

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

**FIRST APPELLATE DISTRICT
DIVISION THREE**

CENTER FOR BIOLOGICAL
DIVERSITY, INC., and PETER
GALVIN,

Plaintiffs and Appellants,

vs.

FPL GROUP, INC.; FPL ENERGY,
LLC; ESI BAY AREA GP, INC.;
ESI BAY AREA, INC.; GREP BAY
AREA HOLDINGS, LLC; GREEN
RIDGE POWER LLC; ALTAMONT
POWER LLC; ENXCO, INC.;
SEAWEST WINDPOWER, INC.;
PACIFIC WINDS, INC.; WINDWORKS,
INC.; and ALTAMONT WINDS, INC.,

Defendants and Respondents.

No. A116362

Alameda County Superior Court
Case No. RG04-183113

The Hon. Bonnie L. Sabraw, Judge
Department 512: (510) 670-6312

**APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC. AND
PETER GALVIN'S**

SUPPLEMENTAL REPLY BRIEF

PURSUANT TO THE COURT'S JANUARY 31, 2008 ORDER

**ON APPEAL FROM A JUDGMENT OF DISMISSAL ON THE
PLEADINGS**

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TABLE OF CONTENTS

| | |
|---|-----------|
| INTRODUCTION | 1 |
| ARGUMENT | 3 |
| I. There Is No Basis For Abstention Here | 3 |
| A. The Trial Court Did Not Abuse Its Discretion In Twice Denying Defendants' Motion For Abstention | 3 |
| B. The UCL Abstention Doctrine Has No Application Here Where Defendants' Conduct Is Prohibited By Law And Where Defendants Are Destroying Public Trust Property In Which Plaintiffs Have An Interest.. | 3 |
| II. The Trial Court's Rejection Of Primary Jurisdiction Should Be Affirmed | 18 |
| III. The Counties Are Not Necessary And Indispensable Parties | 19 |
| CONCLUSION | 21 |

TABLE OF AUTHORITIES

Cases

| | |
|--|----------------|
| <i>Alvarado v. Selma Convalescent Hospital</i> , 153 Cal.App.4th 1292 (2007)..... | 13, 14, 16 |
| <i>Barquis v. Merchants Collection Assn.</i> , 7 Cal.3d 94 (1972)..... | 12 |
| <i>Bell v. Blue Cross of California</i> , 131 Cal.App.4th 211 (2005)..... | 9 |
| <i>California Grocers Ass’n v. Bank of America</i> , 22 Cal.App.4th 205 (1994) . | 14, 16 |
| <i>California v. Altus Finance</i> , 36 Cal.4th 1284 (2005)..... | 14, 15 |
| <i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.</i> , 20 Cal.4th 163 (1999)..... | 5 |
| <i>Cortez v. Purolator Air Filtration Products Co.</i> , 23 Cal.4th 163 (2000)..... | passim |
| <i>Countrywide Home Loans v. Superior Court</i> , 69 Cal.App.4th 785 (1999) | 20 |
| <i>De Canas v. Bica</i> , 40 Cal.App.3d 976 (1974)..... | 11 |
| <i>De Canas v. Bica</i> , 424 U.S. 351 (1976) | 11 |
| <i>Deltakeeper v. Oakdale Irrigation Dist.</i> , 94 Cal.App.4th 1092 (2001) | 20 |
| <i>Desert Healthcare Dist. v. PacifiCare, FHP, Inc.</i> , 94 Cal.App.4th 781 (2001) | passim |
| <i>Diaz v. Kay-Dix Ranch</i> , 9 Cal.App.3d 588 (1970)..... | 10, 11, 12, 13 |
| <i>Farmers Ins. Exchange v. Superior Court</i> , 2 Cal.4th 377 (1992)..... | 2, 18 |
| <i>Korea Supply Co. v. Lockheed Martin Corp.</i> , 29 Cal.4th 1134 (2003)..... | 6 |
| <i>Kraus v. Trinity Management Services, Inc.</i> , 23 Cal.4th 116 (2000)..... | 6, 12 |
| <i>Krumme v. Mercury Insurance Co.</i> , 123 Cal.App.4th 924 (2004)..... | 18 |
| <i>Larez v. Oberti</i> , 23 Cal.App.3d 217 (1972)..... | 13 |

