CASE NO. ________________

IN THE

SUPREME COURT OF CALIFORNIA

Pierre Genevier,

Plaintiff and Appellant

vs.

The Superior Court of Los Angeles County,

Respondent

Los Angeles County,

Real party of interest

After a Decision by the Court of Appeal

of Second Appellate District, Division One, Case No. B220 781

On a petition for a peremptory writ of mandate to compel the Superior Court of Los Angeles County to issue a New Order Striking LA County Demurrer to FAC, The Honorable Mel Recana, Judge.

Case No. BC 364 736

PETITION FOR REVIEW

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Petitioner (pro per) and Appellant/plaintiff

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PETITION FOR REVIEW

ISSUE(S) PRESENTED

1)_ Whether the Appeals Court violated the California Constitution **[Cal Cont. art. VI & 14]** and US Constitution [right to a due process, principle of equal justice] when it denied **summarily** the petition for a **peremptory** writ of mandate to compel the Superior Court to issue a new order striking LA County's demurrer to FAC?

2)_Whether CCP 471.5 **disallows** the filing of a demurrer on a '***CCP 471.5 type of amended complaint***' (as in this case)? (Or whether the word 'answer' in CCP 471.5 means 'answer' or 'respond'?).

3)_ Whether CCP 1008 forcloses the Court from ruling on a demurrer to a '*CCP 471.5 type of amended complaint*' (as in this case) as opposed to a '*CCP 472 type of amended complaint*'? (The answer to this question confirms the answer to the previous question and the validity of CCP 471.5's wording.).

<u>INTRODUCTION</u>

This petition for review of the summary denial of a petition for a **peremptory** writ of mandate to compel the Superior Court to issue a new order **striking** LA County's demurrer to FAC (in the negligence case no BC 364 736) follows 2 previous similar petitions for review (to obtain the entry of default against the LA County) and could lead, if granted, to an entry of default also (see ER 102), but petitioner, a pro se, had not presented all the arguments and legal authorities presented here, and that leave no doubt about why the petition (s) is (were) justified. Petitioner alleges (and now presents California Court cases supporting) **<u>(1) that</u>** the Appeals Court violated the <u>California</u> and <u>US Constitutions</u> when it denied summarily the petition (s) for a **peremptory** writ of mandate; **<u>(2) that</u>** CCP 471.5 disallows the filing of demurrer on a '*CCP 471.5 type of amended complaints*', and **<u>(3) that</u>** CCP 1008 forcloses the Superior Court from ruling on a demurrer to a '*CCP 471.5 type of amended complaint*' as in this case. Petitioner also alleges that LA County's demurrer to FAC was 'untimely' according to **CRC R 3.1320 d,** and that the Appeals Court decision leads to a gross miscarriage of justice, and is unduly harsh in its impact.

<u>WHY REVIEW SHOULD BE GRANTED</u>

Review should be granted because the petition raises **2 important questions of law** [CRC R 8.500 (b) (1), (b) (3)].

First, the '**unconstitutionality**' of summary denials of petitions for a <u>peremptory</u> writ of mandate', the process of justice takes place when the Court renders a **<u>motivated</u>** decision [as Cal Cont. art. VI & 14 reminds us], not when the Court renders a summary decision. This Court has already concluded in *Funeral Dir. Assn. v. Bd. Of Funeral Dirs. (1943) 22 C. 2d. 104*, that the granting or denying of a **peremptory** writ of mandate was/is a '***determination of cause***' justifying the written (and motivated) decision guaranteed by the Constitution, but

nevertheless the Appeals Court denied summarily for the **third time** petitioner's petition for a **peremptory** writ of mandate that presents all the essential elements and record necessary to grant the petition, and again only one judge is listed (although 3 judges are required). Given that the summary denial also violates the **US Constitution** and that the result of the Appeals Court decision is an important loss and is extremely harsh for petitioner, the question is of significant importance. Moreover, writing a motivated decision (with a short summary of fact and the ground for denial appearing at the face of the petition) takes only 15 to 20 minutes, so there is no need to allow courts to render summary ('out of hand') decision that violates the constitution **in a modern justice system**, and the Supreme Court can review the issue (it had already ruled on in 1943, it appears) at the light of the increased use of word processing, electronic filing, and in an effort to encourage accrued accountability by Appeals Court.

