

Case No.: 22-55085

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

VANESSA BRYANT, ET AL,

Plaintiffs/Appellees,

v.

SPORTS ACADEMY, LLC SPORTS ACADEMY / THE HARTFORD
ACCIDENT AND INDEMNITY COMPANY, Proposed: Plaintiff-in-Intervention,

Intervenor/Appellant,

v.

ISLAND EXPRESS HELICOPTERS, INC., ET AL,

Defendants/Third-Party Defendants/Appellees.

On Appeal from the United States District Court for Central California,
Los Angeles

Case Nos. 2:20-cv-08953-FMO-PVC; 2:20-cv-08954-FMO-PVC;
2:20-cv-08955-FMO-PVC; 2:20-cv-08956-FMO-PVC

Honorable Fernando M. Olguin

APPELLANT'S OPENING BRIEF

Barry W. Ponticello, Esq.
California Bar No. 159339
England Ponticello & St.Clair
701 B Street, Suite 1790
San Diego, CA 92101
Tel: (619) 255-6450
bponticello@eps-law.com

Attorneys for Appellant
Sports Academy, LLC Sports Academy/
The Hartford Accident & Indemnity
Company

DISCLOSURE STATEMENT

Sports Academy, LLC Sports Academy/The Hartford Accident & Indemnity Company (hereinafter “Appellant”) is not aware of any parent corporation or any publicly held company that owns 10% or more of its stock.

Date: April 20, 2022

ENGLAND PONTICELLO & ST.CLAIR

s/Barry W. Ponticello

Barry W. Ponticello

Attorneys for Appellant

SPORTS ACADEMY, LLC SPORTS

ACADEMY/THE HARTFORD

ACCIDENT & INDEMNITY COMPANY

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INTRODUCTION

The California workers' compensation statutory scheme, including California Labor Code §§ 3850, *et seq.*, provides for third party actions resulting from workplace injuries, including that of the employee and the recovery of workers' compensation benefits and other damages caused by third-party tortfeasors¹. The California statutory scheme governing workplace injuries was enacted with a statutory right of reimbursement, mandatory (not permissive) intervention, and "a clear legislative policy militating in favor of reimbursement whenever possible". (*Gapusan v Jay*, 66 Cal.App.4th 734 (1998).) The District Court's denial of this mandatory intervention here was an abuse of discretion and error.

The underlying civil case arises out of a fatal helicopter accident that occurred on January 26, 2020, in Calabasas, California. At the time of the incident, Christina Mauser (hereinafter "Decedent"), a passenger on the ill-fated flight, was in the course and scope of her employment as a basketball coach with Sports Foundation, LLC. At the time of the incident, Sports Academy Foundation, LLC

¹ Case law and Labor Code § 3850 alternately refer to this party as employer, insurer, or workers' compensation benefit provider. These descriptions will be used herein to denote the party seeking reimbursement pursuant to Labor Code Section 3850, *et seq.*

was insured by The Hartford Accident & Indemnity Company for workers' compensation coverage (hereinafter "Hartford").

Sports Academy, LLC Sports Academy is the umbrella company under which several other entities are organized, which were insured for workers' compensation benefits by Hartford. Included under the Sports Academy, LLC umbrella was Sports Academy Foundation, LLC dba Mamba Sports Academy dba Mamba. As a result of the fatal helicopter crash, Hartford became obligated to and continues to pay workers' compensation benefits, including funeral and burial costs, and death benefits. Subsequent to the events in this case, Mamba Sports Academy dba Mamba was transferred out from under the Sports Academy, LLC Sports Academy umbrella.

JURISDICTIONAL STATEMENT

On December 16, 2021, the U.S. District Court for the Southern District of California denied Appellant's Motion for Reconsideration of the District Court's denial of Appellant's Motion for An Order Granting Leave to File a Complaint-in-Intervention. [1-ER-002-004.] Appellant timely filed this appeal pursuant to Federal Rule of Appellate Procedure Rule 4. Pursuant to 28 U.S.C. § 1346(b)(1), the lower court had jurisdiction because the U.S. Government was a defendant. A District Court's denial of a party's motion to intervene as of right is a final appealable order. (*United States v. Stringfellow*, 783 F.2d 821, 825 (9th Cir.

1985), cert. granted on other grounds, sub nom. *Stringfellow v. Concerned Neighbors in Action*, 476 U.S. 1157 (1986).) Pursuant to 28 U.S.C. § 1291, this Court has jurisdiction over this appeal from the District Court’s final decision denying Appellant’s statutory intervention into the underlying civil case.

STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the Addendum to this brief.

ISSUE PRESENTED

Whether the District Court erred in denying Appellant’s mandatory statutory intervention, sought pursuant to California Labor Code §§ 3850, *et seq.*

STATEMENT OF THE CASE

On January 26, 2020, Decedent was in the course and scope of her employment as a basketball coach for Sports Academy, LLC, Sports Academy dba Sports Academy Foundation, LLC dba Mamba Sports Academy dba Mamba (hereinafter “Sports Academy”) when she died in a fatal helicopter crash in Calabasas, California. [2-ER-022-023; 2-ER-040; 2-ER-089; 2-ER-107; 2-ER-201; 2-ER-215.] At the time of the incident, Sports Academy was insured for workers’ compensation coverage by Hartford. [2-ER-023; 2-ER-040; 2-ER-089; 2-ER-107; 2-ER-201; 2-ER-217.] As a result of Decedent’s death, Appellant was legally obligated to, and did, and continues to, pay workers’ compensation benefits on

behalf of Decedent and her heirs (*Mauser Plaintiffs*), including funeral and burial costs and death benefits, pursuant to the California Labor Code §§ 4700, *et seq.* [2-ER-023; 2-ER-040; 2-ER-089-090; 2-ER-107; 2-ER-201; 2-ER-217.]

