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, et al., Defendants.	Case No. CGC-13-533693 STATEMENT OF DECISION

I. INTRODUCTION

In this case the San Francisco City Attorney, on behalf of the People of California, asks this court to vacate the decision of the defendant accrediting commission (ACCJC) in terminating the accreditation of the City College of San Francisco. City College is not a party. The action is brought under this state's unfair competition law (UCL). This use of the law appears unprecedented, and the case presents a series of novel legal issues. A plain English summary of my rulings appears at § III (Summary) at page 16 below.

The issues before the court are whether and to what extent the People have proven a violation of the UCL, and if they have, what relief is commensurate with the specific material violations proven. Unlike the situation presented by a motion for preliminary injunction, I do not now balance hardships of issuing or not issuing an injunction, and I do not weigh those hardships against a forecast of the

strength of the parties' positons on the merits. The merits are now established and the sole function of injunctive relief is to address the defendant's proven derelictions.

On January 16, 2015 I issued a tentative decision and proposed statement of decision under CRC 3.1590 (c)(1). In addition to their objections, I solicited the parties' view on (a) the scope of the injunction and (b) the potential impact of internal appellate procedures on prejudice or materiality for the purpose of the common law fair procedure doctrine. I also invited ACCJC to request a stay of the injunction pending appeal, which it has declined. I have treated other post trial issues such as a request to accept an amicus filing and evidentiary issues in a separate order also dated this date.

II. BACKGROUND

A. The ACCJC and City College

The Accrediting Commission for Community and Junior Colleges accredits community colleges and other 2-year institutions in California, Hawaii, and the Pacific Islands. ACCJC Trial Brief, 6. ACCJC is a non-profit organization with over 100 member institutions. *Id.*; *see also* People's Post-Trial Brief, 51. As an accreditor, ACCJC collaborates with member institutions to develop and promulgate a set of accreditation requirements and standards applicable to member institutions. Deposition of Barbara Beno, 22:25-23:20. Member institutions agree that they will periodically undergo a comprehensive review assessing their compliance with accreditation requirements. *Id.* ACCJC's role, as described by its President, Barbara Beno, is to provide quality assurance to the public and to provide the impetus and support for institutional excellence over time. *Id.* at 21:11-14, 22:18-24.

At the time of trial, ACCJC had a nine-person paid staff, consisting of seven full-time members and two-part time members. Trial Transcript, 572:6-8.[1] When ACCJC evaluates a school, it dispatches an evaluation team made up of unpaid volunteers to visit the school. *Id.* at 572:20-22.

[1] In 2012, ACCJC spent almost $800,000 to compensate four of its full-time staff members. *See* Dec. 2, 2014 Stipulation ¶ 1. ACCJC also paid other full time staff in 2012. *Id.* at ¶ 2. ACCJC continues to pay salaries to full-time staff and executives. *Id.* at ¶ 3.

Then ACCJC's Commission, also composed of unpaid volunteers, makes an accreditation decision. *Id.* at 572:23-573:1.

City College of San Francisco is a public community college accredited by ACCJC. I have previously discussed City College's signal importance. *See* Jan. 2, 2014 Order, 41-42.

B. City College's Recent Accreditation History

1. 2006 Evaluation and Follow-up Reports

An ACCJC evaluation team visited City College in March 2006. Ex. 2 at 3. "The visiting team validated that the college meets the eligibility requirements for accreditation and complies with the standards of accreditation, as required by [ACCJC]." *Id* at 4. Nevertheless, the team developed eight recommendations "to guide the college in accomplishing certain goals and assuring the high quality of its programs and services." *Id.* at 4-5. The team elaborated, "Recommendations #2, #3, and #4 are presented as overarching concerns that should receive the college's focused attention and emphasis. The other recommendations are also important for the college to address in conjunction with its ongoing planning and operational activities." *Id.* at 5.[2] Recommendation 2 concerned planning and assessment. *Id.* Recommendation 3 concerned student learning outcomes. *Id.* Recommendation 4 concerned financial planning and stability. *Id.* In Recommendation 4, the team recommended "that the college develop a financial strategy that will: match ongoing expenditures with ongoing revenue; maintain the minimum prudent reserve level; reduce the percentage of its annual budget that is utilized for salaries and benefits; and address funding for retiree health benefit costs." *Id.*

In June 2006, the Commission took action to reaffirm City College's accreditation with the requirement that City College complete a Progress Report and a Focused Midterm Report. Ex. 3 at 1. The Commission instructed City College to focus on its resolution of Recommendation 4 in the

[2] Together, the eight recommendations implicated Standards I.A.3, I.A.4., I.B, II.A.1.c, II.A.2, II.A.3, II.A.6, II.B.2.a, III.C.1, III.C.1, III.D.1.b, III.D.2.c, III.D.2.d, and IV.B.1.g. Ex. 2 at 5-6.

Progress Report, which City College was required to submit in March 2007. *Id.*[3] The Commission instructed City College to address all recommendations in the Focused Midterm Report, with special emphasis on Recommendations 2 and 3. *Id.* at 1-2.

City College submitted the required Progress Report. Ex. 6 at 1. In addition, an evaluation team visited City College in March 2007. *Id.* The evaluation team concluded that City College had made significant progress in responding to Recommendation 4, but that City College should continue to address the issue of the percentage of personnel costs as part of its overall budget and should develop a plan for funding the long-term liability of retiree health benefits. Ex. 5 at 7. After reviewing the reports submitted by City College and the 2007 evaluation team, the Commission took action to accept the report with a requirement that City College complete a Focused Midterm Report. Ex. 6 at 1. The Commission directed City College to address all recommendations noted by the 2006 evaluation team, with a special emphasis on Recommendation 4. *Id.*

In January 2008, between the Commission's action on the Progress Report and City College's submission of the mid-term evaluation, ACCJC sent a letter to Chief Executive Officers and Accreditation Liaison Officers of all the institutions it accredits. Ex. 9 at 1. In the letter, the Commission reported that the Department of Education found that ACCJC did not fully comply with the two-year rule, which, according to the letter, requires accreditors to provide no more than two years for an institution to correct deficiencies and come into compliance with accreditation standards unless the Commission identifies good cause to extend the period and withhold termination. *Id.* The Commission reported that it would (1) strengthen the language referring to the two-year rule in letters sent to institutions with deficiencies, (2) set deadlines, within a two-year time limit, by which institutions must address deficiencies, (3) not extend the accreditation of an institution beyond a maximum of two years where that institution is deficient in accreditation standards that significantly

[3] The letter reporting the Commission's action was sent by ACCJC President Barbara Beno on behalf of the Commission. In the letter, Beno referred to Standards I.B, II.A.1.c. II.A.2, II.A.3, II.A.6, III.D.1.b, III.D.2.c, and III.D.2.d. Ex. 3 at 1-2.

affect educational quality or institutional integrity, and (4) create a small list of reasons that the Commission would consider potential reasonable bases for a "good cause" extension. *Id.* The Commission stated that it would retain sole discretion to determine whether a "good cause" extension is warranted. *Id.*

City College submitted the required Focused Midterm Report in advance of the Commission's June 2009 meeting. Ex. 19 at 1. The Commission took action to accept the Focused Midterm Report with the requirement that City College submit a Follow-Up Report by March 2010. *Id.* The Commission directed City College to "demonstrate status toward resolution of Recommendation 3 and resolution of Recommendation 4." *Id.* The letter also provided: "[I]nstitutions out of compliance with standards or on sanction are expected to correct deficiencies within a two-year period or the Commission must take action to terminate accreditation. City College of San Francisco must correct the deficiencies noted by June 2010." *Id.* But nothing else in the Commission's communications with City College up to and including the Commission's acceptance of the Focused Midterm Report indicates that City College was deficient in meeting the accreditation standards. To be sure, the Commission had identified concerns and required City College to take action to address those concerns. But it had not identified deficiencies.[4]

City College submitted the required Focused Midterm Report, which the Commission to accepted at its June 2010 meeting. Ex. 24 at 1. But the Commission expressed concern that City College was not making its Annual Required Contribution (ARC) to meet its Other Post Employment Benefits (OPEB). *Id.* The Commission explained it was concerned about whether City College's financial resources were sufficient to support student learning outcomes and to improve institutional effectiveness. *Id.* The Commission stated that unless the OPEB liability was funded, the college's financial condition would deteriorate to a level that it would make it difficult to meet Standard III.D. *Id.* at 2. The Commission required City College to provide information about how City College would

[4] The definition of 'deficiencies' is discussed below at § IV(C)(3)(c)(ii).

handle ARC in its upcoming self-study, due in spring 2012 in conjunction with the City College's evaluation for re-accreditation. *Id.* The Commission also desired City College to meet standards related to student learning outcomes and planning. *Id.*[5] The Commission did not mention the two-year rule.

2. 2012 Evaluation

a. Policy on Commission Actions on Institutions

ACCJC's July 2011 Policy on Commission Actions on Institutions provides: "In the case that a previously accredited institution cannot demonstrate that it meets the Eligibility Requirements, Accreditation Standards, and Commission Policies, the Commission will impose a sanction as defined below. If the institution cannot document that it has come into compliance within a maximum of two years after receiving the initial sanction, the Commission will take adverse action." Ex. 36 at 38.[6] Adverse action, for an accredited institution, means termination of accreditation. *Id.*

The policy sets forth eight possible actions that may be taken on institutions that apply for reaffirmation of accreditation. *Id.* at 40-42. First, the Commission may reaffirm accreditation. *Id.* at 40. This is proper where the institution substantially meets or exceeds accreditation requirements and recommendations are directed towards strengthening the institution, not correcting failures to meet accreditation requirements. *Id.* If the Commission reaffirms accreditation, the institution is required to submit a midterm report in the third year of the six-year accreditation cycle. *Id.*

Second, the Commission may reaffirm accreditation and request a follow-up report. *Id.* Third, the Commission may reaffirm accreditation and request a follow-up report with a visit. *Id.* at 40-41. These actions are appropriate where the institution substantially meets or exceeds the accreditation requirements, but faces recommendations on a small number of issues of some urgency that, if not immediately addressed, may threaten the institution's ability to meet the accreditation requirements.

[5] The Commission listed a set of standards: I.B.1, II.A.2.e, II.A.2.f, II.B.4, and II.C.2.
[6] The policy was subsequently edited in August 2012 and revised in June 2013. Ex. 119 at 1. The provisions for termination in the June 2013 version of the policy are not materially different from those discussed below. *Id.* at 5.

Id. at 4. In both cases, the recommendations are expected to be resolved within a one- to two-year period. *Id.*

Fourth, the Commission may defer a decision on reaffirmation to allow an institution six months or less to correct deficiencies or provide additional information. *Id.* at 41. During the deferral period, the institution remains accredited. *Id.*

The fifth through seventh options are increasing levels of sanctions: warning, probation, and show cause. *Id.* at 41-42. In all cases, an institution that is out of compliance with accreditation standards must come into compliance within a two-year period or be terminated, absent good cause for an extension of time. *Id.* at 41. The Commission will issue a warning, the lowest level of sanction, when an institution has "pursued a course deviating from" the accreditation requirements. *Id.* The Commission will set the time for the institution to resolve its deficiencies. *Id.* During the warning period, the institution is subject to reports and visits at the Commission's discretion. *Id.*

The Commission will impose probation when an institution "deviates significantly from" the accreditation requirements, "but not to such an extent to warrant a Show Cause order or the termination of accreditation, or fails to respond to conditions imposed upon it by the Commission, including a warning[.]" *Id.* As with a warning, the Commission will set the time for the institution to resolve its deficiencies and, during the probation period, the institution is subject to reports and visits at the Commission's discretion. *Id.*

The Commission will require the institution to show cause why its accreditation should not be withdrawn when an institution is "in substantial noncompliance with" the accreditation requirements, "or when the institution has not responded to the conditions imposed by the Commission." *Id.* at 41-42. An institution on show cause status must demonstrate that it has corrected the deficiencies noted by the Commission and is in compliance with accreditation standards. *Id.* at 42. The burden of proof is on the institution. *Id.* The Commission will set the time by which the institution must resolve

deficiencies and the institution will be subject to reports and visits at the Commission's discretion. *Id.*

Finally, the Commission will terminate accreditation where an institution "has not satisfactorily explained or corrected matters of which it has been given notice, or has taken an action that has placed it significantly out of compliance with the" accreditation requirements. *Id.* Termination is subject to internal review and appeal. *Id.*

b. Policy on Commission Good Practice in Relations with Member Institutions

In ACCJC's July 2011 Policy on Commission Good Practice in Relations with Member Institutions, the "Commission makes the commitment to follow good practices in its relations with the institutions it accredits." Ex. 36 at 43. Specifically, the Commission stated that it "will": "Provide institutions with due process concerning accrediting decisions made by the Commission: Institutions are provided an opportunity to respond in writing to draft team reports in order to correct errors of fact; to respond in writing (no less than 15 days in advance of the Commission meeting) to final team reports on issues of substance and to any Accreditation Standard deficiencies noted in the report; and to appear before the Commission when reports are considered." *Id.* at 44. Importantly, the Commission stated, among other things, that "[i]f the Commission's action lists any deficiency, which was not noted in the Team Report, before making any decision that includes a sanction, denying or terminating accreditation, or candidacy, the Commission, through its President, will afford the institution additional time to respond in writing to the perceived deficiency before finalizing its action at the next Commission meeting." *Id.* at 45.

c. The 2012 Team's Report

The 2012 Evaluation Team reviewed City College's progress in meeting the eight recommendations made by the 2006 Evaluation Team and adopted by the Commission. *See* Ex. 61 at 11-15. The team found that City College had partially addressed Recommendations 1-3, 7-8. *Id.* at 12-13, 15. The team found that City College had not addressed Recommendations 4-6. *Id.* at 13-14.

With respect to Recommendation 4, the team found that the projections for 2011-12 showed expenditures exceeding revenues, a reserve that met the minimum requirement under California law but that was well below prudent levels, salaries and benefits above 92% of the unrestricted general fund expenditures, and growing unfunded liabilities such as OPEB. *Id.* at 14. The team found that City College did not have a plan to address payment of its unfunded liabilities. *Id.*

The 2012 Evaluation Team made fourteen recommendations. *Id.* at 5-8. The recommendations fell into three groups: (1) "to improve institutional effectiveness," implying that the accreditation requirements are met but that there is room for improvement; (2) "to fully meet" accreditation requirements; and (3) "to meet" accreditation requirements. *Id.* The first group consisted of Recommendations 1 and 3. *Id.* at 5-6.[7] The second group consisted of Recommendations 2, 4-9, 12-14. *Id.* at 5-8.[8] The third group consisted of Recommendations 10-11. *Id.* at 7-8.[9] The 2012 team's Recommendations 10-11, like the 2006 team's Recommendation 4, related to City College's financial situation. *Id.* at 55-58.

The 2012 team recommended the Commission impose probation through March 2014, with a follow-up report and a visit in one year. Ex. 68 at ACCJC 004012. The team reasoned that City College deviated significantly from the accreditation standards, had not addressed four of the eight recommendations from the 2006 team, had partially addressed four of the eight recommendations from the 2006 team, and did not meet four eligibility requirements: administrative capacity, financial resources, financial accountability, and relations with the accrediting commission. *Id.* at ACCJC 004014; *see also* Ex. 69 (letter from Serrano expressing concerns relating to "overarching challenges" facing City College, including with respect to mission and institutional effectiveness, student learning and assessment, leadership, governance, and decision-making, and resources and institutional

[7] The 2012 Evaluation Team cited Standards I.A.3 and I.B.5.
[8] The Evaluation Team cited Standards I.A.3, I.B, I.B.1, I.B.2, I.B.4, I.B.6, II.A.1, II.A.2.a-c, f, g-i, II.A.3, II.A.6, II.A.6.a, II.B.1, II.B.3, II.B.3.a, c, f, II.B.4, II.C.2, III.A.1.c, III.A.2, III.A.6, III.B.1, III.B.2.a-b, III.C.1.a-d, III.C.2, III.D.1.a-c, III.D.2.a-c, g, III.D.3, IV.A, IV.A.1 IV.A.2.b, IV.A.3, IV.A.5, IV.B.1, IV.B.1.a, e-h, and IV.B.2.b.
[9] The Evaluation Team cited Standards III.D.1.c-d and III.D.2.c, g.

integrity).

d. The Commission's Action

In a July 2, 2012 letter, Beno announced that in June 2012 the Commission acted to order Show Cause, requiring City College to submit a Show Cause Report by March 15, 2013. Ex. 77 at 1. The report was to be followed by a visit. *Id.* The Commission stated that City College would be required to demonstrate that it had corrected the deficiencies noted by the Commission and brought itself into compliance with the accreditation requirements at the time of the Commission's June 2013 meeting. *Id.* The Commission emphasized that City College would bear the burden of proof of demonstrating that it should be allowed to retain accredited status. *Id.*

The Commission based its decision on its conclusion that City College failed to demonstrate compliance with a significant number of accreditation requirements and failed to implement the eight recommendations of the 2006 team, partially addressing five and failing to implement three. *Id.* at 2. The Commission incorporated the 2012 Evaluation Team Report by reference insofar as it listed specific accreditation requirements that City College failed to meet, fully or partially. *Id.* at 2 (incorporating the report), 4 (urging City College to use the report as a basis for developing strategies to come into compliance). The Commission also copied the text of the 2012 Evaluation Team's findings on Eligibility Requirements and recommendations, noting which recommendations repeated recommendations expressed by the 2006 Evaluation Team and specific standards implicated by the recommendations. *Id.* at 4-7.

3. 2013 Show Cause Evaluation

City College submitted its Show Cause Report, as required. Thereafter, a new team, again chaired by Sandra Serrano, visited City College.

The 2013 Evaluation Team was impressed by City College's response to the Commission's

show cause directive. Ex. 112 at 9.[10] Nevertheless, the team found that City College did not meet many standards.[11] The team found that City College did not meet Eligibility Requirements 5, 17, 18, and 21. *Id.* at 63-66. The team found that City College had addressed Recommendations 3-4, 6, and 9, and had partially addressed Recommendations 1-2, 5, 7-8, and 10-14, made by the 2012 Evaluation Team. *Id.* at 66-77.

