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5
6 **In The Court of Appeal of the State of California**
7 **Second Appellate District**
8

9 Pierre Genevier (Plaintiff/petitioner) | AC no: _____
10 | SC no: BC 364 736
11 **V.** | **Petition for a Peremptory Writ**
12 | **of Mandate to Compel**
13 | **Trial Court to Issue**
14 Los Angeles County Superior Court | **New Order Striking LA**
15 (Defendant/respondent) | **County Demurrer to FAC**
16 (Real Party of Interest Los Angeles County) | **With Immediate Stay**

17 TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF
18 THE COURT OF APPEAL OF THE Second APPELLATE DISTRICT OF THE
19 STATE OF CALIFORNIA:

20 Petitioner alleges:

21 1. This is a petition for a peremptory writ of mandate to compel the Superior Court
22 (respondent) to issue a new order striking LA County's demurrer to the first
23 amended complaint in the negligence case no BC 364 736 against LA County (real
24 party of interest). It is necessary to '**prevent a needless and expensive trial**', to
25 avoid an irreparable injury to petitioner, and **to address significant issues of law**
26 **and of first impression.**

27
28 2. Judge Recana denied the motion to strike on 12-2-09 [ER 102], and the

1 ruling is subject to review by higher court by extraordinary right [*see , e.g.,*
2 '*Clauson v. Superior Court (1998) 67 Cal. App. 4th 1253, 1255, 79 Cal. Rptr. 2d. 747*
3 (*mandate directing trial court to issue new order denying motion to strike punitive*
4 *damage allegations in complaint*),', *CFPP 375.23 [2]*]. This is an unlimited case
5 (damages sought \$2 840 000), so the Appellate Division of the Superior Court
6 does not have jurisdiction, and the petition must be presented to this Court.

7
8 3. The Superior Court '*is under legal duty to apply the proper law and it may be*
9 *directed to perform that duty by writ of mandate*' [see *CFPP 358.32*], so it had a
10 duty to apply the law justifying the striking of the demurrer described below.

11
12 4. Petitioner alleges that LA County's demurrer to FAC should be stricken
13 **because CCP 471.5 does not allow the filing of a demurrer and applies to a**
14 **FAC that complies with the Court order sustaining the demurrer with leave to**
15 **amend and that does not present any new fact and/or cause of action and/or does**
16 **not change facts and/or cause of action - a '*CCP 471.5 type of amended***
17 ***complaint*' (as opposed to a CCP 472 type of AC), see in *McGary v. Pedorena***
18 **(1881) 58 C. 91 and CFPP no 21.19.**

19
20 5. Petitioner further alleges that LA County's demurrer to FAC should be stricken
21 **because it violates CCP 1008 in this particular context of a CCP 471.5 type of**
22 **amended complaint**, so CCP 1008 forecloses the Court from ruling on the demurrer
23 to FAC issues that were or could have been presented in the initial demurrer, see
24 ***Bennett v. Suncloud 56 Cal. App. 4th 91; 65 Cal. Rptr. D 80 (June 1997)***.

25
26 6. Petitioner finally alleges that LA County's demurrer to FAC should be stricken
27 **because it was not timely re-noticed according to California Rule of Court Rule**
28 **3.1320 d** in 2007-2008, and therefore that the demurrer is not timely.

1 7. Petitioner also alleges that the deficiencies presented above appear at the face of
2 the demurer [CCP 437 (a)], and therefore that **the striking of the demurer is**
3 **legitimate** and warranted according to CCP 430.40 and to the case Buck v.
4 Morrossis (1952) 114 Cal. App. 2d 461, 464 -465 P.2d 27- (demurrer).

5
6 8. Petitioner has no plain, speedy and adequate remedy in the course of law, other
7 than the relief sought in this petition, in that the order denying the motion to strike
8 is not immediately appealable; and **it is urgent** that this Court addresses the above
9 issues of law to prevent petitioner from suffering an irreparable injury since these
10 issues of law must be addressed before the hearing on the demurrer set for 12-11-
11 09, and because they prevent the entry of default also (ER 102).

12
13 9. Respondent's failure to strike the demurrer and to apply the above proper law
14 has damaged petitioner in the sum of **\$2 840 000** in that it prevented the entry of
15 default also, see court order ER 102.

16
17 10. The stay of the demurrer hearing set for 12-11-09 is necessary, of course,
18 because the Court must rule on the issues of law justifying the striking of the
19 demurrer before the hearing of the demurrer (see no 8).

