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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF SAN FRANCISCO**

PEOPLE OF THE STATE OF CALIFORNIA, by and through Dennis J. Herrera, City Attorney for the City and County of San Francisco,

Plaintiff,

vs.

GUADALOUPE AGUILAR-BENEGAS aka GUADALOUPE AGUILARBENEGAS, an individual,

Defendant.

CASE NO. CGC-20-586732

**DEFENDANT GUADALOUPE AGUILAR-BENEGAS'S NOTICE OF DEMURRER AND DEMURRER TO PLAINTIFF'S COMPLAINT FOR INJUNCTIVE RELIEF AND CIVIL PENALTIES; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**

*[Filed concurrently with (1) Defendant's Notice of Motion and Motion to Strike Portions of Plaintiff's Complaint and Memorandum of Points and Authorities in Support; (2) Declarations of Edward W. Swanson in Support of Defendant's Demurrer and Motion to Strike; and (3) [Proposed] Order]*

Date: January 26, 2021
Time: 9:30 a.m.
Dept: 302
Judge: Hon. Ethan P. Schulman

Complaint Filed: September 24, 2020
Trial Date: Not Set

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**TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:**

**PLEASE TAKE NOTICE THAT** on January 26, 2021, at 9:30 a.m., or as soon thereafter as this matter may be heard, in Department 302 of the above-titled Court, located at 400 McAllister Street, San Francisco, California 94102, Defendant Guadaloupe Aguilar-Benegas will and hereby does:

1. Generally demur to the complaint filed in this action by the People of the State of California, by and through Dennis J. Herrera, City Attorney for the City and County of San Francisco ("Plaintiff" or "the City Attorney" or "the City") on the following grounds:

a. The City's first cause of action for public nuisance is subject to demurrer based on Code of Civil Procedure section 430.10(e) because it does not state facts sufficient to constitute a cause of action.

b. The City's second cause of action for violation of California's Unfair Competition Law, Business and Professions Code sections 17200 *et seq.*, is subject to demurrer based on Code of Civil Procedure section 430.10(e) because it does not state facts sufficient to constitute a cause of action.

As set forth in the concurrently filed Declaration of Edward W. Swanson, on December 17, 2020, counsel for Ms. Aguilar-Benegas met and conferred via videoconference with counsel for the City as required by Code of Civil Procedure section 430.41, and counsel were not able to reach an agreement that would resolve the objections to be raised in this demurrer.

This demurrer is based on this Notice, attached Memorandum of Points and Authorities, the Declaration of Edward W. Swanson, the complete records, pleadings, documents, and papers on file with the Court in this action, and upon such other further oral and/or documentary evidence as may presented at the hearing of this demurrer.

**DEFENDANT'S DEMURRER TO COMPLAINT**

Pursuant to Code of Civil Procedure section 430.10, Defendant Guadaloupe Aguilar-Benegas generally demurs to the complaint filed by the People of the State of California, by and through Dennis J. Herrera, City Attorney for the City and County of San Francisco ("the City") on each of the following grounds:

**Demurrer To First Cause Of Action – Public Nuisance**

1. The First Cause of Action is subject to demurrer because it does not state facts sufficient to constitute a cause of action. (Civ. Proc. Code, § 430.10, subd. (e).)

**Demurrer To Second Cause Of Action – Violation Of California's Unfair Competition Law**

2. The Second Cause of Action is subject to demurrer because it does not state facts sufficient to constitute a cause of action. (Civ. Proc. Code, § 430.10, subd. (e).)

