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NEWS RELEASE

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Herrera Moves to Close Down 'Heaven'

Lawless North Beach Strip Club and Prostitution Venue Has Repeatedly Defied Notices of Violation, Cease and Desist Orders

SAN FRANCISCO (July 22, 2009)—City Attorney Dennis Herrera today moved to shutter a notorious North Beach strip club that has continued to operate in defiance of repeated City notices of violation, cease and desist orders, and police citations for prostitution dating back more than a year. In his 20-page pleading filed in San Francisco Superior Court this morning, Herrera petitioned Judge Charlotte Walter Woolard to declare the Heaven Mini Theatre at 1054 Kearny Street a public nuisance for operating in violation of state and local laws, and to issue a preliminary injunction that would close down the illicit enterprise.

Heaven Mini Theatre was also implicated in an April 9, 2009 shooting, in which a witness informed police investigators of his belief that an alleged Heaven employee was the gunman who shot two doormen at the Broadway Showgirls Nightclub in apparent retaliation for a physical altercation a week earlier. The victims, who had been shot in the thigh and neck respectively, survived.

“Naming a business ‘Heaven’ doesn’t place it beyond earthly laws and regulations, but that appears to be exactly what the operators of this illicit enterprise think,” said Herrera. “The Police and Planning Departments have been thorough and persistent in enforcing the law and doing their jobs. Yet gallingly, ‘Heaven’ sued the City because of it. The reality is that this lawless endeavor has no intention of obeying the law in San Francisco, and the court ordered injunction I’m seeking is necessary to shut it down.”

Herrera’s motion details an improbable procedural history of the case, in which the illicit establishment—which has operated without a single City permit—preemptively sued the City for violating its federal constitutional guarantees of equal protection and due process because of what it described as “selective enforcement” of state and local laws. Yet despite being lawfully served with a Cease and Desist Order by the San Francisco Planning Department, despite numerous citations for prostitution by the Police Department, and despite repeated warnings by the City Attorney’s Office, Heaven’s operators have stubbornly remained open for business, distributing lurid flyers promoting their unlawful enterprise, and allegedly engaging in at least one act of intimidation toward a promoter of a lawful and properly permitted competing establishment.

The case is *1054 Kearny, LLC, DBA Heaven Mini Theatre v. City and County of San Francisco*, San Francisco Superior Court No. CGC 08 479-624, filed Sept. 9, 2008.

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COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION
12

13 1054 KEARNY, LLC, DBA HEAVEN
MINI THEATRE,

14 Plaintiff,

15 vs.

16 CITY AND COUNTY OF SAN
FRANCISCO and DOES 1 to 25,

17 Defendants.

18 CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation,
19 and the PEOPLE OF THE STATE OF
CALIFORNIA, by and through DENNIS
20 J. HERRERA, City Attorney for the CITY
AND COUNTY OF SAN FRANCISCO,

21 Cross-Complainants,

22 vs.

23 ALYCE D K CRAFT TRUST; 1054
24 KEARNY, LLC, DBA HEAVEN MINI
THEATRE; PETER LAMBERTSON; and
25 DOES 1 through 100,

26 Cross-Defendants.
27
28

Case No. CGC 08 479-624

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
CROSS-COMPLAINANTS' MOTION
FOR PRELIMINARY INJUNCTION

Hearing Date: August 19, 2009
Hearing Judge: Charlotte Walter Woolard
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 9, 2008
Trial Date: Not Yet Set

TABLE OF CONTENTS

1

2 **TABLE OF AUTHORITIES** ii

3 INTRODUCTION 1

4 STATEMENT OF FACTS 2

5 I. SAN FRANCISCO PLANNING DEPARTMENT'S ADMINISTRATIVE

6 ACTIONS 2

7 A. Notice Of Violation..... 2

8 B. Cease And Desist Order..... 3

9 C. Administrative Hearing Before Board of Appeals..... 4

10 D. Complaint by Cross-Defendant 1054 Kearny, LLC, DBA Heaven

11 Mini Theater..... 4

12 E. Board of Permit Appeals Hearing On October 15, 2008. 4

13 F. New Cease and Desist Order 5

14 LEGAL ARGUMENT 5

15 I. CROSS-COMPLAINANT SEEKS A PRELIMINARY INJUNCTION

16 BECAUSE ALL EFFORTS TO OBTAIN CROSS DEFENDANTS'

17 COMPLIANCE HAVE FAILED. 5

18 II. CROSS-COMPLAINANTS HAVE STATUTORY AUTHORITY TO

19 OBTAIN IMMEDIATE INJUNCTIVE RELIEF..... 7

20 A. The Planning Code..... 7

21 B. The Unfair Competition Law 7

22 C. The Preliminary Injunction Should Issue Because Plaintiffs Are

23 Public Entities Seeking to Enjoin Violations of Statutes That Provide

24 For Injunctive Relief And Defendants Cannot Show Requisite Harm 8

25 1. Cross-Complainants Are More Than Reasonably Likely To

26 Prevail On The Merits..... 11

27 a. Cross-Complainants Have Produced A Legally

28 Authorized Cease And Desist Order 11

 b. Cross-Complainants Have Demonstrated The

 Existence of a Serious And Hazardous Public Nuisance

 Per Se 11

 c. Cross-Complainants Can Demonstrate That Cross-

 Defendants Have Committed And Continue To

 Commit Unfair And Unlawful Business Practices 12

 2. Cross-Defendants Cannot Meet Their Burden of Showing That

 an Injunction Will Cause Them Grave and Irreparable Harm 13

CONCLUSION..... 14

TABLE OF AUTHORITIES

State Cases

AL Holding Co. v. O'Brien & Hicks, Inc.
(1999) 75 Cal.App.4th 131010

Barquis v. Merchants Collection Assn.
(1972) 7 Cal.3d 9412

City and County of San Francisco v. City Investment Corp.
(1971) 15 Cal.App.3d 10316

City and County of San Francisco v. Padilla
(1972) 23 Cal.App.3d 3886

City and County of San Francisco v. Sainez
(2000) 77 Cal. App.4th 130213

City of Bakersfield v. Miller
(1966) 64 Cal.2d 936

Continental Baking Co. v. Katz
(1968) 68 Cal.2d 5128

Farmers Ins. Exch. v. Superior Court
(1992) 2 Cal.4th 37712

Hernandez v. Stabach
(1983) 145 Cal.App.3d 30913

IT Corporation v. County of Imperial
(1983) 35 Cal.3d 638, 13

People v. Acuna
(1997) 14 Cal.4th 109011

People v. Costa Mesa Blanca Convalescent Homes
(1984) 159 Cal.App.3d 53012

People v. McKale
(1979) 25 Cal.3d 62612

People v. National Association of Realtors
(1981) 120 Cal.App.3d 45912

Robbins v. Superior Court of Sacramento County
(1985) 38 Cal.3d 1998, 9

Saunders v. Superior Court
(1994) 27 Cal.App.4th 83212

1	<i>Stoiber v. Honeychuck</i>	
	(1980) 101 Cal.App.3d 903	13
2	<i>Volpicelli v. Jared Sydney Torrance Memorial Hospital</i>	
3	(1980) 109 Cal.App.3d 242	5
4	<i>Weingand v. Atlantic Savings & Loan Assn.</i>	
5	(1970) 1 Cal.3d 806	8
6	State Statutes & Codes	
7	Business & Professions Code	
	Section 17200.....	12
8	Section 17203.....	7
	Sections 17200-17210.....	2, 7
9	Civil Code	
10	Section 3479.....	11
11	Section 3480.....	11
12	Code of Civil Procedure	
	Section 426.30(a)	10
13	Section 731.....	7
14	Federal Cases	
15	<i>Church of Scientology v. Commissioner of Internal Revenue,</i>	
	823 F.2d 1310 (9 th Cir. 1987)	10
16	<i>Sherman v. Yolo County Chief Probation Officer,</i>	
17	2007 WL 2429712, *6 (E.D.Cal. 2007).....	10
18	<i>U.S. v. Alisal Water Corp.,</i>	
	114 F.Supp.2d 927 (N.D. Cal. 2000)	10
19	Federal Statutes	
20	United States Code	
21	Section 1983.....	4
22	San Francisco Statutes, Codes & Ordinances	
23	San Francisco Planning Code	
	Section 176.....	10
24	Section 176(b)(2)	3, 7, 11
	Section 176(b)(3)	1
25	Section 176(b)(4)	1
	Section 176(c)(1)	2
26	Section 303(c)(5)(A)(ii)	12, 13
27	Section 312(c)	12, 13
28	Section 790.36.....	2, 11, 12, 13

