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**MEMORANDUM
PRIVILEGED & CONFIDENTIAL**

TO: Boalt Affirmative Litigation Class
FROM: Owen J. Clements
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DATE: January 10, 2007
RE: Types of Affirmative Litigation Cases Filed by San Francisco

This memorandum briefly summarizes some of the most common theories under which the City and County of San Francisco brings affirmative cases. While this list is by no means exhaustive, it describes the causes of action that San Francisco has typically used to file affirmative cases in recent years, with reference to the key statutory and decisional law and specific examples of the cases we have filed within each category.

1) Unfair Competition Law Cases: California's broad Unfair Competition Law ("UCL") prohibits any "unlawful, unfair or fraudulent business act or practice" and any "unfair, deceptive, untrue or misleading advertising." Cal. Bus. & Prof. Code §§ 17200-17210. The San Francisco City Attorney has standing to bring actions in the name of the People of the State of California to enjoin violations of the UCL and to obtain civil penalties of up to \$2,500 per violation. Cal. Bus. & Prof. Code §§ 17204, 17206.

Under the unlawful prong of section 17200, business practices that violate federal, state, or local laws or regulations are per se violations of the UCL. *Stop Youth Addiction v. Lucky Stores* 17 Cal.4th 553, 561-567 (1998). The deceptive prong prohibits business practices that are "likely to deceive" a significant proportion of the public (or of the intended audience). *Committee on Children's Television v. General Foods Corp.*, 35 Cal.3d 197, 211 (1983) (holding that general allegations that food companies marketed their sugared breakfast cereals to children in a deceptive manner were sufficient to state a UCL claim).

Under the unfair prong of section 17200, a practice that is neither unlawful nor deceptive can nevertheless be prohibited if it "offends an established public policy or . . . is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers" (*People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal.App.3d 509, 530 (1984)), or when the utility of the practice is outweighed by the harm it creates. *State Farm Fire & Cas. Co. v. Sup. Ct.*, 45 Cal.App.4th 1093, 1104 (1996). The California Supreme Court has expressed concern that these definitions of "unfairness" are too amorphous. The Court has limited the concept of unfairness, at least in cases brought by a defendant's competitor, to "conduct that threatens an incipient violation of an antitrust law, or violates the policy or spirit of one of those laws . . . or otherwise significantly threatens or harms competition." *Cel-Tech Communications v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 182-187 (1999). It is unclear whether similar limitations will be placed on unfair business practices cases brought by consumers or public prosecutors.

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The San Francisco City Attorney's Office has brought many significant suits under the UCL. Examples include a very successful UCL suit against the tobacco industry, which helped create fundamental reforms in tobacco industry marketing practices and enabled California local governments to share equally with the state in the multi-billion dollar tobacco settlement. We also filed an ultimately unsuccessful suit against firearm manufacturers for failing to control their distribution systems. *In re Firearms Cases*, 126 Cal.App.4th 959, 981 (2005). The Office's Code Enforcement team files numerous UCL suits against owners of substandard properties for failing to comply with housing codes (*see e.g., City and County of San Francisco v. Jen*, 135 Cal.App.4th 305 (2005); *City and County of San Francisco v. Sainez*, 77 Cal.App.4th 1302 (2000)), and against other businesses for violating applicable rules. *See e.g., People ex rel Renne v. Servantes*, 86 Cal.App.4th 1081 (2001) (enjoining renegade tow truck operation).

2) **Public Nuisance Law:** California law defines a nuisance as "anything which is injurious to health . . . or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" Cal. Civ. Code § 3479. A public nuisance is one that "affects at the same time an entire community or neighborhood, or any considerable number of persons" Cal. Civ. Code § 3479. The San Francisco City Attorney's Office has standing to bring an action in the name of the People of the State of California to abate a public nuisance. Cal. Code Civ. Proc. § 731.

