IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

VENICE STAKEHOLDERS ASSOCIATION, APPELLANT, v. CITY OF LOS ANGELES AND COUNTY OF LOS ANGELES RESPONDENTS	COURT OF APPEAL NO.: B272373 SUPERIOR COURT NO.: BC562230

Appeal from a Judgment
Of the Superior Court, County of Los Angeles
The Honorable Gregory Alarcon, Presiding

APPELLANT'S OPENING BRIEF

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APPELLANT'S OPENING BRIEF

Appellant Venice Stakeholders Association ("**Venice Stakeholders**") submits this opening brief.

I. INTRODUCTION

This is an action to stop the City and County of Los Angeles from maintaining truly disturbing nuisances on their property which have far reaching implications for the health and safety of residents living near the Venice Beach boardwalk and Venice Beach Recreation Area ("**VBRA**"). Contrary to what the City and County have argued, this is not a lawsuit to force the city to add additional police protection or to unlawfully arrest homeless people or deprive

them of constitutional rights. On the contrary, as the trial court ruled multiple times, this action involves traditional nuisances.

The case arises from a verified complaint alleging (among other things) that the City of Los Angeles and the County of Los Angeles are each maintaining nuisances by, among other things, leaving health and safety hazards in open public spaces, including trash, feces, tampons, drug paraphernalia, human sewage, excrement, blood, urine, sleeping bags, bed rolls, tents, tarps, hammocks, camping equipment, umbrellas, canopies, furniture, canvasses, merchandise, bikes, carts, and more. (CT00012-14, 18-19.) [1] The City and County dispute this, contending they are keeping the area reasonably clean, but plaintiffs submitted evidence contradicting the City and County's claims of regular maintenance and removal of the hazardous materials. (CT1229-1230, 1234-1235, 1237-1238.) The evidence in this case presents a classic disputed issue of material fact which precludes summary judgment.

Venice Stakeholders also allege the city is allowing other nuisances on its property, including regular drug use, crimes, excessively loud noises, harassment, vandalism of surrounding properties, illegal camping on public property, regular blocking of sidewalks by bulky items, and many more specific, intolerable conditions visited upon plaintiffs and residents of Venice. (CT0012-0024)

Defendants' obtained summary judgment by focusing on allegations in the complaint that the City systematically fails to enforce laws intended to protect citizens against the violence, rampant drug-use, and crime perpetrated by transients and vagrants living along the beach, relying upon immunities sometimes enjoyed by the City and County to shield them from these claims. While these issues are critically important to the residents of Venice, these are not the only allegations of the

[1] "CT___" refers to Clerk's Transcript followed by the page number.

complaint, which also seeks abatement of other very traditional nuisances, including removing dangerous hazardous waste the city maintains in public areas along the Venice Boardwalk and VBRA.

Contrary to arguments advanced by the City and County, Venice Stakeholders and the other Venice residents do not ask for increased law enforcement or any of the things the City and County claim they are immune from being required to do. In deposition, Plaintiffs specifically testified repeatedly that they were not telling the City or County how to abate the nuisances. (*See, e.g.* CT0732, 0737, 0706.) They just want the City and County to abate nuisances, including removal of what the city itself characterizes as "hazardous waste" accumulating on the City and County's properties. (CT0397-0399) The verified complaint does not demand stepped up law enforcement, arrest of homeless people, or any other particular method of eradicating the nuisances. (CT00024.) It merely seeks to have the City and County abate the nuisances, including ridding their property of dangerous hazardous waste.

The trial court specifically recognized the limits of relief available and so ruled multiple times, on both the demurrer and the Motion To Intervene, where it stated expressly that **"this court does not intend to file any judgment to violate any law governing homeless rights…or require governmental enforcement…".** (CT0372.) After those two rulings, the case was clearly not about requiring the City or County to provide additional law enforcement nor about arresting homeless people. It was about whether the City and County must clean up hazardous waste and abate other traditional nuisances they maintain on public areas of their property.

