

FILED
San Francisco County Superior Court

AUG 29 2022

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

CLERK OF THE COURT

BY

[Signature]

Deputy Clerk

PEOPLE OF THE STATE OF CALIFORNIA, et al,

Plaintiffs,

vs.

POTTER HANDY LLP, et al.,

Defendants.

Case No. CGC 22-599079

ORDER SUSTAINING DEMURRER TO THE COMPLAINT WITHOUT LEAVE TO AMEND

Background

On demurrer, the court assumes the facts in the complaint are true. The only issues presented are, assuming the truth of the allegations, whether there are legal reasons why nevertheless the case may not proceed. See generally, Weil & Brown, et al., CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL ¶ 7:43 (Rutter 2022) (“RUTTER”).

The complaint was filed by the district attorneys of Los Angeles and San Francisco. It outlines a shakedown scheme operated by the defendant lawyers. They are accused of perpetrating a scam by accusing people and small businesses of violations of the American With Disabilities Act (ADA). The lawyers (it is said) have filed thousands of complaints with false standing allegations, in order to obtained the jurisdiction of federal courts. They extracted millions of dollars in essentially coerced settlement from parties who cannot afford to litigate.

The complaint alleges:

1
2 Each year, Potter Handy files thousands of boilerplate “ADA/Unruh” lawsuits on behalf
3 of a few repeat plaintiffs (“Serial Filers”) against California small businesses with little
4 regard to whether those businesses actually violate the ADA. These lawsuits are
5 financially onerous, in large part because the Unruh Act (but not its federal counterpart)
6 allows Potter Handy to demand damages of at least \$4,000 per alleged violation. Small
7 businesses, particularly those owned by immigrants and individuals for whom English is
8 a second language, who are often less familiar with the complexities of the American
9 legal system, are rarely able to afford the risk and expense of defending themselves in
10 court. As a result, each year Potter Handy uses ADA/Unruh lawsuits to shake down
11 hundreds or even thousands of small businesses to pay it cash settlements, regardless of
12 whether the businesses actually violate the ADA.

13
14 Complaint ¶ 2.

15
16 ***Requests for Judicial Notice***

17 Each side has filed unopposed requests. They are granted.

18
19 ***The Demurrer***

20 The demurrer, which I will also refer to as the motion, presents four argument why I
21 should dismiss the case at this stage: collateral estoppel, litigation privilege, Noerr-Pennington,
22 and preemption. The litigation privilege argument is valid; the others are not. I sustain the
23 demurrer; and because the problem cannot be cured, the demurrer is sustained without leave to
24 amend.

25
26 1. Collateral estoppel

27 The argument is based on two earlier cases: (1) July 26, 2019 Order re Defendants’
Demurrer to Complaint in *People v. Rutherford et al.*, Case No. RIC 1902577 (Riverside Sup.
Ct.); and (2) *People v. Rutherford*, No. E073700, 2020 WL 7640848 (Cal. Ct. App. Dec. 23,
2020).

1 In state court, the term “issue preclusion” is preferred to ‘collateral estoppel’. *Grande v.*
2 *Eisenhower Med. Ctr.*, 13 Cal. 5th 313, 323 (2022); *Meridian Fin. Servs., Inc. v. Phan*, 67 Cal.
3 App. 5th 657, 684 (2021). The causes of action as between the present and earlier cases don’t
4 matter. Re-litigation of issues is barred if

5
6 “... (1) after final adjudication (2) of an identical issue (3) actually litigated and
7 necessarily decided in the first suit and (4) asserted against one who was a party in the
8 first suit or one in privity with that party.” [Citation]

9 Even if these threshold requirements are satisfied, courts may consider the public policies
10 underlying issue preclusion in determining whether the doctrine should be
11 applied.[Citation]

12 These policies include “conserving judicial resources and promoting judicial economy by
13 minimizing repetitive litigation, preventing inconsistent judgments which undermine the
14 integrity of the judicial system, and avoiding the harassment of parties through repeated
15 litigation.”

16 *Meridian Fin. Servs., Inc. v. Phan*, 67 Cal. App. 5th 657, 686–87.

17 When an issue of fact or law is actually litigated and determined by a valid and final
18 judgment, and the determination is essential to the judgment, the determination is
19 conclusive in a subsequent action between the parties, whether on the same or a different
20 claim.