San Francisco Police Code

Section 791.....3, 11

1
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1 **INTRODUCTION**

2 Cross-defendants own, manage and operate a business known as Heaven Mini Theater at
3 1054 Kearny Street, in San Francisco, California. Currently, this business is operating without a
4 lawful permit, is a public nuisance and is in violation of various municipal codes, including
5 Planning and Police.

6 Moreover, more recently, police reports alleging acts of prostitution and a report of a
7 shooting related to an altercation involving one or more employees of Heaven Mini Theatre have
8 been filed.

9 While the City Planning Department ("Planning") was in process of defending itself from a
10 challenge by Cross-Defendants to the cease and desist order at the Board of Permit Appeals, Cross-
11 Defendants sued the City and County of San Francisco ("City") preemptively on the basis that
12 Planning was selectively enforcing its code, while ignoring other violators, alleging violations of
13 their rights under the Equal Protection and Due Process clauses of the U.S. Constitution.

14 Ultimately, Planning prevailed and the Board upheld Planning's Notice of Violation and
15 Cease and Desist Order (see Declaration of Tina Tam, Exhibit B, "Tam Decl.") on October 30,
16 2008. Planning served the Cross-Defendants with a copy of said order via Certified U.S. Mail on
17 November 8, 2008. (See Decl. Tam, Exhibit C)

18 Cross-Defendants proceeded to ignore it, and have been in continuous operation until the
19 present date. (See Declaration of Off. Scott Gaines, ¶5 -7, "Gaines Decl.")

20 The City seeks a preliminary injunction to enforce this valid, lawful order.

21 Due to the chronic and persistent penal code violations, such as prostitution, police code
22 violations, operating an adult business in close proximity, within 1000 feet, of other adult
23 entertainment and flagrant violation of Planning Codes, by operating without any form of valid
24 permit, Cross-Complainants bring this motion for a preliminary injunction and other equitable relief
25 against Cross-defendants, as well as its officers, agents, lessees, assigns and employees. Cross-
26 complainant requests that Cross-defendant be enjoined by this Court from maintaining and
27 operating the Heaven Mini Theater in violation of Planning Code Sections 176(b)(3), 176(b)(4),
28

1 176(c)(1). and 790.36, Business and Professions Code Sections 17200-17210 (the Unfair
2 Competition Law), and other applicable remedies available under California law.

3 **STATEMENT OF FACTS**

4 Cross-Complainants are informed and believe that Cross-Defendants have been the sole
5 owners, managers and operators with exclusive responsibility for the management, maintenance and
6 control of Heaven Mini Theater during all times pertinent to this lawsuit.

7 **I. SAN FRANCISCO PLANNING DEPARTMENT'S ADMINISTRATIVE ACTIONS**

8 **A. Notice Of Violation**

9 On March 17, 2008, the San Francisco Planning Department ("Planning") received
10 documentation from the Police Department that on February 2, 2008, February 3, 2008 and
11 February 10, 2008, the establishment known as Heaven Mini Theatre was operating past hours of
12 operation limits of 2 a.m. (See Declaration of F. Dario Jones, ¶4, "Jones Decl.") Also, on March
13 12, 2008, in response to complaints, the San Francisco Police Department Vice Crimes Division
14 conducted an investigation of the establishment. While conducting the investigation, the police
15 officers made an arrest for the solicitation of an act of prostitution. (See Declaration of Sgt. K.
16 Delaney, ¶1 -15, "Delaney Decl.")

17 In response, Planning conducted research for previous approvals for the use of the second
18 story as part of a commercial operation. Planning found no previous authorizations for any
19 commercial use, and found no building permit records that would indicate previous approvals for
20 the business, Heaven Mini-Theatre, the use of the second floor of the subject property, nor the
21 business signs that advertise Heaven Mini Theatre. (See Jones Decl., ¶6)

22 Based upon the above reports provided by the Police Department, and the lack of any
23 previous authorizations for the use of the second story, the subject property was found to be in
24 violation of Planning Code. (See Jones Decl., ¶7)

25 Planning determined that Planning Code §790.36 requires a 1000 foot separation between
26 Adult Entertainment uses. (See Jones Decl., ¶8)

27 In this case, the business located on the 2nd Floor of 1054 Kearny may not seek to legalize
28 through the Conditional Use process for adult entertainment due to the fact that it is located directly

1 above an already existing adult entertainment use known as Rio or XXX European DVD. (See
2 Jones Decl., ¶9)

3 Heaven Mini Theatre is an adult theatre featuring "Totally Nude Dances", according to
4 flyers the cross defendants have distributed freely and frequently in the North Beach area. (See
5 Brass Decl., ¶5, Exhibit B)

6 An adult theatre is defined by Police Code §791 as a theatre that is

7 used more than 10 percent of its presentation time, measured on an annual
8 basis, for the exhibition or display of entertainment which is distinguished or
9 characterized by an emphasis on matter depicting, describing or relating to
10 Specified Anatomical Areas, namely, less than completely and opaquely
11 covered (a) human genitals, pubic hair, buttock, natal cleft, perineum, anal
12 region, and (b) female breast at or below the areola thereof; and human male
13 genitals in a discernibly turgid state, even if completely and opaquely
14 covered.

15 The Planning Department's Zoning Administrator, Lawrence B. Badiner, then issued a
16 Notice of Violation, which recited all the above allegations and sent it in letter form to Cross-
17 Defendant, Craft Alyce D K Trust, P.O. Box 3598, Incline Villa, NV 89450, the owner of the
18 property on April 14, 2008 via U.S. Mail. (See Jones Decl., ¶10, Exhibit A).

19 **B. Cease And Desist Order**

20 On May 14, 2008, Planning Department's, F. Dario Jones, issued a Cease and Desist Order
21 to Craft Alyce DK Trust at P.O. Box 3598, Incline Villa, NV 89450, Heaven Mini Theatre at 1054
22 Kearny Street, San Francisco, CA 94133 and Peter Lambertson, at 483 Broadway, San Francisco,
23 CA 94133, stating that "the failure to immediately cease and desist all operations and activity
24 related to the no authorized Adult entertainment Use knows (sic) as Heaven Mini Theatre will result
25 in the immediate request for assistance by the Office of the City Attorney on Monday, May 19,
26 2008 to maintain an action for injunction or to restrain or abatement to cause correction or removal
27 of this violation and for the assessment and recovery of civil penalty for such violations as well as
28 attorney fees or costs, including but not limited to expert witness fees, incurred in maintaining such
an action as authorized by Planning Code §176(b)(2)." (See Jones Decl., ¶11, Exhibit B).

