PROPOSED TENTATIVE

On February 2, 2024, plaintiff Oak River Insurance Co. (administered by Berkshire Hathaway Homestate Companies) filed a complaint against defendants Lineage Logistics, LLC and Sure Fresh Produce, LLC, for reimbursement of workers' compensation benefits.

According to the complaint, Ernesto Flores was employed by Ice Refrigeration Services, Inc. (Ice Refrigeration), and plaintiff had issued a workers' compensation insurance policy to Ice Refrigeration. On March 8, 2022, Mr. Flores, during his employment with Ice Refrigeration, was working at defendants' property located at 1302 W. Stowell Road, Santa Maria; while using a rooftop access ladder to service the refrigeration system, Mr. Flores was seriously injured. According to the complaint, defendants "negligently maintained said access ladder and failed to provide adequate safety features and fall protection and failed to keep the area in safe condition, and warn against dangerous conditions where they were working such as to negligently cause a dangerous condition of the type of injury herein alleged when the property was used in due care in a manner in which it was reasonably foreseeable that it would be used." Plaintiff alleges that it paid Mr. Flores compensation payments under the workers' compensation policy for medical payments, and pursuant to Labor Code section 3852, it is "subrogated to the rights of the injured employee Ernesto Flores with respect to all payments made for medical and related expenses and for compensation payments awarded and to be awarded to Ernesto Flores up to the time of trial in this matter." Defendants filed a joint answer on May 24, 2024. In the answer, defendants raise as an affirmative defense, inter alia, Mr. Flores' own negligence as the cause of his harm. The next CMC hearing is scheduled for August 25, 2025.

On April 16, 2025, Mr. Flores filed a motion to file a complaint in intervention, under the authority of Labor Code[1] section 3853, which reads in full as follows: "If either the employee or the employer brings an action against such third person, he shall forthwith give to the other a copy of the complaint by personal service or certified mail. Proof of service shall be filed in such action. If the action is brought by either the employer or employee, the other may, at any time before trial on the facts, join as party or shall consolidate his action, if brought independently." On May 6, 2025, Mr. Flores filed an "Amended Exhibit A" to his motion, which contains the amended complaint in intervention he wishes to file. In the amended complaint he advances two causes of action against defendants Lineage Logistic, LLC, and Sure Fresh Produce, LLC – general negligence and premises liability. No opposition has been submitted as of this writing.

[1] All further statutory references are to the Labor Code unless otherwise indicated.

A) *Legal Background*

An employee injured in the course of employment is entitled to receive compensation (workers' compensation) benefits from his or her employer without regard to negligence. This recovery is the exclusive remedy as against the employer, but does not preclude suit by the employee against a negligent third party. Further, an employer may recoup the benefits it has paid to the employee by utilizing any of three different means: (1) a direct action against the third party (§ 3852); (2) as party or an intervenor in an action by the employee against the third party (§ 3853); or (3) as a lien claimant against the employee's recovery in an action against the third party. (§ 3856, subd. (b).) The term "employer" includes the employer's workers compensation insurance carrier. (*O'Dell v. Freightliner Corp*. (1992) 10 Cal.App.4th 645, 653.) It is clear that plaintiff Oak River Insurance Co. followed the first procedure by filing a direct action against defendants as alleged third-party tortfeasors. While the appropriate statute of limitations period (here, two years) governs both the employee's and employer's suit against a third party, an employer or an employee has the unconditional right to intervene in the other's lawsuit "at any time prior to trial on the facts," and thereby avoid the statute of limitations bar. (*Ibid;* see *Roski v. Superior Court* (1971) 17 Cal.App.3d 841, 844 [employee entitled to intervene after expiration of statute of limitations timely brought by insurance carrier so long as that action remained pending].) As observed in *Jordan v. Superior Court* (1981) 116 Cal.App.3d 202, when an employer's (insurance carrier's) action is timely filed, the employee may intervene and press his complaint in intervention to recover damages for personal injuries, even though the employee does not appear and make such claim until after the statute of limitations period has expired. (Id. at pp. 206-207; *Home Ins. Co. v. Southern Cal. Rapid Transit District* (1987) 196 Cal.App.3d 522, 525 [*Jordan* and the earlier cases cited, *supra,* clearly establish that the right of employers and employees to intervene in each other's timely filed actions is not dependent upon their own compliance with the statute of limitations].) "Substantively, as well as procedurally, employer and employee actions are interchangeable: regardless of who brings an action, it is essentially the same lawsuit." (*County of San Diego v. Sanfax Corp.* (1977) 19 Cal.3d 862, 874; *Andersen v. Barton Memorial Hospital, Inc.* (1985) 166 Cal.App.3d 678, 684.) The right to intervene exists only so long as the underlying action has not been dismissed. (*Roski, supra,* at p. 844.)