| | |
|---|---------------|
| <i>Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.</i> , 22 Cal.App.3d 303 (1971)..... | 14 |
| <i>McKell v. Washington Mutual, Inc.</i> , 142 Cal.App.4th 1457 (2006) | 15 |
| <i>McNary v. Haitian Refugee Ctr., Inc.</i> , 498 U.S. 479 (1991)..... | 10 |
| <i>People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co.</i> , 38 Cal.3d 509 (1985) | 9, 10 |
| <i>People v. McKale</i> , 25 Cal.3d 626 (1979) | 15 |
| <i>Samura v. Kaiser Foundation Health Plan</i> , 17 Cal.App.4th 1284 (1993)..... | 8, 9, 13, 16 |
| <i>Shamsian v. Department of Conservation</i> , 136 Cal.App.4th 621 (2006)..... | 3, 13, 14, 16 |
| <i>Solorzano v. Superior Court</i> , 10 Cal.App.4th 1135 (1992) | 10 |
| <i>Stop Youth Addiction, Inc. v. Lucky Stores, Inc.</i> , 17 Cal.4th 553 (1998) 4, 5, 6, 13 | |
| <i>United States v. Lara</i> , 541 U.S. 193 (2004) | 9 |
| <i>Worcester v. Georgia</i> , 31 U.S. 515 (1832)..... | 9 |
| Statutes | |
| Labor Code former § 2805 | 11 |
| Penal Code § 908..... | 4 |
| Constitutional Provisions | |
| U.S. Const., art. I, § 8 | 9 |
| U.S. Const., art. II § 2..... | 9 |

INTRODUCTION

Plaintiffs hereby reply to the supplemental briefs filed by defendants in response to the Court's supplement briefing order of January 31, 2008.

In their supplemental briefs, defendants rely primarily on the UCL abstention doctrine. The trial court properly exercised its discretion and twice denied defendants' motions to dismiss or stay the action on the basis of the abstention and primary jurisdiction doctrines. These determinations were correct and defendants make no attempt to show the trial court abused its discretion.

The UCL abstention doctrine on which defendants rely has no application here. The doctrine applies only to UCL claims; even in the case of UCL claims, it does not apply where, as here, the defendant's conduct is unlawful and violates statutory and common law prohibitions. Moreover, as the trial court found, this lawsuit does not present an issue of complex economic policy. Defendants' abstention argument fails for another reason as well: In deciding whether to exercise its equitable powers, a court of equity must consider the equities of both the plaintiff and the defendant, something it can only do at the end, not the beginning of the case, after it has a complete evidentiary record by which to judge. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 180-81 (2000). The court's duty to weigh the equities cannot be abdicated on the basis of ungrounded speculation and supposition before the court has received a shred of evidence.

Nor do defendants attempt to show that the trial court abused its discretion in twice denying their primary jurisdiction motion. The trial court was correct because, among other reasons, there is no " 'pervasive and self-contained system of administrative procedure' to deal with the

precise questions involved” in the litigation. *Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377, 396 (1992) (citation omitted).

Finally, Alameda and Contra Costa Counties are not necessary or indispensable parties because they have no cognizable interest in the eagles, hawks, falcons, owls, and other birds defendants are killing. Nor do they have any power to authorize defendants’ unlawful killing of public trust wildlife.

ARGUMENT

I. There Is No Basis For Abstention Here

A. The Trial Court Did Not Abuse Its Discretion In Twice Denying Defendants' Motion For Abstention

The trial court twice properly exercised its discretion and denied defendants' motions to dismiss or stay the action on the basis of the abstention doctrine. RA 95; RA 229. The trial court's rejection of dismissal on abstention grounds was correct and defendants make no attempt to show the trial court abused its discretion; thus, it must be affirmed on appeal. *Shamsian v. Department of Conservation*, 136 Cal.App.4th 621, 641 (2006). In particular, the trial court twice found that this case does not involve "an issue of complex economic policy." RA97; RA229. This is a factual finding supported by substantial evidence to which this Court must defer on appeal. The trial court also held correctly that the Alameda "County Planning Department is not charged with enforcement of" laws protecting wildlife. RA230.

B. The UCL Abstention Doctrine Has No Application Here Where Defendants' Conduct Is Prohibited By Law And Where Defendants Are Destroying Public Trust Property In Which Plaintiffs Have An Interest

Even if the trial court had not already properly exercised its discretion to twice reject abstention, defendants' authorities would provide no support for dismissal of this action on abstention grounds. The foundation of defendants' abstention argument is the unfair competition law abstention doctrine set forth in dicta in *Desert Healthcare Dist. v. PacifiCare, FHP, Inc.*, 94 Cal.App.4th 781 (2001). The complaint in that action alleged that the contracts the defendant health care plan made with providing physicians were acts of unfair competition under the unfair competition law ("UCL"), Business and Professions Code section 17200 et

seq. The Court of Appeal rejected that contention, holding that the plaintiff had failed to state a UCL claim because the agreements “were specifically approved of by the Knox-Keene Act [, which regulates health care plans]. As such, there was nothing unlawful, unfair, or fraudulent about those agreements.” *Id.* at 793.

