

Chapter 11—Challenging the Complaint

§ 11.01 Introduction

- ➔ Challenging Service of the Summons
- ➔ Challenging Personal Jurisdiction
- ➔ Challenging Venue

If the defendant cannot dispose of the plaintiff's action on procedural grounds by challenging the service of process, the court's personal jurisdiction, or the plaintiff's choice of venue, then the defendant must consider whether to attack either the form or the substance of the plaintiff's complaint. Though the law provides a variety of tools to accomplish this task, the defendant's lawyer should consider the tactical ramifications of employing any of them.

If the defendant has a plausible argument that the court lacks jurisdiction over him, his best course of action is almost certainly a [motion to quash service of the summons and complaint](#). If he succeeds, he may well avoid litigation altogether, for the plaintiff may not have the resources or the will to bring his action in a court that has jurisdiction over the defendant. In contrast, if the defendant has a plausible argument that the plaintiff's complaint is defective in form or substance, an attack on the complaint is unlikely to dispose of the case. If the defect concerns merely a matter of form, a successful attack will yield nothing more than an order allowing the plaintiff to [amend](#) the complaint to cure the defect. If the complaint is unclear or incomplete, the defendant can more easily obtain the missing information by means of [discovery](#). If the defect concerns the plaintiff's attempt to plead a cause of action, a successful attack will probably yield nothing more than an order permitting the plaintiff to correct the mistakes the defendant has so generously brought to his attention.

In general, the only time it makes sense to attack the complaint is when the plaintiff has not alleged facts sufficient to constitute a cause of action and cannot do so through amendment of his complaint. The primary tool for this task is the demurrer, though the defendant may, if he wishes, raise his objections in his answer.¹

§ 11.02 Demurrers

Demurrers—Procedure

A demurrer, though it takes the form of a motion, is a pleading.² By demurring a defendant makes a general appearance in the action.³

[A] Matters Considered

Demurrers have almost nothing to do with the truth of the plaintiff's allegations. Rather, they ask the question, "Even if we assume that everything the plaintiff alleges is true, would the plaintiff be entitled to a legal remedy?"⁴ In ruling upon a demurrer, the court must ignore the factual improbability of the plaintiff's allegations and focus its attention on their legal sufficiency. A demurrer challenges only the legal sufficiency of the complaint, not the truth of its factual allegations or

¹ CODE CIV. PROC. § 430.80(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:31 (1996).

² CODE CIV. PROC. § 422.10. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:6–:7a (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 894, 899–901 (3d ed. 1985).

³ CODE CIV. PROC. § 1014. One may not use a demurrer in a family law case. RULES OF CT. 1215.

⁴ CODE CIV. PROC. § 589(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:5, :11 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 895, 905 (3d ed. 1985).

the plaintiff's ability to prove those allegations.⁵ Given the demurrer's particular function, the court must limit its examination to the complaint and to matters of which the court may take [judicial notice](#).⁶ This means that the plaintiff can postpone a confrontation by pleading around unpleasant facts or by framing his complaint in common counts, provided that other counts of the complaint do not specifically plead facts showing that the common counts lack merit.⁷

Example: *P* sues *D* for malpractice. *D* demurs to the complaint on the ground that *P*'s claim is barred by the statute of limitations. To circumvent *P*'s allegations of late discovery, *D* supports his demurrer with a hospital record purporting to show *P*'s earlier knowledge. The trial court sustains the demurrer.

The court erred. Evidentiary material other than matters subject to judicial notice has no bearing on the legal sufficiency of the facts alleged.⁸

⁵ *Nast v. State Bd. of Equalization*, 46 Cal. App. 4th 343, 346 n.2, 53 Cal. Rptr. 2d 592, 593 n.2 (1996).

⁶ *Blank v. Kirwan*, 39 Cal. 3d 311, 318, 703 P.2d 58, 61, 216 Cal. Rptr. 718, 721 (1985); *Afuso v. United States Fidelity & Guar. Co.*, 169 Cal. App. 3d 859, 862, 215 Cal. Rptr. 490, 492 (1985).

⁷ *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 601, 176 Cal. Rptr. 824, 828 (1981) (court must sustain a demurrer to a common count if the plaintiff is not entitled to recover under those counts in the complaint in which he specifically pleaded the facts upon which his claim is based).

⁸ *Tyree v. Epstein*, 99 Cal. App. 2d 361, 364–65, 221 P.2d 1002, 1005 (1950).

[1] The Complaint

A demurrer admits, for the limited purpose of assessing the sufficiency of the complaint, the well-pleaded facts set forth in the complaint.⁹ A demurrer does not, however, admit improperly pleaded matter, such as [legal conclusions](#).¹⁰

In addition to the allegations in the complaint, the court may consider evidentiary facts found in recitals of exhibits attached to a complaint.¹¹ The court may also consider allegations in a superseded complaint.¹²

➡ [Motions: Judicial Notice](#)

[2] Judicial Notice

The defendant may demur to a complaint if the grounds for the objection to the complaint appear from any matter of which the court is required to or may take judicial notice.¹³

⁹ Aragon-Haas v. Family Sec. Ins. Services, Inc., 231 Cal. App. 3d 232, 238–39, 282 Cal. Rptr. 233, 237 (1991). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 898 (3d ed. 1985).

¹⁰ Moncur v. City of Los Angeles, Dept. of Airports, 68 Cal. App. 3d 118, 121, 137 Cal. Rptr. 239, 240 (1977).

¹¹ Frantz v. Blackwell, 189 Cal. App. 3d 91, 94, 234 Cal. Rptr. 2d 178, 179–80 (1987). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:9 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 896 (3d ed. 1985).

¹² Frantz v. Blackwell, 189 Cal. App. 3d 91, 94, 234 Cal. Rptr. 2d 178, 179–80 (1987).

¹³ CODE CIV. PROC. § 430.30(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:12 (1996).

[a] Subjects of Judicial Notice

The court *must* take judicial notice of

- California and federal case law and statutes¹⁴
- California and federal administrative regulations¹⁵
- the rules of professional conduct for lawyers¹⁶
- the California Rules of Court¹⁷
- the rules of the federal courts¹⁸
- the meanings of words, phrases, and legal expressions¹⁹
- facts and proposition of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute.²⁰

¹⁴ EVID. CODE § 451(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:12, :17.4 (1996).

¹⁵ 11 U.S.C. § 1507; EVID. CODE § 451(b); GOV. CODE §§ 11343.6(d), 11344.6, 18576 (state civil service regulations).

¹⁶ EVID. CODE § 451(c).

¹⁷ EVID. CODE § 451(c).

¹⁸ EVID. CODE § 451(d).

¹⁹ EVID. CODE § 451(e).

²⁰ EVID. CODE § 451(f); *Gould v. Maryland Sound Indus., Inc.*, 31 Cal. App. 4th 1137, 1145, 37 Cal. Rptr. 2d 718, 722 (1995) (the existence of a contract between private parties cannot be established by judicial notice as a fact or proposition that is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy).

The court *may* take judicial notice of

- the case law and statutes of other states²¹
- legislative enactments and regulations of other public entities²²
- ➡ Official Acts • official acts of state and federal legislative, executive, and judicial departments²³
- ➡ Court Records • records of any California court or of any court of record of the United States or of another state²⁴
- the rules of any California court or of any court of record of the United States or of another state²⁵
- the laws of international organizations²⁶
- facts and propositions that are of such common knowledge within the court’s territorial jurisdiction that they cannot reasonably be the subject of dispute²⁷

²¹ EVID. CODE § 452(a).

²² EVID. CODE § 452(b); *see, e.g.*, Beresford Neighborhood Ass’n v. City of San Mateo, 207 Cal. App. 3d 1180, 255 Cal. Rptr. 434 (1989) (judicial notice of city’s municipal code).

²³ EVID. CODE § 452(c); *see, e.g.*, Fowler v. Howell, 42 Cal. App. 4th 1746, 1749–50, 50 Cal. Rptr. 2d 484, 486 (1996) (judicial notice of factual findings adopted by State Personnel Board).

²⁴ EVID. CODE § 452(d).

²⁵ EVID. CODE § 452(e).

²⁶ EVID. CODE § 452(f).

²⁷ EVID. CODE § 452(g).

- facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.²⁸

Judicial notice becomes mandatory if the defendant (1) requests that the court take judicial notice of any of the matters as to which judicial notice is discretionary, (2) gives the plaintiff sufficient notice of the request to enable him to prepare to meet the request, and (3) furnishes the court with sufficient information to enable it to take judicial notice of the matter.²⁹

[i] Court Records

If the defendant provides the plaintiff and the court certified copies of other court records, the court must take judicial notice of those records.³⁰ If those records establish one of the grounds for demurring, the court will sustain the defendant's demurrer.³¹

²⁸ EVID. CODE § 452(h).

²⁹ EVID. CODE § 453.

³⁰ LOS ANGELES SUPER. CT. R. 9.16(c); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 43(b). If the material is part of a file in the court in which the matter is pending, the party must specify in writing the part of the court file sought to be judicially noticed and make arrangements with the clerk to have the file in the courtroom at the time of the hearing. RULES OF CT. 323(b). Some local rules require the party seeking judicial notice to file his request for judicial notice a certain amount of time before the hearing to enable the clerk to locate the file. *See, e.g.*, LOS ANGELES SUPER. CT. R. 9.16(c) (request must be filed at least five days before the hearing); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 42 (same). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:15–:15.3 (1996).

Though judicial notice is appropriate to establish the existence of material in court records, the court may not take judicial notice of the content of these records for the purpose of establishing truth of the content. Judicial notice of the truth of the content of court records is appropriate only when the existence of the record itself precludes contravention of that which is recited in it, for example where findings of fact, conclusions of law, or judgments bind a party for purposes of res judicata or collateral estoppel. Otherwise, the content of the court records constitutes hearsay, and the truth of the content is reasonably subject to dispute.³² A court, after hearing a factual dispute between litigants *A* and *B*, may choose to believe *A*, and make a finding of fact in *A*'s favor. Later, another court may properly take judicial notice that the first court did in fact make that particular finding in favor of *A*, but the second court may not take judicial notice that the "fact" so found is "the truth." The taking of judicial notice that the first court ruled in favor of *A* on a particular factual dispute is different from the taking of judicial notice that *A*'s testimony must necessarily have been true simply because the court believed *A* and not *B*.³³

Example: *P* sues *D* for violating the Political Reform Act of 1974³⁴ for failing to report a loan in his disclosure statement. *D* demurs to *P*'s complaint on the ground that the loan was a regular bank loan made to students

³¹ See, e.g., *Frommhagen v. Board of Supervisors*, 197 Cal. App. 3d 1292, 1299, 243 Cal. Rptr. 390, 393 (1987) (cause of action barred by res judicata); *Bistawros v. Greenberg*, 189 Cal. App. 3d 189, 191–92, 234 Cal. Rptr. 377, 378 (1987) (another action pending).

³² *Fowler v. Howell*, 42 Cal. App. 4th 1746, 50 Cal. Rptr. 2d 484 (1996); *Columbia Casualty Co. v. Northwestern Nat'l Ins. Co.*, 231 Cal. App. 3d 457, 473, 282 Cal. Rptr. 389, 398 (1991).