Second, the meaning of CCP 471.5 and in particular the fact that it does **not** allow the filing of demurer on a CCP 471.5 type of amended complaints, [see CFPP no 21.19 (2)], is also a very important issue of law because obviously **the legal community is very confused on this issue** [two leading publishers of California Civil Procedure guides even present contradictory information on the issue as seen below] although the existing legal authorities address the issue and the wording of CCP 471.5 is coherent with other CCP statutes as the response to petitioner's third question will confirm (CCP 1008 also forcloses the Court from ruling on a demurer to a 'CCP 471.5 type of amended complaints' as in this case).

Review should be granted also because the case is meritorious [the demurrer was not timely (or not timely noticed according to CRC R 3.1320 d); two Courts have already concluded that the demurrer's objections were not 'valid' already; the rulings on the previous related cases ignored existing legal authorities to reach unfair conclusions, …], and the Appeals Court decision leads to a gross miscarriage of justice and to a result unduly harsh in its impact.

<u>**FACTUAL AND PROCEDURAL HISTORY**</u>

<u>A The facts.</u>

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

While plaintiff pursued his first request to enter default in front of the US Supreme Court, he requested a stay of the demurer to the FAC hearing until the US Supreme Court rules on the first request to compel entry of default, and the stay was granted. **On October 29 2007**, the US Supreme Court denied the request to compel the entry of default and the stay ended, <u>but the LA County did **not** re-noticed its demurer at the earliest available date</u> as required by California Rule of Court Rule 3.1320 d [specifically stating that the demurer must be heard within 35 days of its filing <u>**or on the first available Court date**</u>] from 10-29-07 to 5-30-08. **On 5-30-08** plaintiff requested a second stay of proceeding to allow the pro bono lawyer appointed by the CA9 in the related case to review this case also and the stay was granted, but the pro bono lawyer overlooked a conflict of interest and later revoked himself. **On 2-25-09** after the Court ordered a status conference, plaintiff applied again ex parte for the entry of default for failure to answer on

time to the FAC, but it was denied, and so was the petition for writ of mandate summarily. And **on 11-5-09**, petitioner filed a motion to strike the demurrer to FAC (ER 79-85) (and a renewed motion to enter default), the County filed an opposition (ER 86-91) and petitioner filed a reply on 11-25 (ER 92-101). The Court denied the motion to strike on 12-2-09 and the renewed to enter default motion, and continued the hearing on the demurrer (see order ER 102).

B Procedural history.

The complaint for damages ($2 840 000) due to professional negligence against the Los Angeles County (**BC 364 736**) followed two earlier complaints: **(a) One initial complaint for misrepresentation** (BC 310 113) filed on February 4 2004 at the Superior Court that was dismissed with prejudice for the claim against the LA County DPSS because of the immunity for misrepresentation **under GC 818.8** although there exits a legal authority stating that this immunity does not apply in the social services area as in this case (and good sense supports this conclusion); **And (b) a second complaint** (05-7517) filed at the Federal Court **on 10-19-05** for **(1)** deprivation of civil rights, **(2)** conspiracy to interfere with civil rights, **(3)** common law conspiracy against several civil servants in their individual capacities [and the **LA County for (1) only**], and for **(4) negligence** against defendants United States of America and **Los Angeles County** that was dismissed without prejudice for the negligence cause of action against the County on December 28 2006, after more than a year of analysis of the complaint and of defendant's demurrer arguments. Petitioner did re-file the negligence complaint (ER 4-15) on 1-12-07 at the Superior Court, it was served by plaintiff on 1-20-07 and formally by the sheriff on 1-30-07, and plaintiff requested the default **on 3-15-07** before the LA County filed its demurer on 3-20-07 (ER 16-25). The Superior Court refused to enter default and the Appeals Court (and Supreme Courts) denied the writ of mandate to compel entry of default as explained above.

C The Appeals Court decision.

