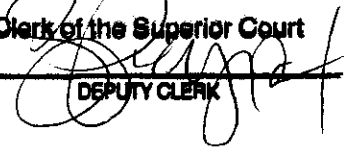


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FILED
SAN MATEO COUNTY

MAY 18 2012

Clerk of the Superior Court
By  DEPUTY CLERK

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN MATEO**

11 ULYSSES S. GRANT EARLY IV, et al.,

12 Plaintiffs,

13 vs.

14 COUNTY OF SAN MATEO,

15 Defendant.

Case No. 509185

**SUPPLEMENTAL MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF DEMURRER**

Hearing:

Date: July 2, 2012
Time: 9:00 a.m.
Dept: Law and Motion

17
18 **I. BACKGROUND**

19 On October 20, 2011 Plaintiffs filed their complaint, alleging that a County Ordinance prohibiting
20 possession of dangerous weapons in parks is preempted by state law. On December 15, 2011 the County
21 filed its General Demurrer, which asks the Court to determine as a matter of law that the Ordinance is not
22 preempted. On April 23, 2012 the Court issued its tentative ruling, indicating its intention to overrule the
23 demurrer on the ground, raised *sua sponte*, that preemption could not be determined on demurrer, citing
24 *Ludgate Ins. Co. v. Lockheed Martin Corp.*, 82 Cal.App.4th 592, 606 (2000). On April 24, 2012 the
25 parties appeared and argued the tentative. The Court indicated its intention to reverse the tentative, but
26 asked for supplemental briefing whether it is should reach the preemption issue.

27 **II. DISCUSSION**

28 The Court should reach the merits of the County's Demurrer.

Case No. 509185

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1 As the County noted at hearing, *Ludgate* is distinguishable and has never been cited by any Court
2 for the proposition that a demurrer to a declaratory relief action cannot be sustained. In *Ludgate*, an
3 insurance company that wrote an excess policy (Ludgate) filed an action against its insured (Lockheed),
4 seeking a declaration regarding the extent of coverage; in its complaint Ludgate alleged that there was an
5 actual controversy with respect to coverage. *Id.* at 597. Lockheed subsequently cross-claimed, also
6 seeking a declaration regarding the extent of coverage and also alleging an actual controversy. *Id.* at 598.
7 Years into the litigation, Ludgate filed a motion for judgment on the pleadings claiming that there was
8 not an actual controversy because Lockheed failed to allege facts that made it likely that it (Lockheed)
9 would exhaust its primary policies and reach Ludgate's excess policy. *Id.* at 601. The trial court granted
10 the motion and Lockheed appealed. *Id.* The Court of Appeal reversed. Its primary rationale was that
11 Ludgate itself had already alleged facts establishing the existence of an actual controversy and was
12 therefore estopped from arguing in a motion for judgment on the pleadings that there was not an actual
13 controversy. *Id.* at 604-05 ("Ludgate's insistence on specific allegations demonstrating exhaustion of
14 primary coverage was unnecessary and improper. It was unnecessary because by alleging in its first
15 amended complaint and representing to the court the existence of an actual and justiciable controversy,
16 Ludgate waived further demonstration of the existence of that controversy.") ("Exhaustion is merely an
17 issue of proof and entitlement to recovery, not of pleading."). The Court of Appeal also held that,
18 regardless, Lockheed had sufficiently alleged exhaustion. *Id.* at 609.

19 The instant case bares no relationship to the *Ludgate* matter. The County is not arguing that it is
20 entitled to judgment because plaintiffs failed to allege facts establishing the existence of an actual
21 controversy. It is arguing that as a matter of law, its Ordinance is not preempted by state statute. The
22 issue raised is a pure legal question particularly well suited for a demurrer. As the County noted at
23 hearing, it has found hundreds of cases permitting demurrers to declaratory relief actions. A few
24 examples include: *O'Connell v. City of Stockton*, 41 Cal.4th 1061 (2007) (deciding issue of preemption
25 of local ordinance on demurrer); *Olszewski v. Scripps Health*, 30 Cal.4th 798, 808 (2003) (holding that
26 the Court of Appeal properly decided preemption issue on demurrer, rejecting the argument that the
27 Court of Appeal improperly denied it the opportunity to litigate the claim); *Eiskamp v. Pajaro Valley*
28 *Water Management Agency*, 203 Cal. App. 4th 97, 103 (2012) (holding that trial court properly sustained