1 **C. Administrative Hearing Before Board of Appeals**

2 An administrative hearing was scheduled for July 16, 2008, in order to allow the Cross-
3 Defendants to appear and have an opportunity to be heard prior to issuing an Order of Abatement
4 and making an official referral to the City Attorney's Office for the filing of a lawsuit against Cross-
5 Defendants. (See Jones Decl., ¶12)

6 Cross-Defendants failed to appear at the hearing as scheduled and the Board of Appeals
7 issued an order affirming the Notice of Violation and upheld the May 14, 2008 Cease and Desist
8 Order. (See Tam Decl., ¶5)

9 On August 13, 2008, attorneys for the Cross-Defendants appeared at the Board to request
10 that the default be set aside, and a new hearing be set at a later date on the basis that their non
11 appearance on July 16, 2008 was due to the fact that Cross-Defendants' counsel believed he had
12 reached an oral agreement with the Zoning Administrator to continue the hearing, and had
13 detrimentally relied on that, having assumed the hearing was taken off calendar, when in fact it was
14 not. (See Tam Decl., ¶6)

15 The Board granted the request for good cause and gave the Cross-Defendants a hearing date
16 of October 15, 2008. (See Tam Decl., ¶7)

17 **D. Complaint by Cross-Defendant 1054 Kearny, LLC, DBA Heaven Mini Theater**

18 Cross-Defendant 1054 Kearny, LLC, DBA Heaven Mini Theatre then filed a Complaint on
19 September 9, 2008 suing the City and County of San Francisco. The causes of action are based on
20 U.S.C. §1983 equal protection and due process violations of the U.S. Constitution, and asking for
21 declaratory relief. (See Brass Decl., Exhibit A).

22 **E. Board of Permit Appeals Hearing On October 15, 2008.**

23 Cross-Defendant 1054 Kearny, LLC, DBA Heaven Mini Theatre, through counsel, appeared
24 before the Board of Appeals to contest the basis for Planning issuance of their April 14, 2008 NOV.
25 After hearing the presentation of Planning's case, and hearing the testimony of two dancers who
26 perform at Heaven, Captain Dudley's testimony, as well as arguments by counsel, the Board decided
27 by unanimous vote to uphold the NOV. (See Tam Decl., ¶8-9)

1 surrounding lawfully operating adult entertainment establishment (See Declaration of Off.
2 McWilliams, ¶13-19, "McWilliams Decl."), and flagrantly failing to comply with the law by
3 insisting on remaining open for business as usual in spite of the Cease and Desist Order (See Gaines
4 Decl., ¶1-8).

5 By seeking a preliminary injunction in this matter, Cross-Complainants seek to enforce
6 certain minimum standards for public health, safety, and welfare, as codified in the San Francisco
7 Planning and Police Codes. This action is consistent with Cross-Complainants' goal of maintaining
8 the public welfare. There is no adequate legal remedy available to Cross-Complainants that can
9 satisfy this goal. Cross-Defendants' ongoing refusal to close down this business as commanded by
10 Planning's Cease and Desist Order in compliance with state and local Planning and Police Codes
11 renders this injunction as only viable option for Cross-Complainants. In order to ameliorate the
12 dangers inherent in allowing a business to operate outside the boundaries set forth by law, Cross-
13 Complainants are entitled to the relief requested. An equitable remedy, in the form of a preliminary
14 injunction sought herein, compelling Cross-Defendants to immediately close down the Heaven Mini
15 Theater, is the only means by which Cross-Complainants can fulfill their obligation to protect the
16 health, safety and welfare of their citizens.

17 California courts have consistently approved injunctive relief as a proper remedy for
18 nuisance abatement on real property when nuisance is caused by failure to maintain a property in
19 compliance with local and state laws. *City and County of San Francisco v. City Investment Corp.*
20 (1971) 15 Cal.App.3d 1031, 1042 (fire code); *City and County of San Francisco v. Padilla* (1972)
21 23 Cal.App.3d 388, 401 (planning code); *City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 99-101
22 (building code).

23 To the extent that the facts demonstrate that Cross-Defendants have kept their business open
24 at the 1054 Kearny Street property continuously, despite being ordered to close by a lawful Cease
25 and Desist Order, Heaven Mini Theatre at the 1054 Kearny Street property is a public nuisance
26 within the meaning of the above authorities. As such, Cross-complainants request for injunctive
27 relief is proper. Accordingly, a preliminary injunction should issue to enforce this Cease and Desist
28

1 Order, to abate all the dangerous, unlawful conditions that pose a threat to the safety and health of
2 the residents of San Francisco.

3 **II. CROSS-COMPLAINANTS HAVE STATUTORY AUTHORITY TO OBTAIN**
4 **IMMEDIATE INJUNCTIVE RELIEF**

5 Code of Civil Procedure §731 authorizes a City Attorney to bring an action to abate a public
6 nuisance.

7 **A. The Planning Code**

8 Planning Code §176(b)(2) provides that the Zoning Administrator of the San Francisco
9 Planning Department by "[c]alling upon the City Attorney to maintain an action for *injunction* to
10 restrain or abatement to cause the correction or removal of any such violation, and for assessment
11 and recovery of a civil penalty for such violation as well as any attorneys' fees or costs, including
12 but not limited to expert witness fees, incurred in maintaining such an action". (emphasis added)

13 By violating the lawful Cease and Desist Order issued by Planning, Heaven Mini Theater is
14 a subject to an action for an injunction by the City Attorney's Office on behalf of Planning as set
15 forth in §176(b)(2). Cross-Defendants were represented at the Board of Appeals by counsel,
16 wherein they challenged the Notice of Violation. They had an opportunity to be heard, put on a
17 defense, test the evidence brought forth by Planning. The Board of Appeals upheld the Notice of
18 Violation and the Cease and Desist Order being challenged by Cross-Defendants. On October 30,
19 2008, the Cease and Desist Order was issued pursuant to this decision.

20 Cross-Defendants have refused to comply, leaving Cross-Complainants no choice but to
21 pursue this injunctive relief.

22 **B. The Unfair Competition Law**

23 The Unfair Competition Law authorizes the City Attorney to bring an action to enjoin unfair
24 and/or unlawful business practices. Business and Professions Code §17203.

25 By keeping Heaven Mini Theater open in flagrant violation of Planning's lawful Cease and
26 Desist Order, Cross-Defendants have necessarily engaged in unlawful and unfair business practices,
27 within the meaning of the Unfair Competition Law.
28

1 **C. The Preliminary Injunction Should Issue Because Plaintiffs Are Public Entities**
2 **Seeking to Enjoin Violations of Statutes That Provide For Injunctive Relief And**
3 **Defendants Cannot Show Requisite Harm**

4 The decision to grant a preliminary injunction rests in the discretion of the court.

5 *Continental Baking Co. v. Katz* (1968) 68 Cal.2d 512, 527. The Court must "exercise its discretion
6 'in favor of the party most likely to be injured.'" *Robbins v. Superior Court of Sacramento County*
7 (1985) 38 Cal.3d 199, 205. "If the denial of an injunction would result in great harm to plaintiff,
8 and the defendants would suffer little harm if it were granted, then it is an abuse of discretion to fail
9 to grant the preliminary injunction." *Id.*

10 When deciding whether to issue a preliminary injunction, courts employ a two-prong test:
11 "1) Are the plaintiffs likely to suffer greater injury from the denial of the injunction than the
12 defendants are likely to suffer from its grant; and 2) is there a reasonable probability that the
13 plaintiff will prevail on the merits." *Id.* at 206.

