation Was Adopted Through Invalid Procedure.**

4 50. In addition to the court’s power to invalidate rules or regulations that exceed the
5 agency’s authority and/or that are inconsistent and in conflict with statutes, courts may declare
6 emergency regulations subject to the Administrative Procedure Act invalid if the facts in the
7 finding of emergency does not constitute an emergency within the provisions of Section 11346.1
8 of the Government Code. Cal. Gov’t Code § 11350(a).

9 51. The 2014 Regulation was illegally adopted under the auspices of the emergency
10 readoption procedure in California Government Code § 11346.1(h).

11 **i. The 2014 Regulation is Invalid because it is Not Restricted to Addressing Valid**
12 **Emergency Situations.**

13 52. Emergency regulation procedures are restricted to situations where adoption is
14 “necessary to address an emergency.” Cal. Gov’t Code § 11346.1(b)(1). An “emergency” is
15 defined by the Legislature to include **only** situations calling for “immediate action to avoid
16 *serious harm* to the public peace, health, safety, or general welfare.” *Id.* § 11342.545 (emphasis
17 added). No explanation of a finding of emergency was provided by GO-Biz to explain the need
18 for a restriction on tax professionals’ fee arrangements when assisting taxpayers with
19 applications for the Tax Credit.

20 53. GO-Biz may not avoid the procedures required to pass an emergency regulation
21 by adding in new, unrelated requirements to a previously passed emergency regulation. All
22 emergency regulations must include “a written statement” and “a description of the specific facts
23 demonstrating the existence of an emergency and the need for immediate action, and
24 demonstrating, by substantial evidence, the need for the proposed regulation.” Cal. Gov’t Code
25 § 11346.1(b)(2).

26 54. Moreover, the emergency regulation may address “only the demonstrated
27 emergency.” Cal. Gov’t Code § 11346.1(b)(2). The 2014 Regulation moves far beyond the
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1 emergency demonstrated and imposes new restrictions addressing an issue, fee arrangements,
2 that has neither been described with specific facts, supported by substantial evidence, nor shown
3 to effectuate only the statutes being implemented, all of which must be done in order to adopt a
4 valid emergency regulation. *See id.*; *see also id.* § 11346.5(a).

5 55. Defendants have the burden of proving the purported emergency required to
6 validate the language introduced during the emergency readoption process for Section
7 8030(g)(2)(H) of the 2014 regulation. *See Cal. Med. Ass'n*, 106 Cal. Rptr. at 564-65, 30 Cal.
8 App. 3d at 650-51 (“Where the evidence necessary to establish a fact essential to a claim lies
9 peculiarly within the knowledge of and competence of one of the parties, that party has the
10 burden of going forward with the evidence on the issue although it is not the party asserting the
11 claim.”).

12 **ii. The Office of Administrative Law Did Not Have the Power to Approve the**
13 **Adoption of the 2014 Regulation.**

14 56. The Office of Administrative Law (“OAL”) reviews all regulations—including
15 emergency regulations—prior to their adoption. *See Cal. Gov’t Code* § 11340.1.

16 57. The 2014 Regulation imposes an unnecessary burden on California taxpayers that
17 is outside the Legislature’s intent in establishing the Tax Credit. The OAL allowed the 2014
18 Regulation despite the fact that the Legislature established the OAL in order to prevent the
19 unnecessary “imposition of prescriptive standards upon private persons and entities through
20 regulations” that “placed an unnecessary burden on California citizens.” *Cal. Gov’t Code*
21 § 11340(d). Significantly, when declaring the need for the OAL, the Legislature observed, “The
22 complexity and lack of clarity in many regulations put small businesses, which do not have the
23 resources to hire experts to assist them, at a distinct disadvantage.” *Id.* § 11340(g).

