SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE 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,

v.

GUADALOUPE AGUILAR-BENEGAS aka GUADALOUPE AGUILARBENEGAS, an individual; JAROLD SANCHEZ, an individual; VICTOR ZELAYA aka VICTOR CELAYA aka VICTOR ALFONSO ZELAYA aka VICTOR CELAUA, an individual; and CHRISTIAN NOEL-PADILLA aka CHRISTIAN PADILLA-MARTEL, an individual,

Defendants.

Case Nos.:

- CGC-20-586732 (Aguilar-Benegas)
- CGC-20-586753 (Sanchez)
- CGC-20-586761 (Zelaya)
- CGC-20-586763 (Padilla-Martel)

ORDER ON PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY

By these motions in four separate cases,[1] the People of the State of California, through the San Francisco City Attorney, seek a preliminary injunction prohibiting the defendants from entering a specified area of the Tenderloin district of San Francisco, referred to by the People as the Tenderloin Drug Abatement Area. The People assert that each of the defendants has participated in the illegal sale of controlled substances in the Tenderloin Drug Abatement Area; that such conduct is causing a public nuisance under Civil Code §§ 3479 and 3480, and violates the Unfair Competition Law, Bus. & Prof. Code § 17200 *et seq.* (UCL); and that injunctive relief is necessary to abate the nuisance and to prohibit future such violations.

The People seek an injunction that would prohibit each defendant from entering the Tenderloin Drug Abatement Area, with boundaries specified by street name and on an attached map, which covers a multi-block area extending from Mission Street on the south, to Ninth Street and Van Ness Avenue on the west, to Geary Street on the north, to Powell Street on the east.[2] The injunction as drafted contains certain exceptions. Specifically, the proposed orders would allow defendants to travel underground through the area on BART and Muni Metro, but would prohibit them from boarding or leaving the trains at Civic Center or Powell Street Stations; would allow them to travel on public transit buses along Van Ness Avenue, but would prohibit them from boarding or leaving the bus within the area; would conditionally allow defendants to use a specified sidewalk on Turk Street to attend a scheduled federal court appearance; and would allow defendants—but only with the People's advance written and filed stipulation—to make a scheduled visit to a particular location in the area to conduct specified lawful business on a designated date and time, on the condition that the defendant carry a copy of the stipulation. The People assert that existing criminal laws have been inadequate to stop Defendants from engaging in illegal conduct, and that a more geographically limited stay-away order

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[1] Although the cases have not been consolidated, they raise closely similar issues. The Court therefore is addressing the People's motions in a single order. The People represent that they have filed similar lawsuits against another twenty-four individuals, although not all of those complaints have been served or are being actively prosecuted.

[2] The abatement area, which comprises some 50 square blocks, has a circumference of over 2.6 miles and covers over 221 acres (0.34 square miles).

would be ineffective in preventing the harm such conduct causes in the Tenderloin area and San Francisco generally. Violations of the proposed injunction would be subject to enforcement by contempt, a motion to enforce pursuant to Business & Professions Code section 17207, and criminal proceedings under Penal Code section 166(a)(4). The proposed preliminary injunction would be dissolved upon entry of a final injunction or upon further order of the Court. It is to be transmitted to the San Francisco Police Department for entry into the California Law Enforcement Telecommunications System (CLETS) as a stay-away order against each defendant.

The Court finds that the People have shown a reasonable likelihood of prevailing on the merits of their public nuisance and UCL claims. As discussed below, in order to obtain injunctive relief against conduct which constitutes a public nuisance *per se*, the People need not show irreparable harm. However, the Court concludes that the relief the People seek—an order excluding each defendant from a roughly 50-square-block neighborhood of San Francisco—is unsupported by California precedent and is both statutorily and constitutionally impermissible.

FACTUAL BACKGROUND

The People's motions are premised on an extensive and largely undisputed factual showing that the Tenderloin district is rife with illegal drug-dealing and other associated activities. The showing is based on numerous factual declarations from a wide variety of individuals who reside and/or operate businesses in the Tenderloin, including the president of a mosque, a theater manager, a restaurant owner, building managers, police officers, and even a former addict who served as a "holder" of illegal drugs for drug dealers. Taken together, these declarations establish, among other things, that blatant and open-air drug sales have been increasingly common in the Tenderloin, with drug dealing occurring all day and night; that sales of narcotics take place in the vicinity of schools, childcare centers, and playgrounds, and while children are walking to and from school; that drug sales occur in front of businesses, restaurants, and office buildings during business hours, making the entry ways inaccessible; that neighborhood residents and workers have to move to the other side of the street or into the street to avoid drug dealers; that injection and other open drug use is common on public streets, sidewalks, in and around alcoves and entry ways of businesses and restaurants, and

that users leave behind narcotics waste on the sidewalks and streets, including used crack pipes and dirty syringes, as well as human waste; and that rampant drug dealing in the Tenderloin is directly and indirectly related to numerous other crimes committed by drug dealers and their customers, including theft, weapons trafficking, and violent crimes. Illegal drugs that are commonly sold and used in the Tenderloin include fentanyl, cocaine base and cocaine salt, methamphetamine, heroin, and prescription pills. Tragically, widespread drug trafficking and use has resulted in numerous drug overdoses and deaths in the Tenderloin and elsewhere.

The People also present substantial evidence that each of the individual defendants has previously engaged in multiple illegal sales and/or possession for sale of controlled substances in the Tenderloin, and has violated stay-away orders issued by the criminal courts. The evidence as to each defendant is briefly summarized below.

A. **Guadaloupe Aguilar-Benegas**

Ms. Aguilar-Benegas, a resident of Oakland, was arrested in the Tenderloin on five different occasions between May 11, 2020 and February 27, 2021 for dealing drugs and/or possessing drugs for sale, and for violating court-issued stay-away orders. As the People point out, three of those arrests occurred just since this lawsuit was filed against her. On the first occasion, she was observed conducting two hand-to-hand sales of suspected narcotics. On each occasion, she was found in possession of multiple illegal drugs, including suspected cocaine base, heroin, methamphetamine, cocaine salt, fentanyl, as well as substantial quantities of cash. On several of those occasions, she was present in violation of stay-away orders issued by the criminal court. (See RJN, Exs. E, F.)