14 Ordinarily, the first prong requires a court to balance the interim harm plaintiff, in this case
15 Cross-Complainants, will sustain if the injunction is denied against the harm the Cross-Defendants
16 will likely suffer if the preliminary hearing is issued. *Weingand v. Atlantic Savings & Loan Assn.*
17 (1970) 1 Cal.3d 806, 820. But, where the Cross-Complainant is a public entity seeking to enjoin
18 violations of statutes that specifically provide for injunctive relief, it is entitled to a rebuttable
19 presumption that the potential harm to the public outweighs the potential harm to the public
20 outweighs the potential harm to Cross-Defendants. *IT Corporation v. County of Imperial* (1983) 35
21 Cal.3d 63, 72. Only "(i)f the defendant shows that it would suffer grave or irreparable harm from
22 the issuance of the preliminary injunction, [must] the court examine the relative harm to the
23 parties." *Id.*

24 Here, where the City and the People of the State of California are the Cross-Complainants,
25 this balancing test must only be performed if Cross-Defendants can show that grave or irreparable
26 harm will result from issuance of the preliminary injunction.

27 Cross-Defendants cannot satisfy this burden.

1 An injunction to enforce a lawfully issued Cease and Desist Order against Heaven Mini
2 Theater/1054 Kearny LLC will not cause them any undue harm. In fact, forcing them to close down
3 will not interfere with any legitimate interest held by Cross-Defendants since they have no right to
4 operate an illegal business there and the location can be used for any variety of legal businesses, as
5 the possibilities in this thriving commercial area of San Francisco are nearly limitless.

6 Moreover, the continued existence of an illegal business at this premises can only hurt their
7 property value, not help it.

8 Next, the court must assess the likelihood that the plaintiff will prevail on the merits at trial.
9 As discussed below, such a likelihood exists in the instant case. The facts unequivocally show that
10 Cross-Defendants' property is being used in flagrant violation of Planning's lawfully issued October
11 30, 2008 Cease and Desist Order. There is continued evidence of prostitution being allowed on the
12 premises. (Attached Declaration of Sgt. K. Delaney, ¶8, "Delaney Decl.") No permit has been
13 issued for a change of use to adult entertainment, yet flyers are being actively distributed
14 advertising "Totally Nude Dances" throughout the North Beach area of San Francisco. (See Brass
15 Decl., Exhibit B)

16 Furthermore, a shooting was investigated relating to an altercation involving an employee of
17 Heaven Mini Theater threatening a street promoter of a neighboring club. (See Decl. McWilliams,
18 ¶1)

19 The continuous operation of the Heaven Mini Theater, despite the October 30, 2008 Cease
20 and Desist Order, coupled with these other incidents relating to prostitution and assaultive,
21 threatening behavior of its agents and/or employees, underscores the likelihood that Cross-
22 Complainants will prevail on the merits.

23 The Cross-defendants' complaint is based on alleged violations of the Fourteenth
24 Amendment of the U.S. Constitution 's Equal Protection and Due Process clauses relating to
25 selective enforcement by Planning's when they issued their Notice of Violation. This may be
26 considered as part of the second prong of the *Robbins* case test analysis to examine whether such a
27 claim would affect the viability of Cross-Defendants' cross complaint.

28 We urge the court to consider the following when analyzing this aspect of the case.

1 First, the undisputed evidence establishes that there was no selective enforcement against
2 Cross-Defendants. Any selective enforcement under the Fourteenth Amendment's Equal Protection
3 Clause must be backed up by evidence that: "(1) others generally are not prosecuted for the same
4 conduct and (2) the decision to prosecute this (cross)defendant was based upon impermissible
5 grounds such as race, religion or exercise of constitutional rights." *U.S. v. Alisal Water Corp.*, 114
6 F.Supp.2d 927, 936 (N.D. Cal. 2000) citing *Church of Scientology v. Commissioner of Internal*
7 *Revenue*, 823 F.2d 1310, 1321 (9th Cir. 1987). It is not enough for Cross-Defendants to allege that
8 similarly situated individuals adult clubs were not cited by Planning for violations of the local
9 Planning and Police Codes; they must present evidence of such treatment. See *Sherman v. Yolo*
10 *County Chief Probation Officer*, 2007 WL 2429712, *6 (E.D.Cal. 2007).

11 This case is still in its early stages and discovery has yet to be conducted, but at his early
12 juncture no such evidence has been alleged or presented.

13 Second, the act of filing a complaint against the City vitiated the City Attorney's office
14 discretion, as we are compelled to respond, per §426.30(a) of the Code of Civil Procedure, within
15 30 days, not only by way of Answer, but also to file any cross-complaint within the same time
16 limits if such cross complaint contains "any related cause of action that he or she has against the
17 plaintiffs". Cross-complainants would otherwise risk waiving any such claims, unless granted leave
18 from the court to bring them at a later date, but only upon a showing of good cause, making the
19 City's cross complaint here compulsory [See *AL Holding Co. v. O'Brien & Hicks, Inc.* (1999) 75
20 Cal.App.4th 1310, 1313-1314].

21 Therefore, the City was compelled to bring this counter lawsuit by the pre-emptive actions
22 of Cross-Defendants. Prior to the filing of their complaint, Planning's referral to the City Attorneys'
23 Office for enforcement under §176 of the Planning Code would have been entirely up to the City
24 Attorney's Office's discretion to pursue any or all remedies, if any at all. By forcing us to respond
25 to their cross-complaint they have eviscerated any viability that the City abused its discretion, which
26 is at the very heart of their original complaint. For these reasons, there is a reasonable probability
27 that the Cross-complainant will prevail on this aspect of this case, as well.

1 Furthermore, granting an injunction will not interfere with any legitimate interest held by the
2 Cross-Defendants, as one has no right to operate an illegal business that is operating without any
3 permits from the local municipality that exercises jurisdiction over its operation.

4 **1. Cross-Complainants Are More Than Reasonably Likely To Prevail On
The Merits**

5 **a. Cross-Complainants Have Produced A Legally Authorized Cease
6 And Desist Order**

7 On October 30, 2008, the Board of Permit Appeals upheld Planning's Notice of Violation
8 and Cease and Desist Order. Said Order was lawfully served upon operators of Heaven Mini
9 Theater via U.S. Mail on October 30, 2008.

10 Since that time, Heaven Mini Theater has been in continuous operation. By violating this
11 lawful Cease and Desist Order issued by Planning and upheld by the Board of Permit Appeals,
12 Cross-Defendants are subject to an action for an injunction by the City Attorney's Office on behalf
13 of Planning as set forth in §176(b)(2).

14 **b. Cross-Complainants Have Demonstrated The Existence of a
15 Serious And Hazardous Public Nuisance Per Se**

16 Under Civil Code §3479, a nuisance is defined as "[a]nything which is injurious to
17 health...so as to interfere with the comfortable enjoyment of life or property." Civil Code §3479.
18 A *public* nuisance is defined as "one which affects at the same time an entire community or
19 neighborhood, or any considerable number of person, although the extent of the annoyance of
20 damage inflicted upon individuals may be unequal." Civil Code §3480. See also *People v. Acuna*
21 (1997) 14 Cal.4th 1090, 1120.

22 Cross-Complainants will prevail on the merits because they can prove that the Property is a
23 per se public nuisance, as it is maintained in violation of Planning Code §790.36 as defined by
24 Police Code §791. Cross-Defendants now are, and for a considerable period of time, have been
25 managing, operating and running a business called Heaven's Mini Theater at the Property featuring
26 "Totally Nude Dancing". Said adult entertainment is considered Adult Entertainment Use within
27 the meaning of Planning Code §790.36 as defined by Police Code §791. The Adult Entertainment
28 Use is an on-going violation of the aforementioned San Francisco Planning and Police Codes.

1 Specifically, Cross-Defendants are in violation of:

- 2 1) Planning Code §790.36 by operating a place featuring adult entertainment within 1000 feet
- 3 of other establishments featuring adult entertainment;
- 4 2) Planning Code §312(c) by having no authorization for any commercial use and having no
- 5 building permit records that would indicate previous approvals for the business, Heaven
- 6 Mini Theatre, on the second floor of the subject property; and,
- 7 3) Planning Code §303(c)(5)(A)(ii) by operating past hours of operation limits of 2 a.m.