The Court of Appeals **summarily** denied the petition for a writ of mandate on 12-11-09 (see attachment 1) although the case record (ER) and petition contained obvious proofs that the petition was meritorious.

LEGAL DISCUSSION

A The Appeals Court violated the California Constitution [Cal Cont. art. VI & 14] and the US Constitution when it denied summarily the petition for a peremptory writ of mandate.

1) The violation of the California Constitution.

California Form of Pleading and Practice (**CFPP**) states **in section 51.17 [b]**: '*All Decisions of the Supreme Court and Court of Appeals are required to be in writing, stating the reasons for the decision* ***[Cal Cont. art. VI & 14]*'**, and later '*when a decision treats an issue in a summary and conclusory manner, and is virtually devoid of reasoning, its authoritative status is undetermined [City of Berkeley v. Superior Court (1980) 26 Cal. 3. d 515…]. When an opinion addresses an issues of first impression without discussing precedent form other jurisdiction or the policy implications of its rule, the decision is not entitled to deference [McHugh v. Santa Monica…]*'. **And t**he California Supreme Court has already agreed that **the grant or denial of a peremptory writ of mandate was a 'determination of a cause**' which required a written and motivated decision (Cal. Const. Art. VI sect. 14) [see *Funeral Dir. Assn. v. Bd. Of Funeral Dirs. (1943) 22 C. 2d. 104*, *'The Supreme Court's initial action in issuing or declining to issue a prerogative writ on* ***an ex parte application*** *does not constitute such 'determination of a cause'* (Cal. Const. Art. VI sect. 14) as to require a written decision. *It is only after an alternative writ has been issued that the matter becomes 'a cause*,' *the determination of which, i.e.,* ***the granting or denying of a peremptory writ***, *requires a written decision'*.], so petitioner is entitled to a written decision. The Superior Court and the real

party of interest had already shown cause why the petition should be denied when they opposed and denied the motion to strike, so the petition is/was a petition for a **peremptory** writ of mandate and determination of a simple cause that required a written decision, and the summary decision violates the California Constitution. [As the a parenthesis, in section 51.17 [c], CFPP states also: '*A Court of Appeal opinion is required to identify the justices participating in the decision, including the author of the majority opinion and any concurring or dissenting opinion. If the opinion is by the Court, <u>it must identify the **three** participating justices</u> [Cal Rules of courts Rules 8.256 (a) (2)]*'; and in this case the decision identifies only one participating justice, there are 4 justices in division one, so it is not difficult to find at least 3 who are available].

Cal Rules of Courts Rules 8.486 allows the Court to **summarily** deny a petition for which the required record or explanation (…) was not presented, but this rule does not apply here because petitioner did present the excerpts of record [containing the necessary documents to evaluate the petition: the complaint and amended complaint (ER 4-15, ER 37-48); the demurrer and demurrer to FAC (ER 16-25, ER 49-61); the Court order on the initial demurrer; (ER 36), the motion to strike (ER 79-85), the opposition (ER 86-91) and reply to this motion (ER 92-101), and the Court order on the motion to strike (ER 102-103)]. And as the Court will see below the petition also presents the essential elements to issue a writ. Moreover, here, **like in the previous petition B 197 948 also denied summarily**, it does not appear at the face of the petition that it should be denied, there are obviously several legal authorities supporting the striking of the demurrer to FAC that were not taken into consideration by the Superior Court and the LA County [see order ER 102 and motion to strike pleadings ER 79-101], so the summary denial is very unfair and illegal (unconstitutional). And the Supreme Court can/should confirm the application of the California Constitution to this type of petition, especially when it leads to a violation of the US Constitution as well.

2) The violation of the US Constitution.

The violation of the California Constitution results in a violation of the Fourteenth Amendment (right to a due process) of the US Constitution, as the case *Burn v. Ohio 360 US 252 (1959)* in which the US Supreme Court had also deducted the violation of the due process (principle of Equal Justice) from the violation of the Ohio Constitution in a similar context, confirms it ['*Since a person who is not indigent may have the Ohio Supreme Court consider his application for leave to appeal from a felony conviction , **denial of the same right** to this indigent petitioner solely because he was unable to pay the filing fee **violated the Fourteenth Amendment***' page 252, later '*The imposition by the State of financial barriers restricting the availability of appellate review for indigent criminal defendants* ***has no place in our heritage of Equal Justice Under Law***'].