ACCJC provided City College a copy of the 2013 Evaluation Team Report, invited City College to send a letter to ACCJC's Beno citing recommended corrections responsive to any perceived inaccuracies, and invited City College's Chief Executive Officer to request an appearance to discuss the report. Ex. 114 at 1. ACCJC stated that the CEO was the expected presenter, and noted that City College should consult with ACCJC staff if it wished to invite other representatives to join the CEO. *Id.* at 2.

Robert Agrella made a presentation on behalf of City College at the Commission's June 2013 meeting. Trial Transcript, 790:12-18, 885:3-8, 904:22-905:6, 920:18-922:18. Interim-Chancellor Thelma-Scott Skillman and Accreditation Liaison Officer Gohar Momjian also provided testimony on behalf of City College at the meeting. Ex. 130 at 1; Trial Transcript, 634:8-12, 790:12-18, 885:3-8, 904:22-905:6, 920:18-922:18. Members of City College's board of trustees did not attend. Trial Transcript, 790:25-791:12; 885:9-20. Their absence was noted by several Commissioners. *Id.* At the June 2013 meeting, the Commission voted 15-1, with one Commissioner abstaining, to terminate City College's accreditation. Ex. 118 at 2.

In a July 2013 letter, the Commission announced its decision to terminate City College's accreditation effective July 31, 2014. Ex. 130 at 1. The Commission cited noncompliance with

[10] The reference to a July 2013 letter is a typographical error in the report, which was prepared before July 2013.
[11] Specifically, Standards I.B.4, II.A.1, II.A.2, II.B.1, II.B.3, II.C, III.A.2, III.A.6, III.B.2, III.B.2.a-b, III.D.1.a-c, III.D.2-a-c, III.D.2.e, III.D.3.a, III.D.3.c, III.D.3.f, III.D.3.h, III.D.4, IV.A.2, IV.A.3, IV.A.4, IV.A.5, IV.B.1, and IV.B.2. Ex. 112 at 17, 22, 24, 28, 31, 35, 38, 42-43, 45, 48-55, 57-59, 61-62.

numerous accreditation standards,[12] noncompliance with Eligibility Requirements 5, 17, 18, and 21, and the failure to fully address twelve[13] of fourteen recommendations made by the 2012 Evaluation Team. *Id.* at 2-3. The Commission expressly referred to deficiencies in City College's leadership and financial management. *Id.* at 3-5.

4. Proceedings Following the Commission's Termination Decision

In the July 2013 letter, the Commission advised City College of its right to a review and to appeal. Ex. 130 at 1. Pending review and appeal, the Commission's decision was not final. *Id.*

The rights to review and appeal are described in the July 2013 edition of ACCJC's accreditation handbook. Ex. 127 at 102-05, 153-57. Institutions whose accreditation is terminated have a right to request a review by the Commission. *Id.* at 102. A review must be requested prior to any appeal. *Id.* The institution may specify any of four bases to request review: "(1) there were errors or omissions in carrying out prescribed procedures on the part of the evaluation team and/or the Commission which materially affected the Commission's decision; (2) there was demonstrable bias or prejudice on the part of one or more members of the evaluation team or Commission which materially affected the Commission's decision; (3) the evidence before the Commission prior to and on the date when it made the decision which is being appealed was materially in error; or (4) the decision of the Commission was not supported by substantial evidence." *Id.* at 102-03.

Institutions may then appeal on the same bases. *Id.* at 156. After a notice of appeal is filed, ACCJC appoints a hearing panel that is not constituted of Commission members and that did not participate in the decision being appealed. *Id.* at 153-54. The institution may challenge hearing panel members. *Id.* at 154. The hearing panel may affirm, amend, reverse, or remand the Commission's decision. *Id.* at 156-57.

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[12] Specifically, Standards I.A.3, I.B.1, I.B.2, I.B.3, 1.B.4, II.A.1, II.A.2, II.A.6, II.B.1, II.B.3, II.B.4, II.C.1, II.C.2, III.A.2, III.A.6, III.B.1, III.B.2, III.C.1, III.C.2, III.D.1, III.D.2, III.D.3, III.D.4, IV.A.1, IV.A.2, IV.A.3, IV.A.4, IV.A.5, IV.B.1, and IV.B.2.

[13] The Commission concluded that Recommendations 6 and 9 had been fully addressed, and Recommendation 3 had nearly been fully addressed.

City College sought review of the Commission's termination decision. By letter of February 7, 2014, the Commission announced its action to re-affirm the termination decision. Ex. 161. City College appealed.[14] The Commission interpreted the ruling of the appellate hearing panel to require a remand of the termination decision to consider City College's state of compliance as of May 21, 2014. Ex. 173 at 1. By letter of July 21, 2014, the Commission announced, upon a review consistent with its interpretation of the hearing panel's decision, that a reconsideration of the termination decision was not warranted. *Id.* The Commission reasoned that City College had not demonstrated compliance with Standards I.B, II.A, II.B, II.C, III.B, III.C, III.D, and IV.B as of May 21, 2014. *Id.* at 1-2. Further, the Commission stated that because City College was on show cause status, substantial compliance was insufficient: City College was required to show full compliance with the standards. *Id.* at 2. In any event, the Commission concluded that City College had not even shown substantial compliance because so many standards were implicated. *Id.* Moreover, the Commission found that City College's evidence indicated that it would take more than a year to achieve compliance with respect to student and learning support services, data analysis capability, internal control systems, and finances. *Id.* Thus, the Commission's termination decision became final. *Id.* Nevertheless, the Commission encouraged City College to apply for "restoration status." *Id.*

The Commission added 'restoration status' to its policies in June 2014. Ex. 174 at 5. Under the policy, an institution that has not been granted a good cause extension to come into compliance with any standard prior to the termination decision may apply for restoration status after a termination decision. *Id.* To obtain restoration status, an institution must demonstrate its compliance with all accreditation requirements or its ability to come into compliance within a two-year restoration status period. *Id.* at 6. The request for restoration status must be accompanied by an eligibility report. *Id.* at 5. The application process includes a comprehensive self-evaluation and a site visit. *Id.* If an institution obtains restoration status, its official status remains accredited, pending termination. *Id.*

[14] The parties have not noted where in the record of this case the bases for that appeal are reflected.

While on restoration status, an institution will be subject to such follow-up or special reports as may be warranted, and will, at the end of the period, be subject to a comprehensive evaluation. *Id.* at 6. If the institution is in "compliance" at the end of the restoration status period, its accredited status will be re-affirmed. *Id.* Otherwise, termination will be immediately implemented with no further opportunity for internal appeal. *Id.* City College applied for restoration status, with express reservations. Ex. 247 at 1-3.[15]

C. Procedural History

The People filed their Complaint in this action on August 22, 2013. ACCJC removed this action to federal court. *People ex rel. Herrera v. Accrediting Comm'n for Community and Junior Colleges*, 2013 WL 5945789, at *3 (N.D. Cal. Nov. 4, 2013). On the People's motion, United States District Court Judge Illston remanded this action to this court. *Id.* at *1. Thereafter, the People sought a preliminary injunction, while ACCJC moved to have this court abstain from hearing the case or to stay the proceedings. In a January 2, 2014 Order, I granted the People's request for a preliminary injunction and denied ACCJC's motion to abstain or stay. On January 30, 2014, I issued a preliminary injunction blocking the Commission from implementing the termination of City College's accreditation. In the summer of 2014, ACCJC's further attempt to stay the proceedings was rejected. In September 2014, I heard argument on cross-motions for summary adjudication pursuant to C.C.P. § 437c(s). Summary adjudication was refused on all but one issue. Sept. 19, 2014 Order, 1-2. On the remaining issue, I found that the Commission's failure to have more than one academic on the 2013 Show Cause Team violated federal regulations. *Id.* at 2. Shortly thereafter, the court denied ACCJC's motion for judgment on the pleadings. Oct. 8, 2014 Order. Trial followed including about a week of testimony and the submission of voluminous exhibits and depositions. At closing argument, the People moved to add two new theories to the Complaint. I permitted the People leave to plead a

[15] While news reports suggest the Commission has granted restoration status, its action on restoration (one way or the other) has no effect on the issues decided here.

theory based on ACCJC's use of improper standards, but not one citing denial of peer review based on rights derived from federal law and ACCJC's policies and procedures. Dec. 15, 2014 Order, 1-2.

D. Central Issues

The ultimate question posed by this case is whether the People are entitled to an order vacating the Commission's 2012 decision to put City College on show cause and/or the Commission's 2013 decision to terminate City College's accreditation; or to some other relief. The People seek such an order to compel the Commission to review City College for re-affirmation of accreditation based on a 'clean slate.' This in turn requires resolution of these issues:

(1) Whether the UCL applies, that is, whether the challenged accreditation activities are "business acts or practices" subject to the UCL.

(2) Whether a doctrine preclude this suit, such as whether the UCL is preempted by federal law. ACCJC also presses arguments under the *Noerr-Pennington* doctrine, the *Parker* doctrine, quasi-judicial immunity, and litigation privilege.

(3) Whether ACCJC engaged in any "unlawful" conduct under the UCL, i.e.:

(a) failure to maintain adequate controls against conflicts of interest, or the appearance thereof, with respect to team members or Commissioners;

(b) failure to include sufficient academics on evaluation teams;

(c) failure to comply with federal regulations governing due process;

(d) violation of common law fair procedure;

(e) basing decisions on factors other than stated accreditation standards.

(4) Whether ACCJC engaged in any "unfair" conduct under the UCL, i.e.:

(a) whether the allegedly unlawful conduct is unfair conduct under the UCL;

(b) acting unfairly by evaluating City College for reaffirmation of accreditation while embroiled in a public political fight with City College.

(5) What relief is justified based on the unlawful or unfair conduct actually proven at trial.

III. SUMMARY

All the interested parties—City College, the People, and ACCJC—agree that when City College had its accreditation terminated in 2013 it was not in full compliance with accreditation standards; and this after years of serious financial and other problems. City College has not yet challenged that termination finding in court, but the San Francisco City Attorney has, on behalf of the affected People of California. The People's case rests on a single statute, the Unfair Competition Law (UCL), which allows courts to issue injunctions after findings of 'unfair' or 'unlawful' business practices. Practices that violate other laws, or state or federal regulations, might be termed 'unlawful,' and the People's complaint contains a lengthy list of such assertedly unfair and unlawful practices. It appears the UCL has never previously been used to challenge an accreditation decision.

The parties presented their evidence at trial, through five days of testimony and many documents. The evidence does not support a finding of any unfair practices. The evidence does show that ACCJC violated certain federal regulations and a law known as the 'common law fair procedure' doctrine. That doctrine requires basic due process, that is, the fundamental opportunity to be able to respond to accusations of deficiencies before a final termination finding is made. These are this court's findings on liability. On my way to those findings, I have had to evaluate a series of defenses that ACCJC claims bar this suit altogether. I have generally rejected those defenses.

The People seek a judgment and injunction which would in effect erase the actions of ACCJC since 2012 and restore City College to a 'clean slate' of a fully accredited status. But in deciding what sort of injunction to issue, a court must first decide which of the liability findings are sufficiently material, or significant, to warrant any relief. I have found that not all the liability bases deserve relief. Some of the liability findings, specifically those relating to City College's ability to respond in 2013 to the bases for termination, do warrant relief. The scope of the injunction I issue must be

commensurate, or proportionate, to that specific liability. Therefore the injunction I issue requires ACCJC to give City College that chance to respond; and allows ACCJC to then take any action consistent with law, including rescinding or reaffirming the 2013 termination.

This relief directly accounts for the significant unlawful practices I have found, it pays attention to the extensive federal regulations which surround the accreditation process, and it respects, as it must and as all parties agree, the fact that under federal law it is ACCJC, and not this court, which exercises its discretion with respect to accreditation decisions.

IV. DISCUSSION

A. ACCJC's Accreditation Activities are Subject to the UCL

1. Business Acts or Practices

The broad language of the UCL's substantive provisions extends to "anything that can properly be called a business practice and that at the same time is forbidden by law." *Loeffler v. Target Corp.*, 58 Cal.4th 1081, 1125 (2014) (quotations omitted). The UCL's purpose is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services. *Id.* The statute allows courts to enjoin wrongful business conduct in whatever context such activity might occur, no matter the variations of possible schemes. *Id.*

The initial question is whether ACCJC's challenged accreditation activities "can properly be called a business practice." For example, the UCL "is not a roving warrant for a prosecutor to use injunctions and civil penalties to enforce criminal laws. Its application to conduct which violates the penal law is limited to circumstances where such conduct is also a business practice." *People v. E.W.A.P. Inc.*, 106 Cal.App.3d 315, 321 (1980). Whether a particular act is business-related is a question of fact. *People ex rel. City of Santa Monica, v. Gabriel*, 186 Cal.App.4th 882, 888 (2010).

ACCJC argues that its accreditation activities are not business acts or practices because

ACCJC is a nonprofit organization that does not compete in a commercial market for accreditation services. ACCJC Trial Brief, 16.[16] The People counter that ACCJC's accreditation activities are business acts or practices because (1) ACCJC charges member institutions for accreditation and accreditation services; and (2) several people make their livelihood from the activities performed by the ACCJC. People's Post-Trial Brief, 51; Ex. 59 (including annual membership fee invoice and schedule of fees for eligibility review charges); Dec. 2, 2014 Stipulation ¶ 1.

ACCJC moved for summary judgment on this issue, but I denied the motion because the Commission had not shown an absence of any businesslike attributes. Sept. 19, 2014 Order, 18. As on summary judgment, ACCJC's primary California authority is *That v. Alders Maintenance Ass'n*, 206 Cal.App.4th 1419 (2012). In *That*, the plaintiff homeowner was part of a group that attempted to recall the sitting board of directors from a homeowners association of which the plaintiff was a member. *That*, 206 Cal.App.4th at 1422. The recall effort failed, after which the plaintiff sued under the UCL challenging the underlying process. The trial court sustained the demurrer to the UCL cause of action, and the Court of Appeal affirmed. *Id.* at 1424, 1427.

The plaintiff argued that a homeowners association is a business under the UCL, noting that such associations have been held to be businesses under the Unruh Civil Rights Act. *Id.* at 1426-27. The *That* Court rejected the analogy, reasoning that the Unruh Act requires a broad definition of "business establishment" to fulfill its purpose of protecting civil rights, but the UCL does not require an equally broad definition of "business" to fulfill its purpose of protecting consumers and competitors by promoting fair competition in commercial markets for goods and services. *Id.* The *That* Court held that the dispute before it was not related to any activity that might be deemed in the 'least bit

[16] ACCJC also argues that its accreditation activities are not business acts or practices because such activities are protected by quasi-judicial immunity and litigation privilege. ACCJC Trial Brief, 17-18. These are separate issues, addressed below. No authority suggests these issues pertain to whether ACCJC's actions are business acts or practices under the UCL.

commercial,' but was solely related to the conduct of association elections. *Id.* at 1427.[17] The Court explained that "applying the UCL to an election dispute would simply make no sense. An association, operating under its governing documents to maintain its premises and conduct required proceedings, possesses none of the relevant features the UCL was intended to address. Applying the UCL in this context would both misconstrue the intent of that statute and undermine the specific procedures set forth in the Davis-Stirling Act." *Id.*

On summary judgment, I distinguished *That* because the Commission charges a fee for accreditation services, which "might be deemed in the least bit commercial." Sept. 19, 2014 Order, 18. *That* remains factually distinguishable for the same reason. Ex. 59.[18]

In *Pines v. Tomson*, 160 Cal.App.3d 370 (1984), the publisher of a business telephone directory, a nonprofit religious corporation, was sued under both the Unruh Act and the UCL. *Pines*, 160 Cal.App.3d at 375-78. The publisher accepted advertisements for publication only upon affirmation that the person placing the advertisement was a born-again Christian. *Id.* at 375. The publisher argued that it was neither a "business establishment" within the meaning of the Unruh Act, nor engaged in "business practices" within the meaning of the UCL. *Id.* at 383. The argument was based on the publisher's professed status as a nonprofit religious corporation. *Id.* The publisher reasoned that it was not a business establishment, and therefore could not be engaged in business practices. *Id.* The Court noted that the publisher had "businesslike attributes," and concluded that the publisher was a business establishment within the meaning of the Unruh Act because it fit both the commercial and noncommercial aspects of the meaning of a business establishment. *Id.* at 386. The Court held that the publisher's activities were business practices under the UCL. *Id.*

Relevant inquires in *Pines* may have included an analysis of the publisher's businesslike

[17] *That* did not foreclose the possibility that the UCL might apply to a homeowners association that decided to sell products or services that are voluntary purchases for members or nonmembers. *That*, 206 Cal.App.4th at 1427.

[18] ACCJC renews its argument, made on summary judgment, that accreditation by a non-profit accreditor is beyond the scope of the UCL. ACCJC's Trial Brief, 16; Sept. 19, 2014 Order, 17-18. But the out-of-state authority on which ACCJC relies is inapplicable to the California UCL, as described in the order. Sept. 19, 2014 Order, 16-18.

attributes and whether the publisher was open to the public for commercial and noncommercial activity.[19] As other courts have explained, the word "business" embraces everything about which one can be employed, and is often synonymous with calling, occupation, or trade, engaged in for the purpose of obtaining a livelihood or gain. *Burks v. Poppy Const. Co.*, 57 Cal.2d 463, 468 (1962) (Unruh Act case). Businesslike attributes in *Pines* included solicitation and sale of commercial advertisements, substantial mandatory monetary fee for advertisements, collection of royalties and derivation of income from the sale of advertising space, and admissions respecting commercial and economic purposes. *Pines*, 160 Cal.App.3d at 386 n.10. While profit-seeking is one businesslike attribute, other attributes include employment of people, care for a physical plant, and charging a fee for use of facilities. *O'Connor v. Village Green Owners Ass'n*, 22 Cal.3d 790, 796 (1983) (Unruh Act case).