8 Cross-complainants will be able to establish that the operation of Heaven Mini Theater at
9 the Property is a per se public nuisance under the Planning and Police Code.

10 **c. Cross-Complainants Can Demonstrate That Cross-Defendants**
11 **Have Committed And Continue To Commit Unfair And Unlawful**
12 **Business Practices**

13 "Unlawful competition" is defined as "any unlawful, unfair, or fraudulent business act or
14 practice." Bus. & Prof. Code §17200. "The 'unlawful' practices prohibited by §17200 et. seq. are
15 any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory,
16 regulatory, or court-made." *Saunders v. Superior Court* (1994) 27 Cal.App.4th 832, 838-839. One
17 court concluded that "an 'unfair' business practice occurs when it offends an established public
18 policy or when the practice is immoral, unethical, oppressive, unscrupulous, or substantially
19 injurious to consumers." *People v. Costa Mesa Blanca Convalescent Homes* (1984) 159
20 Cal.App.3d 530, 534. The "unlawful" prong "borrows violations of other laws" and treats them as
21 "practices independently actionable under §17200." *Farmers Ins. Exch. v. Superior Court* (1992) 2
22 Cal.4th 377, 383 (quotations omitted).

23 California courts have consistently interpreted Bus. & Prof. Code §17200 broadly. An
24 "unlawful business activity" has been found to include anything that can properly be called a
25 business practice and at the same time is forbidden by law. *People v. McKale* (1979) 25 Cal.3d
26 626, 632 (citing *Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113); *People v. National*
27 *Association of Realtors* (1981) 120 Cal.App.3d 459, 474.

28 Courts have found that, in enacting §17200, the Legislature intended to permit courts to
enjoin wrongful business conduct in whatever context it might occur. *Barquis, supra*, 7 Cal.3d at

1 111. This would include ownership of a property which allows the operation of an illegal business
2 while collecting monthly income from rent or simply a real estate speculator, profiting from the rise
3 of real estate values, while turning a blind eye to an illegal business on the Property. When the
4 Property is being used for such an illegal business in violation of the Planning and Police Codes, as
5 enumerated above, it is maintained in an unlawful manner, and therefore, constitutes an unlawful
6 business practice by the property owner and their agents, employees, tenants and anyone else
7 authorized to do so on the Property. *Hernandez v. Stabach* (1983) 145 Cal.App.3d 309, 314;
8 *Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 926-928; *City and County of San Francisco v.*
9 *Sainez* (2000) 77 Cal. App.4th 1302 at 1321.

10 Cross-Defendants committed unfair and unlawful business practices at their Property by
11 allowing Heaven Mini Theater to operate in clear and flagrant violation of Planning's Cease and
12 Desist Order, as well as Planning Code §790.36, §303(c)(5)(A)(ii), and §312(c).

13 **2. Cross-Defendants Cannot Meet Their Burden of Showing That an**
14 **Injunction Will Cause Them Grave and Irreparable Harm**

15 Based on its overwhelming evidence, Cross-Complainants are more than reasonably likely
16 to prevail on the merits of their claims. Therefore, the requested injunctive relief must be issued
17 unless Cross-Defendants can meet their burden of showing that the injunction requested, if issued,
18 would cause them to suffer "grave and irreparable harm." *IT Corporation v. County of Imperial,*
19 *supra*, 35 Cal.3d at 72. Cross-Defendants cannot meet this burden. Being court ordered to simply
20 comply with the law in timely fashion in order to promote the health and safety of the public cannot
21 realistically constitute the requisite grave or irreparable harm need to overcome the rebuttable
22 presumption in favor of Cross-Complainants. If anything, the closure of Heaven Mini Theater
23 would, if anything, increase the property value of 1054 Kearny. By attempting to squeeze Heaven
24 Mini Theater into a fictitious definition of legitimate adult entertainment, Cross-Defendants only
25 further compounds the illegality by creating a fiction that remains illegal per se, as it fails to be
26 more than 1000 feet of other adult entertainment in that neighborhood, which continues to be a
27 violation of Planning Code §790.36. By cementing the reputation of this property with the negative
28

1 association being created by this illegal business, Cross-Defendants are harming themselves far
2 more than the granting of this injunction ever could.

3 **CONCLUSION**

4 For all the foregoing reasons, Cross-Complainants respectfully request that this Court issue
5 the proposed Preliminary Injunction.

6 Dated:

7 DENNIS J. HERRERA
8 City Attorney
9 ALEX G. TSE
10 Chief Attorney
11 Neighborhood and Resident Safety Division
12 FRANK BRASS
13 Deputy City Attorney

14 By: _____
15 FRANK BRASS
16 Attorneys for Cross-Complainants
17 CITY AND COUNTY OF SAN FRANCISCO
18 Attorneys For Cross-Complainants
19 CITY AND COUNTY OF SAN FRANCISCO and
20 PEOPLE OF THE STATE OF CALIFORNIA
21
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1 **PROOF OF SERVICE**

2 I, Morris Allen, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market
5 Street, Sixth Floor, San Francisco, CA 94102.

6 On July 22, 2009, I served the following document(s):

7 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF CROSS-
8 COMPLAINANTS' MOTION FOR PRELIMINARY INJUNCTION**

9 on the following persons at the locations specified:

10 Gregory S. Walston Esq.
11 Walston Cross, Attorneys
12 735 Montgomery Street, Suite 250
13 San Francisco, CA 94111

14 in the manner indicated below:

15 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies
16 of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing
17 with the United States Postal Service. I am readily familiar with the practices of the San Francisco City
18 Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s)
19 that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that
20 same day.

21 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed
22 envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional
23 messenger service. **A declaration from the messenger who made the delivery** **is attached** or **will**
24 **be filed separately with the court.**

25 **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed
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28 In the ordinary course of business, the sealed envelope(s) that I placed for collection would be collected by a
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BY FACSIMILE: Based on a written agreement of the parties to accept service by fax, I transmitted true
and correct copies of the above document(s) via a facsimile machine at telephone number Fax #' to the persons
and the fax numbers listed above. The fax transmission was reported as complete and without error. The
transmission report was properly issued by the transmitting facsimile machine, and **a copy of the transmission**
report **is attached** or **will be filed separately with the court.**

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

Executed July 22, 2009, at San Francisco, California.

Morris Allen

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1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 ALEX G. TSE, State Bar #152348
Chief Attorney
3 Neighborhood and Resident Safety Division
FRANK BRASS, State Bar #160022
4 Deputy City Attorney
1390 Market Street, Seventh Floor
5 San Francisco, California 94102-5408
Telephone: (415) 554-3880
6 Facsimile: (415) 437-4644
E-Mail: Frank.Brass@sfgov.org
7

8 Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

9 Attorneys For Cross-Complainants
10 CITY AND COUNTY OF SAN FRANCISCO AND
PEOPLE OF THE STATE OF CALIFORNIA

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

13 1054 KEARNY, LLC, DBA HEAVEN
14 MINI THEATRE,

15 Plaintiff,

16 vs.

17 CITY AND COUNTY OF SAN
FRANCISCO and DOES 1 to 25,

18 Defendants.

19 CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation,
20 and the PEOPLE OF THE STATE OF
CALIFORNIA, by and through DENNIS
21 J. HERRERA, City Attorney for the CITY
AND COUNTY OF SAN FRANCISCO,

22 Cross-Complainants,

23 vs.

