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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

Judicial Council Coordination Proceeding
Special Title (Rule 1550(b))

FIREARMS CASES

Coordinated actions:

THE PEOPLE OF THE STATE OF CALIFORNIA, by and through San Francisco City Attorney Louise H. Renne, et al.

v.

ARCADIA MACHINE & TOOL, et al.,

THE PEOPLE OF THE STATE OF CALIFORNIA, by and through JAMES K. HAHN, City Attorney of the City of Los Angeles, et al.

v.

ARCADIA MACHINE & TOOL, et al.,

--[caption continues on next page]--

J.C.C.P. No. 4095

Superior Court of California, City and County of San Francisco No. 303753

Superior Court of California, County of Los Angeles No. BC 210894

Superior Court of California, County of Los Angeles No. BC 214794

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO ANDREWS' MOTION FOR JUDGMENT ON THE PLEADINGS

Date: To Be Determined
Time: 8:30 a.m.
Dept: 65
Judge: Hon. Vincent P. DiFiglia

THE PEOPLE OF THE STATE OF CALIFORNIA, ex rel. the County of Los Angeles, et al.

v.

ARCADIA MACHINE & TOOL, et al.,

I. INTRODUCTION

Defendant Andrews Sporting Goods, Inc., dba Turner Outdoorsman ("Andrews") has moved for judgment on the pleadings on several of the claims brought against Andrews. In essence, Andrews argues that only certain persons and governmental entities and/or certain attorneys for such governmental entities are authorized to bring actions on behalf of the people of the State of California, whether in the context of a public nuisance action or Business & Professions Code claim. For example, Andrews argues that only city attorneys and district attorneys, as opposed to county counsel, may bring public nuisance abatement actions on behalf of the people. Andrews also argues that certain public officials such as mayors and board of supervisor members are not natural persons and so are somehow barred from bringing an action on behalf of the general public under the Business & Professions Code.

Andrews arguments are without merit. First, Andrews has no standing to object to any claims by any plaintiffs in the San Francisco action, *People of the State of California, et al. v. Arcadia Machine & Tool, et al.*, No. 303753 (San Francisco Superior Court), because Andrews is not a party to that action. Second, counties, and their county counsel, may properly bring public nuisance claims. Third, public officials are not barred from bringing Business & Professions Code claims on behalf of the general public, and have previously done so. Fourth, to the extent that consent of the district attorney is required for certain city attorneys to file suit under section 17200 of the Business & Professions Code, such consent either exists or is forthcoming. As a result, there is no basis to grant any part of Andrews' motion for judgment on the pleadings, and plaintiffs respectfully request that the Court deny the motion.

II. ARGUMENT

A. Andrews Lacks Standing To Object To Any Of The Claims Brought In The San Francisco Complaint

Andrews lacks standing to object to any claims brought in the action on behalf of the northern California plaintiffs because Andrews is not named as a party in that complaint. *People of the State of California, et al. v. Arcadia Machine & Tool, et al.*, No. 303753 (San Francisco Superior Court) (the "San Francisco complaint"). Andrews apparently is aware of its

obvious lack of standing, but attempts to gloss over that fatal fact. *See* Andrews' Memorandum, at 1, n.1. Andrews acknowledges that it is not named in the San Francisco complaint, but vaguely states that "San Francisco nonetheless has treated ANDREWS as though it were part of its lawsuit. . . " Then Andrews seems to advise that "[r]egardless" of its lack of standing, it will include the San Francisco plaintiffs in its analysis. *Id.*

Because Andrews was not named in the San Francisco complaint, it lacks standing to challenge the pleadings filed in that action. As a result, Andrews' motion as it relates to any of the Northern California plaintiffs must be denied.[1]

B. The County Counsel of the County of Los Angeles May Bring a Public Nuisance Claim on Behalf of the People

As to the public nuisance claim, Andrews appears only to challenge the ability of the County Counsel of the County of Los Angeles to bring a public nuisance action on behalf of the people of the State of California. Andrews does not challenge the standing of any of the city attorneys in the Los Angeles complaint, No. BC 210894 (Los Angeles Superior Court), to bring a public nuisance claim. As to the County of Los Angeles' action, No. BC 213794 (Los Angeles Superior Court), Andrews does not contest the standing of the County of Los Angeles to bring a public nuisance action. Its objection is exclusively limited to whether the County Counsel of the County of Los Angeles, as opposed to the Los Angeles District Attorney, is an appropriate office to bring such an action. Andrews bases its argument that only the Los Angeles District Attorney may bring such an action on Code of Civil Procedure section 731, which states that a public nuisance action "*may* be brought" by the district attorney for the county. The question presented by Andrews' motion is whether section 731 actually *precludes* Los Angeles County Counsel from bringing such an action even when directed by the Board of Supervisors to do so. Plaintiffs respectfully submit that it does not.