The issue is a close one here. On one hand, ACCJC collects a fee to provide accreditation services by which it funds, in part, its operations. ACCJC also maintains a paid staff that supports its accreditation work. Ex. 59. Indeed, all of the work performed by ACCJC relates to its evaluations of institutions for accreditation; and the members pay for these services. Trial Transcript at 417; Ex. 59. On the other hand, ACCJC is a non-profit corporation; at closing argument, ACCJC urged this as a decisive fact.[20] Aside from the receipt of a fee for the provision of services, there is no indication that ACCJC competes in any market to provide accreditation services. The fact that ACCJC provides accreditation services through a regulated federal system overseen by the Department of Education[21] is vaguely reminiscent of *That's* invocation of regulation by the Davis-Sterling Act as a factor suggesting the inapplicability of the UCL.

If the lone rationale for the application of the UCL were to protect business competition, the

[19] As noted in my summary judgment order, precedent is in conflict with respect to whether cases construing only the Unruh Act are good precedent for definitions under the UCL. Sept. 19, 2014 Order, 18 n.51.
[20] Closing Argument Transcript at 66. As my earlier order noted (Sept. 19, 2014 Order, 15-16), I have rejected the notion that this is decisive.
[21] This is discussed in more detail below, § IV(B)(1) (preemption).

analysis would favor ACCJC's position. But the UCL also protects consumers such as those the City Attorney represents now, and provides a broad scope of protection. *Loeffler*, 58 Cal.4th at 1125. Because ACCJC receives compensation to provide accreditation reviews, including the one at issue here, and maintains a paid full-time support staff to facilitate the provision of accreditation services, the conduct at issue in this case can properly be described as a 'business' practice. The UCL applies.

2. Safe Harbor

As it did on summary judgment, ACCJC argues that it is expressly authorized to conduct accreditation activities under federal and state law, so it cannot be subject to UCL liability. ACCJC Trial Brief, 18-20; September 19, 2014 Order, 19. Of course, a UCL action cannot succeed if the challenged conduct is actually legal. September 19, 2014 Order, 19 (citing cases). But whether or not ACCJC is expressly authorized to conduct accreditation activities, the People are not alleging that ACCJC violated the law simply by conducting accreditation activities, but rather that ACCJC violated the law by conducting accreditation activities in a manner that violates the law and is not expressly authorized.

B. The City Attorney is Not Barred from Bringing this Lawsuit

1. Preemption

> [F]ederal legislation prevails over state law pursuant to the supremacy clause of the United States Constitution, article VI, section 2. Where federal law and state law do not directly conflict, however, courts will determine that federal law preempts state law where preemption is the "clear and manifest purpose of Congress."

Yarick v. PacifiCare of California, 179 Cal.App.4th 1158, 1165 (2009), quoting *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

a. Types of Federal Preemption

There are four species of federal preemption: express, conflict, obstacle,[22] and field. *Viva!*

[22] In *Arizona v. U.S.*, 132 S.Ct. 2492, 2505-07 (2012), the Supreme Court invalidated state statutory provisions as an obstacle to the regulatory system Congress chose under the "well-settled" proposition that state law is preempted where it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Justice

Intern. Voice for Animals v. Adidas Promotional Retail Operations, Inc., 41 Cal.4th 929, 935 (2007); *see also People ex rel. Harris v. Pac Anchor Transp., Inc.*, 59 Cal.4th 772, 777 (2014). Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it. *Viva!*, 41 Cal.4th at 936.[23]

ACCJC's invokes obstacle and field preemption. ACCJC Trial Brief, 27-31 (discussing obstacle preemption under header for conflict preemption).[24] Obstacle preemption arises when state law blocks the full purposes and objectives of Congress. *Viva!*, 41 Cal.4th at 936. Field preemption applies where the scheme of federal regulation is so comprehensive that the court must infer that Congress meant to 'occupy the field' and so intended to prohibit state regulation. *Id.*

The United States Supreme Court has identified two cornerstones of the federal preemption analysis. *Pac Anchor*, 59 Cal.4th at 778.

First, the question of preemption is fundamentally a question of congressional intent. *Id*; *CTS Corp. v. Waldburger,* 134 S. Ct. 2175, 2185 (2014). If a statute contains an express pre-emption clause, the task of statutory instruction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent. *Pac Anchor*, 59 Cal.4th at 778. The structure and purpose of the statute as a whole is relevant. *Id.*

Second, in all preemption cases, and particularly in those in which Congress has legislated in a

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Thomas, in a separate opinion concurring in part and dissenting in part, expressed his view that "the 'purposes and objectives' theory of implied pre-emption is inconsistent with the Constitution because it invites courts to engage in freewheeling speculation about congressional purpose that roams well beyond statutory text." *Id.* at 2524 (Thomas, J., concurring in part and dissenting in part). But obstacle preemption remains good law. *See Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1061 (9th Cir. 2014).

[23] Recent decisions confirm the rule that disfavors a finding of preemption. E.g., *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1217 & n.19 (10th Cir. 2014), *cert. denied,* No. 14-379, 2015 WL 132974 (U.S. Jan. 12, 2015), construing multiple opinions in *CTS Corp. v. Waldburger,* 134 S. Ct. 2175 (2014).

[24] Cases sometimes treat obstacle prevention as a type of *conflict* preemption, rather than a distinct form of preemption. *See Salas v. Sierra Chemical Co.*, 59 Cal.4th 407, 421 (2014); *Paz v. AG Adriano Goldshmeid, Inc.*, 2014 WL 5561024, at *2 (S.D. Cal. Oct. 27, 2014) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)); *Montemayor v. GC Services LP*, 302 F.R.D. 581, 586 (S.D. Cal. 2014). ACCJC does so here. This Statement uses the four categories set forth in *Viva!*. Applying that framework, ACCJC has not actually raised conflict preemption because ACCJC has not argued that it would be impossible to comply with both federal and state law. *Compare, Viva!*, 41 Cal.4th at 936 (conflict preemption arises when simultaneous compliance with both state and federal directives is impossible). Rather, ACCJC argues *obstacle* preemption. Defendants' Trial Brief at 29, lines 12 *et seq.*

field traditionally occupied by the states, courts assume that the historic police powers of the states are not superseded by the federal act unless that is the clear and manifest purpose of Congress. *Id.*

b. The Higher Education Act

20 U.S.C. § 1099b is at the heart of ACCJC's preemption argument. Section 1099b is part of the Higher Education Act. *See, e.g., Accrediting Comm'n for Community and Junior Colleges*, 2013 WL 5945789 at *4 (Illston, J.).

Accreditation by an accreditation agency recognized by the Secretary of Education is generally a requirement to be treated as an institution of higher education under the Higher Education Act. *See* 20 U.S.C. §§ 1001-1002, 1099b(j).[25] Accreditation by a recognized accreditation agency enables an institution to participate in various federal programs and receive federal funds under the Higher Education Act.[26]

Section 1099b is found in a part of a subchapter concerning the integrity of student assistance programs.[27] This section governs, among other things, recognition of accrediting agencies. For example, pursuant to § 1099b(a), "[n]o accrediting agency or association may be determined by the Secretary[of Education[28]] to be a reliable authority as to the quality of education or training offered for the purposes of this chapter or for other Federal purposes, unless the agency or association meets criteria established by the Secretary pursuant to this section." *See also* 20 U.S.C. § 1099b(c)

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[25] Receipt of "preaccreditation status" will also suffice if such status is bestowed by an agency or association that has been recognized by the Secretary for the granting of preaccreditation status and the Secretary has determined that there is satisfactory assurance that the institution will meet accreditation standards of the same agency or association within a reasonable time. 20 U.S.C. § 1001(a)(5).

[26] *See* 20 U.S.C. §§ 1070, 1085, 1091(a)(1), 1094, 1099b(m); *Chicago School of Automatic Transmissions, Inc. v. Accreditation Alliance of Career Schools and Colleges*, 44 F.3d 447, 449 (7th Cir. 1994) (the school applied for accreditation because it "wanted a key that would unlock the federal Treasury. An accreditation agency is a proxy for the federal department whose spigot it opens and closes"); *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 33 (1st Cir. 1998) (*Massachusetts School of Law II*) ("Accreditation serves an important national function because once an institution of higher education becomes accredited by the DOE or its designated accrediting agency, the institution becomes eligible for federal student loan monies. [Citation.] The Higher Education Act and the DOE's implementing regulations spin a sophisticated regulatory web that governs the relationship between accrediting agencies and accreditation applicants").

[27] § 1099b is found in part G of subchapter 4 of chapter 28 of Title 20 of the United States Code. Part G is entitled "Program Integrity."

[28] 20 U.S.C. § 1003(17).

(operating procedures required for recognition). The Secretary enforces an accrediting agency's compliance with the requirements of § 1099b and the Secretary's underlying regulations. *See* 20 U.S.C. § 1099b(l)-(o).

Under the Higher Education Act recognized accreditors are required to provide an institution an opportunity to appeal any adverse action. 20 U.S.C. § 1099b(a)(6)(C). The Secretary must not recognize the accreditation of any institution of higher education unless that institution agrees to submit any dispute involving the final denial, withdrawal, or termination of accreditation to initial arbitration prior to any other legal action. 20 U.S.C. § 1099b(e). Section 1099b(f) provides: "Notwithstanding any other provision of law, any civil action brought by an institution of higher education seeking accreditation from, or accredited by, an accrediting agency or association recognized by the Secretary for the purpose of this subchapter and part C of subchapter I of chapter 34 of Title 42 and involving the denial, withdrawal, or termination of accreditation of the institution of higher education, shall be brought in the appropriate United States district court." Thus, § 1099b(f) creates exclusive federal jurisdiction where an institution of higher education sues its accreditor to challenge the withholding of accreditation on the basis of alleged harms within the accreditation process. *Massachusetts School of Law II*, 142 F.3d at 33.

In sum, an educational institution benefits from accreditation by an accrediting agency recognized by the Secretary because such accreditation is a prerequisite to eligibility for certain federal funds. *See Chicago School*, 44 F.3d at 449. If an educational institution's accreditation is terminated by the accrediting agency, and the institution wishes to bring a civil action "involving" the "termination of accreditation," the institution must bring the challenge in federal court. 20 U.S.C. § 1099b(f). To bring such an action, the institution must exhaust required processes. *See* 20 U.S.C. § 1099b(a)(6)(C), (e).

c. The Higher Education Act and the Underlying Regulatory Scheme Do Not Preempt This Suit

In federal court, ACCJC opposed remand by arguing that 20 U.S.C. § 1099b created federal question jurisdiction. *Accrediting Comm'n*, 2013 WL 5945789 at *4. The federal Court noted that a state law claim arises under federal law, and therefore creates a federal question, if (1) the federal law completely preempts state law, (2) the state claim is necessarily federal in character, or (3) the right to relief requires resolution of a substantial, disputed, federal question. *Id.* at *3. Judge Illston noted that ACCJC did not explicitly argue that the Higher Education Act preempts the People's claims in this case, but did argue that the Higher Education Act created a comprehensive regulatory framework that does not authorize the state to have input on an adverse accreditation decision. *Id.* at *4. The Court held that the Higher Education Act does not completely preempt state law claims. *Id.* at *4-*5. As a result, the Court ruled that federal preemption is nothing more than a defense, and remanded the case to state court. *Id.* at *5. Now, ACCJC raises preemption as a defense.[29]

i. Field Preemption

20 U.S.C. § 1099b(f) does not refer to civil actions brought by any party other than the institution whose accreditation is terminated. Thus, while the statute explicitly gives City College the right to challenge the termination of accreditation in federal court and precludes City College from initiating that suit in state court, it is silent on the right of other parties (such as the People) to bring a suit challenging the termination of City College's accreditation in either state or federal court. The statute does not expressly preempt a state court action brought by the People under state law seeking to vacate an accreditor's termination decision, or otherwise "involving" the termination of accreditation.

In *Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222, 224-25 (9th Cir. 1994), plaintiff students pled a cause of action for common law negligence against an accreditor on the theory that the

[29] ACCJC's trial brief contains the sole ACCJC argument on preemption in this court. ACCJC's post-trial brief did not mention it. Preemption implicates subject matter jurisdiction and is not waived by failure to assert it in the answer. *DeTomaso v. Pan American World Airways, Inc.*, 43 Cal.3d 517, 520 n.1 (1987) (defendant raised preemption for the first time in the trial brief, without pleading preemption as an affirmative defense in the answer).

accreditor failed to monitor the school the students' attended, causing the students damages. The Ninth Circuit noted that the Higher Education Act does not expressly preempt state common law tort claims against accreditors, even though it does expressly preempt state law in several areas. *Id.* at 225.[30] Moreover, as Judge Illston noted in her remand decision, the Ninth Circuit refused to find field preemption, concluding that the narrow and precise express preemption clauses were irreconcilable with the implication that Congress intended to occupy the entire field in which it was regulating. *Id.* at 225-26. The Ninth Circuit held that the accreditors were not entitled to dismissal on the basis of preemption because they had not demonstrated that preemption of the negligence claims at issue was the clear and manifest purpose of Congress. *Id.* at 227.[31]

ACCJC hopes to avoid *Keams* by defining the "field" more narrowly. In *Keams*, the Ninth Circuit looked to the entire field in which Congress was legislating pursuant to the Higher Education Act. Now ACCJC argues only that "Congress intended to occupy the field of accreditation decision[s] affecting eligibility for federal funds." ACCJC Trial Brief, 28. ACCJC appears to suggest that Congress provided the procedure for obtaining a reversal of accreditation decision, and intended the procedure it provided to be the *sole* procedure available. *See id.* at 28-29. This argument devolves to ACCJC's obstacle preemption argument, addressed next. ACCJC Trial Brief, 30. Here, it is enough to note that under *Keams* Congress did not in enacting the Higher Education Act preempt the field in which it legislated. As discussed in more detail below, Congress did not preempt all state law claims "involving" the termination of accreditation.

ii. Obstacle Preemption

Preemption analysis looks to the practical impact of state law on federal laws and the policies

[30] Specifically, the *Keams* Court found express preemption in the following provisions: 20 U.S.C. § 1099 (loans not subject to state disclosure requirements); 20 U.S.C. § 1078(d) (state usury laws inapplicable); 20 U.S.C. § 1091a(a) (state statutes of limitations inapplicable); and 20 U.S.C. § 1091a(b) (state infancy defenses unavailable). *Keams*, 39 F.3d at 225.
[31] As discussed below, the accreditors also raised obstacle preemption in *Keams*.

they manifest. *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053, 1062-63 (9th Cir. 2014).[32]

Obstacle preemption has unique features. First, the issue is whether in a "particular case" state law is an obstacle to the execution of the federal purpose. *Parks v. MBNA Am. Bank, N.A.,* 54 Cal.4th 376, 383 (2012), *quoting Viva!,* 41 Cal.4th at 935. Second, the degree of incompatibility between the state and federal regimes must be very high:

> Under obstacle preemption, whether a state law presents "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: [¶] 'For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act ***cannot otherwise be accomplished***—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.' "

Cnty. of San Diego v. San Diego NORML, 165 Cal.App.4th 798, 821-22 (2008), *quoting Crosby v. National Foreign Trade Council,* 530 U.S. 363, 373 (2000)(emphasis supplied).[33] Thus the issue is whether the prosecution of this particular case will bar the success of the federal goals.

Of course, this requires ascertainment of the federal goals. ACCJC tells us those goals are to keep the process of accreditation and the connected issues of federal funding within the federal system, including the federal courts. ACCJA Trial Brief, 30, lines 1-5. This sounds like tautology—state claims are barred because only federal claims are allowed—but this conceivably could be the case. However, there is no useful evidence that ACCJC is right. ACCJC points to the fact of the federal scheme, and of course that does exist, evidenced by the federal regulations. But there is a federal scheme in *every* preemption analysis—that is the *start* of the analysis, and cannot necessarily establish preemption.

ACCJC asserts that Congress must have intended the scheme in question here to be a

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[32] In *Arizona Dream*, the Ninth Circuit wrote, "If the practical result of the application of Defendants' policy is that DACA recipients in Arizona are generally obstructed from working – despite the Executive's determination, backed by a delegation of Congressional authority, that DACA recipients throughout the United States may work – then Defendants' policy is preempted." *Arizona Dream*, 757 F.3d at 1063.

[33] *Crosby* is the case ACCJC relies on, Trial Brief at 29, and my emphasis here is the same as made by *Qualified Patients Ass'n v. City of Anaheim*, 187 Cal.App.4th 734, 760 (2010).

comprehensive dispute resolution process concerning adverse accreditation decisions. ACCJC Trial Brief, 29, citing 20 U.S.C. § 1099b(a)(6)(C), (e)-(f). Congress did preclude institutions from seeking relief from adverse accreditation decisions outside of the dispute resolution process Congress created. 20 U.S.C. § 1099b(f). But Congress did not address suits by third parties. ACCJC's argument, then, relies on the inference that Congress intended to preclude a suit brought by third parties. But ACCJC provides no evidence or other support for this inference; only the fact of the federal regime itself. ACCJC has not satisfied its burden to identify the putatively protected federal goal or purpose which would be frustrated by the prosecution of this case.

I turn to cases which look at preemption in cases attacking the actions of accreditors such as ACCJC.

In *Keams*, the Ninth Circuit found no obstacle preemption. The negligence claim for damages pressed by the *Keams* plaintiffs plausibly threatened the objectives of the Higher Education Act by subjecting accreditors to diverse standards, discouraging accreditors from participating in the federal program. *Keams*, 39 F.3d at 226. But the Court concluded that diversity of standards could, just as plausibly, be a boon to the federal program because diverse standards would help adapt the federal program to local conditions. *Id.* Further, the Ninth Circuit reasoned that the interest in honest and effective accreditation may best be protected by allowing the students to bring suit in a state court forum. *Id.* at 227. The Court concluded that a private tort for negligent accreditation could benefit the federal system by aiding the Secretary of Education in overseeing accreditation agencies. *Id.* Thus, the *Keams* Court held that the accreditors failed to demonstrate that preemption of the claims brought by the plaintiffs was the clear and manifest purpose of Congress. *Id.*

ACCJC's argument suggests this lawsuit has a greater potential to disrupt the federal scheme than did the action brought by the students in *Keams*. As ACCJC phrases it, allowing this suit to proceed is an "end-run around 1099b(f) and accord[s] state courts the ability to effectively direct

federal funds to non-complaint institutions." Defendant's Trial Brief at 31. ACCJC has not demonstrated that it would be contrary to Congressional objectives for a state court too to hear challenges to termination decisions. Although a state court might thereby render decisions that have the indirect consequence that federal funds continue to be disbursed, such state court proceedings might as well be thought of as a mechanism to ensure an unfairly terminated institution continues to enjoy the benefits of accreditation, *furthering* the federal interest in disbursement of funds to qualified institutions. The diversity of standards as between a state UCL proceeding and the federal action might, as in *Keams*, help adapt the federal program to local conditions. And the interest of all participants in an honest and effective accreditation process may be protected by allowing a suit such as this one.

