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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE – CIVIL COMPLEX CENTER

PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.); BETHANY WEBB; THERESA SMITH; and, TINA JACKSON,

Plaintiffs/Petitioners,

vs.

ANTHONY J. RACKAUCKAS, in his official capacity as Orange County District Attorney; and, SANDRA HUTCHENS, in her official capacity as Orange County Sheriff,

Defendants/Respondents.

Case No. 30-2018-00983799-CU-CR-CXC
Assigned for all purposes to:
Honorable Glenda Sanders; CX-101

REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE

DATE:	December 7, 2018
TIME:	1:30 p.m.
DEPT:	CX-101
Action Filed:	April 4, 2018
Remand Accepted:	August 8, 2018
First Amended Complaint Filed:	October 1, 2018
Trial Date:	TBD

Defendants reply to Plaintiffs' Response to the Demurrer as follows:

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A. Plaintiffs Concede That Their First, Second, Fourth, Fifth, Seventh, and Eighth Causes of Action Fail.

Plaintiffs concede that their claims are premised on taxpayer or public interest standing, and that they do not intend to pursue any tandem claims premised on a theory of *personal* injury. In that sense, there is little controversy that the Demurrer should be sustained without leave to amend as to Plaintiffs' First, Second, Fourth, Fifth, Seventh, and Eighth causes of action, as Plaintiffs do not refute that they fail to allege (or even seek to pursue) a personal rights violation. Rather, they seek to challenge the alleged misconduct through their Ninth cause of action as taxpayers challenging public expenditures.

Plaintiffs' Response makes this abundantly clear. The very first sentence of the Introduction reads that "Plaintiffs bring this action to vindicate their rights as taxpayers to end the use of public money on illegal conduct . . ." (Response, p. 8.) They further state that "[t]his is an independent civil lawsuit brought by taxpayers to end Defendants' illegal use of public money on an unconstitutional Informant Program." (Response, at p. 14; see also *Id*. at p. 16 ("[t]his is a taxpayer case . . .") Turning to the FAC, the First, Second, Fourth, Fifth, Seventh, and Eighth causes of action are alleged separate and apart from any cause of action that raises a theory of taxpayer injury. Indeed, the only cause of action that fits this description is Plaintiffs' Ninth cause of action, wherein Plaintiffs challenge illegal expenditures as a result of alleged misconduct. (FAC, at ¶¶ 168-72.) Assuming that Plaintiffs' other causes of action were not intended as redundant, Plaintiffs not only fail to demonstrate any source of personal standing that would make those actions independently viable, but they appear to agree that the FAC cannot survive demurrer with a separate action premised on a personal injury theory.

Accordingly, as Plaintiffs now effectively concede that they intended these causes of action to fall under the umbrella of the Ninth Cause of action, and that there is no viable independent theory of personal standing to maintain them, the Demurrer should be sustained as to the First, Second, Fourth, Fifth, Seventh, and Eighth causes of action actions for lack of standing and failure to state facts sufficient to constitute a cause of action.

B. Plaintiffs Fail to Establish Taxpayer Standing.

Despite the fact that Plaintiffs now maintain that they are relying on a theory of taxpayer standing, such standing is not proper in this case. The Demurrer should be sustained.

Plaintiffs assert in their Response that Defendants do not directly challenge Plaintiffs' taxpayer standing, and maintain instead that what Defendants are objecting to is the existence of section 526a itself. This is incorrect. Plaintiffs apparently misread the arguments in the Demurrer, and seek to oversimplify the *Weatherford* case. Defendants do directly challenge Plaintiffs' taxpayer standing.

Plaintiffs' apparent reading of what a court's calculus should be when assessing the availability of taxpayer standing is essentially a simple, black-and-white analysis of whether a plaintiff pays taxes in the municipality. (Response, p. 10.) So long as the answer is in the affirmative, Plaintiffs suggest that the standing inquiry should end. (*Id*. at pp. 10-11.) This is an oversimplification of the Supreme Court's ruling in *Weatherford*, which makes clear that a court is not so handicapped as to have to mechanically confer standing in every case. Rather, the standing analysis itself is more robust than formulaic, and a court not only can, but should consider the nuances of the case before it as part of its determination of whether a Plaintiff has standing. The Court said as much in *Weatherford*, noting that "[o]ur standing jurisprudence nonetheless reflects a sensitivity to broader prudential and separation of powers considerations . . ." and that such "prudential and separation of powers considerations . . . have traditionally informed the outer limits of standing." (*Weatherford v. City of San Rafael* (2017) 2 Cal.5th 1241, 1248-49.) Thus, in conducting a taxpayer standing analysis, a court must "recognize the need for limits in light of the larger statutory and policy context." (*Id*. at p. 1248.)

