City Attorney Dennis Herrera News Release

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City College wins reprieve, as court enjoins ACCJC from terminating accreditation

Herrera grateful to court 'for acknowledging what accreditors callously won't: that the educational aspirations of tens of thousands of City College students matter'

SAN FRANCISCO (Jan. 2, 2014)—A San Francisco Superior Court judge has granted a key aspect of a motion by City Attorney Dennis Herrera to preliminarily enjoin the Accrediting Commission for Community and Junior Colleges from terminating City College of San Francisco's accreditation next July. Under terms of the ruling Judge Curtis E.A. Karnow issued late this afternoon, the ACCJC is barred from finalizing its planned termination of City College's accreditation during the course of the litigation, which alleges that the private accrediting body has allowed political bias, improper procedures, and conflicts of interest to unlawfully influence its evaluation of the state's largest community college. Judge Karnow denied Herrera's request for additional injunctive relief to prevent the ACCJC from taking adverse accreditation actions against other educational institutions statewide until its evaluation policies comply with federal regulations. A separate motion for a preliminary injunction by plaintiffs representing City College educators and students was denied.

In issuing the injunction, the court recognized that Herrera's office is likely to prevail on the merits of his case when it proceeds to trial, and that the balance of harms favored the people Herrera represents as City Attorney. On the question of relative harms, Judge Karnow's ruling was emphatic in acknowledging the catastrophic effect disaccreditation would hold for City College students and the community at large, writing: "There is no question, however, of the harm that will be suffered if the Commission follows through and terminates accreditation as of July 2014. Those consequences would be catastrophic. Without accreditation the College would almost certainly close and about 80,000 students would either lose their educational opportunities or hope to transfer elsewhere; and for many of them, the transfer option is not realistic. The impact on the teachers, faculty, and the City would be incalculable, in both senses of the term: The impact cannot be calculated, and it would be extreme."

[MORE]

"I'm grateful to the court for acknowledging what accreditors have so far refused to: that the educational aspirations of tens of thousands of City College students matter," said Herrera. "Judge Karnow reached a wise and thorough decision that vindicates our contention that accreditors engaged in unfair and unlawful conduct. Given the ACCJC's dubious evaluation process, it makes no sense for us to race the clock to accommodate ACCJC's equally dubious deadline to terminate City College's accreditation."

Judge Karnow adjudicated four separate pre-trial motions in today's ruling following two days of hearings on Dec. 26 and 30. Herrera filed his motion for preliminary injunction on Nov. 25—three months after filing his initial lawsuit—blaming the ACCJC for procedural foot-dragging and delay tactics, which included a failed bid to remove the case to federal court and its months-long refusal to honor discovery requests. Judge Karnow granted in part and denied in part Herrera's motion, issuing an injunction that applies only to the ACCJC's termination deadline for City College's accreditation, and not statewide.

Apart from Herrera's motion, AFT Local 2121 and the California Federation of Teachers also moved for a preliminary injunction on Nov. 25, citing additional legal theories. That motion was denied. A third motion by the ACCJC asked the court to abstain from hearing the City Attorney's lawsuit for interfering with complex accrediting processes largely governed by federal law; or, failing that, to stay Herrera's action pending the outcomes of City College's accreditation proceeding and ACCJC's own efforts to renew its recognition with the U.S. Department of Education. A fourth motion, also by the ACCJC, requested that the court strike the AFT/CFT's case under California's Anti-SLAPP statute, which enables defendants to dismiss causes of actions that intend to chill the valid exercise of their First Amendment rights of free speech and petition. (SLAPP is an acronym for "Strategic Lawsuits Against Public Participation.") Both of the ACCJC's pre-trial motions were denied.

The ACCJC has come under increasing fire from state education advocates, a bipartisan coalition of state legislators and U.S. Rep. Jackie Speier for its controversial advocacy to dramatically restrict the mission of California's community colleges by focusing on degree completion to the detriment of vocational, remedial and non-credit education. The accrediting body's political agenda—shared by conservative advocacy organizations, for-profit colleges and student lender interests—represents a significant departure from the abiding "open access" mission repeatedly affirmed by the California legislature and pursued by San Francisco's Community College District since it was first established.

Herrera's action, filed on Aug. 22, alleges that the commission acted to withdraw accreditation "in retaliation for City College having embraced and advocated a different vision for California's community colleges than the ACCJC itself." The civil suit offers extensive evidence of ACCJC's double standard in evaluating City College as compared to its treatment of six other similarly situated California colleges during the preceding five years. Not one of those colleges saw its accreditation terminated.

The City Attorney's case is: *People of the State of California ex rel. Dennis Herrera v. Accrediting Commission for Community and Junior Colleges et al.*, San Francisco Superior Court No. 13-533693, filed Aug. 22, 2013. The AFT/CFT case is: AFT *Local 2121 et al. v. Accrediting Commission for Community and Junior Colleges et al.*, San Francisco Superior Court No. 534447, filed Sept. 24, 2013. Documentation from the City Attorney's case is available online at: http://www.sfcityattorney.org.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

AFT LOCAL 2121 ET AL., Plaintiffs, vs. ACCREDITING COMMISSION FOR COMMUNITY AND JUNIOR COLLEGES, ET AL., Defendants.	Case No. CGC – 13-534447
PEOPLE OF THE STATE OF CALIFORNIA EX REL DENNIS HERRERA, SAN FRANCISCO CITY ATTORNEY, Plaintiff, vs. ACCREDITING COMMISSION FOR COMMUNITY AND JUNIOR COLLEGES, ET AL., Defendants.	Case No. CGC 13-533693 MEMORANDUM ORDER -GRANTING IN PART AND DENYING IN PART CITY ATTORNEY'S MOTION FOR A PRELIMINARY INJUNCTION, AND -DENYING AFT'S MOTION FOR A PRELIMINARY INJUNCTION, AND -DENYING COMMISSION'S ANTI-SLAPP, ABSTENTION, AND STAY MOTIONS

I. Introduction

In these two related cases plaintiffs seek to block the actions of a junior college accrediting Commission. That Commission, the Accrediting Commission for Community and

Junior Colleges, has voted to terminate the accreditation of the City College of San Francisco effective July 31, 2014. The College is not party to these two suits.

One of the cases is brought by the City Attorney of San Francisco, on behalf of the people of the State. The other is brought on behalf of a putative class or classes by teachers, students, and unions who assert they are and would be harmed by the loss of accreditation. I refer to the latter set of plaintiffs as AFT, after the first named plaintiff.

Both cases involve California's Unfair Competition Law (UCL), found at Business and Professions Code (B&P) § 17200. Under that statute, plaintiffs may sue a defendant who has committed an "unfair" or "unlawful" or "fraudulent" practice. In this case the plaintiffs contend that the defendant Commission has committed unfair and unlawful practices. I discuss the UCL in more detail below, at § II C 3 (a).

Appended at page 54 is a plain English summary of the issues decided in connection with the preliminary injunction motions.

A. Motions Decided

The two sets of plaintiffs have each filed a motion for preliminary injunction. The Commission has filed an anti-SLAPP special motion to strike against AFT, and filed a motion to stay or abstain against the City Attorney. Here I grant in part and deny in part the City Attorney's motion for a preliminary injunction. I deny AFT's motion for a preliminary injunction, as well as the Commission's anti-SLAPP, abstention, and stay motions.

B. Motions For Leave to File Briefs by Amicus Curiae

Tom Torlakson, The State Superintendent of Public Instruction filed a "request" for leave to file his amicus curiae brief, which brief I take to be the December 9, 2013 letter addressed to

me appended to that request. This was copied to the parties before their briefing was complete. The request is granted.

SEIU Local 1021 filed a motion for leave to file brief of amicus curiae on or about December 20, 2013. I first saw it about a day before argument, and at argument counsel for the Commission had not yet seen it, much less had a chance to respond to it in writing. It would be unfair to grant leave here where the parties have not had the opportunity to address the brief, and the request is denied.

C. Procedural Background

On December 26 2013 I heard argument on motions for preliminary injunction brought by both the City Attorney and AFT. I also heard argument on the Commission's anti-SLAPP motion brought in the AFT case. On December 30 I heard argument on the Commission's motion to stay or abstain in the City Attorney's case.

D. Factual Background

The Commission includes 19 elected commissioners, supported by staff that does not participate in Commission decisions. Declaration of Barbara Beno in Support of Motion to Abstain, ¶ 3. The Commission accredits 133 institutions, including 112 in California. *Id.* at ¶¶ 2, 4. The Commission is currently recognized as an approved accreditor by the United States Department of Education (DOE), although it must periodically petition DOE for continued recognition. *Id.* at ¶¶ 7-8. Through this process DOE monitors and regulates the Commission.

Id. at ¶ 6. State funding to community colleges and federal funding to community college students both depend on the Commission accreditation. *Id.*[1]

The Commission maintains a set of standards and policies. *See id.* at ¶¶ 10-11, Exs. B-C. All Commission accredited institutions, including the College, go through reviews every 6 years. *Id.* at ¶ 12. That process includes these steps: (1) the institution completes a self-study assessing whether it meets each accreditation standard; (2) the Commission sends a team to examine the self-study and visit the institution, assessing whether it meets the accreditation standards; (3) the visiting team drafts a report containing findings as to whether the institution meets each standard and explaining any deficiencies; (4) the draft is provided to the institution so that it may correct factual inaccuracies; (5) a final report is prepared and sent to the Commission; (6) the Commission decides whether accreditation will continue, and whether any condition are imposed; and (7) the Commission's decision is communicated to the institution in an action letter. *Id.* at ¶¶ 12-13. Short of termination, the Commission may take any of three adverse actions (termed "sanctions") if it concludes that an institution has not met one or more standards. *Id.* at ¶ 13, Ex. G at 4-5. In order of severity, the possible sanctions are: (1) warning; (2) probation; and (3) show cause. *Id.* at Ex. G at 4-5. A show cause order may issue when the Commission finds substantial non-compliance with its eligibility requirements, or when the institution has not responded to the conditions imposed by the Commission within the specified time. *Id.* at Ex. G at 4. If the Commission orders show cause, the institution is required to show why its accreditation should not be withdrawn at the end of a stated period

[1] According to Beno, federal funding depends on accreditation by a DOE-approved accreditation agency and California funding is tied to approval by the Commission. Although AFT objects to Beno's recitation of this fact, it is undisputed that state and federal funding are tied to accreditation by the Commission.

by demonstrating that it has corrected the deficiencies noted by the Commission and come into compliance with the eligibility requirements. *Id.* at Ex. G at 4-5. The accredited status of the institution continues during the period of the show cause order. *Id.* at Ex. G at 5.

If the Commission terminates accreditation, the institution may invoke a two-step review process. *Id.* at ¶ 17, Exs. H-I. First, the institution requests review, identifying one or more of four bases for the request, a review committee is created, the review committee makes confidential findings that are sent to the Commission, and the Commission renders its decision. *Id.* at Ex. H at 1-4. Next, the institution may appeal the review decision to a "hearing panel." *Id.* at Ex. I at 3, 5-6.

An institution may then bring a civil action against a recognized accrediting agency involving the termination of accreditation, which must be brought in federal court. 20 U.S.C. § 1099b (f).

1. Factual Background for City Attorney's case

The City Attorney's papers focus their attention on a political dispute among those involved in community college governance. The Board of Governors of the California Community Colleges adopted recommendations of a Student Success Task Force (SSTF) in January 2012, after a meeting at which 22 students (13 from the College) and 22 faculty (10 from the College) testified, some against the recommendations. SB 1456 was then introduced in the California Senate to implement parts of the SSTF recommendations. Some College students and faculty were critical of SB 1456. The Commission strongly supported it and the SSTF recommendations. Barbara Beno, the Commission's President, wrote two letters expressing the Commission's strong support for SB 1456.

The City Attorney paints the accreditation saga of the College against the backdrop of that political dispute. The Commission's 17-member 2012 site evaluation team the Commission sent to the College included (a) 3 individuals from colleges that were represented on the SSTF; (b) 7 individuals from community college districts that supported SSTF recommendations and/or SB 1456; and (c) Beno's husband, Peter Crabtree. Only one member was listed as a professor. In a July 2, 2012 letter written by Beno, the Commission notified the College that it was required to 'show cause' why its accreditation should not be withdrawn at the Commission's next meeting in June 2013. The College was required to submit a show cause report by March 15, 2013, to be followed by a site visit.

