COURT OF APPEAL
STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____

Andrews Sporting Goods Inc. dba Turner's Outdoorsman

Petitioner,

vs.

Superior Court for the State of California, County of San Diego

Respondent,

The People of the State of California, *ex rel.* the County of Los Angeles, on behalf of itself and the general public, et al.

Real Parties in Interest.

From the Superior Court for San Diego County Hon. Vincent P. Di Figlia
JCCP NO. 4095
Superior Court of California City & County of San Francisco No. 303753
Superior Court of California County of Los Angeles No. BC210894
Superior Court of California County of Los Angeles No. BC214794

PETITION FOR WRIT OF MANDATE/PROHIBITION OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF C. D. MICHEL

STAY AND IMMEDIATE RELIEF REQUESTED

(Trial Date: April 25, 2003)

UNFAIR COMPETITION CASE

C.D. Michel - S.B.N. 144258
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ATTORNEYS FOR DEFENDANTS/PETITIONERS

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INTRODUCTION

Trial in this case is set for April 25, 2003; Immediate issuance of a temporary stay pending this Court's ruling on this petition is essential for the following reasons.

The hearing on the motion for judgment on the pleadings, the results of which are challenged herein by petitioners, occurred on February 28, 2003. Plaintiffs have not filed an order consistent with Respondent court's tentative ruling, as requested by Respondent. Petitioner, due to time constraints, has attached the tentative ruling as an exhibit hereto. Moreover, this petition has been delayed by the summary judgment motions heard in this action on March 7, 2003. Respondent had taken petitioner's motion under submission at that hearing and the final ruling was delayed due to Respondent's schedule and the breadth of the ruling (45 pages in length). The final "Ruling on Motions for Summary Judgment (7)" was not executed and filed until April 10, 2003. Thus, it was not until April 10 that petitioner's counsel learned that one of its two related defendants had been granted summary judgment and that the remaining defendant, petitioner herein, had been granted summary adjudication on one of the three claims against it. (See Declaration of Carl D. Michel, attached hereto, following the Memorandum of Points and Authorities.) This petition concerns Respondent's ruling, in excess of its jurisdiction, on one of those claims: public nuisance, pursuant to Code of Civil Procedure section 731.

At the hearing on February 28, 2003, Respondent denied, in part, Petitioner's Motion for Judgment on the Pleadings, wherein petitioner sought judgment against real party in interest, the County of Los Angeles

("the County"), on its defectively pled public nuisance claim, based on the County's failure to comply with the standing provisions of California Code of Civil Procedure section 731 ("Section 731"). Section 731 provides that actions to abate a public nuisance must be brought in the name of the People of the State of California ("the People") and thus, are the province of public prosecutors who represent the People, specifically, district attorneys and city attorneys. Petitioner seeks immediate confirmation from this Court that Section 731 means what it says, and that the California Supreme Court's holding in *Board of Sup'rs of Los Angeles County v. Simpson* (1951) 36 Cal.2d 671 [227 P.2d 14], interpreting the plain language of Section 731 to that effect, is still good law.

The issue of who has standing to bring a public nuisance abatement action is both important and urgent, as local governments increasingly seek to define, enact, and enforce social policies through judicial, rather than legislative, action, using public nuisance law as a means to regulate otherwise lawful business activity. The importance of enforcing this particular standing provision–aside from complying with the law–is that it places the duty to bring such actions in the hands of district attorneys and city attorneys who, in addition to being experienced prosecutors, are charged with "doing justice," whereas county counsel is a zealous advocate for the county–two very different mandates. Arguably, having abatement actions brought through public prosecutors charged with doing justice on behalf of the People, rather than the county counsel zealously representing their clients, will inject some level of restraint on county officials who feel compelled to use the courts to pursue their legislative agendas.

