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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF HUMBOLDT

10 THE PEOPLE OF THE STATE OF)
11 CALIFORNIA,)

12 Plaintiff,)

13 vs.)

14 THE PACIFIC LUMBER COMPANY,)
15 *et al.*,)

16 Defendants.)

Case No. DR 030070

**SUPPLEMENTAL BRIEF IN
OPPOSITION TO DEMURRER
TO SECOND AMENDED
COMPLAINT**

17 **I.**

18 **INTRODUCTION**

19 On December 6, 2004, the trial court invited further briefing regarding Defendant's
20 demurrer to the second amended complaint (SAC) as to (1) "privity," (2) whether the "extrinsic
21 fraud" exception to Civil Code 47 has been pleaded, and (3) whether the "sham" exception to
22 Noerr-Pennington has been pleaded.

23 In this supplemental brief the People will show:

24 1. Privity: This issue, raised by the Defendant, is a red herring, totally irrelevant. The
25 Supreme Court states in *Rubin v. Green*¹ that "the policy underlying the UCL can be vindicated
26 by . . . district attorneys," whom the UCL, in turn, *requires* to "bring" actions against "any"
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¹ Rubin v. Green (1993) 4 Cal. 4th 1187, 1204

1 person for "any" wrongful business practice "in whatever context." This Rubin dictum is not
2 only compellingly persuasive on all lower courts, but actually binding.

3 2. Extrinsic Fraud: The SAC complies with the Court's "litigation privilege" ruling in
4 that, despite such privilege being inapplicable in this case under Rubin, the SAC nonetheless
5 fully pleads the "extrinsic fraud" exception to this privilege.
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7 3. Sham Exception: The SAC complies with the Court's "Noerr-Pennington" ruling in
8 that, despite such doctrine being inapplicable in this case,² it nonetheless fully pleads the
9 "sham" exception to this doctrine.

10 II.

11 STATEMENT OF THE CASE

12 On April 30, 2004, this Court issued its ruling ("Ruling") on the demurrer to the
13 People's first amended complaint alleging the Defendant's violation of the Unfair Competition
14 Law (UCL), as set forth in Business & Professions Code sections 17200 *et seq.*
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16 On May 27, 2004, The People filed a second amended complaint (SAC) complying
17 with the ruling by fully pleading all the elements of the "extrinsic fraud" exception to the
18 litigation privilege of Civil Code section 47, and by fully pleading all the elements of the
19 "sham" exception to the Noerr-Pennington doctrine.
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21 On July 16, 2004, the People, in their Opposition to Defendant's new demurrer, showed
22 that there was no need even to plead the "extrinsic fraud" exception to Civil Code 47 because in
23 Rubin v. Green, the California Supreme Court, in strong and clear dictum, has stated that the
24 litigation privilege does not apply to "district attorneys" vindicating the UCL.
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26 ² (Ruling, p. 14, lines 7-8 ("As stated the immunity afforded by the Noerr-Pennington Doctrine does not
27 apply in this case."); the Court's ruling is supported by Columbia Steel Casting v. Portland General
28 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.").)

1 On July 21, 2004, the Defendant, in its Reply Brief, tried to evade this Supreme Court
2 dictum by arguing (1) that the aforesaid observation of Rubin "is merely dicta," (2) that "the
3 Court did not say that public entities would be permitted to use the privilege communications if
4 they brought their own action," (3) that the People's "argument runs contrary to the Court's
5 conclusion that section 47 is an absolute privilege," (4) that other cases "contradict the District
6 Attorney's conclusion that section 47 is inapplicable to public entities," (5) that "privity exists
7 between the District Attorney and the state entities in the Headwaters Transaction," and (6) that
8 the People's interpretation of section 47 would "encourage endless rounds of litigation on
9 matters decided in official proceedings."
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11 The discussion that follows will show each of these arguments to be specious.

12 III.

13 DISCUSSION

14 A.

15 **The Supreme Court states in Rubin that the policy**
16 **underlying the UCL can be vindicated by district attorneys,**
17 **whom the UCL requires to "bring" actions against "any"**
18 **person for "any" wrongful business practice "in whatever**
19 **context." This Rubin dictum is binding on all lower courts.**
Hence Defendant's "privity" and other Civil Code 47
arguments are irrelevant.

20 In their Opposition, the People cited the following language in the Supreme Court's
21 Rubin v. Green decision as authorizing a district attorney to file UCL actions without Civil
22 Code section 47 being a bar:

23 "Our conclusion that plaintiff's tack of pleading his claim under
24 the unfair competition statute does not override the litigation
25 privilege in this case is reinforced by the fact that the policy
26 underlying the unfair competition statute can be vindicated by
27 multiple parties other than plaintiff under the broad standing
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1 provision of Business and Professions Code section 17204.
2 Apart from the overreached client, these litigants include the
3 Attorney General, district attorneys, and certain city attorneys.
4 [Citation.]"

