

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT, DIVISION THREE

THE PEOPLE OF THE STATE OF  
CALIFORNIA,

Appellant and Plaintiff,

vs.

PACIFIC LUMBER COMPANY, ET  
AL,

Respondent and Defendant.

Case No. A112028

(Humboldt Superior Court  
No. DR030070)

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**APPELLANT'S OPENING BRIEF**

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The Honorable Richard L. Freeborn

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**CERTIFICATE OF INTERESTED ENTITIES OR PERSONS**

There are no interested entities or persons to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
3.	
4.	

Please attach additional sheets with person or entity information if necessary.

Dated: November 8, 2006

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## INTRODUCTION

In this case, the trial court ruled that the People's *Business & Professions Code* § 17200 ("UCL") lawsuit for fraud against Pacific Lumber Company, et al. ("PL"), seeking civil penalties and restitution, was immune from prosecution under *Civil Code* § 47's litigation privilege and the "*Noerr-Pennington* doctrine." The trial court also determined, contrary to the allegations in the complaint, that PL's misrepresentations did not undermine the administrative agency's decision; and, contrary to law, that the UCL is not applicable to single transactions and the complaint alleges a single transaction.

None of these conclusions are correct. Specifically: (i) the litigation privilege does not apply to the People's UCL lawsuit because the People were not a party to the underlying CEQA process; (ii) the *Noerr-Pennington* doctrine is not applicable to this case because PL wasn't lobbying government - they were applying for a timber harvest permit; and the lawsuit is a law enforcement action of the People of the State of California, not an individual or a non-government entity; (iii) the allegations in the complaint that PL's material misrepresentations undermined the entire proceeding is a factual issue that cannot be resolved by demurrer; and (iv) by law, the UCL applies to a single act of fraud.

## STATEMENT OF FACTS AND CASE

The People bring this *Business & Professions Code* § 17200 ("UCL") lawsuit against Pacific Lumber Company, et al. ("PL"), seeking civil penalties and restitution. The People allege that PL intentionally misrepresented crucial facts in an adjudicative administrative procedure governed by the *California Environmental Quality Act* ("CEQA"), resulting

in the circumvention of a critical step in the CEQA process: recirculation of the Environmental Impact Report (“EIR”) for public comment. As a result, PL was permitted to log more timber than it otherwise would have been allowed. The increased harvest rate resulted in increased landslides, water pollution, sedimentation, and impairment of northern California watersheds and fisheries that threaten the health and safety of residents and public infrastructure. PL benefited and continues to benefit from its deceit.

PL has thrice demurred to People’s successive complaints, and the matter is now at issue following the trial court’s order sustaining PL’s demurrer to the Second Amended Complaint. [CT 614-615.]

The basis for the trial court’s ruling are that: (1) Civil Code § 47’s litigation privilege bars this lawsuit; [CT 595-602]; (2) the “*Noerr-Pennington* doctrine” protecting the rights to lobby or petition the government bars this lawsuit; [CT 605, 610]; (3) PL’s misrepresentations did not undermine the agency decision; [CT 609-611]; and (4) the UCL is directed at ongoing wrongful conduct, not single transactions, and the complaint alleges a single transaction. [CT 611-612.]

The trial court’s conclusions are incorrect. First, the litigation privilege does not apply to the People’s UCL lawsuit because the People were not a party to the underlying CEQA process. Second, the *Noerr-Pennington* doctrine is not a defense to the People’s UCL lawsuit because (i) PL’s conduct amounted to fraud against the People of the State of California - not lobbying; and (ii) the lawsuit is a law enforcement action designed to protect the public. Third, the court’s failure to accept the allegations in the complaint, to wit: PL’s material misrepresentations undermined the entire proceeding, as true when ruling on the demurrer as is

required by law was an abuse of the court's authority. Fourth, it is well settled law that UCL applies to a single act of fraud.

### **STANDARD OF REVIEW**

A demurrer tests only the legal sufficiency of a pleading. *Committee on Children's Television, Inc. v. General Foods Corporation* (1983) 35 Cal.3d 197, 213-214. In reviewing a judgment of dismissal pursuant to a demurrer, the Court must assume the truth of all properly pleaded material allegations of the complaint. *Silberg v. Anderson* (1990) 50 Cal.3d 205, 210.

### **SUMMARY OF ARGUMENT**

The trial court's ruling is contrary to the law, public policy and the facts alleged in the complaint. Specifically: (i) the People were not a party to the underlying CEQA process so the litigation privilege does not apply to this lawsuit; (ii) the People's UCL lawsuit against PL is a law enforcement action of the People of the State of California and PL wasn't lobbying government - they were applying for a timber harvest permit, so the *Noerr-Pennington* doctrine does not apply to this lawsuit either; (iii) the allegations in the complaint were that PL's material misrepresentations undermined the entire proceeding and the court had no authority to decide otherwise; and (iv) the UCL applies to a single act of fraud.