21 RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982).

22 There are flaws with the defendants' argument.

23 Defendants say the party against whom preclusion is to be applied is the same because it's
24 the “People”- the word appears on the title of the two earlier cases and here as well. If
25 defendants were right, any issue resolved against a district attorney in the state—including those
26 resolved by a superior court judge whose decisions, alas, have not even precedential
27 authority¹—would then bind all district attorneys throughout the state, including, presumably, the
Attorney General, who also presents cases on behalf of the People; and perhaps also binding all

¹ RUTTER at ¶ 9:67.7

1 qui tam plaintiffs who too file cases on behalf of the People. This is an unappetizing argument,
2 and I won't endorse it. Different district attorneys are different parties.

3 Secondly, there is a deep ambiguity in what the defendants mean by suggesting the same
4 "issue" was resolved in the earlier cases. The earlier cases had different parties and different
5 facts, different accused lawyers, different conduct, and different time periods were at stake. The
6 problem of carefully defining the "issue" is noted in comment c of the RESTATEMENT (SECOND)
7 OF JUDGMENTS § 27:

8
9 *Dimensions of an issue.* One of the most difficult problems in the application of the rule
10 of this Section is to delineate the issue on which litigation is, or is not, foreclosed by the
11 prior judgment. ... for example: Is there a substantial overlap between the evidence or
12 argument to be advanced in the second proceeding and that advanced in the first? Does
13 the new evidence or argument involve application of the same rule of law as that
14 involved in the prior proceeding? Could pretrial preparation and discovery relating to the
15 matter presented in the first action reasonably be expected to have embraced the matter
16 sought to be presented in the second? How closely related are the claims involved in the
17 two proceedings? ... Sometimes, there is a lack of total identity between the matters
18 involved in the two proceedings because the events in suit took place at different times.

19 So too here. Every factor noted tells us the issues are different as between this case and the
20 earlier cases. See also, e.g., *Ass'n of Irrigated Residents v. Dep't of Conservation*, 11
21 Cal.App.5th 1202, 1230-31 (2017) ("Where the subsequent action involves only parallel facts,
22 but a different historical transaction, the application of the law to the facts is not subject to
23 collateral estoppel.") Obviously we don't have the "identical factual allegations" in this case,
24 *Castillo v. City of Los Angeles*, 92 Cal. App. 4th 477, 481 (2001), so issue preclusion does not
25 apply.

26 2. Litigation Privilege (CC § 47)

27 On its face the privilege of § 47 bars this action. The conduct alleged here has to do with
drafting and filing of complaints, and so is protected. *Navellier v. Sletten*, 106 Cal. App. 4th 763
(2003).

1
2 the importance of the litigation privilege's absolute protection of access to the courts.
3 while recognizing that this absolute protection has its costs. “ [It] is desirable to create an
4 absolute privilege ... not because we desire to protect the shady practitioner, but because
we do not want the honest one to have to be concerned with [subsequent derivative]
actions....”

5 *Action Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1244 (2007) (citations
6 and internal quotes omitted). The “absolute privilege is interpreted broadly to apply “to any
7 communication, not just a publication, having ‘some relation’ to a judicial [or quasi-judicial]
8 proceeding,” irrespective of the communication's maliciousness or untruthfulness.” *People ex*
9 *rel. Gallegos v. Pac. Lumber Co.*, 158 Cal. App. 4th 950, 958 (2008) (citation omitted). See e.g.,
10 *Herterich v. Peltner*, 20 Cal. App. 5th 1132, 1141 (2018) (“the litigation privilege extends to
11 fraudulent statements, even when made to a court, if they were made in furtherance of
12 litigation”). The scope of § 47 is very broad. E.g., RUTTER at ¶¶ 1:605 *ff.*

14 The People argue that the privilege only bars the UCL claim here if the underlying
15 conduct, i.e., B+P § 6128(a), is itself immunized, citing e.g., *People v. Persolve, LLC*, 218
16 Cal.App.4th 1267, 1276-77 (2013).

17 All agree there's no privilege in a criminal case brought under B+P § 6128(a), which
18 reads “Every attorney is guilty of a misdemeanor who ... (a) Is guilty of any deceit or collusion,
19 or consents to any deceit or collusion, with intent to deceive the court or any party....”. *Action*
20 *Apartment Assn., Inc. v. City of Santa Monica*, 41 Cal. 4th 1232, 1246 (2007).

22 But the issue here is whether the privilege is available in the civil UCL claims predicated
23 on § 6128(a). *Persolve* tells us that if the predicate laws are (i) more specific than the litigation
24 privilege and (ii) the two sets of law (§47 and the predicates) are irreconcilable, the privilege
25 gives way. The predicates in *Persolve* were however two *civil* statutes, and the court held the
26 civil enforcements of those statutes—enforced via the UCL or not—was incompatible with § 47.
27

1 “Civil statutes for the protection of the public should be interpreted broadly in favor of their
2 protective purpose.” *Persolve*, 218 Cal.App.4th at 1276-77 (emphasis supplied).

