

Lawrence J. Kouns, State Bar No. 095417
Christopher J. Healey, State Bar No. 105798
LUCE, FORWARD, HAMILTON & SCRIPPS LLP
600 West Broadway, Suite 2600
San Diego, California 92101-3391
Telephone No.: (619) 236-1414
Fax No.: (619) 232-8311
Attorneys for Defendants
SMITH AND WESSON CORP., and
STURM, RUGER & COMPANY, INC.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF)
CALIFORNIA, by and through San Francisco City)
Attorney Louise H. Renne, Berkeley City Attorney)
Manuela Albuquerque, Sacramento City Attorney)
Samuel L. Jackson, and San Mateo County Counsel)
Thomas F. Casey, III, Oakland City Attorney Jayne)
W. Williams, and East Palo Alto City Attorney)
Michael S. Lawson; JOE SERNA, JR., Mayor of)
Sacramento, the CITY OF BERKELEY, the CITY)
OF OAKLAND, the CITY OF EAST PALO ALTO)
and the COUNTY OF ALAMEDA, on behalf of the)
general public,)

Plaintiffs,)

v.)

ARCADIA MACHINE & TOOL, INC., BRYCO)
ARMS, INC., DAVIS INDUSTRIES, INC.,)
EXCEL INDUSTRIES, INC., LORCIN)
ENGINEERING CO., INC., CHINA NORTH)
INDUSTRIES, PHOENIX ARMS, SUNDANCE)
INDUSTRIES, INC., BERETTA U.S.A. CORP.,)
PIETRO BERETTA Sp. A., BROWNING ARMS)
CO., CARL WALTHER, GmbH, CHARTER)
ARMS, INC., COLT'S MANUFACTURING CO.,)
INC., FORJAS TAURUS, S.A., TAURUS)
INTERNATIONAL MANUFACTURING, INC.,)
GLOCK, INC., GLOCK GmbH, H&R 1871 INC.,)
HECKLER & KOCH, INC., KEL-TEC CNC)
INDUSTRIES, INC., MKS SUPPLY INC.,)
NAVEGAR, INC., NORTH AMERICAN ARMS,)
INC., SIGARMS, INC., SMITH AND WESSON)
CORP., S.W. DANIELS, INC., STURM, RUGER)
& COMPANY, INC., AMERICAN SHOOTING)
SPORTS COUNCIL, INC., NATIONAL)

Case No. 303753
DEFENDANTS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
TRANSFER OF VENUE
[C.C.P. § 394(a)]
Date: November 4, 1999
Time: 9:30
Dept.: Room 301
Judge: Honorable David Garcia
Complaint Filed: May 25, 1999
Amended Complaint Filed: July 16, 1999
Trial Date: None Set

1 SHOOTING SPORTS FOUNDATION, INC.,)
SPORTING ARMS AND AMMUNITION)
2 MANUFACTURERS' INSTITUTE, INC., B.L.)
JENNINGS, INC., ELLETT BROTHERS INC.,)
3 INTERNATIONAL ARMAMENT CORP., RSR)
WHOLESALE GUNS, INC., SOUTHERN OHIO)
4 GUN DISTRIBUTORS, TRADERS SPORTS,)
INC., and DOES 1-200,)
5 Defendants.)
6

7
8 Pursuant to California Code of Civil Procedure Section 394(a), defendants respectfully
9 request a change of venue to a neutral county or a reassignment by the Chairman of the Judicial
10 Council to a judge from a neutral county.

11 I.

12 FACTUAL BACKGROUND

13 Five cities and two counties in Northern California contend that various gun manufacturers
14 and related trade associations have created public nuisances within their cities and counties. The
15 cities of San Francisco, Sacramento, Berkeley, Oakland and East Palo Alto and the counties of San
16 Mateo and Alameda all seek restitutionary benefits and civil penalties from defendants for the
17 defendants allegedly wrongful promotion and distribution of firearms. These funds are
18 presumably sought to defray the public cost allegedly incurred by these municipal entities as a
19 result of defendants' purported violations of law.

20 None of the moving defendants are incorporated in the State of California. Nor do any of
21 these defendants have their principal place of business in the State of California. None have a
22 branch office in San Francisco. Likewise, none of the moving defendants manufacture the
23 products at issue in San Francisco. See the two Declarations of James C. Sabalos, Esq. (one for
24 Bryco Arms and one for B.L. Jennings, Inc.), George Colclough (for Smith & Wesson Corp.),
25 Terry McSweeney (for Colt's Manufacturing Co.), and Phyllis S. Garber (for Sturm, Ruger & Co.).