The Mauser Plaintiffs initiated the underlying civil lawsuit in Los Angeles Superior Court against alleged negligent third parties. [2-ER-026; 2-ER-107; 2-ER-201; 2-ER-217.] When the United States was named as a defendant in the action, it removed the case to the Central District of California. [2-ER-026; 2-ER-107-108; 2-ER-121; 2-ER-201-203; 2-ER-217.] The party plaintiffs filed motions to remand the case back to Los Angeles Superior Court, which were ultimately denied. [2-ER-026; 2-ER-044; 2-ER-107-108; 2-ER-202; 2-ER-217.] During the pendency of this litigation, Appellant placed all known parties on notice of its statutory reimbursement claim and made clear to all parties its intent to intervene, once the jurisdictional issues were resolved. [2-ER-023-025; 2-ER-040-041; 2-ER-108; 2-ER-202.]

Appellant filed its Motion for Leave to Intervene on July 9, 2021. [Docket #78; 2-ER-097; 2-ER-189-259; 3-ER-391.] A number of Docket entries issued after Appellant filed its Intervention Motion, and before the Motion was decided, including a Scheduling and Case Management Order issued by Judge Olguin on July 20, 2021. [Docket #82; 3-ER-392.] On July 23, 2021, the United States opposed the Motion to Intervene, noting that following the Consolidated

Complaint, there remained no operative pleadings against the United States and nothing upon which to intervene. [Docket #85; 2-ER-168-169; 3-ER-392.] No other party opposed the Intervention.

The Motion to Intervene was set for hearing on the Court's Calendar, but the District Court, in Docket #92 [3-ER-393], took the hearing off calendar *sua sponte* on August 9, 2021. On October 29, 2021, Appellant filed an Ex Parte Application to Expedite Court's Ruling on Motion to Intervene. [Docket #107; 2-ER-078-143; 3-ER-394-395.] The District Court issued its Order Denying Motion to Intervene on November 10, 2021. [Docket #118; 1-ER-005-007; 3-ER-393.] A Motion for Reconsideration [Docket #120; 2-ER-009-077; 3-ER-396] was filed, which was denied on December 16, 2021 [Docket #126; 1-ER-002-004; 3-ER-396.]

At the time of Appellant's Motion for Leave to Intervene, no dismissal had been requested by the parties in this case. The Order Dismissing Action was issued December 28, 2021. [Docket #139; 3-ER-397], with an amended Order Dismissing Action dated January 3, 2022. [Docket #140; 3-ER-397.]

SUMMARY OF THE ARGUMENT

The California workers' compensation statutory scheme, codified as to third party claims in California Labor Code §§ 3850, *et seq.* creates a statutory subrogation right for a workers' compensation benefit provider to recover obligatory workers' compensation benefits and related payments made because of

a tortious responsible third-party. The workers' compensation laws "spread the cost of industrial injuries to goods and services...increases industrial safety."

(*Fremont Comp. Ins. Co v. Sierra Pine*, 121 Cal.App.4th 389 (2004).) A worker, or his or her heirs, may bring an action against a responsible third party. (Cal. Lab Code §§ 3850, *et seq.*) Likewise, a workers' compensation benefit provider who has become obligated to pay workers' compensation benefits and other amounts may bring a lawsuit to recover those amounts against a responsible third-party to recover the benefits paid. (Cal. Lab. Code § 3852.)

As to intervention, where the injured worker and workers' compensation benefits provider bring two separate lawsuits, the cases "shall" be consolidated. (Cal. Lab. Code § 3853.) In fact, "the employer has an absolute right to intervene in any action brought by the employee against a third party tortfeasor..." (*Tate v. Superior Court*, 213 Cal.App.2d 238, 244 (1963)). If either the worker or workers' compensation benefit provider are aware of ongoing litigation against a third party and intend to seek damages from that third party, they are therefore constrained to intervene in the already ongoing action-as opposed to filing a separate action. Here, because the Mauser Plaintiffs (to whom workers' compensation payments have been and are ongoing) had already filed a lawsuit, it was mandatory for Appellant, who was aware of the action, to intervene to seek their damages against the same third parties, as opposed to filing a separate lawsuit. The District Court

erred in not considering this statutorily granted reimbursement right a substantive right.

Appellant appropriately and timely sought this statutory reimbursement. A workers' compensation benefit provider may intervene in an injured worker's pending lawsuit "at any time before trial on the facts . . ." (Cal. Lab. Code § 3853, emphasis added.) An employee may settle his claim against a third party "subject to the employer's right to proceed to recover compensation he has paid." (Cal. Lab. Code § 3859, emphasis added.) For a settlement to be valid, notice of settlement must be provided to the employer to allow "opportunity to the employer to recover the amount of compensation he has paid or become obligated to pay . . ." (Cal. Lab. Code § 3860, emphasis added.)

Reading the foregoing together, the California Legislature created a substantive right for the workers' compensation benefit provider to intervene in an injured worker's pending lawsuit at any time before trial on the facts to assert its subrogation interests. The California Legislature specified the time for an employer to intervene in an injured workers' civil lawsuit against negligent tortfeasors even where a settlement between the parties has been reached. The California Labor code statutorily creates a substantive right to intervene at any time before trial on the facts and any denial of this right impedes a workers' compensation benefits provider's ability to pursue its claims.

