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Attorneys for Intervenors
Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America dba Association of California Insurance Companies, National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

MERCURY CASUALTY COMPANY,

Petitioner and Plaintiff,

v.

DAVE JONES, IN HIS OFFICIAL CAPACITY AS THE INSURANCE COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondent and Defendant.

CONSUMER WATCHDOG,

Intervenor.

PERSONAL INSURANCE FEDERATION OF CALIFORNIA, et al.,

Intervenors.

Case No. 34-2013-80001426
Hon. Shellyanne W.L. Chang, Dept. 24

TRADES' APPENDIX OF AUTHORITIES IN SUPPORT OF OPPOSITION TO MOTION TO STRIKE

Date: March 28, 2014
Time: 10:00 a.m.
Dept.: 24

Action Filed: March 1, 2013

Intervenors Personal Insurance Federation of California, American Insurance Association, Property Casualty Insurers Association of America (doing business in California as Association of California Insurance Companies), National Association of Mutual Insurance Companies, and Pacific Association of Domestic Insurance Companies (collectively the "Trades") submit this Appendix of Authorities in support of the Trades' Opposition To Motion to Strike.

Exhibit Tab	Authority
A	Robert Weil & Ira Brown, Jr., California Practice Guide Civil Procedure Before Trial Ch. 2 (Rutter Group 2013) at 2:446
B	Robert Weil & Ira Brown, Jr., California Practice Guide Civil Procedure Before Trial Ch. 7 (I)-B (Rutter Group 2013) at 7:188.5 and 7:197
C	4 Witkin, Cal. Proc. 5th Plead, § 387 (2008) at 526-26

Dated: March 17, 2014

HOGAN LOVELLS US LLP

By: _____
Victoria C. Brown

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EXHIBIT A

California Practice Guide

CIVIL PROCEDURE BEFORE TRIAL

Chapters 1-7

ORIGINAL AUTHORS

JUDGE ROBERT I. WEIL (Ret.)
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San Francisco Superior Court

CURRENT EDITION AUTHORS

JUSTICE WILLIAM F. RYLAARSDAM
Calif. Court of Appeal, 4th Dist.

JUDGE LEE SMALLEY EDMON
Los Angeles Superior Court

2013

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This book should be cited as Weil & Brown et al., CAL. PRAC. GUIDE: CIV. PRO. BEFORE TRIAL (The Rutter Group 2013).

action before your motion can be heard. This would cut off your right to intervene, and could bar relief entirely if the statute of limitations has run. One alternative is to apply ex parte for an Order to Show Cause why leave to intervene should not be granted, and to include in the proposed order a stay of proceedings. Of course, you will have to notify opposing parties by telephone prior to making the ex parte application (CRC 3.1203(a); *see ¶9:352*).

FORM: Application and Order to Show Cause Why Leave to Intervene Should Not Be Granted, *see Form 2:6* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

c. [2:443] **Complaint in intervention:** The intervenor's pleading (whether it supports plaintiff's claims, or defendant, or claims adversely to both) is captioned "Complaint In Intervention." [See *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 CA3d 873, 879, 150 CR 606, 609; *Sutter Health Uninsured Pricing Cases* (2009) 171 CA4th 495, 513, 89 CR3d 615, 630—intervention denied because of failure to attach complaint]

It must comply with the rules applicable to pleadings generally (*see Ch. 6*). In addition, it must set forth the *grounds upon which the intervention rests*; i.e., the facts which show that intervention is a matter of right (*¶2:401 ff.*), or the basis for permissive intervention (*¶2:414*). [*Western Heritage Ins. Co. v. Sup.Ct. (Parks)* (2011) 199 CA4th 1196, 1206, 132 CR3d 209, 217 (citing text)]