WHEREFORE, Ms. Aguilar-Benegas prays that:

3. The Court sustains this demurrer in its entirety and without leave to amend;

4. The Court enter an order dismissing each cause of action stated in the complaint without leave to amend; and

5. The Court grant such other and further relief as it may deem proper.

Dated: December 23, 2020

SWANSON & MCNAMARA LLP

By: */s/ Edward W. Swanson*
Edward W. Swanson
Carly Bittman
Attorneys for Defendant
GUADALOUPE AGUILAR-BENEGAS

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## MEMORANDUM OF POINTS AND AUTHORITIES

## I. INTRODUCTION

The San Francisco City Attorney's Office is suing Guadaloupe Aguilar-Benegas ("Ms. Aguilar-Benegas") under California's public nuisance statute (Civ. Code, §§ 3479 & 3480) and Unfair Competition Law ("UCL," Bus. & Prof. Code, §§ 17200 *et seq.*). This lawsuit—based only on a small number of drug offenses allegedly committed by Ms. Aguilar-Benegas—is unprecedented, and, most importantly, unsupported by the law.[1]

Neither cause of action is supported by the factual allegations in the complaint. *First*, the City's cause of action for public nuisance fails because the complaint lacks any allegation that Ms. Aguilar-Benegas's conduct affected "at the same time" a "considerable number of persons" as required by the statute. The complaint also fails to adequately allege that Ms. Aguilar-Benegas's limited conduct was the cause of the very real hardships faced by the Tenderloin's residents. *Second*, the City's cause of action under the UCL is subject to demurrer because the type of conduct at issue here—a small number of isolated drug offenses—does not amount to a "business act or practice" that falls within the reach of the statute.

The City indisputably has an interest in protecting the safety and comfort of its residents. And there is no question that creative and bold solutions are needed to address the unprecedented drug crisis in the Tenderloin. But this lawsuit is not that solution. If this case is permitted to proceed, it would threaten to expand the public nuisance and unfair competition statutes far beyond their current or intended reach, thereby providing the City Attorney's Office with a tool to target, punish and banish nearly any individual that it deems undesirable. The Court should not condone such a limitless transformation of these statutes and should sustain the demurrer in its entirety.

## II. BACKGROUND

While the complaint alleges detailed facts about the demographics of San Francisco's

[1] In her concurrently filed motion to strike, Ms. Aguilar-Benegas explains in detail why the injunctive relief sought in the complaint is impermissibly overbroad and vague. Those arguments will not be repeated here.

Tenderloin neighborhood, the characteristics and frequency of low-level drug crimes that occur there, and the effects those collective drug crimes have on the neighborhood's residents (Compl., ¶¶ 5-16), the complaint alleges few facts regarding Ms. Aguilar-Benegas's own conduct.

According to the complaint, Ms. Aguilar-Benegas is a 27-year-old resident of Oakland, California. (Compl., ¶ 19.) The complaint alleges that on May 11, 2020, Ms. Aguilar-Benegas engaged in two hand-to-hand drug sales in the Tenderloin, after which she was arrested and found to be in possession of $718 and small amounts of various controlled substances. (*Id*., at ¶ 20.) In a subsequent criminal prosecution brought by the San Francisco District Attorney's Office, Ms. Aguilar-Benegas pled guilty to a misdemeanor violation of the Penal Code as an accessory. (*Id.*) Following her guilty plea, the court ordered her to stay 150 years away from 240 Hyde Street. (*Id*.) The complaint further alleges that on July 29, 2020, the police arrested Ms. Aguilar-Benegas for violating that stay away order at the same location, searched her, and found in her possession $411 and small amounts of various controlled substances. (*Id*., at ¶ 21.) Following that arrest, the District Attorney charged Ms. Aguilar-Benegas with additional drug offenses, which charges are currently pending. (*Id.*)

Based on these allegations, the City asserts causes of action for public nuisance and violations of the UCL and seeks penalties and an injunction prohibiting Ms. Aguilar-Benegas from, among other things, entering the Tenderloin or "any area" of San Francisco where Ms. Aguilar-Benegas "has engaged in the illegal sale of controlled substances." (Compl., Prayer for Relief, ¶¶ 1-10.)

## III. PROCEDURAL HISTORY

The City filed this suit in September 2020. After Ms. Aguilar-Benegas received extensions on the responsive pleading deadline in order to retain counsel, the parties met and conferred about the arguments to be raised in this demurrer on December 17, 2020 but were unable to resolve Ms. Aguilar-Benegas's objections.