Nevertheless, as set forth below, the trial court reluctantly granted summary judgment only after receiving a suggestive Palma notice. Appellant appeals from the final judgment entered upon the granting of summary judgment. (CT1650) Such a judgment is appealable pursuant to CCP § 437c(m)(1) and CCP §904.1(a)(1).

On this appeal, Appellant contends that: The City and County are not immune from claims that they are maintaining a nuisance in the form of hazardous materials on public areas of their property and maintaining other traditional nuisances, and whether the City and County are adequately removing hazardous waste from their property and abating other traditional nuisances, such as excessively loud music, is a disputed issue of material fact, thus precluding summary judgment.

The Court's grant of summary judgment must be reversed and this matter remanded for trial.

II. PROCEDURAL BACKGROUND, RELIEF SOUGHT AND APPEALABILITY

On October 20, 2014, Appellant and five individuals filed an action against the City of Los Angeles and County of Los Angeles in a verified complaint (CT000012) alleging nuisances as more specifically set forth below. They sought "injunctive relief including a preliminary and permanent injunction requiring Defendants to abate the nuisances alleged herein", damages, and costs. (CT000024)

The City and County both brought demurrers. The trial court overruled both demurrers, ruling, in part:

> "The pleading at least partly alleges statutory nuisances not subject to immunities, such as the failure to maintain public property free from garbage, which could involve simply picking up litter, and not require any law enforcement activities, or any infringing upon homeless rights…". (CT0159)

Thereafter, a homeless advocacy organization sought to intervene. In denying the motion to intervene, the trial court reiterated its position on demurrer, ruling that:

> "…this court does not intend to file any judgment to violate any law governing homeless rights. The court already has pointed out how a disposition of this action need not impact homeless interests, resolve constitutional issues, or require government enforcement…". (CT0372)

At this point, it was more than clear that the case was now limited to issues regarding maintaining hazardous waste and other traditional nuisances, and not issues regarding homeless rights or forcing the city to provide additional law enforcement.

The City of Los Angeles and County of Los Angeles each filed a Motion For Summary Judgment. (CT375, CT1015, CT1019) On November 2, 2015, the trial court sustained many of Plaintiffs' Objections To Evidence and *denied* both Motions For Summary Judgment. (CT1601) In the trial court's order denying the motions, it specifically found:

> "In response to moving parties' declarations, some homeowners have filed declarations, saying that defendants do not really clean up as frequently and thoroughly as they claim, but instead rarely do, and leave some objects on the sidewalks and streets….
>
> Further, the opposing homeowner declarations and other evidence sufficiently relate to statutory nuisances, not necessarily tied to immunities and constitutional violations, such as the failure to maintain public property free of garbage, which could involve simply picking up, and not require any different law enforcement activities, or any infringing upon homeless rights.

> Further, the pleading is sufficiently broad in scope, to include simple issues such as trash cleanup, other than more concerning issues of law enforcement or homeless rights (e.g. Complaint ¶¶36, 41)."

(CT001602)

Both the City and County filed Petitions For Writ of Mandate. Without Appellant or any of the plaintiffs having responded, the Court of Appeal issued an Alternative Writ.[2] (CT001635) The Writ provided that the trial court could either reverse its ruling or show cause to this Court why the relief sought by the City and County should not be granted. (CT001635)

The trial court held a hearing on whether it should change its ruling. On March 15, 2016, the trial court reversed its prior ruling and entered summary judgment against Appellant and all of the other plaintiffs. (CT1651-1652.) The record does not reflect that the trial court changed any of its rulings on objections to evidence.

On March 23, 2017, Respondent City of Los Angeles served a Notice of Entry of Judgment. (CT1654-1660.) On May 18, 2016, Appellant timely filed a Notice of Appeal. (CT1662-1663.)