³³ *Sisinsky v. Grant*, 6 Cal. App. 4th 1548, 1564–65, 8 Cal. Rptr. 2d 552, 561–62 (1992).

³⁴ Gov. CODE §§ 81000 *et seq.*

and was therefore excluded from the Act's disclosure requirement. The court sustains the demurrer after taking judicial notice of the contents of a sworn affidavit filed in another action.

The court erred. A court may take judicial notice of the existence of each document in a court file but cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file.³⁵ If, however, *P* was a party to the prior action, judicial notice of the fact that a final judgment was entered against him may support the sustaining of *D*'s demurrer on the ground that *P*'s claim is barred by res judicata or collateral estoppel.³⁶

[ii] Official Acts

Courts have upheld the taking of judicial notice of a wide variety of official acts, including

- a statement of identity filed in the secretary of state's Roster of Public Agencies³⁷
- the insurance commissioner's release of a reinsurer from liability for an insolvent insurer's debts³⁸

³⁵ *Bach v. McNelis*, 207 Cal. App. 3d 852, 865, 255 Cal. Rptr. 232, 238 (1989).

³⁶ *Frommhagen v. Board of Supervisors*, 197 Cal. App. 3d 1292, 1299, 243 Cal. Rptr. 390, 393 (1987)

³⁷ *Elmore v. Oak Valley Hosp. Dist.*, 204 Cal. App. 3d 716, 722, 251 Cal. Rptr. 405, 409 (1988). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:17.1–17.3 (1996).

³⁸ *Ascherman v. General Reinsurance Corp.*, 183 Cal. App. 3d 307, 310–11, 228 Cal. Rptr. 1, 2–3 (1986).

- a sheriff's booking sheet.³⁹

The court may sustain a demurrer based on judicial notice only in those instances in which there is not or cannot be a factual dispute concerning that for which the defendant seeks judicial notice. The court may not take judicial notice of an official act when the public entity's performance of the official act is disputed.⁴⁰

[b] Procedure for Taking Judicial Notice

If the defendant bases his demurrer on a matter as to which judicial notice is discretionary, he must specify the matter in the demurrer or in his memorandum of points and authorities⁴¹ and provide the court and each party with a copy of the material.⁴² If the material is part of a file in the court in which the matter is being heard, the party requesting judicial notice must specify in writing the part of the file for which he seeks judicial notice and must make arrangements with the clerk to have the file in the courtroom at the time of the hearing.⁴³ The court must afford each party a reasonable opportunity to present to the court information relevant to the propriety of taking judicial notice or the substance of the judicially noticed matter.⁴⁴ The court may also consult any source of pertinent information, including experts.⁴⁵ The court may appoint an expert on its own motion or on the motion of any party.⁴⁶ The court must make this information and its source part of the record

³⁹ Scannell v. County of Riverside, 152 Cal. App. 3d 596, 605, 199 Cal. Rptr. 644, 648 (1984).

⁴⁰ De Cruz v. County of Los Angeles, 173 Cal. App. 3d 1131, 1134, 219 Cal. Rptr. 661, 663 (1985) (judicial notice of public entity's customary practice in respect of mailing notices of rejection of claims did not establish that such practice had been followed in a particular case).

⁴¹ CODE CIV. PROC. § 430.70.

⁴² RULES OF CT. 323(b).

in the action and afford each party a reasonable opportunity to confront such information.⁴⁷ Other than the rules of privilege, exclusionary rules of evidence do not apply to this inquiry. The court, however, may decline to take judicial notice if the probative value of the matter is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice or confusion.⁴⁸

⁴³ RULES OF CT. 323(b). The local rules of the Los Angeles and San Francisco superior courts require that the party requesting judicial notice file a written request with the clerk of the department where the matter is to be heard at least five days before the hearing. LOS ANGELES SUPER. CT. R. 9.16(b); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION MANUAL § 42. The Los Angeles Superior Court will not hear argument on the demurrer unless the department where the matter is to be heard receives the file at least two court days before the hearing. LOS ANGELES SUPER. CT. R. 9.16(b). Nothing in the rules prohibits the demurring party from attaching to the moving papers copies of the matters to be judicially noticed, as protection against misplacement of the court file. LOS ANGELES SUPER. CT. R. 9.16(c). The Los Angeles Superior Court treats each district as a “different court.” LOS ANGELES SUPER. CT. R. 9.16(c). The San Francisco Superior Court requires that the certified copies be attached to the moving papers. SAN FRANCISCO SUPERIOR COURT LAW AND MOTION MANUAL § 43.

If the matter to be judicially noticed is in a case file in a different court, the party seeking judicial notice must either supply the law and motion judge with certified copies of the matter or subpoena the other court’s file.

⁴⁴ EVID. CODE § 455(a).

⁴⁵ EVID. CODE § 454(a)(1).

⁴⁶ EVID. CODE § 460.

⁴⁷ EVID. CODE § 455(b).

⁴⁸ EVID. CODE §§ 352, 454(a)(2).

[B] Grounds

Code of Civil Procedure section 430.10⁴⁹ provides that a defendant may object by demurrer to the complaint on any of the following grounds:

➡ Challenging Subject Matter Jurisdiction

➡ Parties—Capacity to Sue and Be Sued

➡ Parties

- The court has **no jurisdiction of the subject of the cause of action alleged in the pleading** (*i.e.*, the court lacks **subject matter jurisdiction**).
- The person who filed the pleading **does not have the legal capacity to sue**.
- There is **another action pending** between the same parties on the same cause of action.
- There is a **defect or misjoinder of parties**.
- The pleading **does not state facts sufficient to constitute a cause of action**.
- The pleading is **uncertain, ambiguous, or unintelligible**.
- In an action founded upon a contract, one cannot determine from the pleading whether the contract is written, oral, or implied by conduct.
- The plaintiff failed to file his attorney's certificate in an action against a licensed architect, engineer, or land surveyor.

[1] General Demurrers

Demurrers made on the ground of the plaintiff's failure to state a cause of action or the court's lack of **subject matter jurisdiction** are known as *general demurrers*. In contrast to demurrers on other grounds (*i.e.*, **special demurrers**), one does not waive an objection on grounds raised by a general demurrer by failing to raise the

⁴⁹ See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 7:30 (1996).

objection by demurrer or [answer](#).⁵⁰ One may not circumvent the rule against belated special demurrers by arguing that essential facts mispleaded in the complaint are not pleaded at all and that the complaint therefore fails to state a cause of action.⁵¹

[a] Failure to State Facts Sufficient to Constitute a Cause of Action

A general demurrer on the ground that a complaint fails to state facts sufficient to constitute a cause of action⁵² assumes the truth of the plaintiff's assertions of material facts,⁵³ no matter how improbable⁵⁴ or difficult to prove.⁵⁵ The court, however, is not bound to assume the truth of contentions, deductions, or conclusions of fact or law.⁵⁶ A demurrer asks whether the plaintiff would be entitled to a legal remedy if the alleged facts were true. A complaint is not subject to a demurrer on

⁵⁰ CODE CIV. PROC. § 430.80(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 7:33–:34, :37 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 902, 908–910 (3d ed. 1985).

⁵¹ *Drullinger v. Erskine*, 71 Cal. App. 2d 492, 497, 163 P.2d 48, 51 (1945).

⁵² CODE CIV. PROC. § 430.10(e).

⁵³ *Serrano v. Priest*, 5 Cal. 3d 584, 591, 487 P.2d 1241, 1245, 96 Cal. Rptr. 601, 605 (1971). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:39–:45.1 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 907 (3d ed. 1985).

⁵⁴ *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604, 176 Cal. Rptr. 824, 829 (1981).

⁵⁵ *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal. 3d 197, 214, 673 P.2d 660, 670, 197 Cal. Rptr. 783, 793 (1983).

⁵⁶ *Moore v. Regents of the Univ.*, 51 Cal. 3d 120, 125, 793 P.2d 479, 480, 271 Cal. Rptr. 146, 147 (1990).

this ground if, on the facts alleged, the plaintiff would be entitled to some remedy, even if the plaintiff misconceives the legal theory supplying his legal remedy.⁵⁷

Example: *P* purchases an automobile insurance policy through *D*, who executes a reduction of uninsured motorist coverage without authorization from *P*. After an accident, *P* hires a lawyer, who persuades the insurer to pay *P* the full uninsured motorist benefits that *P* would have received if *D* had not executed the reduction of coverage. *P* sues *D* for fraud. *D* demurs to the complaint on the ground that *P*'s complaint does not state facts sufficient to constitute a cause of action for fraud. The court sustains the demurrer.

The court erred. Though the complaint did not state a cause of action for fraud, it did state a cause of action against *D* for professional malpractice.⁵⁸

Nor is the complaint subject to a general demurrer if the plaintiff seeks an inappropriate remedy,⁵⁹ for a demurrer does not lie against the defective part of a claim as long as the pleaded facts show the plaintiff's entitlement to some relief.⁶⁰ The fact that a complaint is ambiguous or uncertain, or that the essential facts are

⁵⁷ *Barquis v. Merchants Collection Ass'n*, 7 Cal. 3d 94, 103, 496 P.2d 817, 823, 101 Cal. Rptr. 745, 751 (1972).

⁵⁸ *Saunders v. Cariss*, 224 Cal. App. 3d 905, 908–09, 274 Cal. Rptr. 186, 188–89 (1990).

⁵⁹ *Grieves v. Superior Court*, 157 Cal. App. 3d 159, 163, 203 Cal. Rptr. 556, 558 (1984). The appropriate vehicle for challenging the plaintiff's choice of remedy is a [motion to strike](#). *Id.* at 164, 203 Cal. Rptr. at 558.

⁶⁰ *PH II, Inc. v. Superior Court*, 33 Cal. App. 4th 1680, 1682, 40 Cal. Rptr. 2d 169, 171 (1995).

merely implied, or that the complaint alleges [conclusions of law](#), does not lead to the conclusion that the complaint does not state facts sufficient to constitute a cause of action and are not subject to a general demurrer. Rather, the defendant can attack these defects only by means of a [special demurrer](#).⁶¹

A demurrer is not an appropriate weapon to attack a claim for [{declaratory relief}](#) inasmuch as the plaintiff is entitled to a declaration of its rights, even if adverse.⁶²

[i] Effect of Allegations

[I] Resolution of Inconsistencies

The plaintiff's allegations do not bind the court to conclude that the plaintiff has stated a valid claim if the complaint contains factual allegations inconsistent with attached documents or allegations contrary to facts that are [judicially noticed](#). Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters

⁶¹ Johnson v. Mead, 191 Cal. App. 3d 156, 160, 236 Cal. Rptr. 277, 280 (1987).

⁶² Farmers Ins. Exch. v. Zerlin, 53 Cal. App. 4th 445, ??, 61 Cal. Rptr. 2d 707, 715 (1997).

judicially noticed by the court render the complaint meritless.⁶³ Nor is the court bound by allegations inconsistent with documents attached to the complaint.⁶⁴

Example: *P* hires *Payroll Company* to process *P*'s payroll checks. *Payroll Company* diverts *P*'s funds to its own use, and *P* sues *Bank*, alleging that he was a customer of *Bank*. The signature card attached to *P*'s complaint discloses, however, that *Payroll Company* was the account holder. The trial court sustains *Bank*'s demurrer.