20
21 11. The present petition is based **(1) on the memorandum** of points and authority
22 below, and **(2) on the excerpts** of record (ER xx, 103 pages) that is presented
23 concurrently with this petition. A notice of application for a peremptory writ is
24 filed concurrently and served on respondents also.

25
26 WHEREFORE, petitioner prays:

27 1. That the court issues **a peremptory writ of mandate directing** (commanding)
28 the Superior Court **to issue new order striking Los Angeles County demurrer**

1 **to the First Amended Complaint** in case no BC 364 736 .

2
3 2. That the Court issues an order staying **temporarily the demurrer to FAC**
4 **hearing** (set for 12-11-09) until it rules on this petition.

5
6 3. For costs of this proceeding and for such other and further relief as the court
7 deems just and proper.

8
9 Dated December 7, 2009

10 Pierre Genevier

11
12 VERIFICATION

13
14 I, Pierre Genevier, am the petitioner in this proceeding. I have read the foregoing
15 petition and know its contents. The facts stated therein are true and are within my
16 personal knowledge.

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

19
20 Dated December 7, 2009

21 Pierre Genevier

22 Certificate of interested entities and persons

23 Memorandum of points and authority

1 **Memorandum of Point and Authorities**

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14 **Table of authorities**

15 **United States constitution / Federal Statutes**

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17 CCP 471.5 6, 7, 8, 9, 10, 11, 12, 14, 16, 17, 18

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24 **Cases**

25 *Bennett v. Suncloud* 56 Cal. App. 4th 91; 65 Cal. Rptr. D 80 (June 1997) 2, 12,13, 14, 17

26 *Buck v. Morrossis* (1952) 114 Cal. App. 2d 461, 464 -465 P.2d 27- (demurrer) 17

27 *Burn v. Ohio* 360 US 252 (1959) 18

28 *Clauson v. Superior Court* (1998) 67 Cal. App. 4th 1253, 1255 2

29 *Funeral Dir. Assn. v. Bd. Of Funeral Dirs.* (1943) 22 C. 2d. 104 17

30 *Gray v. Hall* 203 Cal. 306 (1928) 13

31 *Kronsberg v. Milton J. Wershow Co.* (1965) 238 Cal. App. 2 d 170, 173 11

32 *McGary v. Pedorena* (1881) 58 C. 91 2, 7, 9, 10, 14, 17

33 *McAllister v. County of Monterrey* (2007) 147 Cal. App. 4th 253, 281 9

34 **Treatise, law review, and other references**

36 California Form of Pleading and Practice (CFPP) (Matthew Bender Guide) 2, 7, 9, 10, 16

37 The Rutter Group California Civil Practice Guide (RCPG) 9,10

1 **I Statement of the case.**

2 This petition for writ of mandate to compel the Superior Court to issue a
3 new order striking the demurrer to FAC in case **BC 364 736** refers to a negligence
4 complaint (ER 4-15) for damages against the Los Angeles County filed **on 1-12-**
5 **07**. The LA County initially demurred to the complaint (ER 16-25) and the Court
6 sustained the County's demurer **with leave to amend and required a small**
7 **change in the complaint (to present a statute imposing liability on the County**
8 **for negligence other than CC 1714, see order ER 36)**. Plaintiff filed his first
9 amended complaint (FAC, ER 37-48) that complied with the Court order and did
10 not change any facts or the sole cause of action for negligence based on the
11 violations of regulation and various statues imposing duty on the County. The
12 County did not strike the FAC or filed an answer, and instead it filed a (almost
13 identical) demurrer to the FAC (ER 49-61) which is now allowed according to
14 **CCP 417.5** and violates **CCP 1008**.

15 While plaintiff pursued his first request to enter default in front of the US
16 Supreme Court, he requested a stay of the demurer to the FAC hearing until the
17 US Supreme Court rules on the first request to compel entry of default, and the
18 stay was granted. **On October 29 2007**, the US Supreme Court denied the request
19 to compel the entry of default and the stay ended, but the LA County did not re-
20 noticed its demurer at the earliest available date as required by California Rule of
21 Court Rule 3.1320 d [specifically stating that the demurer must be heard within 35
22 days of its filing **or on the first available Court date**] from 10-29-07 to 5-30-08.
23 **On 5-30-08** plaintiff requested a second stay of proceeding to allow the pro bono
24 lawyer appointed by the CA9 in the related case to review this case also and the
25 stay was granted, but the pro bono lawyer overlooked a conflict of interest and
26 later revoked himself.