- ***FORM:*** (Proposed) Complaint In Intervention, *see Form 2:7* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

d. [2:444] **Service of complaint in intervention:** A complaint in intervention must be served on any parties who have not yet appeared in the action, in the same manner as the complaint (*¶4:180 ff.*). Service on parties who have appeared is made through service (by mail or other permitted methods) on their attorneys of record. [CCP §387(a)]

e. [2:445] **Challenging intervention:** Unless a noticed motion for leave to intervene was utilized (*¶2:441*), the existing parties' first opportunity to challenge the intervention is normally by *demurrer* or *motion to strike* the complaint in intervention. [See *Timberidge Enterprises, Inc. v. City of Santa Rosa*, supra]

(1) [2:446] Any objection to the intervention is deemed *waived*, unless raised by the existing parties at their earliest opportunity to do so. [See *Bloom v. Waxman* (1941) 48 CA2d 646, 120 P2d 509, 510]

EXHIBIT B

California Practice Guide

CIVIL PROCEDURE BEFORE TRIAL

Chapters 1-7

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Bakhtiari (1985) 169 CA3d 509, 512, 215 CR 359, 361]

(c) [7:188.1] **Substantive defects in portion of claim:** A general demurrer does not lie to a portion of a cause of action (*see ¶7:42.2*). Thus, where there is a substantive defect affecting only a *portion* of a claim, the proper challenge is by motion to strike. [*PH II, Inc. v. Sup.Ct. (Ibershof)* (1995) 33 CA4th 1680, 1682-1683, 40 CR2d 169, 171—legal malpractice claim based on several incidents of alleged malpractice, one of which was not actionable as a matter of law]

This use of the motion must be "cautious and sparing": "We have no intention of creating a procedural 'line item veto' for the civil defendant." [*PH II, Inc. v. Sup.Ct. (Ibershof)*, supra, 33 CA4th at 1683, 40 CR2d at 171]

[7:188.2-188.4] *Reserved.*

(3) [7:188.5] **Compare—improper to strike cause of action:** A pleading challenge to an entire cause of action is by demurrer rather than a motion to strike under CCP §436: "(M)atter that is essential to a cause of action should not be struck and it is error to do so." [*Quiroz v. Seventh Ave. Ctr.* (2006) 140 CA4th 1256, 1281, 45 CR3d 222, 241—error not prejudicial if cause of action was susceptible to summary adjudication]

d. [7:189] **Limitation in limited civil cases:** Motions to strike are permitted in limited civil cases only on the ground that the damages or relief sought are not supported by the allegations of the complaint (e.g., punitive damages sought for simple nonpayment of promissory note). Any other ground for a motion to strike must be raised, if at all, as an affirmative defense in the answer. [CCP §92(d),(e)]

4. [7:190] **Moving Papers:** The regular noticed motion procedure applies. The moving party must serve and file on opposing counsel the following:

- Notice of Motion [CCP §1010]
- Points and Authorities [CRC 3.1112(c), 3.1113]
- Proposed Order (required only in courts still using attorney orders; *see discussion at ¶6:680*)

FORM: Motion to Strike and Proposed Order, *see Form 7A:5* in Rivera, *Cal. Prac. Guide: Civ. Pro. Before Trial FORMS* (TRG).

a. **Notice of motion**

(1) [7:191] **Notice required:** The notice and all supporting papers must be served at least *16 court days* before the hearing. If served by mail, the 16-day notice period is extended by 5 calendar days where both the address and place of mailing are in California; by 10 calendar days if either is in another state; and by 20 calendar days if either is in another country. [CCP §§435(b), 1005(b); *see ¶9:31*]

If service is by express mail or other method providing for overnight delivery, by fax (allowed only where so agreed to in writing), or by electronic transmission or notification (allowed only where agreed to or required by the court), the 16-day notice period is extended by only 2 court days. [See CCP §§1010.6, 1013; CRC 2.250-2.259; *and ¶9:87 ff.*]

If the motion to strike is filed concurrently with a demurrer, both must be set for hearing not more than 35 days from filing, or on the first available court date thereafter. [CRC 3.1320(d)]

(2) [7:192] **Portion to be stricken quoted verbatim:** If only some sentences or phrases are sought to be stricken, these must be quoted verbatim in the notice of motion. But this does *not* apply where the motion to strike is directed to the entire pleading, or to some *paragraph*, count or cause of action therein. [CRC 3.1322]

[7:193] *Reserved.*

b. **Declarations in support of motion**

(1) [7:194] **Not permitted:** Because the defect must appear on the face of the pleading and extraneous evidence is not permitted, declarations cannot be used to support the motion (other than to support a request for judicial notice).