The court ruled correctly. Facts appearing in exhibits attached to the complaint will be accepted as true and, if contrary to the allegations in the pleading, will be given precedence.⁶⁵

The plaintiff cannot avoid the consequences of a fatal inconsistency by filing an {amended complaint} omitting the facts that rendered the complaint defective or by

⁶³ *Cantu v. Resolution Trust Corp.*, 4 Cal. App. 4th 857, 877, 6 Cal. Rptr. 2d 151, 162 (1992) (allegations in complaint filed in earlier case); *Owens v. Kings Supermarket*, 198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627, 630 (1988) (prior complaint); *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604, 176 Cal. Rptr. 824, 829–30 (1981) (plaintiff's affidavits and deposition testimony); *Stencel Aero Eng'g Corp. v. Superior Court*, 56 Cal. App. 3d 978, 987 n.6, 128 Cal. Rptr. 691, 696 n.6 (1976) (plaintiff's responses to requests for admissions). *But see Garcia v. Sterling*, 176 Cal. App. 3d 17, 22, 221 Cal. Rptr. 349, 352 (1985) (judicial notice may not be taken of the truth of the plaintiff's deposition testimony). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:46–:48.19 (1996).

⁶⁴ *Software Design & Application, Ltd. v. Hoefer & Arnett, Inc.*, 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756, 764 (1996); *Del E. Webb Corp. v. Structural Materials Co.*, 123 Cal. App. 3d 593, 604, 176 Cal. Rptr. 824, 829–30 (1981).

⁶⁵ *Dodd v. Citizens Bank*, 222 Cal. App. 3d 1624, 1626–27, 272 Cal. Rptr. 623, 624 (1990).

pleading facts inconsistent with the allegations of prior pleadings. In order to avoid the effect of earlier inconsistent pleadings, of which the court would otherwise take **judicial notice**, the plaintiff must explain the inconsistency.⁶⁶

➔ Drafting the
Complaint—Pleading
in the Alternative

The plaintiff, however, is entitled to plead inconsistent causes of action.

[II] Interpretation of Ambiguous Instruments

If the plaintiff bases his cause of action on an ambiguous contract, he must allege his construction of the agreement.⁶⁷ So long as the pleading does not place a clearly erroneous construction upon the provisions of the contract, in passing upon the sufficiency of the complaint the court must accept as correct the plaintiff's allegations as to the meaning of the agreement.⁶⁸

Example: *P* sues *D* for breach of a vacuum truck service agreement containing a termination provision. *P* alleges the existence of a trade custom and usage in the petroleum industry that such agreements are terminable only for cause. The court sustains *P*'s demurrer.

⁶⁶ *Software Design & Application, Ltd. v. Hoefler & Arnett, Inc.*, 49 Cal. App. 4th 472, 484, 56 Cal. Rptr. 2d 756, 764 (1996); *Owens v. Kings Supermarket*, 198 Cal. App. 3d 379, 384, 243 Cal. Rptr. 627, 630 (1988).

⁶⁷ *Hayter Trucking, Inc. v. Shell W. E & P, Inc.*, 18 Cal. App. 4th 1, 18, 22 Cal. Rptr. 2d 229, 240 (1993). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:48.25–.27 (1996).

⁶⁸ *Marina Tenants Ass'n v. Deauville Marina Dev. Co.*, 181 Cal. App. 3d 122, 128, 226 Cal. Rptr. 321, 324 (1986).

The court erred. If the interpretation of a written instrument turns upon the credibility of extrinsic evidence, the plaintiff need only allege the meaning he ascribes to the agreement.⁶⁹

[ii] Omission of an Element of the Plaintiff's Cause of Action

If a complaint fails to allege a crucial element of the plaintiff's cause of action but the defendant files an improper "speaking" demurrer (*i.e.*, a demurrer accompanied by supporting evidence), the demurrer supplements the complaint, and if the defendant's evidence supplies the missing pieces of the plaintiff's complaint, the demurrer should be overruled.⁷⁰

[iii] Defense Disclosed on Face of Complaint

[I] Statute of Limitations

If the complaint discloses that the statute of limitations bars the plaintiff's cause of action, the complaint is subject to a general demurrer.⁷¹ To save his action, the plaintiff must plead around the limitations defense by stating facts negating the defense (*e.g.*, delayed discovery of his cause of action).⁷² Though the defendant

⁶⁹ Hayter Trucking, Inc. v. Shell W. E & P, Inc., 18 Cal. App. 4th 1, 18, 22 Cal. Rptr. 2d 229, 240 (1993).

⁷⁰ Mohlmann v. City of Burbank, 179 Cal. App. 3d 1037, 1041 n.2, 225 Cal. Rptr. 109, 110 n.2 (1986). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:61--62 (1996).

⁷¹ Barton v. New United Motor Mfg., Inc., 43 Cal. App. 4th 1200, 1204, 51 Cal. Rptr. 2d 328, 330 (1996); Sirott v. Latts, 6 Cal. App. 4th 923, 928, 8 Cal. Rptr. 2d 206, 209 (1992). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:49--57 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 912 (3d ed. 1985).

need not plead more than that “the cause of action is barred by the statute of limitations,”⁷³ a demurrer is deficient if it identifies specific statutes of limitations but fails to identify the correct one.⁷⁴

A demurrer based on the statute of limitations will not lie where the action *may* be barred. In order to raise the bar of the statute of limitations by demurrer, the statute’s preclusive effect must clearly and affirmatively appear on the face of the complaint.⁷⁵ An allegation that the defendant committed a certain act “on or about” a certain date is not an allegation that the defendant committed the act on that certain date and thus is not vulnerable to a general demurrer if that certain date is outside the limitations period.⁷⁶ If the defendant cannot invoke the statute by means of a general demurrer, he must allege the statute of limitations as an **affirmative defense**, pin the plaintiff down as to the relevant dates through discovery, and file a **{motion for summary judgment}** based on the statute of limitations. The same is true if the plaintiff alleges unlawful acts and damages both within and outside the limitations period: the complaint is not subject to a general demurrer, though the statute of limitations may bar the plaintiff’s recovery of compensation relating to damages that occurred too long before the filing of the complaint.⁷⁷

⁷² Union Carbide Corp. v. Superior Court, 36 Cal. 3d 15, 25, 679 P.2d 14, 20, 201 Cal. Rptr. 580, 586 (1984).

⁷³ Bainbridge v. Stoner, 16 Cal. 2d 423, 431, 106 P.2d 423, 428 (1940).

⁷⁴ Zakaessian v. Zakaessian, 70 Cal. App. 2d 721, 725, 161 P.2d 677, 680 (1945).

⁷⁵ Marshall v. Gibson, Dunn & Crutcher, 37 Cal. App. 4th 1397, 1403, 44 Cal. Rptr. 2d 339, 343 (1995).

⁷⁶ Childs v. State, 144 Cal. App. 3d 155, 161–62, 192 Cal. Rptr. 526, 529 (1983).

⁷⁷ G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 279, 195 Cal. Rptr. 211, 226 (1983).

Example: *P* sues *D* for antitrust violations, alleging damages occurring more than three years, less than three years and more than one year, and less than one year before the filing of the complaint. The court sustains *D*'s demurrer without leave to amend based on the applicable one-year and three-year statutes of limitations.

The court erred. *P*'s harm suffered within three years of the filing of the complaint was within the limitations period and was reimbursable through compensatory damages. Harm suffered within one year was subject to an additional treble damages penalty. The statute of limitations barred the recovery of damages for harm suffered more than three years before the filing of the complaint. By alleging some harm occurring within one year of the filing of the complaint, the complaint stated a cause of action and was not subject to a general demurrer, even though some of the harm alleged occurred outside the limitations period.⁷⁸

If the application of the statute of limitations turns on whether the contract sued upon was oral or written, the defendant has the means to pin the plaintiff down before the discovery stage. Code of Civil Procedure section 430.10(g) provides that, in an action founded upon a contract, a defendant may demur if one cannot ascertain from the complaint whether the contract was written, oral, or implied by conduct. If the plaintiff is forced to allege that the contract was oral, the defendant may demur to the amended pleading if its allegation of an oral contract discloses the applicability of the statute of limitations.

⁷⁸ G.H.I.I. v. MTS, Inc., 147 Cal. App. 3d 256, 279, 195 Cal. Rptr. 211, 226 (1983).

[II] Laches

One may raise the defense of laches by a general demurrer where the facts showing laches appear on the face of the complaint.⁷⁹ Laches appears on the face of the complaint if the complaint shows unreasonable delay on the plaintiff's part resulting in prejudice to the defendant.⁸⁰

[III] Contract Defenses

If the complaint discloses that the plaintiff is seeking to enforce an oral contract which the statute of frauds requires to be in writing, the complaint is subject to a general demurrer.⁸¹ As with the statute of limitations defense, the defendant may file a special demurrer if the plaintiff neglects to allege whether the contract was written or oral.⁸² If the plaintiff is forced to allege that the contract was oral, the defendant may demur to the amended pleading if its allegation of an oral contract discloses the applicability of the statute of frauds.

➡ Affirmative Defenses:
Illegality

If the complaint discloses that the plaintiff is seeking to enforce an illegal contract, the complaint is subject to a general demurrer.⁸³

⁷⁹ *Stafford v. Ballinger*, 199 Cal. App. 2d 289, 296, 18 Cal. Rptr. 568, 572 (1962). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 913 (3d ed. 1985).

⁸⁰ *Barndt v. County of Los Angeles*, 211 Cal. App. 3d 397, 403, 259 Cal. Rptr. 372, 376 (1989).

⁸¹ *Harper v. Goldschmidt*, 156 Cal. 245, 252–53, 104 P.2d 451, 454 (1909). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:58–:59.1 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 916 (3d ed. 1985).

⁸² CODE CIV. PROC. § 430.10(g).

⁸³ *Beck v. American Health Group Int'l, Inc.*, 211 Cal. App. 3d 1555, 1564, 260 Cal. Rptr. 237, 243 (1989).

If the complaint discloses that the parties' agreement was not sufficiently definite to constitute a contract, the complaint is subject to a general demurrer.⁸⁴ (One raises an objection that the complaint is not sufficiently definite by means of a [special demurrer](#) on the grounds of [uncertainty](#).)

[IV] Res Judicata

The defense of res judicata is generally raised in an [answer](#) to the complaint or by [{motion for summary judgment}](#). However, if all of the facts necessary to establish that an action is barred on res judicata grounds appear on the face of the complaint, the complaint is subject to demurrer.⁸⁵

[V] Plaintiff Not the Real Party in Interest

Where the complaint states a cause of action in someone but not in the plaintiff, a general demurrer for failure to state a cause of action will be sustained.⁸⁶ One must distinguish between such an objection and an objection that the plaintiff, though he has pled a cause of action, does not have the capacity to sue. One raises the latter objection by [special demurrer](#).

