City Attorney Dennis Herrera News Release

For Immediate Release:
October 8, 2014
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City College accreditors suffer another pre-trial setback, as judge rejects motion to dismiss

With case set for trial on Oct. 27, Herrera is 'grateful for a decision that confirms once again that accreditors' violations are not beyond the reach of courts or the law'

SAN FRANCISCO (Oct. 8, 2014)—The private commission seeking to terminate City College of San Francisco's accreditation suffered another legal setback today when a Superior Court judge rejected a move by the Accrediting Commission for Community and Junior Colleges that would have effectively dismissed City Attorney Dennis Herrera's lawsuit alleging that accreditors allowed improper procedures and conflicts to unfairly influence their evaluation of California's largest community college. The case is set for trial on Oct. 27.

In an 8-page ruling issued late this afternoon, Judge Curtis E.A. Karnow denied the ACCJC's eleventh hour bid to strike Herrera's lawsuit as an impermissible assault on accreditors' First Amendment rights. In reaching the conclusion, Karnow largely sided with Herrera's contention that legal doctrines intended to protect the right of organizations to petition the government to redress grievances would not insulate accrediting agencies from liability for their procedural violations or wrongful decision-making.

ACCJC's motion for judgment on the pleadings was argued in a hearing before Judge Karnow yesterday morning. It is the accreditors' sixth failed bid to derail or delay the lawsuit Herrera initially filed on Aug. 22, 2013. Previously, lawyers for the Novato, Calif.-based accrediting commission sought unsuccessfully to remove the case to federal court; to petition the state court to abstain from hearing the case; to stay proceedings pending accreditors' review of the college; to stay proceedings based on ACCJC's invention of a "restoration" process; and for summary adjudication based on an array of similarly failed arguments.

"The ACCJC has virtually exhausted the playbook in terms of trying to shield its actions from judicial review," said Herrera. "I'm grateful for a decision that confirms once again that accreditors' violations are not beyond the reach of courts or the law. Judge Karnow has demonstrated patience

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and thoughtfulness in repeatedly addressing the applicability of state law to unfair practices. I look forward to finally litigating these issues at trial on Oct. 27, and to making our case as to why City College of San Francisco—a cherished institution that has been a cornerstone of educational promise for generations—deserves a fair and lawful accreditation process."

Case Background

In June 2012, the ACCJC issued to City College of San Francisco the harshest sanction an accreditation process can produce: a "show cause" letter placing the onus on the college to demonstrate why its accreditation should not be terminated. A year later, in June 2013, despite significant progress by the college to address deficiencies identified by accreditors, the commission acted to terminate City College's accreditation effective July 31, 2014.

Herrera filed his civil action against the ACCJC on Aug. 22, 2013. On Nov. 25, 2013, following three months of procedural delays by the ACCJC that Herrera said demonstrated an attempt "to run out the clock," the city attorney filed a motion for a preliminary injunction to block the commission from terminating City College's accreditation as planned, eight months later. Judge Karnow granted the major portion of Herrera's motion on Jan. 2, 2014, preliminarily enjoining the commission from finalizing its planned termination of City College's accreditation during the course of the litigation. That injunction remains in place.

The 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. Additional information on the San Francisco City Attorney's Office is available at: http://www.sfcityattorney.org.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA ex rel. DENNIS HERRERA, SAN FRANCISCO CITY ATTORNEY, Plaintiff, vs. ACCREDITING COMMISSION FOR COMMUNITY AND JUNIOR COLLEGES, Defendant.	Case No. CGC-13-533693 ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

The People of the State of California alleged a single cause of action against the Accrediting Commission for Community and Junior Colleges for violation of California's Unfair Competition Law (UCL) in connection with the Commission's review of the City College of San Francisco's accreditation.

The People's single cause of action is based on roughly seven theories or alleged improprieties: (1) the Commission evaluated City College while embroiled in a political dispute with City College; (2) the Commission appointed Commission President Barbara Beno's husband on a 2012 Evaluation Team in violation of its own policy and federal regulations; (3) the Commission filled a 2012 Evaluation Team and a 2013 Show Cause Visiting Team with individuals affiliated with districts and organizations that, like the Commission, supported the Student Success Task Force recommendations and/or S.B. 1456; (4) the Commission failed to ensure that sufficient academic personnel were on the evaluation teams pursuant to federal regulations; (5) the Commission failed to inform institutions whether recommendations made by the Commission indicated noncompliance with accreditation

standards or simply room for improvement in violation of federal regulations; (6) the Commission terminated City College's accreditation in retaliation against City College for its opposition to the legislation supported by the Commission; and (7) the Commission violated federal statutory and regulatory law by applying its standards to subvert City College's open access mission. Complaint ¶ 134.

The Commission now moves for judgment on the pleadings. I heard argument October 7, 2014. The motion is denied.

