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COUNTY OF SAN MATEO

(ENDORSED)
FILED
SAN MATEO COUNTY
APR 17 2012
Clerk of the Superior Court
By GERARDO B. TOLENTINO
DEPUTY CLERK

8 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **IN AND FOR THE COUNTY OF SAN MATEO**

11 ULYSSES S. GRANT EARLY IV, et al.,

12 Plaintiffs,

13 vs.

14 COUNTY OF SAN MATEO,

15 Defendant.

Case No. 509185

**REPLY MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEMURRER**

Hearing:

Date: April 24, 2012

Time: 9:00 a.m.

Dept: Law and Motion

18 **I. DISCUSSION**

19 In opposition to the County's Demurrer Plaintiffs argue that Government Code Section 53071
20 (general Registration and Licensing of Firearms)¹ preempts the County's prohibition on dangerous
21 weapons in its parks and rely solely on a single case, *Fiscal v. City and County of San Francisco*, 158
22 Cal. App. 4th 895 (2008).

24 ¹ Plaintiffs argue that they are not relying on Penal Code Section 26150 (formerly 12050), which
25 addresses issuance of licenses to carry concealed firearms as the County assumed. That does not make
26 much sense since Plaintiffs are seeking an Order creating an exception in a County Ordinance that
27 applies solely to Section 26150 licensees. Opposition at 5, line 4. Further Section 53071 is not even
28 mentioned in the Complaint. However, as the result is the same (a finding of no preemption) regardless
of the State law Plaintiffs claim to rely upon, the County asks that the Court reach the merits of the
Demurrer rather than simply giving Plaintiffs leave to amend (which they have not requested).

1 *Fiscal* was already addressed in the moving papers—Plaintiffs’ reliance on *Fiscal* is misplaced.
2 Moving Papers at 8. Again, *Fiscal* turned on the fact that the City and County of San Francisco’s
3 Ordinance totally banned possession of licensed handguns everywhere in the City and County, both in
4 public places and in private homes. *Id.* at 906 (“With narrow exceptions, Section 3 of Prop. H bans the
5 possession of handguns by San Francisco residents, including handgun possession within the sanctity of
6 homes, businesses, and private property.”). It was that total prohibition on possession that the Court of
7 Appeal concluded ran afoul Section 53071, which vests with the Legislature exclusive authority over
8 licensing and registration of firearms. The Court of Appeal reasoned that handgun licenses issued
9 pursuant to state law were being functionally and impermissibly totally invalidated by the San Francisco
10 Ordinance. *Id.* at 910 (“In finding Government Code section 53071 expressly preempted Prop. H, the
11 trial court pointed out that the ordinance had the practical effect of ‘revoking or otherwise invalidating
12 existing state licenses,’ including those permitting the possession of handguns. The trial court went on to
13 conclude that ‘a local regulation that invalidates existing licenses, but does not affirmatively create new
14 licensing schemes, ‘relates’ to the state’s regulatory scheme of licensing firearms’ and, consequently, is
15 expressly preempted by Government Code section 53071. We agree.”). Section 3.68.080 does not
16 invalidate any State-issued firearms licenses and is not a licensing regulation. As the Supreme Court in
17 *Nordyke v. King*, 27 Cal. 4th 875, 880 (2002) explained, an explanation that fits equally here: “[t]he
18 Ordinance does not duplicate the statutory scheme. Rather, it criminalizes possession of a firearm on
19 county property, whether concealed, loaded or not, and whether the individual is licensed or not. Thus,
20 the Ordinance does not criminalize precisely the same acts which are prohibited by statute.” *Id.* at 883-
21 84. People with a firearms license can still possess their firearms almost everywhere within the County
22 (with a concealed weapons license) and in their homes. People simply cannot bring those firearms into
23 County parks—a limitation the law enforcement agency issuing the concealed weapons license to
24 Plaintiff Gene Hoffman could also have imposed. And the language of *Fiscal* supports just such a
25 limitation. *Id.* at 915 (“The City is not simply imposing additional restrictions on state law to
26 accommodate local concerns; but instead, it has enacted a total ban on an activity state law allows. This
27 difference was recognized in *Great Western*, which noted that total bans are not viewed in the same
28 manner as added regulations, and justify greater scrutiny.”); *id.* at 919 (“As the City repeatedly

1 emphasizes, the statutes governing firearms have been ‘carefully worded to avoid any broad preemptive
2 effect.’ Nevertheless, the sheer breadth of Prop. H makes it vulnerable to a preemption challenge.”). No
3 court has ever even suggested that *Fiscal* or its progenitor *Doe v. City and County of San Francisco*, 136
4 Cal. App. 3d 509 (1982) stand for the proposition asserted by Plaintiffs that Section 53071 prohibits all
5 limitations on locations where firearms can be carried. *See California Rifle & Pistol Assn. v. City of West*
6 *Hollywood*, 66 Cal. App. 4th 1302 (1998) (holding that a local regulation banning “Saturday Night
7 Specials” was not preempted by California gun laws) (“[T]he Legislature has studiously avoided
8 comprehensive preemption of such local laws despite several legislative opportunities to enact a
9 complete preemption.”).

10 The remainder of Plaintiffs’ brief contains discussion of the cases cited by the County.

11 Plaintiffs observe that one of the cases cited by the County (subsequently to the filing of the
12 motion), *Empire Patient’s Health and Wellness Center, Inc.* (“*Health and Wellness Center*”), 200 Cal.
13 App. 4th 885 (2011), is being reviewed by the Supreme Court (and is therefore depublished). Opposition
14 at 3. *Health and Wellness Center* is not a firearms-related preemption case. It was cited solely because it
15 was the most recent treatment of state preemption law and it contains a very concise and well-written
16 summary. The Supreme Court is reviewing its irrelevant (to this case) holding that a ban on medical
17 marijuana dispensaries is not preempted. But each of the general propositions on preemption, for which
18 it is cited, is supported by other authority contained therein.