Example: *P Corp.* sues *D*, contending that *D*'s negligent work on a condominium project caused *P Corp.* to incur repair costs. The complaint dis-

➔ Parties—The Real Party in Interest Rule

➔ Parties—Capacity to Sue and Be Sued

➔ Demurrers—Plaintiff's Lack of Capacity to Sue

⁸⁴ *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d 240, 244 n.2, 449 P.2d 462, 465 n.2, 74 Cal. Rptr. 398, 401 n.2 (1969).

⁸⁵ *Brosterhous v. State Bar*, 12 Cal. 4th 315, 324, 906 P.2d 1242, 1247, 48 Cal. Rptr.2d 87, 92 (1995). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 915 (3d ed. 1985).

⁸⁶ *Oakland Municipal Improvement League v. City of Oakland*, 23 Cal. App. 3d 165, 170, 100 Cal. Rptr. 29, 32 (1972). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 914 (3d ed. 1985).

closes, however, that *P Corp.* was hired to maintain the condominium and did not own it. *D* demurs on the ground of *P Corp.*'s lack of capacity. The court sustains *D*'s general demurrer on the ground that *P Corp.* "has no legal capacity to sue."

The court erred. *P Corp.*'s allegation that it is a corporation established its capacity to sue. The complaint was defective because the cause of action alleged belonged to the condominium owners and not to the corporation they hired to maintain the condominium. The complaint was subject to a general demurrer for failing to state facts sufficient to constitute a cause of action in *P Corp.*⁸⁷

[VI] Privilege

A general demurrer lies when the complaint discloses that a privilege bars the plaintiff's tort claim.⁸⁸

[b] Lack of Subject Matter Jurisdiction

A general demurrer will also lie when the complaint discloses that the court lacks [subject matter jurisdiction](#) over the controversy, even though the complaint states facts sufficient to constitute a cause of action for which some other court may grant relief.⁸⁹ A demurrer for lack of subject matter jurisdiction resembles a demurrer for

⁸⁷ *Friendly Village Community Ass'n, Inc., No. IV v. Silva & Hill Constr. Co.*, 31 Cal. App. 3d 220, 224, 107 Cal. Rptr. 123, 125 (1973).

⁸⁸ *Green v. Cortez*, 151 Cal. App. 3d 1068, 1072–73, 199 Cal. Rptr. 221, 223–24 (1984). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 917 (3d ed. 1985).

⁸⁹ CODE CIV. PROC. § 430.10(a). *See generally* 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 919 (3d ed. 1985).

failure to state a cause of action in that the defendant forfeits neither objection if he fails to raise it by demurrer or in his [answer](#).⁹⁰ For this reason, demurrers on these grounds are classified together as general demurrers.⁹¹

[2] Special Demurrers

One may object to the complaint on grounds other than the plaintiff's failure to state a cause of action or the lack of subject matter jurisdiction by demurrer, known as a *special demurrer*, or in one's [answer](#).⁹² If a defendant fails to do so, he forfeits the objection.⁹³ The Code of Civil Procedure does not permit special demurrers in municipal court actions.⁹⁴

[a] Uncertainty

The defendant may demur to a complaint if the complaint is uncertain, ambiguous, or unintelligible.⁹⁵ A demurrer for uncertainty is strictly construed, even

⁹⁰ CODE CIV. PROC. § 430.80(a).

⁹¹ *Certified Grocers, Ltd. v. San Gabriel Valley Bank*, 150 Cal. App. 3d 281, 285 n.1, 197 Cal.Rptr. 710, 713 n.1 (1983).

⁹² CODE CIV. PROC. § 430.80(a); *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:2.1, :3, :32, :38–:38.1 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 903 (3d ed. 1985).

⁹³ CODE CIV. PROC. § 430.80(a); *Stockton Newspapers, Inc. v. Members of Redevelopment Agency*, 171 Cal. App. 3d 95, 103, 214 Cal. Rptr. 561, 565 (1985) (failure to raise uncertainty by special demurrer results in forfeiture of the objection).

⁹⁴ CODE CIV. PROC. § 92(c).

⁹⁵ CODE CIV. PROC. § 430.10(f). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:84–:89.1 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 924–927 (3d ed. 1985).

where a complaint is in some respects uncertain, because ambiguities can be clarified under modern {discovery} procedures.⁹⁶ The court will not sustain such a demurrer unless the complaint fails to include sufficient factual allegations to apprise the defendant of the issues he must meet.⁹⁷ The court will overrule a demurrer for uncertainty if the uncertainty concerns facts presumptively within the defendant's knowledge.⁹⁸ A demurrer must distinctly specify the grounds upon which the defendant objects to the complaint. If it does not do so, the court may disregard it.⁹⁹ The failure to specify the uncertain aspects of a complaint will defeat a demurrer based on the grounds of uncertainty.¹⁰⁰

⁹⁶ *Khoury v. Maly's, Inc.*, 14 Cal. App. 4th 612, 616, 17 Cal. Rptr. 2d 708, 710 (1993). *See* LOS ANGELES SUPER. CT. R. 9.18(c); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 21(c).

⁹⁷ *Williams v. Beechnut Nutrition Corp.*, 185 Cal. App. 3d 135, 139 n.2, 229 Cal. Rptr. 605, 606 n.2 (1986).

⁹⁸ *Khoury v. Maly's, Inc.*, 14 Cal. App. 4th 612, 616, 17 Cal. Rptr. 2d 708, 710 (1993).

⁹⁹ CODE CIV. PROC. § 430.60.

¹⁰⁰ *Fenton v. Groveland Community Servs. Dist.*, 135 Cal. App. 3d 797, 809, 185 Cal. Rptr. 758, 765 (1982). *See also* LOS ANGELES SUPER. CT. R. 9.18(c) (requiring specification by page and line number of the portion of the complaint claimed to be uncertain); ORANGE SUPER. CT. R. 516(C) (same); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 21(c) (same). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:90-94 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 928 (3d ed. 1985).

[b] Written or Oral Contract

In an action founded upon a contract, the defendant may demur to the complaint if one cannot ascertain from the complaint whether the contract is written, oral, or implied by conduct.¹⁰¹ This ground for special demurrer enables the defendant to flush out an admission of facts showing the applicability of the statute of fraud or of the statute of limitations. The plaintiff, however, can avoid this pitfall by pleading a common count without attempting to plead a separate cause of action for breach of the contract on which the common count is based.¹⁰²

[c] Attorney's Certificate

Code of Civil Procedure section 411.35 provides that before serving on any defendant a complaint for professional negligence against an architect, professional engineer, or land surveyor,¹⁰³ an attorney must file a consultation certificate. Section 411.36 imposes an identical regimen in "occupational negligence" actions against contractors by common interest development associations under section 383. In either kind of case, the defendant may object by special demurrer if the plaintiff's attorney failed to file the required certificate.¹⁰⁴

➡ Actions Against
Architects,
Professional
Engineers, and Land
Surveyors

➡ Actions by Common
Interest Development
Associations Against
Contractors

¹⁰¹ CODE CIV. PROC. § 430.10(g). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:90–94 (1996).

¹⁰² *Moya v. Northrup*, 10 Cal. App. 3d 276, 281, 88 Cal. Rptr. 783, 786 (1970).

¹⁰³ Section 411.30 formerly imposed a consultation requirement in medical malpractice actions. This version of the statute, however, was repealed by its own terms as of January 1, 1989.

¹⁰⁴ CODE CIV. PROC. § 430.10(h), (i). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:95–97.5 (1996).

► Actions to Enforce
Common Interest
Development
Covenants and
Restrictions

Civil Code section 1354 requires an attempt at alternative dispute resolution before initiating litigation to enforce the covenants and restrictions relating to a “common interest development.”¹⁰⁵ The failure to file a certificate is grounds for a demurrer or a [motion to strike](#) unless the plaintiff certifies in writing that one of the other parties to the dispute refused alternative dispute resolution before the filing of the complaint, that preliminary or temporary injunctive relief is necessary, or that alternative dispute resolution is not required because the limitation period for bringing the action would have run within the 120-day period following the filing of the action, or the court finds that dismissal of the action would result in substantial prejudice to one of the parties.¹⁰⁶

[d] Failure to Exhaust Administrative Remedies

Ordinarily, a defendant raises an exhaustion defense by way of special demurrer. Exhaustion of administrative remedies is a procedural prerequisite to access to the courts, not something affecting the courts’ [subject matter jurisdiction](#), and it is therefore waived if it is not timely asserted.¹⁰⁷

[e] Pleas in Abatement

At common law the defendant, before demurring or [answering](#), could make preliminary objections to the form of the proceeding. These objections, known as *pleas in abatement*, are now included among the grounds upon which one may

¹⁰⁵ A “common interest development” is a community apartment project, a condominium project, a planned development, or a stock cooperative. CIV. CODE § 1351(c).

¹⁰⁶ CIV. CODE § 1354(c).

¹⁰⁷ HWB Auto. Group, Inc. v. Nissan Div. of Nissan Motor Corp., 45 Cal. App. 4th 1663, 1665, 53 Cal. Rptr. 2d 505, 507 (1996).

assert a special demurrer. There is no basis in the Code of Civil Procedure for treating the pleas in abatement differently from other objections raised by special demurrer. Case law, however, reverses the distinction. One sometimes reads that one must make a plea in abatement at the first opportunity, by demurrer if the defect appears on the fact of the complaint.¹⁰⁸ It is doubtful, however, whether classifying an objection as a plea in abatement has any modern significance beyond requiring a strong justification for allowing amendment of the answer to assert a plea in abatement.¹⁰⁹

[i] Plaintiff's Lack of Capacity to Sue

The defendant may demur to a complaint if it appears from the complaint that the plaintiff does not have the legal capacity to sue.¹¹⁰ One must take care not to confuse lack of capacity with failure to sue in the name of the **real party in interest**.¹¹¹ An objection on the latter ground is, in substance, an objection that the complaint does not state facts sufficient to constitute a cause of action *in this plaintiff* and is raised by means of a **general demurrer** (or in one's **answer** if the insufficiency does not appear on the face of the complaint or in matters of which the court may take **judicial notice**).

➡ Parties—Capacity to Sue and Be Sued

➡ Demurrers—Plaintiff Not the Real Party in Interest

¹⁰⁸ Ostrowski v. Miller, 226 Cal. App. 2d 79, 86, 37 Cal. Rptr. 790, 793 (1964).

¹⁰⁹ Stewart v. San Fernando Refining Co., 22 Cal. App. 2d 661, 663, 71 P.2d 1118, ?? (1937)[check]. See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 1051–1054 (3d ed. 1985).

¹¹⁰ CODE CIV. PROC. § 430.10(b). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:70–:73 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 920, 1055–1057 (3d ed. 1985).

¹¹¹ American Alternative Energy Partners II, 1985 v. Windridge, Inc., 42 Cal. App. 4th 551, 559, 49 Cal. Rptr. 2d 686, 690–91 (1996).