Requests for Judicial Notice

The Commission requests judicial notice of (1) an August 22, 2013 Legal Challenge and Petition for Rulemaking filed by the City Attorney with the Board of Governors of California Community Colleges; and (2) a January 28, 2014 Department of Education decision. There is no opposition and the existence of the documents is noticed, although not the veracity of their contents. *See* Evid. Code § 452(c), (h).

The People request judicial notice of AB 1942 (2014). The unopposed request is granted. Evid. Code § 452(c).

Objections to Evidence

Counsel for the People provided a declaration with an exhibit listing the People's theories in this case. Declaration of Sara J. Eisenberg, Ex. 1. The Commission objects on the basis that it is attorney argument and an improper attempt to recast the People's pleadings. Objection, 2. The objection is sustained.

Discussion

A motion for judgment on the pleadings is granted when the "complaint does not state facts sufficient to constitute a cause of action against that defendant." C.C.P. § 438(c)(1)(B)(ii). The grounds for the motion must appear on the face of the challenged pleading or from matters that may be judicially noticed. C.C.P. § 438(d). I accept as true all material facts properly pleaded. *Shea Homes Limited Partnership v. County of Alameda,* 110 Cal.App.4th 1246, 1254 (2003).

Waiver

The People argue that the Commission cannot now raise *Noerr-Pennington* and *Parker* defenses because those defenses are not disclosed in the Commission's Answer. In the fifth affirmative defense, the Commission pled that its "conduct at all times herein was authorized, privileged, and/or justified under applicable law." Verified Amended Answer, 21. This language is vague, but the *Noerr-Pennington* and *Parker* arguments arguably are within that scope.

Noerr-Pennington

The Complaint does not disclose any petitioning activity by the Commission beyond its support of the Student Success Task Force. Because there are other allegations and other bases for liability, I cannot grant a motion for judgment on the pleadings based on *Noerr-Pennington.*

The *Noerr-Pennington* doctrine immunizes conduct aimed at influencing decision making by the government. *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749, 1757 (2014). The doctrine provides room for the free exercise of the First Amendment's petitioning rights.

Some of the theories of liability or at least some of the allegations in the Complaint may implicate activities which are the petitioning of government. Complaint ¶ 134(a)(i), (iii). This is not true for other theories. E.g., Complaint ¶ 134(a)(ii), (b)-(d).

The Commission asserts that *Noerr-Pennington* immunity attaches to the entire process of communicating accreditation decisions to the government. It relies on *Massachusetts School of Law at*

Andover, Inc. v. American Bar Association, 107 F.3d 1026, 1037-39 (3d Cir. 1997) and *Zavaletta v. American Bar Association*, 721 F.Supp. 96 (E.D. Va. 1989). Both were decided on summary judgment, with records which do not exist here.

Massachusetts School held that the accreditor engaged in petitioning activity because (1) the accreditor had campaigned to the states to prohibit graduates from unaccredited schools from taking the bar; and (2) the accreditor continued to communicate its accreditation decisions to the states and desired they be given credence. 107 F.3d at 1038. The Court held that a loss of prestige from the accreditor's justification of its accreditation decisions was incidental to that petitioning activity. *Id.* at 1037-38.

The school also alleged direct injury from the enforcement of the accreditor's standards. In reaching the merits, the Court rejected the notion that the accreditor was immune from antitrust liability flowing directly from the enforcement of its standards – a process involving entirely private conduct. *Id.* at 1038-39.

Zavaletta cited several alternate bases in finding for the accreditors: (1) the accreditor's activities imposed no restraint on trade; (2) the accreditor has a First Amendment right to communicate its views on law schools to governmental bodies and others; and (3) to the extent states have chosen to recognize only schools accredited by the accreditor, the plaintiffs' complaints were more appropriately directed at the states. *Id.* at 98-99.

Here, unlike *Massachusetts School*, there is no record showing the accreditor's petitioning activity concerning the weight given to its accreditation decisions. There is no evidence suggesting what the Commission could have been petitioning the government for in reporting accreditation decisions. Even if there were such a record, *Massachusetts School* nevertheless found enforcement of accreditation standards was not incidental to petitioning activity. Several of the People's claims here relate solely to the alleged errors in the process of enforcing accreditation standards, having nothing to

do with the reporting of a decision.

Parker

Parker v. Brown, 317 U.S. 341, 352 (1943) immunizes private action which otherwise would violate the Sherman Act when it is, in effect, state action. It does so because as a matter of statutory construction, the Sherman Act does not reach governmental action. *United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.*, __ F.3d __, 2014 WL 3973413, at *5 (9th Cir. Aug. 15, 2014) (states receive immunity from potential antitrust liability because nothing in the Sherman Act or its history shows Congress intended to restrict the sovereign capacity of the States to regulate their economies).

Massachusetts School applies the *Parker* doctrine to some, but not all, of the claims before it. States decide whom to allow to sit for bars exams, and in *Massachusetts School* the state decided to rely on accreditation decisions. So the Court rejected a Sherman Act claim brought by a law school against an accreditor to the extent that the asserted antitrust injury (i.e., students may not take the bar exam) flowed from the law school's lack of accreditation. 107 F.3d at 1031, 1035-36. But *Parker* did not bar theories of injury arising from stigma or flowing directly from the enforcement of the accreditor's standards. *Id.* at 1037, 1041.