## IV. LEGAL STANDARD

"The party against whom a complaint . . . has been filed may object, by demurrer" on the ground that "[t]he pleading does not state facts sufficient to constitute a cause of action." (Code

Civ. Proc., § 430.10, subd. (e).) "The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled." (*Guardian N. Bay, Inc. v. Superior Court* (2001) 94 Cal.App.4th 963, 971.) Although courts "assume the truth of all facts properly pleaded," they "do not assume the truth of contentions, deductions or conclusions of fact or law." (*Cansino v. Bank of Am.* (2014) 224 Cal.App.4th 1462, 1468.)

"Because a demurrer tests the legal sufficiency of a complaint, the plaintiff must show the complaint alleges facts sufficient to establish every element of each cause of action." (*Price v. Starbucks Corp*. (2011) 192 Cal.App.4th 1136, 1141 [citation omitted].) In other words, "[g]eneral allegations are . . . inadequate" to assert statutory causes of action. (*Mittenhuber v. City of Redondo Beach* (1983) 142 Cal.App.3d 1, 5; *see also Worsham v. O'Connor Hosp*. (2014) 226 Cal.App.4th 331, 335.) Because the public nuisance and unfair competition laws provide statutory causes of action, they must be particularly pleaded. (*Orange Cty. Water Dist. v. Sabic Innovative Plastics US, LLC* (2017) 14 Cal.App.5th 343, 402 ["Nuisances are defined by statute[.]"]; *Venuto v. Owens-Corning Fiberglas Corp.* (1971) 22 Cal.App.3d 116, 131 [asking "whether plaintiffs have pleaded particular facts" to allege that a nuisance exists under the relevant statutory provisions].)

Finally, a demurrer should be sustained without leave to amend when the only issues are legal and the court decides against the plaintiff as a matter of law. (*Lawrence v. Bank of Am.* (1985) 163 Cal.App.3d 431, 436.) A court should not grant leave to amend when doing so "would serve no useful purpose." (*Mercury Cas. Co. v. Superior Court* (1986) 179 Cal.App.3d 1027, 1035.)

## V. ARGUMENT

### A. The City Has Failed to Plead a Cause of Action for Public Nuisance

The complaint offers compelling detail about the very real challenges that residents of the Tenderloin face. But the complaint does not explain how Ms. Aguilar-Benegas's conduct amounts to anything approaching a public nuisance. Specifically, the complaint contains no factual allegations to show that Ms. Aguilar-Benegas's conduct affected a "considerable number of persons" and did so "at the same time," as required by the statute. Nor does the complaint connect

Ms. Aguilar-Benegas's limited alleged conduct to the hardships of the Tenderloin's residents. To the extent the City seeks to hold Ms. Aguilar-Benegas responsible for the longstanding and widespread social ills detailed in the complaint, the complaint lacks any allegations from which to infer that Ms. Aguilar-Benegas's conduct was a "substantial factor" in bringing about those conditions.

**1. The City Has Failed to Plead that Ms. Aguilar-Benegas's Conduct Affected a Considerable Number of Persons at the Same Time**

The City's cause of action for public nuisance fails because the complaint does not allege an essential element of the statute—that Ms. Aguilar-Benegas's conduct "affects at the same time an entire community or neighborhood, or any considerable number of persons." (Civ. Code, § 3480.) To be sure, the complaint alleges that Ms. Aguilar-Benegas has engaged in nuisance-like behavior. (*See* Civ. Code, § 3479 ["Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances. . . is a nuisance."].) To plead a cause of action for *public nuisance*, however, a plaintiff must also allege that the defendant's conduct "affected a substantial number of people at the same time."[2] (*Birke v. Oakwood Worldwide* (2009) 169 Cal.App.4th 1540, 1548; *see also People v. Robin* (1943) 56 Cal.App.2d 885, 889 [explaining that a nuisance is not a public nuisance if it does "not affect any part of a neighborhood or any considerable number of people"].) No such facts are alleged here.

