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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

FRANKLIN ARMORY, INC., and CALIFORNIA RIFLE & PISTOL ASSOCIATION, INCORPORATED, Petitioners-Plaintiffs, v. CALIFORNIA DEPARTMENT OF JUSTICE, ROBERT A. BONTA, in his official capacity as Attorney General for the State of California, and DOES 1-10, Respondents-Defendants.	Case No.: 20STCP01747 [Assigned for all purposes to the Honorable James C. Chalfant; Department 85] **PLAINTIFFS AND PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO DEMURRER TO AND MOTION TO STRIKE RESPONDENTS' ANSWER** Hearing Date: October 14, 2021 Hearing Time: 9:30 a.m. Department: 85 Action Filed: May 27, 2020

INTRODUCTION

In its opposition, the State relies on a weak strand of flawed case law to argue that it can ignore the rules of civil procedure and file an unverified answer in a writ proceeding. In doing so, the State ignores clear guidance it received from a court just two years ago in *Ashmus v. Superior Court*. The State also argues that it need not plead code-complaint affirmative defenses thanks to liberal pleading standards. As this reply will show, the State is wrong on both counts.

ARGUMENT

I. IN WRIT PROCEEDINGS, VERIFICATION IS REQUIRED WITHOUT EXCEPTION, SO THE STATE'S UNVERIFIED ANSWER MUST BE STRICKEN

Recall, when an answer is filed in response to a writ petition, Code of Civil Procedure section 1089[1] is clear that there are only three acceptable responsive pleadings: "a return by demurrer, *verified* answer or both." (Italics added.) The rule applies to both private parties and government defendants alike—regardless of section 446's exception for government actors answering an ordinary common complaint. Indeed, "[s]ections 1086 and 1089, contained in title 1, . . . require verification in mandate proceedings *without exception, and therefore prevail over the provisions of section 446*." (*People v. Super. Ct. (Alvarado)* (1989) 207 Cal.App.3d 464, 470, citing *Mun. Ct. v. Super. Ct. (Sinclair)* (1988) 199 Cal.App.3d 19, 25, fn. 1, italics added; see also *Ashmus v. Super. Ct.* (2019) 42 Cal.App.5th 1120, 1124, fn. 4 (*Ashmus*).)

The only reason there is a dispute over this seemingly obvious point stems from a faulty observation in *Seckels v. Department of Industrial Relations* (1929) 98 Cal.App. 647 (*Seckels*), a 92-year-old case noting that "[t]he answer of an officer of the state to a complaint *or petition* need not be verified." (*Id.* at p. 648, citing Code Civ. Proc., §§ 446, 1109, italics added.) Respectfully, the *Seckels* court got it wrong. In applying its rule to both complaints *and* petitions, *Seckels* did not even mention the very code section that governs verification of petitions—section 1089. Instead, it cited only sections 446 and 1109. But section 446 does not (and did not in 1929) mention writ petitions at all. And section 1109 is clear that "*[e]xcept as otherwise provided in this Title* [i.e.,

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[1] All statutory references are to the Code of Civil Procedure unless otherwise noted.

Title 1, relating to writ petitions], the provisions of Part II of the Code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." (Code Civ. Proc., § 1109, italics added.) Section 1089, which is nestled comfortably within Title 1, commands that a return be made by "demurrer, *verified* answer or both" and is the sort of exception expressly identified in section 1109.

That said, the legislative history of section 1089 is essential too. The law was amended in 1971 to clarify that, in the writ context, the respondent may file a return "by demurrer, *verified* answer, or both." (Stats. 1971, ch. 1475, § 3, p. 2914, italics added.) Before that, section 1089 required a respondent to "answer the petition under oath, in the same manner as an answer to a complaint in a civil action." (*See Priv. Invs., Inc., v. Homestake Mining Co.* (1936) 16 Cal.App.2d 1, 4, quoting Code Civ. Proc., § 1089 [before amended by Stats. 1971, ch. 1475, § 3, p. 2914].) To be sure, that might mean that section 1089 incorporated the verification requirement of section 446 (as well as its exception for government defendants) by reference. Or it *could* mean that section 1089 incorporated the verification requirement of section 446 (but *not* its exceptions). No matter which interpretation is correct, however, the 1971 amendment is indication that even if verification were not required before 1971 (when *Seckels* was decided), it is clearly *required* now.

