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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
(San José Division)

CALVARY CHAPEL SAN JOSE, et al.,

Plaintiffs,

v.

GAVIN NEWSOM, et al.,

Defendants.

No. 20-CV-03794 BLF

COUNTY DEFENDANTS' REPLY TO PLAINTIFFS' AMENDED OPPOSITION TO COUNTY DEFENDANTS' MOTION TO DISMISS

Date: March 10, 2022
Time: 9:00 a.m.
Courtroom: 3
Judge: Hon. Beth Labson Freeman

I. PLAINTIFFS' CLAIMS AGAINST THE COUNTY DEFENDANTS REMAIN MOOT.

Despite the recent resurgence of COVID-19 nationally and in the Bay Area due to the spread of the Omicron variant of the SARS-CoV-2 virus, the County health orders and directives that Plaintiffs filed suit to enjoin have *not* been put back into place. The reasons for this are manifest. Now, unlike in early 2020, the County has more tools in its anti-COVID-19 toolkit, including: highly efficacious vaccines and boosters in ample supply; widespread community acceptance and administration of those vaccines; rapid and robust testing in the County; capacity in its hospital system; and, where necessary, access to newly developed COVID-19 therapeutics to meet the needs of those with more severe infections. *See* Request for Judicial Notice (RJN) at ¶¶ 1-3. As a result, Plaintiffs remain unburdened by any capacity or closure restrictions—as they have for the past 10 months. They therefore no longer have an interest in obtaining declaratory and injunctive relief against rescinded orders crafted under significantly different conditions. Thus, even if other aspects of this case survive, Plaintiffs' claims for injunctive and declaratory relief should be dismissed. *See New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020).

Plaintiffs' amended opposition makes two arguments regarding mootness, neither of which addresses the circumstances before this Court. First, Plaintiffs implicitly argue that the voluntary cessation exception to mootness should apply, by pointing to the speculative claim in the TAC that "County Officials still believe that they have the power to ban indoor religious activities if they decide it is necessary to protect public health." Opp. at 7 (quoting TAC ¶ 8). The Court does not have to accept Plaintiffs' speculation as fact, but regardless, government officials' purported "belief" in the constitutionality of the County's since-rescinded health orders is not one of the factors considered in the Ninth Circuit's mootness analysis. *See Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (listing relevant factors). And Plaintiffs do not address the actual factors that confirm the low likelihood of recurrence and support mootness here, including that the challenged County directives were lifted in March 2021; that those changes fully addressed Plaintiffs' objections; and that those changes will have been in place for over a year when the Court hears the County's motion in March 2022. *See* Mot. at 2-4 (applying *Rosebrock* factors). Plaintiffs also do not dispute that the challenged directives were temporary, emergency measures to address the early stages of a once-in-

a-century pandemic that has claimed hundreds of thousands of lives; nor that the specific circumstances that gave rise to the challenged directives are unlikely to recur. Mot. at 3-4 (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631-32 (1979)). Indeed, today the County and Bay Area enjoy record high vaccination rates and more effective treatment protocols for COVID-19. (Mot. at 3-4.) And we now have the experience of the County's actual actions in the face of both the Delta-variant case surge in late summer 2021 and the Omicron-variant case surge that is occurring today, which establish that the approach of the State and County towards COVID-19 mitigation has significantly changed to reflect changing circumstances. *See* Mot. at 4; RJN at ¶¶ 1-3.

Second, Plaintiffs argue that they have a number of live claims against the County, including their challenge to the $2.8 million in fines the County is seeking to collect in the state court enforcement action. Opp. at 7-8. But these claims do not resolve the mootness issue that should require dismissal of, at a minimum, Plaintiffs' claims for declaratory and injunctive relief. Plaintiffs' challenge to the fines should be dismissed (*see* Part C *infra*), but if it is not, the Court should exercise its inherent "discretionary power to stay" this proceeding pending the outcome of the parallel state court proceedings, which are likely to dispose of central and shared issues. *See Prescott v. Nestle USA, Inc.*, No. 19-cv-07471-BLF, 2020 WL 7053317, at *2 (N.D. Cal. Nov. 25, 2020) (citation omitted). And although Plaintiffs argue that the Court should not abstain from deciding Plaintiffs' claims and dismiss this action in favor of the state court proceeding pursuant to *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 817 (1976) (*see* Opp. at 8), the Court does not need to reach that issue to exercise its discretion to grant a temporary stay.