The right to intervention (even when taking into consider the language of section 3853 that permits intervention "at any time before trial on the facts"), however, is *not* absolute. Code of Civil Procedure section 387, subdivision (b) obligates a court to grant intervention only "upon timely application." "While[] section 3853 provides [for] . . . an unconditional right to intervene [in an action] against a third party tortfeasor, Code of Civil Procedure section 387 provides the authorization and proper procedure for intervention in general. [Citation.] Whether intervention is permissive or mandatory, a petition to seek leave is required; without permission from the court, a party lacks any standing to the action. (*Ibid.*) A court must initially determine whether the petition is timely. (*Id.* at pp. 1783–1784.) This exercise of discretion is solely a judicial function. (*Lohnes v. Astron Computer Products* (2001) 94 Cal.App.4th 1150, 1153; see also

Sanders v. Pacific Gas & Elec. Co. (1975) 53 Cal.App.3d 661, 668 ["it is the general rule that a right to intervene should be asserted within a *reasonable time* and that the intervener must not be guilty of an *unreasonable delay after knowledge of the suit.*"].) Thus, "[t]imeliness . . . is one of the prerequisites for granting an application to intervene." (*Northern Cal. Psychiatric Society v. City of Berkeley* (1986) 178 Cal.App.3d 90, 109.) "[T]he question of delay. . . is a question of fact" (*In re Yokohama Specie Bank, Ltd.* (1948) 86 Cal.App.2d 545, 555), and "[w]hether in a particular case intervention should be allowed 'is best determined by a consideration of the facts of that case' [citation], and the decision is ordinarily left to the sound discretion of the trial court" (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 302).

B) Merits

The court makes three predicate observations before addressing the merits of Mr. Flores's motion to file a complaint in intervention. First, the statutory scheme makes it clear that the plaintiff, standing in the shoes of the employer via subrogation as the entity that initiated the lawsuit against the alleged third party defendant tortfeasors, was required to provide notice to Mr. Flores of the lawsuit (and to provide the court with proof of service of this notice). The statutory language mandates that the employer must "forthwith give" to the employee " a copy of the complaint by persona service or certified mail," and must file "proof of such service" with the court. (§ 3853; see *O'Dell, supra*, 10 Cal.App.4th at p. 654.) Mr. Flores does not explain how he was notified of the current lawsuit (Ms. Brenner's declaration is silent about the issue); more significantly, there is no proof of service in the register of actions indicating plaintiff served on Mr. Flores the complaint by certified mail or through personal service. Such notice must be formal, not informal. (*O-Dell, supra,* 10 Cal.App.4th at p. 656.) The plaintiff's failure to provide such notice clearly factors into the timeliness of the present motion, on omission inuring to Mr. Flores's benefit in that calculus.

Second, defendants in their answer raise the affirmative defense that Ice Refrigeration own negligence was responsible for causing Mr. Flores's injury, which by logic implicates Mr. Flore's own alleged negligent acts. This defense sets the stage for Mr. Flores's intervention, and is an obvious factor that also inures to benefit in whether to grant the motion.

Finally, no trial date has been set, and no opposition to Mr. Flores's motion has been filed (despite service of the present motion electronically on both all parties on April 16, 2025, meaning the hearing is timely today).

With this background, the court grants plaintiff's motion to file a complaint in intervention pursuant to section 3853 and Code of Civil Procedure section 387. There is no basis to conclude the motion was untimely, based on notice, and certainly no prejudice has been established. No due process rights have been violated, and under the circumstances, there is no likelihood that any party is hampered or precluded from discovery or harmed by the intervention. It is legally irrelevant that plaintiff filed this request outside the statutory of limitations based on

the accrual date of his injury, as plaintiff's lawsuit itself was timely filed, based on the authority identified above.

The court will deem the complaint in intervention filed today, and sign the "amended proposed order granting plaintiff's motion to intervene" submitted on May 6, 2025. The parties are directed to respond to the complaint in intervention within 30 days of today's hearing. The parties are directed to appear at the hearing in person or by Zoom.