



**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO**

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ORDER

PEOPLE OF THE STATE OF CALIFORNIA, VS. CORRECTIVE EDUCATION
COMPANY ET AL

001C05985346

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1 Prepared by the Court

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Superior Court of California
County of San Francisco

AUG 14 2017

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Deputy Clerk

8 **SUPERIOR COURT OF CALIFORNIA**

9 **County of San Francisco**

10 Department No. 302

12 PEOPLE OF THE STATE OF
13 CALIFORNIA, acting by and
14 through San Francisco City
15 Attorney Dennis J. Herrera,

16 Plaintiff,

17 v.

18 CORRECTIVE EDUCATION
19 COMPANY, et al,

20 Defendants.

No. CGC-15-549094

ORDER GRANTING PLAINTIFF'S MOTION
FOR SUMMARY JUDGMENT ON
EXTORTION AND FALSE IMPRISONMENT
AND DENYING SUMMARY JUDGMENT
AND SUMMARY ADJUDICATION ON
ALLEGED FRAUDULENT AND UNFAIR
BUSINESS PRACTICES

21 A hearing was held on May 17, 2017 on the motion for summary judgment or, in the
22 alternative, summary adjudication filed by plaintiff People of the State of California, acting by
23 and through San Francisco City Attorney Dennis J. Herrera (plaintiff or the People), against
24 defendant Corrective Education Company (CEC). Plaintiff appeared by Joshua White and
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1 Jeremy Goldman. CEC appeared by Howard Golds. At the conclusion of the hearing I took the
2 motion under submission so that I could more fully consider the parties' oral and written
3 arguments, the evidence and objections thereto submitted by the parties, and the applicable law.

4 With apologies for the length of time it took, having completed the further consideration I
5 felt was necessary, I now issue this order: a) granting summary judgment in favor of plaintiff on
6 the portions of its sole cause of action for violation of the Unfair Competition Law (UCL) that
7 CEC's diversion program is unlawful because that program violates California's extortion and
8 false imprisonment laws and b) denying the motion as to all other portions of the People's UCL
9 cause of action.

10 THIS MOTION

11 By this motion, plaintiff seeks an order permanently enjoining CEC from operating its
12 diversion program and from conducting various activities that either now or in the past have been
13 part of CEC's diversion program based on one or more of six grounds (or counts) that that the
14 diversion program allegedly violates the UCL. Two of the six grounds are based on the unlawful
15 prong, one on the fraudulent prong, and three on the unfair prong. Any of the six grounds, if
16 proven as a matter of law based on undisputed facts, entitles the plaintiff to a judgment on its
17 UCL cause of action, although that judgment must await the conclusion of the case after all the
18 liability and remedies issues have been resolved. (*People v. Superior Court of Los Angeles*
19 *County* (2015) 234 Cal. App. 4th 1360) (*Cahuenga's The Spot*).

20 *Cahuenga's The Spot* holds that, unlike damages on common law contract and tort
21 causes of action, the remedies available for a UCL cause of action are not elements of a UCL
22 cause of action and thus a party alleging a UCL cause of action may obtain summary judgment
23 without adjudication of the party's entitlement *vel non* as to any of the remedies sought by the
24 party in its operative pleading. Per *Cahuenga's The Spot*, plaintiff wishes to defer its entitlement
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1 to restitution and civil penalties till later in the case and before entry of judgment. However,
2 plaintiff now seeks entry of a permanent injunction, which effectively moots its request for a
3 preliminary injunction that has been returned to this court after a journey to the Court of Appeal.

4 I will first address the six grounds asserted by the plaintiff why it is entitled to summary
5 judgment and then discuss plaintiff's request for injunctive relief.