III. STATEMENT OF FACTS

Venice Stakeholders is a corporation comprised of residents and property owners in Venice, a beachfront community within the City of Los Angeles. Venice Stakeholders has represented hundreds of Venice residents in various community issues. (CT0013)[3] Other plaintiffs are owners of property near or on the

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[2] Appellant is not contending it had a right to be heard, but is including this fact so the Court is aware that it has previously only considered a very one-sided and incomplete view of the dispute as framed by Respondents in their Petitions for Peremptory Writ.

[3] This fact and many of the others come from the Complaint, which is verified by the President of Venice Stakeholders. Los Angeles County regularly cited to the Verified Complaint as evidence in its separate statement. Appellant cites it

Venice Boardwalk and adjoining Venice Beach Recreational Area ("VBRA"). (CT0013-14, 1229)

On a daily basis, each of the individual plaintiffs and others living near the Venice Boardwalk and VBRA have suffered because the City and County of Los Angeles have failed to maintain the Venice Boardwalk and VBRA. (CT0014) In addition to failing to control mentally-ill, drug addicted, and violent homeless that congregate on the Venice Boardwalk and in the VBRA, perpetrating crimes and harassing residents (CT0014-16), Respondents have allowed hazardous waste to remain present on their property, including trash, feces, tampons, drug paraphernalia, human sewage, excrement, blood, urine, left-over food, empty beer cans, liquor bottles, blankets, sleeping bags, bed rolls, tents, tarps, hammocks, camping equipment, umbrellas, canopies, furniture, canvasses, merchandise, bikes, carts, flattened boxes, and more. (CT00012-14, 18-19.)

The City recognizes that this material is "hazardous waste" (CT0397-0399) and admits that the hazardous materials found on the Venice Boardwalk regularly include "human waste, needles, vermin, and drug paraphernalia, among other things." (CT0407)

Some of the Plaintiffs have been forced to hire private companies to pressure wash sidewalks and other public areas in an effort to alleviate some of the hazardous waste issues. (CT0019)

Plaintiffs also suffer from unreasonably loud noise, including yelling and music, at all hours of the day and night. (CT0018)

The foregoing conditions were brought to the attention of the City (CT0020), but the requests to abate these conditions were largely ignored. (CT0021-22)

On an almost daily basis, Plaintiffs and the public at large are exposed to these conditions, and the sanitation issues arising

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for background facts and context. The evidence it relies upon to establish disputed issues of material fact were all submitted as declarations.

therefrom, including mice, mite, lice, rat and other rodent infestations, all of which are grave health and safety concerns. (CT0022) The record contains a few pictures of some of the refuse on the public streets. (CT0401-0405)

Plaintiffs and other residents do not ask for additional police patrols or law enforcement, but leave it to the City and County to figure out how to abate the nuisances. (CT0732, 737, 706-707)

The City contends that it cleans the areas regularly to remove the complained of hazardous waste, but residents living in the area each deny that the City is actually performing the clean-up it claims. (CT1229-1230, 1234-1235, 1237-1238.)

IV. STANDARD OF REVIEW AND BURDENS OF PROOF

(a) The Appellate Court Applies A De Novo Standard Of Review

On an appeal from the granting of a motion for summary judgment, an appellate court "review[s] the trial court's decision de novo, liberally construing the evidence in support of the party opposing summary judgment and resolving doubts concerning the evidence in favor of that party." Ennabe v. Manosa (2014) 58 Cal.4th 697, 705. Appellate courts review the trial court's evidentiary rulings on summary judgment for abuse of discretion. Serri v. Santa Clara University (2014) 226 Cal.App.4th 830, 852. In this case, the Court sustained many objections to Respondents' evidence when it initially ruled. There is no suggestion in the record that the trial court reversed any rulings sustaining those objections. Absent the trial court's abuse of discretion, the rulings on objections stand, but the ruling on the Motion For Summary Judgment is otherwise reviewed *de novo*.

