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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

GHOST GUNNER FIREARMS CASES	JCCP No. 5167
Included actions:	Superior Court of California County of Orange Case No. 30-2019-01111797-CU-PO-CJC
30-2019-01111797-CU-PO-CJC *Cardenas v. Ghost Gunner, Inc. dba GhostGunner.net, et al.*	Superior Court of California County of San Bernardino Case No. CIV-DS-1935422
CIV-DS-1935422 *McFadyen, et al. v. Ghost Gunner, Inc., dba GhostGunner.net, et al.*	**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO JUGGERNAUT TACTICAL, INC.'S MOTION FOR DISMISSAL, ATTORNEYS' FEES, AND OTHER SANCTIONS** Date.: October 14, 2022 Time: 9:00 a.m. Dept.: CX 104 Judge: Hon. William D. Claster

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INTRODUCTION

Defendant Juggernaut Tactical, Inc. ("Juggernaut") is asking this Court to impose the extraordinary remedy of dismissal from the consolidated case with prejudice and sanctions against both Plaintiffs and their counsel. The sole basis for Juggernaut's motion is that the parties participated in a May 24, 2022 inspection ("Inspection") of certain firearms and firearm parts that the Tehama County Sheriff's Office ("TCSO") presumably collected at multiple crime scenes involved in the November 2017 Tehama County Massacre.[1] On June 20, 2022, Juggernaut sent Plaintiffs a declaration from its President and owner, Zackary Kasanjian-King, and a report from an expert named Michael Shain retained on behalf of Juggernaut. In that letter, Juggernaut claimed that the King Declaration and Shain Report together were "incontrovertible evidence that the products they claim caused their injuries were not manufactured by Juggernaut Tactical." Mot. at 1. Juggernaut summarized that:

> Simply put, an inspection of the subject firearms and firearm parts confirmed that it is an ***impossibility*** that the products at issue were manufactured by Juggernaut Tactical. Plaintiffs and their counsel know this, yet they persist in their willfully blind pursuit of a misplaced and self-righteous attack on an industry.[2]

Id. Juggernaut thus concluded that Plaintiffs could not have had a good faith basis pursuant to C.C.P. § 128.7 to continue to name it as a defendant when it filed the First Amended Complaint. Mot. at 5.

Juggernaut described its June 20 letter as a "courtesy" that would be followed by a draft motion and supporting evidence. Schilsky Decl., Ex. A at 1. Counsel for Juggernaut neither

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[1] *See* Shyong, Frank; Panzar, Javier; Serna, Joseph; Saint John, Paige (November 14, 2017), "Terror in Northern California town as gunman goes on rampage, sprays school with bullets", https://webarchive.loc.gov/all/20171116154316/http://beta.latimes.com/local/lanow/la-me-ln-norcal-elementary-school-shooting-20171114-story.html.

[2] Plaintiffs take issue with Juggernaut's demeaning description of their attempt to seek damages from the death and destruction they suffered in November 2017 as a "self-righteous attack on an industry" of some kind of Second Amendment takedown. *See* Mot. at 1. It is inconsistent with the California Attorney Guidelines of Civility and Professionalism. *See, e.g.*, Section One ("The dignity, decorum and courtesy that have traditionally characterized the courts and legal profession of civilize d nations are not empty formalities. They are essential to an atmosphere that promotes justice and to an attorney's responsibility for the fair and impartial administration of justice.").

followed up with a call or email to request meet and confer. But Juggernaut did follow through with a draft sanctions motion on July 18, 2022, stating that it was "unequivocally clear" that "Juggernaut Tactical is not a proper defendant in this case, and should be immediately dismissed." *Id.*, Ex. B at 1. And once again, Juggernaut did not request meet and confer but instead stated that Plaintiffs could contact counsel "[s]hould [Plaintiffs] like to discuss further." *Id.* Juggernaut proceeded with filing its motion on August 17, 2022.

While Juggernaut's evidence may ultimately prove convincing, Plaintiffs have no obligation to take Juggernaut's self-serving testimony and report at face value. *See, e.g.*, *People v. Esquivel*, No. A149692, 2019 WL 2592630, at *14 (Cal. Ct. App. June 25, 2019), *review denied* (Oct. 9, 2019) (plaintiff not required to accept defendant's unsupported, self-serving claims). And just as was true in the sanctions motion brought by defendant Polymer80 and denied by the Court on February 4, 2022, there are substantial evidentiary holes in Juggernaut's analysis that make it premature to suggest an improper motive in Plaintiffs continuing to pursue their case. Plaintiffs have considered the evidence offered by Juggernaut and wish to test the assumptions that evidence is predicated upon. That is not sanctionable conduct, but the bare minimum to be expected of a zealous advocate.