The cases the State cites to bolster its claim do not change the analysis. Whether the *Seckels* court erred in holding that government answers to writ petitions need not be verified because it ignored section 1089, or the 1971 amendment changed the original meaning of section 1089 so *now* all petitions must be verified "without exception" (*Alvarado, supra*, 207 Cal.App.3d at p. 470), the line of cases that sprouted from the near-century-old case is flawed.

First, as Petitioners explain in their moving papers, *Lertora v. Riley* (1936) 6 Cal.2d 171, 176 (*Lertora*), relied only on *Seckels* for its conclusion that verification is not required of government respondents, meaning that *Lertora* is flawed for the same reason *Seckels* is flawed. (Demurrer, pp. 8-9) Many years later, *Crowl v. Commission on Professional Competence* (1990) 225 Cal.App.3d 334, 342 (*Crowl*) would, in turn, cite just *Lertora* and *Seckels* to reach the same conclusion. And these two cases, along with *Verzi v. Superior Court* (1986) 183 Cal.App.3d 382 (*Verzi*), which also held that verification is not required by citing only section 446 without further

analysis, would later lead the court in *Hall v. Superior Court* astray. There, the court cited only *Lertora*, *Crowl*, and *Verzi* to conclude that "in a writ proceeding, as in a civil action, an answer filed by a public entity need not be verified." (*Hall v. Super. Ct.* (2005) 133 Cal.App.4th 908, 914, fn. 9.)[2] But not one of these cases analyzed whether *Seckels*' holding was correct or, in the post-1971 cases, whether the amendment to section 1089 had any impact on its application. They merely applied the *Seckels*-created rule without further discussion or consideration of the legislative change. It is on this weak foundation that the State mainly bases its opposition. (Oppn., p. 1-2.)

To be sure, the State cites other cases, but each is wrong for the same reason the *Seckels* line of cases is wrong. For instance, the State cites *Trask v. Superior Court* (1994) 22 Cal.App.4th 346, which declared that "a public agency, unlike a private citizen, need not verify its answer to a verified petition." (Oppn., p. 2.) But as the State alludes to in its full citation, *Trask* never mentioned section 1089. Instead, it relied on sections 446 and 1109, as well as *Elliott v. Contractors' State License Bd*. (1990) 224 Cal.App.3d 1048. *Elliott*, as the Court can likely guess based on the pattern now established, likewise did not refer to section 1089. *Epstein v. Superior Court* (2011) 193 Cal.App.4th 1405, 1409, another case the State cites (Oppn., p. 2), is marginally better because it at least makes passing mention of section 1089. But it too ultimately relies on just sections 446 and 1109 (as well as *Trask* and *Elliott*) to conclude that verification is not required.

In sum, all the State's cases either ignore section 1089, or they only mention it in passing. None substantively engage with it. Nor do they explain why it is not exactly the kind of exception that section 1109 *explicitly* contemplates. Petitioners' cited cases, however, do discuss this issue in more depth. (Demurrer, pp. 8 and 10, analyzing *Alvarado*, *supra*, 207 Cal.App.3d 464, *Sinclair*, *supra*, 199 Cal.App.3d 19 and *Ashmus*, *supra*, 42 Cal.App.5th 1120.) And they reach the correct conclusion because of it. For instance, in *Municipal Court v. Superior Court (Sinclair)*, the court discussed the issue as follows:

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[2] The State points out that footnotes are not less authoritative than the body of the opinion. (Oppn., p. 2.) Petitioners do not dispute that. The reason Petitioners pointed out that the discussion in *Hall* was relegated to a footnote was simply to show that the court may not have given the issue

> Despite section 446 . . . which provides that pleadings of public entities need not be verified, a petition by a public entity must be verified. *Section 1109 . . . provides that "[e]xcept as otherwise provided in this title* [i.e., tit. 1, encompassing §§ 1067-1110b], the provisions of part two of this code are applicable to and constitute the rules of practice in the proceedings mentioned in this title." *Sections 1086* ***and 1089****, contained in title 1, and supplemented by California Rules of Court, rules 56(a) and 56(c),* ***require verification in mandate proceedings without exception, and therefore prevail over the provisions of section 446*** which are contained in part 2.

(*Sinclair*, *supra*, 199 Cal.App.3d at p. 25, fn. 1, italics and bold added.) A year later, the *Sinclair* court's analysis was followed in *Alvarado*, another case Petitioners cite in their moving papers. (Demurrer, pp. 8-10.)

The State makes a few complaints about the cases cited by Petitioners. First, it argues that *Alvarado* "held only that a *petition* for writ of mandate to be used as evidence of the facts stated therein generally requires verification." (Oppn., p. 3, italics added.) But *Alvarado* cited *Sinclair* for the rule that verification is required in *all* mandate proceedings "without exception." (*Alvarado, supra*, 207 Cal.App.3d at p. 470.) There is no principled reason that requirement would extend to petitions, but not to answers, given that *Sinclair* observed that sections 1086 (governing petitions) *and* 1089 (governing answers) *both* share the verification requirement.

Next, the State argues that *Alvarado* was wrong to rely on *Sinclair* because the latter's discussion of the verification issue was dicta because *Sinclair* did not involve an unverified petition or answer. (Oppn., p. 3.) But that was only because the government entity in that case verified its answer just before the court ruled on the issue, likely realizing based on the opposing party's briefing that verification was required: "Real parties in their opposition contend that the petition had not been properly verified since it was verified by the county counsel on behalf of the County of Marin which is not a party to the proceedings. The petition has now been verified on behalf of the People." (*Sinclair*, *supra*, 199 Cal.App.3d at p. 25, fn. 1.)

But even if the court's holding on the verification issue in *Sinclair* was not controlling because it is dicta, that hardly makes its substantive discussion irrelevant. Dictum, "while not

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an in-depth examination, understandably relying on the three earlier cases without discovering that

controlling authority, carries persuasive weight and should be followed where it demonstrates a thorough analysis of the issue or reflects compelling logic." (*Pogosyan v. Appellate Div. of Super. Ct.* (2018) 26 Cal.App.5th 1028, 1037, citing *Smith v. Cnty. of L.A.* (1989) 214 Cal.App.3d 266, 297.) Again, none of the cases cited by the State thoroughly analyzed the issue. They either did not mention section 1089 at all, or they failed to explain why section 1089 does not control given section 1109's express guidance that, in the context of writs, the requirements of Title 2 (where section 446 is found) only control where they do not conflict with the requirements of Title 1 (where section 1089 is found). In contrast, Petitioners' cited cases discussed the issue with more complete consideration and found that verification is required, in part because section 1089's verification requirement supersedes section 446's exception under section 1109.

Third, the State argues that *Alvarado* misstated the Witkin authority it cited because the practice guide did not address whether a public agency or official needs to verify its answer to a verified petition. (Oppn., pp. 3-4.) The irony of the State making this argument right after saying that excerpts from case law should be disregarded as dicta is notable. For the State appears to be elevating a practice guide above actual court opinions as persuasive authority. In any event, the State is wrong on this point. *Alvarado* only cited Witkin *after* it had concluded that section 1089 requires verification. It was not relying on Witkin to establish that government respondents must verify, but to provide additional support for its holding that verification is required. (*Alvarado*, *supra*, 207 Cal.App.3d at p. 470.)