(b) Defendants Moving For Summary Judgment Must Defeat The Entire Claim or Cause Of Action to Obtain Summary Judgment

A defendant is only entitled to summary judgment where it shows that the *entire action* has no merit. CCP § 437c(a). The result is that summary judgment lies only where the opponent has no case at all (not merely a weak case). 24 Hour Fitness, Inc. v. Sup.Ct. (Munshaw) (1998) 66 Cal. App. 4th 1199, 1215. Summary adjudication addresses single causes of action, but a summary adjudication must *completely dispose of* the cause of action. CCP § 437c(f)(1). As set forth below, in this case, neither the entire action nor an entire single cause of action was properly disposed of. Each cause of action involved traditional nuisance claims which could have and should have remained. No summary judgment should have been granted.

(c) Respondents Had The Initial Burden Of Demonstrating That The Entire Action Had No Merit

Respondents, as the moving parties, bore the initial burden of production to make a *prima facie* showing that there are no triable issues of material fact. Aguilar v. Atlantic Richfield Co., (2001) 25 Cal. 4th 826, 850. Appellant and the other plaintiffs had no burden of any kind until Respondents met their initial burden. Consumer Cause, Inc. v. SmileCare (2001) 91 Cal App. 4th 454, 468. In other words, if Respondents failed to meet their burden of production, the motion would have to have been denied irrespective of what Venice Stakeholders submit.

Because Respondents are defendants below, they can only meet that initial burden by producing admissible evidence that establishes either that Appellant cannot establish one or more elements of its cause of action or that Respondents have a complete defense to that cause of action. CCP §437c(p)(2). Respondents declarations and evidence must be strictly construed in

determining whether they disprove an element of plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (opposing party's) favor." Johnson v. American Standard, Inc. (2008) 43 Cal. 4th 56, 64. As set forth below, Respondents failed to meet that initial burden, so the motion for summary judgment should have been denied outright.

(d) Venice Stakeholders Can Defeat The Motion By Providing Evidence Created A Disputed Material Fact

Even if Respondents had met their initial burden, Venice Stakeholders could still defeat the motion by submitting evidence that contradicts Respondents' evidence with respect to a material fact. CCP § 437c(p)(2). Venice Stakeholders was not required to put on evidence of every element of its case, but merely to show that there are disputed issues of material fact as to the elements being attacked. FSR Brokerage, Inc. v. Sup.Ct. (Blanco) (1995) 35 Cal App.4th 69, 73-74. Further, Venice Stakeholders is not required to do anything unless Respondents have negated an essential element of the opposing party's case or made the requisite "showing" that such element "cannot be established". CCP § 437c(p)(2).

In this case, as set forth below, even if Respondents met their initial burden, Venice Stakeholders submitted evidence which contradicts Respondents evidence and creates a material issue of fact.

V. THE CITY AND COUNTY FAILED TO MEET THEIR INITIAL BURDENS BECAUSE THEY DID NOT SHOW THAT THE HAZARDOUS WASTE AND OTHER NUISANCES WERE REMOVED

The City and County did not negate any element of the claim.[4] Instead, they submitted declarations from various city employees contending that the City cleans up hazardous materials once a week (on Fridays) in the area of the Venice Boardwalk and in an unrelated part of Venice which is not the subject of this lawsuit. (CT0397-0400.) They provide a number of photos of the subject area showing hazardous waste and other debris present in two isolated locations on the Venice Boardwalk and VBRA (and some other locations elsewhere) with purported "after" images showing these specific materials removed. (CT0401-0405)

Evidence negates an element of a plaintiff's claim only if it shows *as a matter of law* that the element cannot be proven. Brantley v. Pisaro (1996) 42 CA4th 1591, 1598. Respondents' evidence does not do that.

The residents of Venice allege the regular and overwhelming presence of hazardous materials including trash, feces, tampons, drug paraphernalia, human sewage, excrement, blood, urine, sleeping bags, bed rolls, tents, tarps, hammocks, camping equipment, umbrellas, canopies, furniture, canvasses, merchandise, bikes, carts, and more. What is missing from Respondents' presentation is any evidence that all of that hazardous waste is actually removed and stays removed.