3 The essence of the People’s position is that if the predicate is a crime and the privilege is
4 not available to defend against the crime, then the privilege cannot possibly be available in a
5 predicated civil UCL action. But that’s not true.
6

7 solicitation, is not only a *misdemeanor* when accomplished through the use of agents, but
8 is also subject to discipline by the State Bar. We granted review in this case to consider
9 whether a defendant in an impending civil action may sue the attorneys for the opposing
10 party on the ground that they wrongfully “solicited” the litigation against him. We
11 conclude that this proceeding not only undermines the established policy of allowing
12 access to the courts....

13 *Rubin v. Green*, 4 Cal. 4th 1187, 1190 (1993) (emphasis supplied).

14 As noted, the conduct of defendants alleged in the complaint is clearly communicative
15 and otherwise within the scope of section 47(b). It is thus absolutely immune from civil
16 tort liability, including plaintiff’s interference with contract and related claims. To permit
17 the same communicative acts to be the subject of an injunctive relief proceeding brought
18 by this same plaintiff under the unfair competition statute undermines that immunity. If
19 the policies underlying section 47(b) are sufficiently strong to support an absolute
20 privilege, the resulting immunity should not evaporate merely because the plaintiff
21 discovers a conveniently different label for pleading what is in substance an identical
22 grievance arising from identical conduct as that protected by section 47(b).

23 *Rubin*, 4 Cal. 4th at 1202–03.

24 The *Persolve* test is not met here. That test has two components: that (1) the statute at
25 issue is “more specific than the litigation privilege,” and (2) application of the privilege would
26 render the statute “significantly or wholly inoperable.” *Id.* at 1274. Unlike the two *civil* statutes
27 in *Persolve*, the *criminal* statute here *can* be fully prosecuted—including, by the way, by the very
28 plaintiffs in this case—even if § 47 blocks this UCL suit. That is, the enforcement of § 47 here
29 has no impact on the enforcement of B+P § 6128(a). *Action Apartment*, 41 Cal. 4th at 1246.

30 At argument plaintiffs noted that in addition to B+P § 6128(a) they had also relied on the
31 state’s rules of professional responsibility as predicates for the UCL claim. This is literally, but
32 usefully, true: the Opposition at 12:15-20 says the reasoning applicable to § 6128(a) applies as
33

1 well to the two rules plaintiffs cite. The statement is conclusory and without authority. I haven't
2 found any authority supporting plaintiffs' position.

3 It's true that these rules can be UCL predicates, *People ex rel. Herrera v. Stender*, 212
4 Cal. App. 4th 614, 633 (2012), but that's not the issue here. The issue is presumably whether the
5 rules would be "significantly or wholly inoperable," e.g., *People ex rel. Alzayat v. Hebb*, 18 Cal.
6 App. 5th 801, 808 (2017). But the rules *are* effective regardless of the impact of § 47 in this
7 case. They are the basis for attorney discipline, which is what they were designed for. *Antelope*
8 *Valley Groundwater Cases*, 30 Cal. App. 5th 602, 621(2018):

9
10 (b) Function. (1) A willful violation of any of these rules is a basis for discipline. (2) The
11 prohibition of certain conduct in these rules is not exclusive. Lawyers are also bound by
12 applicable law including the State Bar Act (Bus. & Prof. Code, § 6000 et seq.) and
13 opinions of California courts. (3) A violation of a rule does not itself give rise to a cause
14 of action for damages caused by failure to comply with the rule. Nothing in these rules or
the Comments to the rules is intended to enlarge or to restrict the law regarding the
liability of lawyers to others.

15 CRPC rule 1.0

16 The rules are used also "to determine whether a contract or transaction involving lawyers
17 is unenforceable as contrary to public policy or whether lawyers or law firms should be
18 disqualified from representation." Mark L. Tuft, et al., CALIFORNIA PRACTICE GUIDE:
19 PROFESSIONAL RESPONSIBILITY ¶4.3 (2021). Plaintiffs offer no argument or authority that these
20 functions of the rules would be jeopardized were the litigation privilege to be honored in this
21 case.
22

23 3. Noerr-Pennington

24 Defendants suggest they are immunized under the *Noerr-Pennington* doctrine, which
25 protects those who petition the Government. E.g., *People ex rel. Gallegos v. Pac. Lumber Co.*,
26 158 Cal. App. 4th 950, 964 (2008); *Dean v. Friends of Pine Meadow*, 21 Cal. App. 5th 91, 108
27

1 (2018). Originally a matter of antitrust law, it covers most activity before the courts and other
2 governmental bodies. *People ex rel. Gallegos*, 158 Cal. App. 4th at 964.