Accordingly, in assessing standing, this Court is not compelled to turn a blind eye to the realities of the case before it, as Plaintiffs would lead it to believe. Rather, the precise opposite is true. While, as a threshold determination, a court must assess whether a plaintiff has established that he or she is a taxpayer, the standing inquiry does not simply end there – a court must also consider the prudential and policy considerations presented by the actual case before it. Here, although Plaintiffs seek to trivialize those concerns, or ignore them altogether, there are essentially two practical truths to this case: (1) the burden that will be placed on the OCSD and OCDA will be overwhelming and immense, and (2) Defendants are still subject to scrutiny even if Plaintiffs are denied standing. Balancing the competing prudential considerations, taxpayer standing is completely inappropriate in this case.

As to the first concern, it does not take a stretch of the imagination to see where this case will go if the Demurrer is overruled and standing is recognized. This is not a typical case. In the FAC,

Plaintiffs broadly allege "thirty years" of misconduct and, in turn, seek to subject over thirty years of criminal cases to review. As noted in the Demurrer, the FAC as written implicates the examination of *millions* of adjudicated criminal cases by Sheriff and District Attorney employees who are already simultaneously tasked with their underlying safety and law enforcement duties (as well as by the Court during *in camera* review).[1] While Plaintiffs insist that Defendants' concern is overblown and emphasize that "[t]his is *not* a case where Plaintiffs as taxpayers are seeking to get involved in one or more criminal cases – past, ongoing, or future" (Response, p. 14 [emphasis in original]), the language of the FAC directly belies this reassurance, and seeks precisely that - requiring Defendants to pour through countless individual cases, subjecting prosecutorial discretion to review and, if relevant, identifying and contacting individual criminal defendants, as well as requiring Defendants to reopen cases, search for additional evidence, and create an electronic database relating to individual criminal cases—all without any time constrictions. (See, e.g., FAC, at p. 37, ¶¶ J, K.) In short, examining taxpayer standing with a sensitivity to prudential concerns and executive branch functionality, as *Weatherford* instructs, this case directly imposes a very real and overwhelming burden upon Defendants that will interfere with their ability to perform ongoing regular enforcement duties in the wake of this litigation. Accordingly, the nature and demands of *this case* brought by Plaintiffs with no direct interest is so extreme and upending that Plaintiffs transgress the outer limits of taxpayer standing. (See, e.g., *Imbler v. Pachtman* (1976) 424 U.S. 409, 425 ["if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law."]; *Carsten v. Psychology Examining Com*. (1980) 27 Cal.3d 793, 801 ["the California judiciary is ill-equipped to add to its already heavy burden the duty of serving as an ombudsman."].)

As to the second consideration of continued scrutiny regardless of standing, Plaintiffs mischaracterize and oversimply Defendants' position. Defendants offer this consideration to the standing calculus as a counterbalance to the first. That is, by denying standing based on the significant burdens of the case, the Court need not be further concerned that doing so will somehow allow Defendants to avoid scrutiny for the issues presented in the FAC. Defendants are still subject to scrutiny

[1] Plaintiffs have already requested discovery in cases from "January 1, 1985" to the present.

by many sources. As noted in the Demurrer, rather than blindly opening up thirty plus years of all cases to review, a criminal defendant who believes his or her case may have been the subject of misconduct can challenge that case through direct mechanisms. (*Schur, supra,* at p. 17 ["the appropriate tribunal for the enforcement of the criminal law is the court in an appropriate criminal proceeding."].) Moreover, to the extent that Plaintiffs believe broader oversight is warranted, Defendants point to other avenues of scrutiny, including oversight by the Federal Department of Justice, the California Department of Justice, and the Orange County Grand Jury, all of whom have exercised such oversight. Based on a broader sensitivity to the totality of prudential considerations, the burdens of this particular taxpayer case are *extremely* cumbersome to the executive branch (and court) if allowed to proceed, but the implications of denying standing are minimal, as there are numerous avenues of scrutiny through existing traditional oversight mechanisms.[2]

In short, undertaking the requisite holistic taxpayer standing analysis, standing is not appropriate in an extreme case as this one. Just as the Demurrer should be sustained as to Plaintiffs' First, Second, Fourth, Fifth, Seventh, and Eighth actions, it should also be sustained as to their Ninth cause of action.