Therefore, this Court should overrule the trial court's order in its entirety.

## LEGAL DISCUSSION

### I.

#### A. **CIVIL CODE SECTION 47(b) DOES NOT PRECLUDE THE PEOPLE'S UCL LAWSUIT BECAUSE THE PEOPLE WERE NOT A PARTY TO THE CEQA PROCESS.**

The trial court ruled that the People's *Business and Professions Code* § 17200 lawsuit against PL is barred by *Civil Code* § 47(b)'s litigation privilege. The People's lawsuit alleges that PL committed fraud in an adjudicatory administrative CEQA process. The People were not a party to that action. Therefore, PL's fraud is not protected by the litigation privilege.

Specifically, in *Rubin v. Green* (1993) 4 Cal.4th 1187, the Supreme Court ruled that the litigation privilege does not preclude lawsuits under *Business and Professions Code* § 17200 by non-party litigants. This ruling was followed in *Kashian v. Harriman* (2002) 98 Cal.App.4th 892, (Where fraud occurred in litigation to which the plaintiff was not a party, the plaintiff could sue for redress from fraud and the litigation privilege would not protect the defendant); and in *American Products Co., Inc. v. Law Offices of Geller, Stewart and Foley, LLP* (2005) 134 Cal.App.4th 1332, (The litigation privilege is not a defense in an unfair competition action if the plaintiff was not a party to the earlier litigation in which the allegedly privileged conduct occurred.)

## II.

### THE NOERR-PENNINGTON DOCTRINE IS NOT A DEFENSE IN THE PEOPLE'S UCL LAWSUIT AGAINST PL.

#### A.

### THE NOERR-PENNINGTON DOCTRINE PROTECTS LOBBYING, NOT MATERIAL MISREPRESENTATIONS IN AN ADJUDICATORY PROCEEDING.

For the Petition Clause of the First Amendment to the United States Constitution, (*U.S. Const. amend. I, cl. 6.*) to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way. Accordingly, in *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, (1961) 365 U.S. 127, the Court rejected antitrust liability stemming from an aggressive lobbying campaign by railroads to persuade states to adopt legislation that would severely limit competition from truckers. The Court explained, "in a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives," *Id.* at 137, therefore, the Sherman Act does not apply to the railroads' advocacy of legislative action, i.e., lobbying, even if there is an anticompetitive intent. *Id.* at 138.

The *Noerr-Pennington* doctrine, which evolved out of the *Noerr* decision and its progeny, has been found to apply to activities aimed at the executive and judicial branches of government and to administrative agencies. *United Mine Workers v. Pennington*, (1965) 381 U.S. 657, 669-

70, 14 L. Ed. 2d 626, 85 S. Ct. 1585 (1965) (executive); *California Motor Transp. Co. v. Trucking Unlimited*, (1972) 404 U.S. 508, 510, 30 L. Ed. 2d 642, 92 S. Ct. 609 (judicial and administrative agencies). The Court explained that " the right to petition extends to all departments of the Government," and therefore, "the same philosophy governs the approach of citizens or groups of them to administrative agencies (which are both creatures of the legislature, and arms of the executive) and to courts, the third branch of Government." *California Motor Transp.*, 404 U.S. at 612-13. *Noerr-Pennington* has also been applied to both state and federal antitrust claims that allege anticompetitive activity in the form of lobbying before any branch of either federal or state government. *Amarel v. Connell*, (9th Cir. 1996) 102 F.3d 1494, 1524.

**B.**

**GIVING FALSE INFORMATION TO AN ADJUDICATIVE ADMINISTRATIVE AGENCY FOR THE PURPOSE OF DECEIVING THEM IN THEIR ADJUDICATIVE ROLE IS NOT LOBBYING, IT IS FRAUD.**

As indicated above, the *Noerr-Pennington* doctrine protects lobbying. However, the process of providing information to an administrative agency charged with a regulatory fact-finding procedure, much like obtaining a building permit or other permits from administrative agencies, is not lobbying.

Specifically, PL was not seeking a change in existing rules of law or policy. Rather, PL sought a decision that would allow them to harvest enough timber to provide them a certain flow of income. Because they thought accurate information about the environmental impact of their

desired harvest rate would cause the administrative agency charged with issuing a harvest rate permit to deny their requested harvest rate, they gave the administrative agency false information about the environmental impact of that desired harvest. The above conduct is fraud, not lobbying.