The complaint's conclusory assertion that Ms. Aguilar-Benegas's conduct caused Tenderloin residents "to suffer from fear, intimidation, and lack of free use of property and quiet enjoyment of life" (Compl., ¶ 17) lacks "sufficient particular facts from which the existence of a public nuisance can be deduced." (*Venuto*, 22 Cal.App.3d at 131; *Mittenhuber*, 142 Ca1.App.3d at 5 ["General allegations are . . . inadequate" for statutory causes of action.].) In *People ex rel. Stephens v. Seccombe* (1930) 103 Cal.App.306, 308-09, for example, the Los Angeles City

[2] This is an important distinction as it relates to the City's statutory standing to bring this action under section 731 of the Code of Civil Procedure, which provides that "[a] civil action may be brought in the name of the People of the State of California to abate a public nuisance." Even if Defendant's conduct amounts to a *private* nuisance, the City would lack standing to bring a cause of action for abatement absent a showing that the City's property rights have been invaded. (*Neuber v. Royal Realty Co.* (1948) 86 Cal.App.2d 596, 624.)

Attorney sought to enjoin the defendant from engaging in certain criminal acts on the theory that the conduct amounted to a public nuisance. The complaint alleged that the defendant had violated usury laws on several occasions and that the defendant's illegal conduct would "cause a loss and detriment to the community and to the economic and financial well-being of said community." (*Id*.) The trial court found the complaint's allegations regarding the effects of the defendant's conduct to be insufficient and sustained the defendant's demurrer without leave to amend. (*Id.* at 308.) In affirming the ruling, the Court of Appeal explained that the complaint was deficient because it contained "no allegation of facts, as distinguished from conclusions of the pleader, which, being deemed true, would support a conclusion of law that the defendant's course of conduct constitutes an obstruction to the free use of the property . . . of 'an entire community or neighborhood, or any considerable number of persons.'" (*Id.* at 310 [quoting Civ. Code, § 3480].) So too here.

Importantly, merely alleging criminal conduct is insufficient to plead a cause of action for public nuisance. (*Id.* at 311 [to survive demurrer "it is not sufficient to allege merely that the defendant has committed and intends to commit additional criminal acts"].) By contorting the public nuisance statute to apply to allegations of isolated episodes of low-level drug dealing, the City asks the Court to adopt an unprecedented and unsupportable expansion of public nuisance law. Cities have long grappled with low-level drug-dealing. But they have also long understood that a small number of isolated acts fall well outside the bounds of a public nuisance. Indeed, the California Supreme Court has cautioned against the sort of judicial expansion of public nuisance statutes that the City asks this Court to endorse:

> Conduct against which injunctions are sought [o]n behalf of the public is frequently criminal in nature. While this alone will not prevent the intervention of equity where a clear case justifying equitable relief is present, it is apparent that the equitable remedy has the collateral effect of depriving a defendant of the jury trial to which he would be entitled in a criminal prosecution for violating exactly the same standards of public policy. The defendant also loses the protection of the higher burden of proof required in criminal prosecutions and, after imprisonment and fine for violation of the equity injunction, may be subjected under the criminal law to similar punishment for the same acts. For these reasons equity is loath to interfere where the standards of public policy can be enforced by resort to the criminal law, and in the absence of a legislative declaration to that effect, the courts should not broaden the field in which injunctions against criminal activity will be granted.

(*People v. Lim* (1941) 18 Cal.2d 872, 880-81 [internal citations omitted].)

For decades, California's public nuisance statute has been effectively employed to address problems such as the pollution of streams, noxious gases from a creamery, dust and noise from cement plants and, more recently, contemporary concerns from lead paint poisoning and climate change to gun manufacturing. (*See, e.g.*, *Wade v. Campbell* (1962) 200 Cal.App.2d 54, 58-59 [summarizing cases].) These applications all share a common characteristic, as mandated by the terms of the statute, which remains unchanged: the nuisance must affect "an entire community or neighborhood, or any considerable number of persons"—and "at the same time." (Civ. Code, § 3480.)