Instead, the testimony merely states that the City "typically" runs a program along a stretch of the Venice Boardwalk and other areas of Venice which includes notice to homeless, collecting and documenting personal belongings of the homeless, removing abandoned bulky items and pressure washing sidewalks. (CT0398) The City does not say how often it does this, whether this effort is effective, or what the result is. In fact, the declaration seems cleverly crafted to avoid exactly those issues. Aside from describing the procedure as "typical", it refers to having done 20-25 operations

[4] This is separate from the issue of whether Respondents are protected by immunity. That is an affirmative defense issue and is addressed below.

over a year "in Venice" without stating how many of them are in the area subject to the lawsuit.

Another declaration contends the cleaning procedure is employed "every Friday" but then lists several areas in which it is run – most of which are not at issue in this lawsuit – and does not say how many of the Fridays are on the Venice Boardwalk and VBRA. (CT0406-407.) Respondents declarations are strictly construed in determining whether they disprove an element of plaintiff's claim "in order to resolve any evidentiary doubts or ambiguities in plaintiff's (opposing party's) favor." Johnson v. American Standard, Inc., *supra,* 43 C4th at 64. Venice Stakeholders objected to many parts of this evidence precisely because it is vague and does not appear to be based on personal knowledge. (CT01083, 1443) The Court sustained many of these objections. (CT01601)

The City admits that every time it does the cleaning operations, it identifies hazardous waste in the subject area, including "human waste, needles, vermin, and drug paraphernalia, among other things." (CT0407.) The court is entitled to consider "all of the evidence set forth in the papers." Villa v. McFerren (1995) 35 CA4th 733, 749.

Most importantly, none of defendants' declarations ever says that the Venice Boardwalk and VBRA are free of hazardous materials after the operation is complete[5] nor how long these areas stay clear of hazardous materials.

Neither the City or County provided any evidence establishing that Venice Stakeholders and the other residents of Venice cannot prove that the City and County operate the Venice Boardwalk and VBRA in a manner that creates excessive noise from yelling and music at all hours of the day and night, as alleged in the Complaint. (CT0018.) No effort was made to address this claim.

[5] As set forth below, even these claims are contradicted by eyewitness testimony from Venice residents stating that the cleanup claimed to be performed by the city does not actually occur.

Evidence that merely suggests the possibility or even likelihood that a plaintiff's claim has no merit is insufficient; it must establish *as a matter of law* that the claim is defeated. Eriksson v. Nunnink (2011) 191 Cal.App.4th 826, 849-850. In Eriksson, plaintiff sued over being injured on an unfit horse. The defendant submitted evidence that it had received no prior complaints, saw nothing out of the ordinary on the horse that day, and had no knowledge of any issue that made the horse unfit. That evidence was insufficient because even though it suggested nothing was wrong with the horse, it did not prove it as a matter of law. The declaration did not say that the horse was fit.

So, too, in the instant case, no one provided evidence that after the operation, the Venice Boardwalk and surrounding areas were free of hazardous materials or that they stayed relatively free of the material until the next cleaning. Making an effort to remove a nuisance is not a defense to the nuisance, at least not as a matter of law.

Other declarations are equally evasive, referring to cleaning trash cans (which is not an issue), picking up litter, washing restrooms, and other cleaning tasks that do not address the presence of the subject hazardous waste, which the City has now admitted is present.

Respondents did not meet their initial burden, so the motion should have been denied without consideration of what Venice Stakeholders and the other Venice residents submitted.