As stated by the Federal Court in *Woods Exploration & Producing Co., Inc. v. Aluminum Co. of America* (5th Cir. 1971) 438 F.2d 1286:

Basic to *Noerr* is a belief that regulation of competition by the political process is legitimate and not proscribed by the Sherman Act, an enactment which is itself a political decision. For the political process to be effective there must be freedom of access, regardless of motive, to ensure the ‘right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws.’ [citations omitted.] Where these political considerations are absent the *Noerr* doctrine is inapplicable. [citations omitted.] The policies of the Sherman Act should not be sacrificed simply because defendants employ governmental processes to accomplish anti-competitive purposes. Otherwise, with governmental activities abounding about us, government could engineer many to antitrust havens. We think that the doctrine should not be extended unless the factors upon which *Noerr* rested are present and require the same result. In *Trucking Unlimited v. California Motor Transport Co.*, [citations omitted], the Ninth Circuit refused to immunize under *Noerr* a scheme whereby trucking companies conspired to oppose before state and federal regulatory commissions all applications by competitors for the issuance, transfer, or registration of operating rights. Characterizing the licensing procedure as adjudicative, the court felt that the defendants were not seeking to influence a policymaking function; rather they were attempting to undermine a well-defined policy with regard to licensing operators by blocking and discouraging access to the governmental agencies. Similarly, in the instant case there has been no attempt by defendants through the filing of false nominations to influence the policies of the Railroad Commission. The germination of the allowable formula was political in the *Noerr* sense, and thus participation in those rule-making proceedings would have been protected. But the formula's subsequent implementation is apolitical. Once the rule is promulgated, defendants may not

plead immunity in their attempt to undermine its efficacy for anti-competitive purposes.

*Id.* at 1296-1297

The *Woods* case, *supra*, is interesting in its factual resemblance to the case at bar. In *Woods* the defendant, a natural gas producer, was not seeking to influence a policymaking function, rather they misrepresented the volume of gas they expected to market from their wells to the governing state agency to reduce the production allowables. In the Peoples case against PL, PL was not trying to persuade the administrative agency charged with fact-finding and issuing a harvest permit to change the rules associated with the fact-finding process or the issuance of a harvest permit. Rather, PL was trying to obtain a permit to harvest an amount of timber that would result in a desired profit. Because PL thought that accurate information about the environmental impact of their desired harvest rate would result in their not being able to obtain a permit that would allow them to harvest timber at a rate that would give them their desired profit, they gave the agency false information about the anticipated environmental impact of their desired harvest rate.

In *Woods*, like PL in this case, the defendant sought to protect their misrepresentations by invoking *Noerr-Pennington* doctrine. However, in *Woods*, the Court rejected that attempt distinguishing attempts to invoke policy-making powers of agencies and attempts to misrepresent the facts to get a favorable permit. *See also: Kasky v. Nike*, (2002) 27 Cal.4th 939, 969 (“[W]hen a corporation, to maintain and increase its sales and profits, makes public statements defending labor practices and working conditions at factories where its products are made, those public statements are commercial speech that may be regulated to prevent consumer deception.”); *Columbia Steel Casting v. Portland General Electric Co.* (9th Cir. 1996)

111 F. 3d 1427, 1446 ("Applying to an administrative agency for approval of an anticompetitive contract is not lobbying within the meaning of the *Noerr-Pennington* doctrine."))

In *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* (1st Cir. 1970) 424 F.2d 25, the First Circuit discussed the difference, for purposes of applying *Noerr-Pennington* doctrine between political lobbying, which is protected, and self-serving attempts to market one's wares, which is not. In *Whitten*, for purposes of summary judgment, the defendant manufacturer of swimming pool hardware admitted to "that it had combined with dealers and others to effect the use of its specifications in the public swimming pool industry, that its specifications were so drawn that only it could comply, and that its purpose was to eliminate competition." *Id.* at 27. The defendant further admitted that such conduct could violate the Sherman Anti-Trust Act, but claimed *Noerr-Pennington* immunity. *Id.* The District Court granted summary judgment but the Appeals Court reversed, pointing out that the defendant's attempts to better its market position was not political lobbying protected by *Noerr Pennington*.

Analyzing *Noerr*, the Court said:

The key to this decision, in our opinion, is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the 'passage or enforcement of laws.' The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy makers. A pluralistic society moves by many motives. The hope, supported by history, is that permitting every interest to be heard will produce a tolerable amalgam responsive to the needs of a given time. But the efforts of an industry leader to impose his product specifications by guile, falsity, and threats on a harried architect hired by a local school board hardly rise to the dignity of an effort to influence the passage or enforcement of laws. By 'enforcement of laws' we understand some significant policy

determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter. *Noerr* alone, then, does not support Paddock's position.

The Court further said:

The state legislatures, by enacting statutes requiring public bidding, have decreed that government purchases will be made according to strictly economic criteria. Paddock [defendant] is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers. Indeed, to hold otherwise might impair the effectiveness of competitive bidding. [*Citation omitted.*] We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.