26 Plaintiffs do not contend to the contrary. The operative complaint concedes that of the 37
27 defendants, 23 are domiciled in and with their principal places of business in other states. (First
28 Amended Complaint ("FAC" ¶¶ 7, 9, 11).) Plaintiffs further allege that five defendants are

domiciled in and have their principal places of business in other countries. (FAC ¶ 7.)

Given these circumstances, defendants move to transfer venue under Section 394(a) of the Code of Civil Procedure. Alternatively, if it is determined that plaintiffs have no right to jury trial, defendants request that a judge from a neutral county be appointed, as is provided for under Section 394(a).

II.

THIS CASE SHOULD BE TRANSFERRED TO A NEUTRAL VENUE OR ASSIGNED TO A JUDGE FROM A NEUTRAL COUNTY

Where, as here, an action is initiated by a city or county against foreign corporations, the action must, upon motion from either party, be either transferred to a neutral county. Civ. Proc. Code § 394(a). As stated in Section 394(a), the transfer requirements are mandatory:

... *[A]ny* action or proceeding brought by a county, city and county, city, or local agency within a certain county, or city and county, against a resident of another county, . . . or corporation doing business in the latter, *shall be*, on motion of either party, transferred for trial to a county, or city and county, other than the plaintiff . . .

Civ. Proc. Code § 394(a). (Emphasis added.)

Section 394(a) also provides that, in cases where there is no right to jury, the case may be reassigned by the Chairman of the Judicial Council to a judge from a neutral county.

When the action or proceeding is one in which a jury is not a matter of right, or in case a jury be waived, then in lieu of transferring the cause the court in the original county may request the chairman of the Judicial Council to assign a disinterested judge from a neutral county to hear said cause and all proceedings in connection therewith.

Civ. Proc. Code § 394(a).

A. Defendants are Entitled to Relief Under Section 394

Where, as here, the foreign defendants are not closely connected with the forum community, the defendants are entitled to the transfer protections under this statute. The protections under Section 394(a) apply even if defendants do substantial business within the City and County of San Francisco. San Francisco Foundation v. Superior Court, 37 Cal.3d 285, 300 (1984) (defendant entitled to Section 394 reassignment by Judicial Council as to equitable claims

1 even with two branch offices in the county, annual payments of between \$100,000 and \$300,000
2 each year to projects in the county, and with 60 percent of its total expenditures in county, "[T]he
3 standard of 'doing business' for purposes of Section 394 turns on the extent to which the
4 corporation is viewed as an outsider."); Westinghouse Electric Corp. v. Superior Court, 17 Cal.3d
5 259, 271 (1976) (defendants entitled to Section 394 transfer even with a \$100 million construction
6 contract within county, "A corporation is doing business in a county for purposes of Section 394
7 only if its activities in the county are substantial enough that the corporation can reasonably be
8 viewed as being intimately identified with the affairs or closely associated with the people of the
9 community." (emphasis added.))

10 Where, as here, a foreign defendant maintains neither its "main place of business" nor "a
11 major branch office" in the forum county, no further showing by the defendant is necessary. Id. at
12 271; San Francisco Foundation, supra, 37 Cal.3d at 299. None of the moving defendants are
13 incorporated in the State of California. Nor do any of these defendants have their principal place
14 of business in the State of California. None have a branch office in San Francisco. Likewise, none
15 of these defendants manufacture any of the products at issue in San Francisco. See the two
16 Declarations of James C. Sabalos, Esq. (one for Bryco Arms and one for B.L. Jennings, Inc.),
17 George Colclough (for Smith & Wesson Corp.), Terry McSweeney (for Colt's Manufacturing
18 Co.), and Phyllis S. Garber (for Sturm, Ruger & Co.).

19 Moreover, plaintiffs concede that of the 37 defendants, 23 are domiciled in and with their
20 principal places of business in other states. (FAC ¶¶ 7, 9, 11). Plaintiffs further concede that five
21 are domiciled in and have their principal places of business in other countries. (FAC ¶ 7.)