Resolution of this issue is urgent for several reasons. First, Respondent's ruling on Petitioner's motion for judgment on the pleadings is not an appealable order and the underlying trial is set for April 25, 2003. Second, both sides will, in all likelihood appeal the outcome of that trial. Proceeding through trial and the likely appellate process on a claim brought by a plaintiff who lacks standing would result in a substantial and needless waste of judicial resources, taxpayer funds, as well as Petitioner's time and money. Third, because the County's other claims (unfair business practices) rest largely on its public nuisance claim, the entire case could be tainted by the presence of the defective nuisance claim. Finally, over 40 defendants (all of whom were subject to public nuisance claims brought by the County) were dismissed from this action March 7, 2003, on motion for summary judgment. (Respondent did not address the standing issues in its summary judgment ruling, relying instead on lack duty and causation.) The County has indicated it will appeal that judgment. This appeal, too, will necessarily be compromised by the defectively pled nuisance claims.

Thus, it is imperative that this Court stay this action and resolve the standing issue before trial in this matter, if possible, and before the appellate court begins consideration of the County's anticipated appeal from the judgment against it concerning other defendants in the underlying action. Because lack of standing is a jurisdictional issue and may be raised at any time, a swift and unambiguous ruling from this Court, reaffirming the holding in *Simpson* and the plain meaning of Section 731, will spare all parties a second round of litigation and conserve limited judicial resources.

As discussed below, writ review of a denial of a motion for judgment on the pleadings is appropriate where the issue is purely legal, on undisputed facts, and of significant legal import. All these requirements are met in this case.

PETITION FOR WRIT OF MANDATE OR PROHIBITION

Petitioner alleges:

1. Petitioner, Andrews Sporting Goods, Inc., dba Turners Outdoorsman (hereinafter, "Andrews"), is, and at all times herein mentioned was, a corporation duly organized and existing under the laws of the State of California.

2. Respondent is the Superior Court of San Diego County, California, in which the above entitled action is pending.

3. Real Party in interest is the County of Los Angeles, and has an interest that is directly affected by this proceeding in that it is one of the plaintiffs in the above entitled action, now pending before Respondent court.

4. Petitioner is a party beneficially interested in the issuance of a writ of mandate by virtue of the fact that it is a defendant in the above entitled action.

5. On February 28, 2003, in Respondent court, the Honorable Vincent. P. DiFiglia, Judge, issued a tentative ruling denying Petitioner's motion for judgment on the pleadings as to the County's cause of action for public nuisance against Andrews. Plaintiffs were charged with preparing an order consistent with Respondent's tentative ruling, but that has not yet

been filed. Accordingly, a copy of the tentative ruling is included herein as Exhibit 11, pp. 353-355.

6. Respondent, in denying Andrews motion for judgment on the pleadings as to the County's public nuisance claim, permitted the County to proceed with its claim despite its lack of standing to do so, in violation of Section 731, in contravention of binding precedent, and in excess of its jurisdiction.

7. Petitioner has no right of appeal from Respondent's order denying its motion for judgment on the pleadings, and has no plain, speedy, and adequate remedy other than the relief sought in this petition. Further, Respondent's order prohibits Petitioner from challenging the amended complaint of the County, making this court the only avenue available for redress.

WHEREFORE, Petitioner Andrews prays that this Court:

1. Stay the underlying action pending this Court's consideration of this petition;

2. Issue a writ of mandate and/or prohibition, or such other extraordinary relief as is warranted, directing Respondent superior court to vacate (or refrain from issuing) its order denying Petitioner Andrews' motion for judgment on the pleadings as to the County's action for abatement of public nuisance, and to enter an order granting the motion;

3. Award Petitioner its costs pursuant to Rule 56.4 of the California Rules of Court; and

4. Grant such other relief as may be just and proper.

Dated: April 15, 2003

TRUTANICH • MICHEL, LLP

C. D. Michel,
Attorney for Petitioners and
Defendants Andrews Sporting
Goods, Inc. and S.G. Distributing,
Inc.

VERIFICATION

I, Carl D. Michel, declare as follows:

I am one of the attorneys for the Petitioner herein. I have read the foregoing Petition for Writ of Mandate/Prohibition Or Other Extraordinary Relief and know its contents. The facts alleged in the petition are within my own knowledge and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than Petitioner, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on April 15, 2003, at San Pedro, California.

C. D. Michel
Attorney for Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES

BACKGROUND

As a preliminary matter, this Court should be aware of the context within which this petition is brought, because the circumstances and procedural posture are somewhat unusual. The following chronology provides a brief a review of the events that led up to this petition and should serve to assist this Court in its review of the complete record.