The College submitted the show cause report by the deadline. The 9-member show cause visiting team included 5 members from the original site visit team, all of which were affiliated with community college districts that supported SSTF recommendations. Two of the new members were also affiliated with districts that supported SSTF recommendations. Again, only one professor was on the team. In June 2013, after reviewing the visiting team's report, the Commission voted in a closed session to terminate the College's accreditation, effective July 31, 2014. None of the deficiencies that formed the basis for the Commission's decision to terminate the College's accreditation focused directly on the College's quality of education.[2] However, the cited areas of non-compliance at least indirectly addressed the quality of education, and no party has demonstrated that the cited defalcations were insufficient bases for the sanctions.

[2] *See* Declaration of S. Ichino In Support Of City Attorney Motion, Ex. O at 2 (listing areas of significant noncompliance as institutional effectiveness, instructional programs, student support services, library and learning support services, physical resources, technology resources, financial resources, decision-making roles and processes, and board and administrative organization, as well as other policies).

The College's current special trustee and interim chancellor agree with the contents of the evaluation reports and the interim chancellor agrees with the College's present show cause accreditation status on the merits. Further, the Fiscal Management Crisis & Management Assistance (FCMAT) team published reports in September 2012 and July 2013.[3] The latter report documented a host of recommendations, and difficulty in bringing the College to adopt past recommendations.

2. **Factual Background for AFT's case**

AFT traces the core facts underlying this dispute to 2006, the last time the Commission reviewed the College's accreditation prior to 2012. In 2006, the Commission renewed the College's accreditation, finding that it substantially met or exceeded accreditation standards. *See* AFT Request for Judicial Notice in Support of AFT Motion (RJN), Exs. 1-4[4] at 4-6 (finding that the College met eligibility requirements and complies with the standards for accreditation, noting that the College made considerable progress in addressing past recommendations), 1-5[5]. However, the Commission required the College to respond to 8 recommendations. RJN, Ex. 1-4 at 5-6. In particular, the Commission identified concerns that should receive the College's focused attention and emphasis. *Id.* at 5. These recommendations concerned planning and assessment, student learning outcomes, and financial planning and stability. *Id.*; *see also* RJN Ex. 1-5. In the action letter, the Commission required the College submit a progress report in 2007 addressing its financial planning and stability. RJN, Ex. 1-5. The Commission also stated

[3] AFT's objection to Beno's declaration pertaining to the existence of these reports are overruled. The reports are relevant and are within her personal knowledge due to her position at the Commission.

[4] This is the 2006 evaluation team report. Its existence and findings are judicially noticed pursuant to Evidence Code § 452(h).

[5] This is the 2006 action letter, announcing the Commission's action. The Commission also cites to this document, referencing the RJN. Its existence and contents are judicially noticed. Evidence Code § 452(h).

that the College's regular midterm report, scheduled for 2009, should address all eight recommendations, focusing on the three identified above. RJN, Ex. 1-5.

The College submitted the required report in 2007, and the Commission reminded the College that it was required to submit a midterm report in 2009. RJN, Exs. 1-6, 1-7.[6] The Commission stated that the 2009 midterm report should place special emphasis on the Commission's recommendations concerning financial planning and stability. RJN, Ex. 1-7.

The College submitted its midterm report in 2009. RJN, Ex. 1-8.[7] The Commission then again required the College to submit a follow-up report in 2010, this time addressing both student learning outcomes and financial stability. RJN, Ex. 1-9.[8] The College submitted the required progress report. RJN, Ex. 1-10.[9] The Commission accepted the report, but opined that the College was in danger of failing to comply with the accreditation standards governing financial resources as a result of its short- and long-term financial outlook. RJN, Ex. 1-11.[10] Specifically, the Commission questioned the College's ability to keep up with unfunded liabilities resulting from post-employment benefits, again required a report, this time in conjunction with the 2012 accreditation review, and instructed the College to provide information on how it would make a minimum annual required contribution payment into an irrevocable trust to address these liabilities. *Id.*

The 2012 evaluation team issued fourteen recommendations, two of which were to improve effectiveness, ten of which were to "fully meet" a given standard, and two of which

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[6] These are the progress report and letter accepting the progress report. The existence and contents of both documents are judicially noticed.

[7] The unopposed request for judicial notice of the midterm report is granted.

[8] The unopposed request for judicial notice of the Commission letter is granted.

[9] The unopposed request for judicial notice of the 2010 progress report is granted.

[10] The unopposed request for judicial notice of the 2010 letter is granted.

were to "meet" a given standard. RJN, Ex. 1-13 at 5-8.[11] The two falling into the final category pertained to financial planning and stability and financial integrity and reporting. *Id.* at 7. Thereafter, the Commission ordered show cause. RJN, Ex. 1-14.[12] The letter stated that the College was in substantial noncompliance with eligibility requirements, accreditation standards, or policies. *Id.* at 1. The letter restated all fourteen recommendations, and criticized the College for failing to address several of the recommendations issued in 2006. *Id.* at 2, 4-7. The letter emphasized concerns that the College failed to plan for reduced funding, pushing it to a financial breaking point. *Id.* at 2. The show cause letter gave the College just under a year to show compliance; indeed the College's show cause report was due in about nine months along with a closure report, and the site evaluation was conducted about ten months after the order to show cause. *Id.* at 1.

The show cause evaluation report indicates that the College did not meet numerous standards and eligibility requirements and failed to address several recommendations in the 2012 evaluation team report.[13] Declaration of William K. Rentz in Support of AFT Motion, Ex. B.[14] Thereafter, the Commission acted to terminate the College's accreditation in a non-final decision, effective July 31, 2014, for substantial noncompliance. *Id.* at Ex. C. In its letter, the Commission found more violations than were found in the evaluation report. *Id.* at Ex. C at 2-3. The report also emphasized that disagreements in the College's governing system and active

[11] The unopposed request for judicial notice of the 2012 evaluation report is granted.
[12] The unopposed request for judicial notice of the 2012 show cause letter is granted.
[13] The College failed to meet the following standards: I.B.4, II.A.2, II.A.3, II.B.1, II.B.3, II.C.1, III.A.2, III.A.6, III.B.2, III.D.1.a-c, III.D.2, III.D.2a-c, e, III.D.3, III.D.3a, c, f, h, III.D.4, IV.A.2, IV.A.3, IV.A.4, IV.A.5, IV.B.1, IV.B.2. Rentz Declaration, Ex. B at 17, 22, 24, 29, 31, 35, 38, 42-43, 48-55, 57-59, 61-62. The College met the remaining standards. The College failed to meet the following eligibility requirements: 5, 17, 18, and 21. *Id.* at 63. These concerned administrative capacity, financial resources, financial accountability, and integrity in relations with the Commission. *Id.* The College met the remaining 17 eligibility requirements. *Id.* As to the 14 recommendations, the Commission found that the College had partially addressed 10 and addressed 4. *Id.* at 66-77.
[14] The contents of the declaration include attorney argument, but there is no objection and so I consider it.

protests indicated that the College would be unable to bring itself into compliance, particularly with its financial management deficiencies. *Id.* at Ex. C at 3-5.

Current College leadership has publicly stated that the Commission had a proper basis to take both of the above adverse actions. In addition, the 2013 state Fiscal Crisis Management report identified deficit spending and insufficient funds, among many "critical issues observed throughout the funding and administrative services unit."[15]

Like the City Attorney, AFT complains of Beno's role with the Commission, the Commission's political involvement in the SSTF, and Crabtree's membership on the 2012 evaluation team, as well as the composition of the evaluation teams. In addition, AFT submits evidence that the Commission requires board members governing community college to speak with one voice. [16] AFT also argues that the Commission's evaluation teams are biased because they include parties interested in JPA trusts, into which institutions like the College are encouraged by the Commission to deposit funds to prefund retiree benefit.[17]

As to harm, AFT submits a plethora of declarations from College faculty, students, and union officers.

E. Current Status: A Summary

In June 2012, the Commission issued a "show cause" letter requiring the College to show cause why its accreditation should not be withdrawn. The College was required to make this showing by June 2013. In June 2013, the Commission acted to terminate the College's accreditation effective July 31, 2014. That decision is not final. The College has requested that

[15] Declaration of Krista A. Johns in Support of Opposition to the City Attorney Motion, Ex. F at 3.
[16] Declaration of Rafael Mandelman in Support of AFT Motion, ¶ 16.
[17] AFT Motion, 21-24.

the Commission review its decision. If the Commission's decision stands, the College's accreditation status will remain "show cause" until it is terminated. After the decision becomes final and after an administrative appeal, the College will have an opportunity to challenge that decision in federal court.

The plaintiffs in the two cases before me are not entitled to participate in any of these future events.

II. DISCUSSION

A. Abstention

The Commission raises abstention both as a defense to the preliminary injunction motions and as a separate motion in the City Attorney case.

"[B]ecause the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them."[18] This case, *Desert Healthcare,* traced the abstention doctrine in UCL cases to decisions involving the intersection of federal and state law.[19] It noted that in *Diaz*[20] "Plaintiffs [sought] the aid of equity because the national government [had] breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected

[18] *Desert Healthcare Dist. v. PacifiCare FHP, Inc.*, 94 Cal.App.4th 781, 795 (2001).
[19] *Id.* at 794.
[20] *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588, 599 (1970). This case was decided under former C.C. § 3369. *Diaz* was an extreme case, in which the injunction sought would "have the cumulative effect of a statutory regulation, administered by the superior court through the medium of contempt hearings. The injunctive relief sought ... would subject farm operators to burdensome, if bearable, regulation, and the courts to burdensome, if bearable, enforcement responsibilities." *Diaz*, 9 Cal.App.3d at 599.

interests, that the national government redeem its commitment. Thus the court of equity withholds its aid."[21]

> The Court of Appeal recently described the scope of the abstention doctrine:
> As a general matter, a trial court may abstain from adjudicating a suit that seeks equitable remedies if 'granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.' .... A court also may abstain when 'the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency.' .... In addition, judicial abstention may be appropriate in cases where 'granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.'[22]

Importantly, the Court noted that abstention is generally appropriate only if there is an alternative means for resolving the issues raised in the complaint.[23]

Abstention is not proper when a court is called on to perform a basic judicial function, such as statutory interpretation, and the bases for abstention are not implicated.[24]

The City Attorney's complaint does not involve determining complex economic policy, and the Court can remedy the wrong asserted in this case – the Commission's decision to order show cause and terminate the College's accreditation based on improper procedures – through an injunction that is not burdensome to monitor and enforce. For example, I could issue a final order requiring the Commission to start the review process anew.[25]

I understand the Commission's concerns that, depending on the liabilities found, the court's order might address a variety of details the subject (at least to some extent) of highly

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[21] 94 Cal.App.4th at 795.

[22] *Klein v. Chevron, U.S.A., Inc.*, 202 Cal.App.4th 1342, 1362 (2012), quoting *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal.App.4th 471, 496 (2010).

[23] 202 Cal.App.4th at 1369.

[24] *See Arce*, 181 Cal.App.4th at 499-502.

[25] Compare *Klein*, 202 Cal.App.4th at 1372 (trial court abused its discretion in abstaining where one form of potential injunctive relief may entail significant burdens that the court would be ill-equipped to manage, but that potential relief was neither the only relief plaintiffs requested nor the only possible remedy in that case).

complex federal regulations and DOE oversight,[26] but this sort of argument is best used to urge the court prudentially to circumscribe whatever relief it might afford, not to wholly eviscerate the plaintiff's ability to seek any sort of relief at all.

The Commission's professed fear that this court would be casting itself in the place of the DOE regulator, taking over the administrative details of regulation without the expertise to do so, confuses (a) forward-looking enforcement of the federal regulations and policies to determine the conditions of the Commission's work, which certainly does require the attention of regulatory experts, with (b) the evaluation whether in the past the Commission has or has not complied with the putative standards. This latter effort may require review of a complex regulatory scheme (something courts must do from time to time) but which has a single and simple result, a finding that the Commission has or has not violated extant standards. This can be done without future engagement in the quotidian business of regulation.