VI. EVEN IF THE INITIAL BURDEN WAS MET, VENICE STAKEHOLDERS SUBMITTED EVIDENCE DISPUTING MATERIAL FACTS

Even if the Court were to look at all of the evidence taken together and decide that Respondents' evidence sufficiently negates an element of the nuisance claims, Venice Stakeholders submitted evidence from residents of Venice to directly contradict that evidence. One eyewitness who walks the boardwalk daily for years

testified that the City only picks up litter once a week on Friday mornings. (CT1238) He testified that other items of hazardous waste including defecation and urine remain and that trash and litter are present the rest of the week. (CT1238)

Another witness corroborated that testimony and stated that all the City cleans up on a regular basis are the trash barrels. (CT0733) A third witness who visits the Venice Boardwalk daily at both 7:00am and 6:00PM stated that the City only picks up trash occasionally and leaves many items, including shopping carts, tents, tarps, vending items, bicycle parts and other items. (CT1234) A fourth witness testified that he lives adjacent to the Venice Boardwalk and that trash is only picked up on Fridays and is present on the Venice Boardwalk the rest of the week. (CT1230) He also states that the hazardous waste remains, including defecation and urine. (CT1230)

These witnesses also disputed other claims of the City, including their claims of waking up the homeless every morning with a pastor, which these witnesses absolutely refute. (CT1229, 1232, 1234)

It is black letter law that "[i]f there is one, single material fact in dispute, the motion must be denied." Cal. Prac. Guide Civ. Pro. Before Trial Ch. 10-A, §10:28; CCP § 437c(p)(2). A Court may not weigh the evidence, nor evaluate its credibility. Binder v. Aetna Life Ins. Co. (1999) 75 Cal.App.4th 832, 840. The result is that summary judgment lies only where the opponent has no case at all (not merely a weak case). 24 Hour Fitness, Inc. v. Sup.Ct. (Munshaw), *supra,* 66 CA4th at 1215.

Venice Stakeholders and the other Venice residents have disputed the City and County's claims of adequately maintaining the property to be free of nuisances, including very disturbing hazardous waste. Accordingly, summary judgment should have been denied. The issue is one for trial.

VII. THE CITY AND COUNTY ARE NOT IMMUNE FROM A CLAIM OF NUISANCE

Both the City and County made two arguments to the trial court to convince it that they are immune from claims by the residents of Venice. Neither argument has merit.

(a) The Complaint Does Not Demand That The City Provide Additional Law Enforcement Activity

First, the City and County both argued that this suit is really a backhanded way to try to have a court force the city to provide additional law enforcement in the area of the Venice Boardwalk and VBRA. They cite many cases which seem to hold, at least in the circumstances of those cases, that a court may not interfere with the City's allocation of law enforcement resources or its discretion in enforcing particular laws. *See, e.g.* Gates v. Superior Court (1995) 32 Cal.App.4th 481, 508-511.

This argument is without merit because the complaint raises a number of nuisances, including ones that have absolutely nothing to do with increased law enforcement, such as removing hazardous waste the City admits is present on its property. As the parties moving for summary judgment, the City and County have the burden to show they are entitled to judgment with respect to *all theories of liability* asserted by plaintiff. Lopez v. Sup.Ct. (Friedman Bros. Inv. Co.) (1996) 45 CA4th 705, 717.

Further, nowhere in the complaint do Plaintiffs demand additional law enforcement or even enforcement of existing laws designed to protect against these exact problems, which the City and County admit they do not enforce. In deposition, each of the plaintiffs were clear that they were not asking for additional law enforcement and were not telling the City how to correct the nuisance conditions. (CT0732, 737, 706-707) By the time the summary judgment was considered, the trial court had already ruled multiple times that it was not considering any part of the

case that required it to either infringe on homeless rights or order additional law enforcement. (CT0159, 0372)

In its initial ruling denying the Motion For Summary Judgment, the trial court specifically acknowledged that the pleadings contained issues beyond the issue of sufficiency of law enforcement. (CT001602) In making that ruling, the trial court correctly analyzed the issues and correctly determined that this claim of immunity was not a sufficient basis to dismiss the entire case. That ruling was correct and should not have been changed.

While additional law enforcement would certainly be welcome relief for a beleaguered community, the fact that this relief may not be available is no basis to grant summary judgment of the entire action.