22 Plaintiffs contend that defendants have "aided and abetted" multiple, highly publicized
23 homicides and other public nuisances within the subject cities and counties. (FAC ¶¶ 2:14-4:9.)
24 There is little doubt that defendants are "likely to be viewed as outsiders." San Francisco
25 Foundation, supra, 37 Cal.3d at 300. Moreover, few, if any of the 37 defendants can be properly
26 characterized as "intimately identified" with the City and County of San Francisco. Westinghouse
27 Electric Corp., supra, 17 Cal.3d at 271. Defendants are entitled to relief under Section 394(a).

28 Likewise, the Plaintiff municipal entities need not reside entirely within the same county

1 for the protections of Section 394 to apply. *Id.* at 268 (multi-county municipal plaintiff covered
2 under statute). The protections of Section 394 also apply where, as here, a municipality appears
3 through its city and/or county counsel.^{1/} Accordingly, defendants are entitled to Section 394 relief,
4 even though this action is filed through plaintiffs' city and/or county counsel and even though it
5 includes plaintiff municipalities located outside the City and County of San Francisco.

6 **B. No Showing of Prejudice is Required**

7 Defendants need not demonstrate prejudice to be entitled to relief under Section 394.
8 Prejudice is presumed under the statute. Ohio Casualty Ins. Group v. Superior Court, 30
9 Cal.App.4th 444, 452 (1994) ("Under section 394, by contrast, *prejudice is presumed . . .*"
10 (emphasis added); County of San Bernardino v. Superior Court, 30 Cal.App.4th 378, 386 (1994)
11 ("There is no need for a party to demonstrate an actual danger of prejudice; *the statute 'is designed*
12 *to obviate the appearance of prejudice as well as actual prejudice or bias.'*" (emphasis added)
13 quoting City of Alameda v. Superior Court, 42 Cal.App.3d 312, 317 (1974)); San Francisco
14 Foundation, supra, 37 Cal.3d at 296 ("[A]s we have long held, the purpose underlying the
15 mandatory change of venue provision in Section 394 'is to guard against local prejudices which
16 sometimes exist in favor of litigants within a county as against those from without and secure to
17 both parties to a suit a trial upon neutral grounds.'" (Citation omitted)); Westinghouse Electric
18 Corp., supra, 17 Cal.3d at 266 (Section 394 designed to guard against local prejudices); Garrett v.
19 Superior Court, 11 Cal.3d 245, 248 (1974) (The Water "District is the type of 'local agency within
20 a certain county' which has a potential prejudicial advantage in a condemnation suit against a non-
21 resident defendant . . . it is still possible that a Riverside County juror will also be a District
22 taxpayer with an interest in keeping the condemnation award unreasonably low. This situation
23 would be precisely one which the Legislature must have intended to avoid by enacting
24

25 ^{1/} The plaintiff cities and counties have each presumably voted to authorize their city and/or
26 county counsel to appear in a representative capacity. (Code Civ. Proc. § 731.) (FAC ¶ 4.) By
27 authorizing their city and/or county counsel to appear in a representative capacity, if successful, all
28 civil penalties awarded will be paid to the City and County of San Francisco, not the State of
California. (Bus. Prof. Code § 17536(c).) Outside their representative capacity, these city and/or
county counsel have no standing to seek civil penalties. Chern v. Bank of America, 15 Cal.3d 866,
875 (1976). Plaintiffs do not specify in their First Amended Complaint which city and/or county
services would be funded if plaintiffs are successful in this case.

1 Section 394"); City of Stockton v. Wilson, 79 Cal.App. 422, 424 (1926) (statute designed to
2 prevent local prejudices).

3 Simply put, the fact that the foreign defendants are being sued by several municipal entities
4 is alone sufficient to trigger the protections of Section 394.

5 **C. The Statute Must Be Liberally Construed**

6 Any doubts as to whether the Section 394 transfer or reassignment provisions apply must
7 be interpreted in favor of the moving party. Courts routinely require that Section 394 be liberally
8 interpreted to allow for transfer wherever possible. San Francisco Foundation, supra, 37 Cal.3d at
9 296 ("Furthermore, as a remedial legislation the section is to be libefally construed.");
10 Westinghouse Electric Corp., supra, 17 Cal.3d at 266 ("[A]s the statute is remedial in its purpose,
11 it should receive a liberal construction which will promote rather than frustrate the policy behind
12 the law."); County of San Bernardino, supra, 30 Cal.App.4th at 386-387 (statute is to be liberally
13 construed to promote the policy behind the law); Ohio Casualty Ins. Group, supra, 30 Cal.App.4th
14 at 449 (Section 394 is to be liberally construed); Finance & Construction Co. v. Sacramento, 204
15 Cal. 491, 493 (1928) (statute subject to liberal construction).