[1] Although plaintiffs will not, in connection with this opposition memorandum, address specific issues relating to the Northern California plaintiffs because of Andrews' lack of standing to challenge the San Francisco pleadings, the reasoning set forth herein relating to the standing of government entities and offices applies with equal force to the various Northern California plaintiffs.

1. **County Counsel Have Authority to Bring All Civil Actions Concerning the County, Including Public Nuisance Actions.**

In its motion, Andrews virtually ignores the relationship between county counsel and the counties they represent. In fact, Government Code section 26529 makes clear that county counsel are directed to prosecute "*all* civil actions and proceedings in which the county . . . is concerned or is a party." This general authority is supplemented by Government Code section 27642, which provides that the county counsel "shall discharge all the duties vested by law in the district attorney other than those of a public prosecutor."

This authority is consistent with the Los Angeles County charter, which invests the Los Angeles County Counsel with the "exclusive charge and control of all civil actions and proceedings in which the county or any officer thereof is a party." (Los Angeles County Charter, section 21; Stats 1913, p. 1484.)

Although Government Code section 26528, like Code of Civil Procedure 731, provides that district attorneys *may* bring public nuisance actions on behalf of the people, that language clearly is not mandatory nor exclusive. The only way all of these statutes, as well as the Los Angeles County Charter, can be harmonized is to conclude that county counsel and district attorneys may each prosecute public nuisance actions concerning the county on behalf of the people. This interpretation is further reinforced by the mandatory language that is contained in the last clause of Code of Civil Procedure section 731, wherein the section explicitly provides that the district attorney "*must* bring such action whenever directed by the board of supervisors of such county" to do so. Absent such explicit direction from the board of supervisors, however, county counsel, which have authority to prosecute all civil actions, may bring such a claim.

Here, the Los Angeles Board of Supervisors directed its County Counsel, and not its District Attorney, to prosecute this nuisance action. *See* Exhibit A to Request for Judicial Notice. Because the Los Angeles County Counsel is vested with the authority to pursue all civil actions on behalf of or concerning the County, and because this nuisance action concerns the County, the Los Angeles Board of Supervisors properly directed its County Counsel to pursue this public nuisance action.

Further support for plaintiffs' position can be found in an Attorney General Opinion, attached as Exhibit B to Request for Judicial Notice, in which the Attorney General was asked by the Los Angeles District Attorney whether the District Attorney, as opposed to the Los Angeles County Counsel, was the proper officer to bring public nuisance actions on behalf of the people. 15 Ops. AG 231. The Attorney General concluded that the County Counsel was the proper party. In so finding, the Attorney General adopted the analysis set forth above. For example, the Attorney General first observed that the Los Angeles County Counsel was created by charter, and the charter expressly provides that the County Counsel shall have exclusive control and jurisdiction over all civil actions. Additionally, the Attorney General relied on Government Code section 26529, which makes clear that in counties having county counsel, such counsel perform *all* of the legal functions except to act as public prosecutor. As a result, the Attorney General concluded that the Los Angeles County Counsel had the authority to bring public nuisance actions on behalf of the people.

2. *Simpson* is Readily Distinguishable.

In support of its argument, Andrews relies heavily on *Board of Supervisors of Los Angeles County v. Simpson* (1951) 36 Cal.2d 671. In *Simpson*, the Court considered whether the Los Angeles District Attorney or Los Angeles County Counsel was the more appropriate office to abate a nuisance caused by a house of prostitution. Unlike here, however, the Los Angeles Board of Supervisors in *Simpson* had directed the Los Angeles District Attorney to bring the claim, and ultimately sought a writ to compel the District Attorney to bring suit. This fact is critical, as section 731 specifically provides that the district attorney "*must* bring such [public nuisance] action whenever directed by the board of supervisors to do so." As a result, the Court in *Simpson* simply followed the mandatory language in Code of Civil Procedure section 731. Here, however the Board of Supervisors directed County Counsel, and not the District Attorney, to bring suit. As a result, *Simpson* is readily distinguishable and certainly not controlling here.