6 EXTORTION

7 The first and arguably central liability issue on this motion is whether CEC's diversion
8 program constitutes extortion per California law. The undisputed facts – the declaration of CEC's
9 co-founder and president Darrell Huntsman without considering any other facts – establish that
10 CEC's diversion program runs afoul of California's extortion laws codified at Penal Code 518,
11 519, 522 and 524. (*See also Cal Crim* 1830 and 1832 (elements of extortion offenses).). The
12 irreducible core of CEC's program is a request by the retailer for the suspect to pay money to
13 CEC in exchange for the retailer's forbearance of notifying the police that the suspect committed
14 a crime. (Huntsman Dec. pars. 11-17; *see also* Exhibit C to Huntsman Dec. ("If ... I pay the
15 Program Tuition ... the Retailer will consider the matter closed for all purposes.")) This is
16 textbook extortion under California law, and has been so declared for at least 125 years and
17 repeatedly re-affirmed by California Supreme and Court of Appeal decisions. (*Morrill v.*
18 *Nightingale* (1892) 93 Cal. 452; *People v. Beggs* (1918) 178 Cal. 79; *Flatley v. Mauro* (2006) 39
19 Cl. 4th 299; *People v. Powell* (1920) 50 Cal. App. 436; *People v. Asta* (1967) 251 Cal. App. 2d
20 64, *disapproved on other grounds in People v. Bolton* (1967) 23 Cal. 3d 208; *People v. Umana*
21 (2006) 138 Cal. App. 4th 625).

22 These cases explain that, whether or not the suspect is guilty or the party seeking a
23 pecuniary benefit is doing so in good faith, the asking for and receiving money or property in
24 return for not calling the cops is the "obtaining of property from another ... induced by wrongful
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1 use of ... fear ... by a threat ... [t]o accuse the individual threatened ... of a crime.” (Penal Code
2 518 and 519(2)). When the transaction involves the signing of an agreement providing for the
3 promise to pay money in the future, as CEC’s diversion program does, it is also the obtaining
4 “from another his signature to any paper or instrument, whereby, if such signature were freely
5 given, ... [a] debt [is] created” in violation of Penal Code 522. And, where the *quid pro quo* is
6 requested but not agreed to by the accused perpetrator of the crime, as where a suspected
7 shoplifter decides not to sign CEC’s diversion contract, the request is an illegal attempt to
8 commit extortion. (Penal Code 524).

9 As stated by the California Supreme Court in a related context, “Extortion has been
10 characterized as a paradoxical crime in that it criminalizes the making of threats that, in and of
11 themselves, may not be illegal....that threat nevertheless becomes illegal when coupled with a
12 demand for money.” (*Flatley*, 39 Cal. 4th at 19-20 (internal quotations and citation omitted).) No
13 matter how well-intentioned, progressive, efficacious and/or thoughtfully designed or
14 implemented, CEC’s diversion program has been, is now – and as long as it involves payment of
15 money to CEC or the retailer – will always be extortion per California law and thus violative of
16 the unlawful prong of the UCL. In 1872, when the Legislature equated accusation of a crime
17 with wrongful use of fear for purposes of the extortion statutes (Penal Code 519(2)), all private
18 criminal diversion programs requesting payment of money to the diversion programmers not
19 under the aegis of a prosecutorial authorities were made illegal in California. While the
20 Legislature surely has the right to determine otherwise, to date it has not done so. By the
21 enactment of Penal Code 518 and 519(2) and the judicial construction of those statutes,
22 California government (specifically prosecutorial agencies with the participation of the courts)
23 have been given a monopoly on criminal diversion programs that charge divertees for their
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1 participation in the programs. Any effort by a private party to intrude on that monopoly is *per se*
2 illegal.

3 CEC's arguments seeking to avoid condemnation of its diversion program as extortion
4 lack merit. As noted, CEC's extolling of the virtues of its diversion program is irrelevant to
5 whether the program constitutes extortion. After reciting some of the "positive aims and
6 impacts" of its program, at the top of page 11 of its opposition memorandum and without citation
7 to authority, CEC argues that plaintiff "seems only concerned with the fact that CEC charges a
8 fee for its course and that the alternative is reporting the crime to the police. This does not
9 constitute extortion." Wrong. In California, per the previously cited authorities, this **does**
10 constitute extortion. CEC's effort to distinguish the case law authorities based on the arguably
11 more egregious facts in those cases misses the point. It is the legal definition of extortion that is
12 enshrined in those cases that controls this case, and CEC has not, nor is it able to, distance itself
13 from that law.