B. **Jarold Sanchez**

Mr. Sanchez, also an Oakland resident, was arrested in the Tenderloin on five different occasions between February 20, 2020 and February 22, 2021 for possessing or selling drugs, and for violating active stay-away orders. On three of those occasions, he was observed making hand-to-hand drug sales to buyers; on a fourth, he sold suspected methamphetamine to an undercover officer in a "buy/bust" operation. The narcotics found in his possession included suspected methamphetamine, cocaine salt, cocaine base, heroin, and fentanyl.

C. **Victor Zelaya**

Mr. Zelaya, an Oakland resident, was arrested in the Tenderloin on three different occasions from July 24, 2019 to May 20, 2020 for selling and/or possessing for sale illegal drugs including suspected cocaine powder, heroin, fentanyl, methamphetamine, and cocaine base. On one of those occasions, on May 20, 2020, he was observed making a hand-to-hand sale of suspected fentanyl, cocaine base, heroin, and/or metaphetamine. He was present in violation of several stay-away orders.

D. **Christian Noel-Padilla**

Since May 2020, Mr. Noel-Padilla, an Oakland resident, has been arrested three times in the Tenderloin for dealing and/or possessing drugs for sale, and for violating stay-away orders issued by the criminal court. On the first of those occasions, on May 2, 2020, he was present in violation of the Shelter in Place Public Health Order. He was found to be in possession of suspected fentanyl, cocaine salt, heroin, and substantial amounts of cash, and admitted to police that he was conducting narcotics sales and that most of the money in his possession was from drug sales. On the second occasion, on June 29, 2020, he was observed engaging in several hand-to-hand narcotics sales, and was found to be in violation of an active stay-away order; he was again found to be in possession of suspected fentanyl, methamphetamine, and cash. On the third occasion, less than 30 days later on July 20, 2020, he was again observed conducting multiple hand-to-hand narcotics sales within a few minutes, and was found in possession of suspected fentanyl, cocaine base, heroine, and over $1,000 in cash. He was again in violation of an active stay-away order. Police regularly observe him in the Tenderloin at locations known for drug trafficking.

Defendants do not take issue with the general picture of the Tenderloin that the People paint, acknowledging that "substance abuse causes very real harms in the Tenderloin" and that "the Tenderloin is facing a drug-related health crisis." (Opp. at 8:9, 9:26-27.) Nor do they dispute that they have been arrested and charged with, and in some cases convicted of, multiple drug crimes. However, they contest whether the People have shown a likelihood of success on the merits of their public nuisance and UCL claims; whether the balance of harms favors the People; and whether the injunctive relief sought by the People is statutorily or constitutionally permissible. The last point, in the Court's view, is dispositive.

DISCUSSION

"In general, when considering a request for a preliminary injunction, the trial court weighs two interrelated factors. The first is the likelihood the party seeking relief will prevail on the merits, and the second is the relative interim harm to the parties if the preliminary injunction is granted or denied." (*People v. Uber Technologies, Inc.* (2020) 56 Cal.App.5th 266, 283.) However, where a governmental entity seeks to enjoin an alleged violation of a statute which specifically provides for injunctive relief, a "variation of this standard" applies. (*Id.*) "Where a governmental entity seeking to enjoin the alleged violation of an ordinance [or statute] which specifically provides for injunctive relief establishes that it is reasonably probable it will prevail on the merits, a rebuttable presumption arises that the potential harm to the public outweighs the potential harm to the defendant." (*Id.*, quoting *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 72.) In other words, "[o]nce a governmental entity establishes that it will probably succeed at trial, a presumption should arise that public harm will result if an injunction does not issue." (*IT Corp.*, 35 Cal.3d at 72.) This presumption is "premised on a recognition that, where the Legislature has specifically provided for injunctive relief, it has already determined that a violation of the statute will cause 'significant public harm' and that 'injunctive relief may be the most appropriate way to protect against that harm.'" (*People v. Uber Technologies, Inc.*, 56 Cal.App.5th at 286, quoting *IT Corp.*, 35 Cal.3d at 70.) The same standard applies in UCL cases. (*People ex rel. Harris v. Black Hawk Tobacco, Inc.* (2011) 197 Cal.App.4th 1561, 1571 [illegal conduct by defendants constituted "showing of obvious public harm"].)

For certain public nuisances, the test for preliminary injunctive relief is even less demanding. "[T]he legislature has the power to declare certain uses of property a nuisance and such use thereupon becomes a nuisance *per se*. Nuisances *per se* are so regarded because no proof is required, beyond the actual fact of their existence, to establish the nuisance." (*City of Costa Mesa v. Soffer* (1992) 11 Cal.App.4th 378, 382.) "An act or condition legislatively declared to be a public nuisance is a nuisance per se against which an injunction may issue without allegation or proof of irreparable injury. To rephrase the rule, to be considered a nuisance per se the object, substance, activity or circumstance at issue must be expressly declared to be a nuisance by its very existence by some applicable law. Thus, the only issues for the court's resolution in a nuisance per se proceeding are whether the statutory

violation occurred and whether the statute is constitutional." (*City of Monterey v. Carrnshimba* (2013) 215 Cal.App.4th 1068, 1086-1087 (citations and internal quotations omitted); accord, *City of Dana Point v. New Method Wellness, Inc.* (2019) 39 Cal.App.5th 989-990 ["an injunction may issue against a nuisance per se without proof of an irreparable injury"] [holding that evidence was sufficient to support trial court's finding that residential properties were being operated as part of unlicensed drug treatment facility, and thus constituted nuisances per se under city residential zoning ordinance]; see also *Adams v. MHC Colony Park, LP* (2014) 224 Cal.App.4th 601, 612 [where Legislature expressly defines specified conduct as a public nuisance, nuisance "can be proved without the need to show the additional elements of a common law public nuisance"].)