Here it is the same, since some petitioners obtain motivated decisions conformed to the Constitution on peremptory writ, the denial of the same right to petitioner, a pro se refugee, who has a valid claim and a petition for a peremptory writ presenting all the essential elements necessary to issue a writ, ***violates the Fourteenth Amendment***', and such a practice '***has no place in our heritage of Equal Justice Under Law***'. The violation of the California Constitution results in **the violation of the US Constitution's Fourteenth Amendment** as in Burns.

B CCP 471.5 does not allow the filing of a demurrer and applies to a CCP 471.5 type of amended complaint.

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

CFPP no 21.19 (2) states: '*Answer to Amended Complaint. The defendant or cross defendant **is required to answer the amendments**, or the complaint …as amended, within 30 days after service, …, and judgments by default may be entered on failure to answer as (CCP 471.5 (a)). CCP 471.5 refers only to the filing of **an answer** to the amended complaint and **does not authorize the filing of a demurrer**. This is also true of its predecessor statute, former code 432.*'].

Again this makes sense because the filing of a demurrer to a FAC that complies with the Court's order sustaining the first demurrer with leave to amend and that does not change and/or add any facts and/or causes of action is nothing else than a dishonest effort to avoid the filing of an immediate petition for writ of mandate at the Appeals Court **to review the '*leave to amend'* issue**, and to have the judge reconsider its initial decision without following the requirements of CCP 1008.

The Code of Civil Procedure described two '*different types of amended complaints*' (CCP 471.5 and CCP 472) – this has been clarified and confirmed by the California Supreme Court very early on *in* ***McGary v. Pedrorena (1881) 58 C. 91*** stating '*in order to give force and effect to both of these sections of the code (471.5 formerly 432 and 472), we must hold that sect. 472 applies to amendments made before answer filed and before trial of an issue of law upon a demurrer, and that sect. 432 (471.5) applies to amendments made after an answer is filed, or after the trial of an issue of law upon a demurrer to a complaint*.' There is therefore no doubt that an amended complaint that complies with the court order and that does not change and/or add any facts and/or causes of action – as in this case [see explanation below in B 3)] is a '*CCP 471.5 type of amended complaint'* which does **not** allow the filing of a new demurrer [and for which the default provision of CCP 471.5 for failing to answer applies also]. While CCP 586 a) 1 and CCP 472 refer to a CCP 472 type of amended complaints in which facts and/or causes of action were changed and/or added, and created possible new issues of law that the judge has not seen and addressed ['***before answer filed and before trial of an issue of law upon a demurrer'***]. Since CCP 472 does not address the default issue (as CCP 471.5 does), the law had to have CCP 586 a) 1 for the '*CCP 472 type of amended complaints*' allowing the filing of a demurrer.

CCP 586 is linked and cross referenced **only** to **CCP 472** (type of amended complaints), **not** to CCP 471.5 (type of amended complaints) [again CCP 586 used

to be named **<u>CCP 872</u>** to show the relation with CCP 472, most certainly], so it does not apply here and does not prevent the striking of the demurrer (or entry of default). If CCP 586 were not <u>only</u> linked (or did not <u>only</u> refer) to CCP 472 (type of amended complaints), then CCP 471.5 would **not** have to specify that '***default may be entered for failure to <u>answer</u>*'**, it would simply not address the issue as CCP 472. **The difference** between CCP 471.5 and 472 that, for some, may seem a too fine intellectual issue (and/or may seem to have lost its importance or necessity over the years), **is in fact still very important** because it prevents the type of dishonest behavior mentioned in the motion and here - the dishonest effort to avoid the filing of an immediate petition for writ of mandate at the appeal court to review the '*leave to amend issue*', and <u>to have the judge reconsider its initial decision without following the requirements of CCP 1008</u>. It also forces the parties to focus on the Court order, the plaintiff must comply or risk a motion to strike (that can be transformed in a motion to dismiss if granted), and the defendant must answer (or strike the AC if it does not comply) or face a default. CCP 471.5 addresses the straight forward cases and most probably the majority of cases.