Now, conceivably a state proceeding might inject standards antithetical to a federal process or analysis. For example, state law might block termination for accreditation unless the accrediting agency finds overtly illegal conduct on the part of the institution, or otherwise tries to modify the standards used by the accrediting agency. Nothing like that has been suggested here. But without the risk of that departure from the federal standards, there is little risk of in effect directing federal funds to a non-compliant institution. Indeed the point of and outcome of this case is to hold ACCJC to the very standards that govern it.

ACCJC's "end-run" argument alludes to procedures for reversal of termination decisions. The federal scheme provides a remedy for adverse accreditation decisions, but not a remedy for negligently awarding an institution accredited status. This case differs from *Keams* in that this case involves a termination decision, from which an institution may seek relief under the federal scheme, whereas *Keams* involved a decision to accredit an institution, for which no federal relief was available. ACCJC's argument assumes a Congressional intent to limit challenges to termination decisions to those brought by institutions. But ACCJC provides no evidence that Congress intended such a result.

Too, ACCJC's position assumes that any problem in the accreditation process of necessity will be called out by the reviewed institution and be the subject the federal review process (including proceedings in federal court). This presumes the interests other parties, such as students and faculty, will always be congruent with those of the institution. This may not always be true, perhaps depending, in some cases, on how well the institution is governed, and responsive to its constituents.

20 U.S.C. § 1099b(f) serves both as a grant and a limitation of jurisdiction. Congress authorized federal courts to hear cases involving the termination of accreditation, but restricted such suits to federal court. *See Massachusetts School of Law II*, 142 F.3d at 33. Congress neither authorized federal courts to hear cases brought by third parties, nor restricted the jurisdiction of such cases to federal court. Congress did not address the possibility of a third party suit seeking to vacate a termination decision, so this action does not interfere with express Congressional objectives. While Congress implemented a procedure by which institutions would resolve disputes involving the termination of accreditation without recourse to litigation, after which litigation initiated by the institution could be brought only in federal court, allowing third parties to sue for similar relief does not prevent the federal process from being carried out; indeed, that process has continued throughout the duration of this case. One might reasonably infer that had Congress intended to preclude actions brought by third parties in state court asserting state law claims, it would have said so. *See Keams*, 39 F.3d at 225 (applying the *expressio unius est exclusio alterius* canon of construction[34] in discussing field preemption). The parties have not provided useful evidence of Congressional intent beyond the language of the statute itself.[35]

It is ACCJC's burden to demonstrate that Congress intended to preempt the People's suit,

[34] The expression of some things in a statute necessarily means the exclusion of other things not expressed. *Gikas v. Zolin*, 6 Cal.4th 841, 852 (1993).

[35] ACCJC argues that the jurisdictional provision, which was enacted as part of Public Law 102-325, was intended to address concerns that federal funds were being allocated to institutions without sufficient assurances that those institutions were meritorious. ACCJC's Trial Brief, 27-28. ACCJC relies on hearing records from the 101st Congress to support its argument, without explaining why records of hearings before the 101st Congress should influence this Court's understanding of the intent of the 102nd Congress. *Id.*

Viva!, 41 Cal.4th at 936, in the words of *Crosby,* 530 U.S. at 373, that federal goals simply cannot be accomplished if this suit is prosecuted. While we know Congress limited the reviewed institutions' options to federal court, ACCJC has not sustained its burden of demonstrating that Congress meant *only* the reviewed institutions could challenge a termination decision. *Keams* suggests otherwise. And an express preemption clause is the best evidence of Congress' pre-emptive intent. *Pac Anchor*, 59 Cal.4th at 778. The Higher Education Act contains various preemption clauses, none of which relates to claims challenging preemption provisions. *See Keams*, 39 F.3d at 225. Congress could have, but did not, preempt this lawsuit.[36]

2. *Noerr-Pennington* Doctrine

"Under the *Noerr-Pennington* doctrine – established by *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, ... (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657, ... (1965) – defendants are immune from antitrust liability for engaging in conduct (including litigation) aimed at influencing decisionmaking by the government." *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S.Ct. 1749, 1757 (2014); *see also Hernandez v. Amcord, Inc.*, 215 Cal.App.4th 659, 679 (2013) (*Noerr-Pennington* has been applied in cases involving civil liability for causes of action beyond the violation of the Sherman Act). The United States Supreme Court "crafted the *Noerr-Pennington* doctrine ... to avoid chilling the exercise of the First Amendment right to petition the government for the redress of grievances." *Id.*

Under the *Noerr-Pennington* doctrine, private action cannot form the basis for antitrust liability if it is "incidental" to a valid effort to influence government action. *Sosa v. DIRECTV, Inc.*, 437 F.3d 923, 934 (9th Cir. 2006). To exercise petitioning rights meaningfully, a party may not be subjected to liability for conduct intimately related to petitioning activities. *Id.* For example, the doctrine protects not just direct communications with legislators, but may also protect public relations campaigns that

[36] While I have not found preemption, the federal interests do have a role as prudential factors evaluated in connection with the relief to be afforded through this lawsuit. See below, § IV(E).

are designed to influence the passage of favorable legislation. *Id.*; *see also Tichinin v. City of Morgan Hill*, 177 Cal.App.4th 1049, 1068 (2009) (conduct incidental or reasonably related to petition is protected).

Here, ACCJC first argues that its communication of its accreditation decisions to the government is protected petitioning activity under *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 107 F.3d 1026 (3d Cir. 1997) (*Massachusetts School of Law I*) and *Zavaletta v. ABA*, 721 F.Supp. 96, 98 (E.D. Va. 1989). ACCJC Trial Brief, 32. As a result, ACCJC argues that its accreditation decisions are themselves petitioning activity. *Id.* at 33. I have previously interpreted *Massachusetts School of Law I* and *Zavaletta*, rejecting ACCJC's argument. October 8, 2014 Order, 3-5. ACCJC does not provide a basis to revisit that reasoning.

Second, ACCJC argues that any liability theory stemming from ACCJC's petitioning activity with respect to the Student Success Task Force is barred. ACCJC Trial Brief, 33. The People assert that ACCJC acted unfairly by evaluating City College at a time when ACCJC and City College were on opposite ends of a public debate concerning the Student Success Task Force. People's Trial Brief, 14; People's Post-Trial Brief, 46-51. The People argue that this conduct was unfair because it created an appearance of bias on the part of ACCJC, it could have influenced some Commissioner's decisions, and Beno may have known and responded to City College's position. People's Post-Trial Brief, 49-51.[37] If the People mean to ascribe liability simply as function of ACCJC's taking a position on the debate, this is likely barred by the doctrine. But there may be a perfectly reasonable basis to challenge ACCJC's accreditation actions based on a conflict of interest, *the evidence of which* includes ACCJC's position on a matter of public debate. In the abstract, that is, the claims survive an attack based on the ***Noerr-Pennington*** doctrine. But as discussed below (§ IV(D)(5)), in this case the claims are without merit.

[37] The People do not contend that the dispute influenced the Commission's decisions or Beno's conduct, only that it could have.

3. *Parker* Doctrine

Parker v. Brown, 317 U.S. 341, 352 (1943) immunizes private action that would otherwise 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. *See United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.*, 766 F.3d 1002, 1009 (2014). Although *Parker* has not been applied to a California UCL claim, the UCL may be similar to the Sherman Act in that the UCL does not regulate state conduct. *See People for the Ethical Treatment of Animals, Inc. v. California Milk Prods. Advisory Bd.*, 125 Cal.App.4th 871, 878-79 (2005); Bus. & Prof. Code §§ 17201, 17203. ACCJC has not identified authority applying *Parker* beyond the antitrust context.[38]

In *Massachusetts School of Law I*, the Third Circuit applied the *Parker* doctrine to some, but not all, of the antitrust claims before it. States decide whom to allow to sit for bar exams, and in *Massachusetts School of Law I* the state decided to rely on accreditation decisions. 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. *Massachusetts School of Law I*, 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. The Court stated 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." *Id.* at 1039.

ACCJC argues that whatever claims the People may have here are against the state because any harm flowing from the loss of accreditation is a result of state action following the loss of

[38] *See* ACCJC Trial Brief, 35, citing *Fed. Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 625, 627 (1992) (assertion of *Parker* immunity from antitrust prosecution as a defense to a charge of price fixing under the Federal Trade Commission Act); *People ex rel. Freitas v. City and County of San Francisco*, 92 Cal.App.3d 913, 920 (1979) (Cartwright Act).

accreditation. ACCJC Trial Brief, 36-37. But, as I have already observed in denying judgment on the pleadings, the People do not claim injury derived from credence the state gives to accreditation decisions, but rather that ACCJC failed to properly conduct its accreditation evaluation. October 8, 2014 Order, 5. This is not an antitrust case, the People do not need to prove antitrust injury. The fact that some of the harm suffered by City College if its accreditation is terminated will flow from an intervening act by the government does not transform the People's claim that ACCJC failed to follow proper accreditation procedures into a claim against the state. The *Parker* doctrine does not preclude the People's claim.

4. Quasi-Judicial Immunity

California courts have granted quasi-judicial immunity to nonjudicial persons who perform quasi-judicial functions. *Bergeron v. Boyd*, 223 Cal.App.4th 877, 887 (2014). The doctrine affords certain individuals absolute immunity for damages claims arising from their performance of duties in connection with the judicial process. *Id.* The purpose of the doctrine is to encourage individuals to accept such roles and to prevent the threat of civil liability from affecting the manner in which individuals perform those roles. *Id.* The doctrine extends to persons performing acts that are judicial in nature. *Id.* at 884-85. The doctrine has, for example, been applied to private arbitrators to promote principled and fearless decision-making and to prevent intimidation. *Id.* at 887; *see also McClintock v. West*, 219 Cal.App.4th 540, 550 (2013) (federal decisions have extended the doctrine to trust officers, conservators, receivers, guardians ad litem, psychologists, and attorneys for children in child abuse cases).

ACCJC argues that its conduct is immune from UCL liability because it is a quasi-judicial body. ACCJC Trial Brief, 17-18. Neither party has identified any California law discussing whether an accreditor is a quasi-judicial body. *Id.*; People's Post-Trial Brief, 54. ACCJC emphasizes that, in rendering accreditation decisions, accreditors hold hearings and find facts to make decisions about the

institutions they accredit. ACCJC Trial Brief, 17, citing *Illinois College of Optometry v. Labombarda*, 910 F.Supp. 431, 433 (N.D. Ill. 1996).[39]

To be sure, in making accreditation decision the Commission accepts evidence, holds a hearing, and renders an accreditation decision based on that evidence. But this is only a small part of the ACCJC's operations. ACCJC's conduct at issue in this case involves: (1) composing teams to be sent to City College to collect facts for consideration by the Commission, including composing related policies; (2) composing a Commission, including composing related policies; (3) providing notice of deficiencies and an opportunity to respond to perceived deficiencies; (4) promulgating accreditation standards; and (5) engaging in political advocacy. None of this conduct is judicial in nature. Moreover, this suit was brought against ACCJC, not any of its Commissioners. In addition, ACCJC has not provided any authority to support the use of quasi-judicial immunity to bar a suit for injunctive relief, as opposed to damages.[40] Quasi-judicial immunity does not bar this suit.

5. Litigation Privilege

ACCJC contends that its accreditation activities are performed by participants in a quasi-judicial proceeding to achieve the object of the proceeding, and are therefore privileged communications. ACCJC Trial Brief, 18. I have already rejected this argument. Sept. 19, 2014 Order, 21. The litigation privilege applies to communications made in judicial or quasi-judicial proceedings, by litigants or other participants authorized by law, to achieve the objects of the litigation. *Silberg v. Anderson*, 50 Cal.3d 205, 212 (1990). This affords litigants and witnesses the freedom to access the courts without fear of being subsequently harassed by derivative tort actions. *People ex rel. Gallegos v. Pacific Lumber Co.*, 158 Cal.App.4th 950, 958 (2008). But, as I noted, this suit is not premised on

[39] The *Illinois College* Court held that because an accreditor was a quasi-judicial body under a six factor test used in Illinois, a complaint filed with the accreditor was protected by Illinois law privileging statements made during quasi-judicial proceedings. *Illinois College* did not involve the claim of quasi-judicial immunity by an accreditor. Nor did it involve California law.

[40] ACCJC relies on *Bergeron*. ACCJC fails to note language making it clear that *Bergeron* is discussing immunity from *damage* claims. Defendant's Trial Brief, 17-18; *Bergeron*, 223 Cal.App.4th at 882, 887; *see also Greene v. Zank*, 158 Cal.App.3d 497, 507 n.10 (1984) ("Judicial immunity, however, does not absolutely insulate judicial officers from declaratory or injunctive relief when acting in their judicial capacities").

communications. *See* Sept. 19, 2014 Order, 21. ACCJC never did identify any particular communications that it believes are subject to the privilege. The litigation privilege does not bar this action.

C. The Commission Violated the UCL – Unlawful Prong

1. Lack of Adequate Controls against Conflicts of Interest

The Secretary of Education must establish criteria for recognition of an accrediting agency. 20 U.S.C. § 1099b(a). The Secretary has done so. 34 C.F.R. § 602.10 *et seq*. In the summary judgment context, I concluded that the Secretary's criteria for recognition may be borrowed under the UCL. September 19, 2014 Order, 22-24.

Pursuant to 34 C.F.R. § 602.15:

> The agency must have the administrative and fiscal capacity to carry out its accreditation activities in light of its requested scope of recognition. The agency meets this requirement if the agency demonstrates that-- (a) The agency has-- (1) …; and (6) Clear and effective controls against conflicts of interest, or the appearance of conflicts of interest, by the agency's-- (i) Board members; (ii) Commissioners; (iii) Evaluation team members; (iv) Consultants; (v) Administrative staff; and (vi) Other agency representatives….

The People contend that ACCJC violated the unlawful prong of the UCL by failing to maintain clear and effective controls against conflicts of interest, or the appearance of conflicts of interest. People's Trial Brief, 7-8. Specifically, the People contend that (1) the inclusion of Peter Crabtree on the 2012 Evaluation Team created the appearance of a conflict of interest; and (2) a significant percentage of Commissioners who served on the Commission in June 2012 and June 2013 were appointed pursuant to a selection process that did not provide clear and effective controls against conflicts of interest. *Id.*

a. Crabtree

Between 2006 and January 2012, ACCJC's conflicts of interest policy provided that the "Commission will not knowingly invite or assign participation in the evaluation of an institution anyone who has a conflict of interest or the appearance thereof." Ex. 12 at 145. The policy stressed

the importance of self-reporting conflicts. *Id.* The policy further provided that any person with one of the following connections with an institution/district/system in the last five years will not participate in the evaluation of an institution: (1) employment at the institution/district being evaluated; (2) candidacy for employment at the institution/district being evaluated; (3) current or prior service as a paid consultant or other business relationship with the institution/district/system being evaluated; (4) any written agreement with an institution/district/system that may create the appearance of a conflict of interest with the institution/district/system; (5) personal or financial interest in the ownership or operation of the institution/district/system; (6) close personal or familial relationships with a member of the institution/district; (7) other personal or professional connections that would create either a conflict or the appearance of a conflict of interest; and (8) receipt of remuneration, honoraria, honorary degrees, honors, or other awards from the institution/district/system. *Id.* at 145-46.

The policy was revised in January 2012. Once again, the Commission stated that it would not knowingly invite evaluators with conflicts of interest to serve on evaluation teams. Ex. 43 at 2. The new policy added a requirement that team members confirm in writing that they reviewed the policy. *Id.* The policy also instructed institutions being evaluated to check for conflicts of interest. *Id.* The revision added a definition of a "conflict:" "any circumstance in which an individual's capacity to make an impartial and unbiased decision may be affected because of a prior, current, or anticipated institutional/district/system affiliation or other significant relationship(s) with an accredited institution/district/system or with an institution seeking initial accreditation, candidacy, or reaccreditation." *Id.* at 1. Again, the Commission stressed the importance of self-reporting. *Id.* The January 2012 policy included the same eight-item list of conflicts. *Id.* at 2.

Peter Crabtree was married to ACCJC President Barbara Beno. Deposition of Peter Crabtree, 53:14-54:5. Crabtree was employed as a Dean at Laney College in the Peralta Community College District. *Id.* at 47:3-25. Crabtree was invited to serve on the 2012 Evaluation Team by Garman

"Jack" Pond. Deposition of Garman J. Pond, 93:8-13; Ex. 40. Crabtree accepted the invitation in the fall of 2011. Ex. 40.

In selecting teams, Pond does not invite current or former employees of the institution being evaluated because those individuals create a conflict of interest or the appearance of it. Pond Deposition, 100:17-101:17. Pond said applicants for jobs at an institution create conflicts, but noted that he would be unaware of application history. *Id.* at 101:18-102:5. Finally, Pond responded to an inquiry regarding "[a]ny other obvious conflicts" by stating that "[he] tr[ies] not to put individuals on a team if they – if their districts actually butt up against one another" because "[t]hey could share students." *Id.* at 102:6-12.