24 ALYCE D K CRAFT TRUST; 1054
25 KEARNY, LLC, DBA HEAVEN MINI
THEATRE; PETER LAMBERTSON; and
26 DOES 1 through 100,

27 Cross-Defendants.
28

Case No. CGC 08 479-624

DECLARATION OF SFPD OFFICER S.
GAINES IN SUPPORT OF CROSS-
COMPLAINANTS' MOTION FOR
PRELIMINARY INJUNCTION

Hearing Date: August 19, 2009
Hearing Judge: Charlotte Walter Woolard
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 9, 2008
Trial Date: Not Yet Set

1 I, OFFICER S. GAINES, #1037, declare as follows:

2 1. On May 3, 2009, at 2:06 a.m., Sgt. Riskin, Star #1915, and I were working in full
3 uniform and did a permit check at 483 Broadway, Heaven Mini Theater after I saw two customers
4 enter the business after 2:00 a.m.

5 2. We entered the club and I saw three men waiting on couches in the lobby while two
6 female dancers/employees were in the lobby.

7 3. One of the females was dancing on an elevated stage with a brass pole.

8 4. The females quickly stopped and the manager, Mr. Welch, came out to the lobby.

9 5. I told Mr. Welch that we were conducting a permit check and he was operating
10 without an entertainment permit, and he is operating without an after hours permit.

11 6. Mr. Welch told me that he was told by his attorneys that they did not need these
12 permits to operate and that he should not allow police to inspect the premises.

13 7. I told Mr. Welch that there is a cease and desist order for this business, and an
14 injunction is also pending.

15 8. I cited Mr. Welch per above and released him with this promise to appear.

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

18 Dated: _____

19 _____
20 Officer S. Gaines, Star #1037
21
22
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1 **PROOF OF SERVICE**

2 I, Morris Allen, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market
5 Street, Sixth Floor, San Francisco, CA 94102.

6 On July 22, 2009, I served the following document(s):

7 **DECLARATION OF SFPD OFFICER S. GAINES IN SUPPORT OF CROSS-
8 COMPLAINANTS' MOTION FOR PRELIMINARY INJUNCTION**

9 on the following persons at the locations specified:

10 Gregory S. Walston Esq.
11 Walston Cross, Attorneys
12 735 Montgomery Street, Suite 250
13 San Francisco, CA 94111

14 in the manner indicated below:

15 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies
16 of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing
17 with the United States Postal Service. I am readily familiar with the practices of the San Francisco City
18 Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s)
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transmission report was properly issued by the transmitting facsimile machine, and **a copy of the transmission**
report **is attached** or **will be filed separately with the court.**

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

Executed July 22, 2009, at San Francisco, California.

Morris Allen

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 ALEX G. TSE, State Bar #152348
Chief Attorney
3 Neighborhood and Resident Safety Division
FRANK BRASS, State Bar #160022
4 Deputy City Attorney
1390 Market Street, Seventh Floor
5 San Francisco, California 94102-5408
Telephone: (415) 554-3880
6 Facsimile: (415) 437-4644
E-Mail: Frank.Brass@sfgov.org
7

8 Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

9 Attorneys For Cross-Complainants
10 CITY AND COUNTY OF SAN FRANCISCO AND
PEOPLE OF THE STATE OF CALIFORNIA

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

13 1054 KEARNY, LLC, DBA HEAVEN
14 MINI THEATRE,

15 Plaintiff,

16 vs.

17 CITY AND COUNTY OF SAN
FRANCISCO and DOES 1 to 25,

18 Defendants.

19 CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation,
20 and the PEOPLE OF THE STATE OF
CALIFORNIA, by and through DENNIS
21 J. HERRERA, City Attorney for the CITY
AND COUNTY OF SAN FRANCISCO,

22 Cross-Complainants,

23 vs.

24 ALYCE D K CRAFT TRUST; 1054
25 KEARNY, LLC, DBA HEAVEN MINI
THEATRE; PETER LAMBERTSON; and
26 DOES 1 through 100,

27 Cross-Defendants.
28

Case No. CGC 08 479-624

DECLARATION OF SFPD OFFICER
THOMAS MCWILLIAMS IN SUPPORT
OF CROSS-COMPLAINANTS' MOTION
FOR PRELIMINARY INJUNCTION

Hearing Date: August 19, 2009
Hearing Judge: Charlotte Walter Woolard
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 9, 2008
Trial Date: Not Yet Set

1 I, OFFICER THOMAS MCWILLIAMS, #1227, declare as follows:

2 1. On April 9, 2009, at 1:02 a.m., Officer Thompson, Star #153 and I responded to the
3 Broadway Showgirls Nightclub (412 Broadway) regarding a shooting at this location.

4 2. Upon our arrival, I was ushered inside the nightclub by several employees who were
5 congregating outside.

6 3. Inside the nightclub, I observed one unknown male, later identified as Ian Heibel,
7 lying on his back on the floor in the hallway.

8 4. Heibel appeared to have sustained a single gunshot wound to the exterior of this left
9 thigh.

10 5. As I was tending to his wounds, another club employee told me that there was
11 another gunshot victim in the rear of the club.

12 6. I directed Officer Thompson to the other gunshot victim, who was later identified as
13 Rodger Mac.

14 7. Mr. Mac appeared to have sustained a single gunshot wound to the right side of this
15 neck.

16 8. Both Mr. Heibel and Mr. Mac were transported to SFGH for further treatment of
17 their injuries.

18 9. While on scene, I was also able to interview Cale Quasha, a doorman for the
19 Broadway Showgirls Nightclub.

20 10. Mr. Quasha told me that he was standing outside of Showgirls nightclub when both
21 Heibel and Mac were shot.

22 11. As I spoke to Mr. Quasha, he kept saying, "I got my friends shot".

23 12. I asked Mr. Quasha what he meant by this.

24 13. Mr. Quasha said that approximately one week prior, he had been passing out
25 Showgirls club passes to pedestrians on the street in front of other Broadway Street clubs, when he
26 was confronted by an unknown individual who Quasha recognized as an employee of Club Heaven
27 (a.k.a. Heaven Mini Theater).

1 14. Mr. Quasha stated that this individual, possibly named Mike, verbally berated
2 Quasha at that time.

3 15. On April 9, 2009, Mr. Quasha said that he had another run in with Mike in front of
4 Club Heaven.

5 16. Mike confronted Mr. Quasha and began to physically assault him, at which time Mr.
6 Quasha backed off and tried to calm Mike down.

7 17. Mr. Quasha then stated that Mike told him, "I am not going to do this on camera. I
8 won't get you now, but will get you later."

9 18. Mr. Quasha said he then left the area and returned to his post in front of Broadway
10 Showgirls club.

11 19. Although Mr. Quasha stated that he did not see the shooter, he was very adamant that
12 it was Mike who was the shooter.

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

15 Dated: _____

16 _____
17 Officer Thomas McWilliams, Star #1227
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1 **PROOF OF SERVICE**

2 I, Morris Allen, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market
Street, Sixth Floor, San Francisco, CA 94102.

5 On July 22, 2009, I served the following document(s):

6 **DECLARATION OF SFPD OFFICER THOMAS MCWILLIAMS IN SUPPORT OF
7 CROSS-COMPLAINANTS' MOTION FOR PRELIMINARY INJUNCTION**

8 on the following persons at the locations specified:

9 Gregory S. Walston Esq.
Walston Cross, Attorneys
735 Montgomery Street, Suite 250
San Francisco, CA 94111

10 in the manner indicated below:

11 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies
12 of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing
13 with the United States Postal Service. I am readily familiar with the practices of the San Francisco City
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23 transmission report was properly issued by the transmitting facsimile machine, and **a copy of the transmission**
report **is attached** or **will be filed separately with the court.**

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

25 Executed July 22, 2009, at San Francisco, California.

26 _____
27 Morris Allen
28

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 ALEX G. TSE, State Bar #152348
Chief Attorney
3 Neighborhood and Resident Safety Division
FRANK BRASS, State Bar #160022
4 Deputy City Attorney
1390 Market Street, Seventh Floor
5 San Francisco, California 94102-5408
Telephone: (415) 554-3880
6 Facsimile: (415) 437-4644
E-Mail: Frank.Brass@sfgov.org
7

8 Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

9 Attorneys For Cross-Complainants
10 CITY AND COUNTY OF SAN FRANCISCO AND
PEOPLE OF THE STATE OF CALIFORNIA

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

13 1054 KEARNY, LLC, DBA HEAVEN
14 MINI THEATRE,

15 Plaintiff,

16 vs.