This conclusion does not, in our view, encroach on the freedom of speech and right to petition protected by the First Amendment. The First Amendment does not provide the same degree of protection to purely commercial activity that it does to attempts at political persuasion. [*Citations omitted*] Moreover, the First Amendment does not prevent government from adopting reasonable rules for regulating the conduct of those who seek its favor. [*Citations omitted.*] Finally, Paddock's right to tout its wares to government agencies, unlike the right to seek legislation involved in *Noerr*, is purely a creature of statute and must be exercised within the confines of bidding procedures designed to insure the maximum possible competition for the government's expenditures. In the light of these considerations, we see no constitutional objection to requiring that Paddock observe the same limitations in dealing with the government as it would in dealing with private consumers.”

*Whitten* 424 F. 2d at 33-34.

The court further observed that *Noerr* protects only attempts to influence political rule making. “*Noerr* stressed the importance of free access to public officials vested with significant policy-making discretion.

We doubt whether the Court, without expressing additional rationale,

would have extended the *Noerr* umbrella to public officials engaged in purely commercial dealings when the case turned on other issues.” (*Id.* at 33.)

In this case, the CEQA process was an adjudicatory administrative process where the administrative agency was charged with gathering information for making a cost-benefit analysis of harvesting timber and for determining what level of mitigation was necessary to minimize the negative environmental impact of that logging. PL was not claiming that such cost-benefit analysis should not be done or that there should be some change in the CEQA process. Rather, they were using the CEQA process to provide false information about the impact of their desired logging so they could harvest more timber than they otherwise would have been able to and would have to do less mitigation of the environmental harm caused by that logging under the pretense of complying with the law. In essence, PL deprived the agency of necessary information to do appropriate cost-benefit analysis as they were obligated to do on behalf of the People of the State of California.

However broad the First Amendment right to petition may be, it cannot be stretched to cover petitions based on known falsehoods. “Misrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process.” *California Motor Transport v. Trucking Unlimited* (1972) 404 U.S. 508, 513. “Attempts to influence

governmental action through overtly corrupt conduct, such as bribes (in any context) and misrepresentations (in the adjudicatory process), are not normal and legitimate exercises of the right to petition, and activities of this sort have been held beyond the protection of *Noerr*.” *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass’n*. (D.C. Cir. 1981) 663 F.2d 253, 263. “We see no reason to believe that the right to petition includes a right to file deliberately false complaints.” *Whelan v. Abell* (D.C. Cir. 1995) 48 F.3d 1247, 1255. “Neither *Noerr-Pennington* nor the First Amendment protects the conduct plaintiffs have alleged--namely, knowing misrepresentations to state securities administrators and a federal court.” *Whelan v. Abell* (D.C. Cir. 1995) 48 F.3d 1247, 1249. The *Noerr-Pennington* doctrine does not provide immunity for a party where there is “proof that a party’s knowing fraud upon, or its intentional misrepresentations to, the court deprive the [prior] litigation of its legitimacy. *Liberty Lake Investments, Inc., v. Magnuson*, (9th Cir. 1993) 12 F.3d 155, 159. “A fraudulent omission can be just as reprehensible as a fraudulent misrepresentation.” *Nobelpharma AB v. Implant Innovations, Inc.*, (Fed. Cir. 1998) 141 F.3d 1059, (No *Noerr-Pennington* doctrine immunity for party that fraudulently obtained patent.)

The trial court’s reliance on *Kottle v. Northwest Kidney Centers* (9<sup>th</sup> Cir. 1998) 146 F.3d 1056, in rendering its decision is also misplaced.

Specifically, *Kottle* dealt with an entirely different situation. In *Kottle* the

entity providing false information to the adjudicative administrative agency was not a party to the adjudicative process. Rather, they were the established dialysis clinic that wanted to prevent Doctor Kottle from getting a permit to open another facility so he would not take away their market domination. The entrenched clinic lied about factual data relevant to the need for and effects of the proposed facility. The agency relied on that information in their decision to not issue the permit and Doctor Kottle sued the entrenched clinic. The holding in *Kottle* would have been entirely different if Doctor Kottle had providing false information to obtain his permit as PL did in the Peoples case. Specifically, he would be facing either a criminal prosecution or a UCL case brought against him by the local prosecutor.