City College was provided a list of team members, which included Crabtree's name and affiliation. The College apparently made no objection. Ex. 56; *see also* Pond Deposition, 104:2-19 (reviewing roster that was apparently sent to City College by Tom Lane).[41]

The People do not argue that Crabtree's appointment presented a conflict under any of the written policies described above. Instead, the People in effect devise a policy and argue that Crabtree was conflicted, or at least the appearance of conflict existed, because Crabtree works at Laney College, which is in the district abutting City College. People's Post-Trial Brief, 4. Laney College is relatively near City College and BART accessible, leading two City College teachers to believe that Laney College might benefit from increased enrollment as a result of City College's accreditation struggles. Trial Transcript, 67:10-68:23; Deposition of Karen Saginor, 165:13-166:11.[42] Pond might

[41] The People object to Exhibit 45 as hearsay. Exhibit 45 consists of an email dated January 4, 2012 from Tom Lane of ACCJC and a reply email dated January 6, 2012 from Don Griffin of City College. Lane announces that the roster of evaluators is attached. Griffin responds that "we" are "very happy" with the team. The roster is not itself included in Exhibit 45. Without considering Exhibit 45 for the truth of the matter asserted, Exhibit 45 indicates that City College had an opportunity to review the team roster and did not raise an objection and it is admissible at least for that purpose. Further, Exhibit 56 is a February 27, 2012 email from Lane to Griffin announcing that the roster has been revised. Exhibit 56 does include the attached roster, which lists Crabtree as a Dean at Laney College. There is no indication that City College objected to Crabtree's membership based on his affiliation with Laney College or for any other reason.

[42] It became clearer at closing argument that the People's view is not precisely that the districts were *next* to each other, but more generally that the same conflicts issues exist whenever the reviewed institution and the reviewer's institution were linked by mass transit, because that in turn suggested students could make an easy transfer from one institution to another.

have thought that inclusion of an evaluation team member created a conflict of interest or the appearance of a conflict of interest. Pond Deposition, 102:6-10.[43]

But there is no evidence that Crabtree stood to personally benefit in any way from Laney College's enrollment, or that Laney College was seeking to increase enrollment, whether at the expense of City College or otherwise. The People argue that Laney College might benefit; thus its employees were conflicted. *See* Trial Transcript, 273:20-25. How might this be? Perhaps if City College lost accreditation and closed (or was threatened with closure), some students might enroll at Laney which might then possibly do better financially (or not), which might then possibly improve the employment security of its faculty (such as Crabtree) or perhaps increase faculty income. That is certainly not an actual conflict. And the series of speculative inferences—for which no substantial evidence was presented at trial—will not support even the more slender reed of an *appearance* of a conflict. Although such appearance might exist where there is a *potential* for the personal interests of an individual to clash with fiduciary duties,[44] nothing suggests such a potential here.[45] We should

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Closing Argument Transcript at 9. Whether linked by BART, bus, or a combination, many intuitions could be presumably be seen as competing for students and so, under the People's very broad view, this would bar reviewers from their peer review work. The People have failed to articulate a test which distinguishes reasonable perceptions of a conflict of interest, and have failed to explain why the testimony of a few people is pertinent. These two problems are discussed at somewhat greater length at note 49 below in connection with the public perception of Beno's role.

[43] The People incorporate the question, including the words "obvious conflicts," into Pond's response. But Pond did not directly answer the question. Pond's statement is only that he tries not to invite members from abutting districts. Pond's other testimony makes it clear that Pond does not invite members in other conflict situations. Pond Deposition, 100:23-25, 101:16-17.

[44] Ex. 139 at 2-3. The parties dispute whether I should consider this Exhibit. As the text makes clear, it doesn't matter. ACCJC contends that Exhibit 139 is a draft of staff findings, which does not amount to the opinion of the Department of Education and is not a final determination, but is subject to ACCJC's written response, appearance at a hearing, and appellate process. ACCJC's Trial Brief, 22-25; ACCJC's Post-Trial Brief, 18-19. The People argue that I can rely on the reasoning in Exhibit 139 regardless of its finality. People's Post-Trial Brief, 5-6 n.3. Exhibit 139 does not contain final findings of fact, so the factual findings should not be adopted. *See* 34 C.F.R. §§ 602.33-602.37; Ex. 139 at 5 ("The Department['s]"finding that ACCJC does not meet the requirements of the sections identified in the body of the letter, advising ACCJC to take immediate action to correct non-compliance, and inviting ACCJC to submit its response to specific sections in the letter in conjunction with its response to the draft staff analysis of ACCJC's petition for recognition). Whether the interpretation of the regulations conveyed in Exhibit 139 is the proper subject of deference is a different question. The degree to which judicial deference to an agency's interpretation is appropriate depends on the context, including the extent to which the agency's expertise provides a comparative interpretive advantage over that of the courts and the degree to which it appears that the agency has carefully considered the issue. *Holland v. Assessment Appeals Bd. No. 1*, 58 Cal.4th 482, 494 (2014). A court may defer to, for example, an informal advice letter. *Id.* at 494-95. I am not confident the Department has given the letter its full consideration. I have attended to its understanding of federal regulations with interest but I do not consider it binding. As to the scope of Exhibit 139's interpretation of federal regulations, I extract these constructions: it (i) specifies to whom there must be an appearance of conflict; (ii) requires

recall that ACCJC is a voluntary association of peers—of competitors, to some extent—who continuously review each other and thus presumably have the power to undermine each other's stability. Something more than speculation is needed to suggest that team members might be reasonably perceived as biased in favor of destroying one of their peer academies.

Second, the People argue that because Crabtree was married to Beno, ACCJC's President, his presence on the evaluation team created the appearance of conflict of interest because either (1) the public could believe that Commission would favor the position taken by the spouse of ACCJC's President, as a team member, over that of the institution being evaluated; or (2) the public could believe that Crabtree would do Beno's bidding. The former position, but not the latter, was adopted in an August 2013 letter from the Department of Education. Ex. 139 at 2-3. The People also presented testimony from three members of the City College community and their expert that, in their opinions, inclusion of Beno's spouse on the evaluation team created an apparent conflict. *See* People's Post-Trial Brief, 6-8.

At issue is the objective "appearance to the public."[46] I will not adopt the Department's factual finding that the public would believe that the Commission may favor the opinion of an evaluation team over an institution if the president's spouse in on the evaluation team. The Department of Education has no special expertise with respect to public opinion. The factual finding was not reviewed, for the Commission revised its policy in October 2013 rather than pursue the issue. *See* Ex. 148 at 3; Ex. 156 at 41. Other than the Department's factual finding, the only other evidence

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policies to account for the appearance of a conflict of interest as well as a conflict; and (iii) notes that an appearance may include the perception that an individual's "personal interests" may conflict with his or her "fiduciary duties" presumably referring to duties on behalf of ACCJC. I am happy to accept those interpretations, but none helps the People's position regarding Crabtree's role.

[45] The People rely on the fact that state funding is given based on enrollment to demonstrate that Laney College has an interest in enrolling students displaced from City College. People's Post-Trial Brief, 4. But enrolling additional students is not without costs. The People do not discuss these costs. Nor have the People noted evidence that Laney College was not already enrolled at capacity. *See* Ex. 152 at ACCJC 002215 (although Laney College agreed to take on City College students in the event of closure, Laney College did not promise seats to City College students but consideration of priority admission within the existing local studies priority policy structure). The record does not support the conclusion that Laney College stood to benefit from an adverse accreditation action against City College.

[46] Ex. 139 at 3.

supporting the notion that the public would perceive an apparent conflict consists of (1) the suggestion that Beno desired the demise of the College and (2) the subjective responses of a handful of witnesses.

While there was evidence that Beno's position on the Student Success Task Force was opposed to that associated with at least some elements at City College,[47] there is no evidence that as a consequence she meant to injure City College or that she knew of the College's position,[48] nor, importantly, that her husband would be perceived as desirous of carrying out a nefarious intent which might be speculatively ascribed to Beno.

And nothing suggests it is reasonable for me to extrapolate from the handful of witnesses to the public as a whole.[49] The People have not proven that the inclusion of Crabtree on the 2012 Evaluation Team created the appearance of a conflict of interest just because he was married to Beno.

But all this is prologue. We must recall the issue: it is whether ACCJC's controls were adequate. The People submit that the controls were inadequate because Crabtree was allowed to be on the team. People's Post-Trial Brief, 8-9. But the fact (even were it true) that a conflict or an

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[47] Many associated with City College opposed the recommendations of the Student Success Task Force. *See, e.g.*, Trial Transcript, 60:25-63:21 211:24-213:5. Beno publicly supported the recommendations personally and on behalf of ACCJC. *See, e.g.*, Trial Transcript 461:24-463:14.

[48] Beno credibly testified that she did not become aware of City College's opposition to the Student Success Task Force recommendations until April or May of 2013, long after Crabtree's involvement in the 2012 evaluation. Trial Transcript, 357:13-19. The People do not point me to contrary evidence. Rather, the People urge that because Beno acknowledged that individual colleges were more sensitive to the recommendations and, according to other testimony, only two colleges opposed the recommendations, Beno must have known that City College opposed the recommendations. People's Post-Trial Brief, 50-51. But Beno explained that in November 2011 she attended an open session held by the Community College League of California at which people raised their hands and spoke to the task force about their thoughts about different recommendations. Trial Transcript, 357:20-358:14. Beno had no idea whether or not City College was at the November 2011 meeting. *Id.* The evidence on which the People rely does not contradict Beno's testimony that she was unaware of City College's position. And Beno specifically testified that that her support for the Student Success Task Force recommendations did not have any effect on, impact on, or relationship with any of the decisions that were made with respect to City College. Trial Transcript, 462:1-14. Nor have the People pointed to any other reason why Beno might have been biased.

[49] The People do not articulate a test by which a court might determine the existence of a potential conflict of interest. It surely cannot be enough to just present witnesses who say they have such a perception. Anecdotal evidence frequently fails in court. E.g., *Wal-Mart Stores, Inc. v. Dukes,* 131 S. Ct. 2541, 2556 (2011). In other contexts, it is plain that unilateral perceptions of an appearance of bias are not grounds for disqualification. *Gai v. City of Selma*, 68 Cal.App.4th 213, 220 (1998). Judges, for example, are subject to exacting standards, but are disqualified only if one "aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." *Id.* at 229; *Linney v. Turpen*, 42 Cal.App.4th 763, 776 (1996). See also *Haworth v. Superior Court*, 50 Cal.4th 372, 389 (2010) (state and federal tests) (test based on a "reasonable person" who is "not someone who is 'hypersensitive or unduly suspicious,' but rather is a 'well-informed, thoughtful observer'); *Mt. Holyoke Homes, L.P. v. Jeffer Mangels Butler & Mitchell, LLP*, 219 Cal.App.4th 1299, 1311 (2013) (arbitrators). The point is that matters are measured from the point of view of someone *who actually knows the pertinent facts*, generating an objective test. The People present no substantial evidence that tracks any such test.

appearance of a conflict arose does not logically imply controls were inadequate: controls need not be perfect, or adhered to in every case, for controls to be adequate. A rule may be plain, clear and adequate and yet transgressed. More to the point, a controlling policy need not be so precise as to expressly determine the outcome in every possible determination of a conflict (or appearance of conflict). Indeed, that would be impossible. A policy may be—indeed, will be—general in its terms, not by its express terms describe every prohibited conflict, and yet be adequate. For example, state law requires a judge to recuse if any one of a set of considerations apply,[50] but one cannot tell from just those words whether a given situation is covered. Those policies are not inadequate because sometimes a judge fails to recuse when she ought to. So too here: even if the People were right that Crabtree ought not to have been on the team (and I have rejected that assumption) his presence on the team would not be sufficient to show the controls were inadequate.

b. Commissioners

Pursuant to the October 2007 version of ACCJC's bylaws, the Commission consists of nineteen members all of whom are appointed by a seven-member Commissioner Selection Committee. Ex. 20 at 136-38. Commissioners serve staggered three-year terms. *Id.* at 137. The seven members of the Commissioner Selection Committee included three appointed by the Chair of the Commission, one appointed by the Pacific Postsecondary Education Council, and three appointed by the Academic Senate for the California Community Colleges, the California Chief Executive Officers, the California Community College Trustees, and the Hawaii Community College Academic Senate Chairs. *Id.* at 138. There must be at least two administrators, two faculty members, and two public representatives on the committee. *Id.* The ACCJC President serves as the nonvoting Secretary to the committee. *Id.*

In an August 2010, the Department of Education sent ACCJC a letter announcing its conclusions, after reviewing various complaints, that the bylaws did not provide the transparency

[50] I.e., if "(i) The judge believes his or her recusal would further the interests of justice.[¶] (ii) The judge believes there is a substantial doubt as to his or her capacity to be impartial. [¶] (iii) A person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial." C.C.P. § 170.1 (a)(6)(A).

necessary to provide clear and effective controls against conflicts of interest (or the appearance of those) in the Commissioner selection process because the bylaws (1) lacked a formal documented process for soliciting appoints to the Commissioner Selection Committee, (2) did not address the maximum number of times an individual may serve on the Commissioner Selection Committee, and (3) did not address public notice of the membership of the Commissioner Selection Committee. Ex. 242 at 1, 3-4. By October 2010, ACCJC had amended its bylaws to address the Department of Education's concerns. Exs. 28-29.

Exhibit 242 demonstrates the Department's understanding of 34 C.F.R. § 602.15(a)(6). Applying that understanding to the bylaws in the present record, I reach the same result. Between at least October 2007 and October 2010, ACCJC's Commissioner selection process did not provide adequate controls against conflicts of interest, or the appearance of conflicts of interest. This was unlawful under the UCL. Twelve of the nineteen Commissioners who served in June 2012 and nine of the nineteen Commissioners who served in June 2013 were appointed under the inadequate policy. Trial Transcript 873:5-874:9.

No evidence, however, establishes that any of the Commissioners had a conflict of interest, or that there was an appearance of a conflict of interest.[51]

2. Failure to Include Sufficient Academics on Evaluation Teams

Item (a)(3) of 34 C.F.R. § 602.15 is: "Academic and administrative personnel on its evaluation, policy, and decision-making bodies, if the agency accredits institutions[.]" I have already ruled that ACCJC failed to include sufficient academics on its 2013 Show Cause Team. September 19, 2014 Order, 39. The People contend that ACCJC also failed to include sufficient academics on the 2012 Evaluation Team. People's Trial Brief, 8.

[51] The Department of Education suggested, as ACCJC acknowledges, that the old policies contributed to a lack of 'transparency.' Defendants' Post-Trial Brief, 20. But this not the same as potential or appearance of a conflict of interest which, as my discussion above in connection with Crabtree suggests, should be tethered to a some sort of specific identifiable [potential or appearance of] conflict. That is, a 'potential conflict of interest' has no content or meaning without specifying what *kind* of conflict is possible.

The People concede that three members of the sixteen-member 2012 Evaluation Team were academics. People's Post-Trial Brief, 17.[52] ACCJC argues that between seven and nine were academics. ACCJC's Post-Trial Brief, 17 (at least seven, nine if ACCJC prevails in an appeal with the Department of Education concerning ACCJC's definition of "academic"); People's Post-Trial Brief, 13 (nine); Trial Transcript, 595:3-596:9.[53]

The People have not provided authority that three academics are too few. The People's expert testified only that a team reviewing a teaching-oriented institution should have more academics than a team evaluating a research-oriented institution. Trial Transcript, 283:3-284:1. He described the proper number as highly variable, and did not discuss the impact administrative issues may have on the appropriate balance. *See id.* The People also point to Pond's testimony, the ACCJC officer charged with assembling the team. Pond testified that he originally sought four faculty members and, upon losing two, felt that the remaining two faculty members were probably too few for a big school. Confidential Deposition of Garman J. Pond, 68:12-69:24. But it is undisputed that there were three academics on the final team and there is no evidence that the inclusion of three academics is insufficient.

The People have not shown that ACCJC included insufficient academics on the 2012 Evaluation Team.

3. Due Process Regulations and Common Law Fair Procedure

The People argue that ACCJC violated a federal regulation requiring ACCJC to provide "sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken," and the common law fair procedure doctrine. *See* 34 C.F.R. §

[52] Pat Flood, Alicia Munoz, and Jeannette Redding.

[53] The focus of the dispute between the parties is whether academics include only individuals with recent direct instructional experience, or can extend to deans and others who lack direct instructional experience but have primary responsibility for instructional support. *See* Ex. 149; Trial Transcript, 598:5-603:19; Ex. 58; People's Post-Trial Brief, 16-17.

602.25(d); *El-Attar v. Hollywood Presbyterian Med. Ctr.*, 56 Cal.4th 976, 987 (2013).[54] The Commission took adverse action when, and only when, it terminated City College's accreditation. *See* 34 C.F.R. § 602.3. Constitutional due process compels the government to afford persons due process before depriving them of any property interest. *Today's Fresh Start, Inc. v. Los Angeles Office of Educ.*, 57 Cal.4th 197, 212 (2013). The essence of due process is the requirement that a person in jeopardy of serious loss be given notice of the case against him and an opportunity to meet it. *Id.* The dictates of due process are flexible and vary according to context. *Id.* Because ACCJC is a private actor, the People rely on the common law fair procedure doctrine rather than Constitutional due process. *Sound Appraisal v. Wells Fargo Bank, N.A.*, 717 F.Supp.2d 940, 945 (N.D. Cal. 2010) *aff'd*, 451 F. App'x 648 (9th Cir. 2011).

a. Due Process Regulations

20 U.S.C. § 1099b(a) includes a list of requirements to be imposed on accrediting associations such as ACCJC. This list includes: "(6) such an agency or association shall establish and apply review procedures throughout the accrediting process, including evaluation and withdrawal proceedings, which comply with due process procedures ...." These review procedures must provide for adequate written specification of identified deficiencies at the institution or program examined and for sufficient opportunity for a written response, by an institution or a program, regarding any deficiencies identified by the agency or association to be considered by the agency or association prior to final action in the evaluation and withdrawal proceedings. *See* 20 U.S.C. § 1099b(a)(6)(A)(ii), (B)(ii).

In 34 C.F.R. § 602.18, the Secretary set forth the criteria for ensuring consistency in decision-making. An accrediting agency meets the requirement in 34 C.F.R. § 602.18 if it meets five conditions, including if the accrediting agency: "(e) Provides the institution or program with a detailed written report that clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards."

[54] The People also argue that ACCJC violated 34 C.F.R. § 602.18(e).