Appellant, after previously giving notice to all parties, sought intervention on July 9, 2021. The District Court took no action until November 10, 2021. Had the District Court noted the statutory, substantive right, as well as the timely intervention in keeping with the statutory and legislative policy (and had not cancelled the hearing *sua sponte*), the employer's rights could have been addressed as required under the California statutory scheme. By delaying decision, and ultimately denying intervention, Appellant's rights were improperly impeded.

While Appellant asserts that statutory worker's compensation benefit reimbursement via intervention is a substantive right, even assuming, *arguendo*, intervention before trial is a procedural issue and Federal Rule of Civil Procedure Rule 24(a) applies, intervention was still timely and should have been permitted. Under FRCP Rule 24(a), intervention as of right requires: (1) the applicant must timely move to intervene; (2) the applicant must have a significantly protectable interest relating to the property or transaction which is the subject of the action; (3) applicant must be so situated such that the disposition of the action may impair or impede the party's ability to protect that interest; and (4) the applicant's interest must not be adequately represented by existing parties. (*Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003))

The District Court abused its discretion in finding Appellant untimely sought intervention. In determining the timeliness of intervention in federal court, a

district court must weigh the following factors: (1) the stage of proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of delay. (*County of Orange v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986).) “Mere passage of time alone is not determinative.” (*Id.*) Here, the District Court did not appropriately weigh the necessary factors, even in using the indicated standard. It improperly focused on the timing of the Motion to Intervene related to the date the Mauser Plaintiffs filed their lawsuit. [1-ER-006.]

Instead, per *County of Orange v. Air California*, the District Court should have considered the following: (1) the jurisdictional issues had resolved less than two months prior to the filing of Appellant’s Motion to Intervene, and no trial date had been set at that point; (2) Appellant had placed the known parties on written notice of its intent to intervene as of January 5, 2021, with the remaining plaintiffs² put on notice of Appellant’s intent to intervene as of June 3, 2021; (3) Appellant’s claims would not broaden the damages being sought against the defendants as they are a subset of the total damages; (4) no prejudice exists to the parties as they were all on notice before any settlement was reached; and (5) Appellant’s timing of seeking intervention, when it was aware no trial date had yet been set-and was sure

² The remaining Plaintiffs, Vanessa Bryant, on her own behalf and on behalf of the Bryant Minor Plaintiffs, James Altobelli, on his own behalf and on behalf of the Altobelli Minor Plaintiff, and Christopher Chester, on his own behalf and on behalf of the Chester Minor Plaintiffs, were put on notice due to the consolidation on cases but were not interested parties for purposes of Appellant’s subrogation action.

to place all parties on notice, was occasioned by its intent to intervene after the jurisdictional issues were resolved, to avoid having to intervene a second time – once in federal court and once if the matter was remanded back to state court. Based on the foregoing, all timeliness factors militated in favor of allowing intervention. Accordingly, the District Court abused its discretion in not permitting the statutorily sought intervention.

Further, the District Court erred in finding that the disposition of the action would not impair or impede Appellant’s ability to protect its subrogation interests. The Court noted that even if a lawsuit affects a proposed intervenor’s interests, those interests may not be impaired if the proposed intervenor has other means to protect them. (*State ex rel. Lockyer v. United States*, 450 F.3d 436, 442 (9th Cir. 2006).) Here, that is not the case.

Appellant learned through informal attorney communications that the settlement between the third-party defendants and the Mauser Plaintiffs was believed to be non-segregated, meaning the Mauser Plaintiffs’ settlement ***included*** the workers’ compensation benefit provider’s claims. This has been confirmed through Superior Court filings by Island Express Helicopters, Inc., Island Express Holdings Corp., and O.C. Helicopters, which allege that a settlement agreement between the Mauser Plaintiffs and Defendants required the Mauser Plaintiffs to

satisfy any and all liens, and in particular workers' compensation payments, arising out of the January 26, 2020, fatal helicopter crash.³

An employee's non-segregated third-party workplace injury settlement invokes California Labor Code § 3859(a), which requires the written consent of the workers' compensation benefit provider for an employee's settlement to be valid. The Mauser Plaintiffs did not seek, nor obtain Appellant's consent to settlement. The settlement at issue occurred in the Federal Court action. Addressing whether the settlement should be set aside per California Labor Code §3859 arises from this Federal case, and hence this appeal. Appellant brought the non-segregated settlement issue to the District Court's attention in its Motion for Reconsideration, but the District Court failed to address this issue in its December 16, 2021, Order Denying Motion for Reconsideration. [1-ER-002-004.]

Appellant has no alternate forum to pursue the rights addressed herein because Appellant cannot separately bring a Federal lawsuit as it has asserted no claims against the United States, and understands that a settlement approved by a Federal Court may not be able to be set aside by a state court in any state action,

³ The underlying fatal helicopter accident occurred on January 26, 2020. Faced with an expiring statute of limitations of January 26, 2022, and the pending appeal, Appellant filed a subrogation action in the Los Angeles Superior Court, Case No. 22STCV00080. Appellant does not seek both a federal and state court action arising from this situation, but filed the state court action to preserve its rights and interests due to the expiring statute of limitations and the current status of the denied federal intervention, the subject of this appeal.

thus necessitating intervention in this action. Once again, had Appellant been allowed to intervene, it would have been a party to the action and these issues could have been addressed before any finality of settlement attempts. Because Appellant was denied leave to intervene in the underlying federal lawsuit, its rights were sufficiently impaired and impeded.