1 the demurrer to declaratory relief claim that challenged validity of an agency ordinance); *Gananian v.*
2 *Wagstaffe*, 199 Cal. App. 4th 1532, 1538-39 (2011) (holding that the trial court properly sustained the
3 demurrer to a declaratory relief claim that was based on the construction of a statute); *Apartment Ass'n of*
4 *Los Angeles County, Inc. v. City of Los Angeles*, 173 Cal. App. 4th 13, 17-19, 21 (2009) (explaining that
5 determination whether ordinance is preempted is a purely legal issue and holding that the trial court
6 properly sustained the demurrer to a declaratory relief claim that challenged the validity of that
7 ordinance) ("The issue of preemption of a municipal ordinance by state law presents a question of law,
8 subject to de novo review. The interpretation of state statutes also entails a resolution of a pure question
9 of law, which is examined de novo."); *Herzberg v. Plumas*, 133 Cal. App. 4th 1, 22-23 (2005) (affirming
10 a judgment issued after sustaining a demurrer to six causes of action (including for declaratory relief) and
11 concluding that a county ordinance was not preempted); *Korean American Legal Advocacy Foundation*
12 *v. City of Los Angeles*, 23 Cal. App. 4th 376, 383 (1994) (affirming trial court's decision to sustain
13 demurrer as to declaratory relief claim on the ground that city ordinances were not preempted). Further,
14 it is clear that the trial court does not have "discretion" to overrule an otherwise proper demurrer. *See,*
15 *e.g., Babb v. Superior Court*, 3 Cal.3d 841, 851-52 (1971) (issuing a writ of mandate directing the trial
16 court to sustain a demurrer to a declaratory relief action because it lacked discretion to overrule the
17 demurrer); *Outboard Marine Corp. v. Superior Court*, 52 Cal. App. 3d 30, 38 (1975) (holding trial court
18 had no discretion to overrule demurrer); *see also, Lazar v. Hertz Corp.*, 69 Cal. App. 4th 1494, 1501
19 (1999) (noting the black letter law that, unlike the decision whether to grant leave to amend (which is
20 discretionary), the decision whether to sustain is a demurrer is pure question of law).¹

21 This action presents a simple, purely legal issue: is a County Ordinance that prohibits possession
22 of dangerous weapons in parks preempted with respect to persons who possess a license (issued by local
23 law enforcement officials) to carry a concealed handgun, merely because the state of California occupies
24

25 ¹ I would note that there is a line of cases holding that the Court has the discretion to deny declaratory
26 relief when it determines that declaratory relief is not in the interests of justice, *e.g.,* here, because no
27 prosecution or threatened prosecution of violations of the County Ordinance at issue has been alleged,
28 but I do not understand the Court to have raised that issue. *See, e.g., Poniktera v. Seiler*, 181 Cal.App.4th
121, 139 (2010) ("Courts have considerable discretion to deny declaratory relief when resolution of the
controversy would have little practical effect in terms of altering parties' behavior.").

1 the field of *gun licensing*. Plaintiffs have never suggested any desire or intention to conduct discovery
2 and have never argued that there are any fact issues to be resolved. This case was filed a year ago. It
3 would be an inefficient use of public resources to delay determination of this basic legal issue. There is
4 no reason to wait. The Court can properly declare the validity of the County's Ordinance in resolving the
5 County's Demurrer.

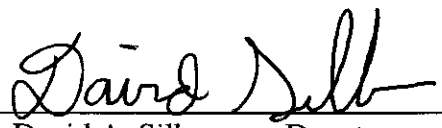
6 **III. CONCLUSION**

7 For the foregoing reasons, and because the infirmities of Plaintiffs' complaint are incurable, the
8 County asks that its Demurrer be SUSTAINED with prejudice and without leave to amend.

9
10 Dated: May 18, 2012

Respectfully submitted,

11 JOHN C. BEIERS, COUNTY COUNSEL

12
13 By: 
14 David A. Silberman, Deputy

15 Attorneys for Defendant
16 COUNTY OF SAN MATEO
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PROOF OF SERVICE

I do hereby declare that I am a citizen of the United States employed in the County of San Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California. I am not a party to the within action.

On May 18, 2012, I served the following document(s):

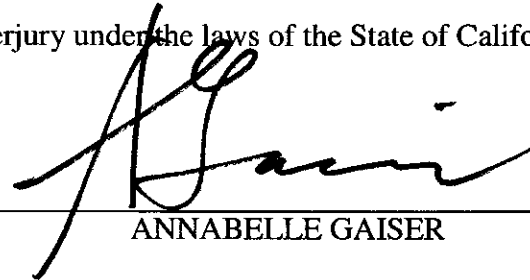
SUPPLEMENTAL MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER

on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the following manner:

☒ (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as shown below for collection and mailing at Redwood City, California following our ordinary business practices. I am readily familiar with this office's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

☐ (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s) shown below. A proof of service signed by the authorized courier will be filed forthwith.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.


ANNABELLE GAISER

Early et al. v. County of San Mateo, et al. – Case No. CIV 509185

NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE

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