16 The statute requires no showing of prejudice to justify transfer or reassignment.
17 Nevertheless, even if prejudice were a requirement, it is present here. The Plaintiff counties and
18 cities seek to shift responsibility for criminal activity within their borders. Under any standard,
19 this case should be transferred to a neutral county or reassigned by the Chairman of the Judicial
20 Council to a judge from a neutral county.

21 **III.**

22 **THE FACT THAT PLAINTIFFS PURPORT TO REPRESENT**
23 **THE STATE OF CALIFORNIA DOES NOT DEFEAT THIS MOTION**

24 Although the real plaintiffs here are several Bay Area municipalities and public officials,
25 the city attorney plaintiffs purport to assert certain claims on behalf of the "People of the State of
26 California." (FAC, ¶ 4). In so doing, plaintiffs apparently hope to avoid the mandatory transfer
27 rule of Section 394(a), under a narrow exception for the "State of California" under Code of Civil
28

1 Procedure § 394(c).^{2/} For several reasons, the attempt fails.

2 **A. The Legislative Intent Behind Section 394 Controls over Plaintiffs' Claims to**
3 **Represent the People of the State of California.**

4 Courts have held that the legislative purpose underlying Section 394 -- eliminating even the
5 appearance of local prejudice -- controls in determining whether a plaintiff truly represents the
6 "State of California" for purposes of the Section 394(c) exception. Thus, in Marin Community
7 College Dist. v. Superior Court, 72 Cal.App.3d 719, 722 (1977), a plaintiff school district sued
8 several foreign contractors seeking monies for an alleged breach of contract. Seeking to invoke
9 Section 394(c), plaintiff relied on substantial authority that construed school districts as state
10 agencies. Id. at 722. Despite this, the Marin court held that for purposes of Section 394 the
11 school district should be treated as a "local agency." The court reasoned that such a construction
12 was mandated by the legislative intent to eliminate the potential for local prejudice.

13 ... [S]ection 394 is to be interpreted to avoid 'absurd consequences';
14 (citation omitted) petitioner is a 'local agency within a certain
county' for the purposes of section 394.

15 Id. Accord, Almar Limited v. County of Ventura, 56 Cal.App. 4th 105, 110 (1997) ("A court
16 should not adopt a statutory construction that will lead to results contrary to the Legislature's
17 apparent purpose."); City of L.A. v. Pac. Tel. & Tel. Co., 164 Cal.App.2d 253, 256 (1958)
18 (interpreting Section 394) ("It is a cardinal rule of construction that words must be
19 given such interpretation as will promote rather than defeat the general purposes and policy of the
20 law.").

21 The Marin decision is consistent with the well-recognized legislative intent underlying
22 Section 394 to require transfer whenever there are actual or potential local prejudices against
23 foreign defendants. Transamerica, supra, 69 Cal.App.4th at 581 ("Section 394 is intended to guard
24 against possible *local* bias against out-of-county defendants.") (emphasis added); County of San
25 Bernardino, supra, 30 Cal.App.4th at 386 (The primary purpose of Section 394 is to guard against
26 *local* prejudices when a municipal entity sues a foreign resident or corporation); San Francisco

27
28 ^{2/} Section 394(c) provides that the "State of California, or any of its agencies, departments,
commissions, or boards" are not "local agencies" for purposes of Section 394.

1 Foundation, supra, 37 Cal.3d at 296 ("[A]s we have long held, the purpose underlying the
2 mandatory change of venue provision in Section 394 'is to guard against local prejudices . . . '")
3 (emphasis added).