As the People concede, in order for a court to enter an injunction prohibiting lawful conduct, the finding of facts necessary to justify preliminary or permanent injunctive relief must be proven by clear and convincing evidence. (*People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, 873.) *People v. Englebrecht* (2001) 88 Cal.App.4th 1236 is pertinent. That case involved a gang injunction that enjoined the defendant from particular gang-related activity in a target area, including both criminal and "a host of noncriminal, usually innocuous and wholly ordinary activities." (*Id.* at 1256.) The court held that the facts supporting injunctive relief had to be shown by clear and convincing evidence. It explained that this requirement does not necessarily require a showing "that the interests involved in the enjoined activities rise to the level of physical liberty or parental or First Amendment rights." (*Id.* at 1256.) Rather,

> The need for a standard of proof allowing a greater confidence in the decision reached arises not because the personal activities enjoined are sublime or grand but rather because they are commonplace, and ordinary. While it may be lawful to restrict such activity, it is also extraordinary. The government, in any guise, should not undertake such restrictions without good reason and without firmly establishing the facts making such restrictions necessary.

(*Id.*)

I. THE PEOPLE HAVE SHOWN A LIKELIHOOD OF PREVAILING ON THE MERITS OF THEIR PUBLIC NUISANCE AND UCL CLAIMS.

The People have shown a likelihood of prevailing on the merits of their public nuisance claims against Defendants. The People show that illegal drug sales, which the Legislature has expressly defined by statute to constitute a nuisance, affect the entire Tenderloin neighborhood, or a considerable number of persons in that neighborhood; and they have presented substantial evidence that each of the defendants has engaged in such illegal sales, and thus has contributed to that public nuisance.

Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances . . . ." (Civ. Code § 3479.) The statute also defines a nuisance to include anything that is "an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or [that] unlawfully obstructs the free passage or use, in the customary manner, of . . . any public park, square, street or highway." (*Id.*) Section 3480 defines a public nuisance as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." Thus, if the illegal sale of controlled substances (or the unlawful obstruction of the public streets) affects an entire community or neighborhood, or any considerable number of persons, it constitutes a public nuisance. Further, because the Legislature has specifically defined sales of illegal drugs as a nuisance, they constitute a nuisance *per se* and, under the authorities cited above, may be enjoined without proof of irreparable injury.

On the record summarized above, there can be little doubt that illegal drug-dealing in the Tenderloin, and the other conduct associated with it (open public drug use, discarding of used syringes and other narcotic waste, drug overdoses, violent crime, etc.) constitutes a public nuisance that affects the entire Tenderloin neighborhood, or at the very least a considerable number of persons who reside or work in that neighborhood, or visit it for other reasons. The People have also presented substantial evidence that each of the individually-named defendants has engaged in such illegal activity in the past, and therefore have contributed to the overall public nuisance. Further,

given defendants' track record of recidivism as shown by repeated arrests, violations of court-issued stay-away orders, and criminal prosecutions, it is reasonable to infer that they are likely to continue their unlawful conduct in the future.[3] Even under the clear and convincing standard of proof, this evidence is sufficient to establish at least a reasonable likelihood that the People will prevail on the merits of their nuisance claims against Defendants.

Defendants' arguments to the contrary are not persuasive. They argue that for the People to prevail on their nuisance claim, they must prove that each defendant, himself or herself, individually engaged in conduct that affected a substantial number of people. Thus, defendants argue that because the People have not shown that any individual defendant "injured anyone or sold drugs to someone who discarded a syringe on the sidewalk," or sold drugs to a buyer who used drugs in public, committed a crime, or suffered an overdose, they cannot be liable under public nuisance law. However, the law is to the contrary. As discussed above, a cause of action for nuisance *per se* does not require a showing of actual harm. For nuisances per se, "no proof is required, beyond the actual fact of their existence, to establish the nuisance. No ill effects need be proved." (*McClatchy v. Laguna Lands, Ltd.* (1917) 32 Cal.App. 718, 725.) The People have shown that defendants engaged in the unlawful activity of selling illegal drugs; they need not show that one or more of their buyers has overdosed in order to establish that defendants have contributed to the creation of a public nuisance. Defendants' proposed approach would make proof of a nuisance that is the product of multiple individuals' conduct almost impossible to establish.

"[T]he causation element of a public nuisance cause of action is satisfied if the conduct of a defendant is a substantial factor in bringing about the result." (*People v. ConAgra Grocery Products Co.* (2017) 17 Cal.App.5th 51, 101.) Contrary to defendants' position, this is not a demanding test: "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, a force which plays only an infinitesimal or theoretical part in bringing about injury, damage, or loss is not a substantial factor, but a very minor force that does cause harm is a substantial factor." (*Id.* at 102 (citations and

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[3] The only possible exception is Ms. Aguilar-Benegas, who counsel represented at the hearing recently became a new mother.

internal quotations omitted); see also *City of Modesto v. Dow Chemical Co.* (2018) 19 Cal.App.5th 130, 151-158 [sufficient to show that defendants' actions "created or assisted in the creation of a nuisance," rejecting argument that substantial factor causation test requires heightened standard of proof].) In short, when one person contributes to a public nuisance, "the fact that . . . others are contributing is not a defense to his own liability." (*Id.* at 108, quoting Rest.2d Torts, §840E, com. b, p. 177.) Here, there is evidence that each defendant's active and repeated participation in the illegal drug trade played at least a minor role in creating the nuisance that exists in the Tenderloin.