Looking to *Massachusetts School*, the Commission vaguely asserts that *Parker* bars the present UCL suit because the consequences of the Commission's accreditation decisions are "up to the state of California." Motion, 9; Reply, 9-10.

The parties have not found a case that applies *Parker* outside the antitrust context. And here, the People do not claim the state is giving undue respect to accreditation decisions and thereby causing injury, but rather that the Commission failed to properly conduct its accreditation evaluation.[1]

[1] In *Massachusetts School of Law* the Court explained that the "state action relates to the use of the results of the accreditation process, not the process itself. The process is entirely private conduct which has not been approved or supervised explicitly by any state. [Citation.] Thus, the ABA's enforcement of an anticompetitive standard which injures MSL would not be immune from possible antitrust liability." *Massachusetts School of Law*, 107 F.3d at 1039. At least

The Commission also cites *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980) (*Midcal*) to suggest its action are in effect state action. Under *Midcal*, the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and the policy must be actively supervised by the state itself. *Midcal*, 445 U.S. at 105.

The Commission points out that it is recognized as the accreditor in California for numerous colleges and programs. Motion, 10; 5 C.C.R. § 51016 (requiring community colleges to be accredited and identifying the Commission as the accreditor); 16 C.C.R. § 1399.170.4 (requiring Commission accreditation of sponsoring program for approval of speech-pathology assistant training program); Bus. & Prof. Code § 4600 (requiring Commission accreditation for massage schools); Commission RJN, Ex. A (statements by the City Attorney to the effect that the California Board of Governors delegated discretion over accreditation decisions to the commission). Second, the Commission asserts that the state of California actively supervises its accreditation activities. Motion, 11 (Educ. Code §§ 66700, 70906(b)(6); Bus. & Prof. Code § 2538.1).

As to the first *Midcal* factor, the challenged conduct is not carrying out accreditation activity, which is sanctioned by the state, but various failures to conform to required procedures. Those failures are not the state's policy. And none of the cited statutes establish there was any state supervision over the Commission. Educ. Code §§ 66700 (Board of Governors shall supervise California Community Colleges, with no reference to the Commission), 70901(b)(6)[2] (stating only that the Board of Governors shall establish minimum conditions entitling districts to receive state aid); Bus. & Prof. Code § 2538.1(b)(3) ("The board shall adopt regulations as reasonably necessary to carry out the purposes of this article ... [including] (3) Standards for accreditation of a Speech-Language Pathology Assistant training program's institution by the Accrediting Commission for Community and Junior Colleges of the Western Association of Schools and Colleges or the Senior College

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some of the People's challenges relate only to the entirely private process.

[2] This appears to be the statute the Commission intended to cite instead of "70906(b)(6)," which does not exist.

Commission of the Western Association of Schools and Colleges, or equivalent accreditation").

Thus, the *Midcal* test is not satisfied.

Other Bases

The Commission argues that it cannot violate Department of Education regulations because (1) even though the DOE found that the Commission was not in compliance with two regulations, the DOE allowed the Commission twelve months to come into compliance while still recognizing the Commission as an accreditor. Motion, 11-13. Thus the Commission argues that a violation of those same regulations cannot be the basis for an order voiding a Commission decision or enjoining its activity. *Id.* at 11, 13. Since the motion was filed, I determined that 34 C.F.R. §§ 602.15(a), 602.18(e) can be borrowed under the UCL. Sept. 19, 2014 Order, 22-24.

The Commission also argues the People cannot plead a claim under the unfair prong of the UCL without alleging that the Commission reached the wrong accreditation decision. Motion, 14. The Commission relies on *McKell v. Washington Mutual, Inc.*, 142 Cal.App.4th 1457, 1473 (2006): "A business practice is unfair within the meaning of the UCL if it violates established public policy or if it is immoral, unethical, oppressive or unscrupulous and causes injury to consumers which outweighs its benefits." Some harm has been alleged. Complaint ¶ 135 (conclusory allegation of harm). Some of the harm may flow, as the Commission suggests, from dis-accreditation, there may be others as well. *See id.* at ¶ 134(d). In any event this argument is insufficient to dispose of the entire UCL cause of action.

Conclusion

The motion is denied.

Dated: October 8, 2014

Curtis E.A. Karnow
Judge Of The Superior Court

Superior Court of California
County of San Francisco

PEOPLE OF THE STATE OF CALIFORNIA ex rel. DENNIS HERRERA, SAN FRANCISCO CITY ATTORNEY, Plaintiff(s) vs. ACCREDITING COMMISSION FOR COMMUNITY AND JUNIOR COLLEGES, 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 October 8, 2014, I electronically served THE ATTACHED ORDER via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: October 8, 2014

T. Michael Yuen, Clerk

By: _____
DANIAL LEMIRE, Deputy Clerk