(2) [7:195] **Request for judicial notice:** The court may take judicial notice of facts under the same rules as for demurrers. *See ¶7:12 ff.*

c. [7:196] **Points and authorities in support:** Failure to include points and authorities supporting each ground for the motion may be treated as an admission that the motion is not meritorious, and as ground to deny it. [CRC 3.1113(a); *and see ¶7:116*]

5. **Ruling on Motion**

a. [7:197] **Policy to construe pleadings liberally:** As with demurrers, motions to strike are disfavored. The policy of

the law is to construe the pleadings "liberally . . . with a view to substantial justice" (CCP §452). Thus, purely technical objections generally receive short shrift.

[7:197.1-197.4] *Reserved.*

b. [7:197.5] **Allegations presumed true:** In ruling on a motion to strike, the allegations in the complaint are considered in context and presumed to be true: "(J)udges read allegations of a pleading subject to a motion to strike as a whole, all parts in their context, and assume their truth." [*Clauson v. Sup.Ct. (Pedus Services, Inc.)* (1998) 67 CA4th 1253, 1255, 79 CR2d 747, 748]

c. [7:198] **Motion to strike heard concurrently with demurrer:** The court will often rule on one, and put the other off calendar.

(1) [7:199] If the judge decides the pleading has been improperly filed (e.g., late, or without leave of court, etc.), the judge will generally grant the motion to strike the entire pleading; and order any demurrers off calendar.

(2) [7:200] If there is no ground to strike the entire pleading, the court will usually deal with any general demurrer to the pleading. If such demurrer is sustained, any accompanying motion to strike will be put off calendar.

(3) [7:200.1] If a motion to strike certain portions of the complaint is heard concurrently with a *special* demurrer directed to some but not all of the complaint's causes of action, the court may rule on both the demurrer and the motion to strike in order to give guidance as to how the complaint should be amended.

d. **Motion to strike granted**

(1) [7:201] **If only a portion of pleading stricken:** Depending on how much is stricken, the judge may or may not require filing an amended pleading. If only a few words are involved, the judge may actually strike them from the original pleading, and initial same by interlineation. In such cases, defendant will then be ordered to *answer* the complaint (as stricken).

(2) [7:202] **If entire complaint stricken:** If the defect in the complaint is correctible, the judge will almost certainly grant *leave to amend* on terms it deems proper. Indeed, failure to do so is an abuse of discretion. [See CCP §472a(d); *Vaccaro v. Kaiman* (1998) 63 CA4th 761, 768-769, 73 CR2d 829, 833-834 (citing text)]

(a) [7:203] **Liberal policy re amendments:** The same liberal policy re amendment of pleadings applies as on sustaining demurrers (*see ¶7:129*).

EXHIBIT C

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4 WITPROC Ch. V, § 387
4 Witkin, Cal. Proc. 5th (2008) Plead, § 387, p. 525
Chapter V. Pleading
b. [§ 387] Allegations of Ultimate Facts.

4 Witkin, Cal. Proc. 5th (2008) Plead, § 387, p. 525

Witkin
California Procedure, Fifth Edition
B.E. Witkin and Members of the Witkin Legal Institute

Chapter V. Pleading
VIII. GENERAL RULES OF PLEADING
A. Pleading Ultimate Facts.
2. Ultimate Facts and Legal Conclusions.

b. [§ 387] Allegations of Ultimate Facts.