Because the People have shown that defendants are engaged in ongoing unlawful conduct, they have also shown a likelihood of prevailing on the merits of their UCL claim. Section 17200 prohibits "unfair competition," which is defined to include "unlawful" business practices. The Legislature "framed the UCL's substantive provisions in broad, sweeping language to reach anything that can properly be called a business practice and that at the same time is forbidden by law." (*Abbott Laboratories v. Superior Court* (2020) 9 Cal.5th 642, 651 (citations omitted).) "By proscribing 'any unlawful' business practice, section 17200 'borrows' violations of other laws and treats them as unlawful practices that the unfair competition law makes independently actionable." (*Id.* (citations omitted).) Thus, "the fact that certain conduct is a crime will not prevent the issuance of an injunction if the conduct also falls within a specific statute authorizing an injunction." (*People v. E.W.A.P., Inc.* (1980) 106 Cal.App.3d 315, 320 [holding that commercial distribution of obscene films and magazines in violation of the Penal Code is an unlawful business practice within the meaning of section 17200]; see also *People ex rel. City of Santa Monica v. Gabriel* (2010) 186 Cal.App.4th 882, 887-888 [landlord's sexual harassment of a tenant was a business practice where it was "made possible by the parties' commercial relationship and occurred only during business-related encounters"].) The UCL, which "specifically authorizes injunctive relief and civil penalties in addition to the remedies of the penal law," is just such a statute. (*Id.*; see also *Abbott Laboratories*, 9 Cal.5th at 654 [district attorney can bring "unlawful" UCL claims predicated on violations of the antitrust laws].) The UCL extends to the illegal sale of drugs. (*People ex rel. Trutanich v. Joseph* (2012) 204 Cal.App.4th 1512, 1525 [affirming summary judgment in favor of People and against storefront business establishment for sales of marijuana, psilocybin, hashish and hashish oil in violation of the Narcotics Abatement Law,

Health & Safety Code § 11570 *et seq.*, and the Public Nuisance Law, Civ. Code § 3479, which constituted unlawful business practices prohibited by § 17200].) Defendants' argument that the UCL only encompasses unlawful business practices by corporations or other business entities, and not by individuals, is unsupported by any authority and is unpersuasive in light of the broad interpretation consistently given to the UCL by California courts.[4]

II. THE INJUNCTION SOUGHT BY THE PEOPLE PROHIBITING DEFENDANTS FROM ENTERING THE TENDERLOIN DRUG ABATEMENT AREA IS STATUTORILY UNSUPPORTED AND CONSTITUTIONALLY IMPERMISSIBLE.

The principal contested issue presented by these motions is whether the injunctive relief the People seek—a stay-away order prohibiting each of the individual Defendants from entering the so-called Tenderloin Drug Abatement Area, at any time and for any purpose—is statutorily and constitutionally permissible. For the following reasons, the Court concludes it is neither.

A. Neither The Public Nuisance Law Nor the Unfair Competition Law Authorizes Creation of An Exclusion Zone.

While public entities have broad statutory authority to seek injunctive relief abating public nuisances and enjoining unlawful conduct under the UCL, there is not a single reported California decision that upholds a stay-away order such as the one the People seek here, which would entirely ***exclude a person*** from a particular neighborhood or exclusion zone (or "drug abatement area") of a city, as opposed to prohibiting the person from engaging in particular ***conduct*** in the target area. To the contrary, as one court stated, "No case has been called to our attention upholding such a broad condition which completely prohibits mere presence in a geographical area at all times." (*In re White* (1979) 97 Cal.App.3d 141, 150.) As the People concede, the relief they seek is unprecedented.

Not only is the People's request unsupported by any reported precedent, the Court concludes that neither the public nuisance law nor the UCL can reasonably be read to authorize such relief. To

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[4] The *E.W.A.P.* court cautioned that "the 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." (106 Cal.App.3d at 320.) It implied that the UCL might not apply to "a streetwalking prostitute or a small-time bookie, who arguably are engaged in 'business' of a criminal nature," nor to a "heroin dealer." (*Id.* at 320 & fn. 8.) That language is dicta, and in any event it predated *Trutanich* and *City of Santa Monica*, both of which broadly construed the term "business practice."

be sure, there is no doubt that a public entity has the authority to seek, and a court to issue, injunctive relief to abate a nuisance. Civil Code section 3491 provides three remedies for a public nuisance: (1) a criminal proceeding; (2) a civil action; or (3) abatement.[5] "Except for instances implicating certain constitutional considerations, . . . the public entity is free to choose any of the three options." (*Flahive v. City of Dana Point* (1999) 72 Cal.App.4th 241, 244.)

Similarly, the UCL provides that a person who engages in unfair competition, which is defined to include unlawful conduct, "may be enjoined in any court of competent jurisdiction." (Bus. & Prof. Code § 17203.) "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 . . . ." (*Id.* (emphasis added).)[6] "While the scope of conduct covered by the UCL is broad, its remedies are limited." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1144.) "Section 17203 authorizes the court to fashion remedies to prevent, deter, and compensate for unfair business practices." (*Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 176.) Plaintiffs "may combat unfair competition by seeking an injunction against unfair business practices." (*Korea Supply Co.*, 29 Cal.4th at 1152.)

While courts may issue injunctive relief against public nuisances and unfair competition, neither the nuisance laws nor the UCL authorizes the relief the People seek here. The nuisance laws authorize abatement, which is "the act of eliminating the condition that causes the nuisance." (*Flahive*, 72 Cal.App.4th at 244 fn. 5; see also Civ. Code § 3495 [any person may abate a public nuisance which is specially injurious to him by removing, or, if necessary, destroying the thing which constitutes the same].) In other words, abatement is equivalent to an injunction against injurious ***activity*** or ***conduct***—not removal of a person who has engaged in such conduct. (*Leider v. Lewis* (2017) 2 Cal.5th

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[5] See also Code Civ. Proc. § 731 ["A civil action may be brought in the name of the people of the State of California to abate a public nuisance, as defined in Section 3480 of the Civil Code," by specified public officials including the city attorney of the city in which the nuisance exists]; Pen. Code §§ 372 [maintaining or committing any public nuisance is a misdemeanor], 373a [each person who maintains, permits, or allows a public nuisance to exist upon his or property or premises is guilty of a misdemeanor], 11225-11235 [Red Light Abatement Law applicable to buildings or places used for the purpose of illegal gambling, lewdness, assignation, or prostitution].