4 **B. Plaintiff Cities and Counties Stand to Gain Substantial Economic Benefits If**
5 **Successful**

6 Here, to permit local municipal entities and their city attorneys to avoid the mandatory
7 transfer rule of Section 394(a), based on the happenstance that other statutes permit local
8 prosecutors to seek relief in the name of the "People of the State of California" would clearly be an
9 "absurd" result. This is particularly true, given that the instant plaintiffs seek substantial monetary
10 relief on behalf of their respective municipalities. Transamerica Homefirst, Inc. v. Superior Court,
11 69 Cal.App. 4th 577, 581 (1999) (plaintiff's potential economic interest relevant to determination
12 of whether public entity is entitled to invoke the Section 394(c) exception to mandatory transfer).

13 Here, plaintiffs seek civil penalties pursuant to the claims asserted under Business and
14 Professions Code §§ 17200 and 17500. (FAC at ¶ 36:8-9.) As to the Section 17200 claim, any
15 penalties collected are to be paid to the county in which the judgment is entered. (Bus.&Prof. Code
16 § 17206(c)). With respect to the Section 17500 claim, the penalties are split between the county
17 and the city. (Bus.&Prof. Code § 17536(c). Plaintiffs also seek restitution and disgorgement of
18 monies pursuant to Business and Professions Code §§ 17203 and 17535. (FAC at ¶ 36:10-11.).
19 Thus, while purporting to sue on behalf of the "People of the State of California," plaintiffs seek
20 substantial economic benefits for their local municipalities. This fact underscores the very real
21 potential for local prejudice.^{3/}

22 _____
23 ^{3/} It also distinguishes this case from Nguyen v. Superior Court, 49 Cal.App.4th 1781(1996),
24 where a plaintiff district attorney, asserting nuisance claims on behalf of the "People of the State of
25 California" was permitted to invoke the Section 394(c) exception. In Nyguyen, however, plaintiff
26 did not seek monetary relief on behalf of the municipal entity. For this reason, the court concluded
27 that the purpose behind the statute in eradicating local prejudices would not be violated in denying
28 transfer under Section 394(a). Nguyen, 49 Cal.App.4th at 1790. Further, the Nguyen holding
reflects an erroneous premise, namely, that the defendant must demonstrate prejudice to obtain the
Section 394(a) transfer. Given the substantial body of authority to the contrary, at least one court
has questioned the validity of Nyguyen. Transamerica Homefirst, Inc. v. Superior Court, 69
Cal.App.4th 577, 581 (1999) (suggesting that the Nguyen court had misinterpreted the statute,
"[W]e agree that the statute does not require that a public entity have an economic interest in the

(continued...)

1 C. Plaintiffs Represent the Local Interests of San Francisco and the Surrounding Cities
2 and Counties

3 Plaintiffs' assertion that they represent the People of the State of California is further
4 undermined by the fact that, on the same day this lawsuit was filed, the City of Los Angeles and
5 other Southern California municipal plaintiffs filed a virtually identical complaint in the Los
6 Angeles County Superior Court. (See Request For Judicial Notice, Ex. "A".) Subsequently, a
7 third, virtually identical suit was filed by the County of Los Angeles and other plaintiffs. (See
8 Request For Judicial Notice, Ex. "B".) As with the instant case, the plaintiffs in these other actions
9 purport to represent the "People of the State of California." Obviously, if any one of these groups
10 of plaintiffs was truly suing on behalf of the State of California, only one complaint would have
11 been necessary. The fact that, at last count, three such lawsuits have been filed, makes clear that
12 these complaints seek to advance local interests in challenging the marketing and sale of
13 defendants' products within the particular geographic regions at issue. As such, plaintiffs should
14 not be permitted to avoid the mandatory transfer requirements under Section 394.

15 That result is also compelled under the well-settled rule that Section 394, as remedial
16 legislation, must be liberally interpreted in favor of transfer. San Francisco Foundation, supra, 37
17 Cal.3d at 296 ("Furthermore, as a remedial legislation the section is to be liberally construed.");
18 Westinghouse Electric Corp., supra, 17 Cal.3d at 266 ("[A]s the statute is remedial in its purpose,
19 it should receive a liberal construction which will promote rather than frustrate the policy behind
20 the law."); County of San Bernardino, supra, 30 Cal.App.4th at 386-387 (statute is to be liberally
21 construed to promote the policy behind the law); Ohio Casualty Ins. Group, supra, 30 Cal.App.4th
22 at 449 (Section 394 is to be liberally construed); Finance & Construction Co. v. Sacramento, 204
23 Cal. 491, 493 (1928) (statute subject to liberal construction).