Finally, the *Noerr-Pennington* doctrine is not a defense if a party's knowing fraud upon, or its intentional misrepresentations to, the judicial proceeding or adjudicative administrative proceeding that the party is before deprives the proceeding of its legitimacy rendering it a “sham” proceeding. *Liberty Lake Inv., Inc. v. Magnuson*, (9th Cir. 1993) 12 F.3d 155, 158. The People’s complaint alleged that PL’s knowing misrepresentations to the administrative agency charged with regulating their timber harvesting deprived the adjudicatory process of its legitimacy by preventing a meaningful initial EIR review and then mandatory recirculation of the EIR because of the significance of the new information

which showed a concordant, rather than a contradictory, relationship, between the Bear and Jordan Reviews. This rendered the proceeding a “sham” and, once again, the *Noerr-Pennington* doctrine is not a defense to the People’s UCL lawsuit against PL.

C.

**NOERR-PENNINGTON IS NOT A DEFENSE WHEN THE UCL LAWSUIT IS BROUGHT BY THE GOVERNMENT ACTING TO ENFORCE ITS LAWS.**

The most interesting and most important issue raised by the trial court’s ruling is whether the *Noerr-Pennington* doctrine precludes a civil law enforcement action brought by a District Attorney to protect the People of the State of California from fraud committed upon them. This is an issue of first impression that has the potential for profound social and legal significance.

The People assert that the *Noerr-Pennington* doctrine does not preclude UCL lawsuits brought by the Attorney General, district attorneys, county counsels and city attorneys under their public protection authority. Further, the People challenge PL to provide a case that holds that it does preclude either a criminal or civil law enforcement action brought by a District Attorney against a person or persons for knowing material misrepresentations to an administrative agency engaged in an adjudicative administrative proceeding involving the person or persons providing that false information.

A civil action brought by a governmental entity under UCL “is fundamentally a law enforcement action designed to protect the public.” *People v. Pacific Land Research Co.*, (1977) 141 Cal.3d. 10, 17. The Supreme Court’s finding in *People v. Pacific Land Research* was reiterated in the most recent amendment to 17204, made by the passage of *Proposition 64* in 2004 by the California electorate. The initiative’s finding and declaration of purpose provided that “[I]t is the intent of California voters in enacting this act that only the California Attorney General and local public officials be authorized to **file and prosecute actions on behalf of the general public.**” (*Initiative Measure (Prop. 64) § 1(f)*, *emphasis added.*) The initiative further declared that “[I]t is the intent of California voters in enacting this act that the Attorney General, district attorneys, county counsels, and city attorneys maintain **their public protection authority and capability under the unfair competition laws.**” *Id.* at § 1(g), *emphasis added.* This stated purpose is in accord with the long history of the UCL. (*See, e.g., People v. Centr-O-Mart* (1950) 214 P.2d 378, 380 (The Attorney General could pursue actions under the predecessor statute to enforce the State’s interest in public welfare.))

The People’s lawsuit against PL is legislatively authorized to protect the public from fraudulent and harmful business practices. It is a legitimate assertion of the government’s police or regulatory power and one of the methods a District Attorney has to fulfill the obligation of enforcing

California laws and regulations that affect the health, welfare and safety of the People of the State of California. Therefore, providing PL immunity from the People's lawsuit against them for fraud under the circumstances in this case is absurd. Such a ruling not only encourages misrepresentation and deceit in every situation where governmental agencies are tasked with regulating activities - it rewards it. If this logic is applied to building permits, air emissions regulations, water quality regulations, and every other activity that government regulates for the purpose of protecting the public and the court will have completely eviscerated government's ability to protect its citizenry. This outcome simply cannot be the law if the law is just.

Each of the cases PL cited in support of their position that the *Noerr-Pennington* doctrine precluded the People's lawsuit was brought by a private party against a competitor. In each instance, one party wished to show that a business competitor had transgressed the permissible limits on trying to persuade a governmental agency to grant favors or advantages. The difference between a lawsuit between competitors, and one brought by the People as part of their police and regulatory power is profound.

Worth noting is that the court in *California Motor Transport v. Trucking Unlimited* (1972) 404 U.S. 508, finding the *Noerr-Pennington* doctrine was inapplicable in an administrative context, observed that it has never been thought unconstitutional to make a course of conduct illegal

simply because the conduct was wholly or partly carried out by means of language. *California Motor Transport v. Trucking Unlimited*, *supra*, 404 U.S. at 613 “Such an expansive interpretation of the constitutional guaranties of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.” *Id.*

Applied to the instant case, turning the right to petition government into a right to lie in an adjudicative administrative hearing makes it impossible for a regulating agency to fulfill its responsibility of regulating. In the context of logging on steep, unstable slopes in watersheds containing people, their homes and community infrastructures, such an expansion leaves those people and their communities wholly unprotected and without any ability to remedy harms inflicted upon them by unconstrained logging.