C. The Response Fails to Establish Standing Under Section 1085.

Plaintiffs also fail to demonstrate standing on their Third and Sixth causes of action for mandate. At the outset, Plaintiffs concede that they do not bring their writ claims under a theory of a personal beneficial interest, and thus the only question remaining is whether they have adequately established standing under the "public interest" exception. (Response, p. 21.) They have not.

Plaintiffs observe the exception that "where the question *is one of public right* and the object of the mandamus is to procure the enforcement *of a public duty*, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the

[2] Plaintiffs distort this second argument in an attempt to undermine it. For example, Plaintiffs point to *California DUI Lawyers Ass'n v. California Dep't of Motor Vehicles* (2018) 20 Cal.App.5th 1247 for the proposition that the mere existence of another available party to challenge a Defendants' conduct does not serve as an *automatic bar* to taxpayer standing. But Plaintiffs miss the nuance of Defendants' argument. Even if that is true, *Weatherford* indicates that taxpayer standing is not automatically guaranteed – prudential considerations also come into play. Here, Defendants do not contend that Plaintiffs are *automatically* precluded because of other available parties, but rather that a court may balance the totality of practical burdens and implications when undertaking its standing analysis.

laws executed and the duty in question enforced." (Response, p. 21 [quoting *Board of Social Welfare v. Los Angeles Cty.* (1945) 27 Cal. 2d 98, 100–01 (emphasis added)].) Adhering to this principle, the public interest exception is not simply automatically available as a substitute where one is unable to satisfy standing the beneficial interest test. (See *Reynolds v. City of Calistoga* (2014) 223 Cal.App.4th 865, 873 ["[n]o party ... may proceed with a mandamus petition as a matter of right under the public interest exception. Judicial recognition of citizen standing is an exception to, rather than repudiation of, the usual requirement of a beneficial interest."].) Thus, it is available only under certain particular circumstances. As courts have observed, "[t]he exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats *the purpose of legislation establishing a public right*." (*Green v. Obledo*, 29 Cal.3d 126, 144 [emphasis added].) In this regard, to determine whether the exception is available, the legislation against which the writ petition is addressed must establish a public right.

Indeed, in *Board of Social Welfare*, in which the exception was first formulated, the court examined the underlying legislation at issue, reasoning that "it is to be noted that by section 103.5 of the Welfare and Institutions Code 'It is . . . declared that provision for public aid to the needy aged . . . as in this code provided *is a matter of State-wide concern*.'" (*Board of Social Welfare, supra,* 27 Cal.2d at p. 100 [emphasis added].) Because the statute itself declared that the matter was one of statewide concern, the court concluded that the legislation was one of public right subject to the exception. (*Id*. at p. 101.) Likewise, in *Green*, in assessing the availability of the exception, the court similarly turned to the applicable underlying legislation, and examined whether it involved a "matter of public right." (*Green, supra,* 29 Cal.3d at p. 144 [citing *Diaz v. Quitoriano* (1969) 268 Cal.App.2d 807, 811].) Turning to the referenced language in *Diaz*, the "legislatively declared purpose . . . is 'to promote the welfare and happiness of all of the people of the state by providing appropriate aid and services to all of its needy and distressed' and that 'provision for public social services in this code is a matter of statewide concern.'" (*Diaz, supra,* 268 Cal.App.2d at p. 811.) Because the legislation conferred a public right, the *Green* court was willing to recognize the exception. (*Green, supra,* 29 Cal.3d at p. 145.) This is the rationale in other relevant cases as well. (See, e.g., *Doe v. Albany* (2011) 190 Cal.App.4th 668, 684-685 [minimum hours of physical education for children under Education Code section 51210 was a public

right where legislation declared that "all children shall have access to a high-quality, comprehensive, and developmentally appropriate physical education program."].)

Here, Plaintiffs do not demonstrate that the statutes upon which their claims are based establish a public right pursuant to which public interest standing is available. Nor can they. Courts have concluded precisely the opposite in the context of criminal cases, noting that the concept of "a 'public duty' is inapplicable" as "[t]he public prosecutor has no enforceable 'duty' to conduct criminal proceedings in a particular fashion" and, moreover, "recognition of citizen standing to intervene in criminal prosecutions would have 'ominous' implications" as "[i]t would undermine the People's status as exclusive party plaintiff in criminal actions, interfere with the prosecutor's broad discretion in criminal matters, and disrupt the orderly administration of justice." (*Dix v. Superior Court* (1991) 53 Cal.3d 442, 453–54.)