27 **On 2-25-09** after the Court ordered a status conference, plaintiff applied ex
28 parte for the entry of default, but it was denied and so did the petition for writ of

1 mandate summarily. And on **November 5 2009**, petitioner filed a motion to strike
2 the demurrer to FAC (ER 79-85) (and a renewed motion to enter default), the
3 County filed an opposition (ER 86-91) and petitioner filed a reply on 11-25 (ER
4 92-101). The Court denied the motion to strike on 12-2-09 and the renewed to
5 enter default motion, and continued the hearing on the demurrer (see order ER 102).

6
7 **II CCP 471.5 does not allow the filing of a demurrer and**
8 **applies to a CCP 471.5 type of amended complaint.**
9

10 **1) The Matthew Benders' citation, and the case *McGary v. Pedorena***
11 ***(1881) 58 C. 91* differentiating amended complaints.**

12 CFPP no 21.19 (2) states: '*Answer to Amended Complaint. The defendant*
13 *or cross defendant is required to answer the amendments, or the complaint ... as*
14 *amended, within 30 days after service, ..., and judgments by default may be*
15 *entered on failure to answer as (CCP 471.5 (a)). CCP 471.5 refers only to the*
16 *filing of an answer to the amended complaint and **does not authorize the***
17 *filing of a demurrer. This is also true of its predecessor statute, former code*
18 *432.']. Again this makes sense because the filing of a demurrer to a FAC that*
19 *complies with the Court's order sustaining the first demurrer with leave to amend*
20 *and that does not change and/or add any facts and/or causes of action is nothing*
21 *else than a dishonest effort to avoid the filing of an immediate petition for writ of*
22 *mandate at the appeals court **to review the 'leave to amend issue'** and/or to avoid*
23 *an eventual appeal later on a final judgment, and to have the judge reconsider its*
24 *initial decision without following the requirements of CCP 1008.*

25
26 The Code of Civil Procedure described two '*different types of amended*
27 *complaints*' (CCP 471.5 and CCP 472) – this has been clarified and confirmed by
28 the California Supreme Court very early on in *McGary v. Pedorena (1881) 58 C.*

1 **91** stating *‘in order to give force and effect to both of these sections of the code*
2 *(471.5 formerly 432 and 472), we must hold that sect. 472 applies to amendments*
3 *made before answer filed and before trial of an issue of law upon a demurrer, and*
4 *that sect. 432 (471.5) applies to amendments made after an answer is filed, or*
5 *after the trial of an issue of law upon a demurrer to a complaint.’* There is
6 therefore no doubt that an amended complaint that complies with the court order
7 and that does not change and/or add any facts and/or causes of action – as in this
8 case [see explanation below in II 3)] is *‘CCP 471 type of amended complaint’*
9 which does **not** allow the filing of a new demurrer [and the default provision for
10 failing to answer of CCP 471.5 applies here also]. While CCP 586 a) 1 and CCP
11 472 refers to an amended complaint in which the fact and/or causes of action were
12 changed or added, and that created possible new issues of law that the judge has
13 not seen and addressed [*‘before answer filed and before trial of an issue of law*
14 *upon a demurrer’*]. Since CCP 472 does not address the default issue (as CCP
15 471.5 does), the law had to have CCP 586 a) 1 for the *‘CCP 472 type of amended*
16 *complaints’* allowing the filing of a demurrer.

17
18 CCP 586 is linked (or refers) **only** to **CCP 472** type of amended
19 complaints, **not** to the CCP 471.5 type of amended complaints [again CCP 586
20 used to be named **CCP 872** to show the relation with CCP 472, most certainly] so
21 it does not apply here and does not prevent the striking of the demurrer (or entry of
22 default). If CCP 586 were not only linked (or did not only refer) to CCP 472 type
23 of amended complaints, then CCP 471.5 would not have to specify that *‘default*
24 *may be entered for failure to answer’*, it would simply not address the issue as
25 CCP 472 does. **The difference** between CCP 471.5 and 472 that, for some, may
26 seem a too fine intellectual issue (and/or may seem to have lost its importance or
27 necessity over the years), **is in fact still very important** because it prevents the
28 type of dishonest behaviors mentioned in the motion and below - the dishonest

1 effort to avoid the filing of an immediate petition for writ of mandate at the appeal
2 court to review the ‘*leave to amend issue*’ or to avoid an eventual appeal later, and
3 to have the judge reconsider its initial decision without following the requirements
4 of CCP 1008; and it forces the parties to focus on the Court order, the plaintiff
5 must comply or risk a motion to strike (that can be transformed in a motion to
6 dismiss if granted), and the defendant must answer (or strike the AC if it does not
7 comply) or face a default.