### III.

**THE ALLEGATIONS IN THE PEOPLE’S COMPLAINT WERE THAT PL’S MATERIAL MISREPRESENTATIONS UNDERMINED THE ENTIRE CEQA PROCEEDINGS AND THE COURT HAD NO LEGAL AUTHORITY TO DECIDE OTHERWISE.**

A demurrer tests only the legal sufficiency of a pleading. *Committee on Children’s Television, Inc. v. General Foods Corporation* (1983) 35 Cal.3d 197, 213-214.)

The trial court states that the misrepresentation could have no effect on the proceeding because the allegedly false report and the corrected report were both filed after the November 16, 1998 cutoff date and

therefore CDF was not obliged to consider them. (TC order p 21.) Further the trial court states that we have not explained how CDF initially arrived at a lower allowable timber harvest figure than PL was later able to obtain, even without the corrected report. (TC order p 22.) In the trial court's view of the allegations, because CDF originally adopted a long-term sustained yield plan (LTSY) known as SYP alternative 25a, and only changed that plan pursuant to PL's later persuasive efforts, we have not shown that the cause of the increased allowance was the fraud. (TC order p 20.)

This oversimplified summary of our allegations is both incorrect and speculative. Specifically, the People alleged that the Jordan creek data – which PL falsified and then hid from regulators and the public so as to conceal its importance – critically undermined the validity of studies made in other watersheds about the effects of logging on steep slopes, and the effectiveness of the HCP mitigations in reducing hazardous logging. Had the Jordan Creek data been available to CDF early in the process, as it should have been, PL would have had no credible defense against the constraints necessarily imposed by the conclusions of the Bear Creek Report, and CDF would have had no credible rationale for even the initial rate of logging in 25a, which was lower than PL finally obtained. The People argued that even 25a was unsupportable, since 25a presumed and relied upon the accuracy of False Jordan report to overcome the constraints of the Bear Creek conclusions.

The People maintain that the Corrected Jordan, insofar as it corroborated the findings in the Bear Creek report, would have required CDF to approve a rate of logging *lower*, not higher than 25a. Therefore, PL could never have persuaded the agency to allow as much logging as it did.

The trial court also impugned the allegations because the Water Quality agency required the Bear and Jordan reviews, as though compelled evidence, irrespective of its origin, were not to be considered in this process. Such is not the case; substantive evidence in a quasi-judicial administrative process such as this is considered because it bears on adjudicatory facts. In any event, the surveys were in fact ordered by Water Quality in conjunction with CDF and other state regulatory agencies, including DFG, a signatory to the HWA, a fact misunderstood by Judge Freeborn because he prematurely and improperly considered it at the demurrer stage without the benefit of a fact-finding process.

Judge Freeborn's similar reliance on dates of submission is marred by his confusion flowing from the inherently inadequate factual airing in a demurrer.

The People alleged the importance of the Jordan Creek data and expect to present witnesses who will testify that the outcome of the proceeding would have been entirely different had the fraud not occurred. The trial court went well beyond its role in reviewing a demurrer when it

decided that the Jordan creek data, because of the timing of events, could have had no effect on the outcome.

Had there been only the Correct Jordan survey demonstrating concordance between Bear and Jordan with respect to the predicted incidence of landslides pursuant to PL's proposed HCP/SYP, even the logging rate approved in 25a would have been untenable, since 25a was approved reliant on False Jordan.

As it played out, the entire proceeding was undermined and made nugatory by this fraud because the fact of False Jordan followed by Corrected Jordan made recirculation of the EIR for further review by the public and the agencies, mandatory, had Correct Jordan been submitted properly. Significant new information requires recirculation under CEQA. Correct Jordan is obviously significant in this context, because it affirmed the acknowledged significance of Bear - that PL's proposed HCP/SYP would violate water law, and constitute a nuisance, both untenable and unlawful outcomes.

We recapitulate some of the crucial facts from our allegations.

When Dr. Leslie Reid reviewed the PL Sediment Source Survey (SSI) for Bear Creek in May, 1998, at the request of the EPA and NCRWQCB, she found a 9.6 fold increase in landsliding rates from hillslopes selectively logged under modern forest practice rules, as compared to partially recovered lands logged prior to the Forest Practice

Rules. At the request of the NCRWQCB, Dr. Reid prepared a calculation of a cutting rate for the Bear Creek watershed that would result in attainment of Basin Plan objectives, including recovery of the watershed. Assuming HCP/SYP protections to be entirely effective and sufficient to avoid any increase in landslides over the naturally occurring background rate, and disregarding the differences between old growth forest stands and logged lands un-reentered for >15 years, Dr. Reid concluded that 1.5% of the watershed could be logged annually. This rate did not take into account logging-related hydrologic alterations, which would further limit the rate of harvest significantly. She emphasized that the logging would have to be “dispersed through time in any given watershed.”