19 Plaintiffs observe that *Great Western Shows, Inc. v. County of Los Angeles*, 27 Cal.4th 853 (2002)
20 was distinguished by *Fiscal*. Opposition at 3-4. But Plaintiffs misinterpret the key difference between
21 *Great Western* and *Fiscal*. It is not that *Great Western* is a “gun show” case and *Fiscal* is a “licensing
22 case” as Plaintiffs suggest; it is that *Fiscal* deals with a complete ban on handguns within San Francisco
23 city limits and *Great Western* deals with a limitation, like the County’s, on **where** they cannot be
24 possessed, *i.e.*, County property. *Fiscal*, 158 Cal. App. 4th at 915.

25 Plaintiffs observe that *Galvan v. Superior Court*, 70 Cal.2d 851 (1969) (upholding a
26 comprehensive firearm ban) was superseded by statute (Opposition at 4); as did the County. Moving
27 Papers at 7. But as the Supreme Court explained in *Great Western*, *Galvan*’s analysis of preemption and
28 the Legislature’s limited response to it is still very important today in understanding the very limited

1 reach of firearms-related preemption. *Great Western*, 27 Cal. 4th 863 (“In sum, a review of case law and
2 the corresponding development of gun control statutes in response to that law demonstrates that the
3 Legislature has chosen not to broadly preempt local control of firearms but has targeted certain specific
4 areas for preemption.”). In any event, *Galvan* was cited merely for the proposition that no case dealing
5 with preemption and firearms supports Plaintiffs’ position.

6 Plaintiffs attempt (but fail) to distinguish three other cases cited by the County, contending that
7 unlike *Fiscal*, these cases deal with “supplemental” local regulation: *Olsen v. McGillicuddy*, 15 Cal. App.
8 3d 897 (1971), *California Rifle & Pistol Assn. v. City of West Hollywood*, 66 Cal. App. 4th 1302 (1998)
9 and *Suter v. City of Lafayette*, 57 Cal. App. 4th 1109 (1997). Opposition at 5. But Section 3.68.080 is a
10 “supplemental” Ordinance as Plaintiffs construe the term. It does not take the place of (or otherwise
11 contradict) Section 53071. And, it is not a licensing-related Ordinance. The attempt to distinguish *City*
12 *of West Hollywood* on the ground that it dealt with a “supplemental” restriction while Section 3.68.080
13 does not, is particularly problematic. In *City of West Hollywood*, the Court of Appeal held that a
14 complete ban sales of “Saturday Night Specials” was not preempted. So, apparently Plaintiffs would
15 take the position that the County could permissibly ban “Saturday Night Specials” in its parks, but not
16 other, less pernicious guns? That would make no sense. *Id.* at 1313 (“It could be, and has been, argued
17 that Government Code Section 53071 [dealing with registration and licensing] is itself an expression of
18 intent to occupy the whole field of firearm regulation. However, the cases uniformly construe state
19 regulation of firearms narrowly, finding no preemption of areas not specifically addressed by state law.”).

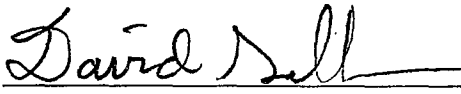
1 **II. CONCLUSION**

2 For the foregoing reasons, and because the infirmities of Plaintiffs' complaint are incurable, the
3 County asks that its Demurrer be SUSTAINED with prejudice and without leave to amend.

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5 Dated: April 16, 2012

Respectfully submitted,

6 JOHN C. BEIERS, COUNTY COUNSEL

7
8 By: 
9 David A. Silberman, Deputy

10 Attorneys for Defendant
11 COUNTY OF SAN MATEO
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1 **PROOF OF SERVICE**

2 I do hereby declare that I am a citizen of the United States employed in the County of San
3 Mateo, over 18 years old and that my business address is 400 County Center, Redwood City, California.
4 I am not a party to the within action.

5 On April 17, 2012, I served the following document(s):

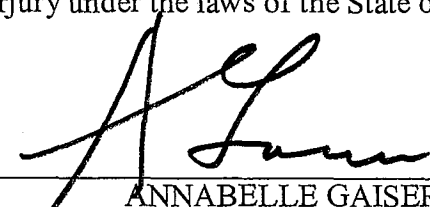
6 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER**

7 on all other parties to this action by placing a true copy of said document(s) in a sealed envelope in the
8 following manner:

9 (BY U.S. MAIL) by placing a true copy of said document(s) in a sealed envelope(s) addressed as
10 shown below for collection and mailing at Redwood City, California following our ordinary
11 business practices. I am readily familiar with this office's practice for collecting and processing
12 correspondence for mailing. On the same day that correspondence is placed for collection and
13 mailing, it is deposited in the ordinary course of business with the United States Postal Service in a
14 sealed envelope with postage fully prepaid.

15 (BY PERSONAL SERVICE) I caused such envelope(s) to be hand-delivered to the addressee(s)
16 shown below. A proof of service signed by the authorized courier will be filed forthwith.

17 (STATE) I declare under penalty of perjury under the laws of the State of California that the
18 foregoing is true and correct.

19 
20 _____
21 ANNABELLE GAISER

22 **Early et al. v. County of San Mateo, et al. – Case No. CIV 509185**

23 **NAME AND ADDRESS OF EACH PERSON TO WHOM SERVICE WAS MADE**

24 Donald E.J. Kilmer, Jr.
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