Cities have also successfully applied the public nuisance statute as a means of enjoining criminal street gangs. In *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, for example, the California Supreme Court upheld a preliminary injunction entered against members of an alleged gang under section 3480 of the Civil Code. There, the plaintiff presented evidence that "it was the gang itself, acting through its membership, that was responsible for creating and maintaining the public nuisance" in a four-block area that the court described as an "urban war zone." (*Id.* at 1123, 1125.) The plaintiff established that gang members routinely obstructed residents' use of their property through drug dealing, created a "hooligan-like atmosphere that prevail[ed] night and day" by drinking, using drugs, playing loud music, and regularly threatened residents with violence. (*Id.* at 1120.) Even then, the injunction at issue did not ban the defendants from the neighborhood as the City seeks to do here. Instead, the defendants were more narrowly enjoined from appearing in public with any other known gang member in the four-block neighborhood, or "confronting, intimidating, annoying, harassing, threatening, challenging, provoking, assaulting and/or battering" residents. (*Id.* at 1110, 1118.)

Unlike the widespread and consistent conduct at issue in *Acuna*, the City here asserts a cause of action for public nuisance based only on a few low-level drug crimes allegedly committed by a single person. But as courts have made clear, mere criminality is insufficient to constitute a public nuisance. Under the City's view of the law, virtually any criminal act, no

matter how petty, would constitute a public nuisance. Isolated criminal acts such as those alleged to have been committed by Ms. Aguilar-Benegas do not constitute a public nuisance because they do not "affect[] at the same time an entire community or neighborhood, or any considerable number of persons." Because the complaint fails to allege this essential element, the Court should sustain the demurrer as to this cause of action.

**2. The City Has Failed to Plead that Ms. Aguilar-Benegas's Conduct Caused the Harms Alleged in the Complaint**

Causation is an essential element of a public nuisance claim. (*Citizens for Odor Nuisance Abatement v. City of San Diego* (2017) 8 Cal.App.5th 350, 359.) In pleading causation, a plaintiff must establish causation in fact, which requires facts demonstrating that the defendant's conduct was a "substantial factor in bringing about the result." (*People v. ConAgra Grocery Prod. Co.* (2017) 17 Cal.App.5th 51, 101.) The substantial factor standard requires "that the contribution of the individual cause be more than negligible or theoretical." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 978.) If a defendant's conduct operated concurrently with other forces to produce the harm, it is a substantial factor so long as "the injury, or its full extent, would not have occurred but for that conduct." (*In re Ethan C.* (2012) 54 Cal.4th 610, 640.) The City must therefore demonstrate that Ms. Aguilar-Benegas's conduct was necessary in bringing about the full extent of the harm alleged in the complaint. (*City & Cty. of San Francisco v. Purdue Pharma L.P.* (N.D. Cal. Sept. 30, 2020) ---F.Supp.3d---, 2020 WL 5816488, at *40.) The complaint falls far short of pleading the requisite facts to meet this standard.

To be sure, the complaint details the very real challenges that Tenderloin residents face, such as large amounts of litter and debris in the streets, high levels of crime and violence, public drug use, and frequent overdoses. (Compl., ¶¶ 9-16.) But the City fails to allege any "connecting element" or "causative link" between Ms. Aguilar-Benegas's conduct and the longstanding difficulties that exist in the neighborhood. (*See In re Firearm Cases* (2005) 126 Cal.App.4th 959, 988.) Indeed, the harms described by the City in the complaint existed *prior* to Ms. Aguilar-Benegas's alleged conduct. (*See, e.g.*, Compl., ¶ 15 [citing drug overdoses that occurred between 2011 and 2019]; *id., at* ¶ 16 [citing the Tenderloin's "safety ratings" in 2019].)

Notably, much of the complaint describes the nuisance-causing behavior of other, unnamed "drug dealers" and "narcotics users" who are not parties to this lawsuit. Although Ms. Aguilar-Benegas's alleged conduct occurred only recently, the complaint concedes that "[o]pen-air drug dealing has been a pervasive and ubiquitous feature of the neighborhood for years." (Compl., ¶ 9). Between June 2019 and September 2020 alone, over 730 arrests were made in the Tenderloin for drug sales and for possession of drugs for sale. (*Id*., ¶¶ 10-11.) As far as can be gleaned from the complaint, Ms. Aguilar-Benegas's contribution to the Tenderloin's ills was only "negligible or theoretical." (*Rutherford*, 16 Cal.4th at 978.) The City alleges nothing to show that the harms alleged would not have happened to their full extent without the conduct that led to Ms. Aguilar-Benegas's arrests—which arrests constitute only 0.27% of those occurring in the Tenderloin in the year preceding the filing of the complaint. Because the City has failed to allege facts demonstrating that Ms. Aguilar-Benegas's conduct was a "substantial factor in bringing about the result" alleged in the complaint, the demurrer as to the public nuisance cause of action should be sustained.