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

The Superior Court justified its order denying the motion to strike with the case ***McAllister*** *v. County of Monterrey (2007) 147 Cal. App. 4th 253, 281…*', the case used by defendant in its opposition (see ER 102), but this case does not specifically address the issue of meaning of CCP 471.5 or of the word '*answer*' in CCP 471.5; it only refers to a Rutter Group Guide citation saying that the word '*answer*' means '*respond*' in CCP 471.5 without presenting any legal authority or legal argument justifying this assertion. Moreover, the case McAllister leaves serious doubt about the veracity of this citation, since the court wrote '*Notwithstanding McAllister's insistence that 'answer' does not mean 'demurrer,'*

*a contrary interpretation **would** not be unreasonable. (Cf. Weil & Brown , Cal. Practice guide: Civil Procedure Before Trial, supra 7:34 p. 7-16 [word 'answer' in 471.5 **presumably** means 'respond' and thus include the possibility for another demurrer]*'; but again it was **not** addressing this specific issue of the meaning of '*amended complaint*' in CCP 471.5, CCP 472, and in CCP 586, or of the meaning of '*answer*' in CCP 471.5, it was simply saying that, for some, the word '*answer*' can easily be (mis) interpreted to mean '*respond*' without saying if it is **rightly** or **wrongly** interpreted to mean '*respond*' in the Rutter Group Guide **since the court used the words '*presumably*' and 'would' which do not imply certainty**.

Petitioner does **not** question the fact that the Rutter Group's practice guide and even the Matthew Benders' guides **are confused** on this issue of the meaning of '*amended complaint*' in CCP 471.5, CCP 472, and in CCP 586; and that they present contradictory information on this issue since the CFPP (Matthew Benders' guides) states that CCP 471.5 does **not** allow the filing of a demurrer, while the Rutter Group's guide states that CCP 471.5 **does** allow the filing of a demurrer, **but first** these guides are **not the California Courts, so their sayings** (unsupported by valid legal authorities) **do not have force of law**; and **second** the reason for their confusion is that **they both overlook** (or ignore) the clarification of the California Supreme Court in ***McGary v. Pedrorena (1881) 58 C. 91*** without which they cannot explain why CCP 471.5 uses the words '*failure to **answer** may lead to a default*', and why CCP 472 does not address the default issue [and instead is cross-referenced with CCP 586 (which again used to be named **CCP 872** to show the relation with CCP 472, most certainly)]. **So they are vague on the issue**, but the Mattew Bender guides have at least the intellectual honesty to write that CCP 471.5 does **not** allow the filing of a demurrer, while the Rutter Group is **not at all** intellectually rigorous on this issue since it cites McAllister as a confirmation of its statement that a demurrer is allowed although, as seen above, the McAllister case does **not** directly address this issue, and leaves

an obvious doubt about the veracity of the Rutter Group's allegation on this matter. The statutes (CCP 471.5, 472) wording and legal authorities on this matter [***McGary v. Pedrorena (1881) 58 C. 91***] are clear, leave no doubt about the objective of the law, and are coherent with other statutes like CCP 1008 as seen below in part C.

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

If the Court thinks about the issue just 5 minutes, it will see that **there is no honest reason** to allow the filing of a demurrer on this **471.5's type** of amended complaint because: **1) If the amended complaint** corrects the complaint fault exactly as the judge requested it, then **for the judge** the amended complaint **is free of objection appearing at the face of the complaint**, and there is no need to ask the judge to rule again on the technical validity of the complaint, and an answer should be filed. **2) If the amended complaint** does not comply with the judge's order, then the defendant can move to strike the amended complaint for failure to comply with the court order sustaining the demurrer with leave to amend (motion that can be transformed into a motion to dismiss if granted) [*Kronsberg v. Milton J. Wershow Co. (1965) 238 Cal. App. 2 d 170, 173*]. And **3) If the amended complaint** corrects (or not) the complaint's fault as requested by the judge and at the same time adds and/or changes allegations, and/or causes of action,, then it is not anymore a CCP 471.5's type of amended complaint, **it is CCP 472's type of amended complaint** because the addition and/or change of facts, and/or causes of action,, creates new possible issues of law that have not been addressed by the judge or answered (the amendments are then amendments before trial of the created possible issues of law), so of course a new demurrer can be filed on this type of amended complaint; the Court will note also that the addition and/or change of facts, and/or causes of action,, creates new circumstances, and CCP