Simpson is also readily distinguishable because the public nuisance in that case involved exclusively criminal conduct. In concluding that the District Attorney in *Simpson* should prosecute the nuisance claim, the Court relied heavily on the fact that houses of

prostitution are declared public nuisances and abatable by action of the district attorney by the California penal statute known as the Red Light Abatement Act, Penal Code § 11226. The Court found that "[t]he abatement of places under the Red Light Abatement Act is more appropriately the duty of the district attorney since it is compatible with his duties as a public prosecutor." *Id.* at 674. The Court opined:

> While actions to abate nuisances are considered civil in nature, the abatement of houses of prostitution is in aid of and auxiliary to the enforcement of the criminal law. . . . Each and every day a public nuisance is maintained is a separate offense and is a misdemeanor which it is the duty of the district attorney to prosecute by continuous prosecutions.

Id. at 674-75.

The Court's analysis therefore hinged on the fact that the nuisance to be abated exclusively involved exclusively criminal conduct and that the nuisance action was "in aid of and auxiliary to" the enforcement of the criminal law. In this regard, the Court extensively relied on *People v. Barbiere* (1917) 33 Cal. App. 770, which it quoted at length:

> 'The [Red Light Abatement] act, in other words, represents only the concrete application of the state's power of police, and, preferably to the courts of criminal jurisdiction, invokes the aid of the civil courts as the most certain instrumentality for the suppression of an evil which has been by the legislature deemed of so pernicious a nature, in its effect upon society, as to have actuated that body in denouncing its practice as a public crime.'

Simpson, *supra*, at 675.

After so quoting *Barbiere*, the Court concluded: "It follows from the foregoing that it is the duty of the district attorney rather than the county counsel to prosecute actions for abatement of houses of prosecution." *Id.* at 675.

Simpson therefore stands for the extremely limited proposition that the district attorney, rather than county counsel, is the proper office to prosecute public nuisance actions pursuant to the Red Light Abatement Act — when the board of supervisors has directed that the district attorney prosecute the action. *Simpson* does not stand for the far broader proposition that all public nuisances *must* be prosecuted *exclusively* by district attorneys, irrespective of whether the board of supervisors has directed the county counsel to act and irrespective of whether the

public nuisance involves conduct that is not exclusively criminal in nature. *See, e.g., Rauber v. Herman* (1991) 229 Cal.App.3d 942, 948 ("Primary responsibility for [prosecuting] non-criminal actions or proceedings [between the district attorney and county counsel] turns on whether they would be in aid of and auxiliary to the criminal law."). Not surprisingly, the court in *Rauber* described the holding of *Simpson* as being limited to the district attorney having "the responsibility to bring civil red-light abatement actions." 229 Cal.App. at 948.

Simpson is therefore readily distinguishable from the facts at issue here because in *Simpson* the Los Angeles Board of Supervisors had directed the District Attorney to act; the District Attorney declined to act; and the nuisance to be abated involved exclusively criminal conduct and therefore was in aid of and auxiliary to the criminal law. The Court's opinion was narrowly drawn, limited exclusively to nuisances under the Red Light Abatement Act and the Court essentially concluded only that the Los Angeles District Attorney lacked the discretion not to bring such a public nuisance action when directed by the Board of Supervisors to do so.

Andrews therefore seeks to read too much into the *Simpson* decision, basically ignoring the facts and the Court's analysis — as well as subsequent courts' interpretations — but instead only focusing on *Simpson*'s conclusion. Plaintiffs are not aware of any case that has ever held that county counsel cannot abate a public nuisance. For example, *People v. Parmar* (2001) 86 Cal.App.4th 781, the other case upon which Andrews relies, involves only the question whether a particular prosecutor can be disqualified in a criminal action, and is of no relevance here.