The concept of nuisance has traditionally related to the misuse or abuse of real property. However, the nuisance doctrine is not limited only to such cases. Any activity that creates a substantial and unreasonable interference with collective social interests can be enjoined as a public nuisance. *People ex rel. Gallo v. Acuna*, 14 Cal.4th 1090, 1103-1105 (1997) (upholding injunction against members of a criminal street gang for creating a public nuisance on their turf).

The San Francisco City Attorney's Office recently filed a similar gang injunction case. *People ex rel. Herrera v. Oakdale Mob*, S.F. Sup. Ct. No. 456-517 (filed Sept. 27, 2006). Our office also relied on public nuisance law in suits against the firearms industry (*In re Firearms Cases*, 126 Cal.App.4th 959, 986-991 (2005)); lead paint manufacturers (*County of Santa Clara v. Atlantic Richfield Co.*, 137 Cal.App.4th 292, 304-306 (2006)); and in numerous code enforcement cases.

3) **False Claims Cases:** The Federal and California False Claims Acts prohibit the submission of false claims for payment from the government, or the withholding of money that is known to be owed to the government. 31 U.S.C. §§ 3729-3733, Cal. Gov. Code §§ 12650-12652. Remedies for violation of these Acts include treble damages and penalties of up to \$10,000 per false claim. False Claims cases provide a powerful remedy against those who seek to defraud the government. For example, a number of high profile false claim cases have recently been filed alleging fraud by pharmaceutical companies in charging excessive amounts for drugs under the Medicare program and similar state programs.

Our office has filed several substantial false claims cases. In one of these matters, San Francisco was awarded over \$10 million for unearthing a title insurance company's practice of failing to escheat unclaimed property to the State of California. *See State of California ex rel. Harris and Herrera v. Old Republic Title Co.*, 125 Cal.App.4th 1219 (2005), *superseded by*

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State of California ex rel. Harris and Herrera v. PriceWaterhouseCoopers, 39 Cal.4th 1220 (2006). Our office also unearthed a scheme to defraud the federal E-Rate program through bid-rigging and the submission of inflated claims for reimbursement of internet related equipment installed at schools, and filed a qui tam complaint that led to the recovery of over \$20 million by the federal government, of which more than \$4 million was awarded to the School District.

4) City As An Antitrust Victim: In addition to its role as a governmental entity, the City and County of San Francisco is a significant market participant. In this role, we purchase many products and services. When companies engage in price fixing and other anti-competitive practices, San Francisco is often a direct victim of those practices, and accordingly has standing to sue under federal and state antitrust laws. In recent years, we have filed antitrust suits against electricity and natural gas suppliers, computer chip manufacturers, and software companies. See e.g., *In re Microsoft Corp. Antitrust Litigation*, 2005 U.S. Dist. LEXIS 6695.

5) City As A Tort Victim: In some situations, San Francisco may also be damaged by an industry's tortious misconduct. Such damages may be direct (e.g., when San Francisco buys defective products) or indirect (e.g., when San Francisco's health care system spends money caring for the direct victims of a tortious practice.) For example, when San Francisco sued the tobacco industry we alleged that those companies committed a fraud on their customers and on the City by covering up the lethality and addictiveness of their products. See *City and County of San Francisco v. Philip Morris*, 1998 U.S. Dist. LEXIS 3071. Indirect tort theories based on San Francisco's outlays to treat injuries to its citizens or other programmatic costs will often give rise to difficulties of proof on issues such as reliance, causation, and damages.

6) Direct Challenges To State And Federal Laws: San Francisco has also filed direct constitutional challenges to state and federal laws. For example, San Francisco has filed an equal protection challenge to state laws that restrict marriage to opposite sex couples. *In re Marriage Cases*, 143 Cal.App.4th 873 (2006). San Francisco has also challenged the constitutionality of the federal partial birth abortion ban. *Planned Parenthood Federation of America v. Ashcroft*, 320 F.Supp.2d 957 (2004), *affirmed* 435 F.3d 1163, *cert. granted* 126 S. Ct. 2901 (2006).