The unsatisfactory nature of the distinction between facts and conclusions of law (see supra, §378) is apparent on an examination of decisions sanctioning the use of certain general descriptive terms, nearly all having as much legal as factual content. The following are important examples:

(1) *Title or ownership.* (See *Robinson v. Glendale* (1920) 182 C. 211, 187 P. 741; infra, §§636, 665, 695.) In an action to quiet title to a riparian water right, it is permissible to allege generally the conclusion that the land is riparian to a watercourse. (*Hudson v. West* (1957) 47 C.2d 823, 829, 305 P.2d 807, infra, §666.)

(2) *Negligence.* (See *Stephenson v. Southern Pac. Co.* (1894) 102 C. 143, 147, 34 P. 618, 36 P. 407; *Roberts v. Griffith Co.* (1929) 100 C.A. 456, 461, 280 P. 199; infra, §596 et seq.)

(3) *Proximate cause.* The allegation that the defendant "caused" something to happen is, standing alone, a conclusion, but the pleading will be sufficient if it adds the manner in which the result was caused, i.e., the acts done. (*Cummins v. Gates* (1965) 235 C.A.2d 532, 543, 45 C.R. 417; see infra, §611 et seq.)

(4) *Invitee.* In *Smith v. Kern County Land Co.* (1958) 51 C.2d 205, 331 P.2d 645, the status of plaintiff as an invitee was sufficiently pleaded by the general statement that defendant "desired and wished" the removal of trees, etc., from its land. (51 C.2d 207.)

(5) *Agency and scope of employment.* (See *May v. Farrell* (1928) 94 C.A. 703, 707, 271 P. 789; infra, §920.)

(6) *Consideration.* In actions for specific performance, the plaintiff's general averment that the consideration was adequate is a conclusion of law. (See infra, §793.) But in ordinary actions on contract, the defendant's averment that the agreement was made "without any consideration" may now perhaps be deemed sufficiently factual. (See infra, §1089.)

(7) *Conversion.* (See *Baird v. Olsheski* (1929) 102 C.A. 452, 454, 283 P. 321; infra, §704.)

(8) *Legislative intent.* Where a complaint seeks to enjoin enforcement of a statute or ordinance on the ground of unconstitutionality, it is scarcely possible to avoid the use of conclusions of law, and they are usually**<<* p.526>>** upheld by calling them allegations of fact. Thus, in *Davis v. San Diego* (1939) 33 C.A.2d 190, 91 P.2d 640, allegations that a certain section of an ordinance "was enacted for regulatory purposes," but that the intent of the defendant city is now to enforce it "as a license for revenue only," were

proper. (33 C.A.2d 192.)

(9) *Knowledge and intent.* In *Rosin v. Superior Court* (1960) 181 C.A.2d 486, 5 C.R. 421, the husband alleged in an affidavit for contempt that the wife removed the children from the state "without my knowledge or consent and with the intent of preventing the exercise of my visitation and communication rights." *Held,* these were allegations of fact. (181 C.A.2d 490, citing *Woodroof v. Howes* (1891) 88 C. 184, 190, 26 P. 111, infra, §728.)

(10) *Right to take in eminent domain.* In a condemnation proceeding, the complaint must contain (a) a general statement of the public use for which the property is to be taken, (b) an allegation of the necessity for the taking, and (c) a reference to the statute that authorizes the plaintiff to acquire the property by eminent domain. (C.C.P. 1250.310(d); see infra, §687.)

(11) *Abandonment of asset by trustee in bankruptcy.* (See *Highlanders v. Olsan* (1978) 77 C.A.3d 690, 699, 143 C.R. 679 [trustees "with intent to abandon, knowingly conspired, schemed, contrived to abandon, and in fact did abandon all legal causes of action"].)

(12) *Standing in will contest.* (See *Estate of Lind* (1989) 209 C.A.3d 1424, 1434, 257 C.R. 853, 14 *Summary* (10th), *Wills and Probate,* §553 [allegation that "contestant's foster parents would have adopted him but for a legal barrier" was allegation of ultimate fact, giving sufficient notice of contestant's claim to standing].)

West's Key Number Digest, Pleading ⇐8(1)

Contents Index and Tables

4 WITPROC Ch. V, § 387

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