[ii] Another Action Pending

The defendant may demur to a complaint if the complaint discloses that there is another action pending between the same parties on the same cause of action.¹¹² Otherwise, the defendant must raise the objection in his [answer](#). Abatement is required only where both actions are pending in California courts. When a federal court and a state court each acquire jurisdiction over a dispute, neither acquires exclusive jurisdiction, and each may proceed at its own pace until one or the other achieves a final judgment, which then becomes *res judicata* as to the other court.¹¹³ When the other action is pending in another state or in federal court, the determination whether to stay the later action is discretionary, not mandatory, and should be raised by motion, not demurrer.¹¹⁴

➡ Motions to Stay or Dismiss for Inconvenient Forum

➡ Meaning of "Cause of Action"

A second lawsuit is “on the same cause of action” as the first lawsuit if a judgment in the first lawsuit would constitute *res judicata* in the second lawsuit. The identity of two causes of action is determined by a comparison of the allegations showing the nature of the invasion of the plaintiff’s primary right.¹¹⁵

Example: *P* sues *Insurance Co.* for bad faith, contending that *Insurance Co.*’s failure to settle *P*’s claim caused *P* extreme emotional distress. In a

¹¹² CODE CIV. PROC. § 430.10(c). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:74–:77.3 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 921, 1060–1071 (3d ed. 1985).

¹¹³ *Fowler v. Ross*, 142 Cal. App. 3d 472, 477, 191 Cal. Rptr. 183, 186 (1983).

¹¹⁴ *Leadford v. Leadford*, 6 Cal. App. 4th 571, 574, Cal. Rptr. 2d 9, 12 (1992); *Gregg v. Superior Court*, 194 Cal. App. 3d 134, 136, 239 Cal. Rptr. 380, 381 (1987) (pending action in federal court).

¹¹⁵ *Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1384, 13 Cal. Rptr. 2d 382, 387 (1992).

separate action, *P* sues *Doctor*, alleging physical injuries as a result of side effects of drugs that *Doctor* prescribed for *P*'s emotional distress. *P* settles with *Insurance Co.* and takes an assignment of *Insurance Co.*'s claim for equitable indemnity against *Doctor*. *P* sues *Doctor* on the assigned claim for equitable indemnity. The court overrules *Doctor*'s special demurrer made on the ground of another action pending.

The court ruled correctly. *P*'s primary right in his tort action was his right to freedom from bodily harm caused by negligence. *Insurance Co.*'s primary right in the equitable indemnity action was its right to freedom from disproportionate liability for damages attributable to the negligence of the concurrent tortfeasors. These were different primary rights. The tort actions against *Insurance Co.* and *Doctor* were based upon different causes of action.¹¹⁶

When the defendant successfully demurs on the ground that another action is pending upon the same cause of action, the court enters an interlocutory judgment in favor of the defendant to the effect that no trial of other issues shall be had until the final determination of that other action. The plaintiff may appeal from the interlocutory judgment in the same manner and within the same time as in appeals from other judgments.¹¹⁷ The interlocutory judgment permits the trial court to retain jurisdiction over the subsequent action so that when a final determination is made in the prior pending action the court can determine the issues in the subsequent suit. If a judgment upon the merits is rendered in the first suit, the defendant should be

¹¹⁶ *Bush v. Superior Court*, 10 Cal. App. 4th 1374, 1384, 13 Cal. Rptr. 2d 382, 387 (1992).

¹¹⁷ CODE CIV. PROC. § 597.

granted leave to amend to plead the res judicata effect of the judgment in bar of the subsequent action. But if the prior litigation is not determined upon the merits, the court should decide the case in accordance with the issues presented by the pleadings in the second action.¹¹⁸

[iii] Misjoinder of Parties

The defendant may demur to a complaint if it appears that there is a defect or misjoinder of parties.¹¹⁹ There is a defect or misjoinder of parties when

➡ Parties—Permissive Joinder of Plaintiffs

- the plaintiff has failed to join a **necessary** or **indispensable** party
- the plaintiffs do not have a claim, right, or interest adverse to the defendant in the property or controversy which is the subject of the action, and their claims do not present common questions of law or fact

➡ Parties—Permissive Joinder of Defendants

- the plaintiff does not assert against the defendants a right to relief jointly, severally, or in the alternative, in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences, and no question of law or fact common to all the defendants will arise in the action.

The court's sustaining of a special demurrer on the ground that the plaintiff failed to join a **necessary** or **indispensable** party does not automatically result in the dismissal of the action. Rather, the court should order that the missing defendant be made a party.¹²⁰

¹¹⁸ Lord v. Garland, 27 Cal. 2d 840, 851, 168 P.2d 5, 11–12 (1946)

¹¹⁹ CODE CIV. PROC. § 430.10(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:78–83.2 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 922–923, 1058–59 (3d ed. 1985).

¹²⁰ CODE CIV. PROC. § 389(a).

➡ Drafting the
Complaint—Pleading
in the Alternative

If the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants for the purpose of determining which of the defendants is liable and to what extent. If the plaintiff's pleading in the alternative causes inconvenience to one of the defendants, the remedy lies not in a demurrer for misjoinder¹²¹ but in either a {motion for separate trial}¹²² or a {motion for severance}.¹²³

If the defendant's objection is that another party was improperly joined as a defendant, the objecting defendant must show some prejudice suffered or some interest affected by the misjoinder.¹²⁴ This means that a properly joined defendant normally cannot demur on the ground that the plaintiff improperly joined another defendant.

Since prejudice rarely appears on the face of the complaint, the requirement of this showing means that the objecting defendant normally must raise the objection in his answer (to avoid forfeiture of the objection) and then present evidence of prejudice by means of a {motion for summary judgment}.

¹²¹ Landau v. Salam, 4 Cal. 3d 901, 908, 484 P.2d 1390, 1395, 95 Cal. Rptr. 46, 51 (1971).

¹²² CODE CIV. PROC. § 379.5.

¹²³ CODE CIV. PROC. § 1048.

¹²⁴ Anaya v. Superior Court, 160 Cal. App. 3d 228, 231 n.1, 206 Cal. Rptr. 520, 522 n.1 (1984).

[C] Procedure**[1] Form**

Though demurrers are pleadings,¹²⁵ they take the form of **motions** and are subject to the rules governing the making of motions.¹²⁶ They differ from motions, however, in the respect that, in addition to the **notice of motion**, **memorandum of points and authorities**, and **proof of service**, the defendant serves and files a separate document, entitled “Demurrer,” setting forth his objections to the complaint. The demurrer should state on the first page immediately below the case number the name of the party filing the demurrer and the name of the party whose pleading is the subject of the demurrer.¹²⁷ The defendant must set forth each objection in a separate paragraph and state whether the objection applies to the entire complaint or to specified causes of action.¹²⁸ One may demur to the entire complaint or to

¹²⁵ CODE CIV. PROC. § 422.10.

¹²⁶ RULES OF CT. 303(c) (unless the context of subject matter otherwise requires, the civil law and motion rules (*id.* 301–391) apply to demurrers); 313(a) (the court may construe the failure of a demurring defendant to file a memorandum of points and authorities in support of a special demurrer as an admission that the demurrer is meritless); *Rains v. Superior Court*, 150 Cal. App. 3d 933, 943, 198 Cal. Rptr. 249, 256 (1984) (for purposes of Code of Civil Procedure section 1008(a), a demurrer is also “an application for an order” and will support an application to reconsider the matter when supported by a proposed pleading containing new allegations not previously included by the pleader). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:7.1, :99–109.1, :116–:121.2 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 904, 906, 911, 918 (3d ed. 1985).

¹²⁷ RULES OF CT. 325(c); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 15.

➔ Drafting the
Complaint—
Incorporating Earlier
Allegations by
Reference

individual causes of action.¹²⁹ Each count or cause of action in a complaint must be complete in itself, and must either contain all the allegations necessary to state a cause of action or expressly incorporate such allegations by reference to other counts. A count sufficient within itself may not ordinarily be defeated by importing from another count an allegation to which the sufficient count makes no reference.¹³⁰

The court must overrule a demurrer that attacks an entire pleading if one of its causes of action is not vulnerable to the objection.¹³¹ Similarly, the court must overrule a joint special demurrer of two defendants if the complaint is good against either of them.¹³² Therefore, defendants should attack the causes of action individually rather than the complaint as a whole, and they should not make their objections jointly.

[2] Timing

A defendant may demur to the complaint within 30 days after service of the complaint.¹³³ If the defendant files the demurrer too late, the court may strike the

¹²⁸ RULES OF CT. 325(a).

¹²⁹ CODE CIV. PROC. § 430.50(a).

¹³⁰ *Lambert v. Southern Counties Gas Co.*, 52 Cal. 2d 347, 352, 340 P.2d 608, 611–12 (1959).

¹³¹ *Shook v. Pearson*, 99 Cal. App. 2d 348, 351, 221 P.2d 757, 760 (1950).

¹³² *Majestic Realty Co. v. Pacific Lighting Corp.*, 37 Cal. App. 3d 641, 642–43, 112 Cal. Rptr. 423, 424 (1974).

¹³³ CODE CIV. PROC. § 430.40(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:24–:26, :110–:115 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* § 929 (3d ed. 1985).

demurrer and enter a {default judgment}¹³⁴ or deny the motion to strike the demurrer and address the demurrer on its merits.¹³⁵

The filing of a [motion to strike](#) the complaint does not extend the time within which to demur.¹³⁶ Therefore, if one intends to pursue both lines of attack, one must demur and move to strike simultaneously. The defendant may also demur and [answer](#) at the same time,¹³⁷ though there is seldom a tactical reason for answering before resolution of the demurrer, since the plaintiff cannot take the defendant's [default](#) while a demurrer is pending.¹³⁸ If one demurs to one cause of action, one need not answer the other causes of action until the court rules on the demurrer.¹³⁹

➔ [Timing Issues \(Motions\)](#)

A defendant filing a demurrer must serve and file a notice of hearing specifying a hearing date according to the rules governing motions generally.¹⁴⁰

[3] Opposing the Demurrer

The plaintiff may defend the complaint against the defendant's attack by filing a [memorandum of points and authorities](#).¹⁴¹ Because a demurrer merely tests the

¹³⁴ Buck v. Morrossis, 114 Cal. App. 2d 461, 464–65, 250 P.2d 270, 272–73 (1952).

¹³⁵ Tuck v. Thuesen, 10 Cal. App. 3d 193, 196, 88 Cal. Rptr. 759, 761 (1970).

¹³⁶ CODE CIV. PROC. § 585(f).

¹³⁷ CODE CIV. PROC. §§ 430.30(c), 472a(a).

¹³⁸ CODE CIV. PROC. § 585(a)–(c).

¹³⁹ RULES OF CT. 325(g). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 7:34.1 (1996).

¹⁴⁰ RULES OF CT. 325(b).

¹⁴¹ *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:122–122.7 (1996).

sufficiency of the complaint and does not raise issues of fact, the plaintiff cannot defeat a demurrer by supplying the court with evidentiary materials to show that he has a valid claim against the defendant. As with any other motion, the defendant may [reply](#) to the plaintiff's opposition papers.