That does not end the inquiry. "Even if we were to assume that the public interest exception could properly be extended to provide standing in this context, *application of the doctrine is still discretionary*." (*Reynolds*, supra, 223 Cal.App.4th at p. 874 [emphasis added].) The prudential analysis of *Weatherford* applicable to taxpayer standing is thus equally pertinent to public interest standing. Moreover, the *Weatherford* court specifically rejected such discretion, concluding that "[e]ven if one might plausibly understand a prosecutor's duties under the law as public, construing public interest standing to authorize such suits would be at odds with both the executive decision making role of prosecutors, as well as the deference we ordinarily afford them." (*Weatherford, supra,* 2 Cal.5th at p. 1248; *Schur, supra,* at p. 17 ["appropriate tribunal for the enforcement of the criminal law is the court in an appropriate criminal proceeding."].) Plaintiffs cannot establish public interest standing and, even if they could, discretionary application of the exception is not proper here. Accordingly, the Demurrer should be sustained as to Plaintiffs' Third and Sixth causes of action.

D. Plaintiffs Fail to Overcome the Limitations Bar as to All Claims.

In addition to the standing hurdles, the limitations bar also remains. Plaintiffs do not dispute the assertion in the Demurrer that they knew or should have known of their claims by at least February 2015, and in turn, that their claims would ordinarily be time-barred. Plaintiffs argue, however, that they should be excused from this time bar based on an exception—the premise of a continuing violation.

(Response, p. 15.) Under this theory, Plaintiffs contend that, despite having sat for over three years before initiating this litigation, their claims can nevertheless be considered timely to the extent that they have adequately plead violations in their FAC that later occurred within the limitations period. The problem with this argument, however, is that Plaintiffs fail to show that the FAC does adequately plead such subsequent timely violations.

Indeed, the closest Plaintiffs get to referencing an alleged violation within the limitations period is a brief mention of "the *Garcia* case in 2018." (Response, p. 15.) According to Plaintiffs' own FAC, however, this example fails. First, to the extent that the FAC discusses a "Garcia" case, the language of the FAC is itself silent as to when that case took place. (FAC, ¶ 130.) Plaintiffs cannot insert facts in their Response to cure a defect that is not plead in the FAC. However, even more fundamentally detrimental, the FAC specifically describes the Garcia case as involving "an *out-of-custody* informant," and not a jailhouse informant. (FAC, ¶ 130 [emphasis added].) To the extent that Plaintiffs now try to point to a timely plead example of a continuing "jailhouse informant program," an example of an informant who was not actually in jail does not fit that bill, no matter when it occurred.

Alternatively, Plaintiffs contend that the FAC sufficiently establishes timely continuing violations because it makes general allegations in that regard in the FAC. (Response, p. 15.) The FAC, however, is insufficient. As noted in the Demurrer, "[g]eneral allegations, innuendo, and legal conclusions are not sufficient" to sustain a taxpayer action. (*Waste Mgmt. of Alameda Cty., Inc. v. Cty. Of Alameda* (2000) 79 Cal.App.4th 1223, 1240.) "[S]pecific facts alleging a waste of public funds must be supported in the record." (*Humane Soc'y of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356.) Here, Plaintiffs make clear that the ultimate crux of their lawsuit is that "Plaintiffs bring this action to vindicate their rights as taxpayers to end the use of public money on illegal conduct . . ." (Response, p. 8.) Indeed, the clearest allegation in the FAC that taxpayer waste is continuing states only vaguely and conclusory that "*[o]n information and belief*, these wastes and illegal expenditures are ongoing and as a result, Plaintiffs have suffered ongoing injuries necessitating relief." (FAC, ¶ 172 [emphasis added].) As noted in the Demurrer, allegations on information and belief are not sufficient to establish essential facts, because a complaint must clearly recite essential facts rather than premise them on beliefs or conclusions. (See *Magnolia Square Homeowners Assn. v. Safeco Ins. Co.*

(1990) 221 Cal.App.3d 1049, 1057; *Ankeny v. Lockheed Missiles & Space Co.* (1979) 88 Cal.App.3d 531, 537.) In this case, Plaintiffs at best seek to insert overtly speculative and conclusory language into the FAC about ongoing violations in an attempt to salvage an otherwise untimely lawsuit. Under the facts plead, Plaintiffs learned in early 2015 of purported misconduct that allegedly happened much earlier and, for some reason, waited over three years to bring a lawsuit in which they offer no specific facts that any violation has since taken place within the limitations period. Accordingly, Plaintiffs' present lawsuit fails to allege sufficient facts that establish a timely claim. (*McLeod v. Vista Unified Sch. Dist*. (2008) 158 Cal.App.4th 1156, 1165 [taxpayer action subject to limitations period].) The Demurrer should be sustained because of the time bar.