Further, there is no record of wrongdoing by Plaintiffs in this matter (or otherwise) to merit Juggernaut's empty accusations of misconduct. To the contrary, Plaintiffs and their counsel have worked cooperatively and constructively with Defendants throughout to move the case forward in as methodical and efficient a manner as possible. Indeed, Plaintiffs have already dismissed another defendant (R&B Tooling) when they were convinced by evidence proffered by that defendant that dismissal was proper. Dkt. No. 307.

Further, sanctions are warranted only in "the rare and exceptional case where the action is clearly frivolous." *Operating Engineers Pension Trust v. A-C Co.*, 859 F.2d 1336, 1345 (9th Cir. 1988). That burden is Juggernaut's to meet. It is not Plaintiffs' obligation to prove the merits of its own case on this motion, as Juggernaut suggests. It is possible that Plaintiffs ultimately will become aware of facts that support a dismissal of Juggernaut and if so, they will take appropriate

action. But Plaintiffs are also mindful that the application of section 128.7 must not "conflict with the primary duty of an attorney to represent his or her client zealously" through innovative but sensible advocacy. *Guillemin v. Stein*, 104 Cal.App.4th 156, 167-68 (2002).

Juggernaut has not come close to meeting its heavy burden of showing on the scant evidence presented and at this early stage that no "reasonable attorney would agree that [Plaintiffs claims against Juggernaut are] totally and completely without merit." *In re Marriage of Flaherty*, 31 Cal.3d 637, 650 (1982). Consequently, Juggernaut's motion should be denied without hearing so the parties can focus on briefing the next round of demurrers and taking discovery to clarify the issues that prevent Plaintiffs from assessing whether Juggernaut's claims of non-involvement are true.

RELEVANT BACKGROUND

On May 24, 2022, the parties with their respective experts jointly attended an inspection of firearms collected by the TCSO and believed to have been used in the Tehama County Massacre. The TCSO showed the participants multiple firearms and firearm parts that presumably had been collected as evidence, including five 80 percent lower receivers and a total of four AR-15 firearms, two of which were unserialized. Ex. A (Shain Report).

Several weeks after the Inspection on July 20, 2022, counsel for Juggernaut sent counsel for Plaintiffs a letter demanding an immediate dismissal. Schilsky Decl., Ex. A. Juggernaut included with its letter a draft declaration from its CEO stating that it had never used a forging process on its AR-15 lowers but instead used a billeting process. *Id.*, Ex. A (King Decl.) at 2. It also included a draft report from Michael Shain, who had attended the Inspection. *Id.*, Ex. A (Shain Report). Mr. Shain concluded that Juggernaut could not have manufactured any of the AR-15 lowers (or uppers, for that matter), explaining that certain markings on the Inspection firearms proved that a forging process had been used. *Id.* at 22. The July letter also included a draft motion for sanctions, which Juggernaut stated it would file after the 21-day safe harbor ran. *Id.*, Ex. B. Juggernaut demanded that Plaintiffs not name Juggernaut as a defendant in its upcoming amended complaint.

Four days after receiving Juggernaut's July 20 letter and its over 40 pages of attachments, Plaintiffs filed their First Amended Complaint ("the FAC") and included Juggernaut as a defendant. Dkt. No. 538. Though Plaintiffs had considered Juggernaut's materials from four days earlier, they still maintained questions about the provenance and scope of the evidence shown at the Inspection that would require a subpoena to the TCSO to obtain information about who had collected the evidence shown at the Inspection, how the evidence was collected and monitored, where TCSO searched, and whether other law enforcement personnel and/or other parties were involved in the search of the multiple crime scenes involved in the Tehama County Massacre. *See* Declaration of Amy K. Van Zant ("VZ Decl."), at ¶ 2. Plaintiffs likewise intend to take targeted discovery from Mr. King and Juggernaut.

On August 17, 2022, Juggernaut filed its motion for sanctions along with the King Declaration and Shain Report that had previously been provided to Plaintiffs in July. Dkt. No. 544. Prior to filing its motion, Juggernaut did not request a telephonic meet and confer. *See* Schilsky Decl., Exs. A and B. However, counsel for the parties had a call on or around August 23, 2022 regarding the parties' joint CMC statement and Mr. Schilsky stated he was disappointed Plaintiffs had not responded to his June and July letters. VZ Decl., at ¶ 4. Ms. Van Zant stated that she did not understand either letter to invite a response, noted that she had been out for much of that period, but offered to conduct a call as soon as possible. *Id.* Ms. Van Zant and Mr. Schilsky met and conferred about the sanctions motion on September 8, 2022 and intend to have further communications in advance of the hearing. *Id.*