### B. The City Has Failed to Allege a Violation of the UCL

The City's attempt to paint the alleged acts of Ms. Aguilar-Benegas as a violation of the UCL is a gross misinterpretation of the statute, which does not cover isolated, low-level drug crimes as a "business act or practice" and was never intended to provide a cause of action under the facts alleged in the complaint.

#### 1. The Complaint Fails to Allege a "Business Act or Practice" Under the UCL

The UCL "prohibits, and provides civil remedies for, unfair competition, which it defines as 'any unlawful, unfair or fraudulent business act or practice.'" (*Kwikset Corp. v. Superior Court*, (2011) 51 Cal.4th 310, 320 [quoting Bus. & Prof. Code, § 17200].) "Its purpose 'is to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services.'" (*Id.* [quoting *Kasky v. Nike, Inc*. (2002) 27 Cal.4th 939, 949].) The UCL reflects "the Legislature's intent to discourage business practices that confer unfair advantages in

the marketplace to the detriment of both consumers and law-abiding competitors." (*Rose v. Bank of America, N.A*. (2013) 57 Cal.4th 390, 397.)

As a threshold matter, the UCL only applies to activities that "can properly be called a business practice." (*Hewlett v. Squaw Valley Ski Corp.* (1997) 54 Cal.App.4th 499, 519 [citation omitted].) "Whether any particular conduct is a business practice within the meaning of section 17200 is a question of fact dependent on the circumstances of each case." (*People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 321-22.) While the statute is liberally construed to extend to "anything that can properly be called a business practice and that at the same time is forbidden by law," (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 113), the statute has its limits.

Some activities, although involving transactions and money, are not business acts or practices. Generally, courts have determined that UCL business acts or practices must be part of the defendant's primary business. (*See, e.g.*, *id.* at 108-09 [noting that filing lawsuits could be a business practice of a collection agency if it was a primary part of its business activity]; *People v. Casa Blanca Convalescent Homes, Inc*. (1984) 159 Cal.App.3d 509, 526-27 [noting that nursing care could qualify under the UCL because it was the defendant hospital's "primary business activity"].) Indeed, one court found it "ludicrous" to propose that an informal business transaction—in that case, selling a piece of one's own real property—meant being "engaged in the 'business' of selling real estate." (*Nakasone v. Randall* (1982) 129 Cal.App.3d 757, 763 [looking to whether an activity is engaged in "for the purpose of livelihood or profit on a continuing basis" in determining whether it constituted a business for purposes of attachment statute] [citation omitted]; *id.* [distinguishing a broker from "a person who frequents brokers' offices, and continually dabbles in real estate," just as we "should hardly call [someone's personal investing] a business, though the line is undoubtedly hard to draw."] [citations and internal quotations omitted].)

Here, the City fails to make any allegation to show that Ms. Aguilar-Benegas is primarily engaged in the business of selling drugs, such as facts demonstrating that she engages in such conduct on a "continuing basis." Instead, the City bases its claims entirely on a small number of isolated incidents. "[E]ndorsing the theory in this case would stretch the already expansive

boundaries of the UCL beyond any principled reading of the statute." (*In re Firearm Cases* (2005) 126 Cal.App.4th 959, 972; *see also id*. at 986 ["Establishing public policy is primarily a legislative function and not a judicial function, especially in an area that is subject to heavy regulation."].)