17 CITY AND COUNTY OF SAN
FRANCISCO and DOES 1 to 25,

18 Defendants.

19 CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation,
20 and the PEOPLE OF THE STATE OF
CALIFORNIA, by and through DENNIS
21 J. HERRERA, City Attorney for the CITY
AND COUNTY OF SAN FRANCISCO,

22 Cross-Complainants,

23 vs.

24 ALYCE D K CRAFT TRUST; 1054
25 KEARNY, LLC, DBA HEAVEN MINI
THEATRE; PETER LAMBERTSON; and
26 DOES 1 through 100,

27 Cross-Defendants.
28

Case No. CGC 08 479-624

DECLARATION OF SFPD SGT. K.
DELANEY IN SUPPORT OF CROSS-
COMPLAINANTS' MOTION FOR
PRELIMINARY INJUNCTION

Hearing Date: August 19, 2009
Hearing Judge: Charlotte Walter Woolard
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 9, 2008
Trial Date: Not Yet Set

1 I, SGT. K. DELANEY, #1320, declare as follows:

2 1. I am employed as a San Francisco Police Officer.

3 2. On March 12, 2009, at approximately 10:20 p.m., I conducted an undercover vice
4 operation targeting "Heaven Mini Theater" at 483 Broadway Street. This operation was conducted
5 in response to the numerous complaints the vice crimes division has received from the community
6 and the Central Police Station about ongoing prostitution occurring inside this club.

7 3. Prior to the start of the operation, I designated Officer J. Hom, Star #1819, as the
8 undercover decoy officer and the following vice crimes members as the arrest and close cover team:
9 Sgt. Yep, Star #95, Inspector Overstreet, Star #526, Inspector Ravella, Star #1802, and Officer
10 Callo, Star #1828.

11 4. I briefed this team about the complaint history of the Heaven Mini Theater, made
12 before and after copies of the marked city funds and provided Officer Hom with \$360.00 of marked
13 city funds.

14 5. A body wire was placed on Off. Hom that provided us with the ability to digitally
15 record and hear Officer Hom during this incident.

16 6. I contacted Central Station Sgt. Cheung, Star #960 and he provided Central Station
17 Officers Carew, Star #36, and Anderson, Star #442 to act as a uniformed presence during this
18 operation.

19 7. Upon Officer Hom's arrival, he was greeted by Welch and Scott.

20 8. Scott grabbed Off. Hom's right hand and lead him to room #7. While inside room
21 #7, Scott solicited Off. Hom for both oral copulation and sexual intercourse for \$160.00.

22 9. Scott told Officer Hom that he needed to also provide an additional \$40.00 for the
23 room.

24 10. Off. Hom provided Scott with \$200.00 of marked city funds and Scott left room with
25 funds.

26 11. Officer Hom gave pre-arranged bust signal and the arrest team moved in to the
27 Heaven Mini Theater.

1 12. As the arrest team entered Heaven Mini Theater, with our stars visible on our
2 outermost clothing, I saw Welch running down the hallways yelling "police, police". Welch was
3 also knocking on the closed room doors to notify everyone of our presence.

4 13. I immediately went to Room #7 and opened the door.

5 14. I saw Scott standing in the room in thong underwear and attempting to cover her
6 naked breasts with her bra.

7 15. I placed Scott under arrest.

8 16. I asked Scott for the marked city funds that Off. Hom had provided to her and she
9 handed me \$160.00, in form of 1 hundred dollar bill of marked city funds, and 3 twenty dollar bills
10 of non marked city funds.

11 17. I asked her what happened to the additional one hundred dollar bill that Off. Hom
12 had given her and she said that she had given the one hundred dollar bill to Welch and that he gave
13 her the sixty dollars in change.

14 18. Inspector Ravella gave Welch the three twenty dollar bills in exchange for the one
15 hundred dollars of marked city funds that Welch had on his person.

16 19. I identified Scott by her California drivers license and issued her a citation for
17 solicitation of prostitution.

18 20. I took four digital photos of Scott and Room #7.

19 21. I released Scott at the scene.

20 22. I placed the digital audio recording of the incident on a CD and the four digital
21 photos of the CD.

22 23. I then made "after" photocopies of the two hundred dollars in marked city funds.
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24. A records check of Scott's criminal history shows numerous prior arrests for solicitation of prostitution.

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

Dated: _____

Sgt. K. Delaney, Star #1320

1 **PROOF OF SERVICE**

2 I, Morris Allen, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market
5 Street, Sixth Floor, San Francisco, CA 94102.

6 On July 22, 2009, I served the following document(s):

7 **DECLARATION OF SFPD SGT. K. DELANEY IN SUPPORT OF CROSS-
8 COMPLAINANTS' MOTION FOR PRELIMINARY INJUNCTION**

9 on the following persons at the locations specified:

10 Gregory S. Walston Esq.
11 Walston Cross, Attorneys
12 735 Montgomery Street, Suite 250
13 San Francisco, CA 94111

14 in the manner indicated below:

15 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies
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transmission report was properly issued by the transmitting facsimile machine, and **a copy of the transmission**
report **is attached** or **will be filed separately with the court.**

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

Executed July 22, 2009, at San Francisco, California.

Morris Allen

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 ALEX G. TSE, State Bar #152348
Chief Attorney
3 Neighborhood and Resident Safety Division
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1390 Market Street, Seventh Floor
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7

8 Attorneys for Defendant
CITY AND COUNTY OF SAN FRANCISCO

9 Attorneys For Cross-Complainants
10 CITY AND COUNTY OF SAN FRANCISCO AND
PEOPLE OF THE STATE OF CALIFORNIA

11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
UNLIMITED JURISDICTION

13 1054 KEARNY, LLC, DBA HEAVEN
14 MINI THEATRE,

15 Plaintiff,

16 vs.

17 CITY AND COUNTY OF SAN
FRANCISCO and DOES 1 to 25,

18 Defendants.

19 CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation,
20 and the PEOPLE OF THE STATE OF
CALIFORNIA, by and through DENNIS
21 J. HERRERA, City Attorney for the CITY
AND COUNTY OF SAN FRANCISCO,

22 Cross-Complainants,

23 vs.

24 ALYCE D K CRAFT TRUST; 1054
25 KEARNY, LLC, DBA HEAVEN MINI
THEATRE; PETER LAMBERTSON; and
26 DOES 1 through 100,

27 Cross-Defendants.
28

Case No. CGC 08 479-624

DECLARATION OF F. DARIO JONES
IN SUPPORT OF CROSS-
COMPLAINANTS' MOTION FOR
PRELIMINARY INJUNCTION

Hearing Date: August 19, 2009
Hearing Judge: Charlotte Walter Woolard
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 9, 2008
Trial Date: Not Yet Set

1 I, F. Dario Jones, declare as follows:

2 1. I am currently employed as a Code Enforcement Planner at the San Francisco
3 Planning Department.

4 2. I have been so employed for the last 4 years.

5 3. I was assigned to the Heaven Mini Theater case, at 1054 Kearny, in middle 2008.