Even though it had already held the plaintiff had failed to state a claim, the *Desert Healthcare* court went on in dicta to endorse Justice Brown’s dissent in *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal.4th 553 (1998), which called for creation of a novel UCL abstention doctrine. *Desert Healthcare*, 94 Cal.App.4th at 794.

Stop Youth Addiction, Inc. v. Lucky Stores, Inc., was a UCL action against Lucky Stores for selling cigarettes to minors in violation of Penal Code section 908. In addition, there existed an administrative enforcement scheme to stop cigarette sales to minors known as the STAKE Act and administered by the Department of Health Services. The defendant attempted to escape liability by arguing that allowing a UCL action based on the defendant’s Penal Code violation of a statute would interfere with government enforcement efforts to reduce cigarette sales to minors. The Supreme Court held that an action for injunctive relief was proper despite these government enforcement remedies: “Most fundamentally, as previously discussed, [the plaintiff] is not suing under, or to enforce, [the criminal statutes whose violation is alleged to be an unlawful business practice]. Rather, [the plaintiff] seeks to enforce the UCL by means of restitution and an injunction Enforcing the UCL in this manner . . . would advance the policy of discouraging unfair competition by leveling the playing field on which [the defendant] competes with other, law-abiding, [businesses]. As we have stated, the UCL embodies ‘the policy of permitting members of the public to police the spectrum of ‘unfair

competition.” . . . [W]e agree with [the plaintiff] the fact a UCL action is based upon, or may even promote the achievement of, policy ends underlying [criminal statutes], does not, of itself, transform the action into one for the ‘enforcement’ of [those statutes].” *Stop Youth Addiction*, 17 Cal.4th at 576 (citation omitted).

In her dissent, Justice Brown argued instead for a “Jurisprudence of Abstention” under the UCL. *Stop Youth Addiction*, 17 Cal.4th at 595 (dissenting opn. of Brown, J.). Justice Brown maintained that courts should abstain from enjoining statutory violations in UCL cases. Her arguments for a UCL abstention doctrine echo arguments made by defendants here: “Given the wide availability of cigarettes to children and the long-term health consequences of their use, the kind and level of regulatory effort needed to combat the threat is an issue for legislative and executive decisionmakers. The right answer implicates a calculus of costs versus results, the optimal allocation of public resources, consistency of regulatory effort, suitability of judicial enforcement, and a host of related issues.” 17 Cal.4th at 596 (dissenting opn. of Brown, J.).

In *Stop Youth Addiction*, all the other Justices of the Supreme Court rejected Justice Brown’s call for a “Jurisprudence of Abstention.” Instead, in cases following *Stop Youth Addiction*, the Supreme Court ultimately resolved concerns over open-ended UCL liability *not* by creating a free-ranging “Jurisprudence of Abstention,” as Justice Brown had advocated, but by carefully crafting other limitations on UCL liability. The Supreme Court created the UCL “safe harbor” doctrine. *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 182-84 (1999). Under the safe harbor doctrine, a UCL action is barred if there is another statute that “ ‘clearly permit[s] the [defendant’s] conduct.’ ” *Id.* at 183. The Supreme Court also limited the scope of

monetary liability by forbidding non-restitutionary disgorgement and forbidding disgorgement of profits not representing monies given to the defendant or benefits in which the plaintiff has an ownership interest. *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th 116, 137 (2000); *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1148 (2003). In addition, Proposition 64's limitations on UCL standing have further restricted the scope of potential UCL liability.

The Supreme Court also limited the scope of UCL liability by holding that in a UCL action, as in every other action for equitable relief, a trial court must balance the equities weighing in the defendant's favor as well as those weighing in the plaintiff's favor; this is an *informed* exercise of equitable discretion that cannot occur at the threshold but only at the end of the case, after liability is established and the court has received evidence, not speculation, of the equities on both sides of a dispute: "A court cannot properly exercise an equitable power without consideration of the equities on both sides of a dispute. This principle of equity jurisprudence has been applied in a variety of contexts in which the court is called upon to exercise equitable power. . . . '[I]n all such cases the court should weigh the competing equities which bear on the issue . . . and should then grant or deny injunctive relief depending on the overall balance of those equities.' . . . [¶] . . . [¶] . . . In short, consideration of the equities between the parties is necessary to ensure an equitable result." *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th 163, 180-81 (2000). After making this statement, the Supreme Court in *Cortez* remanded the action so the trial court could receive evidence on the equities. *Id.* at 181.

Unaccountably, *Desert Healthcare* ignored all these limitations on UCL liability the Supreme Court created following its decision in *Stop Youth Addiction* and ignored the Supreme Court's admonition in *Cortez*

that “consideration of the equities between the parties is necessary to ensure an equitable result.” 23 Cal.4th at 181. Instead, despite the Supreme Court’s rejection of a “Jurisprudence of Abstention,” the *Desert Healthcare* court in dicta expressed approval for Justice Brown’s theory.