The Court of Appeal's decision in *People v. E.W.A.P., Inc.* is instructive. There, the Court of Appeal held that a corporation distributing obscene materials had violated the unlawful prong of the UCL. But, in doing so, the court noted that the defendant was a corporation organized and existing under the laws of California with a principal place of business in California, that the corporation-defendant had officers, had in place a "commercial" distribution network, and that it had distributed various copies of 44 named obscene 8-millimeter films and various copies of three named magazines over a period of approximately a year. (*E.W.A.P.,* 106 Cal.App.3d at 317-19.) Under those circumstances, the court held that the plaintiff had adequately alleged a "business practice" within the meaning of the UCL. (*Id.* at 324.) The trial court had earlier held that the defendant's conduct could not be a "business practice" out of a "concern[] that if [the UCL] were applicable in the circumstances in this case, they would equally be applicable to a street-walking prostitute or a small-time bookie . . . ." (*Id.* at 320.) While the court concluded that the statute was properly applied to the *E.W.A.P.* defendants, it suggested it could be a "misapplication of the law" to find a UCL violation in a future case involving the sort of criminal conduct referenced by the trial court. (*Id.*) The court cautioned that:

> [T]he unfair competition law 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. . . . Whether any particular conduct is a business practice within the meaning of section 17200 is a question of fact dependent on the circumstances of each case.

(*Id.* at 320; *see also People v. K. Sakai Co.* (1976) 56 Cal.App.3d 531 [business practice found where corporate owners and operators of a grocery store sold canned whale meat].)

The complaint alleges that Ms. Aguilar-Benegas conducted a small number of isolated narcotics offenses, based on which the City argues that she has engaged in a "business act or practice" regulated by the UCL. The reasoning in cases such as *E.W.A.P.* counsel against such a

conclusion, and the Court should not accept the City's invitation to find a "business act or practice" here.

**2. The UCL Was Not Meant to Provide a Cause of Action Based on These Facts**

The UCL was adopted "to protect both consumers and competitors by promoting fair competition in commercial markets for goods and services." (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949 [holding that the UCL applies to companies' false and misleading speech] [citing *Barquis*, 7 Cal.3d at 110].) The civil penalties under the UCL "were enacted because criminal remedies were often too inadequate to protect the public, especially where corporate defendants were concerned." (*E.W.A.P.*, 106 Cal.App.3d at 322 [citing *People v. Superior Court (Jayhill)* (1973) 9 Cal.3d 283, 288-89, fn. 3] [the civil penalties were added to the UCL in part because juries were reluctant to convict corporate defendants for white collar crimes].) While non-corporate crime can fall within the range of business acts and practices regulated by the UCL, the case law demonstrates that the UCL only reaches such activity when it involves owners and operators of legitimate businesses who have committed crimes attendant to their primary businesses. (*See E.W.A.P.*, 106 Cal.App.3d at 317-19; *see also People ex rel. Gwinn v. Kothari* (2000) 83 Cal.App.4th 759, 762-63 [finding a UCL violation where motel owners permitted drug sales and prostitution to occur on the premises].) Just as it has done with the public nuisance statute, the City is seeking to use the UCL in a manner that courts have cautioned against—as a "roving warrant for a prosecutor to use injunctions and civil penalties to enforce criminal laws." (*E.W.A.P.*, 106 Cal.App.3d at 320.)

The City's proposed expansion of the UCL would result in the statute covering any criminal act that has some sort of financial component, such as possessing a small amount of drugs for personal use, shoplifting, or cashing a stolen check. Endorsing such an extreme expansion is not only unjustified by precedent or legislative intent but it would also raise serious due process concerns: if every act of a private individual that involves money can be penalized under the UCL, such a standard would provide no guidance on when and to whom the statute applied. Because such a standard would be untenable, the Court should sustain the demurrer as to the UCL claim.

## VI. CONCLUSION

For the aforementioned reasons, the Court should sustain Ms. Aguilar-Benegas's demurrer and dismiss both causes of action in the City's complaint without leave to amend.

Dated: December 23, 2020

SWANSON & MCNAMARA LLP

By: */s/ Edward W. Swanson*
Edward W. Swanson
Carly Bittman
Attorneys for Defendant
GUADALOUPE AGUILAR-BENEGAS