Finally, the State also tries to brush aside as dicta the guidance it received in *Ashmus v. Superior Court* (2019) 42 Cal.App.5th 1120, 1124, fn. 4 (*Ashmus*), the most recent case discussing the public-entity verification issue. (Oppn., p. 3, fn. 4.) But the reasoning in that case was not dicta. The court in *Ashmus* was directly deciding how to handle an unverified return from the Attorney General, who is also a Respondent in this case. (42 Cal.App.5th 1120 at p. 1124, fn. 4, italics added ["Ashmus points out that the Attorney General's 'Return to Order to Show Cause' 'takes the form of an unverified legal brief that includes neither an answer nor a demurrer…..' *Ashmus argues that*

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they may have been based on a faulty foundation.

the return, therefore, should be stricken for purposes of addressing the petition's merit."].) And it concluded that, but for the fact that it could treat the return as a demurrer, the court would have to strike the answer:

> "Fortunately for [the Attorney General], there is a less catastrophic consequence available to us that we deem more appropriate than striking [the] entire argument." (*Agricultural Labor Relations Bd. v. Superior Court* (2016) 4 Cal.App.5th 675, 682 [209 Cal. Rptr. 3d 243].) In *Agricultural Labor Relations Bd.*, the real party in interest filed an unverified legal brief in response to an order to show cause, and the appellate court treated the brief "as a return by demurrer, because a demurrer admits the facts pleaded in a writ petition"; the brief was "essentially a memorandum of points and authorities in support of a demurrer" to the petition for writ of mandate. (*Ibid*.) *We will likewise treat the Attorney General's return as a memorandum of points and authorities in support of a demurrer to Ashmus's petition for writ of mandate*.

(*Ibid.*) The Court only treated the return as a demurrer to avoid the "catastrophic consequence" otherwise commanded by section 1089. (*Ibid.*) And in doing so, it implicitly held that section 1089 requires even the Attorney General to verify his answer to a writ petition. (*Ibid.*) As the court noted, the Attorney General was lucky that *Agricultural Labor Relations Bd. v. Superior Court* allowed for answers to be treated as demurrers in this scenario. (*Ibid.*)

The Attorney General was indeed fortunate then, but his luck has now run out. *Ashmus* was decided in December 2019. The State therefore had very recent warning that it must verify its answers in writ proceedings. Because it failed to do so, the State must now face the "catastrophic consequence" it narrowly escaped just two years ago. Unlike the return filed in *Ashmus*, the State's answer here cannot so easily be construed as a demurrer. Not only has the State already filed *multiple* demurrers, but it was also ordered by this Court to *answer* the petition. And unlike the return in *Ashmus*, which took "the form of an unverified legal brief" consisting "principally of legal arguments," the State's responsive pleading here is simply a set of admissions and denials and a list of boilerplate "affirmative defenses," with almost no legal argument. In short, the State's filing is an unverified answer.

Again, "[i]n the absence of a true return, all well-pleaded and verified allegations of the writ petition are accepted as true." (*Bank of Am., N.A. v. Super. Ct*. (2013) 212 Cal.App.4th 1076, 1084, citing Code Civ. Proc., § 1094; see also *Universal City Studios, Inc. v. Super. Ct.* (2003) 110

Cal.App.4th 1273, 1287 ["We agree with defendant that the unverified return which is not a demurrer should be stricken in terms of the merits of the mandate petition"].) The State's unverified answer should thus be stricken, and all the well-pleaded allegations of the verified writ petition accepted as true. But the State asks this Court to give it leave to amend if the demurrer is sustained on these grounds. (Oppn., p. 7.) If this Court decides it has such discretion despite the *Ashmus* court's comments on the "catastrophic consequence" of filing an unverified answer, it should decline to exercise it here.