8
9 **2) The *McAllister v. County of Monterrey* case and the Matthew
10 **Benders and Rutter guides confusion and contradictory conclusion on this
11 issue.****

12 The Court justifies its order denying the motion to strike with the case
13 *McAllister v. County of Monterrey* (2007) 147 Cal. App. 4th 253, 281 ...’ the case
14 used by defendant in its opposition (see ER 102), but this case does not
15 specifically address the issue of meaning of CCP 471.5 or of the word ‘answer’ in
16 CCP 471.5; it only refers to a Rutter Group Guide citation saying that the word
17 ‘*answer*’ means ‘*respond*’ in CCP 471.5 without presenting any legal authorities
18 or legal argument justifying this assertion. Moreover, the case *McAllister* leaves
19 serious doubt about the veracity of this citation, since the court wrote
20 ‘*Notwithstanding McAllister’s insistence that ‘answer’ does not mean ‘demurrer,’*
21 *a contrary interpretation **would** not be unreasonable. (Cf. Weil & Brown , Cal.*
22 *Practice guide: Civil Procedure Before Trial, supra 7:34 p. 7-16 [word ‘answer’*
23 *in 471.5 **presumably** means ‘respond’ and thus include the possibility for another*
24 *demurrer’*; but again it was **not** addressing this specific issue of the meaning of
25 ‘*amended complaint*’ in CCP 471.5, CCP 472, and in CCP 586, or of the meaning
26 of ‘*answer*’ in CCP 471.5, it was simply saying that, for some, the word ‘*answer*’
27 can easily be (mis) interpreted to mean ‘*respond*’ without saying if it is **rightly** or
28 **wrongly** interpreted to mean ‘*respond*’ in the Rutter Group Guide **since the court**
29 **used the words ‘presumably’ and ‘would’ which do not imply certainty.**

1 Petitioner does **not** question the fact that the Rutter Group’s practice guide
2 and even the Matthew Benders’ guides **are confused** on this issue of the meaning
3 of ‘*amended complaint*’ in CCP 471.5, CCP 472, and in CCP 586; and that they
4 present contradictory information on this issue since the CFPP (Matthew Benders’
5 guides) states that CCP 471.5 does **not** allow the filing of a demurrer, while the
6 Rutter Group’s guide states that CCP 471.5 does allow the filing of a demurrer,
7 **but first these guides are not the California Courts, so their sayings**
8 (unsupported by valid legal authorities) **do not have force of law**; and second the
9 reason for their confusion is that **they both overlook** (or ignore) the clarification
10 of the California Supreme Court in *McGary v. Pedrorena (1881) 58 C. 91*
11 without which they cannot explain why CCP 471.5 uses the words ‘*failure to*
12 *answer may lead to a default*’, and why CCP 472 does not address the default
13 issue [and instead is cross-referenced with CCP 586 (which again used to be
14 named **CCP 872** to show the relation with CCP 472, most certainly)]. **So they are**
15 **vague on the issue**, but the Matthew Bender guides have at least the intellectual
16 honesty to write that CCP 471.5 does **not** allow the filing of a demurrer while the
17 Rutter Group is **not at all** intellectually rigorous on this issue since it cites
18 McAllister as a confirmation of its statement that a demurrer is allowed although,
19 as seen above, the McAllister case does **not** directly address this issue, and leaves
20 an obvious doubt about the veracity of the Rutter Group’s allegation on this
21 matter. The statutes (CCP 471.5, 472) wording and legal authorities on this matter
22 [*McGary v. Pedrorena (1881) 58 C. 91*] are clear, leave no doubt about the
23 objective of the law, and are coherent with other statutes like CCP 1008 as seen
24 below in III.