(b) The City and County Are Not Immune From Liability for The Instant Nuisances

Second, the City and County argued that their immunity extends to all of the other conditions alleged in the Complaint. California has a well-established body of law which allows public entities to be sued for nuisances, including the nuisances similar to kinds of nuisances alleged here. In Lopez v. Southern California Rapid Transit District (1985) 40 Cal.3d 780, the California Supreme Court held that a claim of nuisance that involves residents being subjected to violent criminal acts, as in this case, is not transformed into a claim for additional law enforcement just because the city taking certain "precautionary measures" would assist in preventing the crime. *Id.* at 792. In this case, maintaining the property free of the offending hazardous waste might itself discourage some of the violence, drug use and criminal activity. Even if it does not, it would nevertheless remove one of the nuisances alleged – the presence of unsafe hazardous waste which is a public health and safety concern.

A city or county may be sued in nuisance for hazardous conditions maintained on their property. In Phleger v. Superior

Court (1985) 172 Cal.App.3d 421, the City of Pacifica and County of San Mateo made an argument similar to what the City and County argued here, which is that they are immune from any claim to clean up the hazardous waste they maintain on their property. The Court rejected that argument, citing Nestle v. City of Santa Monica (1972) 6 Cal.3d 920, on holding unequivocally that a city may be liable for nuisance under CPP §3479 for maintaining hazardous conditions on their property. CPP §3479 provides:

> "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

Plaintiffs have alleged exactly that – the presence of hazardous waste on public sidewalks and areas, which are offensive and prevent the free use of the public areas. (CT00014-16, 0018-20.) Even the City admits the regular presence of these hazardous materials, identifying it as "hazardous waste" (CT0397) and admits that the hazardous waste found on the Venice Boardwalk regularly includes "human waste, needles, vermin, and drug paraphernalia, among other things." (CT0407)

Nor are the City and County immune because they are exercising their "discretion" in maintaining the nuisances, in that they are not arresting the violent, drug-addicted and mentally ill vagrants or otherwise enforcing existing anti-vagrancy laws intended to protect the residents of Venice from these problems. As the court held in Kempton v. City of Los Angeles (2008) 165 Cal.App.4th 1344, 1349, the city is not required to prosecute others

to remove the nuisance. Here, the city can remove the hazardous waste without arresting or prosecuting anyone. The city does not have "discretion" to leave offensive hazardous waste that is highly injurious to health and public safety on sidewalks and other public areas.

The law is replete with cases where the courts entertain claims of nuisances maintained by a government entity on government property. In Greater Westchester Homeowners Assoc v. City of Los Angeles (1979) 26 Cal.3d 86, the court held a city liable for noise and disruption caused to neighbors by Los Angeles International Airport (LAX), even though the expansion to LAX was done as a matter of policy, and even though it was the airplanes that made the noise, and not the city itself. *Id.* at 98-99.

In the trial court, the City and County cited cases where plaintiffs were not allowed to proceed on nuisance claims, but each of these cases had some special circumstance, such as an express immunity provision that took it out of the general rule announced in the cases above.

On the other hand, generally, a plaintiff may assert a nuisance action against a government entity. *See, e.g.* Varjabedian v. City of Madera (1977) 20 Cal.3d 285 (nuisance upheld against city for building a sewage plant which has noxious odors); Vedder v. County of Imperial (1974) 36 Cal.App.3d 654, 661 (county could be held liable for nuisance where it permitted storage of gasoline by others on its property even though fire started by negligence of third party); and Paterno v. State of California (1999) 74 Cal.App.4th 68, 103, as modified on denial of reh'g (Sept. 10, 1999) (holding that government entity not immune from nuisance for operating a levee in an unsafe manner that caused water to spill over).