Similarly Plaintiffs' claim for nominal damages—"customarily [] defined as a mere token or 'trifling'" (*Cummings v. Connell*, 402 F.3d 936, 943 (9th Cir. 2005)—should also be stayed pending the outcome of the state court proceeding, which is likely to resolve Plaintiffs' constitutional defenses under the First, Eighth, and Fourteenth Amendments. Plaintiffs will not suffer any damage or hardship if they are forced to wait for the possibility of a few dollars in nominal damages during the pendency of any stay. *See Prescott*, 2020 WL 7053317, a *3-4 (considering hardship to parties).

Finally, Plaintiffs' First Amendment and *Monell* claims based on purported retaliation (Opp. at 8) do not affect mootness, because both claims should be dismissed. *See* Part IV *infra*.

II. PLAINTIFFS' FIRST AMENDMENT AND EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED.

Plaintiffs raise only two points respecting their First and Fourteenth Amendment claims, but neither defeats dismissal. First, Plaintiffs argue that the State's December 13, 2021 face covering guidance warrants "strict scrutiny" (Opp. at 2), but the State's guidance is not relevant to the claims against the County Defendants.

Second, Plaintiffs dispute the availability of qualified immunity on the basis of the U.S. Supreme Court's preliminary shadow-docket order in *Gateway City Church v. Newsom*, stating that the "outcome" was "clearly dictated" by the Court's order 21 days earlier in *South Bay United Pentecostal Church v. Newsom*. Opp. at 3. But qualified immunity analysis does not rely on preliminary judicial views regarding the certainty of "outcomes"—*i.e.*, whether a preliminary injunction would issue in *Gateway*. Qualified immunity turns on whether a right is clearly established. *South Bay* concerned a "prohibition on indoor worship services" (141 S.Ct. 716), whereas *Gateway* concerned generally applicable restrictions on "indoor gatherings" as applied to gatherings in churches. Whether or not injunctive relief was appropriate in both cases, they do not concern the same "rights," and thus whether or not *South Bay* made clear that an injunction was coming in *Gateway*, it cannot resolve the qualified immunity analysis related to the rules governing generally applicable gatherings restrictions during the early stages of a once-a-century pandemic. Moreover, Plaintiffs cannot show damages arising from County gathering rules that they admittedly were not following (Mot. at 8-9), which independently merits dismissal.

III. PLAINTIFFS' EXCESSIVE FINES CLAIMS SHOULD BE DISMISSED.

The parties agree that Plaintiffs' excessive fines claim is governed by *Pimentel v. City of Los Angeles*, 974 F.3d 917, 922 (9th Cir. 2020), but disagree whether the claim can be resolved on this motion. *See* Opp. at 4. Plaintiffs argue that the claim can only be decided "on a [f]ull [e]videntiary [r]ecord." *Id*. However, Plaintiffs themselves have taken the position that the Eighth Amendment excessive fines issue is appropriately resolved at the pleadings stage, by filing a demurrer to the County's complaint in the state court enforcement action on the same Eighth Amendment grounds (ECF 136, Ex. M at 10-13); and further by opposing discovery related to their defense, claiming in

state court that "[t]he reasonableness of the fines is not at issue." RJN, Ex. A at 1.

The excessive fines issue is easily resolved on the record before the Court. The $2.8 million in fines that the County is seeking to collect are not "grossly disproportional" to Plaintiffs' 10 months of ongoing noncompliance, including conduct that posed an imminent risk of contagion to the community—*e.g.*, repeatedly hosting large indoor gatherings of around 400 people without requiring face coverings or social distancing—during timeframes in which the County's hospitals were near or at capacity and before the County had achieved widespread vaccination. Mot. 8-9 (citations omitted). On these facts, Plaintiffs' excessive fines claim should be dismissed.