There is no alternative forum in which to remedy the wrongs set forth in the complaint. Perhaps the Commission's allegedly tainted procedures[27] can be reviewed by a federal judge if the College challenges the Commission's decision.[28] But that will not provide the relief the City Attorney now seeks. If the City Attorney is right on the merits (and for purposes of this motion

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[26] For example, at the December 30 hearing, the Commission referred me to *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 33 (1st Cir. 1998) which described a "sophisticated regulatory web that governs the relationship between accrediting agencies and accreditation applicants."

[27] The City Attorney focuses solely on the procedures used to reach the decision, but does not attack the merits of the decision itself. *See* City Attorney Reply, 3. Indeed, the City Attorney concedes that the court may be ill-suited to second-guess the merits of the accreditation decision. *Id.*

[28] In such cases, federal courts, including at least two district courts in California, have applied the doctrines of common law due process or fair procedure to review the accrediting agency's decision. *See W. State Univ. of S. Cal. v. American Bar Ass'n*, 301 F.Supp. 2d 1129, 1135-38 (C.D.Cal. 2004) (granting preliminary injunction on common law due process theory); *Whittier College v. American Bar Ass'n*, 2007 WL 1624100, at *7-*10 (C.D. Cal. May 7, 2007) (denying preliminary injunction on common law fair procedure claim). Aside from issues concerning the College, the record here does not indicate the Commission is more generally failing to fulfill its function. *See* Johns Declaration, Ex. B.

I assume he is), if he has properly stated a cause of action (and the Commission does not suggest otherwise at this stage), then the interests he represents cannot be accommodated by a federal review after final dis-accreditation; by then the College may be at best a shell of its former self, bereft of much of the faculty and students, and they will have already suffered the harm this state action seeks to prevent.

A more difficult question is posed by one of the City Attorney's alternative requests for relief, which is in effect to stop the Commission from all its work unless and until it comes into compliance with a variety of policies and governing rule and regulations. This may involve the court's interference with the regulatory framework governing accreditation. 20 U.S.C. § 1099b provides for the DOE's recognition of accrediting agencies. Under 20 U.S.C. § 1099b(a)(6) an accreditation agency must, to be recognized by the DOE, apply specified review procedures throughout the accrediting process and, before an adverse action becomes final, must provide the institution an appeal hearing at the institution's request. An institution may challenge the termination of accreditation by way of a civil action brought in the appropriate United States district court.[29] The City Attorney's request that this court stop the Commission from continuing to accredit *any* schools in the state[30] until it fixes the alleged problems with its process—problems which are generally a matter between the DOE and the various accrediting

[29] 20 U.S.C. § 1099b(f). The Ninth Circuit has held that this statutory scheme does not preempt state tort claims by students against school accrediting associations. *See Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222, 224 (9th Cir. 1994). But *Keams* did not involve a challenge to termination of accreditation, but a suit for damages allegedly suffered as a result of wrongful accreditation and failure to monitor. The Court noted that it is plausible that private litigation may assist the DOE in policing accreditors by stimulating examination of particular agencies. *Id.* at 227. But the matter in this case has not been briefed as a preemption issue. In remanding this case, the District Court held that § 1099b(f) does not completely preempt state law claims. *People ex rel. Herrera v. Accrediting Commission for Community and Junior Colleges*, 2013 WL 5945789, at *5 (N.D. Cal. Nov. 4, 2013). The Court ruled that in the absence of complete preemption, federal preemption is a defense and does not authorize removal to federal court. *Id.*

[30] Opposition, 12-13 (City Attorney seeks "concrete statewide relief").

commissions it regulates—threatens to embroil this state court in the detailed interpretation and application of federal rules and regulations.[31]

Although the City Attorney may seek overbroad forms of injunctive relief, this case does not *necessarily* require the court to do anything more than determine whether the Commission acted unfairly or unlawfully in ordering show cause and terminating the College's accreditation. That does not require the court to make complex policy judgments. The issue is not measured, as the Commission argued before me, by the *maximum* extent of the relief sought by the complaint—some of which might well implicate complex policy matters beyond the ken of this court—but rather by whether *any* relief necessarily implicates such policy matters.[32]

B. **Request for Stay**

The Commission requests a stay on these bases: (1) the dispute is not yet ripe because the Commission's determination is not yet final; (2) the College has not yet exhausted its administrative remedies; and (3) as to the request to enjoin the Commission to comply with federal guidelines, the matter is currently being reviewed by the DOE.

The ripeness doctrine is based on the recognition that judicial decisions are best made in the context of established facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.... It must be a real and substantial controversy admitting

[31] However, there is no indication that the remedies afforded by 20 U.S.C. § 1099b are exclusive. *See* 20 U.S.C. § 1099b; *see also People ex rel. Hererra v. Accrediting Commission for Community and Junior Colleges*, 2013 WL 5945789, at *5 (N.D. Cal. Nov. 4, 2013) (if Congress intended § 1099b(f) to apply to any lawsuit involving adverse accreditation decisions, it would have said so).

[32] *Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342, 1368 (2012).

of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law upon a hypothetical set of facts.[33]

Here, the Commission made an adverse show cause decision and a termination decision. Although the termination decision is not final, plaintiffs challenge both decisions on procedural grounds. The facts underlying those decisions are extant. The harm caused by the challenged Commission's actions is assertedly being felt now.[34] Whether or not the dispute may to some extent be mooted by a future decision by the Commission, it is ripe for resolution on the present facts. For this reason this case is distinguishable from those in which plaintiffs claim failure to accredit as the injury – but where the failure is not yet manifest.[35] Certainly the Commission believes that only a bad *result*, or processes which can be shown to lead to a bad result, can properly be the subject of this suit; but that is a matter for the merits, and I discuss it in the context of the motions for preliminary injunction.

Second, there is no administrative remedy available to plaintiffs, so they cannot be subject an exhaustion requirement. Whether or not the College must exhaust its administrative remedy before it brings suit is irrelevant; this is not for example an action for mandamus predicated on actions by an administrative agency; it is a B&P § 17200 claim, with original jurisdiction in this court.[36]

Finally, I note the DOE is currently in the midst of its review of the Commission's own status. In the future, the DOE may require the Commission to change its procedures; or not.

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[33] *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal.App.4th 689, 708 (2003), quoting *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal.3d 158, 170-71 (1982) (internal quotations omitted).

[34] *Western*, 301 F.Supp.2d at 1137-38 (because harm if accreditation is withdrawn is substantial, Western need not wait for the axe to fall before seeking an injunction).

[35] *Staver v. Am. Bar Ass'n,* 169 F. Supp. 2d 1372, 1377 (M.D. Fla. 2001) (argued by the Commission at the December 30 hearing).

[36] *Compare*, *Farmers Ins. Exch. v. Superior Court,* 2 Cal. 4th 377, 390 (1992).

The present complaints do not presume such future action, one way or the other. The pendency of this DOE review may well weigh heavily as a matter of prudence (or perhaps, more strongly, under doctrines of e.g., primary jurisdiction) in my evaluation of remedies, but should not be used now to obliterate every possible remedy.

C. Motions for Preliminary Injunction

1. Standards

A preliminary injunction is an order sought by a plaintiff prior to a full adjudication of the merits of its claim.[37] The purpose of such an order is to preserve the status quo until a final determination following a trial.[38]

A plaintiff is ordinarily required to present evidence of irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication on the merits.[39] In deciding whether to issue a preliminary injunction, a court must usually weigh two factors: (1) the likelihood that the moving party will ultimately prevail on the merits; and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction.[40] The trial court's determination must be guided by the mix of the potential merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. *Id.* For example, if there is an extreme disproportionality of harms favoring a plaintiff, the strength of the case on the merits may be correspondingly less. But in any event, a

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[37] *White v. Davis*, 30 Cal.4th 528, 554 (2003).
[38] *Costa Mesa City Employees' Ass'n v. City of Costa Mesa*, 209 Cal.App.4th 298, 305 (2012).
[39] *White*, 30 Cal.4th at 554.
[40] *O'Connell v. Superior Court*, 141 Cal.App.4th 1452, 1463 (2006), quoting *Butt v. State of California*, 4 Cal.4th 668, 677-78 (1992).

trial court must not grant a preliminary injunction, regardless of the balance of interim harm, unless there is *some possibility that the plaintiff will ultimately prevail* on the merits.[41]

In this case, that rule countenancing an injunction when there is 'some possibility' of ultimate success is decisive.

When a governmental entity (1) tries to enjoin the violation of an ordinance, and (2) establishes that it is reasonably probable to succeed on the merits, a rebuttable presumption arises that the harm to the public outweighs the harm to the defendant. The presumption kicks in when the statute as here specifically provides for injunctive relief.[42] As discussed below, this presumption is not important here because the balance of harms tips sharply in favor of an injunction in any event.

2. Relief Requested

The City Attorney asks me to stop the Commission from (1) finalizing the termination of the College's accreditation before the end of trial in this action; and (2) taking adverse accreditation action against *any* institution unless the Commission changes its policies to comply with federal regulations. AFT asks me to issue an order that (1) as with the order requested by the City Attorney, bars the Commission from finalizing the termination of the College's accreditation before the trial in this action, and (2) requires the Commission to place the College back on accredited status, i.e., rescinding the Commission's show cause and termination actions.

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[41] CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 9:531 (2012), citing *Butt*.

[42] *IT Corp. v. County of Imperial*, 35 Cal.3d 63, 72 (1983). See *People ex rel. Brown v. Black Hawk Tobacco, Inc.*, 197 Cal.App.4th 1561, 1565, 1567 (2011)(for UCL claims, court applies the presumption under *IT Corp*).

3. **Likelihood of Success on the Merits**

(a) Requirements under the UCL

Both lawsuits rely on a common legal theory: the Commission committed unfair and unlawful business practices in violation of California's unfair competition law (UCL) in its conduct leading to its decision to terminate the College's accreditation.

The UCL extends to "unfair competition," defined to include "any unlawful, unfair or fraudulent business act or practice."[43] "Its coverage is sweeping, embracing anything that can properly be called a business practice that at the same time is forbidden by law."[44] A practice may violate the UCL even if it is not prohibited by another statute. Unfair and fraudulent practices are alternate grounds for relief.

As our Supreme Court recently noted, "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled." *Zhang v. Superior Court,* 57 Cal.4th 364, 380 n.9 (2013), citing *Aleksick v. 7-Eleven, Inc.*, 205 Cal.App.4th 1176, 1192 (2012) (public policy that is predicate for action must be tethered to specific constitutional, statutory, or regulatory provisions); *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal.App.4th 528, 539 (2008) (courts balance utility of defendant's conduct against the gravity of the harm to the alleged victim and consider whether the practice offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers);[45] *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394, 1403 (2006) (consumer injury must be substantial, and neither outweighed

[43] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999); B&P § 17200.
[44] *Cel-Tech*, 20 Cal.4th at 180 (internal quotations and citations omitted).
[45] *Ticconi* cites *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal.App.4th 700, 718-19 (2001). The City Attorney argues that I should apply the *Smith* test. I discuss this test further below, § II C 3 (e) (ii).

by countervailing benefits nor avoidable by consumers); *Progressive West Ins. Co. v. Superior Court*, 135 Cal.App.4th 263, 285-87 (2005) (impact of the act or practice on victim is balanced against reasons, justifications and motives of the alleged wrongdoer).

Zhang did not resolve this multiplicity of legal tests.

The UCL grants standing to (a) the City Attorney here as well as to (b) those who suffered injury in fact and lost money or property as a result of the unfair competition.[46]

(b) City Attorney's case

The City Attorney alleges nine business acts or practices. Four are assertedly both unfair and unlawful: (1) failing to include sufficient academic personnel on evaluation teams; (2) failing to have clear and efficient controls against conflicts of interest and the appearance of conflicts of interest; (3) failing to provide institutions with a detailed written report that clearly identifies any deficiencies in the institution's compliance with the agency's standards (specifically whether "recommendations" indicate noncompliance with an accreditation standard or an area for improvement); and (4) applying accreditation standards in a manner that subverted the open access mission set forth in California legislative declarations and embraced by the College.[47] The City Attorney asserts that the remaining five practices are only unfair: (1) including two individuals who created an actual or apparent conflict of interest on the College evaluation teams; (2) creating a conflict of interest by constituting evaluation teams comprised mainly of individuals from schools or districts politically aligned with the Commission; (3) evaluating the College while embroiled in a political fight over the proper mission for community colleges in California; (4) sanctioning the College because it opposed the

[46] B&P § 17204; *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 322-27 (2011).
[47] Declaration of Sarah J. Eisenberg in Support of City Attorney's Motion, Ex. B.