Plaintiffs have the better argument: either the district attorney or the county counsel may bring public nuisance actions on behalf of the people. Only where the board of supervisors directs the district attorney to do so — as in *Simpson* — must the district attorney do so, as set forth in Code of Civil Procedure section 731. And even in that context, when the district attorney is directed to bring such a claim, the Court's reasoning in *Simpson* would limit the exclusivity of the district attorney's obligation only to the abatement of nuisances that involve entirely criminal acts. *Simpson* therefore does not speak to the instant situation, where the Board directed County Counsel to act, and where the nuisance does not involve exclusively criminal

conduct. Here, the Government Code and Los Angeles Charter make clear County County's ability to prosecute a public nuisance claim on behalf of the people, particularly when directed by the Board of Supervisors to take such action, as was the case here.

For these reasons, plaintiffs respectfully submit that Los Angeles County Counsel may bring this public nuisance abatement action.

C. Plaintiffs Have Properly Pleaded Their Standing To Pursue Claims Pursuant To The Business & Professions Code

Andrews next argues that certain government officials and cities and counties named in the various complaints may not properly bring claims pursuant to Business & Professions Code section 17200 *et seq.* and section 17500 *et seq.* As to the section 17200 cause of action, Andrews' principal complaint is that persons who hold political office (whether as mayor, or a member of the board of supervisors) may not bring an action on behalf of the general public. Again, Andrews does not and cannot cite to a single case that stands for the proposition that someone who holds political office does not constitute a "person" under the Business & Professions Code. In fact, the common and accepted practice in California is that public officials, as persons, routinely bring actions on behalf of the general public.

City attorneys from the smaller cities concede that they need the consent of the district attorney to bring a section 17200 claim on behalf of the people of the State of California. Such formal approval either exists or is forthcoming. There is no question but that all city attorneys and county counsel may prosecute section 17500 claims, as section 17535 expressly provides for their standing to bring such claims.

1. Public Officials are "Persons"

Business & Professions Code section 17204 provides that "any person acting for the interests of itself, its members or the general public" may bring suit under the Unfair Competition Law. Section 17201 defines "person" to include "natural persons, corporations, firms, partnerships, joint stock companies, associations, and other organizations of persons." In the Los Angeles County action, No. BC 214794, three Los Angeles County Supervisors seek to bring the action on behalf of the general public. In the City of Los Angeles action, No. BC

210894, the mayors of West Hollywood and Inglewood also seek to bring suit on behalf of the general public.

Plaintiffs submit that the inclusion of these public officials as persons who may bring claims on behalf of the general public is consistent with the plain language of sections 17201 and 17204, which speak in terms of any "natural persons" being able to bring such a claim. Andrews seeks to invent a bar against such public officials bringing claims on behalf of the general public. But there is no such bar. Andrews purports to object to these persons (*e.g.*, mayors, members of boards of supervisors) filing suit on behalf of the general public because they are not expressly listed under section 17204 as among the public officials who may bring a claim "on behalf of the people of the State of California. However, claims on behalf of the "people" are admittedly different from claims brought on behalf of the "general public." Plaintiffs concede that mayors and board of supervisor members may not bring claims on behalf of "the people." The list of legal officers who may bring actions on behalf of "the people," as opposed to the "general public," includes only those *legal offices* that are able to prosecute legal claims, such as the office of the Attorney General, as well as the offices of the city attorney, county counsel, city prosecutor and district attorney. However, this listing of public legal offices with the ability to bring public lawsuits on behalf of the "people" does not speak to who is a proper "person" able to bring suit on behalf of the "general public."

Andrews' reference to the doctrine of *ejusdem generic* is therefore inappropriate. In section 17204, the Legislature plainly referred to the legal offices able to prosecute public lawsuits on behalf of the people. The Legislature also made explicit that persons could bring suit on behalf of the general public, and could not have defined the term person more broadly. Nowhere is person defined to exclude persons who hold an elected office.