Desert Healthcare, however, has no application here. First, plaintiffs’ cause of action for destruction of public trust wildlife is not a claim brought under the UCL to which the UCL abstention doctrine would apply.

Second, in *Desert Healthcare* the defendants’ conduct was “specifically approved of by the Knox-Keene Act. As such, there was nothing unlawful, unfair, or fraudulent about those agreements.” 94 Cal.App.4th at 793. Here, by contrast, there is no statute that “specifically approves” defendants’ wildlife killings; to the contrary, as explained in plaintiffs’ prior briefing, defendants are violating numerous statutory prohibitions by their continuing destruction of public trust wildlife. The Legislature, rather than “specifically approv[ing]” (94 Cal.App.4th at 793) defendants’ conduct in killing eagles, hawks, owls, and other birds, has specifically *prohibited* their conduct. And, as explained in plaintiffs’ prior briefing, the common law public trust doctrine also prohibits plaintiffs’ conduct.

Thus, there is no risk that defendants will be held liable for conduct that the Legislature by statute has “clearly permit[ted],” *Cel-Tech*, 20 Cal.4th at 183, or even that defendants will be held liable for conduct that the Legislature has neither permitted nor prohibited. The Legislature instead has clearly prohibited defendants’ killing of public trust wildlife.

Defendants’ other authorities are equally unavailing at justifying abstention in this case. Like *Desert Healthcare*, these decisions are UCL actions. *Samura v. Kaiser Foundation Health Plan*, 17 Cal.App.4th 1284

(1993), another UCL action against a health care plan alleging violations of the Knox-Keene Act, does not support abstention here, for it is not an abstention case. To the contrary, it held that, notwithstanding that the Knox-Keene Act had set up a statutory administrative scheme regulating health care plans, UCL actions and injunctive relief were proper to enjoin conduct violating the Knox-Keene Act. “Th[e] power [to regulate health care plans] has been entrusted exclusively to the Department of Corporations, preempting even the common law powers of the Attorney General. Among other things, the Department of Corporations has exclusive power to regulate the provisions of health service agreements of health maintenance organizations and the content of the required disclosure form and evidence of coverage pamphlets. [¶] But, despite the existence of a statutory enforcement scheme, *Samura* may still sue [under the UCL] to enjoin acts which are made unlawful by the Knox-Keene Act.” *Id.* at 1299 (citations omitted). The court only limited the plaintiffs from relying in their UCL claims on statutory provisions that did not mandate or prohibit any conduct by the defendants, but that set forth only goals and aspirations for the Department of Corporations in its regulation of the health care industry: These statements of legislative intent were “statutory provisions . . . [that] serve to govern the Department of Corporations in the exercise of its regulatory powers” but that “do not define unlawful acts.” *Id.* at 1301. As *Cortez* requires, the *Samura* court’s assessment of the propriety of equitable relief occurred after a full trial on the merits. The Court of Appeal held that on the evidentiary record created at trial the plaintiffs had failed to prove any statutory violation or that the defendants’ conduct was unlawful or misleading. *Id.* at 1298, 1300-01.

Here, unlike *Samura*, plaintiffs allege defendants’ conduct is in violation of statute and is destroying wildlife in which plaintiffs have a

public trust property interest. Nor does plaintiffs' cause of action for destruction of public trust wildlife rely on any statutory provision that sets forth only goals and aspirations for an administrative agency.

The Court of Appeal later confirmed that *Samura* is not a barrier to UCL actions alleging statutory violations: “*Samura* does not in any event purport to give the Department of Managed Health Care exclusive jurisdiction to enforce every section of the Knox-Keene Act, but simply limits a contracting provider’s suit for injunctive relief to ‘acts which are made unlawful by the Knox-Keene Act.’ ” *Bell v. Blue Cross of California*, 131 Cal.App.4th 211, 217 (2005).

People ex rel. Dept. of Transportation v. Naegele Outdoor Advertising Co., 38 Cal.3d 509 (1985), was a federal-law preemption decision. *Naegele* was a UCL action attempting to enforce state and federal billboard regulations against billboards on Indian tribal lands. The Constitution gives the federal government exclusive powers to regulate Indian tribes and land. U.S. Const., art. I § 8, art. II § 2; *United States v. Lara*, 541 U.S. 193, 200 (2004) (“[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’ ”); *Worcester v. Georgia*, 31 U.S. 515, 557 (1832) (“The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states; and provide that all intercourse with them shall be carried on exclusively by the government of the union.”). For that reason, the Court held that application of state law to the Indian billboards was preempted by federal law, and that the application of federal law under the UCL would interfere with the exclusive federal jurisdiction over Indian affairs. 38 Cal.3d at 522-23.