1. In August of 1999, the County, on behalf of the People of the State of California, itself, and the general public, along with three of its Supervisors, on behalf of the general public, brought three causes of action against Andrews: (1) public nuisance, pursuant to Code of Civil Procedure section 731; (2) unfair competition, in violation of Business and Professions Code section 17200; and (3) false advertising in violation of Business and Professions Code section 17500. The County's Complaint did not indicate any intent to limit which plaintiffs were bringing which causes of action. On the contrary, all causes were brought by "plaintiffs" against all defendants. This can be seen in the caption of the County's complaint and paragraph 12 therein, which provides in pertinent part, as follows:

PLAINTIFFS

1. People of The State of California, *ex rel.* the County of Los Angeles, County of Los Angeles, on behalf of itself and the general public, and Gloria Molina, Zev Yaroslavsky, and Yvonne Brathwaite Burke, Supervisors of Los Angeles County, on behalf of the general

public, bring this action pursuant to Business and Professions Code §§ 17204 and 17535 and Code of Civil Procedure § 731.

See Exhibit 1, pp. 1-63.

Thus, Andrews was facing three separate causes of action brought by six different plaintiffs, for a total of 18 claims. Note that, while the County brought its claims on behalf of the State, itself, and the general public, it did so as a public entity, and not through any public official, e.g., the District Attorney or County Counsel.

2. As noted below and in the attached briefs, the County lacked standing to bring any of the subject claims (nine, in all) in its capacity as a public entity. Exh.1, pp. 10-37 . Further, the three supervisors failed to allege any specific injury that would entitle them to bring a public nuisance claim, thus subjecting them to judgment on the pleadings on that claim. Exh.1, pp. 30-32. Finally, although the supervisors arguably brought their Section 17200 and 17500 actions as "persons" under the relevant standing statutes (they had no standing to do so in their official capacities), the Complaint was unclear and Andrews sought clarification on that point. Exh. 3, pp. 54-55, 59-60 . Accordingly, on January 3, 2003, Andrews and co-defendant S. G. Distributing filed a Motion for Judgment on the Pleadings, challenging all 18 claims–only six of which were arguably valid (i.e., the supervisors' Section 17200 and 17500 claims).[1] Exh. 2, pp.40-41.

3. In its opposition to the motion, (Exh. 5, pp.90-100), the

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[1] S.G. Distributing has since been granted summary judgment by Respondent court, by Order dated April 10, 2003, and thus is not a party to this petition.

County effectively "rewrote" its complaint, ignoring 15 of its 18 claims–*and adding three new ones.* It adopted the position that the County, itself, brought only three claims against Andrews (public nuisance, Section 17200 and Section 17500), all on behalf of the People of the State of California and all through its county counsel. That is demonstrably false; county counsel was not a named party. Further, it claimed that the three supervisors were only bringing one claim each, a Section 17200 claim on behalf of the general public. That is also demonstrably false, based on paragraph 12 of the complaint and the headings for each of the three causes of action. In short, the County's opposition papers "informed" Respondent that it now had only six claims, not 18, and that three of those claims were brought by county counsel–someone who was not even a party to the action.

4. In its Reply Brief (Exh.8, pp.316-317), Andrews noted and strongly objected to the County's attempt to "rewrite" its complaint by way of its opposition brief and asked that judgment be entered in its favor on the 15 claims abandoned by the County, even if Respondent were inclined to permit the County to amend its complaint to cure those defects that could be cured.

5. In its tentative ruling issued shortly before the February 28 hearing on Andrews' motion, Respondent ruled only on the claims and attendant issues addressed in the County's opposition papers rather than on the 18 claims contained in the actual complaint, and challenged by Andrews' motion. (Exh.11, pp. 353-354). At the hearing, Andrews objected to this "amendment-by-motion" strategy and, again, respectfully demanded a ruling on *all* causes brought by the County's complaint.

Exh.10, pp.336-345. Respondent, however, followed the County's lead, ignored the actual complaint and Andrews' specific objections to it, and let the tentative ruling stand.