As a result, it is not surprising that public officials have previously brought section 17200 actions on behalf of the general public. For example, in the tobacco litigation, then-Lieutenant Governor Gray Davis filed suit on behalf of the general public against the tobacco companies. *See, e.g., Davis, et al v. R.J. Reynolds Company, et al.*, No. 00706458 (San Diego Superior Court) (subsequently coordinated in *Tobacco Cases I*, J.C.C.P. No. 4041),

attached as Exhibit C to Request for Judicial Notice. Additionally, Board of Supervisors official Zev Yaroslavsky, who seeks to serve as a plaintiff on behalf of the general public in the instant case, also previously served as a plaintiff on behalf of the general public in a separate tobacco action pursuant to sections 17200 and 17500. *See, e.g., County of Los Angeles, et al. v. R.J. Reynolds Tobacco Company, et al.*, No. 707651 (San Diego Superior Court) (subsequently coordinated in *Tobacco Cases I*, J.C.C.P. No. 4041), attached as Exhibit D to Request for Judicial Notice. Here, the fact that the persons are members of a board of supervisors or serve as mayors is not relevant to the claims being asserted, as they are not alleging an injury that is specific to them in their official capacity. These people are bringing the action in their capacity as persons under section 17204, and bring the action on behalf of the general public in the same way that any private person may.

Andrews cannot cite to a single case that stands for the proposition that persons who happen to hold public office do not constitute persons under section 17204 and are therefore unable to bring suit on behalf of the general public. Andrews' citation to some loose language in Witkin is misplaced, *see* Andrews Mem. at 13, as the cases upon Witkin relies either involve whether public entities may be sued (as opposed to being able to sue) pursuant to 17203 or do not address whether a public official may bring a claim on behalf of the general public, as opposed to in the name of the people.

2. <u>Alternatively, Public Officials May Also Bring Suit On Behalf of the General Public As "Officers"</u>

In addition to authorizing any "person" to bring an action on behalf of the general public, section 17204 also authorizes any "officer" to bring such a claim. Section 17204 provides, ". . . or upon the complaint of any board, officer, person, corporation or association or by any person acting for the interests of itself, its members or the general public." To the extent that the term "person" somehow does not include those who hold elected office, then "officers" would include such individuals. As this language cannot be read as mere surplusage, a fair reading would include those publicly elected officers who seek to file suit on behalf of the general public.

For this reason, too, therefore, plaintiffs are convinced that public officials may bring suit on behalf of the general public. Andrews' reading of the statute ignores the plain meaning of "person," and also ignores the inclusion of "officers." Andrews' motion as it relates to the individuals who seek to file suit on behalf of the general public should be denied.

3. Smaller Cities as well as Counties Must Obtain The Consent of the District Attorney

Plaintiffs concede that city attorneys of the cities of West Hollywood, Compton and Inglewood do not have standing to bring an action under 17204 absent the agreement of the district attorney of that city. West Hollywood has received such consent. *See* Exhibit E to Request for Judicial Notice. The consent of the District Attorney for Compton and Inglewood is being sought.

D. Plaintiffs Have Sought Statutory Penalties under Section 17200 Only On Behalf of the Cities of Los Angeles and San Francisco.

Plaintiffs concede that only the cities of Los Angeles and San Francisco have standing to pursue penalties under 17200. The complaints are properly pleaded in this regard.

E. Plaintiffs Have Properly Pleaded Their Standing to Pursue Claims Pursuant to Section 17500.

The standing requirements for those who may bring claims on behalf of the people of the State of California is broader under section 17500 than under section 17200. For example, section 17535 makes clear that "[a]ctions for injunction under this section may be prosecuted by the Attorney General or any district attorney, county counsel city attorney or city prosecutor in this state in the name of the people of the State of California." As a result, each of the named county counsel and city attorneys may bring an action for injunctive relief under 17500. Additionally, although the same "persons" or "officers" that may bring an action on behalf of the general public under 17200 may also bring such an action under 17500, the mayors and board of supervisor members do not purport to bring such claims in the governing complaints.

Section 17536 makes clear that city attorneys and county counsel also may seek civil penalties for a violation of the statute.

As a result, the entities that seek to plead a claim under section 17500 — *i.e.*, the city attorneys in the City of Los Angeles action, No. BC 210894, and the County Counsel in the County of Los Angeles action, have standing to bring this action on behalf of the people of the State of California.

III. CONCLUSION

County Counsel of the County of Los Angeles, which has been directed by its Board of Supervisors to prosecute this action, has standing to do so. Public office holders such as mayors and supervisors constitute "persons" and/or "officers" who may bring actions pursuant to section 17204 on behalf of the general public. The standing requirements of section 17500 are also met. For these reasons, and as set forth more fully above, plaintiffs respectfully request that the Court deny Andrews' motion for judgment on the pleadings.

DATED: January 29, 2003

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