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27 _____
28 ^{2/} (...continued)
outcome of a lawsuit before a nonresident defendant may seek a transfer of venue, . . .").

1 IV.

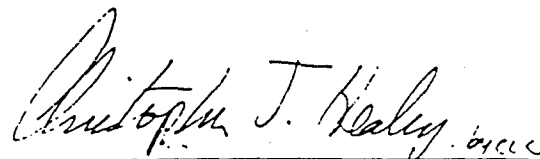
2 CONCLUSION

3 For the reasons stated herein, pursuant to Section 394(a), defendants respectfully request
4 that the case be transferred to another county or reassigned by the Chairman of the Judicial
5 Council to a judge from a neutral county.

6 DATED: September 29, 1999

LUCE, FORWARD, HAMILTON & SCRIPPS LLP

7
8
9 By:


Lawrence J. Kourls, State Bar No. 095417
Christopher J. Healey, State Bar No. 105798
Attorneys for Defendants
SMITH AND WESSON CORP., and
STURM, RUGER & COMPANY, INC.

LAW OFFICES OF JAMES C. SABALOS

By: James C. Sabalos by att

JAMES CLIFFORD SABALOS (SBN 182545)

Attorney for Defendants BRYCO

ARMS, INC. and B.L. JENNINGS, INC.

THE ST. PETER LAW GROUP

By: Scott Shaffer by att

MICHAEL ST. PETER (SBN 042119)

SCOTT SHAFFER (SBN 130402)

Attorneys for Defendant

COLT'S MANUFACTURING, CO., INC.

SF1 #33426 v1

EXHIBIT C

1 TERENCE HALLINAN, State Bar # 39953
District Attorney

2 JUNE CRAVETT, State Bar # 105094

3 DAVID C. MOON, State Bar # 43851

Assistant District Attorneys

732 Brannan Street

4 San Francisco, California 94103

Telephone: (415) 551-9571

5 Facsimile: (415) 551-9504

6 LOUISE H. RENNE, State Bar #36508

City Attorney

7 PATRICK J. MAHONEY, State Bar #46264

Chief Trial Attorney

8 DONALD P. MARGOLIS, State Bar #116588

MATTHEW D. DAVIS, State Bar #141986

9 Deputy City Attorneys

Fox Plaza

10 1390 Market Street, 6th Floor

San Francisco, California 94102-5408

11 Telephone: (415) 554-3948

Facsimile: (415) 554-3837

12 Email: MATTHEW_DAVIS@CI.SF.CA.US

13 Attorneys for Plaintiffs

14 SUPERIOR COURT OF THE STATE OF CALIFORNIA

15 CITY AND COUNTY OF SAN FRANCISCO

16 THE STATE OF CALIFORNIA, *ex rel.*

17 TERENCE HALLINAN, District Attorney of
the City and County of San Francisco and
18 LOUISE H. RENNE, City Attorney of the City
and County of San Francisco, in their official
capacities as representatives of the *qui tam*
19 plaintiff CITY AND COUNTY OF SAN
FRANCISCO; and the PEOPLE OF THE
20 STATE OF CALIFORNIA,

21 Plaintiffs,

22 vs.

23 OLD REPUBLIC TITLE COMPANY, a
California corporation; et al

24 Defendants.
25

ENDORSED
FILED
San Francisco County Superior Court

SEP 11 1998

ALAN CARLSON, Clerk

BY: CYNTHIA S. HERBERT
Deputy Clerk

Case No. **993-507**

**[PROPOSED] ORDER DENYING
MOTION TO TRANSFER AND
JOINDER**

26 Defendants John Collopy, John Dosa and Michael Trudeau's motion to transfer this
27 action to Napa County pursuant to CCP § 394 came on for its regularly scheduled hearing on
28 September 8, 1998. Also heard was the joinder in that motion by defendants Old Republic Title

1 Company, Old Republic Title Holding Company, Old Republic Title Information Concepts and
2 Old Republic National Title Insurance Company. Jon S. Tigar of Keker & Van Nest appeared for
3 the moving and joining parties and Deputy City Attorney Matthew D. Davis appeared for
4 plaintiffs. All other appearances were noted in the record. Upon considering the papers,
5 pleadings, arguments and evidence presented, and for good cause appearing, the motion and
6 joinder are