[6] The UCL also provides for restitution, which is not applicable here.

1121, 1136 [when criminal activity is at issue, Civil Code section 3369 requires "a definition of prohibited conduct along with a provision specifically authorizing equitable relief ***to restrain the defined conduct***" (emphasis added); *People v. Lim* (1941) 18 Cal.2d 872, 880 ["Conduct against which injunctions are sought in behalf of the public is frequently criminal in nature."]; *In re Englebrecht* , 67 Cal.App.4th at 492 ["Either criminal or noncriminal conduct may be abated, but the equitable remedy lies only 'where the objectionable activity can be brought within the terms of the statutory definition of public nuisance'"].) Thus, as discussed below, while California courts have granted injunctions to abate public nuisances in a variety of contexts, in every case the relief granted has prohibited persons from engaging in unlawful and other injurious ***conduct***, rather than ***excluding the persons themselves*** from a particular geographic area in which they have engaged in misconduct.

Likewise, the purpose of injunctive relief under the UCL is to prohibit unfair competitive ***practices*** or conduct—not to exclude the persons engaged in it. (See, e.g., *People ex rel. Harris v. Aguayo* (2017) 11 Cal.App.5th 1150, 1176-1178 [after trial in civil enforcement action brought by State of California against defendants for violation of UCL arising out of complex real estate scam, following criminal trials, trial court properly "enjoined the acts which formed the basis for [defendants'] wrongful scheme."].) The rule is that "an injunction must seek to prevent harm, not to punish the wrongdoer." (*Feitelberg v. Credit Suisse First Boston, LLC* (2005) 134 Cal.App.4th 997, 1012, quoting *Brockey v. Moore* (2003) 107 Cal.App.4th 86, 103.)

There is no question that a court may enjoin the illegal sale of drugs, which as noted is conduct that the Legislature has specifically declared to be a nuisance. Indeed, courts have affirmed orders granting preliminary and permanent injunctions against marijuana dispensaries and other businesses selling illegal drugs without required permits on the ground that they constitute public nuisances. (See, e.g., *People ex rel. Feuer v. FXS Management, Inc.* (2016) 2 Cal.App.5th 1154, 1157, 1162 [affirming preliminary injunction abating a medical marijuana business as a nuisance, presuming the existence of public harm because it was not authorized by city ordinance]; *County of Los Angeles v. Hill* (2011) 192 Cal.App.4th 861, 868 [affirming preliminary injunction prohibiting defendants from possessing, offering, selling, or giving away marijuana in unincorporated area of county without first obtaining necessary licenses and permits required by county ordinances].) Likewise, property owners who allow

their properties or businesses to be used for illegal activity including drug dealing may be enjoined from continuing to operate them as public nuisances. (See, e.g., *Benetatos v. City of Los Angeles* (2015) 235 Cal.App.4th 1270, 1284-1285 [city properly determined that plaintiffs operated fast-food restaurant in a manner that constituted a nuisance, where there was substantial evidence, among other things, that restaurant was open 24 hours a day, crimes committed at restaurant included drug offenses, prostitution, and violent crimes, and residents and business owners from the surrounding community were exposed to and complained about the criminal activity that took place at the restaurant]; see also *Lew v. Superior Court* (1993) 20 Cal.App.4th 866, 870-875 [plaintiffs were liable in damages for nuisance where their apartment building was being used as a center for the sale and distribution of drugs and plaintiffs "did not take all reasonable measures available to them to control their property"]. Again, however, the People do not cite a single case, nor has the Court been able to find one, in which a court issued an injunction that, rather than prohibiting the unlawful ***conduct*** comprising the nuisance or the unlawful business practice, excluded ***persons*** who had engaged in the unlawful conduct from the neighborhood or other geographic area in which the conduct has occurred.

The People rely heavily on *People v. Moran* (2016) 1 Cal.5th 398 and other probation cases. However, those cases arose under a different statute, Penal Code section 1203.1, and involved entirely different considerations. In *Moran*, for example, the issue was the validity of a probation condition prohibiting a defendant, who had pled no contest to second degree burglary of a Home Depot store, from entering the premises or adjacent parking lot of any Home Depot store in California. The Supreme Court held that the probation condition was permissible under state law, relying on the broad discretion conferred on sentencing courts by the Penal Code to impose conditions on release that are "fitting and proper to the end that justice may be done that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and . . . for the reformation and rehabilitation of the probationer." (*Id.* at 402-403, citing Pen. Code § 1203.1(j).) The Court applied the test for probation conditions first articulated in the seminal case of *People v. Lent* (1975) 15 Cal.3d 481: "Generally, a condition of probation will not be held invalid unless it (1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future

criminality. This test is conjunctive—all three prongs must be satisfied before a reviewing court will invalidate a probation term. As such, even if a condition of probation has no relationship to the crime of which a defendant was convicted and involves conduct that is not itself criminal, the condition is valid as long as the condition is reasonably related to prevent future criminality." (*Id.* at 403, quoting *People v. Olguin* (2008) 45 Cal.4th 375, 379-380 (citations and internal quotations omitted).)

Under this test, the *Moran* Court concluded that the trial court did not abuse its discretion when it imposed the Home Depot stay-away condition on defendant's probation. Under the first factor, because defendant stole from a Home Depot store, "the condition that he stay away from all such stores is reasonably related to his crime." (*Id.* at 404.) Moreover, under the third factor, "prohibiting defendant from entering Home Depot stores is reasonably directed at curbing his future criminality by preventing him from returning to the scene of his past transgression and thus helping him avoid any temptation of repeating his socially undesirable behavior." (*Id.*) As the Court noted, "Sentencing courts often condition a grant of probation on the offender's agreement to avoid future contact with his or her victim. [Citations.] Indeed, such so-called stay-away orders are common in domestic violence cases." (*Id.*) The Court rejected defendant's argument that the stay-away probation condition swept too broadly because it extended to multiple Home Depot stores in California, reasoning that "conditions of probation aimed at rehabilitating the offender need not be so strictly tied to the offender's precise crime." (*Id.* at 404-405.) Thus, although the sentencing court could reasonably have limited the geographic reach of the stay-away condition, its statewide scope did not render it improper within the meaning of *Lent*. (*Id.* at 405.)