25
26 **3) The logic behind CCP 471.5 and CCP 472, and the FAC and**
27 **demurer to FAC contents.**

28 If the Court thinks about the issue just 5 minutes, it will see that **there is no**
29 **honest reason** to allow the filing of a demurrer on this **471.5’s type** of amended

1 complaints because: **1) If the amended complaint** corrects the complaint fault
2 exactly as the judge requested it, then **for the judge** the amended complaint **is free**
3 **of objection appearing at the face of the complaint**, and there is no need to ask
4 the judge to rule again on the technical validity of the complaint, and an answer
5 should be filed. **2) If the amended complaint** does not comply with the judge's
6 order, then the defendant can move to strike the amended complaint for failure to
7 comply with the court order sustaining the demurrer with leave to amend (motion
8 that can be transformed into a motion to dismiss if granted) [*Kronsberg v. Milton*
9 *J. Wershow Co. (1965) 238 Cal. App. 2 d 170, 173*]. And **3) If the amended**
10 **complaint** corrects (or not) the complaint's fault as requested by the judge and at
11 the same time adds and/or changes allegations, causes of action,, then it is not
12 anymore a CCP 471.5's type of amended complaint, **it is CCP 472's type of**
13 **amended complaint** because the addition and/or change of facts, causes of
14 action,, creates new possible issues of law that have not been addressed by the
15 judge or answered (the amendments are then amendments before trial of the
16 created possible issues of law), so of course a new demurrer can be filed on this
17 type of amended complaint; the Court will note also that the addition or change of
18 facts, causes of action,, creates new circumstances and CCP 1008 does not apply
19 anymore; **but this is not the case here, petitioner did not change and/or add**
20 **any facts and/or cause of action.**

21
22 **Here the amended complaint is almost identical to the initial complaint**
23 (exactly same facts, same cause of action,) and it complies with the Court order
24 (again the defendant did not strike it) since the amendment requested was to
25 present a statute imposing liability on the County other than CC 1714 (which
26 petitioner had presented in conjunction with GC 815.2 imposing a vicarious
27 liability). Petitioner had mentioned also **GC 815.6** in his complaint, so the
28 **amendment was only the slight modification of the 3 paragraphs on the**

1 **existence of the duty** (see ER 45 no 47) - the demurrer to FAC did not even
2 address this amendment. And the demurrer to FAC **was also almost identical to**
3 **the first one** since the **2 notices** stated that **the demurrer is made on the**
4 **grounds** that: (1) the complaint fails to state facts sufficient to constitute the cause
5 of action, and (2) the complaint is uncertain. And the 2 memoranda of points and
6 authorities stated that (1) the complaint is barred by principle of res juridicata; and
7 (2) the allegations subsequent to the previous lawsuit filing in 2-2004 do not
8 constitute negligence. The new paragraphs in the 2nd demurrer are: **(a) the**
9 **complaint** is not timely filed [which the Court surely understands would not have
10 been welcomed in the first demurrer that was filed more than 20 days late (!), and
11 show that the LA County's lawyer has a very short memory]; and **(b) the plaintiff**
12 has not sufficiently pled compliance with applicable claims statute. Both of which
13 could have been presented earlier since petitioner did not change his allegation of
14 claims filing in paragraph 53 of the initial complaint! So the demurrer to FAC
15 also violated without any doubt **CCP 1008** forbidding the filing of a motion to
16 reconsider if the moving party cannot present new or different facts, circumstances
17 or law while explaining why they were not presented in the earlier motion, in
18 addition to be unauthorized by CCP 471.5.

19
20
21 **III LA County's demurrer violates CCP 1008 in this particular**
22 **context.**
23

24 **1) The case *Bennett v. Suncloud* and the defendant had the possibility**
25 **to file a petition for writ of mandate.**

26 The case *Bennett v. Suncloud* 56 Cal. App. 4th 91; 65 Cal. Repr. D 80
27 (*June 1997*) in which CCP 1008 prevented the Court from reconsidering a
28 previous ruling on a demurrer stating that the complaint was timely (see *Bennett*
29 on page 96) leaves no doubt about the fact that CCP 1008 also applies to demurrer

1 to FAC unlike the defendant's lawyer pretended (see opposition ER 90). The
2 Court in Bennett wrote:

3 [*Appellant contends that in sustaining the demurrer to the entire third amended*
4 *complaint, Judge Haber disregarded section 1008 of CCP which essentially*
5 *forbids trial courts from reconsidering orders previously rendered in the action*
6 *... A motion made in accordance with section 1008 must include reference to new*
7 *or different facts... On the other hand, when judge Finkel overruled the demurrer*
8 *to the first, second third, seventh and ninth cause of faction (for breach of express*
9 *warranty...), Judge Haber was foreclosed from rendering a new determination*
10 *on the viability of those claims unless new facts, or circumstances were brought*
11 *to his attention...'].*

12 So CCP 1008 prevents Judge Recana from ruling on the demurrer to FAC
13 because again there is no new (and/or changed) facts and/or causes of action in the
14 FAC, and the County does not present any special new circumstance justifying the
15 demurrer it only repeats mainly the initial demurrer as seen above or present issue
16 of law that could have been presented earlier.