Finally, the District Court's denial of Appellant's mandatory right to intervene in the underlying civil lawsuit abridged Appellant's statutory right to intervene and resulted in additional burdensome litigation contrary to the purpose of Chapter 5 of the California Labor Code. Pursuant to the Rules Enabling Act, the Federal rules of procedure "shall not abridge, enlarge or modify any [state] substantive right." (28 U.S.C. § 2072(b).) The California workers' compensation subrogation statutory scheme was enacted to avoid double recovery by an employee who receives workers' compensation benefits and sues a third-party tortfeasor for the same injuries and damages. (*Abdala v. Aziz*, 3 Cal.App.4th 369, 376 (1992).) "[T]he statutory scheme assures that the employer, not the employee, shall, at least ultimately, be entitled to recover the value of those benefits from the tortfeasor." (*Id.*) The California workers' compensation statutes:

seek to insure, first, that, regardless of whether it is the employee or the employer who sues the third party, both the employee and employer recover their due, and, second, that, as far as possible, the third party need defend only one lawsuit." (*County of San Diego v. Sanfax Corp.*, 19 Cal.3d 862, 872 (1977).)

The District Court's denial of Appellant's motion to intervene abridged Appellant's absolute right to intervene in the Mauser Plaintiffs' pending lawsuit and is contrary to California's public policy as stated. As a result of the denial, Appellant's ability to address its statutory rights has been impeded and the third-party defendants, who did not oppose Appellant's Motion to Intervene, are now having to defend a separate action. Accordingly, the District Court's denial of Appellant's intervention is contrary to California public policy.

STANDARD OF REVIEW

This appeal is from denial of a Motion for Reconsideration of the District Court's denial of Appellant's Motion for Leave to File a Complaint-in-Intervention which the District Court determined: (1) the motion to intervene was untimely; and (2) Appellant failed to show disposition of the action would impair its ability to protect its interests. [1-ER-002-007.] The standard of review related to timeliness is for abuse of discretion. (*NAACP v. New York*, 413 U.S. 345, 365-66 (1973); *Orange County v. Air California*, 799 F.2d 535, 537 (9th Cir. 1986), cert. denied sub nom. *City of Irvine v. Orange County*, 480 U.S. 946 (1987). The standard of review for a District Court denial of a party's motion to intervene as of right is *de novo*. (*United States v. Stringfellow*, *supra*, 783 F.2d at 825.)

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ARGUMENT

I. Pursuant to the California Workers' Compensation Statutory Scheme, Employer Intervention to Seek reimbursement Before Trial on the Facts is A Substantive Right

The District Court erred in finding that Federal Rule of Civil Procedure Rule 24(a) governed the benefit provider's reimbursement attempts, while dismissing the effect and obligations of the California workers' compensation statutory scheme. The District Court erred in finding that Federal Rule of Civil Procedure Rule 24(a) governs in this case and disregarded California Labor Code § 3853. The District Court noted that a federal procedural rule answering a question in dispute governs over a conflicting state law unless the federal rule "exceeds statutory authorization or Congress's rulemaking power." (1-ER-003, citing *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 410 (2010).) Pursuant to the Rules Enabling Act, the Federal rules of procedure "shall not abridge, enlarge or modify any [state] substantive right." (28 U.S.C. § 2072(b).) Here, Federal Rule of Civil Procedure Rule 24(a) does not answer the same question as California Labor Code § 3853. Interpreting California Labor Code § 3853 as a procedural question ignores the remainder of the workers' compensation subrogation statutory scheme and the absolute right to intervention created by the California Legislature.

Appellant seeks reimbursement for payments made pursuant to the California legislatively enacted statutory scheme. This statutory scheme sets forth the rights and obligations of both employers and employees in workplace injury scenarios, including as to third party damage pursuit. In setting forth these rights and obligations as to third party claims, the Legislature has delineated the employer rights as substantive.

Further, the purpose of the California statutory scheme is meant to ensure that nothing inhibits a benefit provider's reimbursement pursuit:

Where an employer is required to provide benefits to an employee for injuries caused by a third party's negligence, the statutory scheme assures that the **employer**, not the employee, shall, at least ultimately, be entitled to recovery the value of those benefits from the tortfeasor. (*Abdala v Aziz, supra*, 3 Cal.App.4th at 376, emphasis added.)

There exists "a clear legislative policy militating in favor of reimbursement whenever possible". (*Gapusan v Jay, supra*, 66 Cal.App.4th at 741.)

The Courts have also identified the policy considerations underlying those activities and results to be avoided:

The policy underlying [these statutory provisions] is avoidance of double recovery by the employee who elects to claim benefits under the Labor Code and also seeks compensation for his or her injuries from a negligent third party. (*Duncan v. Wal-Mart Stores, Inc.*, 18 Cal.App.5th 460, 469 (2017), citing *Abdala, supra*, 3 Cal.App.4th at 376.)