Commission in a political dispute; and (5) employing the harshest sanction possible against the College and failing to provide the College adequate time to address the stated deficiencies.[48]

The Commission responds to the City's showing by relying on (1) the abstention doctrine; (2) the argument that the City Attorney's case turns on a superseded DOE letter; and (3) the argument that a third party cannot reverse an accreditation decision where the institution does not dispute the propriety of that decision. The Commission does not, at least in the context of this motion, contest the merits of the City's allegations.

I briefly discuss the Commission's defenses and then discuss the City Attorney's general theory of liability.

The abstention doctrine is discussed above.

The second argument is unpersuasive. The City Attorney has presented some evidence that the Commission failed to comply with federal regulations. The Commission has not produced authority that violations of those regulations cannot serve as predicate unfair or unlawful conduct under the UCL.[49] The City Attorney will probably be able to establish that the Commission engaged in the underlying conduct (which the City Attorney contends is unfair or unlawful).

I turn to the third defense. The City Attorney does not say that the Commission would not have reached the same accreditation decision if it had applied the proper procedures. He straightforwardly confesses that he has no idea if the Commission would or would not have come to the same determination. Instead, the City Attorney argues that the 'tainted'

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[48] *Id.*

[49] *Compare, Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal.App.4th 700, 717-18 (2001)("An 'unlawful' business activity includes *anything* that can properly be called a business practice and that at the same time is forbidden by law. .... Virtually any law federal, state or local can serve as a predicate for an action under Business and Professions Code, section 17200.") (internal quotations omitted, emphasis in original).

procedures themselves are sufficient to justify an injunction reversing that decision.[50] The Commission, in contrast, contends that an injunction is not warranted unless I determine that, as a result of the alleged tainted procedures, it reached the wrong result.[51]

I examine these contentions of "taint."

The City Attorney begins by arguing there were insufficient *faculty* personnel on the Commission's site evaluation teams.[52] The City Attorney argues that any decision by an improperly constituted body, such as this one, is invalid.[53] In the case he cites, *Vuagniaux*, an improperly constituted medical disciplinary board *had no power to act* because it was not lawfully constituted, such that its decision was void.[54] But the City Attorney does not assert that the Commission site evaluation teams were likewise powerless to act because there were too few faculty representatives. The City Attorney relies on a federal regulation[55] which requires, as a criterion for DOE recognition of an accrediting agency, that an agency have academic and administrative personnel on its evaluation, policy, and decision making bodies. But the regulation does not purport to make an imbalance the basis for *voiding* a Commission decision, especially without any showing of prejudice. Nor does it literally specify the number of faculty personnel that must be assigned to an evaluation team.

Next, the City Attorney argues the Commission failed to maintain effective controls against conflicts of interest, or the appearance of such conflicts.[56] The City Attorney cites only one California case for the proposition that a decision must be actually *discarded* based on the

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[50] Reply in Support of City Attorney Motion, 3, 10.
[51] Opposition to City Attorney Motion, 10-11.
[52] City Attorney Motion, 10.
[53] *Id.*, citing *Vuagniaux v. Dep't of Prof. Reg.*, 208 Ill.2d 173, 185-86 (2003).
[54] *Vuagniaux*, 208 Ill.2d at 186.
[55] 34 C.F.R. § 602.15(a)(3).
[56] City Attorney Motion, 12, citing 34 C.F.R. § 602.15(a)(6).

appearance of impropriety absent any showing of prejudice.[57] But that case, *Christie,*[58] was decided under the statutory scheme governing the appearance of a conflict in a judge, and so is not helpful here. Where judges are concerned, we have clear law on voiding judgments when judges have conflicts of interest;[59] I see no evidence of such rules in the context of accrediting commissions, and so the reference to *Christie* is pointless, and begs the legal question.

What then is left of the City Attorney's position that he may succeed on the merits without a showing of prejudice, that is, without a showing that the assertedly illegal or unfair acts actually caused the Commission to reach the decisions it did which in turn inflicted the harm on the City Attorney's constituents? I raised the issue at argument, asking whether any violation, no matter how minor or immaterial, would be enough for the City Attorney to be entitled to the relief he seeks now and at trial. The answer was equivocal, but included the response that the violations and unfair acts here were serious, not trivial.

But this still is not good enough.

The issue is the extent to which the City Attorney must show a causal connection between the assertedly illegal or unfair acts on the one hand—including extremely serious such acts—and, on the other hand, the harms suffered. In this case we may phrase the issue: must the City Attorney show that the appearance of bias, or the reduced number of teachers on the evaluation panels, or the failure to issue the assertedly required written report (and so on), caused the issuance of the show cause letter? Or is the City Attorney correct that, whether or not the same result would have occurred with or without the assertedly unfair procedures (or

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[57] City Attorney Motion, 12-13.

[58] *Christie v. City of El Centro*, 135 Cal.App.4th 767, 776-77 (2006).

[59] E.g., C.C.P. §§ 170.3(a)(1); 170.1(a)(6)(A)(i), (iii); *Bates v. Rubio's Restaurants, Inc.,* 179 Cal.App.4th 1125, 1133 (2009).

"taint"), the show cause action must be set aside?[60] This issue of causation is central to the result on both motions for preliminary injunction, and I discuss it in further detail below at § II C 3 (d) & (e).

(c) AFT's case

AFT spends no time in its briefs discussing the elements of its UCL claim; it simply discusses a lengthy list of assertedly unfair and illegal practice engaged in by the Commission. These are the alleged practices: (1) the Commission violated common law fair procedure by taking adverse actions against the College without giving a clear indication that the College's failures were serious, irreparable, or had a noticeable effect on the College's quality of education; (2) the Commission failed to consider that the College's quality of education exceeds minimum standards; (3) the 2012 show cause order mischaracterized recommendations from the 2006 report as deficiencies; (4) the 2012 evaluation team included Crabtree, Beno's husband, at a time that Beno was politically opposing the College and after Beno wrote action letters in 2006, 2007, 2009, and 2010; (5) the Commission as a whole was conflicted due to the SSTF; (6) the 2012 evaluation team had only one teacher out of 17 evaluators; (7) the 2012 evaluation team included members of a JPA Trust, creating a conflict of interest; (8) the Commission applied the wrong burden of proof in 2012; (9) the Commission wrongly applied Government Accounting Standards Board (GASB) guidelines in considering the College's use of a pay-as-you-go approach to long term liabilities; (10) the College was not afforded an opportunity to appeal the 2012 show cause order; (11) the 2013 team was invalid because it

[60] To be clear, the City Attorney does not contest the merits of the Commission's decisions; no one knows, the City Attorney tells us, if the Commission's decisions are right or not. City Attorney's Reply at 1 line 6; at 3 note 2. At argument, AFT too noted that no one knows what the Commission would have done had it followed fair procedures and, for example, limited themselves to considering only the original 19 deficiencies identified in the show cause evaluation team report, as opposed to apparently considering a total of 30 deficiencies.

included members of the JPA trust; (12) the Commission gave the College insufficient time to show cause, in a break from its treatment of other institutions; (13) the Commission added deficiencies in its final report in 2013 without providing notice to the College; (14) the Commission improperly considered the failure of the College board to "speak as one;" and (15) the Commission ignored facts indicating the College had a balanced budget and financial reserves that met state standards.

While the general tenor of its papers suggests AFT's belief that the adverse accreditation decision resulted from the challenged practices, AFT does not demonstrate that. Instead, it argues (as does the City Attorney) that it need not show prejudice because the Commission's decision lacked procedural fairness, and because the decision was tainted by bias.[61]

The Commission, for its part, asserts the following defenses against AFT: (1) failure to join an indispensable party; (2) laches; (3) abstention (discussed above); (4) privilege; (5) ripeness (discussed above); and (6) lack of standing.

It is important to note the court is not now asked to rule on the ultimate merits of these defenses; the issue is simply whether these defense appear so strong at this point as to demonstrate that AFT is unlikely to prevail at trial. They do not. Because I conclude AFT is unlikely ultimately to prevail, quite aside from the impact of these defenses, I only discuss them briefly, and only if I have not addressed them elsewhere in this Memorandum Order. I then discuss the core theory of liability, common law fair procedure.

[61] AFT Motion at 8 (Commission procedures "infected"), 17 ("tainted").

(i) **Defenses To AFT's claims**

a. Failure to Join

It remains unclear whether it will be necessary to join the College; some of the relief sought (such as blocking the Commission's ability to finalize the accreditation termination) may not adversely affect the College.

b. Standing

There are three types of AFT plaintiffs: unions, College employees, and students. At least one of the unions and at least one of the College employees have a reasonable likelihood that they will be able to demonstrate economic damages resulting from the Commission's adverse accreditation decisions, although the evidence is murky.[62] And at least one student has probably demonstrated standing in showing that the uncertainty created by the College's accreditation status caused economic harm – for example incurring fees to apply to other schools.[63] *Kwikset*, 51 Cal.4th at 327 (plaintiff not required to allege that the challenged misrepresentations were the sole or even decisive cause of the injury producing conduct). The *causation* aspect of standing—whether the economic harm was *caused* by the unfair or illegal practices—is separately discussed below, § II C 3 (e).

[62] Declaration of Chris Hanzo in Support of AFT Motion, ¶¶ 24-28 (faculty members have not had a salary increase since 2007-08, but have suffered a series of wage cuts beginning with cuts for the 2010-11 fiscal year); Declaration of Chris Hanzo in Support of Opposition to Anti-SLAPP Motion, ¶¶ 10, 16, 23 (College imposed unilateral wage cuts on AFT employees under pressure from the Commission, resulting in declining union dues); Declaration of Rachel Cohen in Support of Opposition to Anti-SLAPP Motion, ¶ 4 (teacher declares she lost pay as a result of unilateral the College pay cuts under pressure from the Commission adverse actions). Objections to these declarations are overruled because Hanzo and Cohen were in a position to have personal knowledge of the pay cuts, as a union officer and an affected individual, and the apparent bases for those pay cuts.

[63] Declaration of Shanell Williams in Support of Opposition to Anti-SLAPP Motion, ¶ 18 (incurred costs traveling to Skyline College to take a placement test); Declaration of Adriana Gutierrez in Support of Opposition to Anti-SLAPP Motion, ¶¶ 13-14, 22-23 (will lose scholarship if the College loses accreditation, will be forced to apply for college elsewhere an move). Objections to the declaration are overruled.

c. Privilege

The Commission tersely argues that AFT relies on privileged broadcasts made (1) "in any other official proceeding authorized by law;" or (2) communications, without malice, to a person interested therein, by one who is also interested or one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive of the communication to be innocent or who is requested by the person interested to give the information. C.C. § 47. The Commission does not tell us which communications are putatively within the scope of the privilege, and it does not mean, I think, that its *decisions* are immunized from challenge. The Commission just cites *Rubin*[64] for the proposition that the privilege applies in UCL cases. But that held only that a plaintiff could not plead around the litigation privilege by recasting a tort under the UCL. On the present record, this vaguely articulated defense does not undermine a showing AFT might make of a reasonable likelihood of success on the merits.

d. Laches

The Commission argues that AFT waited over a year after the 2012 show cause determination to ask for injunctive relief. I note this below,[65] and have determined not to modify the status quo as it pertains to that specific determination. Accordingly I need further discuss its impact on the merits.

(d) Common Law Fair Procedure

Plaintiffs invoke the College's common law fair procedure rights.

'Common law fair procedure' differs from 'common law due process' although they are close cousins. The latter applies to governmental entities. The former applies to *private*

[64] *Rubin v. Green*, 4 Cal.4th 1187, 1200-04 (1993).
[65] The laches argument is considered below, text at note 119.

institutions where judicial intervention is warranted by the public interest.[66] Common law fair procedure doctrine provides for deferential judicial review. It ensures that procedures allow the plaintiff an opportunity to be heard by an impartial decision-maker. The doctrine is not a vehicle for de novo review of an actor's decision, and it likely does not provide protections as broad as those under the due process equivalent.[67]

> Since the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process. Fair procedure rights apply when the organization involved is one affected with a public interest, such as a private hospital.... The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of the protection afforded an individual; the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights.[68]

Applebaum applied the fair procedure doctrine to a private hospital, concluding that the procedures used created a risk of bias that were too high to maintain the guarantee of fair procedure.[69]

It is on the basis of this somewhat nebulous doctrine that plaintiffs contend they will ultimately prevail at trial before this court. As the parties acknowledged at the hearing, the application of this doctrine in circumstances such as this has little precedent.