Unlike *Naegele*, this case does not involve a matter like Indian affairs that the federal Constitution has committed exclusively to the jurisdiction of the federal government. *See Solorzano v. Superior Court*, 10 Cal.App.4th 1135, 1148 (1992) (rejecting the defendant’s argument that under *Naegele* and *Diaz, infra*, the “existence of a federal regulatory scheme makes state injunctive relief inappropriate under general principles of equity;” “The cases are inapposite because, unlike the case at bench, both deal with fields absolutely and entirely preempted by federal law (immigration and Indian affairs).”) Instead, members of the public have a cognizable property interest under state public trust law in the wildlife whose lives are at stake here.

Another case defendants rely on, *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588 (1970), also does not support abstention here. In *Diaz*, the plaintiffs, lawful farm workers, sought not just a prohibitory injunction prohibiting employers from knowingly hiring illegal aliens but a mandatory injunction requiring employers to investigate the immigration status of potential employees. *Diaz* dismissed the action at the pleading stage based on the potential difficulties of fashioning and supervising mandatory injunctive relief to monitor the hiring of all farm workers in California by all the farm employers in California.

Diaz was decided in 1970. In *Diaz*, unlike here, there was no federal or state statute prohibiting the defendant employers’ conduct in hiring illegal aliens; it was not until sixteen years later, with the enactment of the Immigration Reform and Control Act of 1986 that for the first time it became unlawful under federal law to hire illegal aliens. *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 483 n.2 (1991) (“Prior to November 6, 1986, the enactment date of the Reform Act, the

employment of undocumented aliens did not violate federal law.”). And it was not until the year after *Diaz*, in 1971, that the Legislature in reaction to *Diaz* enacted Labor Code former section 2805, prohibiting employment of illegal aliens. Thus, the defendants in *Diaz* were violating no law by their conduct, and the *Diaz* court thus had no clear statutory standard by which to measure injunctive relief. Here, by contrast, defendants’ killing of eagles, hawks, falcons, and owls is specifically prohibited by state and federal criminal statutes, as well as by the public trust doctrine.

Moreover, after the enactment of Labor Code former section 2805 prohibiting employment of illegal aliens, a UCL suit was again brought by lawful workers against employers who knowingly hired illegal aliens. Once again, the Court of Appeal affirmed the dismissal of the suit, holding that using section 2805 as the basis for injunctive relief “is in conflict with the national law and policy,” without identifying any actual conflict between state and federal law. *De Canas v. Bica*, 40 Cal.App.3d 976, 980 (1974). This time, however, the United States Supreme Court reversed the Court of Appeal and held that federal law and policy did not bar the UCL suit seeking injunctive relief to enforce the Labor Code prohibition against employing illegal aliens, absent an actual direct conflict between state and federal law. *De Canas v. Bica*, 424 U.S. 351, 354, 364-65 (1976). It reached this conclusion notwithstanding that the “[p]ower to regulate immigration is unquestionably exclusively a federal power,” *id.* at 354, and that employers were expressly excluded from liability under the federal law prohibiting the harboring of illegal aliens, *id.* at 360. Here, of course, there is no conflict between state and federal

law because they both prohibit defendants from killing raptors and other birds.

It is significant for another reason as well that *Diaz* was decided in 1970. It was not until the Supreme Court decided *Barquis v. Merchants Collection Ass'n* in 1972 that the Court approved for the first time private UCL actions. Before *Barquis*, as the Supreme Court has noted, the status and proper scope of private UCL actions, including the availability of injunctive relief, was highly uncertain: “[T]he law was relied on principally by public prosecutors until *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, a case brought by private plaintiffs, confirmed the breadth of the definition of unfair competition and the availability of the action for injunctive relief to private plaintiffs.” *Kraus v. Trinity Management Services, Inc.*, 23 Cal.4th at 130. Thus, *Diaz* also reflects the general uncertainty at the time it was decided as to whether injunctive relief was available in any private UCL actions.

Diaz has also been superseded by subsequent developments in yet another respect. *Diaz* was a dismissal at the pleading stage based on the assessment of the feasibility and propriety of potential injunctive relief. As explained above, the Supreme Court has now made clear that the proper time for weighing the equities and for deciding whether and to what extent to award equitable relief in a UCL action is at the conclusion of the case, after litigation of the merits, rather than at the pleading stage. *Cortez v. Purolator Air Filtration Products Co.*, 23 Cal.4th at 179-81.