17
18 In her opposition (ER 90), Mrs. Ellyatt writes that CCP 1008 *‘does not*
19 *apply to defendant demurrer because the matters set out in the original*
20 *complaint were no longer before the court’*, this argument has been contradicted
21 by several courts as seen in *Gray v. Hall 203 Cal. 306 (1928)* that cites *Redington*
22 *v. Cornwell, 90 Cal. 49, 60,61:*

23 The court wrote: *‘some earlier authorities would seem to indicate that an amended*
24 *complaint supersedes the original complaint for all purposes. The case*
25 *Redington..., however, correctly interprets these decisions and declares: ‘IT has*
26 *been said in a number of cases that a amended complaint supersedes the original;*
27 *but I think a careful examination of those cases will show that it was only to the*
28 *extend of the amendment. Beyond this, whatever may have been said is mere*
29 *dictum. But in none of the cases has it been said that the original is not part of the*
30 *judgment roll; nor has it been decided that an original complaint is superseded for*
31 *the purpose of showing when the action was commenced, and **whether or not a***
32 ***new difference causes of action was introduced by amendment.** For the purpose*
33 *of determining these questions and perhaps others that may arise, which often*
34 *become material on appeal, **the amended complaint can by no possibility***
35 ***supersedes the original...**’.*

1 As seen in *McGary v. Pedrorena (1881) 58 C. 91 and Bennett above*, it is
2 **the nature of the amendments that determines if CCP 1008 applies**, so the
3 original complaint is important to see that no new cause of action and/or facts
4 were added and that the facts were not changed, only the amendments requested
5 by the court on the use of CC 1714 were made. So here, as in *Bennett v. Suncloud*,
6 CCP 1008 prevents the court from reviewing the 2nd demurrer.

7
8 The judge has seen 2 of the objections of the demurrer to the FAC already
9 in the first demurrer and ruled that they were not sufficient to dismiss the case (or
10 to sustain the demurrer **without leave to amend**), he also thought that the
11 complaint was sufficient to support a cause of action obviously since he asked
12 petitioner to make only a minor change in his complaint, so **if Mrs. Ellyatt**
13 **thought** that the 2 objections and the new objections were sufficient to sustain the
14 demurrer without leave to amend [and obviously she did think that they were
15 sufficient since she presented them again in the demurrer to FAC that is identical
16 to the complaint in fact and cause of action], **she should have immediately filed a**
17 **petition for writ of mandate at the Appeal Court to question** the judge's
18 decision to **grant leave to amend** to save '*a needless and expensive trial*' as it is
19 proper to do.

20 [Please see *North American Chemical Co. v. Superior Court 59 cal. App. 4th 764*,
21 explaining that '**review by mandamus** is appropriate when the Court sustains a
22 demurer and when the mandamus proceeding **prevents a needless and expensive**
23 **trial and reversal**', or see *Big Valley Band of Pomo Indians v. Superior Court*
24 *(2005) 133 CA 4th 1185, 1189-1190... (writ review was appropriate to determine*
25 *defendant was immune form suit)*, or finally see *Cryolife, Ind. V. Superior Court*
26 *(2003) 110 CA 4th 1145, 1151-1152... (writ review was appropriate when petition*
27 *raised two significant issues of first impression)...*].

28 Mrs. Ellyatt had the possibility to present her concerns about the
29 sufficiency of the complaint to the Appeals Court by writ to end the case
30 immediately, and had the possibility to strike petitioner FAC if she thought it was
31 not complying with the court order, but not to file a new demurrer on a CCP 471.5

1 type of FAC, so her demurrer violating CCP 1008 should be stricken.

2
3 **IV The demurrer was not timely re-noticed according to**
4 **California Rule of Court Rule 3.1320 d.**

5 After the US Supreme Court denied the petition to compel the entry of
6 default on 10-29-07, and practically ended the stay of proceeding, the LA County
7 failed to re-notice its demurer **on the first available court date** as required by the
8 **California Rule of Court Rule 3.1320 d.** and this during 7 months at least until 5-
9 30-08, while at the same time it used the pending demurrer as an argument to
10 refuse to respond to the discovery questions. The demurrer was therefore not
11 noticed appropriately according to CRCR 3.1320 d and **should be stricken** also
12 as untimely [*Rule 3.1320. Demurrers. (d) Date of hearing Demurrers must be set for hearing not*
13 *more than 35 days following the filing of the demurrer or on the first date available to the court*
14 *thereafter. For good cause shown, the court may order the hearing held on an earlier or later day on*
15 *notice prescribed by the court.*']. Again according to CRC R 3.1320 c the noticing of the
16 demurer is the responsibility of the moving party, the County here, not
17 petitioner's.