In 34 C.F.R. § 602.25, the Secretary set forth the criteria for ensuring that accrediting agencies provide due process. An accrediting agency meets the requirement in 34 C.F.R. § 602.25 if it meets seven conditions, including if the agency: "(d) Provides sufficient opportunity for a written response by an institution or program regarding any deficiencies identified by the agency, to be considered by the agency within a timeframe determined by the agency, and before any adverse action is taken." "Adverse action" means "the denial, withdrawal, suspension, revocation, or termination of accreditation or preaccreditation, or any comparable accrediting action an agency may take against an institution or program." 34 C.F.R. § 602.3.

b. Common Law Fair Procedure

Common law fair procedure provides for deferential review.[55] The doctrine protects against arbitrary decisions by private organizations under certain circumstances. *Potvin v. Metropolitan Life Ins. Co.*, 22 Cal.4th 1060, 1066 (2000). California courts have applied the doctrine where a union arbitrarily denied full membership privileges to African-American workers and in medical privileges cases. *Id.* at 1066-70. The private organization subject to the common law right to fair procedure in that case was a private entity affecting the public interest. *Id.* at 1070. *See Applebaum v. Bd. of Directors of Barton Mem'l Hosp.*, 104 Cal.App.3d 648, 657 (1980).

Although neither party has identified a case applying the common law fair procedure doctrine to an accreditor, the applicability of the doctrine is not disputed here.[56] As discussed in the preemption analysis above, ACCJC's accreditation decisions play a gatekeeper role in limiting access to funding. As in the medical privileges context, accreditation by ACCJC impacts City College's ability to operate. *Sound Appraisal*, 717 F.Supp.2d at 946. The common law fair procedure doctrine applies to a decision by ACCJC to terminate accreditation.

An association subject to the common law fair procedure doctrine retains discretion in

[55] Jan. 2, 2014 Order, 27-34; Sept. 19, 2014 Order, 27-30.
[56] ACCJC submitted over eighty pages of trial briefs. Nowhere there did ACCJC dispute that an accreditor is subject to a common law duty to provide fair procedure.

formalizing procedures that provide notice and an opportunity to respond. *El-Attar v. Hollywood Presbyterian Med. Ctr.*, 56 Cal.4th 976, 987 (2013). The judicial inquiry extends "to the questions whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by evidence." *Id.* at 987-88. Although abuse of discretion is established where the respondent has not proceeded in the manner required by law, such a deviation from the mandated procedures is not prejudicial, and therefore does not warrant relief, unless the deviation is material. *Id.* at 991. Similarly, a violation of a hospital's own bylaws may deprive fair procedure if, and only if, it is prejudicial. *Id.* at 990-91. Prejudice or materiality is shown where the violation resulted in unfairness, such as depriving an individual of adequate notice or an opportunity to be heard before impartial judges. *Id.* To establish liability, plaintiffs need not show that the outcome of the review would have been different.

c. The Procedures were Insufficient

The People contend that ACCJC violated each of the regulations governing due process when it terminated City College's accreditation in 2013 because ACCJC acted on deficiencies without providing City College notice of the same deficiencies. People's Trial Brief, 9-10; People's Post-Trial Brief, 18-29. Similarly, the People contend that ACCJC violated the common law fair procedure doctrine because ACCJC did not give City College adequate notice of the charges against it and an opportunity to respond. People's Trial Brief, 11. The People argue that the common law fair procedure theory is supported by (1) the same facts that show a violation of 34 C.F.R. §§ 602.18(e) and 602.25(d); and (2) ACCJC's failure to follow its own Policy on Commission Good Practices. *Id.* The central question under both theories is whether ACCJC afforded City College notice and an opportunity to respond before terminating City College's accreditation. *See El-Attar*, 56 Cal.4th at

990-91 (even if ACCJC failed to follow its own policies, there is no violation of common law fair procedure unless the violation in some way deprived City College of notice and an opportunity to be heard by impartial judges).

Beginning in 2006 the Commission raised various concerns regarding City College's future ability to comply with accreditation standards. But the Commission did not at that time, or at any time between 2006 and 2012, find that City College failed to meet any accreditation requirement. In 2012, the Commission found that City College failed to meet numerous accreditation requirements and placed City College on show cause status. At that point, City College was given notice of the deficiencies identified by the Commission in issuing its show cause decision.

Pursuant to the show cause evaluation, City College submitted a written self-evaluation that spanned over 200 pages and separately addressed each Accreditation Standard and Eligibility Requirement. *See* Ex. 103. Thereafter, City College was reviewed by a new visiting team. City College had an opportunity to review and comment on the team's report before the report was finalized and sent to the Commission. *See* Trial Transcript, 454:4-22, 528:12-14, 534:23-25. The team found that City College had made progress, but still failed to meet numerous accreditation standards. The Commission then terminated City College's accreditation. In doing so, the Commission concluded that some accreditation requirements the team believed were met were not, in fact, met. Before the Commission's action became final, City College had an internal right to appeal. City College did appeal. The appellate panel remanded the termination decision to the Commission to consider City College's compliance as of May 21, 2014. Concluding that several standards were not met as of that date, the Commission did not reconsider its decision, at which point the termination decision became final. There are discrepancies between the Standards that the 2013 Evaluation Team concluded were not met and the Standards that the Commission concluded were not met.[57]

[57] In 2012, the Evaluation Team found deficiencies with respect to Standards I.A.3, I.B, I.B.1, I.B.2, I.B.4, I.B.6, II.A.1, II.A.2.a-c, f, g-i, II.A.3, II.A.6, II.A.6.a, II.B.1, II.B.3, II.B.3.a, c, f, II.B.4, II.C.2, III.A.1.c, III.A.2, III.A.6, III.B.1,

Three analyses are required in order to determine if the process provided by ACCJC was sufficient. First, we must decide the relevant time period for notice purposes. Second, we must decide which "deficiencies" City College should have been afforded notice of. Third, we should consider whether the internal appellate process ACCJC afforded City College affects the adequacy of the procedures.

i. Time Period

There are at least two ways of analyzing the time period for which notice of deficiencies is effective for the purposes of ascertaining whether City College was afforded notice of deficiencies and an opportunity to respond in writing. *See* 34 C.F.R. § 602.25(d); *El-Attar*, 56 Cal.4th at 990-91.[58] One, suggested by ACCJC, is to determine whether City College was at any time prior to termination made aware of deficiencies identified by the Commission, and given an opportunity to respond in writing and/or come into compliance.[59] Under this rubric, City College received notice of all of the

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III.B.2.a-b, III.C.1.a-d, III.C.2, III.D.1.a-d, III.D.2.a-c, g, III.D.3, IV.A, IV.A.1 IV.A.2.b, IV.A.3, IV.A.5, IV.B.1, IV.B.1.a, e-h, and IV.B.2.b. Ex. 61 at 5-8. The Commission adopted the 2012 Evaluation Team's findings. Ex. 77 at 2.

In 2013, the Evaluation Team found deficiencies with respect to Standards I.B.4, II.A.1, II.A.2, II.B.1, II.B.3, II.C, III.A.2, III.A.6, III.B.2, III.B.2.a-b, III.D.1.a-c, III.D.2-a-c, III.D.2.e, III.D.3.a, III.D.3.c, III.D.3.f, III.D.3.h, III.D.4, IV.A.2, IV.A.3, IV.A.4, IV.A.5, IV.B.1, and IV.B.2. Ex. 112 at 17, 22, 24, 28, 31, 35, 38, 42-43, 45, 48-55, 57-59, 61-62. The Commission thereafter found deficiencies with respect to Standards I.A.3, I.B.1, I.B.2, I.B.3, 1.B.4, II.A.1, II.A.2, II.A.6, II.B.1, II.B.3, II.B.4, II.C.1, II.C.2, III.A.2, III.A.6, III.B.1, III.B.2, III.C.1, III.C.2, III.D.1, III.D.2, III.D.3, III.D.4, IV.A.1, IV.A.2, IV.A.3, IV.A.4, IV.A.5, IV.B.1, and IV.B.2. Ex. 130 at 2-3. Comparing the two lists, the Commission found deficiencies that were not found by the Evaluation Team with respect to Standards I.A.3, I.B.1, I.B.2, I.B.3, II.A.6, II.B.4, III.B.1, III.C.1, III.C.2, and IV.A.1. The Commission had found deficiencies with respect to each of these standards except Standard I.B.3 in 2012. However, after appeal the Commission determined that even with supplemental information submitted City College had not demonstrated compliance with Standards I.B, II.A., II.B, II.C, III.B, III.C, III.D, and IV.B. Ex. 173 at 1-2. Thus, the Commission did not base its decision on remand on deficiencies with respect to Standards I.A.3 or IV.A.1. It is not clear whether the Commission relied on deficiencies with respect to I.B.1, I.B.2, I.B.3, II.A.6, II.B.4, and III.B.1. This is because other deficiencies found by the Evaluation Team and the Commission could also support a finding of deficiencies with respect to I.B, II.A, II.B, and III.B. The Commission continued to rely on deficiencies with respect to only III.C that were not found by the 2013 Evaluation Team.

The Commission's decision on remand cited violations with respect to III.C that were not found by the 2013 Evaluation Team but were noticed in issuing show cause in 2012. The Commission may have incorporated deficiencies with respect to I.B.1, I.B.2, II.A.6, II.B.4, and III.B.1 that were not found by the 2013 Evaluation Team but were noticed in issuing show cause in 2012. The Commission may have incorporated deficiencies with respect to I.B.3 that were neither found by the 2013 Evaluation Team nor noticed in issuing show cause in 2012.

[58] Whether City College received notice and an opportunity to respond is critical to 34 C.F.R. § 602.25(d) and the common law fair procedure doctrine, but is not relevant to 34 C.F.R. § 602.18(e).

[59] In making this argument, ACCJC views "deficiencies" as problems that need to be addressed rather than findings relating to specific accreditation requirements. The appropriate understanding of the term "deficiencies" is addressed in the following subsection.

deficiencies[60] that supported the Commission's final termination decision in the Commission's 2012 letter announcing the decision to put City College on show cause status, with the possible exception of I.B.3.[61] In the same letter, the Commission announced a date by which City College would need to be compliant with all accreditation requirements. Thereafter, City College was permitted to submit a written report demonstrating its compliance in the form of a self-evaluation, which spanned over 200 pages and addressed every accreditation standard. An evaluation team then visited City College, City College had input on the report, and, after a hearing, the Commission issued its decision. On this reading, City College had an opportunity to respond in writing to the deficiencies identified by the Commission before adverse action was taken.

Another approach, implied by the People, is to analyze whether City College was afforded notice of deficiencies and an opportunity to respond within the evaluation cycle at which the termination decision was reached. Under that rubric, City College should have had notice of all deficiencies found by the Commission at the time of a given evaluation, and an opportunity to respond in writing, before those deficiencies are made the basis for termination of accreditation. That did not happen in this case.

The People's approach finds strong support in ACCJC's Policy on Commission Good Practice and Relations with Member Institutions. Ex. 36 at 43-45. There, the "Commission makes the commitment to follow good practices in its relations with institutions it accredits." *Id.* at 43. The Commission states that it "will fulfill its commitment by adhering to" a list of practices. *Id.* One such practice is providing due process, including providing institutions

> an opportunity to respond in writing to draft team reports in order to correct errors of fact; to respond in writing (no less than 15 days in advance of the Commission meeting) to final team

[60] Using "deficiencies" to mean failures to meet specific accreditation requirements.

[61] *See* Ex. 61 at 5-8 (fourteen recommendations with associated unmet or partially met standards); Ex. 77 (Commission action letter announcing decision to place City College on show cause, incorporating the team's findings with respect to unmet or partially met standards, and advising City College that it would bear the burden of demonstrating compliance with all standards prior to the June 2013 Commission meeting); Deposition of Pamila Fisher, 210:5-19 (explaining that she created accreditation response teams organized around the 14 recommendations).

> reports on issues of substance and to any Accreditation Standard deficiencies noted in the report; and to appear before the Commission when reports are considered. … If the Commission's action lists any deficiency, which was not noted in the Team Report, before making any decision that includes a sanction, denying or terminating accreditation, or candidacy, the Commission, through its President, will afford the institution additional time to respond in writing to the perceived deficiency before finalizing its action at the next Commission meeting.

Id. at 44-45. The Commission did not comply with its policy.[62] Rather, the Commission concluded that ten standards were unmet, where the 2013 Evaluation Team had concluded those standards were met.

The People's interpretation of 34 C.F.R. § 602.25(d) is also supported by 34 C.F.R. § 602.18(e). 34 C.F.R. § 602.18(e) requires the Commission to provide institutions a "detailed written report" that "clearly identifies any deficiencies in the institution's or program's compliance with the agency's standards." Thus, in each evaluation cycle ACCJC must identify all deficiencies. Read together with 34 C.F.R. § 602.25(d), this indicates, consistent with ACCJC's policy,[63] an institution is entitled to respond in writing to any deficiencies identified in a given evaluation cycle before those deficiencies are acted upon.

ii. Deficiencies

ACCJC must (1) issue a detailed report that clearly identified any deficiencies in City College's compliance with ACCJC's standards (34 C.F.R. § 602.18(e)); and (2) provide City College with notice and an opportunity to respond to deficiencies identified by ACCJC before adverse action, such as termination, is taken. 34 C.F.R. § 602.25(d); *El-Attar*, 56 Cal.4th at 990-91.

The meaning of the term "deficiency" is critical. ACCJC asserts that the word "deficiency" refers to *conduct* that results in noncompliance, not noncompliance itself. Therefore, ACCJC contends, the Commission may conclude that an institution failed to meet an accreditation standard at the pertinent time for the purposes of terminating accreditation even if the failure to meet that standard

[62] Again, using "deficiencies" to mean failures to meet specific accreditation requirements.
[63] 34 C.F.R. § 602.25(d) allows the accreditor discretion to determine the timeframe for consideration of an institution's written response to deficiencies identified by the accreditor, lending additional weight to ACCJC's policy.

at the pertinent time has not been previously raised by ACCJC so long as the Commission's decision is based on facts found by the evaluation team. The People argue that deficiency means the failure to meet a standard.

I reject ACCJC's definition of "deficiencies" as merely the 'facts on the ground' that result in noncompliance. It is not a reasonable interpretation. Under that view, if the facts on which the Commission's decision is based are somewhere in the record, the reviewed institution has an opportunity to respond to those facts. But an institution confronted with a lengthy report with a host of factual determinations accompanied by a determination, based on the facts in the same report, that the institution is in compliance with an accreditation requirement cannot possibly be thusly afforded notice that it is charged with failing to comply with that same accreditation requirement on the same facts. 34 C.F.R. § 602.25(d); Ex. 36 at 44 n.1 (ACCJC policy implements, among other regulations, 34 C.F.R. § 602.25(d))

I adopt the meaning urged by the People. Whether a factual finding amounts to a 'deficiency' is a conclusion arising from the application of accreditation standards to factual findings. A deficiency is not noted or identified until the underlying conduct is evaluated in connection with an accreditation standard, and an insufficiency is found. If the same factual finding is made, but there is no conclusion that the accreditation standard is unmet, no deficiency has been identified.[64] That is, a deficiency is not listed or identified with respect to a specific standard unless and until the underlying behavior is directly tied to a failure to meet the standard.[65]

This interpretation means that the Commission violated 34 C.F.R. § 602.18(e). If the

[64] ACCJC argues that this interpretation of its policy will lead to the absurd result that the Commission can never finalize a termination decision because the institution will continuously reargue the merits. ACCJC Post-Trial Brief, 41. Not so. As discussed in the body, this interpretation of the policy allows institutions one opportunity to contest, in writing and before the Commission reaches its decision, the conclusion that a factual finding amounts to a deficiency.

[65] Beno testified that deficiencies are behaviors that lead to a failure to meet the standard. Trial Transcript, 410:9-12, 433:12-15. Her views do not change the interpretation of federal regulations or ACCJC's policy. It is significant that at least two Commissioners apparently believed that a deficiency is a failure to comply with accreditation standards. Deposition of Chris Constantin, 145:18-146:13; Trial Transcript 935:14-23. Momjian, City College's Accreditation Liaison Officer, understood deficiency to mean noncompliance with the standard. Deposition of Gohar Momjian, 334:15-20.

Commission adopts the team's findings, as was the case in 2012, the team report clearly identifies any deficiencies in compliance by tying factual findings to standards. If, in 2013, the Commission was not relying on the evaluation report, then there is no such detailed report that serves that purpose. The termination decision, as ACCJC argues (ACCJC Post-Trial Brief, 37), does not make factual findings. Nor does it tie factual findings to specific standards, although of course it lists several standards. If ACCJC is relying on the team report, then the team report does not identify deficiencies in compliance with the standards that the team report concluded were met, but the Commission concluded were not met. Either way, ACCJC violated 34 C.F.R. § 602.18(e) with respect to the 2013 evaluation.

As to 34 C.F.R. § 602.25(d), City College was not given notice that deficiencies with respect to standards I.B.1, I.B.2, I.B.3, II.A.6, II.B.4, III.B.1, and III.C persisted in 2013 before the Commission acted to terminate based in part on the conclusion that those deficiencies did persist in 2013. The record does not disclose what weight the Commission gave to those deficiencies. Indeed, the only deficiencies, of the above, necessarily referenced in the Commission's final decision after appeal were with respect to III.C. Nevertheless, this violates 34 C.F.R § 602.25(d).

I turn to the common law fair procedure doctrine. For the reasons outlined above, ACCJC's violation of its own policy was material with respect to the additional deficiencies identified as such by the Commission but not in the 2013 report. The policy, as I interpret it based on the evidence before me, ensures an institution the opportunity to dispute, in writing and in advance of the Commission meeting at which a decision is reached, the conclusion that a factual finding amounts to a deficiency. This can happen at one of two times: (1) if the team concludes that a standard is unmet, the institution can dispute that conclusion after the team's report is finalized but at least 15 days before the Commission meets; (2) if the team does not conclude that a standard is unmet, but the Commission does and intends to list that deficiency in its action letter, the Commission will allow the institution to respond in writing to the perceived deficiency before taking the matter up again at the next

Commission meeting. Ex. 36 at 44-45. City College was deprived of that opportunity to the extent that the Commission identified new deficiencies not identified as such in the team report because City College was never given notice that deficiencies with respect to those specific standards persisted in 2013. Such a deprivation of notice can render the process unfair.

iii. Appeal

The termination decision was not the end of the process. ACCJC seems to suggest that the review and appeal procedures afforded to City College cured any unfairness in the process. ACCJC's Post-Trial Brief, 41 n.21. As noted above, City College was permitted to seek review and appeal on the basis that "there were errors or omissions in carrying out prescribed procedures on the part of the evaluation team and/or the Commission which materially affected the Commission's decision." Ex. 127at 102-03. Neither party has discussed the impact this may have on the fairness of the procedure afforded by the Commission.