7 DENIED.

8 Dated: September 8, 1998

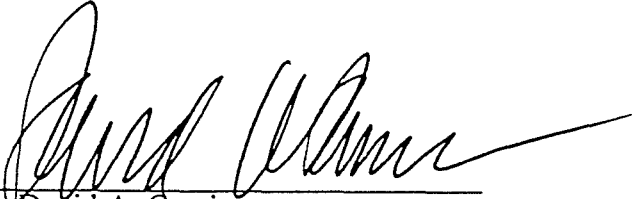

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10 Hon. David A. Garcia
Superior Court Judge
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EXHIBIT D

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
2 IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO
3 BEFORE THE HONORABLE DAVID A. GARCIA, JUDGE
4 LAW & MOTION DEPARTMENT

5 --oOo--

6 THE STATE OF CALIFORNIA, ex)
7 rel. TERENCE HALLINAN,)
8 District Attorney of The)
9 City and County of San)
10 Francisco and LOUISE RENNE,)
11 City Attorney of the City)
12 and County of San Francisco,)
13 in their official capacities)
14 as representatives of the)
15 qui tam plaintiff CITY AND)
16 COUNTY OF SAN FRANCISCO.)

17 PLAINTIFFS.)

18 VS.)

19 NO. 993507)

20 OLD REPUBLIC TITLE COMPANY,)
21 a California corporation,)
22 et al.,)

23 DEFENDANTS.)
24
25
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28

REPORTER'S TRANSCRIPT OF PROCEEDINGS

TUESDAY, SEPTEMBER 8, 1998

REPORTED BY: JOSEPH HAYDEN VICKSTEIN, CSR #4780

A P P E A R A N C E S:

For the Plaintiff:

LOUISE RENNE, City Attorney
By: MATTHEW D. DAVIS, Deputy City Attorney
1390 Market Street, Sixth Floor
San Francisco, Ca 94102

and

TERENCE HALLINAN, District Attorney
By: DAVID MOON, Deputy District Attorney
880 Bryant Street
San Francisco, Ca 94103

For the Defendants COLLOPY, DOSA and TRUDEAU:

Law Offices of KEKER & VAN NEST, LLP
By: JON S. TIGAR, Attorney at Law
710 Sansome Street
San Francisco, Ca 94111-1704

1 TUESDAY, SEPTEMBER 8, 1998

Morning Session

2 --oOo--

3 THE CLERK: Line 21, State of California versus
4 Old Republic Title.

5 MR. TIGAR: Good morning, Your Honor. John Tigar
6 for Moving Defendants.

7 MR. DAVIS: Good morning, Your Honor. Matt Davis
8 and David Moon on behalf of Plaintiffs.

9 MR. MOON: Good morning, Your Honor.

10 MR. TIGAR: Your Honor. I have the tentative in
11 this case obviously, but I don't have a reason. So let me
12 attempt to identify what I think the two most salient points
13 of the People's --

14 THE COURT: Why don't I just tell he what my
15 reasons were. And that is that the People of the State of
16 California are the ones that are suing, as qui tam
17 plaintiffs. It's the people that are suing. Not the City
18 and County of San Francisco. Therefore the code section,
19 CCP Section 394 simply isn't applicable.

20 MR. TIGAR: Your Honor, I think that going to the
21 authorities that the City and County relies on in its papers
22 to make exactly that argument, the Court has to ask itself
23 two questions.

24 First, does the City and County of San Francisco
25 have a separate identity in this lawsuit, apart from the
26 State of California. And secondly, do the citizens of the
27 City and County of San Francisco have a financial stake in
28 this lawsuit?

1 Because if the answer to either of those questions
2 is yes, then this case distinguishes itself from Nguyen and
3 distinguishes itself in the 17200 authority.

4 THE COURT: That's if, in fact, what we think is
5 that the People, that the citizens of the City and County of
6 San Francisco are distinguishable from the People of the
7 State of California, which to this Court's thinking they are
8 not.

9 Ultimately the reason for the statute is to
10 preclude local bias. Isn't it? That's the purpose of it.
11 And the idea being that the citizens of San Francisco would
12 favor the City and County of San Francisco.

13 But of course I have found that that's not always
14 the case. When the City is a litigant they frequently lose
15 before the citizens of the City of San Francisco. But be
16 that as it may, we won't indulge ourselves in such
17 discussions.