5 (Rubin v. Green, *supra*, 4 Cal. 4th at p. 1204,³ emphasis added.)

6 All of Defendant's arguments regarding Civil Code 47 are fruitless attempts to evade the
7 powerful impact of Rubin.

8 **1.**

9 **The Rubin dictum authorizes district attorneys to bring UCL actions.**

10 Defendant argues that the Supreme Court in Rubin "did not say that public entities
11 would be permitted to use the privilege communications if they brought their own action." This
12 argument is clearly specious because the UCL that is to be vindicated authorizes, *by its terms*,
13 district attorneys to "bring" actions as plaintiffs, and to do so against "any" person who
14 commits "any" wrongful business practice.⁴ And district attorneys must do so to achieve the
15 "broad" policy purposes of the UCL, which include dealing with the "innumerable new
16 schemes which the fertility of man's invention would contrive," including "in whatever context
17 such activity might occur."⁵ "In whatever context" necessarily includes this case, in which
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21 ³ Portions of this Rubin dictum are quoted with approval in subsequent cases. (See Stop Youth
22 Addiction, Inc. v. Lucky Stores, Inc. (1998) 17 Cal. 4th 553, 564; and Kashian v. Harriman (2002) 98
23 Cal. App. 4th 892, 924.)

24 ⁴ See Bus. & Prof. Code, sec. 17206(a), emphasis added ("*Any person who engages . . . in unfair*
25 *competition shall be liable for a civil penalty not to exceed . . . \$2,500 . . . for each violation, which shall*
26 *be assessed and recovered in a civil action brought in the name of the people of the State of California*
27 *by the Attorney General, by any district attorney*"); see also Bus. & Prof. Code, sec. 17204, emphasis
28 added ("*Actions . . . shall be prosecuted . . . by . . . any district attorney*").

29 ⁵ Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co. (1999) 20 Cal. 4th 163, 181,
30 emphasis added ("*The unfair competition law, which has lesser sanctions than the Unfair Practices Act,*
31 *has a broader scope for a reason. '[T]he Legislature . . . intended by this sweeping language to permit*
32 *tribunals to enjoin on-going wrongful business conducted in whatever context such activity might occur.*
33 *Indeed, . . . the section was intentionally framed in its broad, sweeping language, precisely to enable*
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1 Defendant, a corporation, is charged with engaging in a fraudulent business practice with the
2 government and public. If, therefore, this Court in this case were to disallow the district
3 attorney from bringing this action under the UCL, it would be sending a catastrophically
4 cynical, harmful invitation to every dishonest corporation dealing with government: no DA will
5 get you--so lie as you please.

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7 **2.**

8 **The Supreme Court's dictum in Rubin is binding on all lower courts.**

9 Defendant's initial (and presumably primary) argument for evading Rubin is that its
10 language regarding district attorneys is "mere dictum." This argument is specious because the
11 Rubin dictum is binding on all lower courts.⁶ It is binding on a Court of Appeal even though
12 the case appealed is decided at trial court level before the Supreme Court decision.⁷ Even under
13 pre-Hickman law, the Rubin dictum would be regarded as compellingly persuasive because of
14 the reasoning Rubin gives for its dictum: UCL policy vindication by the Attorney General and
15 district attorneys. As shown above, this policy could never be vindicated unless district
16 attorneys were exempt from the litigation privilege in filing UCL actions "in whatever context."
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18 **3.**

19 **The Rubin dictum is consistent with Civil Code 47 being an absolute privilege.**

20 Defendant argues that that the People's argument "runs contrary to the Court's
21 conclusion that section 47 is an absolute privilege." Defendant's argument mistakenly
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judicial tribunals to deal with the innumerable "new schemes which the fertility of man's invention would
contrive." [Citation.]"

25 ⁶ *Hickman v. Mulder* (1976) 58 Cal. App. 3d 900, 902, italics added ("The case is squarely controlled by
26 a dictum in *Cornelison v. Kornbluth*, 15 Cal.3d 590 . . . , and *in obedience to that dictum we must*
reverse the judgment of dismissal.")

27 ⁷ See *Marriage of Condon* (1998) 62 Cal. App. 4th 533, 549.

1 misconstrues the term "absolute" to mean no exception to the applicability of the privilege,
2 whereas it simply means no exception within the scope of the coverage. The leading case on
3 Civil Code 47, for example, carves out an exception for extrinsic fraud despite calling the
4 litigation privilege absolute, which it defines as "irrespective of maliciousness" within the
5 scope of the privilege.⁸ Most importantly, the Rubin court itself, by referring to "multiple
6 parties other than plaintiff under the broad standing" provision of the UCL, is clearly
7 demonstrating that, even though the privilege is called absolute, it does not apply to such
8 multiple parties, which include district attorneys.