1008 does not apply anymore; **but this is not the case here, petitioner did <u>not</u> change and/or add any facts and/or cause of action.**

Here the amended complaint is almost identical to the initial complaint (<u>exactly same facts, same cause of action</u>, see ER 4-15 and 37-48) and it complies with the Court order (again the defendant did not strike it) since the amendment requested was to present a statute imposing liability on the County other than CC 1714 (which petitioner had presented in conjunction with GC 815.2 imposing a vicarious liability). Petitioner had mentioned also **GC 815.6** in his complaint, **<u>so the amendment was only the slight modification of the 3 paragraphs on the existence of the duty</u>** (see ER 45 no 47) - the demurrer to FAC did not even address this amendment. And the demurrer to FAC (ER 49-61) **was also almost identical to the first one** (ER 16-25) since the **2 notices** stated that **the demurrer is made on the grounds** that: <u>(1) the complaint</u> fails to state facts sufficient to constitute the cause of action, and <u>(2) the complaint</u> is uncertain. And the 2 memoranda of points and authorities stated that <u>**(1)** the complaint</u> is barred by principle of res juridicata; and <u>**(2)** the allegations</u> subsequent to the previous lawsuit filing in 2-2004 do not constitute negligence. The new paragraphs in the 2nd demurrer are: **(a) the complaint** is not timely filed [which the Court surely understands would not have been welcomed in the first demurer that was filed more than 20 days late (!)]; and **(b) the plaintiff** has not sufficiently pled compliance with applicable claims statute. Both of which could have been presented earlier since petitioner did not change his allegation of claims filing in paragraph 53 of the initial complaint! So the demurrer to FAC also violated without any doubt **CCP 1008** forbidding the filing of a motion to reconsider if the moving party cannot present <u>new or different facts, circumstances or law while explaining why they were not presented in the earlier motion, in addition to be unauthorized by CCP 471.5.</u>

C LA County's demurrer violates CCP 1008 in this particular context.

1) The case *Bennett v. Suncloud*.

The case *Bennett v. Suncloud 56 Cal. App. 4th 91; 65 Cal. Reptr. D 80 (June 1997)* in which CCP 1008 prevented the Court from reconsidering a previous ruling on **a demurrer** stating that the complaint was timely (see *Bennett* on page 96), leaves no doubt about the fact that CCP 1008 also applies to demurrer to FAC unlike the defendant's lawyer pretended (see opposition ER 90). The Court in Bennett wrote:

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

So CCP 1008 prevents Judge Recana from ruling on the demurrer to FAC because again there is no new (and/or changed) facts and/or causes of action in the FAC, and the County does not present any special new circumstance justifying reconsideration, it only repeats mainly the initial demurrer arguments as seen above or presents issues of law that could have been presented earlier. This Court has confirmed the importance of CCP 1008 and clarified its use in *Le Francois v. Goel 35 Cal. 4th 1094 (2005)*, so there is no doubt that the demurrer is in violation of CCP 1008 in this case.

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

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

As seen in ***McGary v. Pedrorena (1881) 58 C. 91 and Bennett above*, it is the nature of the amendments that determines if CCP 1008 applies**, so the original complaint is important to see that no new cause of action and/or facts were added and that the facts were not changed, only the amendments requested by the court on the (mis) use of CC 1714 were made.

2) The defendant had the possibility to file a petition for writ of mandate.