The test for standing is more restrictive in federal court than in state court. In federal court, the City must demonstrate: (i) "actual injury" (i.e., an "actual" or "imminent" invasion of a legally protected interest); (ii) a causal connection between the injury and the conduct complained of; and (iii) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). If the City can show that any of its agencies are injured by the conduct at issue, it will have standing to sue in federal court. For example, in its challenge to the federal Partial Birth Abortion Ban Act, the City satisfies the standing requirement for the same reason Planned Parenthood does: its doctors at San Francisco General Hospital treat patients using the procedure banned by the statute.

In state court, the test for standing is somewhat more lenient. The City may challenge conduct by the State if the City has a beneficial interest in the subject matter of the litigation. Cal. Code Civ. Proc. § 1086. "Beneficially interested generally means the petitioner has some special interest to be served or some particular right to be preserved or protected over and above

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the interest held in common with the public at large." *Sacramento County Fire Protection Dist. v. Sacramento County Assessment Appeals Board II*, 75 Cal.App.4th 327, 331 (1999); *see also County of Ventura, et al. v. State Bar of California*, 35 Cal.App.4th 1055, 1060 (1995). In the marriage case, the City has asserted that it has an interest in protecting its employees from violating the constitution by denying marriage licenses to same-sex couples.

There is an exception to the "beneficial interest" requirement: In cases "where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty," the plaintiff need not show that he has any special interest in the result. *Green v. Obledo*, 29 Cal.3d 126, 144 (1981). Although this doctrine was created to enable a citizen to file suit, the City would consider attempting to invoke it in appropriate cases. The City might also consider, in appropriate cases, that it has standing to sue in a representative capacity on behalf of its residents. *See City of Compton v. Bunner*, 197 Cal.App.3d 662 (1988) (later depublished).

San Francisco can also challenge federal and state administrative agency regulations as being unconstitutional, inconsistent with statutes, or otherwise in excess of the authority of the promulgating agency. *See e.g. Spanish Speaking Citizens Foundation v. Low*, 85 Cal.App.4th 1179 (2000) (challenging auto insurance rate regulations for placing too much weight on a driver's zip code, and thereby unfairly penalizing many urban drivers with good driving records.)

7) Legislation Within San Francisco's Police Power, Or Placing Restrictions On Those Who Do Business With San Francisco: In addition to the power to bring affirmative litigation cases, San Francisco of course also has the power to legislate. Under state law, San Francisco has been delegated the same police power as is exercised by the State. As a Charter City, San Francisco can also adopt ordinances that are inconsistent with state law, so long as those ordinances relate to matters of municipal concern, and the state legislature has not declared any overarching state-wide interest. The precise boundaries of San Francisco's power to legislate over "municipal affairs" is not well defined. In California, local ordinances are often challenged as purportedly being preempted by state law. *See e.g., Great Western Shows Inc. v. County of Los Angeles*, 27 Cal.4th 853 (2002) (rejecting preemption challenge to local ordinance prohibiting the sale of guns and ammunition on county property). Similarly, local ordinances which venture into areas subject to federal regulation can be preempted by federal law. *Bank of America v. City and County of San Francisco*, 309 F.3d 551 (2002) (finding ordinance that limited fees on ATM transactions was preempted by the National Bank Act).

As a major market participant, San Francisco can also place restrictions on those who the City chooses to do business with, so long as those restrictions are not unconstitutional or otherwise invalid under state or federal law. For example, many state and local governments enacted laws that prohibited them from doing business with companies who had not divested themselves from all dealings with the apartheid regime in South Africa. More recently, San Francisco enacted an equal benefits ordinance, which requires firms that do business with San Francisco to offer the same benefits to domestic partners as they do to married couples. This law, and others like it, led to a vast increase in the availability of benefits to domestic partners, and has been largely upheld against state and federal preemption challenges. *S.D. Myers Inc. v. City and County of San Francisco*, 336 F.3d 1174 (2003); *Air Transportation Ass'n of America v. City and County of San Francisco*, 266 F.3d 1064 (2001).