[4] The Hearing

If, when the court calls the demurrer for hearing, a party does not appear, the court is to dispose of the demurrer on the merits at the request of the party appearing unless, for good cause, the court continues the hearing. If the defendant fails to appear in support of a [special demurrer](#), the court may construe the failure to appear as an admission that the demurrer is meritless and as a waiver of the defendant's objections. If neither party appears, the court may dispose of the demurrer on its merits, drop the matter from its calendar, or continue the hearing.¹⁴²

A stipulation between the parties that the hearing on a demurrer and a motion to strike be taken off calendar in exchange for the plaintiff's agreement to file an amended complaint is the effective equivalent of a stipulation that the demurrer is deemed to be sustained with leave to amend within the time specified in the stipulation. If the plaintiff fails to amend, the defendant may move to dismiss.¹⁴³ A stipulation between the parties to take off calendar a demurrer on the ground of [another action pending](#) is the functional equivalent of allowing the court to sustain the demurrer. The sustaining of the demurrer results in the postponement of the

¹⁴² RULES OF CT. 325(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:123–:123.3 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 930–931 (3d ed. 1985).

¹⁴³ *Harding v. Collazo*, 177 Cal. App. 3d 1044, 1053, 223 Cal. Rptr. 329, 333 (1986).

action until resolution of the pending action. When the pending action is resolved, the defendant must respond to the action or risk default.¹⁴⁴

[5] The Ruling

[a] Statement of Grounds for Decision

If the court sustains the demurrer, the court must include in its decision or order a statement of the specific ground or grounds upon which it based its decision. The court need only refer to the appropriate pages and paragraphs of the demurrer.¹⁴⁵

Example: At the time a demurrer is argued, the court states: “The demurrer is sustained without leave to amend for failure to state a cause of action.” The trial court states in its minute order, “The court adopted its tentative ruling as set forth below. (Failure to state a cause of action) . . . Sustain without leave to amend.” The formal written order does not include the grounds for the decision.

The court’s direction, entered in writing in the minutes, constituted an order. There was no error in stating the grounds for the court’s decision.¹⁴⁶

¹⁴⁴ Barragan v. Banco BCH, 188 Cal. App. 3d 283, 298, 232 Cal. Rptr. 758, 766 (1986).

¹⁴⁵ CODE CIV. PROC. § 472d. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:124–:128.3 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 937–938 (3d ed. 1985).

¹⁴⁶ Stevenson v. San Francisco Hous. Auth., 24 Cal. App. 4th 269, 275, 29 Cal. Rptr. 2d 398, 400–01 (1994). *Cf.* Crowley v. Kattelman, 8 Cal. 4th 666, 676, 881 P.2d 1083, 1086, 34 Cal. Rptr. 2d 386, 389 (1994) (court’s reference to supporting authorities did not constitute a sufficient statement of the grounds for its decision).

If the plaintiff fails to notify the court of its failure to state the grounds for its decision, the plaintiff forfeits his objection.¹⁴⁷

If the trial court fails to state the grounds for its sustaining of a demurrer, the appellate court will uphold the ruling if any of the grounds stated in the demurrer are well taken.¹⁴⁸ When the defendant interposes both a general demurrer and a special demurrer and the court sustains the demurrer without specifying its reasons, the appellate court will assume that the trial court ruled only in the general demurrer and not on the special demurrer. Thus upon remand the defendant may address again the matters raised in its special demurrer.¹⁴⁹

[6] Procedure Following the Sustaining of a Demurrer

[a] Leave to Amend

If the court sustains the defendant's demurrer, the plaintiff has ten days in which to amend the complaint, unless the court orders otherwise.¹⁵⁰ If there is any reasonable possibility that the plaintiff can state a good cause of action, it is an abuse of discretion to sustain a demurrer without leave to amend.¹⁵¹ When a complaint states a cause of action and any uncertainties or ambiguities in the complaint can be

¹⁴⁷ *Krawitz v. Rusch*, 209 Cal. App. 3d 957, 962, 257 Cal. Rptr. 610, 612 (1989).

¹⁴⁸ *Muraoka v. Budget Rent A Car, Inc.*, 160 Cal. App. 3d 107, 114, 206 Cal. Rptr. 476, 479 (1984).

¹⁴⁹ *E.L. White Inc. v. City of Huntington Beach*, 21 Cal. 3d 497, 504 n.1, 579 P.2d 505, 508 n.1, 146 Cal. Rptr. 614, 617 n.1 (1978).

¹⁵⁰ RULES OF CT. 325(e). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:129–:145.2, :155.2–:155.7 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 932–936, 939–940, 942–947, 952 (3d ed. 1985).

¹⁵¹ *Blank v. Kirwan*, 39 Cal. 3d 311, 318, 703 P.2d 58, 62, 216 Cal. Rptr. 718, 721 (1985).

corrected by amendment, denial of leave to amend constitutes an abuse of discretion, even if the plaintiff did not request leave to amend.¹⁵² In determining whether there is a reasonable possibility that the plaintiff can state a cause of action, the court is not required to foresee that the plaintiff might amend the complaint in some obscure manner totally altering his theory of the case.¹⁵³ It is proper to sustain a demurrer without leave to amend if it is probable from the nature of the defects and previous unsuccessful attempts to plead that the plaintiff cannot state a cause of action.¹⁵⁴ The burden of proving the reasonable possibility of amendment rests upon the plaintiff,¹⁵⁵ who must show in what manner he can amend his complaint and how that amendment will change the legal effect of his pleading.¹⁵⁶

The court may deny leave to amend if the facts are not in dispute and the nature of the claim is clear but no liability exists under substantive law.¹⁵⁷ This may occur, for instance, when the original complaint reveals that the plaintiff cannot state a cause of action within the court's subject matter jurisdiction¹⁵⁸ or when the cause of action is not yet ripe.¹⁵⁹

¹⁵² *Wennerholm v. Stanford Univ. Sch. of Medicine*, 20 Cal. 2d 713, 128 P.2d 522 (1942).

¹⁵³ *Stephenson v. Drever*, 50 Cal. App. 4th 174, 180–81, 57 Cal. Rptr. 2d 662, 665 (1996).

¹⁵⁴ *Lee v. Interinsurance Exch. of Auto. Club*, 50 Cal. App. 4th 694, 724, 57 Cal. Rptr. 2d 798, 817 (1996).

¹⁵⁵ *Blank v. Kirwan*, 39 Cal. 3d 311, 318, 703 P.2d 58, 62, 216 Cal. Rptr. 718, 722 (1985).

¹⁵⁶ *Goodman v. Kennedy*, 18 Cal. 3d 335, 349, 556 P.2d 737, 746, 134 Cal. Rptr. 375, 384 (1976).

¹⁵⁷ *Lawrence v. Bank of America*, 163 Cal. App. 3d 431, 436, 209 Cal. Rptr. 541, 545 (1985).

¹⁵⁸ *E.g.*, *Spencer v. Crocker First Nat'l Bank*, 86 Cal. App. 2d 397, 194 P.2d 775 (1948).

¹⁵⁹ *E.g.*, *Industrial Indem. Co. v. Mazon*, 158 Cal. App. 3d 862, 204 Cal. Rptr. 885 (1984).

If the court sustains the demurrer without leave to amend, the plaintiff may file a [motion for reconsideration](#), provided that he supports the motion with a proposed pleading containing new allegations not previously included by the pleader.¹⁶⁰ If the proposed pleading states any cause of action, then the trial court must vacate its order sustaining the demurrer and grant the plaintiff leave to file an amended complaint containing the causes of action the court determines to be valid.¹⁶¹

If the court grants leave to amend, it may set conditions on the amendment.¹⁶² It lies within the court's discretion to stay discovery until the plaintiff pleads a valid cause of action if the matters the plaintiff seeks to discover would not assist the plaintiff in framing a proper claim and allowing discover would impose an unfair burden on the defendant.¹⁶³

[b] Application for Dismissal

If the court sustains a demurrer to the plaintiff's entire action, or to all of the causes of action pleaded against a particular defendant, and the plaintiff does not amend the complaint within the time allowed, the defendant may file an ex parte application for dismissal of the action pursuant to Code of Civil Procedure section 581(f)(2).¹⁶⁴ The same is true if the court sustains a demurrer to the plaintiff's entire

¹⁶⁰ Rains v. Superior Court, 150 Cal. App. 3d 933, 943, 198 Cal. Rptr. 249, 256 (1984).

¹⁶¹ Careau & Co. v. Security Pac. Business Credit, Inc., 222 Cal. App. 3d 1371, 1386, 272 Cal. Rptr. 387, 394 (1990).

¹⁶² CODE CIV. PROC. § 472a(c).

¹⁶³ Terminals Equip. Co., Inc. v. City and County of San Francisco, 221 Cal. App. 3d 234, 247, 270 Cal. Rptr. 329, 337 (1990).

¹⁶⁴ CODE CIV. PROC. § 581(f)(2); RULES OF CT. 325(f).

➡ Statement of Grounds
for Decision

action, or to all of the causes of action pleaded against a particular defendant, without granting leave to amend.¹⁶⁵ The court need not file a statement of its grounds for dismissing the action, as is required when sustaining a demurrer.¹⁶⁶ Dismissal is discretionary.¹⁶⁷

If the plaintiff files an amended complaint after the time allowed, the defendant may seek to strike the amended pleading by a noticed motion pursuant to Code of Civil Procedure section 1010.¹⁶⁸ The defendant may not, however, file an ex parte application for dismissal without first obtaining a order striking the late amended pleading.¹⁶⁹

If the court sustains a demurrer to some of the causes of action without granting the plaintiff leave to amend, the defendant has ten days in which to [answer](#) the remaining causes of action.¹⁷⁰

➡ (Form 11.?: Notice of
Ruling)

The time to act following the court's ruling on a demurrer runs from the service of the [notice of ruling](#).¹⁷¹ The parties may waive notice provided that waiver occurs in open court and is entered in the minutes.¹⁷² Service of a file-stamped copy of the formal order satisfies the requirement of notice: there can be no better notice of what

¹⁶⁵ CODE CIV. PROC. § 581(f)(1).

¹⁶⁶ *Harding v. Collazo*, 177 Cal. App. 3d 1044, 1056–57, 223 Cal. Rptr. 329, 335 (1986).

¹⁶⁷ *Contreras v. Blue Cross*, 199 Cal. App. 3d 945, 947, 245 Cal. Rptr. 258, 260 (1988).

¹⁶⁸ RULES OF CT. 325(f).

¹⁶⁹ *Gitmed v. General Motors Corp.*, 26 Cal. App. 4th 824, 827–28, 31 Cal. Rptr. 2d 625, 628 (1994).

¹⁷⁰ RULES OF CT. 325(g). Serial demurrers are a theoretical, though not practical, possibility. *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL §§ 7:34.1–4 (1996).

an order says than is provided by a file-stamped copy of the order itself.¹⁷³ If the winner serves the notice of ruling by some means other than personal delivery, the loser's time to act is extended.¹⁷⁴

➡ Motions—Timing Issues

When the court rules on a demurrer in a matter it has taken under submission, the clerk notifies the parties of the ruling.¹⁷⁵ The clerk's service of the court's minute order constitutes notice of the court's ruling and triggers the running of the loser's time to act.¹⁷⁶

[c] Procedure Following Amendment of the Complaint

If the plaintiff amends the complaint, the amended complaint supersedes the original complaint, and the plaintiff forfeits any objection he might have had to the sustaining of the defendant's demurrer.¹⁷⁷

¹⁷¹ CODE CIV. PROC. § 472b. When an order sustaining a demurrer without leave to amend is reversed or otherwise remanded by a reviewing court, the plaintiff must file any amended complaint within 30 days after the clerk of the reviewing clerk mails notice of the issuance of the remittitur. *Id.*

¹⁷² CODE CIV. PROC. §§ 472b, 1019.5(a); *People v. \$20,000 U.S. Currency*, 235 Cal. App.3d 682, 691, 286 Cal. Rptr. 746, 750 (1991).