In California, the doctrine has been applied in medical privileges cases because judicial intervention in a private association's membership decisions is warranted where the considerations of policy and justice are sufficiently compelling.[70]

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[66] *See generally, Potvin v. Metro. Life Ins. Co.*, 22 Cal.4th 1060, 1070 (2000); *Palm Med. Grp., Inc. v. State Comp. Ins. Fund*, 161 Cal.App.4th 206, 215 (2008).

[67] Elizabeth L. Crooke, "Applicability of the Fair Procedure Doctrine" *L.A. Law* at 18, 19 (June 2009) (discussing *Pinsker* cases).

[68] *Applebaum v. Bd. Of Directors of Barton Mem'l Hosp.*, 104 Cal.App.3d 648, 657 (1980). *See also, Whittier College v. American Bar Ass'n*, 2007 WL 1624100, at *7 (C.D. Cal. May 7, 2007).

[69] *Applebaum*, 104 Cal.App.3d at 657-60. *See also Ezekial v. Winkley*, 20 Cal.3d 267, 278 (1977) (plaintiff stated a claim for wrongful denial of the common law right of fair procedure by alleging that dismissal from residency program at private hospital will effectively prevent his entry into medical specialty for which residency training was preparing him).

One important case, *El-Attar*, begins by noting two earlier *Pinsker* decisions, which held that a dentist had a judicially enforceable right to have his application for membership in a dental association considered in a manner comporting with the fundamentals of due process.[71] The Court stated the rule of those cases as follows: the common law fair procedure requirement

> may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position. As such, this court should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the 'charges' against him and a reasonable opportunity to respond.... Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of an abuse of such discretion.[72]

Next, the *El-Attar* Court discussed Anton,[73] the first decision extending the doctrine to peer review decisions concerning staff privileges. From that decision, the Court concluded that judicial inquiry extends

> to the questions whether the respondent proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by evidence.[74]

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[70] *El-Attar v. Hollywood Presbyterian Medical Center*, 56 Cal.4th 976, 986 (2013); *see also Pinsker v. Pacific Coast Soc. of Orthodontists*, 12 Cal.3d 541, 550 (1974) (whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair).

[71] *El-Attar,* 56 Cal.4th at 987.

[72] *Id.*, noting that Pinsker was denied fair procedure because he was given no opportunity to respond to the charges against him – he was not notified of the reason the dental association rejected his application for membership.

[73] *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977).

[74] *Id.* at 987-88. In 1989, the Legislature codified the common law fair procedure doctrine in the hospital peer review context. *Id.* at 988. The statute guarantees, among other things, a physician's right to notice and a hearing before a neutral arbitrator or an unbiased panel, the right to call and confront witnesses and to present evidence, and the right to a written decision by a trier of fact. *Id.* Significantly, the Legislature rejected *Anton's* rule that the courts were to make their review de novo using their independent judgment; instead, the deferential 'substantial evidence' standard is used. *See generally,* Craig W. Dallon, "Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions," 73 TEMP. L. REV. 597, 668-69 (2000).

Some opinions provide guideposts as to the sort of procedures that may be unfair. In *Applebaum*, the Court concluded that a panel composed in such a way that partiality could be presumed based on a realistic appraisal of psychological tendencies and human weakness violated fair procedure even without a showing of actual bias.[75] On the other hand, *El-Attar* found no violation where a hospital arguably violated its own bylaws concerning selection of hearing participants because, assuming the bylaws were violated, there was no basis to presume that the review hearing participants were actually biased.[76] However, the Court cautioned that deviation from established bylaws can provide evidence bolstering a fair procedure claim.[77]

I conclude an educational accreditor can probably be required under California law to comply with common law fair procedure, at least to the extent that its actions have the effect of excluding an institution from eligibility which in turn implicates the institution's substantial economic interest, which is doubtless the case here.[78] As with hospital privileges, a private accreditor's decision touches on an issue of central public interest (the quality of education and related funding) and is made pursuant to procedures required by law. The public import is also evidenced by the funding implications of accreditation decisions: taxpayer dollars will or will not flow to the institution depending on the accreditation decision. Some federal courts have applied the federal version of the doctrine to private accreditors.[79]

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[75] *Applebaum*, 104 Cal.App.3d at 659-60.
[76] *El-Attar*, 56 Cal.4th at 990, 995-97.
[77] *Id.* at 997.
[78] *See generally,* Note, "Supreme Court Rules That Health Insurer's Termination Of Contracting Physician Must Be 'Substantively Rational And Procedurally Fair' If Insurer Possesses Substantial Economic Power," 21 CAL. TORT REP. 197 (June 2000) (discussing *Potvin*).
[79] *See Whittier*, 2007 WL 1624100, at *8 (citing decisions from the Fifth and Sixth Circuits in explaining that courts have made the policy decision to ensure that private accrediting organizations act in the public interest and do not

However, neither I nor the parties have identified any case in which one party asserted a claim based on a *different* party's suffering from an unfair procedure, as here.

The interplay of the UCL and the fair procedure doctrine is central to the present case, because while the fair procedure doctrine itself may or may not require a showing of actual prejudice, the UCL usually does. Plaintiffs do not *directly* invoke the fair procedure doctrine, probably because they may not have standing to do so; but in their invocation of the UCL—their passport to a hearing in this court—they must accept the UCL's own elements, such as causation requirements.

Here there is some evidence that the panels were weighted in favor of individuals with affiliations to institutions assertedly politically aligned with the Commission, although there is no good evidence that these asserted political alignments were material or caused anyone to decide any issue in a given way. The Commission's adverse action appears extreme, especially in light of the short window for compliance, although perhaps not in light of the financial situation at the College, and perhaps not in light of the Commission's obligation to either issue sanctions "immediately" or otherwise then require the school to come into compliance (generally within a two year period).[80] There is some evidence that such a swift move to show cause and such a short time window is uncommon.[81] Beno's husband Crabtree was on the 2012 evaluation team, although there is no good evidence that she put him there, or that it

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abuse their power, but that judicial review is limited to protecting the public interest such that courts do not review the accreditor's decision de novo); compare *W. State Univ. of S. Cal. v. American Bar Ass'n*, 301 F.Supp.2d 1129, 1135-38 (C.D.Cal. 2004) (applying common law due process in the same context without discussion of common law fair procedure, citing a Seventh Circuit decision).

[80] 34 C.F.R. § 602.20(a). The commission is required to take immediate adverse action if an institution fails to bring itself into compliance within the time afforded unless the Commission for good cause extends the period for achieving compliance. 34 C.F.R. § 602.20(b).

[81] Second Supplemental Declaration of Alexandra Iova in Support of AFT Motion, Exs. 2-3.

mattered to any of the decisions of the Commission. There is no showing of actual bias, and the Commission has presented evidence that the College was on notice of the problems underlying the violations since at least 2006, and certainly as of 2010, even if those problems had not been technically cited as "deficiencies".

There is good evidence that the College was presented with additional deficiencies which probably made it impossible for it to fully respond to all charges;[82] but it remains unclear if those made a difference to the outcome because (i) the earlier deficiencies identified by the evaluation teams appeared sufficient for the show cause order and (ii) there is no showing on this record that the College could have, with more time, solved the new ones added by the Commission.

The observations in the two paragraphs just above provide the backdrop to my discussion of causation, that is, whether the asserted unfair practices must be shown to have led to the result. Here, I provide a brief discussion of causation under the common law fair procedures doctrine. Thereafter, I discuss causation as a feature of the UCL. I conclude that while some sort of causation in the shape of a materiality element is part of the common law fair procedure doctrine, causation as such is clearly an element under the UCL (at least for standing purposes).

The Supreme Court in *El-Attar* cited a series of cases in support of the proposition that under the common law fair procedure doctrine, the problems identified with the procedures must have mattered—they must have produced 'some injustice':

[82] Rentz Declaration, Ex. B (site evaluation team report), Ex. C at 2-3 (letter announcing Commission action to terminate accreditation). There is no indication in the record that the College had an opportunity to respond to 11 apparently new deficiencies.

> Not every violation of a hospital's internal procedures provides grounds for judicial intervention. In applying the common law doctrine of fair procedure, we have long recognized that departures from an organization's procedural rules will be disregarded unless they have produced some injustice. (See, e.g., *Levy v. Magnolia Lodge, No. 29, I.O.O.F.* (1895) 110 Cal. 297, 308, 42 P. 887 [" 'As these are proceedings under articles agreed to by all the members, it is necessary to consider them without much regard to technicalities, and to follow substantial justice more than form.' (*People ex rel. Burton v. St. George's Soc.* (1873) 28 Mich. 261, 262–263.)"]; *Anton, supra,* 19 Cal.3d at p. 826 & fn. 25, 140 Cal.Rptr. 442, 567 P.2d 1162 [even if the judicial review committee that upheld plaintiff's suspension should have applied a prior version of the defendant hospital's bylaws, plaintiff had failed to demonstrate how this error "resulted in prejudice to him"]; *Dougherty v. Haag* (2008) 165 Cal.App.4th 315, 338–343, 81 Cal.Rptr.3d 1 [discussing and applying common law fair procedure harmless error doctrine].) As the Court of Appeal observed in *Rhee v. El Camino Hospital District* (1988) 201 Cal.App.3d 477, 247 Cal.Rptr. 244 (*Rhee*), "it cannot be said that a violation of a hospital's bylaws establishes a denial of due process in every case. [Citation.] Rather the question is whether the violation resulted in unfairness, in some way depriving the physician of adequate notice or an opportunity to be heard before impartial judges." (*Id.* at p. 497, 247 Cal.Rptr. 244.)[83]

A few months ago in October, the Court of Appeal cited *El–Attar* for exactly this proposition: deviations from procedure must be material.[84] But materiality is not tantamount to a causation requirement. One might be able to prove injustice in a procedure without having to establish that the procedure's result would have been different. The various formulations quoted by *El-Attar* are, in their sum, ambiguous. In any event, *El-Attar* is good authority for the proposition that to succeed on the merits, even if one were only to look to the elements of a common law fair procedure claim, the problems must be shown to be more than trivial.

AFT's papers do not do much to suggest all the procedural problems they identify were *material*, perhaps under the impression that the sheer number of asserted problems would suffice. In any event, for purposes of these motions for preliminary injunction, based on among other the evidence that the College was not afforded enough time to respond to all formally

[83] *El-Attar v. Hollywood Presbyterian Med. Ctr.,* 56 Cal.4th 976, 990-91 (2013).
[84] *Sadeghi v. Sharp Mem'l Med. CenterChula Vista,* 221 Cal.App.4th 598 (2013).

cited deficiencies, I find that AFT would probably be able to establish that the College was not afforded a fair procedure.

(e) Causation Under UCL

The parties have not addressed the causation requirement under the UCL. Plaintiffs assert they need not meet any such requirement, that is, that evidence of unfair procedures is good enough to show they are likely to prevail at trial, whether or not those procedures were material. Or the plaintiffs may just contend that the only causation element they need address is whether the Commission's decisions (such as issuing the show cause letter) caused the harm they now complain about. They certainly do contend that; but the illegality and unfairness arguments made by the plaintiffs are addressed not, strictly speaking, to the ultimate decisions of the Commission, but rather to the *processes* that led to those decisions.

The Commission's papers don't discuss the causation issue at all.

As suggested above, plaintiffs have in effect assumed that because under the fair procedure doctrine the Commission's decisions may be 'void ab initio' (as AFT puts it) or sufficiently 'tainted' or infected by unfairness (as the City Attorney would have it), they need not show that the unfairness made any difference to the outcome of the Commission's deliberations.