14 That a retailer neither asks for nor receives any money or property for itself when a
15 suspect agrees to participate in CEC's diversion program is of no moment since the retailer's
16 request that CEC be paid money is made on behalf of CEC and CEC expects to receive the
17 money. By the *quid pro quo* of asking for money in exchange for forbearance in calling the
18 police, the retailer and CEC are acting in concert and are jointly liable for the extortionate
19 conduct. Under well-settled principles of agency and aiding and abetting (*CACI* 3610 and 3705),
20 both the retailer and CEC are engaging in extortion. CEC cites no authority to the contrary, nor
21 am I aware of any such authority. While the retailer and CEC may act separately and apart from
22 each other (and bear no liability for each other's actions) with respect to certain matters, such as
23 the initial detention by the retailer or implementation of the diversion program by CEC after the
24 day of the suspected theft, that too is of no moment. The core illegality – the extortionate
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1 conduct – is the coordinated *quid pro quo*: the retailer facilitates the request that money be paid
2 to CEC and, if the money is paid, the retailer will “consider the matter closed for all purposes.”

3 Nor does the fact that the suspect has a “choice” to decline to pay any money to CEC
4 preclude the diversion program from being extortionate. It is the (apparent Hobson’s) “choice”
5 offered to the suspect that is the core act of extortion. While the retailer has every right to call the
6 police or not regarding its belief that the suspect committed a crime, when (with CEC’s
7 knowledge and assent) it conditions its decision on the suspect’s “choice” of whether or not to
8 pay money to CEC, the retailer and CEC have both committed extortion.

9 That extortion is a specific intent does not exempt CEC from having its diversion
10 program declared extortion as a matter of law. The cited authorities establish that the required
11 intent – indisputably held by both the retailer and CEC – is the intent to use the retailer’s exercise
12 of its choice whether to call the police to obtain money for CEC. (*See, e.g., Cal Crim* 1830
13 (Element 2: “When making the threat, the defendant intended to use that fear [defined in Penal
14 Code 519(2) to include the fear of being accused of a crime] to obtain the other person’s consent
15 to give the defendant money”) (extraneous words, brackets and parentheses omitted); *Cal Crim*
16 1832 (Element 2: “When making the threat, the defendant intended to use that fear [defined in
17 Penal Code 519(2) to include the fear of being accused of a crime] to obtain the other person’s
18 signature on a document that, if voluntarily signed, would create a debt”) (extraneous words,
19 brackets and parentheses omitted).)

20 My determination that CEC’s program is illegal per the extortion statutes is not based on
21 any view, express or implied, that the diversion program is or is not beneficial to the public, the
22 retailers, the suspects or anyone else. If lack of beneficiality (assuming such a word exists) were
23 an element of extortion, CEC submitted ample admissible evidence that would create a triable
24 issue precluding entry of summary judgment (*See, e.g., Declarations of David Bejarano, Brand*
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1 Elverston, Read Hayes, Paul Jaeckle, and Franklin Zimring). But it is not. Based on the unlawful
2 *quid pro quo* that constitutes extortion, plaintiff is entitled to summary judgment on the extortion
3 portion of its sole cause of action for violation of the UCL.

4 FALSE IMPRISONMENT

5 CEC's diversion program violates the UCL unlawful prong for the additional reason that
6 the program is designed to and does require the detention of a theft suspect under threat of arrest
7 beyond the time allowed by the common law merchant's privilege codified at Penal Code
8 490.5(f)(1). (*Fermino v. Fedco, Inc.* (1994) 7 Cal. 4th 701, 716). The unauthorized period of
9 detention constitutes false imprisonment. (*Id.*). On this issue as well, the material facts are not in
10 dispute and are entirely contained in Mr. Huntsman's declaration. Those facts are that, after a
11 suspect is deemed eligible for CEC's diversion program, the suspect is detained for an
12 appreciable time by the retailer, not for the purpose of the retailer investigating the theft, but to
13 determine whether the suspect agrees to participate in CEC's diversion program. *Fermino*
14 establishes that detention of a suspect by a retailer under threat of arrest for a purpose other than
15 investigation of the crime exceeds the permissible scope of the merchant's privilege and
16 constitutes false imprisonment. (*Accord Moffatt v. Buffum's, Inc.* (1937) 21 Cal. App. 2d 371;
17 *see also Cal Crim 1242 and CACI 1400 and 1409* (elements of criminal and civil false
18 imprisonment and merchant's privilege)).