3
4 Defendants' central argument is that there is no "sham" exception to the doctrine. That's
5 not true; there is such an exception. E.g., *People ex rel. Gallegos*, 158 Cal. App. 4th at 965;
6 *Tichinin v. City of Morgan Hill*, 177 Cal. App. 4th 1049, 1068 (2009); *Vargas v. City of Salinas*,
7 200 Cal. App. 4th 1331, 1343 (2011). Defendants' argument is frivolous, because the very case
8 they cite conflicts with their assertion. Here is the assertion from their Reply: "California
9 appellate courts have refused to apply the sham litigation exception. For instance, in *Gallegos*,
10 *supra*, 158 Cal. App. 4th 950, the Court of Appeal declined to extend the federal sham exception.
11 *Gallegos, supra*, 158 Cal. App. 4th at 967-968." That's not what the case says; it says there is
12 such an exception.

13
14 Indeed, the very idea that state courts could refuse to adopt the federal rule is peculiar,
15 because the doctrine *is* a federal rule, in the first place, as the case cited by defendants notes:

16 The doctrine derives from the holdings of the United States Supreme Court in *Eastern*
17 *Railroad Presidents Conference et al. v. Noerr Motor Freight, Inc. et al.* (1961) 365 U.S.
18 127. 81 S.Ct. 523. 5 L.Ed.2d 464 (*Noerr*). and *Mine Workers v. Pennington* (1965) 381
19 U.S. 657. 85 S.Ct. 1585. 14 L.Ed.2d 626 (*Pennington*). and "rest[s] on statutory
20 interpretation." (*Blank, supra*, 39 Cal.3d at p. 321, 216 Cal.Rptr. 718, 703 P.2d 58.)

21 *People ex rel. Gallegos*, 158 Cal. App. 4th at 964 n.7. And so it is that state cases routinely cite
22 federal cases, including those of the U.S. Supreme Court. E.g., *Vargas v. City of Salinas*, 200
23 Cal. App. 4th 1331, 1343 (2011).

24 The sham exception covers the conduct alleged here, such as "unlawful actions," *People*
25 *ex rel. Harris v. Aguayo*, 11 Cal. App. 5th 1150, 1161 (2017). There is a two part test, involving
26 both objective and subjective factors. *People ex rel. Gallegos*, 158 Cal. App. 4th at 965-66.
27 Both are pled here. See e.g., Complaint ¶¶ 1, 13, 75-85, 96.

1 4. Preemption

2 Defendants claim the action is preempted by federal law, i.e., the American With
3 Disabilities Act (ADA, 42 USC §§ 12101 *et seq.*) and its anti-retaliation provisions. The People
4 note that the ADA is directed at the acts of employers in relation to their employees. E.g., §§
5 12112, 12203. The People and the defendants here of course are not in such a relationship. In
6 reply, defendants only note that the federal regulation covers public entities. 28 CFR 36.206.
7 This isn't responsive to the point made by the People.
8

9 The specific conduct giving rise to preemption, argue defendants, is that the People's
10 complaint is an "adverse action" of retaliation, Demurer at 14:13 *ff.*, citing a magistrate judge's
11 unpublished opinion in "*Marca v. Capella Univ.*, No. SACV 05-642-MLG, 2007 WL 9705859,
12 at *18 (C.D. Cal. Dec. 13, 2007)... Defendants must show ... (2) that Plaintiff has subjected
13 them to an adverse action..."
14

15 These are usually adverse *employment* actions. *Yanowitz v. L'Oreal USA, Inc.*, 36 Cal. 4th
16 1028, 1049 (2005); *Bagatti v. Dep't of Rehab.*, 97 Cal. App. 4th 344, 360 (2002); *Lyons v. Katy*
17 *Indep. Sch. Dist.*, 964 F.3d 298, 303 (5th Cir. 2020); *Parker v. Brooks Life Sci., Inc.*, 39 F.4th
18 931 (7th Cir. 2022); *Laird v. Fairfax Cnty., Virginia*, 978 F.3d 887 (4th Cir. 2020). There is no
19 such adverse employment action here. While the ADA bars retaliation in other context, the only
20 case offered by the defendants is *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1166 (11th Cir.
21 2003), which found the duty to refrain from retaliation was applicable to those parties which
22 provide "public services," which parties *as such* have duties under the ADA. There doesn't
23 seem to be a sort of free-floating obligation applicable to all people and entities in the county to
24 refrain from "retaliation."²
25
26