An employee is not allowed to manipulate the employer’s reimbursement rights, as this would “undermine the system created by the Legislature.” (*Duncan, supra*, 18 Cal.App.5th at 472.) The governing statutes were enacted to ensure both the injured worker and the employer have full opportunity to seek recovery of their damages from responsible third parties. Substantive rights were set forth to achieve these policy goals through various requirements, including mandating intervention when either the injured worker or the employer initiates a third-party civil lawsuit without the other. With all the above in consideration, the California Legislature granted the workers’ compensation benefit provider a primary right of recovery from third-party tortfeasors – a substantive grant – with a policy favoring reimbursement “whenever possible.”

In California, an “employer has an absolute right to intervene in any action brought by the employee against a third party tortfeasor” (*Duncan v. Wal-Mart Stores, Inc., supra*, 18 Cal.App.5th at 468.) “Substantively, as well as procedurally, employer and employee actions are interchangeable: regardless of who brings the action, it is essentially the same lawsuit.” (*County of San Diego v. Sanfax Corp.*, 19 Cal.3d 862, 847 (1977).) As noted by the Central District of California, a workers’ compensation benefit provider may join an injured worker’s pending lawsuit as a party plaintiff at any time before trial. (*Popovich v. United States*, 661 F.Supp. 944, 947 (C.D. Cal. 1987).)

As applied by the District Court in this case, Rule 24(a) abridges Appellant's absolute right to intervene. By applying Rule 24(a) and the test for intervention as of right, the District Court ignored the California Legislature's explicit intent to ensure an employer has the ability to recover the workers' compensation benefits and other payments it has made from responsible negligent third parties and impedes Appellant's absolute right to intervene in a pending action brought by an injured worker.

The District Court's denial of Appellant's Motion to Intervene and subsequent Motion for Reconsideration ignores the overall statutory scheme requiring valid settlements be subject to the employer's right to intervene. (Cal. Lab. Code §§ 3852, 3859, and 3860.) The legislative intent and policy purpose has been oft repeated – nothing should frustrate the employer's ability to seek to recovery from negligent third parties, of which notice of any non-segregated settlement and an opportunity to recover is required, with the opportunity to intervene in a pending lawsuit. The California Legislature accomplished this goal by requiring a settling injured worker to provide notice of settlement to the employer and allowing intervention "at any time before trial on the facts." (Cal. Lab. Code § 3853; see also *Mar v. Sakti International Corp.*, 9 Cal.App.4th 1780,1789-90 (1992).)

By finding Rule 24(a) as dispositive and disregarding the California statutory scheme, the District Court abridged Appellant's substantive statutory right to seek recovery, which includes intervening at any time before trial. Accordingly, the District Court's denial of Appellant's Motion to Intervene and Motion for Reconsideration should be overturned.

II. Employer Intervention in a Pending Third-Party Workplace Civil Lawsuit is Mandatory Under California Law

In California, an injured employee and workers' compensation benefit provider must proceed in a single lawsuit against third-party tortfeasors. As to intervention, where the injured worker and workers' compensation benefits provider bring two separate lawsuits, the cases "shall" be consolidated. (Calif. Labor Code § 3853.)

Here, Appellant was aware of the Mauser Plaintiffs' pending lawsuit against the third-party defendants. Had Appellant not known of the Mauser Plaintiff action and instead brought its own, separate action, it would have been required to consolidate that action with the pending Mauser Plaintiff action. However, because Appellant knew of the pending action, Appellant was required to intervene. Appellant's intervention was not a tactical choice; it was mandated by the California Legislature.

Part of this legislative purpose exists so that defendants are required to defend only one matter. (*County of San Diego v. Sanfax Corp.*, *supra*, 19 Cal.3d

862.) It also exists so that the benefits provider can seek their full reimbursement, including when they are put on notice of settlement and/or approval is sought. By finding this was not a mandatory statutory right to intervene at any time before trial, the District Court erred in denying Appellant's mandatory intervention in the Mauser Plaintiff's pending lawsuit.

III. The District Court Abused Its Discretion in Finding Appellant's Motion for Leave to Intervene was Untimely

Appellant asserts that Labor Code §§ 3850, *et seq.* governs their rights as to intervention. The District Court relied upon Federal Rule of Civil Procedure Rule 24(a). As set forth below, under either standard, Appellant was timely in seeking intervention.

a. The District Court Abused Its Discretion Because Intervention Was Timely Pursuant to California Labor Code § 3853

To prevent a double recovery by an injured worker and to protect the interests of an employer/benefit provider, California Labor Code § 3853 specifically allows for intervention “at any time before trial on the merits” As noted above, the California workers' compensation statutory scheme specifically provides for notice of settlement by either the injured worker or the employer/benefit provider to allow the other to assert its rights by intervening in the pending lawsuit. (Calif. Labor Code §§ 3852, 3859, and 3860.)

Here, the case was originally filed in Los Angeles Superior Court. [2-ER-026; 2-ER-107; 2-ER-201; 2-ER-217.] Once the U.S. Government was named as a defendant, the case was removed to the Central District of California. [2-ER-026; 2-ER-102-108; 2-ER-121; 2-ER-201-202; 2-ER-217.] Several parties filed motions to remand the case back to the Superior court, which were denied. [2-ER-026; 2-ER-044; 2-ER-107-108; 2-ER-206; 2-ER-217.] After advising all parties of its intent to intervene, Appellant was in discussions with the Mauser Plaintiffs' counsel through this process and was told to hold off intervening until the jurisdictional issues were resolved. [2-ER-026-027; 2-ER-043-044; 2-ER-108; 2-ER-202; 2-ER-217-218; 2-ER-222; 2-ER-235-237.]