E. Plaintiffs Still Do Not Allege Sufficient Facts to Support Their Claims.

The Response only reemphasizes that the FAC is insufficiently premised on legal conclusions and innuendo. The Demurrer should be sustained for failure to state facts sufficient to support a claim.

In clarifying the purpose of their lawsuit, Plaintiffs again make clear that they are not "seeking to get involved in one or more criminal cases," but rather their FAC attempts to plead facts to more broadly show the existence of improper official "polices, practices, and customs." (Response, pp. 9, 14; FAC, ¶ 170.) Plaintiffs further acknowledge that to properly challenge a policy or custom, specific facts showing the actions of individual actors are not enough to state a claim, and that Plaintiffs need to instead plead specific facts that there is an official policy, ordinance or regulation, or that the municipality itself has gone so far as to endorse any improper conduct of that individual actor. (Response, p. 17.) As discussed in the Demurrer, although the FAC reaches the *conclusion* that Defendants have a thirty-year policy in place, turning to the specific facts actually plead in support of this conclusion, Plaintiffs instead rely on a handful of examples of *individual actors* engaging in alleged misconduct in *individual cases*, in which they further plead the Sheriff and District Attorney have denied an authorized policy. (FAC, ¶¶ 124, 126.) Digging deeper, Plaintiffs' limited attempt to bridge the gap between purported individual misconduct to overarching policies is also premised on speculation. Indeed, to jump between alleged individual misconduct in some cases to an endorsed agency policy of *Brady* violations, Plaintiffs make the speculative leap that "*[o]n information and belief*, the OCDA had and currently has a policy, practice, and custom of not producing information . . . in violation of the

OCDA's obligations under *Brady v. Maryland*." (FAC, at ¶ 49 [emphasis added]; see also FAC, ¶¶ 62, 98, 110 [similar extrapolations made "on information and belief."].)

Accordingly, as noted above, to state a cause of action, "[g]eneral allegations, innuendo, and legal conclusions are not sufficient; rather, the plaintiff must *cite specific facts* and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur." (*Waste Mgmt. of Alameda Cty., Inc., supra,* 79 Cal.App.4th at p. 1240.) Plaintiffs premise their taxpayer litigation on the belief that an ongoing illegal policy, practice, or custom, is wasting funds but, when it comes down to it, they fail to adequately state *facts* establishing such a policy, and instead at best point to circumstances in which individually aggrieved defendants can seek remedies within their own criminal cases. The Demurrer should therefore be sustained.

F. Plaintiffs Should Not Be Given Leave to Amend.

Plaintiff should not be given leave to amend. "[T]he burden is on the Plaintiff to show the manner in which she may amend, and how the amendment will change the legal effect of the pleading." (*Goodman v. Kennedy* (1976) 18 Cal.3d 335, 349.) Plaintiffs' defects as to standing and the statute of limitations are fundamental, and not subject to amendment. Moreover, Plaintiffs have already had two operative complaints, as well as additional briefing in their most recent Response, neither of which discuss, let alone establish, the possibility of amendment. In short, Plaintiffs have chosen simply to rely on their pleadings, with no inclination to depart from their present allegations. No leave should be given.

G. Conclusion

For the reasons stated above, and in the Demurrer, Defendants request that the Demurrer be sustained without leave to amend.

DATED: November 30, 2018

Respectfully submitted,

LEON J. PAGE, COUNTY COUNSEL

By /s/
Adam C. Clanton, Deputy

Attorneys for Defendants/Respondents,
ANTHONY J. RACKAUCKAS and
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PROOF OF SERVICE

I declare that I am a citizen of the United States employed in the County of Orange, over 18 years old and that my business address is 333 W. Santa Ana Blvd., Ste. 407, Santa Ana, California 92701; and my email address is simon.perng@coco.ocgov.com. I am not a party to the within action.

On November 30, 2018, I served the following document, **REPLY IN SUPPORT OF DEMURRER TO FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND VERIFIED PETITION FOR WRIT OF MANDATE,** on all other parties to this action in the following manner:

BY ELECTRONIC SERVICE: Pursuant to California Rules of Court, rule 2.251(c)(2), I caused an electronic version of the document(s) to be sent to the person(s) listed below.

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

Dated: November 30, 2018

Simon Perng

Attorneys for Plaintiffs/Petitioners: PEOPLE FOR THE ETHICAL OPERATION OF PROSECUTORS AND LAW ENFORCEMENT (P.E.O.P.L.E.); BETHANY WEBB; THERESA SMITH; and, TINA JACKSON:

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