Diaz itself demonstrates the danger and futility of attempting to judge the propriety of equitable relief at the pleading stage without any factual record. In concluding that the UCL action before it should be dismissed on abstention grounds, the *Diaz* court relied heavily on the

following assertion, which it made without any evidentiary support: “The federal government could, if it would, reduce the flow of illegal entrants to a trickle or virtually dry it up.” *Diaz*, 9 Cal.App.3d at 599. The history of the federal government’s strenuous but entirely unsuccessful efforts to stop illegal immigration over the past 35 years since *Diaz* demonstrates beyond dispute the falsity of this assertion and the imprudence of attempting to decide the propriety of injunctive relief at the pleading stage without an evidentiary record. *Diaz*’s reasoning on this point is also contrary to *Stop Youth Addiction*, which, as described above, held in very strong terms that the lack of enforcement of criminal and regulatory statutes by government officials is no barrier to a private UCL action.

Nor, unlike *Diaz* and *Larez v. Oberti*, 23 Cal.App.3d 217 (1972) (another migrant labor UCL lawsuit on which defendants rely), is this a case in which there are thousands of potential defendants who would be subject to injunctive relief. Although some defendants operate through subsidiaries or joint ventures, there are only six parent companies operating wind turbines at Altamont Pass.

Shamsian v. Department of Conservation, 136 Cal.App.4th 621, 642 (2006), was yet another UCL action in which the defendants were not violating any statutory prohibition and were not destroying property in which the plaintiffs had an ownership interest. As in *Samura*, the plaintiffs in *Shamsian* sought to base their UCL claim on an assertion that the court should use “a statement of legislative intent” to fashion a new legal standard by which to judge the lawfulness of the defendants’ conduct. *Shamsian*, 136 Cal.App.4th at 633, 641. *Alvarado v. Selma Convalescent Hospital*, 153 Cal.App.4th 1292 (2007), was also a UCL action; the trial court concluded that the statute the defendants allegedly violated was one that was committed to the exclusive enforcement of the Department of

Health Care Services. *Id.* at 1304. Even apart from the abstention doctrine, the exclusive nature of the statutory remedy alone barred any UCL action. *California v. Altus Finance*, 36 Cal.4th 1284, 1303 (2005) (UCL actions barred where statutory remedy is exclusive). Notably, *Shamsian* and *Alvarado* were both cases where the respective trial courts had ordered abstention and the Court of Appeal held that the trial courts had not abused their discretion, unlike here where the trial court twice denied defendants' abstention motions.

The final case on which defendants rely is not an abstention case at all, but simply a case holding that after full trial on the merits it was an abuse of discretion to enjoin a bank's price for a particular service where the price was neither illegal, unconscionable, nor a breach of contract. *California Grocers Ass'n v. Bank of America*, 22 Cal.App.4th 205, 217-19 (1994). *California Grocers* illustrates why it is only after a full trial on the merits that the propriety of injunctive relief can be judged, for the Court of Appeal was only able to come to the conclusion that injunctive relief on the facts before it was an abuse of discretion by scrutinizing the trial record. And, unlike *California Grocers*, this case involves conduct that violates state and federal criminal wildlife protection laws, not conduct that is entirely lawful.¹

¹ *Lazzareschi Inv. Co. v. San Francisco Fed. Sav. & Loan Assn.*, 22 Cal.App.3d 303 (1971), is entirely off-point. It is an ordinary contract case in which the plaintiff sought to recover a mortgage prepayment penalty it contended was unconscionable. It is not an abstention case; it is not an injunctive relief case, for the plaintiff there sought damages, not an injunction; it is not a UCL case; and no statutory violation was at issue. The trial court decided the merits of the claim, as did the Court of Appeal; the Court of Appeal's dicta quoted by defendants does not speak to the issue presented here.

Moreover, the broad and sweeping language used in some of these UCL abstention cases is called into question by the Supreme Court's reaffirmance that "the fact that there are alternative remedies under a specific statute does not preclude a UCL remedy, unless the statute itself provides that the remedy is to be exclusive." *California v. Altus Finance*, 36 Cal.4th at 1303; *accord, People v. McKale*, 25 Cal.3d 626, 632 (1979) ("even though a specific statutory enforcement scheme exists, a parallel action for unfair competition is proper"). In light of *Altus Finance*, abstention is not proper when the Legislature has outlawed the defendant's conduct.