18 The real problem is here, this isn't really a jury
19 question. The issue ultimately of what extent it is that
20 the citizens benefit from the litigation should, in fact,
21 the People of the State of California prevail, and should it
22 ultimately be determined what amount of money is owed to the
23 City, is a judge question. And we know judges can't be
24 biased in favor of localities as a matter of law.

25 MR. TIGAR: Your Honor, even as to non-jury
26 questions, Moving Defendants might still have the right to a
27 judge from a different county, if that's where we wound up.

28 But I also think that -- I also think that the

1 City's personal stake in the outcome of this case.
2 distinguishes it from Nguyen, even relying on the
3 authorities cited by the City & County.

4 Kelly versus Boeing, which is a Federal Ninth
5 Circuit case, False Claims Acts standing that the People
6 rely on, says at Page 79:

7 "Qui tam plaintiffs have the requisite personal
8 stake in the outcome of the case." And they talk about what
9 that stake is. Relying on their need to fund the
10 litigation, their sizeable bounty they receive if they
11 prevail, and the fact that they will be liable for costs if
12 the suit is frivolous.

13 We are not arguing that the City & County is not
14 the State of California. But it's clear based on Kelly
15 versus Boeing and several other factors that the City &
16 County of San Francisco has a dual identity here.

17 This is not a quasi-criminal action. This is not
18 like Nguyen. In fact if the City & County of San Francisco
19 wanted to bring a criminal action, the authority in their
20 papers, Penal Code Section 72, would be where they proceed.
21 That fact by itself distinguishes this case completely from
22 Nguyen.

23 And let me also say, this is a case of first
24 impression in California. I agree that it would be up to
25 the Court to determine exactly the amount of the recovery
26 that the City & County receives. But the fact is that under
27 Government Code Section 12652, there is a range of recovery
28 for the citizens of the California.

1 And what the Court will determine is not whether
2 they will entitled to receive that range. But my
3 understanding of the statute is the Court will set where
4 within that range their recovery falls. So they do claim
5 the right to a jury. The citizens of the City & County of
6 San Francisco do stand to benefit financially. That's why
7 they brought this case. I don't think there's going to be
8 any dispute about that. And we know this can't be a
9 quasi-criminal statute, because there is a separate criminal
10 statute.

11 I just think that on every salient point, this is
12 completely different from the cases cited by the City &
13 County, Your Honor.

14 THE COURT: Very good.

15 MR. DAVIS: I don't have too much to add, Your
16 Honor, except what is stated in the briefs. If you want --

17 THE COURT: Do you want to respond to his
18 comments?

19 MR. DAVIS: Well, we do cite authority that says
20 under the Business & Professions Code, it is a
21 quasi-criminal statute.

22 Both the D.A. and the City Attorney have authority
23 to bring actions under that statute on behalf of the People
24 of the State of California. San Francisco has no claim in
25 this lawsuit. Rather, just prosecuting the claims on behalf
26 of either the State or the People.

27 THE COURT: Does San Francisco have a stake in the
28 outcome of the litigation? And is that an important

1 consideration?

2 MR. DAVIS: A financial stake? At the conclusion
3 of the Falls Claims proceedings, if there's a recovery, San
4 Francisco has a right to ask for a share of any recovery
5 that Old Republic has already been ordered to pay. That's a
6 determination that's made by the judge and not the jury.

7 THE COURT: Do you want to add anything?

8 MR. MOON: Nothing further.

9 THE COURT: I will take it under submission. I
10 think it's very likely I will stand on my tentative ruling,
11 but I want to think about the things you have said.

12 MR. DAVIS: Your Honor, I have a proposed order.

13 THE COURT: Please.

14 MR. TIGAR: Your Honor?

15 THE COURT: Please.

16 MR. TIGAR: If the Court, after consideration,
17 changes its mind, would the Court like to be heard briefly
18 on the selection of the venue, if the 394 motion is granted?

19 THE COURT: Did the City want to speak to that at
20 all?

21 MR. DAVIS: If you change your tentative, maybe we
22 should come back to talk about that.

23 THE COURT: All right.

24 MR. TIGAR: Thank you, Your Honor.

25 MR. DAVIS: How many copies would you like, Your
26 Honor?

27 THE COURT: One.

28 (Whereupon, the proceedings were adjourned.)

(2)

Joseph Hayden Vickstein, CSR #4780