Once the District Court denied the motions to remand, Appellant filed the Motion for Leave to Intervene in the pending lawsuit. [Docket # 78; 2-ER-189-259; 3-ER-391-392.] At the time of Appellant's Motion, no trial date had been set, no trial on the facts had commenced, and no dismissal had been sought or ordered. Accordingly, Appellant's Motion to Intervene was timely pursuant to California Labor Code § 3853.

b. The District Court Abused Its Discretion; Intervention Was Timely Pursuant to Federal Rule 24(a)

Assuming, *arguendo*, Federal Rule of Civil Procedure Rule 24(a) governs this case, the District Court still abused its discretion. Intervention as of right is timely under Federal Rule of Civil Procedure Rule 24(a), when Appellant shows:

(1) the move to intervene was timely; (2) Appellant had a significantly protectable interest relating to the property or transaction which is the subject of this action; (3) Appellant was situated such that disposition of the action may impair or impeded its ability to protect that interest; and (4) Appellant's interest must not have been adequately represented by existing parties.⁴ (*Arakaki v. Cayetano*, 324 F.3d 1078, 1083 (9th Cir. 2003))

In evaluating whether an intervention pursuant to Federal Rule of Civil Procedure Rule 24(a) was timely, the District Court was required to weigh the following factors: (1) the stage of proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of delay. (*County of Orange v. Air California, supra*, 799 F.2d 535 at 537.) “Mere lapse of time is not determinative.” (*Id.*) Under federal law, “[t]he timeliness requirement for intervention as of right should be treated more leniently than for permissive intervention because of the likelihood of more serious harm.” (*Id.* at 552.) Weighing of the aforementioned factors, as the District Court was required to do, results in the conclusion that Appellant’s Motion to Intervene was timely.

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⁴ The district court’s Order denying intervention focused on requirements (1) and (3), timeliness and impairment. Accordingly, this appeal solely focuses on these two requirements and believes the district court did not find against Appellant’s showing of requirements (2) and (4), significantly protectable interest and no adequate representation by existing parties.

i. Stage of proceeding at which Appellant sought to intervene

As a result of the jurisdictional issues between state and federal court, the pending lawsuit was only in its initial phases of litigation when Appellant sought to intervene. On June 9, 2021, the party plaintiffs filed a Consolidated Complaint for Damages and Demand for Jury Trial. [Docket # 71; 3-ER-391.] On June 22, 2021, less than three weeks later, the parties filed a Joint Notice of Settlement. [Docket # 72; 3-ER-391.] At the time Appellant filed its Motion for Leave to Intervene, the case was approximately 14.5 months old, and the filings in the case included motions for removal and remand between state and federal court and various Complaints and Answers by the party plaintiffs and defendants. [3-ER-374-391.] No defendant had answered the June 9, 2021, Consolidated Complaint for Damages and Demand for Jury Trial and no trial date had been set. (*Id.*) The early stage of the proceeding, especially in light of Appellant's notice to the parties of its intent to intervene, again demonstrates that Appellant timely moved for intervention.

The District Court's actions, or lack thereof, regarding the Motion to Intervene, also speaks to the timeliness of the intervention. Appellant sought Intervention on July 9, 2021. [Docket #78; 2-ER-093; 2-ER-189-259; 3-ER-391.] A number of Docket entries issued after Appellant filed its Intervention Motion, but before it was decided, including a Scheduling and Case Management Order

issued by Judge Olguin on July 20, 2021. [Docket #82; 3-ER-392.] The Motion to Intervene was set for hearing on the Court's Calendar on August 5, 2021 (later moved to August 12, 2021), but the District Court, in Docket #92 [3-ER-393], took the hearing off calendar *sua sponte* on August 9, 2021, without a decision or request for any additional briefing or information.

On October 29, 2021, when no ruling had yet issued, Appellant filed an Ex Parte Application to Expedite Court's Ruling on Motion to Intervene. [Docket #107; 2-ER-78-143; 3-ER-394-395.] The District Court issued its Order Denying Motion to Intervene on November 10, 2021. [Docket #118; 1-ER-005-007; 3-ER-395.] No explanation was set forth why the intervention request was not acted upon previously during the pendency of other case activities. Had the District Court noted the statutory, substantive right, as well as the timely intervention request in line with the statutory and legislative policy and granted intervention, Appellant's rights could have been addressed as required under the California statutory scheme (as well as in keeping with judicial efficiency) before dismissal was sought and entered. Instead, from July 9 through November 10, 2021, case activities were underway while Appellant was seeking to pursue their statutory rights in the case they were mandatorily required to join to seek reimbursement. Appellant had no means of discovery or other avenues to pursue their statutory reimbursement.

ii. No Prejudice to other parties

The prejudice inquiry looks at the prejudice which:

flows from a prospective intervenor's failure to intervene after he knew, or reasonably should have known, that his interests were not being adequately represented – and not from the fact that including another party in the case might make resolution more “difficult[.]” (*Smith v. L.A. Unified School District*, 830 F.3d 843, 857 (9th Cir. 2016)).