To summarize, the UCL abstention doctrine was developed to address concerns unique to UCL jurisprudence and applies only to UCL claims. There is no precedent for applying the UCL abstention doctrine to non-UCL claims like plaintiffs' cause of action for destruction of public trust wildlife. In addition, the UCL abstention doctrine applies only where the Legislature or the common law have not made the defendant's conduct unlawful and there is no applicable legal standard by which to judge the lawfulness of the defendant's conduct. When, as here, the defendant's conduct has already been declared unlawful by the Legislature and the common law public trust doctrine, abstention has no place. The court in *McKell v. Washington Mutual, Inc.* so concluded when it rejected application of the UCL abstention doctrine to that case: "[T]he legislative determination as to the propriety of [defendant's] actions already has been made through the enactment of the applicable laws." *McKell v. Washington Mutual, Inc.*, 142 Cal.App.4th 1457, 1474 (2006). No case has ever applied the UCL abstention doctrine to conduct that violates a statutory prohibition. As *Cortez* held, "equitable defenses may not be

asserted to wholly defeat a UCL claim since such claims arise out of unlawful conduct.” *Cortez*, 23 Cal.4th at 179.

Moreover, as the trial court found, this is not a case involving “an issue of complex economic policy.” RA97; RA229. Plaintiffs are not seeking to regulate the prices defendants charge or the terms of their contracts, as was the case in *Desert Healthcare*, *Samura*, and *California Grocers*. Nor is this a case like *Shamsian* or *Alvarado*, where there is an agency with the discretionary power to forbid the defendant’s conduct that has not acted to forbid the defendant’s conduct and has not made it unlawful.

Nor does the fact that a judgment against defendants might cause them to expend money complying with it turn this case into one involving complex economic policy. Virtually every judgment awarding legal or equitable relief against any defendant in any type of lawsuit costs the defendant something to comply with, yet that does not turn every lawsuit into one involving complex economic policy.

The wisdom of the procedure set forth in *Cortez* in which the trial court exercises its equitable discretion at the end of the case upon a full evidentiary record is apparent here. Defendants seek to have plaintiffs’ public trust cause of action dismissed on the basis of disputed issues of fact never resolved by the trial court concerning the results of scientific studies of defendants’ killing of birds with their wind turbines, the effectiveness of various mitigation measures, whether defendants have undertaken mitigation efforts in the past, whether defendants have complied in the past or are currently complying with their permits, speculation about defendants’ future conduct and future permit compliance, etc. It would be improper for this Court to resolve those questions against plaintiffs in an appeal addressing only whether plaintiffs have stated a cause of action for

defendants' unlawful destruction of public trust wildlife. Instead, *Cortez* teaches that the proper procedural stage for a court of equity to exercise its equitable discretion is at the remedies phase, after it has received evidence, determined that the defendant is liable, and has the evidence before it with which to “ ‘weigh the competing equities which bear on the issue . . . and . . . then grant or deny injunctive relief depending on the overall balance of those equities.’ ” *Cortez*, 23 Cal.4th at 180-81.

Finally, the notion put forward by the FPL defendants that the settlement agreement in the CEQA actions is a “quasi-administrative framework” justifying abstention is a fiction. Alameda County has not been delegated any authority by the Legislature to regulate wildlife, to regulate the windpower industry, or to erect any “quasi-administrative framework” to bargain away the public trust rights that all Californians possess in the wildlife that defendants are killing. The settlement agreement is a sweetheart deal that *lessened* the restrictions the County had previously imposed on defendants in its September 2005 resolution. Moreover, the parties to the settlement agreement specifically crafted it to freeze out any further participation by the Center for Biological Diversity or other members of the public. Only Golden Gate Audubon and Californians for Renewable Energy, the parties to the CEQA lawsuit, have any right to enforce the settlement agreement. Meanwhile, the latest scientific studies by the County's own Scientific Review Committee show defendants are killing raptors at a *higher* rate than before the new County permits and the settlement agreement. Despite this increasing death toll, the County and defendants have rejected the Scientific Review Committee's recommendations for mitigation measures necessary to reduce defendants' killings.

II. The Trial Court's Rejection Of Primary Jurisdiction Should Be Affirmed

The GREP defendants agree that there is no basis for application of the primary jurisdiction doctrine here. The FPL defendants argue that primary jurisdiction should apply, but they do not demonstrate the existence of any of the doctrine's prerequisites. Instead, they contend that the Court should make a primary jurisdiction referral to the ad hoc procedures established by the settlement agreement in the CEQA litigation.

The trial court twice denied defendants' motions to stay or dismiss the action on the basis of the primary jurisdiction doctrine. RA 94-101; RA 228-31. The trial court's decisions are reviewed for an abuse of discretion. *Krumme v. Mercury Insurance Co.*, 123 Cal.App.4th 924, 938 (2004). The trial court's exercise of its discretion in this regard was correct, and there is no basis in the record for finding an abuse of discretion or for reversing on appeal the trial court's decision.