But even were this a direct review of the Commission's actions brought by the College in federal court, in light of the substantial deference courts provide to the reviewing agency, trivial or insubstantial deviations from prescribed procedures would be overlooked. This is the materiality criterion I discussed above. Perhaps more serious issues, such as the failure of the agency to include legally required personnel, might be deemed material and, without more, be

enough to reverse the agency's decision.[85] It also may be true that in such a case, brought by the directly affected entity in the prescribed court, failure to provide a meaningful administrative appeal, alone, may be enough to show a violation of "due process."[86] However, plaintiffs here do not contend the Commission was illegally constituted nor that the College has not had its appeal (the time for that appeal will come, if needed, after July 2014).

But more to the point here, this is *a state UCL claim* before the court, and I know of no authority that suggests *its* elements may be elided because predicate illegality or unfairness doctrines do not include those elements. And, as I say, the parties' papers do not take on this issue.

(i) AFT

For private plaintiffs such as AFT, causation is required under the UCL as an element of standing.[87] The injury suffered must be "the result" of the illegal or unfair acts.[88]

> [T]he *Kwikset Corp.* court held a plaintiff can satisfy the *causation* prong of the standing requirements under Business and Professions Code section 17204—i.e., show the "plaintiff's economic injury [occurred] 'as a result of' the unfair competition"—by showing a "causal connection" between the economic injury and the alleged unfair conduct. (*Kwikset Corp., supra,* 51 Cal.4th at p. 326, 120 Cal.Rptr.3d 741, 246 P.3d 877.) A plaintiff fails to satisfy the causation prong of the statute if he or she would have suffered "the same harm whether or not a defendant complied with the law." (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1099, 61 Cal.Rptr.3d 716.)[89]

On the *present* record, it is not apparent AFT will be able to prove this. To be sure, future discovery may show that the Commission would not have undertaken the adverse actions in 2012 and 2013 had they followed what AFT alleges to have been illegal and unlawful

[85] Cf., e.g., *Doyle v. U. S.*, 599 F.2d 984, 996 *amended sub nom. In re Doyle*, 609 F.2d 990 (Ct. Cl. 1979). See *Porter v. United States,* 163 F.3d 1304, 1317 (Fed. Cir. 1998)(*Doyle* involved "illegally composed selection" boards).
[86] *W. State Univ. of S. California v. Am. Bar Ass'n,* 301 F. Supp. 2d 1129, 1137 (C.D. Cal. 2004).
[87] B&P § 17204; *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 322-27 (2011).
[88] See also *Hall v. Time Inc.,* 158 Cal. App. 4th 847, 855 (2008).
[89] *Jenkins v. JP Morgan Chase Bank, N.A.,* 216 Cal.App.4th 497, 522 (2013).

acts, but I do not discern that now. And a fact finder might credit all of AFT's evidence, disregard the Commission's arguments, and infer the Commission's defalcations were material to the decision.[90] But as I weigh the current record, it suggests the opposite, which is that the adverse actions would have been taken anyway as a result of the financial and administrative problems the Commission (and FCMAT[91]) identified. AFT did argue both in its papers and at the hearing that the Commission failed to identify any important problems in the quality of the *education* provided by the College,[92] but it is clear that the Commission is entitled to base its sanctions on administrative and financial issues.[93]

The present record does not show that the Commission would have done anything differently had it, for example, not involved Crabtree on the evaluation team, or had it characterized the 2006 report otherwise, or more than one teacher had been involved, or different financial guidelines had been invoked, or had more time had been allowed for certain response from the College; and so on. The record doesn't show this, and indeed, as I note above, AFT rejects the notion that it ought to show it.

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[90] The distinction in how evidence is treated in this context of the preliminary injunction motion as opposed to the context of the anti-SLAPP motion explains the differing results of those motions. See further at § II D 3.

[91] July 2013 report (Ex. F to the Johns Declaration).

[92] E.g., AFT Motion at 6, 7-9. And indeed the point is made repeatedly in bold type.

[93] *See* 34 C.F.R. § 602.20 (requiring accrediting agency to bring school into compliance with all standards or initiate adverse action, through the scheme described above); 20 U.S.C. § 1099b(a)(5) (enumerating issues that standards for accreditation assess, including "fiscal and administrative capacity as appropriate to the specified scale of operations"); 34 C.F.R. 602.16(a)(1) (requiring accrediting agency to have "rigorous" standards, and stating that this requirement is met if the agency has standards address the "quality of the institution" in several areas, one of which is "Fiscal and administrative capacity as appropriate to the specified scale of operations"). The two cases AFT urged me at argument to review are not helpful: they don't say that an accrediting entity must base its determination on educational competence. To the contrary: The loss of accreditation, as well as any criticisms the courts had of that loss, were based on other issues. *Pinsker v. Pac. Coast Soc'y of Orthodontists*, 12 Cal.3d 541, 556 (1974) (dentist accused of "patient-sharing"); *Feinstein v. State Bar of Cal.*, 39 Cal.2d 541, 546 (1952)(lawyer's moral turpitude).

(ii) City Attorney

Causation is not an element of UCL standing for the City Attorney.[94] Typically when the state enforces statutes such as § 17200, the law enforcement officer—here, the City Attorney—need not show that the public suffered actual harm as a result of the assertedly unlawful or unfair practices, at least as a matter of standing.[95]

But causation probably matters a great deal in least two other contexts: how "unfair" acts are determined and in the context of the relief courts provide in UCL cases. I discuss these in order.

a. Unfair Practices

To show that a business practice satisfies the "unfair" prong, there must be a link between a defendant's practice and the alleged harm – "[t]he UCL provisions are not so elastic as to stretch the imposition of liability to conduct that is not connected to the harm by causative evidence."[96] *In re Firearm Cases* noted two important rationales for its ruling: (1) businesses must be able to know what conduct California law prohibits and what it permits (this goal is furthered by requiring a showing that the "unfair" conduct causes harm to consumers); and (2) no post *Cel-Tech*[97] cases that have continued to use the balancing test for the unfairness prong in consumer cases have dispensed with the need for some causal connection when

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[94] B&P § 17204.

[95] *People ex rel. Van de Kamp v. Cappuccio, Inc.*, 204 Cal.App.3d 750, 760 (1988); *Herr v. Nestle U.S.A., Inc.*, 109 Cal.App.4th 779, 790 (2003) citing *Cappuccio.* But if the predicate law "borrowed" for the § 17200 "unlawful" claim requires competitive injury—e.g., a claim under the Cartwright Act—then so too does the § 17200 claim. *Kentmaster Mfg. Co. v. Jarvis Products Corp.*, 146 F3d 691, 695 (9th Cir. 1998).

[96] *In re Firearm Cases*, 126 Cal.App.4th 959, 981 (2005) (role of causation in UCL claim brought by California cities and counties under the unfair prong).

[97] 20 Cal.4th 163 (1999).

weighing the utility of the defendant's conduct against the gravity of harm to the alleged victim.[98]

The import of *In re Firearm Cases* is this: when courts determine whether an act or practice is "unfair" within the meaning of the UCL, courts balance the harms against the benefits of the defendant's conduct.[99] This balancing generally cannot be done without identifying at least *some* harm, which in turn suggests that the challenged act or practice must be causally linked to a demonstrated harm.

This requirement of an alleged impact on a victim appears in the very case which the City Attorney urges contains the right test for determining whether a practice is "unfair":

> The test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim.... [Citations.]' [Citation.] In *People v. Casa Blanca Convalescent Homes, Inc.* 1984) 159 Cal.App.3d 509, 206 Cal.Rptr. 164, the court, acknowledging that the parameters of the term 'unfair business practice' had not been defined in a California case, applied guidelines adopted by the Federal Trade Commission and sanctioned by the United States Supreme Court in *FTC v. Sperry & Hutchinson Co.* (1972) 405 U.S. 233, 244 [92 S.Ct. 898, 905, 31 L.Ed.2d 170, 179]. The court concluded that an 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" (*State Farm, supra,* 45 Cal.App.4th at pp. 1103–1104, 53 Cal.Rptr.2d 229.)[100]

To be fair, this quotation also contains the suggestion that a practice which is merely "immoral, unethical, oppressive, unscrupulous" might alone qualify. And it may be that for

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[98] 126 Cal.App.4th at 981-82; *see also Zhang v. Superior Court*, 57 Cal.4th 364, 380 n.9 (2013) (collecting cases for the various unfairness tests, each of which apparently requires some form of weighing involving the gravity of harm).

[99] E.g., *Bardin v. Daimlerchrysler Corp.*, 136 Cal.App.4th 1255, 1269 (2006). *Zhang*, 57 Cal.4th at 380 n.9. The only case cited in *Zhang* without reference to balancing involves the *Gregory* line of cases, but *Gregory* too suggests that the court should weigh the gravity of the harm to the alleged victim against the utility of the defendant's conduct. *Gregory v. Albertson's, Inc.*, 104 Cal.App.4th 845, 856-57 (2002).

[100] *Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal.App.4th 700, 718-19 (2001) (note omitted).

some of the assertedly illegal practices there is *no benefit whatsoever*; and as the parties have not briefed the law, the balancing, nor the impact of practices that may have zero utility on that balancing, I am reluctant at this stage of the litigation to determine that the facts adduced by the plaintiffs could not at trial demonstrate unfairness in the sense contemplated by the UCL. For all these reasons I conclude there is some possibility the City Attorney may be able to prove an unfair business practice.

b. Causation & Relief

The second way in which causation affects UCL cases has to do with remedies. All remedies afforded by the UCL are equitable:

> Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.[101]

It may well be inequitable to require the Commission to start the process anew if, on all of the evidence presented at trial, it would have reached the same result regardless of the unlawful or unfair procedures. While this is obviously a matter ultimately best left to trial, these considerations do play a role in the scope of an injunction which can be justified on the record as I now have it. That is, these considerations weigh against an injunction which would retrospectively unravel the work of the Commission.

[101] B&P § 17203.

c. Unlawful Practices

When it comes to the UCL's incorporation of an *illegal* act as a predicate, the worries that animated *In re Firearm Cases*, and before it, *Cel-Tech,* do not obtain here: there is no risk posed by amorphous notions of fairness nor by the possibly unpredictable and inconsistent views of judges as to the meaning of "fair."

The "unlawful" prong can, for example, rely on predicate violations of federal statutes.[102] This is so even if Congress has not provided a private cause of action because the UCL does not enforce the underlying law, but borrows violations of other laws and treats them as unlawful practices that are independently actionable.[103] Importantly for this case, violations of a federal regulation can also serve as predicate unlawful conduct.[104]

In the present motion, the City Attorney relies on two regulations, both of which by their terms set forth the requirements an accrediting agency must meet in order to be "recognized" by the Department of Education. 34 C.F.R. § 602.15(a)(3) (agency must have academic administrative personnel on its evaluation bodies) and (6) (agency must have clear and effective controls against conflicts of interest, or the appearance of conflicts of interest, in the agency's evaluation team members). I question whether these sorts of regulations count as 'laws' under the UCL, in particular because these two regulations simply govern the relationship between the Commission and the DOE. But the Commission has not yet cited any authority that distinguishes among laws and regulations in this way, suggesting that some, but not others, qualify as proper UCL predicates.

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[102] *Rose v. Bank of America, N.A.*, 57 Cal.4th 390, 394 (2013).

[103] *Id.* at 396.

[104] *Smith v. Wells Fargo Bank, N.A.*, 135 Cal.App.4th 1463, 1480 (2005); *see also Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342, 1383 (2012) (virtually any law or regulation – federal or state, statutory or common law – can serve as a predicate for a § 17200 "unlawful" theory).

In short, I conclude there is some possibility that the City Attorney will ultimately prevail on the merits, because there is some possibility that he will establish some Commission practices (i) have zero utility and so demonstrating their unfairness, or others (ii) are illegal.

4. Balance of Harm

(a) *Plaintiffs' Interests*

Termination of the College's accreditation will likely cause the College to close. This will have severe consequences for employees, current and prospective students, and the community. California community colleges are funded on the basis of full-time equivalent students (FTES). Declaration of Kathy Blackwood in Support of City Attorney Motion, ¶ 3. If there is a sustained drop in enrollment, funding will be cut. *Id.* In general, sanctions last for longer than one year and lead to sustained enrollment drops. *Id.* at ¶ 4. This can lead to cuts to faculty salaries, reductions in programs, and further enrollment drops – creating a downward spiral. *Id.* at ¶¶ 5-6. The College has seen a 21.04% decline in FTES between 2010-2013. Declaration of Lynn Eudey in Support of City Attorney Motion, ¶ 8. This includes a drop of 12.82% from 2012 to 2013, after a slight uptick between 2011 and 2012.[105] *Id.* at ¶¶ 8, 10. Should the College close, Campbell declares that thousands of College employees will lose their jobs, 80,000 students would be affected (students may be unable to transfer, will likely face significantly increased expenses if they are able to transfer, and may face decreased earnings prospects), and the San Francisco economy will suffer.[106]

There is some evidence supporting what I have termed "uncertainty harm," that is, harm generated by the uncertainty whether the College will be unaccredited as of July 31,

[105] Eudey does not provide the change between 2010 and 2011.
[106] Declaration of Severin Campbell in Support of City Attorney Motion, ¶¶ 12-21, Ex. A.