19 CEC's argument that the suspect is voluntarily detained when the suspect is read or
20 shown CEC's materials and is deciding whether to sign CEC's agreement belies reality and is
21 contrary to both *Fermino* and *Moffat*. When a suspect is being told about and asked to agree to
22 CEC's diversion program, the suspect is detained against his will because the suspect is led to
23 believe that the alternative to learning about and agreeing to CEC's diversion program is the
24 retailer's calling the police.

1 While it may be theoretically possible to operate a private diversion program that does
2 not constitute false imprisonment, CEC has not done so. The undisputed facts show that at all
3 times that CEC has operated its diversion program in California the program calls for retailers to
4 detain suspects for an appreciable amount of time under threat of arrest not for the purpose of
5 investigating the crimes allegedly committed by the suspects, but to give the suspects the
6 opportunity (some might say, to encourage them) to agree to participate in CEC's diversion
7 program. Doing so is black letter false imprisonment done on behalf of and for the pecuniary
8 benefit of CEC. (*Fermino*). As I did with extortion, in making the determination that CEC's
9 diversion program constitutes false imprisonment under California law, I disclaim any express or
10 implied finding that the program is or is not beneficial.

11 FRAUDULENT BUSINESS PRACTICE

12 Plaintiff has not satisfied its summary judgment burden that the version of CEC's
13 diversion program currently in effect is a fraudulent business practice in violation of the UCL.
14 Because the People seek injunctive relief and that relief is generally not available to redress
15 discontinued practices that are unlikely to recur, I have not considered any assertedly fraudulent
16 practices that were part of previous versions of CEC's diversion program and for which the
17 plaintiff has provided no evidence is part of the CEC's current program. My review of the
18 materials used by CEC in its current program do not show as a matter of law that viewers of
19 those materials are likely to be misled or deceived about the array of consequences to and
20 options for those who decline to participate in the diversion program. The issue whether
21 statements are likely to deceive (as opposed to the distinct issue of actual deception which
22 plaintiff has not shown or even tried to show) is factually intensive. Whether CEC's current
23 diversion program is likely to deceive persons accused of shoplifting requires a full consideration
24 of the relevant facts and weighing of those facts which is not amenable to resolution on this
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1 motion. (*Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal. App. 4th 115, 134-
2 35).

3 While a suspect or his parent who is asked to participate in CEC's diversion program is
4 not told about the existence of District Attorney approved diversion programs and that juvenile
5 arrest records are confidential, those omissions, without more, do not render what is told to the
6 suspect or his parent deceptive as a matter of law because a hypothetical reasonable suspect may
7 be unconcerned with those matters at a time when the pressing issue is whether he will be
8 arrested and prosecuted. This is especially true when, per the current version of CEC's program,
9 CEC has submitted admissible evidence from which reasonable inferences can be drawn that,
10 after leaving the retailer's location and no longer being under the immediate threat of arrest, the
11 suspect or his parent has 72 hours to obtain any additional information about the consequences to
12 and options of declining to participate in the CEC program, including information about the
13 availability of prosecution-sponsored diversion programs and the confidentiality of juvenile
14 arrest records. Thus, even if the People had met its summary judgment burden, it would not be
15 entitled to summary judgment on the fraudulent prong of the UCL based on a triable dispute.

16 UNFAIR BUSINESS PRACTICE

17 The People's unfair prong arguments based on asserted violations of the policies
18 embodied in California's unconscionability of contract, pretrial diversion and criminal
19 compromise laws require little discussion. Condemnation of a business practice as unfair in
20 violation of the UCL, as is the case with a practice alleged to be fraudulent in violation of the
21 UCL, entails consideration of all the relevant facts and a careful weighing of those facts. (*Linear*
22 *Technology*). Plaintiff has not shown sufficient facts that CEC's current diversion program is an
23 unfair business practice as a matter of law. Even if the People had done so, the declarations
24 submitted by CEC explaining the efficacy of its diversion program create a triable issue
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1 precluding summary judgment in favor of the People on the portions of the People's UCL cause
2 of action based on the unfair prong.