Here, Appellant notified of its reimbursement pursuit no later than January 5, 2021. [2-ER-023-024; 2-ER-040-041; 2-ER-108; 2-ER-202.] The interested parties, the Mauser Plaintiffs and the third-party defendants, were advised of Appellant's intent to intervene on or about January 5, 2021. [*Id.*] Counsel for the Mauser Plaintiffs was in communications with counsel for Appellant regarding intervention and/or a possible agreement with the Mauser Plaintiffs. [*Id.*] On June 3, 2021, Appellant gave notice to all parties, including the Mauser Plaintiffs and third-party defendants, of its intent to intervene in the lawsuit. [*Id.*] The timing of filing the Motion for Leave to Intervene was related to the delay in resolution of whether the case would remain in federal court or be remanded back to state court. If the matter was remanded, Appellant would intervene in state court, if it remained in federal court, it would intervene there, as it has attempted. With all parties on notice of the workers' compensation benefit providers reimbursement claim, there was no prejudice to any party as to the timing of seeking intervention. In fact, the

Mauser Plaintiffs were ones who requested that intervention be held off until the jurisdiction issue resolved.

Based on *Smith*, the inquiry is not whether resolution of the case would be more difficult; instead, the focus is on the prejudice which flows from the timing of the intervention. Here, there was no prejudice because all parties were on notice of Appellant's claims and intent to intervene, and the case was ongoing.

Additionally, Appellant's claims do not broaden the damages already sought by the Mauser Plaintiffs. Appellant's claims are for recovery of workers' compensation benefits and related payments and are a subset of the total tort damages. Appellant's damages are contained within the Mauser Plaintiffs' tort value. Because the damages sought by Appellant do not broaden the claims already being asserted against the third-party tortfeasors, and prevents double recovery, no prejudice results from the timing of Appellant's sought intervention.

iii. Reason for Intervention Timing

Appellant did not "delay" in pursuing its subrogation rights and seeking to intervene. The District Court erroneously found Appellant failed to explain the timing of its intervention motion. The Declaration of counsel submitted concurrently with and in support of Appellant's Motion to Intervene, explained the timing of the motion. Appellant's timing, as noted above. [2-ER-216-220.] On

July 9, 2021, Appellant filed the underlying Motion for Leave to Intervene.

[Docket #78; 3-ER-391-392.]

Appellant set forth that it was awaiting the resolution of the jurisdictional issues before proceeding with intervention in the pending action. Had the District Court granted the motions to remand, the Motion for Leave to Intervene would have been required to be filed in state court. Because the motions to remand were denied, Appellant was required to file its Motion for Leave to Intervene in federal court. Appellant was requested by the Mauser Plaintiffs' counsel to refrain from intervening until the District Court had issued its decision on the pending motions to remand. To avoid duplication, and in light of no trial date being set, it was reasonable for Appellant to hold off on seeking to intervene until the jurisdictional issues were resolved. Once resolved, Appellant pursued its mandatory intervention. Accordingly, the District Court abused its discretion in finding Appellant's intervention was untimely.

IV. The District Court Erred In Finding Disposition Of The Action Would Not Impair Appellant's Ability to Protect Its Interests

The District Court erred in finding Appellant did not meet its burden of showing its ability to protect its subrogation interests would be impaired or impeded by disposition of the action. Potential intervenors are required to show an unfavorable disposition of the pending litigation would result in the practical

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impairment of its interests. (*Arakaki, supra*, 324 F.3d 1078 at 1083.) However:

[i]ntervention as of right does not require an absolute certainty that a party's interests will be impaired . . . Rule 24 is invoked when the disposition of the action "may" practically impair a party's ability to protect their interest in the subject matter of the litigation . . . (*Citizens for Balanced Use v. Montana Wilderness Association*, 647 F.3d 893, 900, (9th Cir. 2011.)

As set forth in its pleadings, Appellant noted a number of reasons why intervention was necessary, including as to the concern of a non-segregated settlement. In California, "[n]o release or settlement of any claim under this chapter as to either the employee or the employer is valid without the written consent of both." (Cal. Lab. Code § 3859(a), emphasis added.) No release or settlement by an injured worker "is valid or binding as to any party thereto without notice" to the workers' compensation benefit provider, "with the opportunity to the workers' compensation benefit provider to recover" the amount of workers' compensation benefits paid to and on behalf of the injured worker. (Cal. Lab. Code § 3860(a).) In non-segregated settlements, the California rule against double recovery by an injured worker "prevents an employee from retaining third party damages except to the extent they exceed compensation benefits received by him." (*Van Nuis v. Los Angeles Soap Co.*, 36 Cal.App.3d 222, 230 (1973).)

A settlement without the consent of the workers' compensation benefit provider may be invalid per Labor Code §§ 3859 and 3860, making Appellant's

intervention in this matter necessary. Here, Appellant learned through informal discussions that the Mauser Plaintiffs' settlement with the third-party defendants may be non-segregated (later confirmed through Superior Court filings of Island Helicopters, Island Express Holdings Corp., and O.C. Helicopters, LLC). The Mauser Plaintiffs did not seek nor obtain Appellant's consent to settlement. As Appellant pointed out to the District Court in its Motion for Reconsideration, a financial stake or potential liability in or from a workers' compensation benefit provider's reimbursement claim derived from contract (here the Mauser Plaintiffs' settlement with the third-party defendants) may jeopardize, impair, and/or impede Appellant's subrogation rights.

The settlement at issue occurred in the Federal Court action and addressing whether the settlement should be set aside per Labor Code §3859 arises from this Federal case; hence, this appeal. Appellant brought the non-segregated settlement issue to the District Court's attention in its Motion for Reconsideration, but the District Court failed to address this issue in its December 16, 2021, Order Denying Motion for Reconsideration. [1-ER-002-004.]