(c) Many of The Nuisances Complained Of Do Not Involve Constitutionally Protected Activity

Respondents have argued below that the conditions complained of are constitutionally protected. The constitutional limitations on interfering with homeless activity is well-defined and neither Venice Stakeholders not any other plaintiff has asked the City to interfere with those rights. There is no constitutional right to accumulate hazardous waste on public streets. Nor is there a constitutional right to play excessively loud music and make loud noises at all hours of the day and night. Mann v. Mack (1984) 155 Cal.App.3d 666, 676 (regulating excessively loud music and sound is not unconstitutional – upholding Los Angeles's sound ordinance); Schild v. Rubin (1991) 232 Cal.App.3d 755, 764 (excessive noise constitutes a nuisance); International Society for Krishna Consciousness of California, Inc. v. City of Los Angeles (2010) 48 Cal.4th 446, 455 (even in a public forum, the right of free speech may be restricted by reasonable restrictions on its time, place, or manner).

The trial court's rulings demonstrated that it had a good handle on what activities presented special concerns, as reflected in its rulings on demurrer, motion to intervene, and even its initial ruling on Motion For Summary Judgment. The City and County are not immune and the summary judgment may not be upheld on that basis.

(d) The Nuisance May Be Corrected Without Implicating Separation of Powers

This case does not present any issue of separation of powers. The decision cited by the County below, Friends of H Street v. City of Sacramento (1993) 20 Cal.App.4th 152, is limited to its unusual facts, where certain parties wanted the court to tell the city what speed limit to impose on a through street. That case does not have any broad implications for correcting nuisances on public property, especially the nuisances complained of here. If it did, none of the cases which allowed nuisance claims to stand would exist. In Westchester, the court could not have imposed liability for nuisance caused by the city's decision to expand the airport, which

was certainly a decision within its authority. The same would be true for every nuisance claim ever upheld against a governmental authority. They are all based, in some manner, on decisions by the public entity. As the California Supreme Court noted in California Oregon Power Co. v. Superior Court (1955) 45 Cal.2d 858, 871 (which is factually different from the present case), this case does not require the Court to choose between conflicting policies, but "merely present[s] the question of what relief if any may be had for a condition which is dangerous…". The City and County are not arguing that it is their policy to accumulate hazardous waste, including trash, feces, tampons, drug paraphernalia, human sewage, excrement, blood, urine, sleeping bags, bed rolls, tents, tarps, hammocks, camping equipment, umbrellas, canopies, furniture, canvasses, merchandise, bikes, carts, and more (CT00012-14, 18-19) on public areas of Venice Beach and the VBRA. This case does not present a separation of powers issue.

VIII. CONCLUSION

The most popular area of Venice should not be covered in hazardous waste, nor should nearby residents be subjected to that waste, nor excessive noise, nor other disturbing and serious nuisances. The City and County presented incomplete evidence which did not shift the burden of proof to Appellant. Even if it had, Appellant presented evidence to contradict it and create a classic disputed material fact. The City and County may not hide behind immunities at the expense of the residents of Venice.

Dated: November 2, 2017 Respectfully submitted,

TURNER, AUBERT & FRIEDMAN, LLP

_____

Jonathan M, Deer, attorney for Appellant Venice Stakeholders Association

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 5579 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By_____
Jonathan M. Deer

PROOF OF SERVICE

Re: Venice Stakeholders Association v. City of Los Angeles; Case No.: _____

I, Marie Bigaud, declare that I am over 18 years old, and not a party to the within action; my business address is 8383 Wilshire Boulevard, Suite 510, Beverly Hills, California 90211.

On November 3, 2017, I served a true copy of **APPELLANT'S OPENING BRIEF** on the following parties, by first class mail:

Clerk of the Supreme Court **- 1 copy**
of the State of California
350 McAllister Street
San Francisco, CA 94102

Judge Gregory Alarcon **- 1 copy**
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Attorneys for Respondent, COUNTY OF LOS ANGELES

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

Executed on November 3, 2017, at Beverly Hills, California.

_____
Marie Bigaud

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate (Cal. Rules of Court, rule 8.208(e)(1), or (2) a financial or other interest in the outcome of the proceeding the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)):

Marc Ryavec
Arthur D. Kraus
Gary Harris
Jack Hoffman
Brad Neal
David Krintzman

Dated: November 3, 2017

_____
Jonathan M. Deer