6. To add to the confusion, by its ruling at the February 28, 2003 (Exh.11, p.353-354), Respondent *granted* Andrews' motion as to the County's Section 17500 claim, allowing the County 21 days to amend its complaint to bring that action through its county counsel, as required by statute, rather than in its own name, as a public entity. Exh.11, pp. 353-354. (It has standing to do the former; it lacks standing to do the latter.) Respondent contradicted itself, however, by *denying* Andrews' motion as to the nuisance cause of action, which was likewise improperly brought by the County, as a public entity, rather than through a public official.[2] See Exh.11, pp. 353-354. In other words, Respondent properly relied on the actual complaint in finding that county counsel was not a party to the underlying case when ruling on the Section 17500 claim, but then relied on the County's opposition brief in ruling that county counsel–who was not a party–had properly brought a public nuisance action against Andrews. (Technically, the issue of whether county counsel could bring the public nuisance claim was not before the court.)

In effect, the court "pre-approved" a then non-existent public nuisance claim by Los Angeles County Counsel, on behalf of the People of the State of California. Respondent court was duty bound to grant

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[2] The main issue in this petition is whether the public nuisance action must be brought by the district attorney as opposed to the county counsel, but it is undisputed that such an action cannot be brought by a public entity, as was done in the County's complaint.

Andrews' motion as to the nuisance claim as it was actually brought, not as the County *intended* to bring it and then, if it found the interests of justice served by allowing an amendment, it could have allowed the County to amend its complaint.

Despite Respondent's procedural misstep, Petitioner asks this Court to resolve the substantive issue now before it: Does county counsel have standing to bring a public nuisance action on behalf of the State? Or, alternatively, did Respondent act in excess of its jurisdiction by failing to enforce the standing provisions or Section 731 and refusing to follow the binding precedent of *Simpson* in violation of the doctrine of stare decisis?[3]

ARGUMENT

I. RELIEF BY EXTRAORDINARY WRIT IS APPROPRIATE, WHERE THE ISSUE IS TENDERED ON UNDISPUTED FACTS, IT IS PURELY LEGAL IN NATURE, AND IT RAISES AN ISSUE OF SIGNIFICANT LEGAL IMPORT.

Ordinarily, the review of the trial court's refusal to grant a judgment on the pleadings would be on the abuse of discretion standard and would, in any event, rarely be considered in an application for extraordinary writ relief. However, where the issue is tendered on undisputed facts and is purely legal in nature, it calls for the court's independent appellate review (see, e.g., *Crocker National Bank v. City and County of San Francisco*

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[3] Respondent's failure to rule on the remaining claims "abandoned" by the County is arguably moot, because the County has since amended its complaint and, in so doing, dropped those claims for which it lacked standing, notwithstanding Respondent's failure to require such action.

(1989) 49 Cal.3d 881, 888, 264 Cal.Rptr. 139, 782 P.2d 278) and where the issue raised is one of significant legal import, relief by extraordinary writ is appropriate. (*American Internat. Group, Inc. v. Superior Court* (1991) 234 Cal.App.3d 749, 756-758, 285 Cal.Rptr. 765.)

In *American International*, Petitioners (insurance companies), filed a motion for judgment on the pleadings with respect to a civil RICO claim, arguing that it was preempted as a matter of law under McCarran-Ferguson (an act preserving the right of states to regulate the insurance industry). (*Id.* at 752.) The court found that California had a comprehensive statutory scheme for regulating the business of insurance and, therefore, that McCarran-Ferguson, in conjunction with California law, precluded application of the civil RICO claim. (*Id.* at 764-65.) The court issued a peremptory writ directing the trial court to vacate its order denying Petitioners' motion for judgment on the pleadings and to enter a new order granting the same. (*Id.* at 768.)

As with the preemption issue in *Amercian International*, the standing issue here is a jurisdictional matter. It is also an issue that is purely legal in nature. Petitioner asks this Court to interpret the plain language of the standing provisions of Section 731, as well as review several binding precedents to determine the breadth of their rulings. Additionally, there are no facts in dispute. The only question is whether Respondent acted in excess of its jurisdiction by ruling that county counsel has standing to bring the public nuisance abatement action in the underlying case.