2014.[107] The College saw a drop in FTES from the 2008-2009 academic year to the 2009-2010 academic year, an uptick going to the 2010-2011 academic year, and another drop in the 2011-2012 academic year.[108] The College saw a recent downward trend in enrollment, and has the second highest percentage drop in enrollment from Fall 2012 to Fall 2013 for community colleges for which Eudey had data. Eudey Declaration, ¶ 14. Although FTES has been declining in other districts, the decline is more pronounced at the College. *Id.* at ¶ 7. The current data for Spring 2014 indicate that enrollment as of the 27th day of registration, is down by 26.8%.[109] The City Attorney suggests the show cause order and the looming loss of accreditation have caused this drop in FTES, which, if sustained, will lead to a loss of state funding for the College.

It remains unclear the extent to which this 'uncertainly harm' was caused by the general negative publicity over the finances of the College, including the FCMAT reports, how much was due to the vagaries of the economy, and so on. Generally, plaintiffs' argument simply assumes that it is obvious that uncertainty over the future of the College must have resulted in harm.

There is no question, however, of the harm that will be suffered if the Commission follows through and terminates accreditation as of July 2014. Those consequences would be catastrophic. Without accreditation the College would almost certainly close and about 80,000 students would either lose their educational opportunities or hope to transfer elsewhere; and for many of them, the transfer option is not realistic. The impact on the teachers, faculty, and the City would be incalculable, in both senses of the term: The impact cannot be calculated, and it would be extreme.

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[107] E.g., Declaration of Fred Chavaria in Support of AFT Motion, ¶¶ 19, 21 (College lost contract with SFPD to run police academy because the College could not guarantee that it would remain accredited for the next three years).
[108] Johns Declaration, Ex. D. The high number in 2008-09 was 38,019. The low number in 2011-12 was 32,632.
[109] Reply Declaration of Sarah J. Eisenberg in Support of City Attorney Motion, Ex. D.

(b) *Commission's Interests*

In response, as it address the countervailing harms should an injunction issue, the Commission focuses not so much on the harm caused by enjoining its actions regarding the College specifically, but rather the harm generated by issuing an injunction which in effect closes down the Commission unless and until the Commission complies with all applicable rules and regulations. There is no basis to issue that second type of injunction, and so it is not necessary to further address the Commission's concerns on that score.[110]

True, the Commission does say a more narrowly drawn injunction relating just to the College will harm the Commission by encouraging future lawsuits,[111] but this is weak, and speculative. And it may be true that an injunction will cause more public money to flow to the College than otherwise, but this is too is unsupported, and no sense of the sums involved is provided.

The Commission also counters that (1) that the College will be damaged by an injunction that allows it to continue in operation despite its financial mismanagement; and (2) the Commission would be forced into noncompliance with its obligations to the DOE. It is difficult to discern the harm to the College of being allowed (not compelled) to continue to operate, and in any event this is not harm to the Commission. As to the second issue, the Commission makes no good argument that it would be placed between the rock of this Court's injunction and the hard place of DOE regulations. The Commission may on its own extend the time for the

[110] That injunction would effectively close the Commission, goes far beyond preserving the status quo, is unsupported by the record (there is no evidence of harm likely to result from the Commission's accreditation review in other districts), was not argued for at the December 26 hearing, and would inflict serious harm on the Commission.

[111] Opposition to City Attorney Motion, 12.

College's compliance for 'good cause'[112] which I assume must include compliance with a court order, and it seems unlikely that the DOE will punish the Commission for doing so.

5. Injunctive Relief

(a) *Efficacy*

The question remains whether there is a reasonable injunction which will actually be effective in ameliorating a harm faced by plaintiffs. Courts do not issue pointless injunctions.[113]

There are two proposed orders I discuss now. The first, sought by both AFT and the City Attorney, would block the Commission from (in the future) implementing its order de-accrediting the College, now set for July 31, 2014.[114] The second, sought only by AFT, would require the Commission to rescind the July 2, 2012 show cause order.

As to the first, I had some doubts that I could issue an effective injunction. I contemplated trial before July 2014, and under those conditions, all the "uncertainty harm" would exist whether or not I issued the injunction: either way, as we waited for the trial, the public would still not know the fate of the College after the summer of 2014 and the uncertainty harm would still exist. But counsel for the City Attorney at argument pointed out that despite my best efforts—and those of the parties—there may not be a trial before July 31, 2014; indeed, I have not yet consulted with the parties to set a trial date. And even if we did have a bench trial in June, the time for statements of decision, post-trial proceedings, and of course appeal, are likely to extend proceedings past July 31, 2014.

I conclude that issuing the first sort of injunction would be effective.

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[112] Cf., 34 C.F.R. § 602.20(b).

[113] E.g., *Arnolds Management Corp. v. Eischen*, 158 Cal.App.3d 575, 578-79 (1984).

[114] The College may administratively appeal and then also take the matter to federal court. The parties were not clear whether as a matter of right, or otherwise, the effective date of dis-accreditation would be concomitantly postponed.

The second order sought—that sought by AFT to vacate the show cause order—would ameliorate more alleged harm than the first, in that it would set back the Commission's work to the summer 2012 time period, and so in effect probably guarantee more students the ability to complete their studies, and more time for faculty to receive pay, and so on. Of course, that injunction would not ensure the College stays in operation, and if the financial situation is as dire as some of the reports suggest, the College might close anyway at some point. Nor would this second type of injunction remove the cloud of uncertainty over the College's accreditation. Thus, it would not allow programs such as the police academy to reopen.[115] Moreover, such a mandatory injunction would practically grant final relief in this action[116] without actually having finally decided the merits.

(b) *Application of Factors for Injunctive Relief*

On balance, I will issue a preliminary injunction barring the Commission from finalizing their dis-accreditation decision pending further order of the court or final adjudication of the merits in this case. That order expressly contemplates that the Commission will proceed with the current process, for example working with the College to resolve the Commission's concerns, as well as taking any and all other actions, *except* to implement a dis-accreditation order such as had been scheduled for July 31, 2014. In the meantime it is my intent to expedite this case and set it for trial at the earliest practicable date.

While I have been unable on the present record to find that AFT is likely to succeed on the merits, I do find that the City Attorney has shown "some possibility"[117] that he will

[115] Chavaria Declaration, ¶¶ 19, 21.

[116] Reply in Support of City Attorney Motion, 1 (Commission will have to undertake a new evaluation).

[117] CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 9:531 (2012), citing *Butt v. State of California*, 4 Cal.4th 668, 677-78 (1992).

ultimately prevail. Given the fact that the balance of harm tips sharply, strikingly, indeed overwhelmingly, in favor of the interests represented by the City Attorney, this is enough to authorize preliminary relief.

I have determined to issue the limited relief, and not the unravelling of the Commission's work back to the 2012 show cause order, for additional reasons. First, that relief was sought by AFT, and I have not found that AFT has met its burden. Secondly, such relief is tantamount a mandatory injunction, for which plaintiffs must present even stronger evidence than usual,[118] which perforce they have not done. Thirdly, issuing this second sort of relief, especially as a matter of preliminary relief, would interfere with the workings of the Commission, the DOE, and the associated federal regulatory scheme—all in the very midst of that scheme's application. I am reluctant to do that at this stage especially given my doubts that the Commission would have not have issued the show cause notice in any event. Fourthly, if the July 2 2012 letter-notice were truly a source of irreparable harm and indeed the harm was an "inevitable" consequence of its issuance (as AFT claims[119]), I would have expected the request for an injunction sometime in 2012. The delay undermines AFT's views on the need for an injunction with respect to the July 2012 action.

[118] *Teachers Ins. & Annuity Assn. v. Furlotti,* 70 Cal.App.4th 1487, 1493 (1999), quoting *Shoemaker v. Cnty. of Los Angeles,* 37 Cal.App.4th 618, 625 (1995).
[119] AFT Motion at 10, line 25.

D. **Anti-SLAPP Motion**

1. Legal Standard

The anti-SLAPP statute provides:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that there is a probability the plaintiff will prevail on the claim.
> ...
> As used in this section, "act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue" includes: (1) any written or oral statement made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, ...or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.[120]

First, the defendant must make a threshold showing that the challenged cause of action is one *arising from* protected activity.[121] Second, if the court finds that such a showing has been made, the plaintiff must demonstrate a probability of prevailing on the claim. To do this, the plaintiff must demonstrate that the complaint is both legally sufficient and supported by a prima facie showing of facts to sustain a favorable judgment, assuming plaintiff's evidence is credited.[122] The court considers the pleadings and evidentiary submissions of both the plaintiff and the defendant, but does not weigh the credibility or comparative probative strength of the evidence.[123] Rather, the court accepts as true evidence favorable to plaintiff and evaluates the

[120] C.C.P. § 425.16(b)(1), (e)(1-2), (4).
[121] *Taus v. Loftus*, 40 Cal.4th at 983, 712 (2007).
[122] *Id.* at 713-14.
[123] *Id.* at 713-14.

defendant's evidence only to determine if it defeats the plaintiff's case as a matter of law.[124] If the plaintiff can show a probability of prevailing on any part of its claim, then the cause of action will not be stricken.

2. Protected Activity

The parties agree[125] that AFT's allegations concerning legislative advocacy touch on protected activity. AFT minimizes the import of these allegations, arguing that they are not the gravamen of the Complaint, which is instead the Commission's accreditation decision.[126] The Commission argues that its accreditation activities involve the Commission's exercise of free speech in connection with a public issue.[127] In any event, the Commission argues that AFT's UCL claim 'arises out' of the Commission's legislative advocacy.[128]

Here the critical issue is whether the cause of action is based on the defendant's protected free speech or petitioning activity.[129] One of the primary pillars on which AFT's claim stands is the theory that the Commission and its evaluation teams were biased based on institutional and personal political leanings that conflicted with those of the College. There are several additional theories on which AFT relies– for example, improperly constituted evaluation teams, failure to consider all relevant factors, and failure to provide proper notice and appeal procedures. But the Commission's political motivations are at the root of each of these theories, and the complaint goes on at length to explain this. The lengthy complaint is its own

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[124] *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011); *Taus*, 40 Cal.4th at 714.
[125] AFT's agreement is implicit. *See* Opposition to Anti-SLAPP Motion, 5-6.
[126] Opposition to Anti-SLAPP Motion, 4-5.
[127] Anti-SLAPP Motion, 11-12.
[128] Reply in Support of Anti-SLAPP Motion, 2-4.
[129] *In re Episcopal Church Cases*, 45 Cal.4th 467, 477-78 (2009) (denying anti-SLAPP motion where the gravamen of the action was a property dispute, the additional fact that protected activity may lurk in the background and explain the basis for the property dispute does not transform the action into a SLAPP suit).

worst enemy in this context, and provides ample fodder for the Commission's claim that its speech and petitioning activities are the target. The Commission has noted some of the relevant allegations in its Reply, which I will not repeat here; they are many.[130] The allegations certainly arose from these protected activities.

Too, AFT's position that it only challenges the [governance] determinations of the Commission are belied by the arguments AFT makes on the merits, for example in connection with its motion for preliminary injunction. It is obvious that AFT attacks not the determinations as such, but rather the processes—the allegedly illegal and unfair processes—which led to those "tainted" and "infected" determinations.

AFT does not dispute that the Commission's accreditation activities involve matters of public interest.[131] Plainly the College's accreditation is clearly an issue of great importance to the public. Instead, AFT argues that the Commission's acts of governance, mandated by law, are not exercises of free speech or petition.[132] But, as several federal courts have held, an accrediting agency expresses its educated opinion about the quality of a school's program at the school's request.[133] In line with this authority, I find the Commission exercised its speech

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[130] See Reply in Support of Anti-SLAPP Motion, 2-4, n.1.