18 **The wording** of California Rules of Court, Rule 3.1320 d **is very clear,**
19 and it requires a demurring party to notice its demurrer '*within 35 days of the*
20 *filing or at the earliest date available*', and according to CRC R. 3.1320 c, the
21 noticing of the demurrer **is the responsibility of the demurring party** [CRC R.
22 3.1320 c) '*Notice of hearing A party filing a demurrer must serve and file*
23 *therewith a notice of hearing that must specify a hearing date in accordance with*
24 *the provisions of Code of Civil Procedure section 1005*'.], so it is obvious that the
25 rule to notice the demurrer *at the earliest date available* applies even when a stay
26 requested by the plaintiff ends or when an earthquake prevents the hearing to take
27 place, and that it is the demurring party that must notice the demurrer, not the

1 Court or the plaintiff – neither the Court nor the plaintiff knows when the
2 defendant is available to hear the demurrer, so the demurring party has to make the
3 noticing at the earliest date available. There is therefore no need to present cases
4 that explain the meaning of CRC R 3.1320 d, it is clear enough [Mrs. Ellyatt and
5 the County delayed the hearing of their demurrer during **7 months** although there
6 is a \$20 000 penalty requested in the complaint for every month until the dispute is
7 resolved and the demurrer is forbidden by CCP 1008 and CCP 471.5, it is very
8 wrong and justifies the striking of the demurrer to FAC!].

9
10 **V The essential elements for a writ, the California**
11 **Constitution, the undisputed facts and well settle principle of**
12 **law, the importance of the issue, and the need for a stay.**

13 CFPP section 358.31 states that **the essential elements** of a writ are **(1) the**
14 **existence of duty** on the respondent and **(2) the demonstration of the right to**
15 **writ by clear, certain and positive evidence** [*The petition for writ of mandate*
16 *must demonstrate the right to a writ by clear, certain and positive evidence.*
17 *California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal.*
18 *App. 2d. 514, 545, see CFPP 358 .31 (1)]. So the petition presents the essential
19 **elements for the issuance of a **peremptory** writ of mandate **because (1) the****
20 **Superior Court ‘is under legal duty to apply *the proper law* and it may be directed**
21 **to perform that duty by writ of mandate’ [see CFPP 358.32], so it has/had a duty**
22 **to apply the provisions of CCP 471.5 forbidding a demurrer and the provisions of**
23 **CCP 1008 forclosing Judge Recana from addressing the issues of the demurer to**
24 **FAC.***

25 **And because (2) the fact that the FAC complies with the Court order**
26 **sustaining the demurrer with leave to amend is obvious **and undisputed** (no**
27 **motion to strike was filed and the change requested was minor and is easily**
28 **verifiable, see ER 4-15 and 37-48), as well as the fact that the FAC presents **no****

1 new facts and/or causes of action and/or does not change the initial facts and sole
2 cause. **The principles of law** explained above [definition and wording of CCP
3 471.5, 472, see *McGary v. Pedorena (1881) 58 C. 91 and Bennett above*] are
4 **well settled (120 years), and coherent with other statutes (CCP 1008,)**, so the
5 demonstration of the right to writ by clear, certain and positive evidence is
6 established. The contradiction on the issue of the meaning of CCP 471.5 in the
7 Rutter Group and Matthew Bender's guides **is due to the fact that they both**
8 **overlook the case *McGary v. Pedorena***, but it does not create a doubt about the
9 meaning of the law, **it only stresses the importance of the issue for the legal**
10 **community and justifies even more the petition for the Court** (if two
11 prestigious publishers present contradictory information on an issue, the court
12 should help them, not let incorrect information be spread).

13 **CCP 1086** also states: '*the writ must be issued in all cases where there is*
14 *not a plain, speedy, and adequate remedy in the ordinary course of law*', and
15 here it is obvious that petitioner had no other plain, speedy and adequate remedy
16 to have the Superior Court apply these well settle principles of law (CCP 471.5,
17 1008,), and **the Appeals Court must address the issue urgently before the**
18 **demurrer is heard** otherwise petitioner will suffer an irreparable injury (including
19 the loss of the possibility to have a default entered), so petitioner's request for a
20 **peremptory writ of mandate is justified and** legitimate.