While *Moran* involved a court order placing geographic restrictions on a person's freedom, it otherwise has little to do with the instant case. Probationers have reduced privacy and other rights, and courts uphold conditions of probation to promote rehabilitation, reduce recidivism, and enable supervision, including restrictions on residence and movement, that would be unacceptable in any other context. "Although conditions requiring prior approval of a probationer's residence may affect the constitutional rights to travel and freedom of association, courts have the authority to do so if there is an indication the probationer's living situation contributed to the crime or would contribute to future criminality." (*People v. Arevalo* (2018) 19 Cal.App.5th 652, 657.) This case does not involve a

criminal court's sentencing authority under the Penal Code, nor does it squarely implicate any of the underlying considerations reflected in the *Lent* test.[7]

Moreover, and critically, even in sentencing a defendant following a criminal conviction, a court would not have the authority to grant the broad relief sought by the People as a condition of probation. The leading California case is *In re White* (1979) 97 Cal.App.3d 141. The petitioner in that habeas corpus proceeding pled guilty to soliciting an act of prostitution. In sentencing, the trial court imposed as a condition of probation that petitioner not be present "at any time, day or night," in any of three control areas (or "map areas") in the city of Fresno. Statistics introduced at the habeas corpus hearing established that the three map areas constitute major areas for prostitution activity in the city of Fresno. Petitioner contended that the map condition violated her constitutional rights including her right to travel, that the condition did not comport with the California probation law, and that it was an improper banishment. The court agreed, holding that the condition was unreasonable. "The map condition may have some relationship to the crime of soliciting. However, a blanket prohibition against being in a designated area of Fresno, 'anytime, day or night', appears to be unduly harsh and oppressive." (*Id.* at 147.) "Mere presence at a particular place, without more, does not amount to solicitation." (*Id.*) Moreover, the condition was far too broad, as it would sweep in "innumerable situations in which a probationer could be in the map area which are unrelated to prostitution." (*Id.*) The court observed,

> The condition relates to conduct which is not criminal. Many perfectly legal activities are covered by this condition which have no relationship whatsoever to soliciting. [Citation.] City buses, the Greyhound Bus and taxicabs pass through the various map areas. Technically, being engaged in a passive activity such as being a mere passenger in public transportation or private transportation would be a violation of the condition.

(*Id.*) Moreover, the condition was insufficiently tied to petitioner's criminal conviction:

> In some regards the condition may be related to future criminal conduct. However, the condition is too broad in proscribing every type of activity. Keeping [petitioner] out of the map area will have a minimal effect on future criminal conduct except possibly in that

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[7] Defendants represent that they are all facing pending criminal charges arising out of the arrests that form a basis for the People's motions. In the event of a conviction, the criminal court would have authority to sentence defendants to probation and to impose reasonable conditions consistent with *Lent*.

> particular area. As previously noted, there was prosecution testimony in the superior court hearing that this type of probation condition only moves solicitors to other areas of Fresno. Unlike conditions proscribing hitchhiking or the frequenting of specific places (such as bars, pool rooms, etc.), this condition is simply too broad. There is little factual nexus between the proscribed activity and future criminality. . . . The condition in question is so sweeping and so punitive that it becomes unrelated to rehabilitation.

(*Id.* at 147-148.)

In short, in California even a criminal court "does not have [the] power" to "banish" a defendant. (*People v. Bauer* (1989) 211 Cal.App.3d 937, 944-945 [collecting authorities]; *People v. Blakeman* (1959) 170 Cal.App.2d 596, 597-598 [same]; compare *People v. Stapleton* (2017) 9 Cal.App.5th 989, 995 [condition of probation restricting residence of defendant, a registered sex offender, "is not a wolf in sheep's clothing; it is not designed to banish defendant or to prevent him from living where he pleases"]; *id.* at 996 ["The residency conditions are necessary under these circumstances to aid in defendant's rehabilitation, and not to banish defendant from any geographic region."].) If a court cannot enter such an exclusion order as a condition of probation following a criminal conviction, it certainly cannot do so in the guise of a civil injunction.

There are two other categories of cases in which courts have addressed the validity of geographic restrictions, but neither supports the People's position here. First, the Legislature has specifically mandated residency restrictions for registered sex offenders. (See, e.g., Pen. Code § 3003.5(b) ["Notwithstanding any other provision of law, it is unlawful for any person for whom registration is required pursuant to Section 290 to reside within 2000 feet of any public or private school, or park where children regularly gather."]; cf. *In re Taylor* (2015) 60 Cal.4th 1019 [holding statutory residency restrictions unconstitutional as applied across the board to sex offenders on parole in San Diego County, but upholding California Department of Corrections and Rehabilitation's authority to impose special restrictions on registered sex offenders in the form of discretionary parole conditions].) No such specific statutory mandate is involved here, nor does this case involve considerations comparable to those involved in registered sex offender cases.