[131] Opposition to Anti-SLAPP, 6.

[132] *See San Ramon Valley Fire Protection District v. Contra Costa County Employees' Retirement Association*, 125 Cal.App.4th 343, 353 (2004) (board action requiring additional pension contributions did not implicate free speech or petition – mere fact that an action as filed after protected activity took place does not mean it arose from that activity).

[133] *Zavaletta v. American Bar Ass'n*, 721 F.Supp. 96, 98 (E.D. Va. 1989) (ABA has a First Amendment right to communicate its views on law schools to governmental bodies and others); *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 937 F.Supp. 435, 444 (E.D. Pa. 1996) (ABA's constitutionally protected expression of its views and any resulting stigma that a law school suffers do not amount to conduct on which to establish antitrust liability); *Lincoln Memorial University Duncan School of Law v. American Bar Ass'n*, 2012 WL 137851, at *20 (E.D. Ten. Jan. 18, 2012) (neither the law school's reputation nor its ability to attract and retain students, faculty, and donors outweighed the ABA' First Amendment right to speech such that balancing of the harms weighed against granting a preliminary injunction). These cases are cited in the moving papers, but AFT does not address them.

rights by expressing its opinion on an issue of public interest when it made the challenged accreditation decisions.

As part of its argument that it only complains of a "governance decision," AFT suggest those aren't protected by the anti-SLAPP statute.[134] AFT cites *San Ramon* which said this:

> the fact that a complaint alleges that a public entity's action was taken as a result of a majority vote of its constituent members does not mean that the litigation challenging that action *arose from* protected activity, where the measure itself is not an exercise of free speech or petition. Acts of governance mandated by law, without more, are not exercises of free speech or petition.[135]

The Commission isn't a public entity. The *San Ramon* court was concerned that allowing anti-SLAPP motions every time someone objected to the decisions of a governmental agency would be bad policy and counter to legislative intent.[136] While *San Ramon* is thusly distinguishable as the Commission urges, the deeper logic of the case harkens back to the core test discussed above, which focus on the extent to which the pending suit truly arises out of protected activities.[137] The *San Ramon* argument is a bit of a red herring; while it may be true that actions "to enforce, interpret or invalidate governmental laws generally are not subject to being stricken under the anti-SLAPP statute,"[138] the governmental entities themselves are not immune, even under *San Ramon*; it all depends on what the complaint is based on.[139]

The Commission has satisfied the first prong.

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[134] Opposition at 4 *et seq.*
[135] *San Ramon Valley Fire Prot. Dist. v. Contra Costa Cnty. Employees' Ret. Ass'n*, 125 Cal. App. 4th 343, 354 (2004).
[136] 125 Cal. App. 4th at 357-58. See *Graffiti Protective Coatings, Inc. v. City of Pico Rivera,* 181 Cal.App.4th 1207, 1220 (2010) (discussing rationale of *San Ramon).*
[137] 125 Cal. App. 4th at 353.
[138] *USA Waste of California, Inc. v. City of Irwindale,* 184 Cal. App. 4th 53, 65 (2010).
[139] See generally, *Holbrook v. City of Santa Monica,* 144 Cal.App.4th 1242, 1249 (2006).

3. **Probability of Prevailing on the Claim**

The Supreme Court articulates the second prong this way:

> [I]n order to establish the requisite probability of prevailing ... the plaintiff need only have " 'stated and substantiated a legally sufficient claim.' [citations]. "Put another way, the plaintiff 'must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.'"[140]

Importantly, the Supreme Court there describes the second prong as one which investigates whether the case "lacks even minimal merit."[141] If it lacks minimal merit, I must grant the motion to strike; but not otherwise. The burden is on the plaintiff to show a "prima facie" case based on admissible evidence.[142] The standard "is quite low".[143] I do not weigh the evidence; I credit the plaintiff's evidence; I ignore the defendant's evidence unless it defeats the plaintiff's case as a matter of law,[144] and in these ways the test is essentially the same as I would use in the context of summary judgment.[145] In that latter context, the rule (which I import here) is that I make all reasonable inferences from the evidence in favor of the party defending against the motion—that is, in favor of plaintiffs.[146]

There are to be sure some similarities between the examination of the merits (a) in this anti-SLAPP context and (b) while evaluating a motion for a preliminary injunction, in that both attend to the strength of the plaintiff's evidence and the extent to which a plaintiff can establish the elements of his case. But the "minimal" standards involved in the anti-SLAPP

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[140] *Navellier v. Sletten,* 29 Cal.4th 82, 88-89 (2002).
[141] 29 Cal.4th at 89.
[142] *See generally*, CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 7:1005 (2012).
[143] CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 7:1006 (2012).
[144] *Oasis West Realty, LLC v. Goldman*, 51 Cal.4th 811, 820 (2011).
[145] CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 7:1007, *et seq.* (2012); *see generally*, *Taus v. Loftus*, 40 Cal.4th 683, 713-14 (2007).
[146] *E.g., Andrews v. Foster Wheeler LLC,* 138 Cal.App.4th 96, 100-01 (2006).

context can be met even when in the context of a preliminary injunction, after weighing all the evidence and free to make inferences as the strength of the evidence suggests, a judge determines that the evidence is insufficient.

As I suggested above,[147] plaintiffs' evidence (setting aside defendants' evidence and explanations) shows, as a function of reasonable inferences which I must draw in AFT's favor, that the Commission might not have had reached the results it did in 2012 and 2013 had it (i) staffed the evaluation teams differently, (ii) allowed the College more time to respond (as it is doing now which, as the Commission now tells me at argument, may {or may not} result in the withdrawal of the show cause notice), (iii) found that the financial management issues such as the way in which pension funds are handled do not in fact violate accepted procedures.

Accordingly AFT has met its burden under the second prong of the anti-SLAPP law, and so I deny the special motion so strike.

III. CONCLUSION

The Commission's motion for abstention and for a stay is denied. AFT's motion for a preliminary injunction is denied. The City Attorney's motion for preliminary injunction is granted, but solely to the extent of enjoining the Commission from terminating the College's accreditation until further order of the court or final judgment in the City Attorney's case; the motion is otherwise denied. This Memorandum Order suffices as the order of the court with respect to the motions generally, but as to the injunction issued at the behest of the City

[147] See text at note 90.

Attorney, the parties must confer now on appropriate language for a separate order constituting the injunction and promptly present it to me.

Dated: January 2, 2014

Curtis E.A. Karnow
Judge of The Superior Court

The Preliminary Injunction Motions: Plain English Summary[148]

This explanation forms no part of the reasoning or legal analysis of the court's Memorandum Order. It is only a highly abbreviated summary of some of the issues.

Motions for preliminary injunctions are brought when a plaintiff—the party starting a lawsuit—says that it cannot wait until trial to get some relief against the defendant in the case, because great or irreparable harm will occur before the trial.

Here there are two cases, one brought by the City Attorney in his capacity as a state law enforcement officer, and another by a union, teachers and students at the City College of San Francisco. Both cases are brought against an accrediting Commission which is responsible for accrediting the College. The Commission has issued a notice that the College will lose its accreditation as of July 2014.

Without the accreditation, students won't have access to certain federal and state funds for tuition. The plaintiffs have stated that without accreditation, many students won't attend, the College will shut down, and that even the uncertainty of whether the Commission will terminate accreditation in July 2014 is driving down enrollment and affecting students and teachers. The plaintiffs do not want to wait until trial in this case is finished, which might come after July 2014, because by then it might be too late to reverse the harm they fear.

Obviously, judges have to decide motions for preliminary injunction without a trial, and before the parties have had a full opportunity to assemble evidence and to closely examine (and maybe criticize) the evidence presented by the other side. That means that sometimes the result at trial is not the same as on the motion for preliminary injunction.

Judges weigh two factors in these sorts of motions: (1) how strong the plaintiffs' case is, and (2) the harm suffered by either issuing or not issuing the injunction. Each factor weighs against the other. For example if a plaintiff has a very strong case, she might not have to show that harm to her (without an injunction) is too much more than the harm to the defendant (if the injunction does issue). So too, if a plaintiff has a relatively weak case, he might still get an injunction if the balance of hardships tips very strongly in his favor. But, no matter what the hardships are, no injunction can ever be ordered unless the plaintiff at least can show that she has some chance of winning a trial.

The balance of hardships tips very strongly in favor of a plaintiff when (a) he would be very seriously injured if he doesn't get the injunction but (b) the defendant won't be hurt much, if at

[148] Dean Erwin Chemerinsky concurs courts (albeit those of far higher authority than this one) ought to offer plain English summaries. See e.g., M. Walsh, "Law prof Chemerinsky offers a syllabus on how the high court can polish its publicity," *ABA Journal* (May 2013), http://www.abajournal.com/magazine/article/law_prof_chemerinsky_offers_a_syllabus_on_how_the_high_court_can_polish_its/. *See also e.g.*, Michael Serota, "Intelligible Justice," 66 U. MIAMI L. REV. 649 (2012).

all, if the injunction does issue. And that is the situation here, at least in the case brought by the City Attorney.

A few words about the law at stake here. It's California's Unfair Competition Law, known as the UCL. The UCL allows a suit against a defendant if the defendant has done anything illegal or unfair, or fraudulent. The act can be illegal under any law- including the laws and regulations of the federal government. The acts can be unfair, too, but there can be difficult legal issues in trying to decide if an act is "unfair" as the UCL uses that word. Although the UCL is a broad statute allowing a wide variety of claims, the sort of relief one can get after winning a UCL case is quite limited. For example, a successful plaintiff can't get money damages, as she might in other sorts of cases. The successful UCL plaintiff might be able to get an order from a judge telling the defendant to do something, or stop doing something, as well as some other sorts of relief.

Back to this case. Some of the plaintiffs (the union, teachers and students) have a problem with their case. They have probably shown enough to conclude that the Commission imposed unfair procedures, but they have not shown that those procedures led to the Commission's adverse decision. As far as the evidence presented to the court shows, the Commission might have issued exactly the same decisions with fair procedures. The plaintiffs have argued that they can win by just showing unfair procedures, and it doesn't matter if the Commission would have done the same thing or not. But under the UCL, it does matter, at least as far as the union, teachers, and students are concerned. They have at least to show they were harmed by the *specific acts they say were unfair or illegal* under the UCL. They didn't do that. It's not good enough to argue that the Commission's ultimate decisions (for example, threatening to terminate accreditation) causes harm.

The situation is different with respect to the case brought by the City Attorney. As a law enforcement officer he is empowered, along with other City Attorneys and the state's Attorney General, to enforce the UCL without showing that any particular person was harmed.

The City Attorney, as with the other plaintiffs, may have trouble establishing that all the acts he says were unfair under the UCL really were 'unfair' as that word is used in that law, but there is still some probability that he will be successful in that, and in any event he has also set out some acts of the Commission he says were illegal, so the potential problem with the "unfair" acts isn't fatal to his case at this stage.

That was the analysis on how strong the plaintiffs' cases are at this point.

Next, the court looked at the harms. Although some forms of the injunction requested by the City Attorney might create very serious harm for the Commission—such as in effect shutting it down—one of the orders requested by the City Attorney does not cause that harm; and that is an order that allows the entire process involving the College to go forward as planned, but for now stops the Commission from terminating the College's accreditation.

Allowing the Commission to terminate accreditation would be catastrophic for the people whose interests are represented by the City Attorney: the likely closure of the College, and the serious impact that would have on about 80,000 students, plus faculty, for example.

On balance, it is best to issue the limited injunction to stop the Commission from terminating the College's accreditation. This order will be in effect unless the Court orders otherwise, or until the trial is completed and the parties have had a full opportunity to present their cases.

Superior Court of California
County of San Francisco

People of the State of California ex rel Dennis Herrera, San Francisco Attorney,

Plaintiff(s)

vs.

Accrediting Commission for Community and Junior Colleges, et al

Defendant(s)

Case Number: CGC-13-533693

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, 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 January 2, 2014, I electronically served the attached MEMORANDUM ORDER via File & ServExpress on the recipients designated on the Transaction Receipt located on the File & ServXpress website.

Dated: January 2, 2014

T. Michael Yuen, Clerk

By: _____
Danial Lemire, Deputy Clerk