If Mrs. Ellyatt thought that the 2 initial objections and the new objections were sufficient to sustain the demurrer without leave to amend [and obviously she did think that they were sufficient since she presented them again in the demurrer to FAC that is identical to the complaint in fact and cause of action], **she should have immediately filed a petition for writ of mandate at the Appeal Court to question** the judge's decision to **grant leave to amend** to save '*a needless and expensive trial*' as it is proper to do.

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

Mrs. Ellyatt had the possibility to present her concerns about the

sufficiency of the complaint to the Appeals Court by writ to end the case immediately, and had the possibility to strike petitioner FAC if she thought it was not complying with the court order, but not to file a new demurrer on a CCP 471.5 type of FAC, so her demurrer violating CCP 1008 should be stricken.

D The demurrer was not timely re-noticed according to CRC R 3.1320 d and the merits of the case.

1) The demurrer was not timely re-noticed.

After the US Supreme Court denied the petition to compel the entry of default on 10-29-07, and practically ended the stay of proceeding, the LA County failed to re-notice its demurer on the first available court date as required by the California Rule of Court Rule 3.1320 d [‘*Rule 3.1320. Demurrers.* ***(d) Date of hearing*** *Demurrers must be set for hearing not more than 35 days following the filing of the demurrer or on the first date available to the court thereafter. For good cause shown, the court may order the hearing held on an earlier or later day on notice prescribed by the court.’*], and this during 7 months at least until 5-30-08, while at the same time it used the pending demurrer as an argument to refuse to respond to the discovery questions.

The demurrer was therefore not noticed appropriately according to CRCR 3.1320 d and should be stricken also as untimely. Again according to CRC R 3.1320 c the noticing of the demurer is the responsibility of the moving party, the County here, not petitioner’s. The wording of CRC Rule 3.1320 d is very clear, so there is no need to present cases that explain its meaning [Mrs. Ellyatt and the County delayed the hearing of their demurrer during 7 months although there is a $20 000 penalty requested in the complaint for every month until the dispute is resolved and the demurrer is forbidden by CCP 1008 and CCP 471.5, it is very wrong and justifies the striking of the demurrer to FAC!].

2) The merits of the case.

In this particular case, the LA County had already presented the same objections to the District Court that had not found them sufficient to dismiss the case after one year of analysis, so the demurrer objections have no (practical) merits for 2 different courts already - again in the previous related case against the California DSS (BC 340712, B191039) both the Superior Court and the Appeals Court found that G815.6 made the DSS liable for violations of the same MPP articles and criminal statutes, so the complaint is valid, and the demurrer is unjustified. It is also obvious that petitioner suffered a very grave prejudice as the result of the LA County's negligence [since he was sent more than 16 times in the street in 2002-03, he could not resettle and later even became very sick over a 7 years period], so the entry of default in this case after the LA County incorrectly obtained the immunity for misrepresentation under G818.8 in the first lawsuit and the DSS incorrectly obtained the judicial immunity despite the direct liability imposed by G815.6 [see *Michael J. V. Los Angeles County, Department of Adoption (app. 2 Dist 1988) 247 Cal. Rptr*. and *Bradford v. State of California (1975) 36 CA 3d 16, 19, 111 Cr 852.*] is justified as well as the damage requested, and the case is meritorious. Finally, if the Court were to rule on the demurrer to FAC asking to review the timeliness of the complaint, it would have - in all honesty - to review first (on his own motion) the timelines of the demurrer that was more than 20 days late, and enter default against the County (!).

E The essential elements for a writ, the undisputed facts and well settle principle of law, and the importance of the issues.

1) The essential elements of the writ.

CFPP section 358.31 states that **the essential elements** of a writ are **(1) the existence of duty** on the respondent and **(2) the demonstration of the right to writ by clear, certain and positive evidence** [‘*The petition for writ of mandate must demonstrate the right to a writ* ***by clear, certain and positive evidence.***

California Federation of Teachers v. Oxnard Elementary Sch. (1969) 272 Cal. App. 2d. 514, 545, see CFPP 358 .31 (1)]. So the petition presents the essential elements for the issuance of a **peremptory** writ of mandate **because (1)** the Superior Court '*is under legal duty to apply* ***the proper law*** *and it may be directed to perform that duty by writ of mandate'* [see CFPP 358.32], so it has/had a duty to apply the provision of CCP 471.5 forbidding a demurrer and the provision of CCP 1008 forclosing the Court from addressing the issues of the demurer to FAC.