Second, in cases involving criminal street gangs, the courts have upheld injunctions prohibiting gang members from engaging in specified conduct in designated "safety zones" or "target zones,"

such as associating with other gang members and engaging in threats and acts of violence. (E.g., *People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1110, 1122; *In re Englebrecht*, 67 Cal.App.4th at 493-499 [upholding provision of preliminary injunction that prohibited defendant from associating with known gang members within specified one-mile-square target area].) Such injunctions may include curfew provisions that are somewhat comparable to the stay-away or exclusion orders the People seek here. In *People ex rel. Reisig v. Acuna* (2010) 182 Cal.App.4th 866, for example, a court upheld a gang injunction that contained a nighttime curfew provision prohibiting gang members from "[r]emaining upon public property, a public place, on the premises of any establishment, or on a vacant lot, between the hours of 10:00 p.m. on any day and 6:00 a.m. the following day." (*Id.* at 889-891; compare *People ex rel. Totten v. Colonia Chiques* (2007) 156 Cal.App.4th 31, 46-49 [finding curfew provision of permanent injunction unconstitutionally vague].) However, the analogy is not a close one, as the order the People seek here would exclude defendants at all times of the day and night. Moreover, the curfew provision in *Reisig* contained multiple express exclusions, including "(1) a meeting or scheduled entertainment activity at a theater, school, church or religious institution, or sponsored by a religious institution, local education authority, government agency or support group like Alcoholics Anonymous; (2) actively engaging in a business, trade, profession or employment which requires such presence; (3) in an emergency situation . . . ; or (4) in the side yard or back yard of his/her own residence." (182 Cal.App.4th at 889.) The People's proposed preliminary injunction here contains no such carve-outs.

B. The Proposed Stay-Away Order Would Violate The Constitutional Right To Intrastate Travel.

Even if the public nuisance statutes or the UCL authorized issuance of a preliminary injunction in the form of a stay-away order from a particular neighborhood or zone, such an order would violate the constitutional right to intrastate travel, which is protected by the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution and Article I, section 7 of the California Constitution. When a constitutionally protected interest is at stake, "the injunctive relief must be narrowly tailored so as to minimally infringe upon the protected interest." (*People ex rel. Gallo*, 14 Cal.4th at 1128.) The People's proposed exclusion order fails that test.

The California Supreme Court has repeatedly reaffirmed that both the federal and state constitutions guarantee the right to travel. "Although not explicitly guaranteed in the United States Constitution, the right to travel, or right of migration, now is seen as an aspect of personal liberty which . . . requires that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement. This right also includes the right of intrastate travel, which has been recognized as a basic human right protected by article I, sections 7 and 24 of the California Constitution." (*Moran*, 1 Cal.5th at 405-406, citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069.) In the context of probation conditions, "[a]lthough criminal offenders placed on probation retain their constitutional right to travel, reasonable and incidental restrictions on their movement are permissible." (*Id.* at 406.) The *Moran* Court found that the Home Depot stay-away order was "too de minimis to implicate" the defendant's constitutional right to travel. (*Id.* at 407.) The Court found that it did not curtail defendant's right to free movement in any meaningful way, emphasizing that defendant "remains free to drive on any public freeway, street or road, use public transportation, work (except in Home Depot stores), shop, visit the doctor's office, attend school, enjoy parks, libraries, museums, restaurants, bars, clubs, and movie theaters. He may—without violating the challenged condition—freely move about his community, the city, and the State of California." (*Id.)*

Moran does not support the People's position here, for at least two reasons. First, as discussed above, it involved a trial court's broad statutory authority under the Penal Code to impose reasonable conditions of probation following a criminal conviction. Second, "[a] probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad." (*In re Sheena K.* (2007) 40 Cal.4th 875, 890.) The broad relief the People seek here—a preliminary injunction prohibiting defendants from entering an entire neighborhood of San Francisco—sweeps far more broadly than the stay-away order from a single chain of stores involved in *Moran*. By no stretch of the imagination is it narrowly tailored. Rather than prohibit specified harmful conduct, it prohibits mere presence in the exclusion zone, at any time of the day or night and for any reason. It would

preclude defendants from entering the area for any purpose, including accessing vital social and health services.

Indeed, even in the probation context, the relief the People seek would run afoul of constitutional limits. Thus, in *In re White*, after deciding that the requirement prohibiting petitioner from being present in certain control areas of the city of Fresno was an unreasonable probation condition, the court went on to hold that the condition "does not pass constitutional muster." (97 Cal.App.3d at 148.) While the court acknowledged that "the right of free movement is not absolute and may be reasonably restricted in the public interest," it found that the condition was not narrowly tailored: "While [petitioner's] reasonable expectations regarding association and travel have necessarily been reduced, the restriction should be regarded with skepticism. If available alternative means exist which are less violative of the constitutional right and are narrowly drawn so as to correlate more closely with the purposes contemplated, those alternatives should be used . . . ." (*Id.* at 150; see also *Ex parte Scarborough* (1946) 76 Cal.App.2d 648, 650 ["The same principle which prohibits the banishment of a criminal from a state or from the United States applies with equal force to a county or city. The old Roman custom of ostracizing a citizen has not been adopted in the United States."].)[8]

Finally, contrary to the People's assertion that "[t]his has never been done before," the People's request that the Court create a "drug abatement area" in the Tenderloin in fact is not a novel idea. Other cities have enacted ordinances that would have created similar drug and prostitution exclusion zones. Courts that have addressed the validity of such ordinances have concluded, consistent with *In re White*, that they would unconstitutionally infringe the right to travel.

For example, in *Johnson v. City of Cincinnati* (6th Cir. 2002) 310 F.3d 484, the Sixth Circuit addressed the validity of a city ordinance that was enacted to enhance the quality of life and protect the health, safety, and welfare of persons in neighborhoods with a significantly higher incidence of conduct associated with drug abuse than other areas of the city. The ordinance provided that if an

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[8] The People attempt to distinguish *In re White* on the ground that it would have enjoined the defendant from entering areas of her own city of residence, whereas defendants here all reside outside San Francisco and "commute" into the Tenderloin to engage in illegal drug dealing. However, nothing in *In re White* suggests that the court's analysis turned in any way on that distinction.