¹⁷³ *Parris v. Cave*, 174 Cal. App. 3d 292, 294, 219 Cal. Rptr. 871, 872–73 (1985).

¹⁷⁴ *People v. \$20,000 U.S. Currency*, 235 Cal. App.3d 682, 692, 286 Cal. Rptr. 746, 751 (1991).

¹⁷⁵ RULES OF CT. 309.

¹⁷⁶ *Robbins v. Los Angeles Unified Sch. Dist.*, 3 Cal. App. 4th 313, 318, 4 Cal. Rptr. 2d 649, 652 (1992).

¹⁷⁷ *Aubry v. Tri-City Hosp. Dist.*, 2 Cal. 4th 962, 966 n.2, 831 P.2d 317, 319 n.2, 9 Cal. Rptr. 2d 92, 94 n.2 (1992).

[d] Judgment of Dismissal

An order sustaining a demurrer without leave to amend is not a final judgment and is not appealable. It is followed as a matter of course by a judgment of dismissal, which is appealable.¹⁷⁸ Either party may move the court to dismiss.¹⁷⁹ If the plaintiff fails to amend, the court has the power to enforce its order by dismissing when the plaintiff did not, in effect, comply with the terms upon which the court granted the plaintiff permission to amend.¹⁸⁰

[7] Procedure Following Overruling of Demurrer

If the court overrules the demurrer, the defendant has ten days in which to move to strike, demur, or [answer](#) the complaint, unless the court sets a different time limit.¹⁸¹ If the defendant demurred to one of several causes of action and the court overrules the demurrer, the defendant may file a successive demurrer to a different cause of action, though the better practice is to combine all of one's demurrers in a single pleading.¹⁸² "[Cause of action](#)" is defined in the strict sense purposes of this

¹⁷⁸ Rudolph v. Fulton, 178 Cal. App. 2d 339, 343, 2 Cal. Rptr. 807, 810 (1960). See generally 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 948–949 (3d ed. 1985).

¹⁷⁹ CODE CIV. PROC. § 581(f)(2).

¹⁸⁰ Sousa v. Capital Co., 220 Cal. App. 2d 744, 34 Cal. Rptr. 71 (1963).

¹⁸¹ RULES OF CT. 325(g).

¹⁸² RULES OF CT. 325(g); Skrbina v. Fleming Cos., 45 Cal. App. 4th 1353, 1365, 53 Cal. Rptr. 2d 481, 488 (1996). *Skrbina* implies, however, that the court may cutoff the defendant's right to file a successive demurrer by ordering the defendant to answer.

rule as the invasion of a single primary right.¹⁸³ In actions for forcible entry, forcible detainer, and unlawful detainer the ten-day time limit is shortened to five days.¹⁸⁴

If the plaintiff amends the complaint or dismisses the causes of action to which the court has sustained a demurrer, the defendant has ten days to move to strike, demur, or [answer](#) the amended complaint or remaining causes of action. If he elects to demur to the amended pleading, he need not comply with the procedural requirements for a [motion for reconsideration](#) of a prior order.¹⁸⁵ Indeed, he may renew the demurrer on grounds rejected in connection with the prior complaint. The defendant acts properly in raising his objection in demurring to the original complaint, and if a portion of the demurrer is erroneously overruled, he may renew the objection in demurring to the amended complaint. The judge ruling upon the second demurrer is free to reexamine the sufficiency of the pleading.¹⁸⁶

[8] Appellate Review

[a] Demurrer Sustained

The sustaining of a demurrer to one of several causes of action is not an appealable order unless the sustaining of the demurrer leads to the dismissal of all

➔ (Appeals—Appealable Orders)

¹⁸³ Skrbina v. Fleming Cos., 45 Cal. App. 4th 1353, 1364, 53 Cal. Rptr. 2d 481, 487–88 (1996).

¹⁸⁴ RULES OF CT. 325(e).

¹⁸⁵ Clausing v. San Francisco Unified Sch. Dist., 221 Cal. App. 3d 1224, 1232, 271 Cal. Rptr. 72, 75 (1990).

¹⁸⁶ Pacific States Enters., Inc. v. City of Coachella, 13 Cal. App. 4th 1414, 1420 n.3, 17 Cal. Rptr. 2d 68, 75 n.3 (1993). *But see* LOS ANGELES SUPER. CT. R. 9.18(d) (discouraging reassertion of a demurrer previously overruled); SAN FRANCISCO SUPERIOR COURT LAW AND MOTION AND WRITS AND RECEIVERS MANUAL § 21(d) (same).

causes of action that any one plaintiff has alleged against any one defendant.¹⁸⁷ If the plaintiff elects to proceed to trial on the remaining causes of action, he must wait until a final judgment is rendered in order to obtain appellate review of the order sustaining the demurrer.¹⁸⁸ Thus, if the plaintiff believes that he cannot amend the complaint to correct what the court perceives as a defect, or should not be required to amend, he can obtain immediate appellate review only by means of a petition for a writ of mandate, which is unlikely to be granted.¹⁸⁹

➡ (Extraordinary Writs—Mandate)

Until the time to amend expires, the plaintiff may dismiss the action without prejudice and hope for a more propitious moment to refile before the expiration of the statute of limitations.¹⁹⁰ Under the fast track rules, however, a court employing the direct calendaring of cases will simply assign a subsequent action on the same claim to the same court that sustained the demurrer to the original action. The plaintiff may not file a new action alleging the same causes of action as to which the

➡ (Fast Track Rules)

¹⁸⁷ *Tinsley v. Palo Alto Unified Sch. Dist.*, 91 Cal. App. 3d 871, 880, 154 Cal. Rptr. 591, 596 (1979) (“[W]hen there is a several judgment resolving all issues between a plaintiff and one defendant, either party may appeal from an adverse judgment, although the action remains pending between the plaintiff and other defendants.”). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:146–:151.4 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 941, 951 (3d ed. 1985).

¹⁸⁸ CODE CIV. PROC. § 472c(b)(1).

¹⁸⁹ *Coulter v. Superior Court*, 21 Cal.3d 144, 147, 577 P.2d 669, 671, 145 Cal. Rptr. 534, 536 (1978) (“While we have generally been reluctant to extend extraordinary relief at the pleading stage . . . , we have said that mandamus will lie when it appears that the trial court has deprived a party of an opportunity to plead his cause of action or defense, and when that extraordinary relief may prevent a needless and expensive trial and reversal . . .”).

¹⁹⁰ *Parsons v. Umansky*, 28 Cal. App. 4th 867, 871, 34 Cal. Rptr. 2d 144, 146 (1994).

court has already sustained a demurrer in the original action. The second complaint is subject to being stricken as a sham pleading.¹⁹¹

If the court sustains a demurrer to the entire action with leave to amend, the plaintiff has the option of refusing to amend, dismissing the case,¹⁹² and appealing. If the court sustains a demurrer to some but not all of the plaintiff's causes of action, the plaintiff may position himself for an immediate appeal by dismissing the remaining causes of action. When the trial court sustains a demurrer with leave to amend and the plaintiff elects not to amend, the reviewing court will presume that the plaintiff stated as strong a case as he can. In determining whether or not the trial court abused its discretion, the reviewing court will resolve all ambiguities and uncertainties raised by the demurrer against the plaintiff. If the complaint is objectionable on any ground raised by the demurrer, the judgment of dismissal will be affirmed.¹⁹³

A judgment following dismissal based on the plaintiff's refusal to amend is a judgment on the merits to the extent that it adjudicates that the facts alleged do not constitute a cause of action, and will, accordingly, be a bar to a subsequent action alleging the same facts. Even though the plaintiff alleges different facts in the second action, if the demurrer was sustained in the first action on a ground equally applicable to the second, the former judgment will be a bar. If, on the other hand, the plaintiff alleges new or additional facts that cure the defects in the original pleading,

¹⁹¹ Ricard v. Grobstein, Goldman, Stevenson, Siegel, LeVine & Mangel, 6 Cal. App. 4th 157, 162, 8 Cal. Rptr. 2d 139, 142 (1992).

¹⁹² CODE CIV. PROC. § 581(f)(2).

¹⁹³ Hooper v. Deukmejian, 122 Cal. App. 3d 987, 994, 176 Cal. Rptr. 569, 572 (1981).

the former judgment is not a bar to the subsequent action, whether or not plaintiff had an opportunity to amend his complaint.¹⁹⁴

An order sustaining demurrers to all causes of action is not appealable, and the appeal must be taken from the ensuing judgment of dismissal.¹⁹⁵ If the court sustains a demurrer without leave to amend, the question as to whether or not the court abused its discretion in sustaining the demurrer is open on appeal even though the plaintiff did not request leave to amend.¹⁹⁶

[b] Demurrer Overruled

Reviewing courts do not routinely review rulings on demurrers because they do not have the time or resources to police law and motion rulings on the pleadings through the mandamus power and, absent unusual circumstances, decline to do so.¹⁹⁷ When, however, the ruling raises a significant issue of law and resolution of the issue in favor of the petitioner would result in a final disposition as to that party, review by writ is appropriate.¹⁹⁸ The defendant may renew the objection in his answer,¹⁹⁹ but if the court rejected the defendant's objection by overruling his

¹⁹⁴ Keidatz v. Albany, 39 Cal. 2d 826, 828, 249 P.2d 264, 265 (1952).

¹⁹⁵ Lavine v. Jessup, 48 Cal. 2d 611, 614, 311 P.2d 8, 9 (1957).

¹⁹⁶ CODE CIV. PROC. § 472c(a); Careau & Co. v. Security Pac. Business Credit, Inc., 222 Cal. App. 3d 1371, 1386, 272 Cal. Rptr. 387, 394 (1990).

¹⁹⁷ San Diego Gas & Elec. Co. v. Superior Court, 13 Cal. 4th 893, 912–13, 920 P.2d 669, 680, 55 Cal. Rptr. 2d 724, 735 (1996).

¹⁹⁸ Babb v. Superior Court, 3 Cal. 3d 841, 851, 479 P.2d 379, 385, 92 Cal. Rptr. 179, 185 (1971); Curry v. Superior Court, 20 Cal. App. 4th 180, 183, 24 Cal. Rptr. 2d 495, 496–97 (1993). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:152–:155.2, 190–196 (1996).

➔ (Demurrer to Answer)

demurrer, the court is likely to reject the defendant's objection by sustaining the plaintiff's demurrer to the [answer](#). The defendant may decline to answer the complaint and let the plaintiff take his default. By defaulting, the defendant admits the well-pleaded allegations in the complaint. If those allegations do not state facts sufficient to constitute a cause of action, the defendant may raise that issue on appeal from the default judgment.²⁰⁰ If, however, the allegations do state a cause of action, the defendant is bound by the judgment and forfeits the opportunity to litigate the merits of the plaintiff's claim.