10 **4.**

11 **The Rubin dictum is not undermined by "other cases."**

12 Defendant argues that other cases⁹ "contradict the District Attorney's conclusion that
13 section 47 is inapplicable to public entities." This argument is specious for two reasons. First,
14 neither case is a Supreme Court case, and hence each would be bound by the dictum in Rubin.
15 Second, neither case involved a district attorney vindicating the UCL, which imposes an
16 *affirmative* duty on district attorneys to bring civil actions against anyone committing an unfair
17 business practice. Had this duty been before either court, it would have had to conclude that
18 Civil Code 47 could not be a bar to a district attorney. The fact that the cases cited by
19 Defendant show Civil Code 47 offers *protection* to public entities *supports* Civil Code 47 *not*
20 *being a bar*. The fairest reading of these cases is that they support district attorneys being
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25 ⁸ See Silberg v. Anderson (1990) 50 Cal. 3d 205, 214, which applies the litigation privilege "except" in
26 situations "such as extrinsic fraud," and declaring (p. 216) that the privilege is absolute because it
27 applies to publications "irrespective of their maliciousness."

28 ⁹ Braun v. Bureau of State Audits (1998) 67 Cal. App. 4th 1382, 1394; and People v. Health Labs. of N.
Am., Inc. (2001) 87 Cal. App. 4th 442, 450.

1 maximally *unfettered*, whether as plaintiffs or defendants, in fulfilling their solemn obligation
2 to protect the public interest.

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4 **5.**

5 **The Rubin dictum necessarily renders "privity" irrelevant.**

6 Defendant next argues that "privity exists between the District Attorney and the state
7 entities in the Headwaters Transaction."¹⁰ This argument is clearly specious in that it is utterly
8 inconsistent with the import of Rubin, which is to grant district attorneys the right to "vin-
9 dicate" the UCL "in whatever context." By virtue of removing Civil Code 47 as a bar to district
10 attorneys bringing UCL actions, the Rubin Court renders the whole notion of privity irrelevant,
11 for it could only have relevance if the litigation privilege were not removed as a bar.¹¹

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13 **6.**

14 **The Rubin dictum actually discourages "endless rounds of litigation."**

15 Defendant argues, last, that the People's interpretation of section 47 would "encourage
16 endless rounds of litigation on matters decided in official proceedings." As a matter of common
17 sense, that argument is nonsensical. District attorney offices have budget constraints, as well as
18 opportunity-cost restraints, and they can only act in matters of the public interest--as
19 distinguished from private interest. There could not, therefore, be endless rounds of litigation
20 resulting from a district attorney being given the latitude to do his job to penalize wrongful
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23 ¹⁰ This argument was *not* raised by the People, there being no reason to do so given their contention
that the Rubin dictum is controlling.

24 ¹¹ Even in UCL cases brought by general members of the public who are not district attorneys, the
25 Rubin court appears to narrow the privity doctrine to require that the same attorneys be involved in both
26 proceedings. (*See Rubin v. Green, supra*, 4 Cal. 4th at p. 1204, emphasis added ("Importantly,
27 members of the public who, unlike plaintiff, are not adversaries in collateral litigation *involving the same*
attorneys also have standing to pursue unfair competition claims under the statute.")) The obvious
reason for this narrower privity rule in UCL cases not brought by the AG or district attorneys is that UCL
enforcement is to be deemed so important by the courts as to circumscribe even the litigation privilege.

1 business practices. In fact, the truth is the very opposite of Defendant's argument: if district
2 attorneys were prevented from prosecuting UCL actions against corporations committing fraud
3 in public dealings, such corporations would then be encouraged to commit fraud in their *private*
4 dealings. This would truly encourage "endless rounds of litigation."

5
6 **B.**

7 **The Second Amended Complaint complies with the Court's**
8 **"litigation privilege" ruling in that it sufficiently pleads the**
9 **"extrinsic fraud" exception to this privilege.**

10 In its ruling on the demurrer to the first amended complaint, this Court held that the
11 People "should be required to plead and prove extrinsic fraud as would avoid application of the
12 litigation privilege." (Ruling, p. 19, lines 5-6.)¹² Extrinsic fraud, in a case cited by the Court, is
13 "fraud which prevents a fair adversary hearing and deprives a party of an opportunity to present
14 his claim or defense to the court." (In re David H. (1993) 33 Cal. App. 4th 368, 381.)

15 The second amended complaint fully pleads extrinsic fraud (*see, e.g.*, SAC, para. 3, 22,
16 23, 24, 26, 35, 40, 42, 45, 47, 50, 52, 55, 57, 62, and 64).