6 4. On March 17, 2008, the San Francisco Planning Department received documentation
7 from the Police Department that on February 2, 2008, February 3, 2008 and February 10, 2008, the
8 establishment known as Heaven Mini Theatre was operating past hours of operation limits of 2 a.m.

9 5. In response, Planning conducted research for previous approvals for the use of the
10 second story as part of a commercial operation.

11 6. Planning found no previous authorizations for any commercial use, and found no
12 building permit records that would indicate previous approvals for the business, Heaven Mini-
13 Theatre, the use of the second floor of the subject property, nor the business signs that advertises
14 Heaven Mini Theatre.

15 7. Based upon the above reports provided by the Police Department, and the lack of any
16 previous authorizations for the use of the second story, the subject property was found to be in
17 violation of Planning Code.

18 8. Planning determined that Planning Code §790.36 requires a 1000 foot separation
19 between Adult Entertainment uses.

20 9. In this case, the business located on the 2nd Floor of 1054 Kearny may not seek to
21 legalize through the Conditional Use process for adult entertainment due to the fact that it is located
22 directly above an already existing adult entertainment use known as Rio or XXX European DVD.

23 10. The Planning Department's Zoning Administrator, Lawrence B. Badiner, then issued
24 a Notice of Violation, which recited all the above allegations and sent it in letter form to Cross-
25 Defendant, Craft Alyce D K Trust, P.O. Box 3598, Incline Villa, NV 89450, the owner of the
26 property on April 14, 2008 via U.S. Mail. (Attached hereto at Exhibit A)

27 11. On May 14, 2008, I issued a Cease and Desist Order to Craft Alyce DK Trust at P.O.
28 Box 3598, Incline Villa, NV 89450, Heaven Mini Theatre at 1054 Kearny Street, San Francisco,

1 CA 94133 and Peter Lambertson, at 483 Broadway, San Francisco, CA 94133, stating that "the
2 failure to immediately cease and desist all operations and activity related to the no authorized Adult
3 entertainment Use knows (sic) as Heaven Mini Theatre will result in the immediate request for
4 assistance by the Office of the City Attorney on Monday, May 19, 2008 to maintain an action for
5 injunction or to restrain or abatement to cause correction or removal of this violation and for the
6 assessment and recovery of civil penalty for such violations as well as attorney fees or costs,
7 including but not limited to expert witness fees, incurred in maintaining such an action as
8 authorized by Planning Code §176(b)(2)." (Attached hereto as Exhibit B)

9 12. An administrative hearing was scheduled for July 16, 2008 at the Board of Appeals,
10 in order to allow the Cross-Defendants to appear and have an opportunity to be heard prior to
11 issuing a Cease and Desist Order and making an official referral to the City Attorney's Office for
12 the filing of a lawsuit against Cross-Defendants.

13 13. On behalf of Planning, I issued a new Cease and Desist order on October 30, 2008.
14 (Attached hereto as Exhibit C)

15 14. Planning served it on Cross Defendants via certified U.S. Mail. (Attached hereto as
16 Exhibit D)

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

19 Dated: _____
20
21

22 _____
23 F. Dario Jones
24 San Francisco Planning Department
25
26
27
28

1 **PROOF OF SERVICE**

2 I, Morris Allen, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market
5 Street, Sixth Floor, San Francisco, CA 94102.

6 On July 22, 2009, I served the following document(s):

7 **DECLARATION OF F. DARIO JONES IN SUPPORT OF CROSS-COMPLAINANTS'
8 MOTION FOR PRELIMINARY INJUNCTION**

9 on the following persons at the locations specified:

10 Gregory S. Walston Esq.
11 Walston Cross, Attorneys
12 735 Montgomery Street, Suite 250
13 San Francisco, CA 94111

14 in the manner indicated below:

15 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies
16 of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing
17 with the United States Postal Service. I am readily familiar with the practices of the San Francisco City
18 Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s)
19 that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that
20 same day.

21 **BY PERSONAL SERVICE:** I sealed true and correct copies of the above documents in addressed
22 envelope(s) and caused such envelope(s) to be delivered by hand at the above locations by a professional
23 messenger service. **A declaration from the messenger who made the delivery** **is attached** or **will**
24 **be filed separately with the court.**

25 **BY OVERNIGHT DELIVERY:** I sealed true and correct copies of the above documents in addressed
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I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed July 22, 2009, at San Francisco, California.

Morris Allen

INDEX TO EXHIBITS

<u>Exhibit</u>	<u>Description</u>
A	Planning Department Notice of Violation dated April 14, 2008
B	Planning Department Cease and Desist Order dated May 14, 2008
C	Planning Department Cease and Desist Order dated October 30, 2008
D	Planning Department Copies of Certified Mail and Return Receipts for October 30, 2008 Cease and Desist Order

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21 J. HERRERA, City Attorney for the CITY
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24 ALYCE D K CRAFT TRUST; 1054
25 KEARNY, LLC, DBA HEAVEN MINI
THEATRE; PETER LAMBERTSON; and
26 DOES 1 through 100,

27 Cross-Defendants.
28

Case No. CGC 08 479-624

DECLARATION OF DEPUTY CITY
ATTORNEY FRANK BRASS IN
SUPPORT OF CROSS-
COMPLAINANTS' MOTION FOR
PRELIMINARY INJUNCTION

Hearing Date: August 19, 2009
Hearing Judge: Charlotte Walter Woolard
Time: 9:30 a.m.
Place: Dept. 302

Date Action Filed: September 9, 2008
Trial Date: Not Yet Set

1 I, Frank Brass, declare as follows:

2 1. I am currently employed as a Deputy City Attorney at the San Francisco City
3 Attorney's Office, and have been so employed since December, 2006.

4 2. On September 9, 2008 the City was served with a summons and complaint by Cross-
5 Defendants requesting a permanent injunction and a declaratory judgment on the basis that the City
6 had violated the Due Process Clause and Equal Protection Clause of the U.S. Constitution's
7 Fourteenth Amendment, and 42 U.S.C. §1983. (Attached as Exhibit A)

8 3. Immediately thereafter, I was assigned to this case.

9 4. In the weeks that followed, I was sent copies of the police reports, and other tangible
10 evidence from Captain Dudley, who is assigned to Central Station, supporting their case against
11 Heaven Mini Theater in the pending action before the Board of Appeals.

12 5. Included in this file were original copies of a flyer that had been confiscated by the
13 San Francisco Police Department promoting Heaven Mini Theater's Totally Nude Dancing during
14 this time period, namely the Fall of 2008. (A copy of said flyer is attached as Exhibit B).

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

17 Dated:

18
19 _____
FRANK BRASS

1 **PROOF OF SERVICE**

2 I, Morris Allen, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the
4 above-entitled action. I am employed at the City Attorney's Office of San Francisco, 1390 Market
5 Street, Sixth Floor, San Francisco, CA 94102.

6 On July 22, 2009, I served the following document(s):

7 **DECLARATION OF DEPUTY CITY ATTORNEY FRANK BRASS IN SUPPORT OF
8 CROSS-COMPLAINANTS' MOTION FOR PRELIMINARY INJUNCTION**

9 on the following persons at the locations specified:

10 Gregory S. Walston Esq.
11 Walston Cross, Attorneys
12 735 Montgomery Street, Suite 250
13 San Francisco, CA 94111

14 in the manner indicated below:

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Executed July 22, 2009, at San Francisco, California.

Morris Allen

INDEX TO EXHIBITS

<u>Exhibit</u>	<u>Description</u>
A	Plaintiff's Complaint For A Permanent Injunction and a Declaratory Judgment filed September 9, 2008; Summons issued September 9, 2008
B	Flyer from Heaven Mini Theatre, Fall 2008

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