The appeal does not cure the violation of 34 C.F.R. § 602.18(e) because the appeal did not result in a report meeting the requirements of that section. Similarly, appellate process does not cure a violation of 34 C.F.R. § 602.25(d), because an accrediting agency is required to separately provide notice and an opportunity to respond and an opportunity to appeal.

In the abstract, the situation might be different with respect to the violation of common law fair procedure. The record reflects the decisions on review and appeal, but not the bases on which City College sought review and appeal. Exs. 161, 173. Appellate proceedings do not necessarily cure defects in the underlying procedure.[66] The record does not show that the appellate processes cured the deficiencies I have noted, specifically, that City College did not have an opportunity to contest the

[66] *See Mileikowsky v. West Hills Hosp. and Medical Center*, 45 Cal.4th 1259, 1272 (2009) (hearing officer improperly and without authority prevented the reviewing panel from fulfilling its statutory duty to review the peer review committee's recommendation to deny a doctor's applications, and the error was not cured by the doctor's appeal to the governing board and the board's affirmance of the hearing officer's order because the board gave no weight to the actions of any peer review body, but instead affirmed the hearing officer's order); *El-Attar*, 56 Cal.4th at 994 (appeal in *Mileikowsky* was insufficient because it did not afford the doctor the procedure to which he was statutorily entitled – a determination by a review panel that the decision to deny his application was justified).

specific deficiencies identified by the Commission but not by the 2013 Evaluation Team.

In my proposed statement of decision I invited the parties to brief the potential impact of internal appellate procedures on the application of the common law fair procedure doctrine.

The matter may be considered as an element of the People's case, or waiver. The latter is a defense and the burden would be on ACCJC. Evid. C. § 500. ACCJC neither pled such a waiver—it only suggested the People, not City College, waived certain grounds—nor presented any evidence in support of it.

Thus I turn to the role of an appeal as an element of the People's case. First I note that it is not clear from the two cases which discuss the role an appeal (see above no.66) that the matter is an element of the claim, but it may be, because a *variety* of procedures may together provide a fair opportunity to be heard. *Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal.3d 541, 555 (1974). Even so, on balance I find the People have met their burden.

I have found the termination decision itself was the first time City College learned that ACCJC charged it with continuing noncompliance with numerous additional accreditation requirements. That decision did not explain the basis for its conclusion that additional standards were unmet, cite to the record, or make any additional factual findings. Ex. 130 at 2. Thus even if City College were given an opportunity to respond to the newly identified areas of noncompliance, it would be left to guess at the reasons for noncompliance. This does not meet the requirements of notice of charges and a fair chance to respond. *Cumbre v. State Comp. Ins. Fund*, 189 Cal.App.4th 1381, 1389 (2010) ("SCIF must have provided Cumbre with both notice of the reasons for the decision and an opportunity to be heard").

Even if the termination decision were treated as notice, the subsequent review and appeal process did not afford City College the right to be heard to which it was entitled. Grounds for those appellate processes were limited, as relevant here, to allegations that (1) there were errors carrying out

prescribed procedures by the evaluation team or the Commission which materially affected the Commission's decision; and (2) the Commission's decision was not supported by substantial evidence. Ex. 127 at 102-03. These two grounds could be raised as bases for review by the Commission itself, as well as on subsequent appeal to a hearing panel.

At the review phase, on the first ground, City College would have had to convince the Commission that the Commission violated the prescribed procedures. The Commission maintains, to this day, that it acted consistently with all prescribed procedures. ACCJC Supplemental Brief, 6. On balance, a request for review on the first basis could not have afforded City College an opportunity to respond to the additional charges on the merits.

As to the second set of grounds for appellate processes, the Commission would only have determined whether there was substantial evidence for the termination sanction and could have done so without attending, at all, to whether City College was or was not in continuing noncompliance with the numerous additional accreditation requirements of which it had no earlier notice). The additional charges may have impacted the Commission's discretionary decision to terminate, and review based on substantial evidence does not remedy this problem.

The institution's ability to take an appeal to the hearing panel does not change the situation. As ACCJC interpreted the direction from the hearing panel, the Commission was to reconsider the termination decision if as of May 21, 2014, the Commission determined that City College was in compliance with all accreditation requirements. Ex. 173. Additional evidence could be noted, but as with the review phase discussed above this would not address the problem that the additional charges may have impacted the Commission's initial discretionary decision to terminate

I conclude that there was a violation of the common law fair procedure doctrine.

4. Basing Accreditation Decisions on Improper Factors

34 C.F.R. § 602.18 requires accrediting agencies to "consistently apply and enforce standards

that respect the stated mission of the institution, ... and that ensure that the education or training offered by an institution ... is of sufficient quality to achieve its stated objective for the duration of any accreditation or preaccreditation period granted by the agency." The regulation sets forth five conditions that, if met, satisfy the requirement. One of those conditions is met where the agency "[b]ases its decisions regarding accreditation and preaccreditation on the agency's published standards[.]" 34 C.F.R. § 602.18(c).

First, the People argue that the Commission acted improperly by considering the fact that City College spent more than 80% of its revenues on salaries or benefits, although no 80% cut-off is contained in the accreditation standards. People's Post-Trial Brief, 34-36. The testimony on which the People rely does not indicate the application of a cut-off but rather an analysis of the amount of revenues City College was spending on salaries or benefits.[67] The People have not contested that financial well-being is, and is properly, evaluated under accreditation standards. The People seem to suggest that the Commission cannot consider the amount of revenues exhausted by salaries and benefits unless ACCJC provides an explicit cut-off in its accreditation standards. Nothing requires such an inflexible approach. To the extent the Commissioners considered the implications of the fact that salaries and benefits at City College consumed a greater percentage of their revenues than salaries

[67] Commissioner Marie B. Smith testified that she voted to place City College on show cause and to terminate City College's in part because City College was unable to balance its budget and was spending more of its budget on salaries and benefits than most colleges. Trial Transcript, 795:1-23. Smith did not invoke any percentage. Commissioner Sharon Whitehurst-Payne testified that she was appalled by the financial situation because 93% of City College's revenue was going towards salary and compensation even though a college has to do more than pay for salaries and compensation. *Id.* at 882:16-23, 897:9-898:1. Whitehurst-Payne did not indicate any potential cutoff. Commissioner Tim Brown testified that there was concern over the amount of the general fund committed to faculty salaries and whether City College was solvent enough to meet liabilities for retirement and benefits. *Id.* at 918:10-18. Brown did not invoke any percentage. Commissioner Steven Kinsella testified that the normal average amount of money spent on salary and benefits is 80% whereas the amount spent at City College was 92%. *Id.* at 951:23-952:9. Kinsella elaborated that City College should have taken some action to address this percentage and that the actions City College did take were insufficient because they did not bring City College in line with the 80% average. *Id.* at 952:10-953:4. While Kinsella did suggest that City College should have come in line with the 80% average, even he did not state that he decided matters based on the basis of a precise cut-off point. Presumably if 80% is an average, there are schools that devote more than 80% of their revenues to salaries and compensation.

and benefits do at the average college, that decision was based on ACCJC's standards.[68] The percentage is indicative of the allocation of funds for various uses, a topic expressly part of the accreditation standards.[69]

Second, the People argue that two Commissioners indicated that their votes were influenced by the fact that no members of City College's Board of Trustees attended the Commission's June 2013 meeting. Post-Trial Brief, 36; Ex. 114 at 2 (institutional CEO is not required to attend the Commission meeting). But this overstates the testimony. The two Commissioners in question did express their disappointment with the fact that the Board of Trustees did not attend.[70] The Commissioners did not say whether or not the absence influenced their votes.[71] More importantly, the Commission set forth the bases for its decision in the letter announcing its termination decision. Nothing in the letter indicates that the decision was based on the fact that the Board of Trustees did not attend the June 2013 meeting. The People have not proven that the Commission based its decision on the fact that no members of the Board of Trustees attended the June 2013 meeting.

D. The Commission Did Not Violate the UCL – Unfair Prong

The People argue that the Commission committed various unfair practices under *Smith v. State*

[68] "Financial Resources" is an accreditation standard. *See, e.g.*, Ex. 36 at 22-23. "Financial Resources" includes several requirements. For example, the level of financial resources must provide a reasonable expectation of both short-term and long-term financial solvency. *Id.* at 22. The distribution of resources must support the development, maintenance, and enhancement of programs or services. *Id.* Financial documents, including the budget, must reflect appropriate allocation and use of financial resources to support learning outcomes and services. *Id.* at 23.

[69] Ex. 36 at 22-23.

[70] Commissioner Smith testified that she was disappointed and frustrated that City College's Board of Trustees did not attend the June 2013 Commission meeting. Trial Transcript, 790:25-791:12. Commissioner Whitehurst-Payne testified that she was surprised City College did not send its Board of Trustees to the Commission meeting and that what stood out to her from the presentation was that City College did not bring a lot of people, City College did not have a lot to say, and City College had not made good progress. *Id.* at 885:9-20, 887:9-16.

[71] Commissioner Smith testified to her reasons for voting to terminate City College's accreditation. Trial Transcript, 789:18-790:11. Commissioner Smith did not identify the failure of the City College's Board of Trustees to appear at the June 2013 Commission meeting as a basis for her decision. *See id.* (termination vote based on lack of progress). Commissioner Whitehurst-Payne similarly testified to her reasons for voting to place City College on show cause and voting to terminate City College's accreditation. *Id.* at 882:13-883:4, 884:5-15. Commissioner Whitehurst-Payne did not identify the failure of City College's Board of Trustees to appear at the June 2013 Commission meeting as a basis for her decisions. *Id.* (first decision based on finance and governance issues, second decisions based on failure to move forward).

Farm Automobile Ins. Co., 93 Cal.App.4th 700 (2001). Under *Smith*, "[t]he test of whether a business practice is unfair 'involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim ... [Citations.]' [Citation.] In [*Casa Blanca*], the court ... concluded that an 'unfair' business practice occurs when that practice 'offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.' [Citation.]" *Smith*, 93 Cal.App.4th at 718-19. The People agree that *Smith* creates a "balancing test." People's Post-Trial Brief, 37. Thus, there must be harm to the victim. *See In re Firearm Cases*, 126 Cal.App.4th 959, 981 (2005) ("The UCL provisions are not so elastic as to stretch the imposition of liability to conduct that is not connected to the harm by causative evidence").

ACCJC has urged me instead to apply *Gregory v. Albertson's, Inc.,* 104 Cal.App.4th 845, 854 (2002) which held that "where a claim of an unfair act or practice is predicated on public policy, we read *Cel–Tech* to require that the public policy which is a predicate to the action must be "tethered" to specific constitutional, statutory or regulatory provisions."

There are important differences between these two approaches.[72]

Neither party has expressly discussed what one commentator says is the current trend, the "FTC test." William L. Stern, BUSINESS & PROFESSIONS CODE § 17200 PRACTICE ¶ 3.121.1. (Rutter 2014) (Stern), citing *Davis v. Ford Motor Credit Co.,* 179 Cal.App.4th 581 (2009). The significance of the FTC test here is that it makes it plain that 'substantial harm' must be proven:[73]

> The key factor under the new FTC standard is consumer injury, and that injury, in turn, must be substantial. Trivial or speculative harm is insufficient, and must arise to real monetary harm

[72] *See generally*, Eric P. Enson, "Davis v. Ford Motor Credit Company: More Confusion Regarding the Definition of "Unfair" or an Indication of Growing Consensus?" 19 COMPETITION: J. ANTI. & UNFAIR COMP. L. SEC. ST. B. CAL. 24, 25-26 (2010) (comparing the two approaches); Roxana Mehrfar, "Redefining Commonality for Consumer Class Actions Under California Business and Professions Code Sections 17200 and 17500," 44 LOY. L.A. L. REV. 353, 372 (2010) (noting split of authority and commenting on *Bardin v. Daimlerchrysler Corp.,* 136 Cal.App.4th 1255, 1260 (2006) (to the same effect)); *Jolley v. Chase Home Fin., LLC,* 213 Cal.App.4th 872, 907 (2013) (same).

[73] This is quite aside from standing requirements that private plaintiffs—but not the People in this case—must demonstrate.

> or unwarranted health and safety risks. Likewise, emotional harm will not render a practice unfair.

Stern ¶ 3.126.[74] There are a few elements to this FTC test as quoted, and I have not seen authoritative state sources that specifically mandate "monetary harm or unwarranted health and safety risks" to the exclusion of all other harms. Nevertheless, the emphasis on *substantial harm* is common to a series of appellate opinions, and that is what I mean when I cite the FTC test below. I also note that same panel that decided the People's favored case, *Smith,* authored *Davis,* which adopted the FTC test. *See also Camacho v. Auto. Club of S. California*, 142 Cal.App.4th 1394, 1405 (2006).

ACCJC invokes *Gregory* because it contends the People cannot show the complained-of practices are 'tethered' to a constitutional, statutory or regulatory provision. But ACCJC has not carefully analyzed the various practices under the *Gregory* test nor demonstrated this failure. A common problem with many of the practices alleged to be unfair are not so much that they are un-tethered in the *Gregory* sense (actually, many are), but that they have not resulted in substantial harm—which is a problem not only under the FTC test and *Davis*, but also under the balancing test of *Smith* pressed by the People.

My findings below on lack of harm reflect (i) the fact that under the FTC test no substantial harm has been shown, as well as (ii) the result of my balancing under *Smith* of the harm against the utility of the conduct, which, because the harm is so insubstantial, and because there is so little evidence (if any) of "impact on [the] alleged victim," *Smith,* 93 Cal.App.4th at 718, favors a finding on no liability. My notations below of a lack of 'substantial' harm reflect this analysis.

1. Denial of Peer Review

The People argue that ACCJC failed to allow City College to be reviewed by its peers because Beno served as a staff reader during the 2013 evaluation, in that capacity edited the 2013 report, and

[74] *See generally, Drum v. San Fernando Valley Bar Ass'n,* 182 Cal.App.4th 247 (2010) (noting endorsement of FTC test in *Davis* and *Camacho v. Automobile Club of Southern California,* 142 Cal.App.4th 1394, 1403 (2006). *See also, In re Firearm Cases,* 126 Cal.App.4th 959, 981 (2005) (Supreme Court in *Cel-Tech* impliedly required evidence of causation and harm, i.e. that "defendants' business practices caused or were likely to cause *substantial injury*") (emphasis supplied).

encouraged Serrano, who was responsible for compiling the report as the team chair, to "[p]lease try to make the suggested changes." Ex. 111; People's Post-Trial Brief, 37-42. The People contend that because of Beno's editing, the report cast City College in a more negative light than it otherwise might have. People's Post-Trial Brief, 41.

First, this theory is beyond the scope of the case because this court denied the People's post-trial request to add this theory to the complaint. Dec. 15, 2014 Order, 2. Second, the theory is not supported by the evidence. ACCJC supplies staff readers to review the team report for clarity, consistency, and accuracy, but not for content. Deposition of Susan Clifford, 23:18-24; Trial Transcript, 440:25-443:3 (staff readers review report for completeness, citations, clarity, and consistency), 446:15-447:13 (team chair can accept or reject staff reader's suggestions, and then should send the report to the evaluation team to ensure the content still reflects the team's findings), 534:15-22, 537:21-538:3, 564:20-565:9. The People do not challenge the use of a staff reader for clarity and consistency. *See* People's Post-Trial Brief, 42.

The People cite four comments in support their suggestion that Beno went beyond permissible involvement. People's Post-Trial Brief, 40-41; Ex. 111 at SS 003823, SS 003850, SS 003878, SS 003882.[75] In the first, Beno highlighted a sentence that read: "The College demonstrated a high level of dedication, passion, and enthusiasm to address the issues and provided evidence of compelling action to address previous findings." Ex. 111 at SS 003823. Beno commented that the sentence spoke of the efforts of the college but read like a conclusion, expressing concern that the sentence could be misread to state that the institution took "compelling action" and addressed "previous findings." *Id.* Beno explained that the words were loose, such that the sentence could be read to mean that City College had addressed all of its problems, compelling a favorable response from ACCJC. *Id.* Beno thought such a conclusion would be inconsistent with the factual content in the report. *Id.*

[75] Beno's comments appear at pages SS 003816, SS 003823, SS 003826, SS 003829-31, SS 003847, SS 003850, SS 003853-54, SS 003857, SS 003870, SS 003875, SS 003878, SS 003881-86 of Exhibit 111.

Nevertheless, Beno advised Serrano to retain the highlighted sentence if it was in fact her conclusion, but to move it to the end of the report where the team listed its conclusions. *Id.*[76] Serrano removed the sentence from the report. *See* Ex. 108 at ACCJC 001917. This comment did not go beyond Beno's role as a staff reader to ensure that the report was consistent throughout. Beno did not suggest any change to the factual findings, but highlighted what she perceived to be an inconsistency between the factual findings and the team's conclusion for review by the team chair.

In the second suggestion highlighted by the People, Beno questioned how the team could conclude that City College met a specific standard given the foregoing narrative in the report. Ex. 111 at SS 003850-51. In the third comment, Beno asked whether Serrano was sure City College met a standard, or had taken action that could meet the standard in the future. *Id.* at 003878. In the narrative, the team's finding was that City College had revised its governance structure and implementation of the revised structure remained in progress. *Id.* In the fourth comment, Beno again questioned whether a standard was in fact met given the factual findings in the report. *Id.* at SS 003882. These instances are further examples of Beno questioning Serrano to ensure that the team's conclusions were consistent with the factual findings in the report. Once again, Beno did not suggest any change to the factual findings made by the team. Serrano implemented the changes. Ex. 108 at ACCJC 001943, ACCJC 001967, ACCJC 001970.

Serrano, who the People do not dispute is a peer to City College, exercised her independent discretion to change the report as a result of comments from Beno (*see* Trial Transcript, 537:10-20). Perhaps Serrano failed to send the report to other team members after revisions; she could not recall whether she in fact sent the report to other team members after making changes pursuant to Beno's edits and before finalizing the report. Trial Transcript, 564:20-565:9. In any event, her failure would not eviscerate peer review. Serrano, a peer and the team's chair, made edits to the report that she

[76] Contrary to the People's assertion, Beno did not instruct Serrano to remove the sentence. *See* People's Post-Trial Brief, 40.

believed were appropriate.