Moreover, the legal significance is self-evident. As is readily apparent from the relief requested in the underlying complaint, the County

and its supervisors hope to deal a devastating blow to the firearms industry and enact–through judicial rather than legislative action–a new gun control regimen. Thousand of hours and millions of dollars have been, and will continue to be, expended in this litigation, both at the trial level and in the impending appeal involving the forty-plus defendants who obtained summary judgement in their favor on March 7, 2003. It is sheer folly to allow this case, and similar cases in the future, to proceed without first resolving the issue at hand. To do otherwise could result in multiple litigation and a substantial waste of judicial resources.

Petitioner contends, and logic dictates, that allowing county supervisors to circumvent the offices of public prosecutors and bring nuisance abatement actions through county counsel invites abuse of the judicial system. This is not meant to disparage county counsel but, as noted above, county counsel is a zealous advocate for its client, i.e., the county. District attorneys and city attorneys, in contrast, are charged with representing the People and doing justice.

> As our Supreme Court stated in *Shepherd v. Superior Court* (1976) 17 Cal.3d 107, 130 Cal.Rptr. 257, 550 P.2d 161, "[t]he district attorney is not an 'attorney' who represents a 'client' as such. He is a public officer, under the direct supervision of the Attorney General . . ., who 'represents the sovereign power of the people of the state, by whose authority and in whose name all prosecutions must be conducted.' " (*Id.* at p. 122, 130 Cal.Rptr. 257, 550 P.2d 161, quoting *Fleming v. Hance* (1908) 153 Cal. 162, 167, 94 P. 620.)

(*People v. Terry* (1991) 234 Cal.App.3d 749, [285 Cal.Rptr. 765].)

Finally, if this Court fails to act on Andrews' petition, there undoubtedly will be a new crop of public nuisance cases following the

instant case, most of which will not be vetted by experienced public prosecutors, but instead will be brought by county counsel. The standing issue will be revisited, repeatedly, by trial courts in California until an appellate court provides some clarity. Of course, Petitioner believes the standing issue is reasonably clear, now, which might explain the paucity of case law on this point. It seems obvious that actions in the name of the People of the State of California must be brought by those attorneys who, in fact, are charged with representing the People, not attorneys whose sole client is the county.

II. Respondent COURT ACTED IN EXCESS OF ITS JURISDICTION BY ALLOWING COUNTY COUNSEL TO BRING A PUBLIC NUISANCE CAUSE OF ACTION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA.

A. Section 731 Unambiguously Provides That Public Nuisance Abatement Actions Are to Be Brought by Public Prosecutors.

The County brought its public nuisance claims against Andrews pursuant to Section 731, which provides, in pertinent part, as follows:

> 731. . . . A civil action may be brought in the name of *the people of the State of California* to abate a public nuisance, as the same is defined in section thirty-four hundred and eighty of the Civil Code, *by the district attorney* of any county in which such nuisance exists, *or by the city attorney* of any town or city in which such nuisance exists . . .. (Code Civ. Proc., § 731)(emphasis added)

As the plain language of Section 731 indicates, public prosecutors are the only parties who may bring an action to abate a public nuisance, and

must do so in the name of the People of the State of California. This comports with the prosecutorial nature of such actions, for both at common law and by statute, a public nuisance is also a criminal offense. (See Penal Code § 370 et seq. [maintenance of a public nuisance is a misdemeanor]; *People v. Cooper* (1944) 64 Cal.App.2d Supp. 946, 948 [149 P.2d 86]; *People v. Acuna* (1997) 14 Cal.4th 1090, 1108 [60 Cal.Rptr.2d 277]; 11 Witkin Summary (9th), Equity, Supp., § 160 [public nuisances are enjoinable as civil wrongs or prosecutable as criminal misdemeanors, not because they are independent crimes, but because of their inherent tendency to injure or interfere with community's exercise and enjoyment of rights common to public].) In fact, a public nuisance is *always* a criminal offense. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1108 [60 Cal.Rptr.2d 277].)

In sum, a public nuisance is a crime against the People, and the legislature has determined that public prosecutors, as agents of the People, are the proper parties to confront such offenses. The fact that a public nuisance can also be dealt with through a civil action, pursuant to Section 731, does not alter the character of the offense, nor the prosecutorial nature of the action. Again, Section 731 makes that clear by requiring that such civil actions be brought in the name of the People, and by public prosecutors.