3 SCOPE OF THE INJUNCTION

4 My determinations that CEC's diversion program, in each iteration it has been operated
5 in California, constitutes extortion and false imprisonment entitles the People to an injunction.
6 *Cahuenga's The Spot* teaches that the scope of a UCL injunction following the determination of
7 liability on a summary judgment motion may or may not be appropriately decided as part of the
8 summary judgment motion. (234 Cal. App. 4th at 1375) (after granting summary judgment that
9 the UCL has been violated, the judge may choose to hold a further hearing on "the scope of
10 injunctive relief...[t]hat hearing may involve arguments on the law, and it may include factual
11 presentations on the feasibility of certain aspects of the injunction to be issue.")

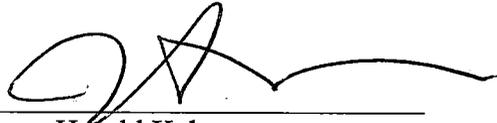
12 Instead of trying to craft an injunction order with essentially no input from the parties and
13 in the absence of a proposed order, I avail myself of the option afforded by *Cahuenga's The Spot*
14 to defer resolution on the scope of the injunction order. Counsel for the People is directed to
15 prepare a proposed injunction consistent with this order and to submit the proposed order to
16 counsel for CEC. If counsel for CEC approves the proposed order as to form, counsel for the
17 People should submit the proposed order to me with a cover letter stating counsel for CEC's
18 approval as to form. If counsel for CEC does not approve the proposed order as to form, the
19 parties are required to meet and confer in an effort to reach agreement on a proposed order. If
20 good faith and sufficient meet and confer does not result in a form of order agreeable to both
21 sides, counsel for the People should file a noticed motion seeking entry of a proposed injunction
22 order.

1 CONCLUSION

2 For the reasons set forth above, the People's motion for summary judgment is granted as
3 to the unlawful prong of the UCL based on extortion and false imprisonment and denied as to the
4 fraudulent and unfair prongs of the UCL.

5 IT IS SO ORDERED.

6 Dated: August 14, 2017

7 

8 _____
Harold Kahn
Superior Court Judge

SUPERIOR COURT OF CALIFORNIA
County of San Francisco

PEOPLE OF THE STATE OF CALIFORNIA,
ETC., ET AL.,

Plaintiff,

v.

CORRECTIVE EDUCATION COMPANY,
ET AL.,

Defendants

Case No. CGC-15-549094

CERTIFICATE OF MAILING
(CCP 1013a (4))

I, Jose Rios Merida, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 14, 2017, I served the attached ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT ON EXTORTION AND FALSE IMPRISONMENT AND DENYING SUMMARY JUDGMENT AND SUMMARY ADJUDICATION ON ALLEGED FRAUDULENT AND UNFAIR BUSINESS PRACTICES by placing a copy thereof in a sealed envelope, addressed as follows:

Joshua S. White, Deputy City Attorney
CITY AND COUNTY OF SAN FRANCISCO
OFFICE OF THE CITY ATTORNEY
City Hall, Room 234
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

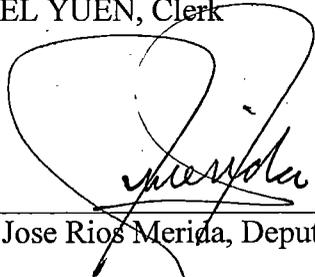
HOWARD B. GOLDS
BEST BEST & KRIEGER LLP
3390 University Avenue, 5th Floor
Riverside, CA 92502

I then placed the sealed envelopes in the outgoing mail at 400 McAllister Street, San Francisco, CA. 94102 on the date indicated above for collection, attachment of required prepaid postage, and mailing on that date following standard court practices.

Dated: August 14, 2017

T. MICHAEL YUEN, Clerk

By:



Jose Rios Merida, Deputy Clerk