individual were arrested or taken into custody within any specified drug-exclusion zone for one of several enumerated drug offenses, the individual would be excluded for up to 90 days from the "public streets, sidewalks, and other public ways" in all drug-exclusion zones; if the individual was convicted, the exclusion would be extended for a year. The ordinance defined drug-exclusion zones as areas where the number of arrests for drug-abuse related crimes for the twelve-month period preceding the original designation was significantly higher than that for other similarly situated and sized areas of the city. (*Id.* at 487-488.) The ordinance was later amended to provide that the 90-day exclusion period would terminate upon acquittal, dismissal of charges, or failure to prosecute. (*Id.* at 488.) Excluded persons who violated the ordinance would be subject to prosecution for criminal trespass, a misdemeanor. The ordinance required the city's chief of police to grant a variance to any person who proves that he or she (1) resided in the drug-exclusion zone prior to receiving the exclusion notice, or (2) was employed by, or owned, a business located in a drug-exclusion zone prior to receiving the exclusion notice. Social service agencies could also grant variances for drug abuse-related counseling services and other reasons. (*Id.*) In 1998, the city council designated Over the Rhine—a mixed residential/commercial neighborhood located immediately north of the City's downtown business district—a drug exclusion zone. The designation followed a police report which showed that 18.7% of city drug arrests occurred in that neighborhood, and that reducing the number of drug offenses in the area was extremely difficult because many arrested individuals returned to the neighborhood immediately upon release. (*Id.*)

The district court held that the ordinance was unconstitutional both as applied and on its face and enjoined its enforcement, holding that it (1) violated the plaintiffs' right to freedom of association and (2) violated the right of excluded persons to freedom of movement in the form of their right to intrastate travel. (*Id.* at 489.) The Sixth Circuit affirmed, holding that the ordinance was subject to strict scrutiny, and that it was facially unconstitutional because it was not narrowly tailored to achieve the city's compelling interest in reducing drug abuse and drug-related crime. (*Id.* at 502-503.) First, the court found that the ordinance implicated individuals' interest in intrastate travel:

> The Ordinance bars excluded individuals from each and every public space and roadway in Over the Rhine. In our view, the right to travel locally through public spaces and roadways is essentially a right of access. By blocking affected individuals' access to an entire metropolitan neighborhood of 10,000 people, the Ordinance therefore plainly infringes on the right to localized travel through the public spaces and roadways of Over the Rhine.

(*Id.* at 503.) Further, the court found that the ordinance was not the least restrictive means to accomplish the city's goals:

> In denying access, the Ordinance initially presents constitutional tailoring problems because it broadly excludes individuals from Over the Rhine without regard to their reason for travel in the neighborhood. Thus, the Ordinance prohibits [one named plaintiff] from engaging in an array of not only wholly innocent conduct, but socially beneficial action like caring for her grandchildren and walking them to school. Likewise, the Ordinance bars [a second plaintiff] from seeking food, shelter, social services and meeting with his attorney in Over the Rhine, at the same time it bans him from pursuing illegal drugs in Over the Rhine.

(*Id.*)

Courts in other states have reached the same conclusion. (See, e.g., *State v. Burnett* (Ohio 2001) 755 N.E.2d 857, 865-868 [city ordinance which prohibits a person from entering a drug-exclusion zone after arrest for or conviction of a drug-related offense violated defendant's due process right of intrastate travel]; *City of New York v. Andrews* (N.Y.S.Ct. 2000) 186 Misc.2d 533 [proposed injunction that essentially banished certain prostitutes and suspected pimps from appearing in neighborhood between hours of 11:00 p.m. and 7:00 a.m. intruded upon defendants' constitutional freedoms to travel, even accepting that open prostitution in neighborhood rose to level of public nuisance] [trial court decision]; see also R. Scharff, "An Analysis of Municipal Drug and Prostitution Exclusion Zones," 15 Geo. Mason Civ. Rights L.J. 321, 322 (2005) ["drug and prostitution exclusion zones are not only counterproductive and unnecessary, but are also an affront to the United States Constitution"].)[9]

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[9] The People contend that these cases are distinguishable because injunctions, unlike ordinances, can be tailored to the circumstances of the individual defendant, and therefore should be subject to a less demanding standard. However, the law is to the contrary. (See *Madsen v. Women's Health Center, Inc.* (1994) 512 U.S. 753, 764 [because "[i]njunctions also carry greater risks of censorship and discriminatory application than do general ordinances," assessment of their constitutionality requires "a somewhat more stringent application of general First Amendment principles"]; *People ex rel. Gallo*, 14 Cal.4th at 1140 [same].)

CONCLUSION

For the foregoing reasons, the Court concludes that the public nuisance laws and the Unfair Competition Law do not authorize issuance of the stay-away orders sought by the People. Further, even if such orders were authorized by statute, they would violate defendants' constitutional right to intrastate travel.[10] Accordingly, the People's motion for a preliminary injunction in each of these cases is denied.

IT IS SO ORDERED.

DATED: May 14, 2021

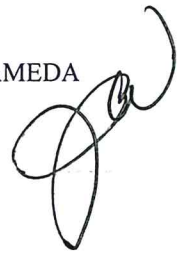
HON. ETHAN P. SCHULMAN
Judge of the Superior Court

[10] This conclusion renders it unnecessary for the Court to address the parties' and *amici*'s debate regarding whether the relief sought by the People would be effective in mitigating the evils it seeks to abate, or rather would be futile or counterproductive. That is primarily a question of social policy that is not within the Court's competence to determine. (See R. Scharff, *supra*, 15 Geo. Mason. Civ. Rights L.J. at 336-340 [arguing that exclusion zones are bad policy].)

CGC-20-586732 PEOPLE OF THE STATE OF CALIFORNIA VS. GUADALOUPE AGUILAR-BENEGAS and related cases CGC-20-586753 (Sanchez), CGC-20-586761 (Zelaya), and CGC-20-586763 (Padilla-Martel).

I, the undersigned, certify that I am an employee of the Superior Court of California, County Of San Francisco and not a party to the above-entitled cause and that on May 14, 2021 I served the foregoing **ORDER ON PLAINTIFF'S MOTIONS FOR PRELIMINARY INJUNCTION** on each counsel of record or party appearing in propria persona by causing a copy thereof to be served electronically by email sent to the email addresses indicated below:

Date: May 14, 2021 By: JACQUELINE ALAMEDA



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