Recall, Petitioners informed the State of its error more than a month before filing their demurrer, providing the State with detailed analyses of the issue throughout the meet-and-confer process. (Barvir Decl., ¶¶ 4-11 & Ex. A.) Petitioners were more than patient, giving the State multiple opportunities to provide an on-point rebuttal to Petitioners' analyses or file an amended verified answer, either of which would have made motion practice unnecessary. (*Id.*, ¶¶ 6-11.) The State instead went silent, leaving Petitioners no choice but to file a demurrer and motion to strike. (*Id.*, ¶ 11.) Considering the State's refusal to amend its answer despite the recent *Ashmus* case, which put the State on notice of the verification requirement, the Court should strike the State's unverified answer and decline its request for leave to amend.[3]

II. THE STATE'S IMPROPER AFFIRMATIVE DEFENSES ARE NOT SAVED BY THE PRINCIPAL FAVORING LIBERAL PLEADING STANDARDS

In answers as well as in complaints, the degree of specificity required calls for a pleading to allege facts—not just mere conclusions. (*Jones v. Grewe* (1987) 189 Cal.App.3d 950, 954.) To that end, affirmative defenses must be pleaded with the *same specificity as a cause of action in a complaint*. (*FPI Devel., Inc v. Nakashima* (1991) 231 Cal.App.3d 367, 384.) Because conclusory allegations are not admitted by answer and have no pleading value, "boilerplate" affirmative defenses are insufficient. (*Ibid.*) And "[t]erse legal conclusions" are not proper affirmative defenses either. (*Ibid.*) Affirmative defenses are also required to "refer to the causes of action which they are

[3] The State cites *United Farm Workers of America v. Agricultural Labor Relations Bd.* (1985) 37 Cal.3d 912 to argue it should have leave to amend to verify, but that case does not apply considering *Ashmus* and because *UFW* did not involve an answer to a verified petition.

intended to answer, in a manner by which they may be intelligibly distinguished." (Code Civ. Proc., § 431.30, subd. (g).) While allegations in a pleading "must be liberally construed," courts must always do so "with a view to substantial justice between the parties." (Code Civ. Proc., § 452.)

The State defends its improper use of 53 poorly pleaded affirmative defenses by relying on the rule favoring liberal pleading standards. (Oppn., 4-6.) Petitioners will state this very simply—if the State's shoddy kitchen sink of affirmative defenses is not subject to a demurrer, then it's hard to imagine when any list of affirmative defenses would *ever* be. Liberal pleading standards should not mean that procedural rules of court and case law are to be ignored.

For example, the State cites the rule that each defense must be considered separately without regard to any other defense. (Oppn. pp. 4-5, citing *S. Shore Land Co. v. Petersen* (1964) 226 Cal.App.2d 725, 733.) This rule may excuse affirmative defenses contradicting each other, but it does not excuse the defenses from failing to identify "which cause of action they are intended to answer in a manner by which they may be intelligibly distinguished." (Code Civ. Proc., § 431.30, subd. (g).) Nor does it save duplicative defenses from a motion to strike. (See *Henke v. Eureka Endowment Assn.* (1893) 100 Cal. 429, 433 [observing that while redundancy in a pleading is not grounds for a demurrer, it is grounds for a motion to strike].) It does not extinguish the rule that affirmative defenses must be cognizable affirmative defenses in the first place. (*Civ. Serv. Employees Ins. Co. v. Super. Ct.* (1978) 22 Cal.3d 362, 368, fn. 2 ["Although the answer contained a total of 15 ostensible 'affirmative defenses,' the bulk of these were more in the nature of general and special demurrers than defenses."].) And, of course, liberal pleading standards do not permit "irrelevant" or "immaterial" matters, as those "have no proper place in the pleading" and are "properly stricken out." (*Eich v. Greeley* (1896) 112 Cal. 171, 173.)