For the reasons explained in plaintiffs' Supplemental Brief at 12-19, primary jurisdiction does not apply here because the Legislature has not established a formal administrative procedure for adjudicating a specific factual question that is both at issue in the litigation and within the special technical competence of the administrative body. The ad hoc procedure created by the parties to the CEQA settlement agreement was not created by the Legislature and is not a " 'pervasive and self-contained system of administrative procedure' to deal with the precise questions involved" in the litigation. *Farmers Insurance Exchange v. Superior Court*, 2 Cal.4th 377, 396 (1992) (citation omitted). Nor are there any factual questions " 'which, under a regulatory scheme, have been placed [by the Legislature] within the special competence' " of Alameda County or of the ad hoc settlement agreement procedure. *Id.* at 390. Accordingly, the primary

jurisdiction doctrine provides no basis for dismissing plaintiffs' cause of action for destruction of public trust property.

III. The Counties Are Not Necessary And Indispensable Parties

For the reasons explained at length in plaintiffs' Supplemental Brief at 21-28, there are no necessary parties absent from this litigation, much less ones that are indispensable.

The FPL defendants suggest that Alameda and Contra Costa Counties may be necessary parties; the GREP defendants contend that Alameda County is a necessary and indispensable party. Defendants present no detailed analysis in support of these contentions, only unsupported assertions to the effect that "the County is the 'responsible party' that would be charged with effectuating any court order" (GREP Supp. Br. at 14), that injunctive relief would "circumvent[] the County's authority" (GREP Supp. Br. at 13), that the counties "have a compelling governmental interest in the subject matter of this litigation" (FPL Supp. Br. at 37), and that "it may be impossible to grant complete relief without them" (*ibid.*).

Alameda and Contra Costa Counties are not necessary or indispensable parties to plaintiffs' cause of action seeking relief for defendants' killing of public trust wildlife. The counties have no authority over or property interest in the eagles, hawks, falcons, owls, and other birds that defendants are killing. Public trust wildlife is owned by the people of California; the state acts as their trustee. The state has not delegated any of its duties as trustee to the counties. The counties lack any authority to authorize defendants to kill public trust wildlife, either for the purpose of producing wind-generated electricity or for any other purpose. Because the counties have no power to authorize defendants to kill eagles, hawks, and other birds, any injunctive relief cannot intrude upon their authority or

conflict with anything they have authorized defendants to do in their permits. Nor will the counties be charged with effectuating any court order. Defendants are subject to the jurisdiction of the court; it is defendants, not the counties, who are killing the birds, and complete relief can be granted without involving the counties at all. Thus, the counties do not have “any interests at stake that could be ‘directly and immediately’ impacted by the outcome of the case.” *Countrywide Home Loans v. Superior Court*, 69 Cal.App.4th 785, 795 (1999).

“[W]e must ask what contribution [Alameda or Contra Costa County] could make to the proceeding before the trial court. In other words, what precisely are they foreclosed from doing by not being named as parties to the lawsuit?” *Deltakeeper v. Oakdale Irrigation Dist.*, 94 Cal.App.4th 1092, 1107 (2001). The answer is “nothing,” because they have no cognizable interest in the public trust wildlife that defendants are destroying and no power to authorize that destruction. Because the counties have no cognizable interest in the continuing destruction of wildlife public trust property that would be prejudiced by their nonjoinder, “their absence as parties will not harm anyone’s protectible interests.” *Countrywide*, 69 Cal.App.4th at 798.

Moreover, as explained in plaintiffs’ Supplemental Brief, the trial court has already invited the state and Alameda County to intervene if they thought it necessary or appropriate, and they have declined. Plaintiffs’ Supp. Br. at 21-22. The trial court has also made clear that any relief it might award would take the terms and conditions of the land use permits the counties have issued into account and would be carefully crafted to harmonize with the permits. RA 230.

CONCLUSION

The trial court's judgment dismissing the action should be reversed.

Dated: May 12, 2008

Respectfully submitted,

s/

Richard R. Wiebe
Attorney for Appellants
Center For Biological Diversity, Inc., and
Peter Galvin

CERTIFICATE OF SERVICE

I am over the age of 18 years, a member of the State Bar of California, and not a party to this action. My business address is 425 California Street, Suite 2025, San Francisco, California, 94104, which is located in the county where the service described below took place.

On the date stated below, I served true and correct copies of the following document(s):

APPELLANTS CENTER FOR BIOLOGICAL DIVERSITY, INC., AND PETER GALVIN’S SUPPLEMENTAL REPLY BRIEF

by placing copies in sealed envelopes, addressed as shown below and depositing them in the United States mail, postage prepaid:

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In addition, I served the aforementioned document(s) on the following persons by placing copies in sealed envelopes, addressed as shown below, and providing for their delivery to the addressee by the method specified:

Via U.S. Mail
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Electronically uploaded
pursuant to Rule 8.212(c)(2)
Supreme Court

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

Dated: May 12, 2008

_____ s/

Richard R. Wiebe