IV. PLAINTIFFS' FIRST AMENDMENT RETALIATION AND *MONELL* CLAIMS SHOULD BE DISMISSED.

The *Noerr-Pennington* doctrine and California state law privileges bar tort liability against the County Counsel and the County Defendants for the prosecution of the state court enforcement action against Plaintiffs Calvary Chapel and McClure, as well as for conduct related, connected, or incidental to that lawsuit. Accordingly, Plaintiffs' Seventh Cause of Action for First Amendment retaliation and Eighth Cause of Action under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), which is based on the same alleged retaliatory conduct (Opp. at 7), should be dismissed.

Plaintiffs concede that the *Noerr-Pennington* doctrine immunizes government actors from liability where the activity at issue is "'petitioning or sufficiently related to petitioning activity.'" Opp. at 5 (quoting *Committee to Protect our Agric. Water v. Occidental Oil & Gas Corp.*, 235 F. Supp. 3d 1132, 1159 (E.D. Cal. 2017)); *see also Theme Promotions, Inc. v. News America Marketing FSI*, 546 F.3d 991, 1007 (9th Cir. 2008) (doctrine protects conduct "incidental to a lawsuit"). The only dispute here is whether the letters sent to Cass Bank describing the well-known public status and outcome of the state court enforcement action (TAC ¶¶ 141-148, 153-157) fall within the scope of that immunity.

Plaintiffs' own pleaded admissions resolve that dispute in favor of immunity and dismissal. According to the TAC, the County's goals in sending the letters included getting Plaintiffs to "pay the fines" and "comply with the County Orders" (TAC ¶ 86)—which was in furtherance of the same goals pursued in the state court enforcement action. *See* Mot. at 9-10. As the County Defendants

detailed in their motion (*id.*), a number of courts have held that correspondence informing interested third parties regarding anticipated or pending litigation—like the correspondence to Cass Bank—is protected conduct. *E.g.*, *UCP International Co. Ltd. V. Balsam Brands Inc.*, 420 F.Supp.3d 966, (N.D. Cal. 2019) (online statements to customers); *Elem Indian Colony of Pomo Indians of the Sulphur Bank Rancheria v. Ceiba Legal, LLP*, No. C 16-03081, 2016 WL 6520151 (N.D. Cal. Nov. 3, 2016) (letters to banks); *Theme Promotions*, 546 F.3d at 1007 (pre-suit demand letter).

Plaintiffs ignore these authorities and argue that immunity is not available because "Mr. Williams was not petitioning the government," but rather "contacting a private party to get leverage in a separate legal proceeding." Opp. at 5. It is not clear what this means, but it does not preclude immunity. Indeed, it seems to concede that the letters were related to litigation activity and thus privileged. In any event, the assertion is difficult to square with Plaintiffs' pleaded allegations that the letters were sent in furtherance of the County's efforts to enforce its "[o]rders"—*i.e.*, the public health orders protecting the community—and collect Calvary's fines. *See* TAC ¶ 86.

Plaintiffs' argument on this issue is similar to that in *Abraham v. Lancaster Community Hospital*, in which the court reasoned that "'[i]t would be anomalous to hold that a litigant is privileged to make a publication necessary to bring an action but that he can be sued for defamation if he lets anyone know that he has brought it.'" 217 Cal. App. 3d 796, 823-24 (1990) (citation omitted.) There is no reasonable dispute that the County Counsel or any other County officer could have called a press conference to report the Superior Court's public orders, finding that Plaintiffs had violated State and County COVID-19 public health orders *and* were in contempt of court for violating the Superior Court's temporary restraining order and preliminary injunctions that required Plaintiffs to follow those same COVID-19 rules. Yet Plaintiffs argue that making those exact same disclosures to Cass Bank exposes the County to tort liability. This makes no sense; and it is not the law. If Plaintiffs' crabbed interpretation of the scope of *Noerr-Pennington* immunity were to be accepted by this Court, it would eviscerate the public deterrence function of civil and criminal enforcement. *See Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 ("[T]o exercise its petitioning rights meaningfully, a party may not be subjected to liability for conduct intimately related to its petitioning activities."). That is, government would be able to pursue civil enforcement actions, but

would not be able to discuss or disclose the results to interested third parties or the general public without risking liability wherever a litigant could allege that the government was "chill[ing]" speech. This is precisely the mischief that *Noerr-Pennington* immunity is supposed to prevent.