24 58. A fee restriction imposed for the first time in an emergency readoption proceeding
25 is unenforceable and illegal. Being unrelated to the statutory purpose of the sections at issue, the
26 fee restriction makes the regulation invalid under *Cal. Gov’t Code* § 11342.2. Further, the OAL
27 is statutorily limited in the readoption proceeding to “an emergency regulation that is the same as
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1 or *substantially equivalent* to an emergency regulation previously adopted.” Cal. Gov’t Code
2 § 11346.1(h) (emphasis added). As detailed above, the fee restriction was not in the original
3 emergency regulation. A new restriction, on a topic neither addressed in the original emergency
4 regulation nor the statutes at issue, cannot be considered substantially equivalent to the original
5 emergency regulation and so may not be approved by the OAL.

6 **C. The 2014 Regulation is Arbitrary and Capricious.**

7 59. Courts have also invalidated regulations that are arbitrary, capricious, or without
8 reasonable or rational basis.

9 60. The contingency fee rate is capped at an undefined “reasonable hourly rate” for
10 the provision of “services related to” the Tax Credit. The 2014 Regulation does not provide a
11 definition or parameters for calculating such a rate.

12 61. Further, the idea of a “reasonable” rate is subjective, and opinions on what is
13 reasonable will vary widely. Hourly rates for economic development and tax services vary
14 dramatically between large and small firms and due to differences in scope and the facts and
15 circumstances of a particular project. Rates further vary based on where in the United States the
16 work is performed and based on the professional accreditations of the particular providers.

17 62. Section 8030(g)(2)(H) of the 2014 Regulation is arbitrary and capricious because
18 GO-Biz lacks the knowledge and experience to implement the contingency fee cap in a non-
19 arbitrary manner. Further, the 2014 Regulation places the burden on the taxpayer to prove a
20 “reasonable hourly rate.” Because no regulation adopted is valid or effective unless consistent
21 and not in conflict with statutory authority, the 2014 Regulation, which conflicts with statutory
22 provisions in the Revenue and Taxation Code as well as in the Business and Professions Code,
23 cannot stand.

24 **II. The 2014 Regulation Violates State Law.**

25 63. GO-Biz has no authority to regulate the contingency fee arrangements of tax
26 professionals assisting with taxpayers’ applications for the Tax Credit.

1 64. Section 8030(g)(2)(H) of the 2014 Regulation inappropriately purports to regulate
2 the professional conduct of attorneys and accountants, as well as other tax professionals. It limits
3 success-based fee arrangements to “a fee that is less than or equal to the product of the number of
4 hours of service provided to the applicant and the reasonable hourly rate for such services.” This
5 caps the fee at an amount quantified solely by hours worked and interferes with the taxpayer’s
6 right to freely negotiate terms and contract with third-party professionals.

7 65. The California Business and Professions Code regulates professional conduct,
8 such as contingency fee agreements, of professionals, including attorneys and accountants. *See*
9 Cal. Bus. & Prof. Code §§ 5010, 5018, & 6147. And, the California Business and Professions
10 Code gives no rulemaking authority to GO-Biz to regulate attorney, accountant, or other
11 professionals’ conduct, such as fee arrangements. The Business and Professions Code and the
12 rules and regulations properly promulgated thereunder cannot be usurped by Section
13 8030(g)(2)(H).

14 66. Under Cal. Bus. & Prof. Code § 6147, an attorney who enters into a contingency
15 fee agreement is required to put the costs in writing, including a statement that “the fee is not set
16 by law but is negotiable between attorney and client.” Cal. Bus. & Prof. Code § 6147. This
17 statute applies to both litigation and transactional—including tax-related service—fees. *See*
18 *Arnall v. Superior Court*, 118 Cal. Rptr. 3d 379, 384, 190 Cal. App. 4th 360, 368 (2010). The
19 Legislature has enacted two express exceptions where contingency fees are capped by law, in the
20 context of medical malpractice suits and suits between merchants. *See* Cal. Bus. & Prof. Code
21 §§ 6146 & 6147.5.