LEGAL STANDARD

Under CCP Section 128.7, a court may impose sanctions only if it concludes a pleading was filed for an improper purpose or was indisputably without merit, either legally or factually. *Guillemin v. Stein*, 104 Cal.App.4th 156, 168 (2002) (vacating the award of sanctions because the motion was not frivolous and Guillemin was entitled to zealously argue the point). A claim is factually frivolous if it is "not well grounded in fact" and is legally frivolous if it is "not warranted by existing law or a good faith argument for the extension, modification, or reversal of

existing law." *Id.* at 167. In either case, to obtain sanctions, the moving party must show the party's conduct in asserting the claim was objectively unreasonable. *Id.* A claim is objectively unreasonable if "any reasonable attorney would agree that [it] is totally and completely without merit." *Flaherty,* 31 Cal.3d at 650; *Guillemin,* 104 Cal.App.4th at 168.

Federal case law construing Rule 11 (28 U.S.C.) is persuasive authority on the meaning of section 128.7. *Guillemin,* 104 Cal.App.4th at 167. Under Rule 11 (28 U.S.C.), even though an action may not be frivolous when it is filed, it may become so if later-acquired evidence refutes the findings of a prefiling investigation and the attorney continues to file papers supporting the client's claims. *See Childs v. State Farm Mut. Auto. Ins. Co.*, I29 F.3d 1018, 1024 (5th Cir. 1994).

Notably, Section 128.7 should only apply in "limited circumstances." *See Kumar v. Ramsey*, 71 Cal. App. 5th 1110, 1120 (2021) (finding the trial court abused its discretion by imposing sanctions against plaintiff). As the Ninth Circuit stated, section 128.7 should be used only in the "rare and exceptional case where the action is clearly frivolous, legally unreasonable or without legal foundation, or brought for an improper purpose." *See Operating Eng'rs Pension Tr. v. A-C Co.*, 859 F.2d 1336, 1344 (9th Cir. 1988) (reversing the imposition of sanctions as improper). Furthermore, any application of section 128.7 must not be construed so as to conflict with the primary duty of an attorney to represent his or her client zealously. *Id.*

California courts have further found that failure to overcome a demurrer or to survive summary judgment is not, in itself, enough to warrant the imposition of sanctions. *See Peake v. Underwood*, 227 Cal. App. 4th 428, 448 (2014) (finding sanctions warranted only when a party does not actually believe the merits of his or her claims). As the Court in *Peake* notes, "sanctions should not be routinely or easily awarded even for a claim that is arguably frivolous." *Id.* Rather, sanctions should be made "with restraint." *Id.*

The evidentiary burden to escape sanctions under section 128.7 is considered "light." *See Kumar*, 71 Cal. App. 5th at 1126. Plaintiffs are only required to demonstrate that they made a reasonable inquiry into the facts and entertained a good faith belief in the merits of the claim. *Id.* As the following section shows, Plaintiffs have more than met their burden of proof and the Court

should deny Juggernaut's motion for sanctions.

ARGUMENT

To succeed in its motion for sanctions, CCP § 128.7 requires that **Juggernaut**, not Plaintiffs, proffer undisputed facts demonstrating that any reasonable attorney would agree that Plaintiffs have no good faith basis for continuing their claims against Juggernaut. *See e.g, Kumar*, 71 Cal. App. 5th at 1120; *Peake*, 227 Cal. App. 4th at 448; *Guillemin*, 104 Cal.App.4th at 167; *Operating Eng'rs Pension Tr.*, 859 F.2d at 1343. Juggernaut has failed in meeting this standard.

There are three primary reasons why Juggernaut's motion fails. *First,* the parties have not had the opportunity to test the circumstances of the TCSO evidence collection and search for firearms used in the massacre. Thus, while the parties can draw conclusions about the weapons they saw at the Inspection, the parties still do not know whether other relevant weapons exist and were collected. *Second,* while Juggernaut has submitted its CEO's declaration regarding it alleged prior practices in making uppers and lowers using the billeting process, Plaintiffs are entitled to test Mr. King's statements through its own investigation and discovery from Juggernaut. *Third,* even if further investigation shows it to be true that no Juggernaut manufactured lower could have been used in the massacre, Plaintiffs have not done anything in bad faith such as would merit sanctions.

On the first point, the Inspection Plaintiffs and Juggernaut agree on what was shown, i.e., firearms and firearms components presumably used in the Tehama County Massacre, but little else. The parties do not to know how the firearms and parts that we were permitted to be inspected were collected and what steps were taken by TCSO to determine whether all firearms, tools, and parts used by Neal in the commission of the massacre were collected. The parties do not know whether there is reason to believe that other weapons may be in the possession of other law enforcement agencies such as the ATF or other federal officials (we understand that the photos shared by the TCSO suggest that other law enforcement agencies may have been present during the collection of evidence and therefore may be in the possession of evidence).