27 ² Defendants repeatedly refer to the ADA's "anti-retaliation" provision. E.g., Reply at 10. But they also invoke the anti-interference provisions of 42 USC § 12203(b), Motion at 13:3, which is quite different. *Wilson v. Murillo*, 163

1 Defendants present no argument on what type of preemption is at stake here: whether it is
2 express, *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621, ___ (2022), or conflict, obstacle,
3 or field preemption. *People v. Salcido*, 42 Cal. App. 5th 529, 537 (2019); *Curtin Mar. Corp. v.*
4 *Pac. Dredge & Constr., LLC*, 76 Cal. App. 5th 651, 669 (2022); *Marrache v. Bacardi U.S.A.,*
5 *Inc.*, 17 F.4th 1084, 1094 (11th Cir. 2021). Thus it is impossible to evaluate their argument.
6 Defendants ignore the long-standing presumption that state law and its causes of action are not
7 preempted. E.g., *Curtin Mar. Corp.*, 76 Cal. App. 5th at 670.

9 The defense argument simply seems to be that any attack on those filing ADA lawsuits is
10 directly barred by federal law. Perhaps this is express preemption. If so we'd expect a federal
11 law that states, for example, that no one may sue anyone because they have filed ADA suits.
12 Defendants note no such law. It's true that "advocating for members of a protected class is a
13 protected activity for purposes of retaliation claims," *Kirilenko-Ison v. Bd. of Educ. of Danville*
14 *Indep. Sch.*, 974 F.3d 652, 662 (6th Cir. 2020), but it's not true that all protected activity is
15 immunized under the ADA. For example, even defendants agree they can be criminally
16 prosecuted for their actions in filing the ADA suits. Motion at 8:27-28. They presumably agree
17 that they can be disciplined by the State Bar (if the complaint's allegations are true).
18

19 Or perhaps defendants mean a sort of implied conflict preemption, so that it's
20 "impossible" to follow both sets of laws. *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621
21 ___ (2022). Defendants attempt no such showing. Nothing suggests punishing lawyers who do
22 what the complaint alleges would interfere with Congress' attempts to protect people under the
23 ADA. *Cnty. of Butte v. Dep't of Water Res.*, No. S258574, 2022 WL 3023670, at *7 (Cal. Aug.
24
25
26

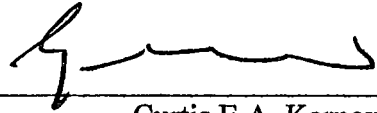
27 Cal. App. 4th 1124, 1132-33 (2008). Under the anti-interference provision, it is possible that anyone who e.g.
interferes with the exercise of a protected right is liable, *id.* at 1133.

1 1, 2022) (conflict with Congress' purposes). Indeed, the opposite may be true. Enjoining the
2 scam artists (again, I assume the complaint is accurate) frees up the courts for the worthy.
3

4
5 **Conclusion**

6 Plaintiffs have not asked for leave to amend and have not suggested how the § 47
7 problems can be cured. The demurrer is sustained without leave to amend as a result of the
8 application of CC § 47.
9

10
11 Dated: August 26, 2022



Curtis E.A. Karnow
Judge Of The Superior Court

CGC-22-599079
HANDY LLP ET AL

PEOPLE OF THE STATE OF CALIFORNIA VS. POTTER

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on August 29, 2022 I served the foregoing **order sustaining demurrer to the complaint without leave to amend** on each counsel of record or party appearing in propria persona by causing a copy thereof to be enclosed in a postage paid sealed envelope and deposited in the United States Postal Service mail box located at 400 McAllister Street, San Francisco CA 94102-4514 pursuant to standard court practice.

Date: August 29, 2022


By: SHIRLEY LE

GABRIEL MARKOFF
SAN FRANCISCO DISTRICT ATTORNEY'S OFFICE
350 RHODE ISLAND ST., 400N
SAN FRANCISCO, CA 94103

DAVID J. DARNELL
CALLAHAN & BLAINE, APLC
3 HUTTON CENTRE DRIVE
NINTH FLOOR
SANTA ANA, CA 92707

HOON CHUN
LOS ANGELES COUNTY DISTRICT ATTORNEY'S
OFFICE
211 WEST TEMPLE STREET
10TH FLOOR
LOS ANGELES, CALIFORNIA 90012