Third, the People have not identified substantial harm caused by the challenged conduct. The People suggest two approaches. On one theory, the denial of peer review is intrinsically harmful to the City College and the People. People's Post-Trial Brief, 42. But, as noted above, this harm must be substantial. It is not. The People also say Beno's comments caused the report to be less favorable to City College. People's Post-Trial Brief, 42. This may be so, but Serrano's responses to Beno's suggestions do not appear to have been improper and, in any event, the People do not argue that this had *any* impact on any decisions based on the report. There is no showing that any asserted deficiencies in the review process, independently or together, impacted the conclusion or otherwise affected any asserted victim.

2. Inclusion of Academics on Evaluation Teams

The People argue that, in addition to being unlawful, the failure to include sufficient academics on evaluation teams is unfair. People's Post-Trial Brief, 43-44. The facts pertaining to this theory are discussed above. The unfairness theory is no broader than the unlawful theory – representation of academics was either sufficient or insufficient. As to harm, the People reference only the intangible harm of depriving City College and the People the right to have City College reviewed by a balanced evaluation team. *Id.* This is not substantial harm. The People do not attempt to prove, for example, that any changes to the review process, even taken together, would have affected the outcome.

3. Basing Decisions on Improper Factors

The People argue that, in addition to being unlawful, it is unfair to base accreditation decisions on improper factors. People's Post-Trial Brief, 44-45. The factual merits of this theory are discussed above. Once again, the harm alleged is insubstantial. No impact was shown.

4. Including Crabtree on the 2012 Evaluation Team

The People contend that it is unethical and contrary to public policy to allow conflicted

individuals, such as Crabtree, to serve on fact-finding bodies. People's Post-Trial Brief, 45. As discussed above, the People have not proven that Crabtree had a conflict of interest, whether personal or financial, nor have they proved Crabtree's inclusion on the 2012 Evaluation Team undermined the perceived fairness of the process in the eyes of the general public or the hypothetical reasonable person I discussed in that context. Even had I concluded otherwise, the insubstantial harm is not cognizable under the UCL: the People only suggest that Crabtree's inclusion *may* have affected the outcome, but concede that Crabtree's impact cannot be proven. *Id.* at 45 n.35.

5. Evaluating City College While Embroiled in a Political Fight with It

The People argue that ACCJC acted unfairly by evaluating City College for reaffirmation of accreditation while embroiled in a public political fight with City College over the proper role of Community Colleges. People's Post-Trial Brief, 46-51. The People's theory is that the debate created an appearance of a conflict of interest. *Id.* at 49. This purportedly caused harm by eroding the public's confidence in ACCJC's accreditation decisions. *Id.* at 50. The People do not argue, or present evidence, that any individual at ACCJC or its Commission acted improperly as a result of the political dispute. Nor is there substantial evidence that the alleged harm occurred.

The People's argument is simply that an accreditor cannot take a public political position adverse to the position of any institutions it accredits. This theory is either barred by the *Noerr-Pennington* doctrine or fails because there is no substantial evidence that the Commission had a conflict of interest as a result of the fact that its position on the Student Success Task Force differed from that espoused by elements at City College.[77]

Finally, the purported erosion of the public's faith in ACCJC is not a substantial harm under the UCL.

[77] The People cite no evidence showing that ACCJC's personnel's views regarding the Student Success Task Force had any effect on any actions regarding City College. *See* People's Post-Trial Brief, 50-51.

E. Remedy

1. Background

Under the UCL, the

> court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Bus. & Prof. Code § 17203.

Only two remedies are available to redress violations of the UCL: injunctive relief and restitution. *Feitelberg v. Credit Suisse First Boston, LLC*, 134 Cal.App.4th 997, 1012 (2005), citing *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal.4th 1134, 1147 (2003). *Feitelberg* held:

> The first sentence of section 17203 provides that those engaging in unfair competition 'may be enjoined in any court of competent jurisdiction.' The second sentence of section 17203 recognizes the court's power 'to prevent' acts of unfair competition and 'to restore' money or property 'acquired by means of such unfair competition.' The remedies and penalties available under the UCL 'are cumulative to each other and to the remedies or penalties available under all other laws of this state.' (§ 17205).

Id. Feitelberg also stated that the "injunctive remedy should not be exercised in the absence of any evidence that the acts are likely to be repeated in the future." *Id.* (internal quotations omitted); *see also Stender*, 212 Cal.App.4th at 631.

In *Consumers Union of the U.S., Inc. v. Alta-Dena Certified Dairy*, 4 Cal.App.4th 963 (1992), the trial court issued an order under the UCL and the False Advertising Law (FAL) requiring the defendant to put a warning label on its consumer products. *Consumers Union*, 4 Cal.App.4th at 971. The Court recognized that both the UCL and FAL authorize courts to make orders or judgments "as may be necessary to prevent the use or employment" of unfair competition. *Id.* at 972. The defendant's advertising had created a perception that its raw certified milk was safe and nutritionally superior to pasteurized milk. The Court found the warning statement imposed by the trial court was

necessary to correct any misperception. *Id.* at 972-73. The Court wrote that while

> an injunction against future violations might have some deterrent effect, it is only a partial remedy ***since it does not correct the consequences of past conduct.*** … An "order which commands [a party] only to go and sin no more simply allows every violator a free bite at the apple." … The warning statement mandated by the trial court is necessary to deter [the defendant] from conducting similar misleading advertising campaigns in the future.

Id. (Emphasis supplied.) I also note that an important focus of authorized injunctive relief under the UCL is the threat of "continuing harm." See e.g., William L. Stern, BUSINESS & PROFESSIONS CODE § 17200 PRACTICE ¶ 8:34 (Rutter 2014). If I am right on the merits, the harm caused by ACCJC's unlawful acts continue to this day (absent the contemplated injunction).

In crafting relief under the UCL, judicial abstention may be implicated. *See* Jan. 2, 2014 Order, 11-12. "[B]ecause the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have discretion to abstain from employing them." *Desert Healthcare Dist. v. PacifiCare FHP, Inc.*, 94 Cal.App.4th 781, 795 (2001). For example, judicial abstention may be appropriate in cases where granting the relief would require a trial court to assume the functions of an administrative agency, would interfere with the functions of an administrative agency, or would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress. *Klein v. Chevron, U.S.A., Inc.*, 202 Cal.App.4th 1342, 1362 (2012).

Closely connected to this are prudential concerns generated by the scheme of federal regulations which normally govern accreditation determinations. While I have not found this state court action preempted, I do take the federal policies as cautionary, an alert that as I exercise my discretion[78] any order of this court only do so much as is plainly necessary to account for the specific liability I have found and avoid to the extent possible interference with federal policies and procedures.

Finally, I note that the task now does not resemble that facing me when I decided the

[78] *Horsford v. Bd. Of Trustees Of California State Univ.*, 132 Cal.App.4th 359, 390 (2005) (injunction issues in discretion of the trial judge).

preliminary injunction motion. That preliminary injunction will of course be dissolved when judgment is entered here, and now I do not consider for example the balance of equities, or the probability of success, as I did in the earlier context. *DVD Copy Control Ass'n, Inc. v. Kaleidescape, Inc.*, 176 Cal.App.4th 697, 721 (2009); *Benasra v. Mitchell Silberberg & Knupp,* 96 Cal.App.4th 96, 110 (2002); *compare* CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL Ch. 9(II) (Rutter 2014) (factors considered for e.g., preliminary injunctions).

2. Appropriate Scope of the Order

As the People acknowledge, it is inappropriate for me to decide if the Commission's decisions in 2012 and 2013 were correct. People's Post-Trial Brief, 68; *see Pinsker v. Pacific Coast Society of Orthodontists*, 12 Cal.3d 541, 556-57 (1974) (trial on the merits before state court did not cure violation of common law fair procedure because doctor was entitled to a ruling from the defendant association, not a trial judge who possessed neither the professional experience nor the discretionary latitude of defendant association). The court lacks the expertise and authority to determine what sanction, if any, was appropriate given the conditions at City College.

We do know that ACCJC had discretion under to the two-year rule to allow City College two years after ACCJC identified deficiencies to come into compliance, plus additional time if ACCJC found good cause to do so. 34 C.F.R. § 602.20(a); Ex. 9; Ex. 36 at 41-42; Ex. 76 at 40-41. ACCJC is permitted by federal regulation to terminate accreditation if an institution is non-compliant with *any* standard without allowing an institution time to cure. 34 C.F.R. §§ 602.3, 602.20(a). ACCJC retained discretion to place an institution on show cause status for "substantial non-compliance" with accreditation requirements and to set the time period within which an institution must come into compliance. Ex. 36 at 41-42; Ex. 76 at 40-41.

The court does not have the expertise or authority to independently review the facts and determine whether ACCJC should have exercised its discretion to allow City College the full two

years, or two years plus a good cause extension, to come into compliance with accreditation standards. Thus the People's extensive argument that the problems at City College did not justify termination, including in light of treatment of purportedly similarly situated schools, is beyond this court's purview.[79] *See* Post-Trial Brief, 68-85.

3. Proven UCL Violations

The People have shown that ACCJC violated the unlawful prong of the UCL in the following ways: (1) failing to maintain adequate controls against the appearance of conflicts of interest in the Commissioner selection process between October 2007 and October 2010, during which time twelve of the nineteen Commissioners who served in June 2012 and nine of the nineteen Commissioners who served in June 2013 were selected in violation of 34 C.F.R. § 602.15; (2) failing to include sufficient academics on the 2013 Evaluation Team in violation of 34 C.F.R. § 602.15; (3) failing to provide a detailed written report that clearly identifies deficiencies in the institution's compliance with accreditation standards in 2013, in violation of 34 C.F.R. § 602.18; and (4) failing to provide sufficient opportunity for a written response to deficiencies identified by the Commission in 2013 but not by the 2013 Evaluation team, in violation of 34 C.F.R. § 602.25 and common law fair procedure.

4. Relief Requested

The People ask the court to vacate the Commission's 2012 decision to place City College on show cause status and the Commission's 2013 decision to terminate City College's accreditation. People's Post-Trial Brief, 60. Further, the People ask the court to order ACCJC to re-evaluate City College, presumably on the basis of its current compliance with accreditation standards. *Id.* The People then apparently expect that, if City College is deficient, those deficiencies will result in some sanction that is less severe than termination and City College will be given some amount of time to come into compliance before termination can be ordered. Indeed, part of the reason the People seek

[79] A court lacks the expertise to determine whether City College was similarly situated with other colleges accredited by ACCJC. Even if the court had sufficient expertise, a perusal of action letters (or other evidence in the record) is insufficient to make such a determination. *See* Exs. 7, 10-11, 15-16, 18, 21-22, 34, 229-36.

the relief they request is to erase any record that City College was deficient in 2012 or 2013. *Id.* at 62. The People contend that this broad relief is appropriate, even if the decisions would have been the same regardless of the above violations, because the decisions are "tainted" and procedural violations could have impacted the outcome. *Id.* at 63-64.

5. The 2012 Show Cause Decision

The only UCL violations proven by the People concerning the 2012 show cause decision relate to policies protecting against the appearance of conflicts of interest in the selection of Commissioners. There is no evidence there was an actual conflict and there is no evidence that the lack of correct procedures had any impact on City College. The Department of Education, which made a parallel finding, expressed no interest in reversing the decisions made by the Commission by those improperly selected Commissioners. Nor did the Department of Education require ACCJC to replace the Commissioners selected under the old policy. Trial Transcript, 675:4-25. There was no showing that failures of the procedures used to select Commissioners rendered those procedures unfair under the common law fair procedure doctrine.

The People suggest comparisons to other cases, none decided under the UCL, involving the appearance of judicial partiality, discriminatory jury selection, an improperly constituted union disciplinary committee, an improperly constituted medical disciplinary board, and a two-judge panel in an appellate court. People's Post-Trial Brief, 64-65. In these cases, there was at least an appearance of bias, indeed, facts suggesting that bias was probably inevitable. E.g., *Applebaum v. Bd. of Directors,* 104 Cal.App.3d 648, 660 (1980). In another case cited by the People, the challenged decision was made by a court improperly constituted under statutory law and implicating a Constitutional right to the correct number of appellate judges. *Johnson v. Appellate Div. of Superior Court,* 230 Cal.App.4th 825, 832 (2014). The People draw from these and the other cited cases the rule that the participation of those with a conflict of interest "either actual or apparent" in effect voids

all decisions made by the pertinent body. People's Post-Trial Brief at 65. The People's logic would void all the decisions of the Commission for a multi-year period, perhaps back to 1963.[80] This logic also has implications for decisions *continuing* institutions' accredited status; for example, the People's logic implies no institution would be validly recognized by ACCJC as an accredited institution. Adopting the People's logic and on that basis granting the relief requested would severely undermine the federal accreditation process.

Even if the People are right that all decisions of bodies which include those with an actual or potential conflict ought to be vacated, that is not what we have in this case. The People have not actually argued, and I have certainly not found, that any of the Commissioners had any such conflict; only that the procedures used to select them contravened federal law.

It would not be equitable to vacate a finding that City College was deficient with respect to specific standards in 2012 when it was afforded, on the whole, a fair procedure. Moreover, no other equitable relief is appropriate because the Department of Education has addressed, and will continue to supervise, ACCJC's compliance with regulations governing Commissioner selection going forward.

6. 2013 Termination Decision

With respect to the 2013 termination decision, the People have proven that (1) the evaluation team had too few academics; (2) numerous Commissioners were selected pursuant to a policy that inadequately guarded against the appearance of conflicts of interest; (3) ACCJC did not provide a detailed written report that clearly identified all deficiencies in City College's compliance with accreditation standards; and (4) ACCJC did not provide sufficient opportunity for a written response to deficiencies identified by the Commission in 2013 but not by the 2013 Evaluation team. For reasons stated above, I will not grant relief with respect to the Commissioner selection policy. Nor will I do so

[80] *See* Trial Transcript, 675:4-9.

with respect to the make-up of the evaluation team.[81]

However, the reporting and notice violations do undermine the fairness of the process within the meaning of the common law fair procedure doctrine. City College was deprived of an opportunity to respond in writing to findings of deficiencies in 2013, and to prepare for a hearing on those same deficiencies. These deficiencies may have been insignificant, because other deficiencies were found and the Commission was entitled to terminate City College's accreditation based on any deficiency after the show cause period had expired. But they may not have been insignificant. We do not know if the Commissioners would have exercised their discretion differently had City College been given an opportunity to address the additional findings in writing.

Given this uncertainty relief should be granted, but the termination decision should not now be vacated. Having in mind that there was no violation of common law fair procedure as to numerous deficiencies, my discretion is best exercised if I do not wholly undermine the federal accreditation process by vacating a decision that the accreditor had discretion to make. But I can address the consequences of past conduct and its continuing impact today, *Consumers Union of the U.S., Inc.*, 4 Cal.App.4th at 972-73, by providing City College the chance it never had to respond to the findings of deficiencies.

As I note, we do not know whether, if City College had had its rights observed in 2013, it would have made any difference;[82] but we can find out—from the Commission. The court's injunction should permit[83] City College to address the additional deficiencies in writing and if City College so opts, mandate the Commission to reconsider its termination decision based on those responses. This

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[81] 34 C.F.R. § 602.15 requires an accreditor to demonstrate its administrative and fiscal capacity to carry out accreditation activities by including academic and administrative personnel on its evaluation bodies. It does not make the inclusion of only one academic a basis for reversing an accreditation decision. The deficiencies identified in 2012 went to financing and administrative oversight, not the quality of instruction. Thus this is not a situation where administrators reviewed teachers and found that the teachers were not teaching properly. There is no showing the make-up of the team had any impact, or indeed created any unfairness, in the team's review of City College.

[82] The People agree. Closing Argument Transcript at 39.

[83] Because City College is not a party, I cannot order it to do anything. Hence the contemplated injunction must allow City College the *option* to trigger the new review.

would ensure that City College has the notice and opportunity to influence the exercise of the Commission's discretion to which the People have demonstrated City College was entitled. At the same time, this relief would not be unduly burdensome on the Commission and would not unduly interfere with the federal accreditation process. If the Commission determines that it would have made the same termination decision, the Commission would proceed free of further restraint from this court; otherwise the Commission should vacate its termination decision. This is the relief which is commensurate with the material violations I have found.

It will be observed that such a resolution leaves in the hands of the defendant the key to further restraint by the court. This is so, and it is unusual. But this is just another way of noting that the Commission is entrusted, and has always been entrusted, to decide accreditation in its own discretion. City College opted for that regime when it joined ACCJC.

The relief sought by the People does not differ from that directed here in the sense that the People, too, agree that the Commission must have the last word on City College's accreditation, the People too urge an injunction requiring the Commission to review the termination decision, as well as an opportunity for City College to respond to the alleged deficiencies. But the specific order pressed by the People would wipe out years of work done by ACCJC, likely interfere with the two-year rule,[84] and might in effect compel the Commission to maintain accreditation contrary to federal criteria.

V. CONCLUSION

ACCJC is liable for violations of the Unfair Competition Law, specifically, the law's ban on unlawful business practices. ACCJC's material violations made it impossible for City College to have a fair hearing prior to the 2013 termination decision. The material violations can only be remedied with an injunction allowing City College to have the due process to which it was entitled in 2013. The Commission must specify in writing its bases for finding deficiencies in its 2013 termination decision

[84] *See* §§ II(B)(1), IV(E)(2).

that were not identified in the 2013 Evaluation Team Report, consider any written responses to those newly identified deficiencies provided by City College, and reconsider its termination decision, then taking such action as it in its lawful discretion may decide.

I have reviewed the parties' proposals for the wording for an injunction, and I have embodied my directives in the accompanying Final Injunction and Judgment.

Dated: February 17, 2015

Curtis E.A. Karnow
Judge Of The Superior Court

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

I, Ericka Larnauti, 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 February 17, 2015, I electronically served the attached STATEMENT OF DECISION via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: February 17, 2015

T. Michael Yuen, Clerk

By: _____
Ericka Larnauti, Deputy Clerk