22 67. The California State Bar Board of Trustees, with the approval of the Supreme
23 Court, formulates and enforces the rules of professional conduct for all licensed attorneys,
24 including attorneys’ fees. *See* Cal. Bus. & Prof. Code § 6076. The State Bar Board of Trustees
25 has properly promulgated Rule 4-200 and Model Rule 1.5 of the Rules of Professional Conduct,
26 which prescribe further rules for contingency fee arrangements. For example, Model Rule 1.5
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1 prohibits contingency fee arrangements in family law and criminal cases. However, even these
2 Rules do not purport to regulate the structure of a validly executed contingent fee arrangement.

3 68. Under Cal. Bus. & Prof. Code § 5018, the California Board of Accountancy is
4 charged with regulating the professional conduct, including fees, of accountants for the purpose
5 of “the establishment and maintenance of a high standard of integrity and dignity in the
6 profession.” The Legislature has explicitly stated that “[e]very licensee of the California Board
7 of Accountancy in this state shall be governed and controlled by the rules and standards adopted
8 by the board.” Cal. Bus. & Prof. Code § 5018. Pursuant this authority, the Board has
9 promulgated regulations that prescribe standards related to contingency fees. See Cal. Code Reg.
10 tit. 16, § 62.

11 69. Whenever a state agency is authorized by statute to carry out the provisions of the
12 statute, no regulation adopted is valid or effective unless consistent and not in conflict with the
13 statute. *Morris v. Williams*, 433 P.2d 697, 707, 67 Cal. 2d 733, 748 (Cal. 1967). “No regulation
14 adopted is valid or effective unless consistent and not in conflict with the statute and reasonably
15 necessary to effectuate the purpose of the statute.” Cal. Gov’t Code § 11342.2.

16 70. By purporting to regulate fee arrangements of any consultant, attorney, or tax
17 professional assisting taxpayers with the Tax Credit, Section 8030(g)(2)(H) of the 2014
18 Regulation directly conflicts with Sections 5010, 5018, and 6147 of the California Business and
19 Professions Code. For example, Cal. Bus. & Prof. Code § 6147 requires a written statement that
20 a contingent fee between an attorney and client is “not set by law but is negotiable between
21 attorney and client.” By requiring the fee to be capped at the ambiguous “industry standard
22 hourly rate,” Section 8030(g)(2)(H) renders the Legislative requirement untrue.

23 71. GO-Biz has no authority to regulate professional conduct or to divest the Board of
24 Accountancy or State Bar of their regulatory jurisdiction. The Legislature has chosen to regulate
25 contingency fee arrangements in the Business and Professions Code, and administrative
26 limitations on use of contingency fees exceed GO-Biz’s authority and conflict with the
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1 Legislature's express intent. *See Schenley Affiliated Brands Corp. v. Kirby*, 98 Cal. Rptr. 609,
2 616-17, 21 Cal. App. 3d 177, 186 (1971).

3 **III. The 2014 Regulation is Unconstitutional.**

4 **A. The 2014 Regulation Violates Due Process and Equal Protection.**

5 72. Section 8030(g)(2)(H) of the 2014 Regulation denies substantive due process and
6 the equal protection of the law. "A person may not be deprived of life, liberty, or property
7 without due process of law or denied equal protection of the laws." Cal. Const. art. 1, § 7; U.S.
8 Const. Amend. XIV.

9 73. The unfounded introduction of a cap on contingency fees by use of an emergency
10 readoption procedure constitutes an arbitrary deprivation of property that violates Ryan's
11 substantive due process. By blocking the taxpayers' application for the Tax Credit, GO-Biz's
12 actions in promulgating and enforcing Section 8030(g)(2)(H) of the 2014 Regulation impose
13 additional burdens and restrictions on taxpayers applying for the Tax Credit that constitute a
14 denial of taxpayers' rights.

15 74. Moreover, the contingency fee rate is capped at an amorphous and undefined
16 "reasonable hourly rate" for the provision of "services related to" the Tax Credit. "Indefiniteness
17 in statutory terminology may be tested as an invalid delegation of power as well as a denial of
18 due process." *Wotton v. Bush* 261 P.2d 256, 260, 41 Cal.2d 460, 468 (Cal. 1953).