Dr. Reid’s final observations in her review of the SSI for Bear Creek sounded a death knell for PL’s desired harvest rates, dependent as they were on maximizing the allowable harvest of mass wasting areas of concern: “It should be noted that soils and bedrock similar to those of Bear Creek watershed are also found through much of the North Fork Mattole watershed and neighboring watersheds along the west valley wall of the Eel; similar soil types are found in parts of the Freshwater Creek and Elk River watersheds. Information and conclusions drawn from the Bear creek watershed are thus potentially relevant through a large area.”

Rather than conduct the SSI of the neighboring (to Bear) small watershed of Jordan Creek as scheduled, PL/PWA evaluated NFER instead,

and released the NFER SSI. It was reviewed by Dr. Reid and Frank Reichmuth of NCRWQCB. Internal inconsistencies in data prevented a final review, but a 13.1-13.6 fold increase in mass wasting from harvesting under modern Forest Practice Rules (FPRs) was found, similar to the Bear Creek SSI. “As it stands, it does not appear that the [mass wasting avoidance] strategy will be capable of avoiding the kinds of failures documented in the Bear Creek report. The strategy depends on site-level inspections by a geologist.

The problem for PL was that the concepts and approach from Dr. Reid’s Bear Creek Review and calculations would be generalized to other watersheds. These findings were submitted as comments to the Draft Environmental Impact Statement/DEIR Report (DEIS/EIR) for the HCP/SYP, and unless somehow discredited or otherwise neutralized, they would undermine the basis for PL’s SYP harvest rate projections. In order to attack the generalizations from Dr. Reid’s review, PL/PWA submitted a “draft” Jordan Creek SSI demonstrating the opposite findings from that of Bear Creek.

What happened next is best explained in an excerpt from Dr. Reid’s review of a geologist’s report for a PL THP in the North Fork Mattole: “The second new contribution to understanding of landslide distribution came with the long-awaited release of the PWA report on landslide distribution in Jordan Creek watershed (PWA 1999), located immediately

north of Bear Creek watershed. This event, however, was marked by considerable confusion, because the actual contents of the report were found to directly contradict the results that had been quoted earlier by PWA (1998), Dr. D. Opalach (1998) of Pacific Lumber Company, and USFWS and CDF (1999). Between 10 November 1998 and 29 January 1999, the results were said to demonstrate that in Jordan Creek, most recent landslides were associated with older logging, and that recently logged slopes showed comparatively low rates of landslides. This “result” was the primary piece of evidence used to assert that results of the Bear Creek report could not be employed to inform management decisions in nearby areas with similar geology, topography, land-use history, and climate: if a neighboring watershed shows the opposite pattern as Bear Creek, then it is clear that results cannot be generalized.

“When the report was finally released, however, it became clear that the actual results of the study showed a pattern very similar to that measured in Bear Creek: “In Jordan Creek, 60% of the landslides and 77% of the landslide sediment delivery came from 50% of the watershed which had been harvested within the last 15 years” (PWA 1999, p 27.) In other words, rates of landslide sediment delivery from recently logged lands in Jordan Creek watershed are 3.3 times higher than those from partially recovered forest (calculated as the ratio between  $(0.77/0.50)$  and  $(0.23/0.50)$ .) Clearly, results in Jordan Creek support those from Bear

Creek, removing the argument that had been used to prevent Bear Creek results from being used to inform management decisions on similar lands nearby.” (Review of “Response to review comments of the Upper Allwardt Creek THP” by Dr. Leslie Reid, 6/7/00.)

“Draft Jordan Creek SSI” was released for this 5000-acre watershed, and no corrected version replaced it until it was too late.

The People further alleged that the entire proceeding was undermined and made nugatory by this fraud because, had the corrected Jordan Creek data been provided in a timely manner, the case would have been recirculated to the public for further input and a meaningful review, in light of the accurate data. The review that did take place was irrevocably tainted by the false data. The corrected data was uniquely important in this case because it undermined the key evidence upon which CDF relied to refute the implications of the Bear creek conclusions that PL’s proposed HCP/SYP inadequately mitigated the adverse environmental consequences of PL’s proposed rate of logging.

The People alleged that the CDF would have recirculated the EIR had it been aware of the false Jordan Creek data, because not only was that data misleading as to the effect of logging in the Jordan Creek watershed, but also it undermined the generality of conclusions about steep slope logging in all the relevant watersheds. This false data was the weightiest data showing no pernicious landslide effects from logging in steep terrain,

and therefore served to undermine the correctness of data from all other watersheds. It was therefore supremely important data with the potential to precipitate wholly different decisions as to circulation of the EIR and final formulation of appropriate THP's.

These are the facts the People plead; their truth cannot be demonstrated without a trial. These allegations are clearly sufficient to demonstrate how important that corrected data was to a valid procedure and a correct result. For purposes of a demurrer, the allegations were enough to demonstrate both extrinsic fraud and the sham nature of the tainted proceeding.