21 The California Supreme Court has already agreed that **the determination**
22 **of a peremptory writ of mandate was a 'determination of a cause'** which
23 required a written and motivated decision (Cal. Const. Art. VI sect. 14) [see
24 *Funeral Dir. Assn. v. Bd. Of Funeral Dirs. (1943) 22 C. 2d. 104*, '*The Supreme*
25 *Court's initial action in issuing or declining to issue a prerogative writ on an ex parte*
26 *application does not constitute such 'determination of a cause'* (Cal. Const. Art. VI sect.
27 14) as to require a written decision. *It is only after an alternative writ has been issued*
28 *that the matter becomes 'a cause,' the determination of which, i.e., the granting or*

1 *denying of a peremptory writ, requires a written decision*'. (App. A)], so petitioner is
2 entitled to a written decision, and a summary decision would not only violate the
3 California Constitution, but also the US Constitution, the right to a due process
4 and principle of equal justice as in *Burn v. Ohio 360 US 252 (1959)*.

5 Finally, the immediate stay of the demurrer hearing (set for 12-11-09) is
6 justified because the Court must absolutely rule on this petition before the
7 demurrer to FAC is heard, otherwise its ruling would become moot and petitioner
8 would suffer an irreparable injury (since it would prevent the entry of default).
9 The defendant would not be prejudiced by a short delay in the hearing of the
10 demurrer since obviously it delayed on its own the hearing by at least 7 months as
11 explained above.

12 13 **V Conclusion.**

14 In conclusion petitioner respectfully requests that the Court issues a
15 peremptory writ directing (commanding) the Superior Court to set aside its order
16 denying the motion to strike (ER 102) and to issue a new order striking LA
17 County demurrer to FAC in the negligence case no BC 364 736 **(1) because CCP**
18 **471.5** does not allow the filing of a demurrer – on this CCP 471.5 type of amended
19 complaint, **(2) because** the LA County demurrer violates **CCP 1008 in this**
20 **particular context** of a CCP 471.5 type of amended complaint, and **(3) because**
21 the demurrer was not timely re-noticed according to **California Rule of Court**
22 **Rule 3.1320 d** in 2007-2008; and all these deficiencies appears at the face of the
23 demurrer.

24 Petitioner also respectfully requests that the Court issues an order immediately
25 staying the demurrer hearing (set for 12-11-09) until it rules on this petition.

26 Dated: December 7, 2009

27 By: _____

28 Pierre Genevier

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**Certificate of compliance pursuant to Fed. R. App. 32 (a) (7) (C), Circuit rule,
rule 32-1 and Cal. rule 14 for case no:**

Pursuant to Fed. R. App. O. 32 (a) (7) (C) and Ninth circuit Rule 32-1, I
certify that the attached brief is proportionally spaced, has a type face of 13 points
and contains 6042 words (560 lines).

Dated December 7, 2009

By : _____
Pierre Genevier

1 Pierre Genevier
2 711 South Westlake Ave., # 205
3 Los Angeles, CA 90057-4128
4 Email: pierre.genevier@laposte.net

5
6 **Court of Appeal of the State of California**
7 **Second Appellate District**
8 **Proof Of Service**

9 I, the undersigned, certify and declare that, on December , 2009, I served a true
10 copy of the **Petition for writ of mandate to compel trial Court to issue a new**
11 **order striking LA County Demurrer to FAC, by hand delivery or fax and/or**
12 **by email to:**

13
14 **Mr. Maranga and Mrs. Ellyatt**, Attorney for the Los Angeles County
15 (defendant), at 5850 Canoga Avenue, suite 600, Woodland Hills, CA 91367, Fax :
16 (818) 380 0028.

17
18 **Mr. Frederick Bennett**, Attorney for Los Angeles Superior Court, and **Judge Red**
19 **Recana**, Superior Court, 111 North Hill street, RM 546, Los Angeles CA 90012 (By
20 hand delivery).

21
22 I hereby certify under the penalty of perjury that the foregoing is true and correct.
23 I also certify that I don't know anybody who can do the service for me, and that I
24 do not have any money to pay someone to do the service for me, or to do the
25 service in any other way.

26
27 Pierre Genevier
28