19 75. Finally, Section 8030(g)(2)(H) of the 2014 Regulation deprives tax professionals
20 providing contingent fee services equal protection of the law. Because the subsection conflicts
21 with statutory provisions regulating contingency fees for attorneys and accountants, the statute
22 could only regulate the fee agreements of tax consultants. GO-Biz cannot single out tax
23 consultants for contingent fee limitations not enforceable against attorneys and accountants.

24 **B. The 2014 Regulation Violates the Commerce Clause of the United States**
25 **Constitution.**

26 76. The United States Constitution gives Congress the power to regulate commerce
27 between the states. Art. 1, § 8, cl. 3. The Commerce Clause has long been understood to have a
28

1 negative aspect that denies the State the power to unjustifiably discriminate against or burden the
2 interstate flow of articles of commerce. *Ceridian Corp. v. Franchise Tax Bd.*, 102 Cal. Rptr. 2d
3 611, 616, 85 Cal. App. 4th 875, 882 (2000).

4 77. The Tax Credit will necessarily involve multi-state work by the tax professionals
5 because the Tax Credit is available when California is in competition with another state for a
6 new business or project

7 78. Tax professionals operating outside the State of California may lawfully provide
8 their services to clients under a contingency fee arrangement. As such, Cal. Code Regs. tit. 10,
9 § 8030(g)(2)(H) violates the Commerce Clause of the United States Constitution since it
10 discriminates against interstate commerce and burdens the interstate flow of commerce.

11 **FIRST CAUSE OF ACTION**

12 **DECLARATORY AND INJUNCTIVE RELIEF**

13 79. Ryan realleges and incorporates by reference paragraphs 1-78 above as though
14 they were fully set forth herein.

15 80. GO-Biz has adopted the 2014 Regulation.

16 81. Ryan contends that GO-Biz lacks the authority to adopt Section 8030(g)(2)(H) of
17 the 2014 Regulation and that the 2014 Regulation is invalid, void, unconstitutional and illegal.
18 Specifically, as set forth above, the Regulation is invalid, void, unconstitutional and illegal
19 because:

- 20 a) GO-Biz does not have the authority to adopt Section 8030(g)(2)(H) of the 2014
21 Regulation;
- 22 b) Section 8030(g)(2)(H) of the 2014 Regulation is inconsistent with governing law
23 and is therefore invalid;
- 24 c) GO-Biz failed to comply with the Administrative Procedure Act in adopting
25 Section 8030(g)(2)(H) of the 2014 Regulation;
- 26 d) Section 8030(g)(2)(H) of the 2014 Regulation violates the United States and
27 California Constitutions;
- 28

1 and (c) such fees should not in the interest of justice be paid out of
the recovery, if any.

2 90. This action will result in enforcement of important rights affecting the public
3 interest and a large class of California taxpayers and will confer significant benefits upon that
4 same class.

5 91. The necessity and financial burden of private enforcement are such as to make the
6 award of attorneys' fees pursuant to the "private attorney general doctrine" appropriate.

7 **FOURTH CAUSE OF ACTION**

8 **REQUEST FOR REASONABLE LITIGATION COSTS**

9 92. Ryan realleges and incorporates by reference paragraphs 1-78 above as though
10 they were fully set forth herein.

11 93. The Court may award to Ryan "a judgment for reasonable litigation costs
12 incurred" due to Ryan's undertaking this proceeding under Revenue and Taxation Code § 19717,
13 because GO-Biz's position is not "substantially justified."

14 **PRAYER FOR RELIEF**

15 Plaintiff requests that this Court enter a judgment, declaring that Section 8030(g)(2)(H)
16 of the 2014 Regulation is invalid and illegal, restricting GO-Biz from applying the illegal
17 requirements, and awarding costs and attorneys' fees to Plaintiff, and, in the alternative, granting
18 Plaintiff such other relief to which Plaintiff may be entitled.

19
20 Dated this 20th of August, 2014

21 

22
23 Robert W. Wood

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SUPERIOR COURT
OF CALIFORNIA
SACRAMENTO COUNTY