B. California Cases That Analyzed Section 731 Found That Only District And City Attorneys May Bring Public Nuisance Actions on Behalf of The People.

Standing for public nuisance actions under Section 731 has been narrowly construed, by both the Supreme Court and two Appellate Courts,

to include only those public officers listed, i.e., district attorneys and city attorneys, exclusively. For example, in *Lamont Storm Water Dist.* v. *Pavich* (App.5 Dist. 2000) 78 Cal. App. 4th 1081 [93 Cal.Rptr.2d 288], discussed more fully in Petitioner's moving papers (Exh.3, p.49), the court held that, despite the water district's general capacity to sue and be sued, the district lacked standing to sue for abatement of a public nuisance, noting that such actions were the province of public prosecutors:

> [W]hen the Legislature has intended to grant the power to abate a nuisance, it has done so specifically and in clear terms. Thus, Code of Civil Procedure section 731 provides that the district attorney and the city attorney have the right and, upon direction from their respective legislative bodies, the duty to bring an action to abate a public nuisance. (*Id* at pp. 1084-1085.)

Similarly, in *Board of Sup'rs of Los Angeles County v. Simpson* (1951) 36 Cal.2d 671 [227 P.2d 14], also discussed more fully in Petitioner's motion and reply brief (Exh.3, pp.49-52 and Exh.8, pp. 314-315, respectively), the California Supreme Court held that it was the duty of ~~the district attorney, not county counsel, to abate a public nuisance, stating,~~ <u>without limitation</u>:

> Thus the particular duty with respect to abatement of public nuisances is that of the district attorney. That is a factor with some significance as a particular statutory provision should prevail over a general one. (Civ. Code, § 3534; Code Civ. Proc., § 1859.)

(*Id.* at p. 675.)

Finally, the court in *People* v. *Parmar* (2001) 86 Cal.App. 4th 781, 798 [104 Cal.Rptr.2d 31] thoroughly analyzed the distinction between county counsel and district attorneys in the context of public nuisance

abatement, and concluded:

> 2. The nature of the district attorney's office
>
> A county has the option, in its discretion, to employ a county counsel to perform most of the civil legal duties required by the county. In the absence of such an election, the district attorney serves as both public prosecutor and civil attorney for the county. *When county counsel is employed, most, but not all, of the district attorney's civil functions are performed by the county counsel. However, the district attorney retains some civil law duties, including nuisance abatement.* (*Ibid.*)(emphasis added).

Despite the plain language of Section 731, the consistent case law interpreting that section, and the apparent logic of having public prosecutors handle actions that are prosecutorial in nature and *must* be brought in the name of the People, the County managed to persuade Respondent court to adopt the County's *argument*, and allow county counsel to bring its public nuisance action on behalf of the People, despite its lack of standing to do so.

C. Respondent Improperly Limited the Holding in *Simpson* to Red Light Abatement Cases.

The Supreme Court in *Simpson* plainly stated that "the particular duty with respect to abatement of public nuisances is that of the district attorney." (*Id.* at 673.) Nonetheless, Respondent adopted the County's contention that the *Simpson* holding was limited to Red Light Abatement cases. (Ex.10, pp. 338-339). But there is nothing in *Simpson* to support such a narrow reading of that decision (and one assumes that the Supreme Court knows how to limit a holding when that is its intent). In fact, the

above-quoted holding came *immediately* following a discussion of and quotation from Section 731, and before the Court's analysis of the Red Light Abatement Act, as discussed in Andrews' reply brief (Exh.8, p.314). There are no cases after *Simpson* that adopt Respondent's narrow view of the holding.

Moreover, Respondent's rationale for adopting that narrow view was flawed, as expressed at the February 28 hearing:

> It [*Simpson*] deals with a Red Light Abatement Act. It speaks in terms of the propriety of the D. A. as opposed to the county counsel handling something which is essentially criminal in nature, which is not the case here.

(Exh.10, p. 338, lines 23-27.)