§ 11.03 Motions to Strike

Code of Civil Procedure section 435 allows the defendant to attack the plaintiff's complaint on grounds that the defendant may not address by means of a demurrer.²⁰¹ A matter that may be addressed by demurrer is not a proper subject of a motion to strike,²⁰² though the court will treat a motion to strike as a [{motion for judgment on the pleadings}](#) if made on grounds that may be raised by [general](#)

¹⁹⁹ CODE CIV. PROC. § 430.10. By answering the complaint the defendant waives any formal defects in the complaint, so that there is no basis for subsequent appeal on such grounds. Page v. Page, 199 Cal. App. 2d 527, 532, 18 Cal. Rptr. 897, 900 (1962).

²⁰⁰ Rose v. Lawton, 215 Cal. App. 2d 18, 19–20, 29 Cal. Rptr. 844, 846 (1963).

➔ Pre-Filing Procedures—
Actions Requiring
Presuit Consultation

²⁰¹ *But see* CODE CIV. PROC. §§ 411.35(g), 411.36(g) (plaintiff's failure to file the required certificate in an action against an architect, engineer, surveyor, or condominium contractor for professional negligence renders his complaint vulnerable to a demurrer or to a motion to strike). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:156–:157 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 959–960, 964 (3d ed. 1985).

²⁰² Stearns Ranchos Co. v. Atchison, T. & S.F. Ry., 19 Cal. App. 3d 24, 41, 96 Cal. Rptr. 317, 329 (1971).

➔Chapter 7—Motions

➔Jurisdiction—General
Appearances

demurrer (*i.e.*, failure to state facts sufficient to constitute a cause of action or lack of subject matter jurisdiction).²⁰³

Motions to strike are subject to the rules applicable to motions generally.²⁰⁴ The filing of a motion to strike constitutes a general appearance.²⁰⁵ A notice of motion to strike a portion of a pleading must quote in full the portions to be stricken unless the moving party seeks to strike an entire paragraph, cause of action, count, or defense. Specifications in the notice are numbered consecutively.²⁰⁶

[A] Grounds

The court may strike out any irrelevant, false, or improper matter in the complaint.²⁰⁷ Also, the court may strike out all or any part of the complaint not drawn or filed in conformity with California law, a court rule, or a court order.²⁰⁸ The grounds for a motion to strike must appear on the face of the complaint or from any matter of which the court is required to take [judicial notice](#).²⁰⁹

Example: *P* sues *D*, accusing *D* of maintaining unsanitary rental premises for *D*'s employee farm workers. *D* [answers](#) the complaint. *P* moves to

²⁰³ Pierson v. Sharp Memorial Hosp., Inc., 216 Cal. App. 3d 340, 343, 264 Cal. Rptr. 673, 674 (1989).

²⁰⁴ CODE CIV. PROC. § 435(b)(2).

²⁰⁵ CODE CIV. PROC. § 1014.

²⁰⁶ RULES OF CT. 329.

²⁰⁷ CODE CIV. PROC. § 436(a). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:158.3–.4, :167–:189 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, *Pleading* §§ 961–963 (3d ed. 1985).

²⁰⁸ CODE CIV. PROC. § 436(b).

²⁰⁹ CODE CIV. PROC. § 437(a).

strike portions of the answer on the grounds that they are false. In support of the motion, *P* lodges *D*'s deposition with the court. The court denies the motion.

The court ruled correctly. A court may strike portions of a pleading as false but only if the falsity appears from matters of which the court may take judicial notice, which does not include the truth of matters stated in a deposition.²¹⁰

► Discretionary Judicial Notice

If the defendant bases the motion on matter of which the court *may* take judicial notice,²¹¹ the defendant must specify such matter in the [notice of motion](#) or in the supporting [memorandum of points and authorities](#) unless the court orders otherwise.²¹² If the defendant bases the motion on other matters, the court will treat it as a [{motion for summary judgment}](#).²¹³

Motions to strike are available in a wide variety of circumstances, including:

- [failure to file a certificate of merit in an action against an architect, professional engineer, or land surveyor](#)
- [failure to file a certificate of attempted alternative dispute resolution in an action to enforce common interest development covenants and restrictions](#)
- [pleading evidentiary facts or conclusions of law](#)²¹⁴

²¹⁰ *Garcia v. Sterling*, 176 Cal. App. 3d 17, 21, 221 Cal. Rptr. 349, 352 (1985).

²¹¹ EVID. CODE §§ 452, 453.

²¹² CODE CIV. PROC. § 437(b).

²¹³ *Vesely v. Sager*, 5 Cal. 3d 153, 168, 486 P.2d 151, 162, 95 Cal. Rptr. 623, 634 (1971).

- pleading facts contradicted by facts recited in an instrument incorporated in the pleading by reference
- a prayer for a specific amount of damages in an action for personal injury or wrongful death
- failure of the plaintiff to sign the complaint
- failure of the plaintiff to verify the complaint where required
- pleading superfluous facts to avoid defenses
- violation of the local rules of court
- attorney's failure to sign a motion
- punitive damages claims against a health care provider, filed without court permission
- punitive damages claims against religious corporations, filed without court permission

Motions to strike are allowed in municipal court actions only on the ground that the damage or relief sought are not supported by the allegations of the complaint.²¹⁵ Rule 1229(d) of the Rules of Court states that the provisions of the motion-to-strike statute²¹⁶ do not apply to family law matters. The effect of Rule 1229(d) is debatable, since the Rules of Court are binding on the courts only to the extent that they do not conflict with a statute.²¹⁷ Rule 1229 authorizes a motion to strike if the

²¹⁴ *But see* Perkins v. Superior Court, 117 Cal. App. 3d 1, 6–7, 172 Cal. Rptr. 427, 430 (1981) (conclusions of law not stricken when sufficient facts are alleged to support the allegation).

²¹⁵ CODE CIV. PROC. § 92(d).

²¹⁶ CODE CIV. PROC. § 435.

petition (or response) contains any matter not specifically required by the applicable Judicial Council forms.²¹⁸ The Rule 1229 motion to strike does not, however, extend the time within which to file a response.²¹⁹

➔ Pre-Filing Procedures—
Claims Arising from a
Person's Exercise of
the Constitutional Right
of Petition or Free
Speech

The Code of Civil Procedure provides for a special motion to strike causes of action arising from defendant's exercise of his right of free speech in connection with a public issue.

[B] Timing

The defendant may file a motion to strike the complaint or any part of the complaint within the time allowed to respond to the complaint.²²⁰ If the defendant files a motion to strike without demurring, the time to answer is extended and the plaintiff may not take the defendant's default.²²¹ The defendant's time to demur is not extended by the filing of a motion to strike,²²² so the defendant risks forfeiting

²¹⁷ Cantillon v. Superior Court, 150 Cal. App. 2d 184, 187–88, 309 P.2d 890, 892–93 (1957); see Wilburn v. Oakland Hosp., 213 Cal. App. 3d 1107, 1110–11, 262 Cal. Rptr. 155, 157–58 (1989) (RULES OF CT. 325(f), requiring a noticed motion in order to dismiss a complaint for failure to amend following the sustaining of a demurrer, invalidated because of conflict with CODE CIV. PROC. § 581(f)(2), which does not require a noticed motion).

²¹⁸ RULES OF CT. 1229(a).

²¹⁹ RULES OF CT. 1229(c).

²²⁰ CODE CIV. PROC. § 435(b)(1). The court may strike pleadings at any time in its own discretion. CODE CIV. PROC. § 436; Lodi v. Lodi, 173 Cal. App. 3d 628, 629, 219 Cal. Rptr. 116, 118 (1985). See generally ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:158–:158.1, :159–:166 (1996); 5 B.E. WITKIN, CALIFORNIA PROCEDURE, Pleading § 965 (3d ed. 1985).

²²¹ CODE CIV. PROC. § 435(c).

objections he might raise by special demurrer unless he demurs and moves to strike simultaneously. If the defendant demurs and moves to strike at the same time, he must notice the matters for hearing at the same time.²²³

[C] The Ruling

If the court grants a motion to strike, the court may order the plaintiff to file an amendment or amended pleading upon terms the court deems proper.²²⁴ The liberal rules governing [leave to amend](#) upon the sustaining of a demurrer apply as well to motions to strike.²²⁵

If the court denies the motion, the court must allow the defendant to [answer](#) the complaint.²²⁶

[D] Appellate Review

An order granting or denying a motion to strike is not an appealable order and may only receive direct review through a petition for a writ of mandate. An order granting a motion to strike a portion of a pleading but not striking the entire

²²² CODE CIV. PROC. § 435(d).

²²³ RULES OF CT. 329. Under the Los Angeles Superior Court local rules, the motion to strike must appear in a separate document from the demurrer, though a single memorandum of points and authorities may address both. LOS ANGELES SUPER. CT. R. 9.18(b). The plaintiff's notice of motion to strike the demurrer or a portion of the demurrer must be set for hearing with the demurrer. CODE CIV. PROC. § 435(b)(3).

²²⁴ CODE CIV. PROC. § 472a(d). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶¶ 7:197–:206 (1996).

²²⁵ *Grieves v. Superior Court*, 157 Cal. App. 3d 159, 168, 203 Cal. Rptr. 556, 561–62 (1984).

²²⁶ CODE CIV. PROC. § 472a(d).

complaint is subject to appellate review in an appeal from the final judgment in the action.²²⁷ If the court strikes the entire complaint or the only cause of action alleged against a defendant, either party may move the court for a judgment of dismissal,²²⁸ which is an appealable order.

²²⁷ CODE CIV. PROC. § 472c(b)(3). *See generally* ROBERT I. WEIL & IRA A. BROWN, JR., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:206a (1996).

²²⁸ CODE CIV. PROC. § 581(f)(3), (4); *Adohr Farms v. Love*, 255 Cal. App. 2d 366, 63 Cal. Rptr. 123 (1967).

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4
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5 _____ [name]

6
7

8 Superior Court of the State of California
9 County of _____

10

11 _____ [name] _____,) Case No.: _____
)
12 Plaintiff,) Demurrer by Defendant _____ to
) Plaintiff _____'s Complaint
13 v.)
) Date: _____
14 _____ [names] _____,) Time: _____
) Dept: _____
15 Defendants.) Trial Date: none
)
16 _____)

16

17 Defendant _____ hereby demurs individually and not jointly to Plain-
18 tiff _____'s Complaint on each of the following grounds:

19 Demurrer to Entire Complaint

20 1. Plaintiff's Complaint is uncertain because one cannot ascertain from
21 the Complaint whether Plaintiff is an individual, an unincorporated associa-
22 tion, a partnership, or a corporation.

23 Demurrer to Second Cause of Action (Prima Facie Tort)

24 2. Plaintiff's Second Cause of Action for "Prima Facie Tort" fails to
25 state facts sufficient to constitute a cause of action.

26 Dated: _____

John Hobart
Attorney for Defendant
[name]

27

28