Worth noting is that the trial court order is based on matters which the court stated were beyond the record. The trial judge said: "While not directly mentioned in the pleadings, one must consider the inception of the CEQA process in this case. The Headwaters Agreement was not some covert, dark of night, operation instigated solely by PALCO. It was a well-publicized coming together of a number of interested parties with a wide divergence of interests in politics, business, ecology, flood control, revenue, employment, and other factors. The process was open to one and all, and the 80,000 page administrative record mentioned in EPIC, supra, attests to the extent to which many contributed to the record. This complex and extensive proceedings [sic] was not some fabrication of PALCO initiated as

a ‘sham’ to take advantage of others.” (Trial Court Order, pp. 18-19, emphasis added).

The trial court erred in deciding this issue on the pleadings because factual issues are unsuitable for demurrer resolution. We further submit that the trial judge was not yet in a position to appreciate the significance of PL’s misrepresentations, because we have not had an opportunity to build the factual context in which these misrepresentations were made. That is why the law wisely provides that facts are not to be tried on demurrer.

#### IV.

#### THE UCL APPLIES TO SINGLE OR TO MULTIPLE TRANSACTIONS

The trial court stated that the UCL requires a “practice,” that is ongoing wrongful conduct, envisioning more than a single transaction citing *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499. [Trial Court Order pp. 22-23] *Hewlett* has not been valid law since 1992 when the Legislature amended § 17200 to provide that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice. . . ." *Business and Professions Code* § 17200. That change has also been reflected in court decisions.

“In response to the California Supreme Court's 1988 ruling that a "business practice" under Business and Professions Code section 17200 must encompass more than a single transaction [see *State of California ex rel. Van De Kamp v. Texaco, Inc.* (1988) 46 Cal. 3d 1147, 1169-1170],

the Legislature amended the statute in 1992 to provide that ‘unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice. . . .’ (§ 17200, italics added.) The California Supreme Court has interpreted the 1992 amendment as overruling that part of *Van De Kamp* that interpreted the statute to require more than a single ‘act.’ (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553.) Accordingly, under the current version of the statute, even a single act may create liability. (*Klein v. Earth Elements, Inc.* (1997) 59 Cal. App. 4th 965, 968, fn. 3; *Podolsky v. First Healthcare Corp.* (1996) 50 Cal. App. 4th 632, 653.)

“Although appellants cite *Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal. App. 4th 499, it is not controlling. This is because *Hewlett* involved a suit filed in 1989, and the *Hewlett* court therefore applied the statute as it read then, rather than as amended in 1992. (Id. at pp. 514, 518.)” (*United Farm Workers of America v. Dutra Farms* (2000) 83 Cal. App. 4th 1146, 1163-1164.)

The trial court is plainly wrong in dismissing this case on the ground that the UCL requires more than a single transaction.

More importantly, the complaint at issue alleged a fraudulent course of conduct. Specifically, it alleges that PL manufactured false data, submitted it to the adjudicatory administrative agency, sent a correction of the false data to the wrong individual in a manner that ensured it would not be read in time to influence the decision, and now profits by its fraud by logging in excess of safe and allowable limits, inflicting continuous harm on the watersheds of Humboldt County.

### CONCLUSION

The trial court's ruling is contrary to the law, public policy and the facts alleged in the complaint. Specifically: (i) the People were not a party to the underlying CEQA process so the litigation privilege does not apply to this lawsuit; (ii) the People's UCL lawsuit against PL is a law enforcement action of the People of the State of California and PL wasn't lobbying government - they were applying for a timber harvest permit, so the *Noerr-Pennington* doctrine does not apply to this lawsuit either; (iii) the allegations in the complaint were that PL's material misrepresentations undermined the entire proceeding and the court had no authority to decide otherwise; and (iv) the UCL applies to single act and multiple acts of fraud.

Therefore, this Court should overrule the trial court's order in its entirety.

Dated: November 27, 2006

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 8,033 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on November 9, 2006.

PAUL V. GALLEGOS  
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Humboldt County

By: \_\_\_\_\_  
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**PROOF OF SERVICE**

I, Jennifer Strona, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the District Attorney's Office of Humboldt County, 825 Fifth Street, Fourth Floor, Eureka, , CA 95501.

On November 9, 2006, I served the following document(s):

**APPELLANT'S OPENING BRIEF**

on the following persons at the locations specified:

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in the manner indicated below:

- BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.
- BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional messenger service. **A declaration from the messenger who made the delivery**  **is attached** or  **will be filed separately with the court.**

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed November 9, 2006, at San Francisco, California.

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Jennifer Strona