However, as noted above, a public nuisance is *always* a criminal offense. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1108 [60 Cal.Rptr.2d 277].) And civil actions to abate a public nuisance are therefore always, in varying degrees, criminal in nature. In Andrews' case, it is licensed to sell firearms from its stores but, if as the County alleges, it does so in a manner that causes substantial harm to the neighborhood or the public at large, then it arguably would be subject to civil suit or criminal prosecution for maintaining a public nuisance. But the forum does not alter the nature of the alleged conduct. Surely, providing weapons to an illegal secondary market or knowingly engaging in "straw purchases/sales" (as the County alleges in its nuisance claim) would result in a public nuisance that is as "criminal in nature" as violating the Red Light Abatement Act. In fact, many of the allegations made by the County, albeit wholly unfounded, would be criminal acts, e.g., being a party to a straw purchase.

Thus, even if the holding in *Simpson* were limited to public nuisance actions that were essentially criminal in nature, the public nuisance action against Andrews would certainly fall within that category–based on the County's own allegations. In short, either way one reads *Simpson*, i.e., following the plain language or finding a narrower holding, Respondent's ruling that *Simpson* it did not apply in this case was wrong.

D. Respondent's Reliance on The Word "May" in Section 731 to Allow Officials Other That Public Prosecutors to Handle Nuisance Actions Is Misplaced.

At the hearing, Respondent indicated its belief that the word "may" in Section 731 opens the door for other public officials to bring public nuisance actions in the name of the People. (See Transcript Exh.10, p. 339, lines 25-26 ["It says 'may.' It doesn't say 'shall.' Doesn't it?"].) This argument is flawed for two reasons. First, under basic rules of statutory construction, one must presume that if the legislature went to the trouble of enacting a specific statute naming which public officers could bring a public nuisance action, and in what manner, then they did not intend to allow other officials to bring such an action, or for the action to be brought in other manners.

If "may" has the meaning attributed to it by Respondent, then public nuisance actions by public officials need not be brought in the name of the People of the State of California (for that requirement also follows "may") or by public prosecutors. Thus, any person or entity that has the general authority to sue and be sued could bring a public nuisance action on behalf of itself, in complete disregard of the standing provisions of Section 731.

That, of course, is not the case, as seen in *Lamont Storm Water Dist.* v. *Pavich* (App.5 Dist. 2000) 78 Cal. App. 4th 1081 [93 Cal.Rptr.2d 288], discussed above, where despite the water district's general capacity to sue and be sued, it lacked standing to sue for abatement of a public nuisance, pursuant to Section 731.

Rather, the "may" indicates nothing more than *a public prosecutor's discretion* in bringing a public nuisance action in the name of *the People of the State of California*, just as prosecutors have discretion in bringing criminal actions. "May" is not an invitation for any unnamed officials, such as county counsel, to bring such actions on behalf of whomever they choose–including on behalf of the People of the State of California, who they do not and cannot represent. Respondent's adoption of and reliance upon the County's "may" versus "shall" argument was unfortunate, and clearly wrong. Such an interpretation would render the standing provisions meaningless.

In sum, the County managed to muddy the waters and confuse what should have been a reasonably straightforward analysis of Section 731. Public nuisance actions, such as the one at issue here, must be brought in the name of the People, and it follows as a matter of course that such actions must be brought by representatives of the People, namely, district attorneys and city attorneys–not by mayors, supervisors, county counsel, or any other party not listed in Section 731. To rule otherwise is to eviscerate that statute.[4]

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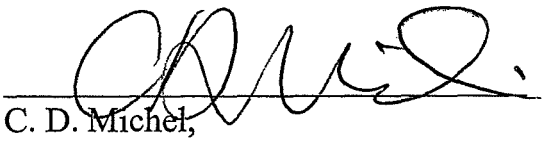
[4] One manifestation of the impropriety of bringing actions in the name of the People of the State of California through county counsel is the absence of any

CONCLUSION

For the reasons stated, Petitioner Andrews Sporting Goods, Inc., respectfully requests this court to temporarily stay the underlying action pending its ruling on this petition, grant extraordinary writ relief as prayed, and issue a decision determining that county counsel lacks standing to bring a public nuisance abatement action on behalf of the People of the State of California, pursuant to California Code of Civil Procedure section 731.