Further, as Petitioners established in their moving papers, nearly all the defenses are subject to demurrer because almost none of them "attempt to demonstrate any of these defenses had merit by, for example, explaining the underlying facts and applying the law to them." (*Rodriguez v. Cho* (2015) 236 Cal.App.4th 742, 751.) The State's opposition made little effort to justify its defenses. In fact, the State's opposition hardly replies to Petitioners' arguments about particular defenses at all, despite Petitioners painstakingly providing many examples of why particular defenses were

subject to a demurrer, motion to strike, or both. The State's failure to give even the most basic factual or legal support for most of its defenses makes it nearly impossible for Petitioners to guess what defenses the State is pleading, let alone what its grounds for those defenses are and how to respond to them. Denying Petitioners' motion in favor of "liberal pleading standards" would thus be patently *unjust* to Petitioners. (See Code Civ. Proc., § 452 ["In the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, *with a view to substantial justice between the parties*."], italics added.)

The State should be apologizing for its abuse of the copy/paste feature. Instead, it defends its stated affirmative defenses, even the ones that confusingly merge several defenses into one, in part by arguing that California Rule of Court 2.112 does not preclude such merging. (Oppn., p. 6.) To be sure, Rule 2.112 may not expressly state that each defense must be separately stated. But it requires it by implication. Indeed, Rule 2.112's references to "separately stated" defenses would be meaningless if a respondent could simply combine all of its affirmative defenses into one. It is even more apparent that Petitioners' interpretation is correct when one considers that Rule 2.112 applies not just to affirmative defenses in an answer, but also to causes of action in a complaint. If Petitioners had merged four claims into a single cause of action in their complaint, the State would have no doubt demurred on those grounds. And it would have been right to do so. Yet the State's Twenty-Seventh Affirmative Defense merges four separate legal theories into a single defense, and the State argues the defense is proper.

It may indeed be reasonable for the State "to include every affirmative defense that may apply in this case." (Oppn. p. 6.) But it is *not* reasonable to duplicate those defenses several times, fail to state which cause of action they are responsive to, merge them with other defenses, omit anything but terse legal conclusions, and perhaps worst of all, state defenses that are not even proper affirmative defenses. If the entire answer is not stricken for being unverified, then upon filing an amended answer, the State should at least have to provide legible affirmative defenses that comply with the applicable rules.

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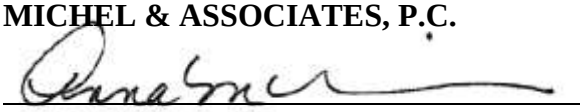
CONCLUSION

The State could have avoided motion practice by simply amending its answer after Petitioners' counsel notified it of the problems with the pleading and gave the State opportunity to amend. In line with the theme of this case, the State refused to do so. This demurrer thus became necessary because the State's excessive and poorly pleaded affirmative defenses will transform what should be a simple discovery process into an unwieldy mess. And, on the verification issue, *Ashmus* reveals that the State had a very recent warning from the courts about the consequences of not verifying its answers in writ proceedings. Yet the State still refused to amend its answer to correct the issue. The Court should now order the State to bear the consequences of its intransigence and strike the State's unverified answer without leave to amend. But if this Court concludes the State should be given an opportunity to amend, the State should at minimum have to file a verified answer with properly pleaded affirmative defenses.

Dated: October 6, 2021

MICHEL & ASSOCIATES, P.C.



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PROOF OF SERVICE

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

On October 6, 2021, I served the foregoing document(s) described as

PLAINTIFFS AND PETITIONERS' REPLY TO RESPONDENTS' OPPOSITION TO DEMURRER TO AND MOTION TO STRIKE RESPONDENTS' ANSWER

on the interested parties in this action by placing
[ ] the original
[X] a true and correct copy
thereof by the following means, addressed as follows:

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X (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission through One Legal. Said transmission was reported and completed without error.

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

Executed on October 6, 2021, at Long Beach, California.

Laura Palmerin