With respect to the California state law immunities that bar liability here, Plaintiffs offer three arguments, all of which misstate the applicable law. First, Plaintiffs argue that Government Code § 821.6, which confers immunity on public employees for "instituting or prosecuting any judicial or administrative proceeding," applies only to "malicious prosecution claims." As an initial matter, Plaintiffs First Amendment retaliation claim is similar to a malicious prosecution claim—*i.e.*, Plaintiffs allege that the County disclosed the status and outcome of the state court enforcement proceeding in order to harm and harass Plaintiffs. Thus, the alleged conduct remains within the ambit of § 821.6. In any event, Plaintiffs' reading of the law is incorrect: the underlying case says only that § 821.6 was intended to shield public employees from liability for "Malicious prosecution and not for False imprisonment." *Sullivan v. County of Los Angeles*, 12 Cal. 3d 710, 719-20 (1974). That distinction is not relevant here.

Second, Plaintiffs argue that Cass Bank was not a party to any lawsuit, so the County's letters are not privileged under § 821.6. But Plaintiffs ignore the fact that § 821.6 immunity extends to public reports of the outcome of the enforcement process. Mot. at 10 (citing *Cappuccio, Inc. v. Harmon*, 208 Cal. App. 3d 1496, 1499-1500 (1989) ("[D]issemination of information on practices inimical to the interests of the public is of vital concern.")). Again, it would make no sense if the County could pursue a civil enforcement action, but could not disclose the outcome of that action to financially or otherwise interested parties and the general public.

Third, Plaintiffs argue that California Civil Code § 47(b), which creates an absolute privilege for statements made in a connection with a judicial proceeding regardless of intent, "generally" does not extend to "[s]tatements to nonparticipants in the action." Opp. at 6 (citing *Rothman v. Jackson,* 49 Cal. App. 4th 1134, 1141 (1996)). But sometimes it does extend that far where the statement is made to achieve the "objects of the litigation" and has some "connection or logical relation to the action." *Boon v. Professional Collection Consultants*, 978 F. Supp. 2d 1157, 1161 (S.D. Cal. 2013) (citations omitted). Thus, the privilege encompasses communications to the press and to interested members

of the community, *Abraham*, 217 Cal. App. 3d at 823-824, which Plaintiffs do not deny. In sum, the County Defendants and its lead counsel enjoy immunity under federal and state law for the supposedly "retaliatory" conduct, and Plaintiffs' harassing Seventh and Eighth Causes of Action should be dismissed.

V. THE BANE ACT AND STATE DAMAGES CLAIMS SHOULD BE DISMISSED.

Plaintiffs do not challenge the County Defendants' motion to dismiss (1) Plaintiffs' Bane Act claim (Ninth Cause of Action) or (2) Plaintiffs' state constitutional claims for damages asserted in connection with their Second and Sixth Causes of Action. Mot. at 12-13. Accordingly, those claims should be dismissed for the reasons set forth in the County Defendants' motion. *Id*.

VI. CONCLUSION

For the reasons set forth in the County Defendants' papers, the County Defendants respectfully request that the Court dismiss Plaintiffs' TAC.[1]

Dated: January 7, 2022

Respectfully submitted,

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[1] The Court's Sept. 27, 2021 Order (ECF 115) that requires the State and County Defendants to share the page limits set forth in the Civil Local Rules has severely constrained the County's ability to address the claims and defenses raised by Plaintiffs' TAC. If it would be helpful to the Court, the County Defendants would be willing to supplement all or any portion of their briefing to address issues the Court believes necessary to resolve the instant motion.