Dated: April 15, 2003

TRUTANICH • MICHEL, LLP



C. D. Michel,
Attorney for Petitioners and Defendants Andrews Sporting Goods, Inc. and S.G. Distributing, Inc.

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case law in which that has been done. If one conducts an on-line search, e.g., using WestLaw, and searches for case titles containing the terms "people," "state" and "district attorney" or "city attorney," well over one hundred cases are retrieved. If, however, one substitutes "county counsel" for district or city attorneys, the search results in zero cases retrieved. It is simply not done. Cases brought on behalf of the People are brought through public prosecutors who represent the People, regardless of whether the action is civil or criminal. They are not brought by county counsel, whose sole client is the county.

Declaration of Carl D. Michel

I, Carl D. Michel, declare as follows:

1. I am one of the attorneys for the Petitioner herein, and have personal knowledge of the following matters:

2. The hearing on the motion for judgment on the pleadings, the results of which are challenged herein by Petitioner, occurred on February 28, 2003.

3. As of the date of this petition, Plaintiffs have not filed an order consistent with Respondent court's tentative ruling, as requested by Respondent.

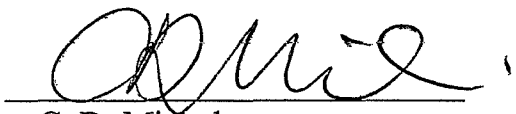
4. Moreover, this petition has been delayed by the summary judgment motions heard in this action on March 7, 2003. Respondent had taken Petitioner's motion under submission, in part, at that hearing and the final ruling was delayed due to Respondent's schedule and the breadth of the ruling (45 pages in length).

5. The final "Ruling on Motions for Summary Judgment (7)" was not executed and filed until April 10, 2003. Thus, it was not until April 10 that Petitioner's counsel learned that one of its two related defendants had been granted summary judgment and that the remaining defendant, Petitioner herein, had been granted summary adjudication on one of the three claims against it.

6. Petitioner due to time constraints, inasmuch as the trial is set to begin April 25, 2003, has attached a true and correct copy of the tentative ruling as an exhibit hereto. The ruling was adopted by Respondent court at the conclusion of the February 28, 2003 hearing in this matter. For purposes of this petition, the import of Respondent's ruling was its denial of Petitioner's motion for judgment on the pleadings as to plaintiffs' defectively pled public nuisance cause of action.

7. In accordance with the California Rules of Court No. 9, and because Petitioner is seeking immediate relief and a stay of this action, Petitioner has served its petition on Respondent Court and real parties in interest via JusticeLink, pursuant to Respondent Court's case management orders. Petitioner is also serving, concurrent with the filing of this petition, the State Attorney General.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on April 15, 2003, at San Pedro, California.



C. D. Michel

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Haydee Villegas, declare:

That I am employed in the City of San Pedro, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 407 North Harbor Boulevard, San Pedro, California 90731.

On April 23, 2003, I served the foregoing document(s) described as **PETITION FOR WRIT OF MANDATE/PROHIBITION OR OTHER EXTRAORDINARY RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF C. D. MICHEL; STAY AND IMMEDIATE RELIEF REQUESTED (Trial Date: April 25, 2003)** on the interested parties in this action by JusticeLink Electronic filing on all persons appearing on JusticeLink's Service List.

Additionally, on April 24, 2003, I caused the above referenced document, enclosed in a sealed envelope to be delivered by hand to the offices of the following parties:

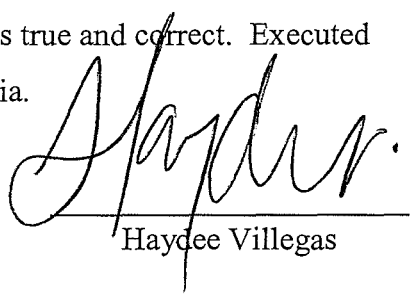
Mr. Steve Cooley
Los Angeles District Attorney's Office
210 West Temple Street, Ste. 18000
Los Angeles, CA 90012-3210

Attorney General
1300 "I" Street
Sacramento, CA 95814

Hon. Vincent P. DiFiglia
San Diego Superior Court - Central Division
330 W. Broadway, DEPT. 65
San Diego, CA 92101

Bonnie Dumanis, District Attorney
San Diego District Attorney's Office
330 W. Broadway
San Diego, CA 92101

I declare under penalty that the foregoing is true and correct. Executed this 23rd day of April, 2003 at San Pedro, California.



Haydee Villegas