Furthermore, some of the Plaintiffs are currently suing Tehama County for the Sheriff's Department's failure to remove all weapons from Neal's possession, thus allowing the massacre to occur when it might have been stopped. Thus, without accusing the TCSO of any wrongdoing (they were extremely helpful at the Inspection), it cannot be ignored that there is a potential for bias and concealment of bad facts. All of this impacts whether the parties have actually seen all of the weapons that were involved in the shooting. Juggernaut is trying to cut further investigation off at the knees before the full circumstances of this most central issue can be assessed.

On the second point, Juggernaut relies on its own untested and self-serving King Declaration and Shain Report as definitive. But the Inspection did not include a review of any of the Defendants' accused firearm products (most specifically, the 80% lowers). We have only King and Shain's say-so for what markings their lowers have and whether that has been 100% consistent for all times prior to 2017. Of course, the law allows for examination of a party's evidence and Plaintiffs are entitled to test Juggernaut's evidence for credibility, including by, *e.g.*, examining Juggernaut uppers and lowers from pre-2017. *See Karma Auto. Llc v. Lordstown Motors Corp.,* 2021 U.S. Dist. LEXIS 177953, at *5-6 (C.D. Cal. July 13, 2021) (court declined to credit two "likely self-serving declarations" and denied motion for sanctions); *see also* 1 Witkin, Cal. Evid. 5th Hearsay § 145 (2021) ("Obviously, a statement in the declarant's own interest is inadmissible hearsay"); *Carlston v. Shenson*, 47 Cal. App. 2d 52, 56 (1941) ("It has never been the law that a self–serving sworn declaration of a party in a collateral and independent matter may be introduced as proving or tending to prove the truth of such statement"); *Lak v. Lak*, 50 Cal. App. 5th 581 (2020) (benefits claim rejected where moving party did not corroborate his self-serving declarations of financial hardship with financial documents). Plaintiffs do not have the burden on this issue on this motion – it is Juggernaut's obligation to show that an objective attorney could not possibly look at the King and Shain evidence and conclude that more discovery is needed.

As for the final point, Juggernaut's assertions of bad faith are really nothing more than

just that – a naked claim. The pleadings in this case are still unsettled, the parties remain in the very earliest stages of discovery and there has been no finding that Plaintiffs have acted in bad faith, nor have they been sanctioned, nor have they been found to be harassing the defendants. To the contrary, it is far easier to conclude that Juggernaut and the other defendants are harassing Plaintiffs by filing serial sanctions motions (first, by Polymer80, next by Juggernaut, and most recently threatened by MFY, Thunder Guns, and Ghost Firearms). VZ Decl., at ¶ 4. But sanctions motions are to be "made with restraint," and not filed just because one party feels like the other is wrong. *See Peake v. Underwood*, 227 Cal. App. 4th 428, 448 (2014), as modified on denial of reh'g (July 17, 2014).

Moreover, in a case like the present one, where a highly contested theory of liability is being explored (and potentially expanded), some leeway is to be expected to ensure that Plaintiffs have a fair shot at making a good faith argument for an expansion of the law. "Because our adversary system requires that attorneys and litigants be provided substantial breathing room to develop and assert factual and legal arguments, sanctions should not be routinely or easily awarded even for a claim that is arguably frivolous. Courts must carefully consider the circumstances before awarding sanctions." *Peake*, 227 Cal. App. 4th at 448; *see also Kojababian v. Genuine Home Loans, Inc.*, 174 Cal.App.4th 408, 421, 94 Cal.Rptr.3d 288 (2009) (no sanctions even when case was found to be frivolous).

Finally, under CCP § 128.7, Plaintiffs certify in filing a pleading before the court that, "to the best of [its] knowledge, information, and belief, formed after an inquiry reasonable under the circumstance" that its claims are non-frivolous and "any other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after reasonable opportunity for further investigation or discovery." Cal. Civ. Proc. Code § 128.7(b). Whether a CCP § 128.7 certification is violated is tested objectively. *Bockrath v. Aldrich Chem. Co., Inc.*, 21 Cal.4th 71, 82 (1999) ("We measure the truth-finding inquiry's reasonableness under an objective standard, and apply this standard both to attorneys and to their clients."). In signing the FAC, Plaintiffs have averred that they have done just that.

CONCLUSION

Juggernaut is zealously represented by its counsel and the same holds true for Plaintiffs. Neither has committed sanctionable conduct and Juggernaut's motion should be denied.

Dated: September 13, 2022

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