And because (2) the fact that the FAC complies with the Court order sustaining the demurrer with leave to amend is obvious **and undisputed** (no motion to strike was filed and the change requested was minor and is easily verifiable, see ER 4-15 and 37-48), as well as the fact that the FAC presents **no** new facts and/or causes of action and/or does not change the initial facts and sole cause**.** **The principles of law** explained above [definition and wording of CCP 471.5, 472, see ***McGary v. Pedrorena (1881) 58 C. 91 and Bennett above***] **are well settled (120 years), and coherent with other statutes (CCP 1008,**); and the deficiencies presented above appear at the face of the demurer [CCP 437 (a)], **so the striking of the demurer is legitimate** and warranted according to CCP 430.40 and to the case Buck v. Morrossis (1952) 114 Cal. App. 2d 461, 464 -465 P.2d 27- (demurrer). And the demonstration of the right to writ by clear, certain and positive evidence is established.

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

2) The importance of the 2 issues presented here.

The Appeals Courts and Supreme Court do **not** have the right and/or authority to change the Constitution, and the Supreme Court fairly clearly specified that the grant or denial of a peremptory writ should be motivated according to the Constitution. If the situation has changed since 1943 – for example if the Courts are overworked and cannot write motivated decision on this type of case, then they must raise the issue in front of the Governor and Senators,, and asked for more judges or for a change of the Constitution, but not penalize the victims who ask for justice, especially when the violation of the California constitution results in the violation of the US Constitution, so **the issue is very important** for California (other Appeals Courts may do the same error also).

The issue of the meaning of CCP 471.5 and of '*answer*' in CCP 471.5 is also very important for the legal community. The Rutter Group and Matthew Bender's guides contradictions that are **due to the fact that they both overlook the case *McGary v. Pedrorena,*** does not create a doubt about the meaning of the law**, it only stresses <u>the importance of the issue</u> for the legal community and justifies the review petition for the Court** (if two prestigious publishers present contradictory information on an issue, the Supreme Court should help, clarify the law, not let incorrect information be spread). Finally, for petitioner who has had serious health problems and has been victim of persecutions **<u>for many years</u>**, the entry of default (or issues presented here) is (are) a life and death matter.

CONCLUSION

For the foregoing reasons, review should be granted in order that the Appellate Court's order **denying** the petition for writ of mandate **be reversed** and that the Superior Court be compelled to issue a new order striking LA County's demurrer to FAC.

December 2009

Respectfully submitted, __________________

Pierre Genevier (pro per)

VERIFICATION

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

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

Dated December , 2009

Pierre Genevier

Certificate of compliance pursuant to Fed. R. App. 32 (a) (7) (C), Circuit rule, rule 32-1 and Cal. rule 14.

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 7227 words (690 lines).

Dated December , 2009

By :______________

Pierre Genevier

This petition for review is at:

http://pgenevier.110mb.com/npdf/petrevsuppwmbc364736-12-17-09.pdf

And the petition for a writ of mandate is at:

http://pgenevier.110mb.com/npdf/petitionwrit3-12-7-09.pdf

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Supreme Court of the State of California

Proof Of Service

I, the undersigned, certify and declare that, on December 2009, I served a true copy of the **Petition for Review (of the Appeals Court summary denial of the petition for a peremptory writ of mandate** B220 781**), by hand delivery and/or fax and/or email** to:

Mr. Frederick Bennett, Attorney for Los Angeles Superior Court, 111 North Hill street, RM 546, Los Angeles, CA 90012. **Judge Red Recana**, Superior Court, 111 N. Hill street, Los Angeles CA 90012. (By hand delivery 1 copy).

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

Appeals Court for the Second District, Division One, 300 South Spring Street, Los Angeles CA 90013-1204. (By hand delivery 1 copy).

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

Pierre Genevier