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20 ¹² With all due respect, the People point out that this Court, in gratuitously setting forth the elements
21 required to be pleaded and proved by the People under the UCL (Ruling, p. 2, n. 1, emphasis added
22 ("such information was actually relied upon"; "[t]he incorrect SYP information was relied upon"; "trees
23 were harvested beyond the acceptable harvest rates as a result of such fraudulent behavior")), grossly
24 misstated them:

25 a. For example, actionable fraud under the UCL is not common law fraud. (Bank of the West v.
26 Superior Court (1992) 2 Cal. 4th 1254, 1266-1267, emphasis added ("In drafting the act, the Legislature
27 deliberately traded the attributes of tort law for speed and administrative simplicity. As a result, to state a
28 claim under the act one need not plead and prove the elements of a tort. Instead, one need only show
that 'members of the public are likely to be deceived.'").)

25 b. Moreover, a 17200 violation can be shown even if no one was actually deceived, or relied upon
26 the fraudulent practice, or sustained damage! (Prata v. Superior Court (2001) 91 Cal. App. 4th 1128,
27 1137, italicized emphasis in opinion ("*The Legislature considered this purpose so important that it*
28 *authorized courts to order restitution without individualized proof of deception, reliance and injury if*
necessary to prevent the use or employment of an unfair practice.").)

1 For example, paragraph 22 (which is incorporated into all six causes of action) states
2 that after providing false information that it knew or should have known was false,¹³ the
3 Defendant had the intent, and result, of defrauding the agencies and public so as to prevent a
4 fair hearing, and to deprive members of the public of the "opportunity" to present their claims:

5 "At the time Pacific Lumber provided this false information it did
6 so (a) with the intention of misleading or concealing from the
7 agencies and the public the true scientific data, (b) with the
8 further intention of fraudulently preventing the public from
9 presenting comments, including claims, on the correct
10 information, (c) with the further intention of fraudulently
11 preventing the public and government from effectively reviewing
12 the governmental permits,

13 * * *

14 "In doing so Pacific Lumber knowingly deprived members of the
15 public of an opportunity to make comments in view of the true
16 information, and undermined the legitimacy of the governmental
17 approvals. Pacific Lumber's suppression of the material and
18 significant true information was an act of unfair competition and
19 it prevented a meaningful administrative review."

20 (SAC, para. 22 and 26, emphasis added.)

21 The First Cause of Action (incorporated into all six causes of action) amplifies the
22 pleading of extrinsic fraud:

23 "Defendants' actions deprived the public, the director of CDF,
24 and all other affected public agencies of an administrative
25 process and of permits untainted by fraud. The review process
26 was so tainted by fraud as to lack all legitimacy, and constituted a
27 fraud and a sham. As a proximate result of the aforesaid conduct
28 of defendants, (a) the public and the government have been
deprived of the benefits of a fair administrative process,"

(SAC, par. 35, emphasis added.)

For the foregoing reasons, extrinsic fraud is sufficiently pleaded.

¹³ *I.e.*, the Defendant stated that in Jordan Creek 15 percent of the recent landslides occurred on the recently harvested areas when the truth was 60 percent (SAC, para. 22 and 23). It stated that the Jordan Creek analysis "dramatically contradicted" landslide associations in the adjacent Bear Creek watershed when the truth was that it showed "remarkably similar" trends between recent logging and landslides as reported for Bear Creek and North Fork Eel River (*Ibid.*)

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C.

**The Second Amended Complaint complies with the Court's
Noerr-Pennington ruling in that it sufficiently pleads the
"sham" exception to this doctrine.**

In its ruling on the demurrer to the first amended complaint, this Court held that the People must, in order to evade Noerr-Pennington, allege "sham," i.e., "that the fraudulent conduct of the defendants deprive the agency action of its legitimacy and deprived the public of a meritorious claim." (Ruling, p. 27, lines 2-4.)

The second amended complaint fully pleads knowing fraud and knowing deprivation of legitimacy. (*See* (emphasis added) para. 3, 22 ("for the purpose of said false information being used . . . to undermine the legitimacy of the agencies' review"), 23, 24, 26, 35 ("The review process was so tainted by fraud as to lack all legitimacy, and constituted a fraud and a sham"), 40, 42, 45, 47, 50, 52, 55, 57, 62, and 64.) And it fully alleges the public's claims were meritorious. (*See* (emphasis added), para. 22 ("fraudulently preventing the public from presenting comments, including claims, on the correct information"), and para. 26 ("knowingly deprived members of the public of an opportunity to make comments in view of the true information").)

For the foregoing reasons, the sham exception is sufficiently pleaded.

IV.

CONCLUSION

FOR THE FOREGOING REASONS, this Court should deny the demurrer.

Dated: December 27, 2004

Respectfully submitted,

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By: _____
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