Appellant has no alternate forum to pursue the totality of its rights because Appellant has asserted no claims against the United States, and understands that the issues involving this matter's settlement, approved by a Federal Court, may therefore need to be reviewed by the Federal Court, thus necessitating intervention

in this action. Once again, had Appellant been allowed to intervene, it would have been a party to the action and these issues could have been addressed before any case finality occurred. Because Appellant was denied leave to intervene in the underlying federal lawsuit, its rights were sufficiently impaired and impeded.

Appellant has noted the fact that after it became aware a tentative settlement had been reached, it had not been served with the unredacted settlement agreement between the Mauser Plaintiffs and the third-party defendants and thus the further need to intervene to protect its interests. [2-ER-030-034.] Appellant requested the settlement documents on several occasions so it could determine whether the proposed settlement between the Mauser Plaintiffs and the third-party defendants was segregated or non-segregated. To date, they have still not been received, although it is understood arguments may be made in reliance on such an unserved document. Addressing the terms of a document Appellant has not reviewed is not fully possible.

The District Court erred in finding Appellant has other means to protect its interests [1-ER-006-007] as addressing the validity of any non-segregated Federal Court approved settlement, including approval involving minors, would likely be within the Federal Court's province, as opposed to state court. Had the District Court granted Appellant's Motion to Intervene, Appellant would have been: (1) a party to the action and had access as a party to any settlement agreement that

affected their rights; and (2) able to evaluate whether the settlement was segregated or non-segregated and able to take action to address the issues and settlement validity before the settlement was concluded and paid. Thus, while courts have held that a potential intervenor's rights might not be impeded if it has other means to pursue its rights, Appellant herein has no complete means other than intervention to protect its rights *in this matter*. (*Lockyer, supra*, 450 F.3d 436 at 442.)

The District Court abused its discretion in finding the intervention untimely and erred in finding Appellant's rights would not be impaired or impeded by denial of the intervention motion. The District Court's denial of Appellant's Motion to Intervene should be overturned and Appellant should be allowed to intervene to pursue its subrogation rights, including as to any necessary actions relating to Labor Code §§ 3859 and 3860.

V. The District Court's Denial of Appellant's Substantive Mandatory Right to Intervene Resulted in Unnecessary Litigation and Prejudice to Appellant Contrary to Public Policy

The California workers' compensation statutory scheme serves a number of purposes including: (1) ensuring the workers' compensation benefit provider and employee recover just compensation from the responsible negligent party; and (2) the tortfeasor is confronted with only one action for the determination of all claims by the workers' compensation benefit provider and the employee. (*San Diego*

Unified Port District v. Superior Court, 197 Cal.App.3d 843, 847 (1988).) The dual purpose of the California Workers' Compensation Act is to: (1) ensure the workers' compensation benefit provider receives full reimbursement for the amount of benefits it paid to and on behalf of an injured employee; and (2) prevent an employee's double recovery for the same compensable injury. (*Van Nuis v. Los Angeles Soap Co.*, 36 Cal.App.3d 222, 229 (1973).) To accomplish these purposes, California Labor Code §§ 3859 and 3860 specifically require the injured employee to provide notice of settlement to the workers' compensation benefit provider to provide it with an opportunity to intervene after settlement is reached between the injured employee and the third-party tortfeasors.

Denial of Appellant's absolute right to intervene by characterizing § 3853 as procedural as opposed to substantive undermines the entire statutory scheme of California Labor Code §§ 3850, *et seq.* Specifically, viewing §3853 as only procedural ignores the intent to provide for an opportunity to a workers' compensation benefit provider to pursue its claim against the third-party tortfeasor in the pending lawsuit. This legislative intent is clear – the statutory scheme requires that the workers' compensation benefit provider receive notice of a settlement by an employee so that it can pursue its subrogation rights against the negligent defendant in the same lawsuit even after the injured worker and third-party defendants have reached a settlement.

The District Court's denial of Appellant's Motion to Intervene has frustrated the purpose underlying the California Workers' Compensation Act. Pursuant to California law, Appellant was mandated to intervene in the Mauser Plaintiffs' pending action. Appellant is not and has not been in possession of the relevant settlement agreement, and even if so, intervention would still be the required result. The District Court's error in denying Appellant's intervention in this case has resulted in prejudice to Appellant and additional, unnecessary litigation in both federal and state courts contrary to public policy.

For these reasons, the District Court's denial of Appellant's intervention should be overturned and Appellant should be granted its absolute right to intervene and pursue its subrogation rights in the Mauser Plaintiffs' lawsuit.

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CONCLUSION

Appellant respectfully requests this Court grant its Appeal and reverse the December 16, 2021, Order Denying its Motion for Leave to Intervene.

Date: April 20, 2022

Respectfully submitted,

ENGLAND, PONTICELLO & ST. CLAIR

BY s/Barry W. Ponticello

BARRY W. PONTICELLO
bponticello@eps-law.com
Attorneys for Appellant,
Sports Academy, LLC
Sports Academy/The Hartford
Accident & Indemnity Company

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

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Dated: April 20, 2022

Signature: s/Barry W. Ponticello
Barry W. Ponticello
Attorneys for Appellant
Sports Academy, LLC
Sports Academy/The Hartford
Accident & Indemnity Company

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk for the Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 20, 2022:

APPELLANT'S OPENING BRIEF

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 20, 2022

Signature: s/Barry W. Ponticello
Barry W. Ponticello
Attorneys for Appellant
Sports Academy, LLC
Sports Academy/The Hartford
Accident & Indemnity Company