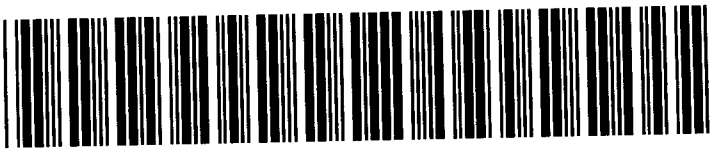

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

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ORDER

PEOPLE OF THE STATE OF CALIFORNIA EX REL DENNIS VS. ACCREDITING COMMISSION FOR COMMUNITY AND JUNIOR et al

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

AFT LOCAL 2121 ET AL., Plaintiffs, vs. ACCREDITING COMMISSION FOR COMMUNITY AND JUNIOR COLLEGES, ET AL., Defendants.	Case No. CGC – 13-534447
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 MEMORANDUM ORDER -GRANTING IN PART AND DENYING IN PART CITY ATTORNEY'S MOTION FOR A PRELIMINARY INJUNCTION, AND -DENYING AFT'S MOTION FOR A PRELIMINARY INJUNCTION, AND -DENYING COMMISSION'S ANTI-SLAPP, ABSTENTION, AND STAY MOTIONS

I. Introduction

In these two related cases plaintiffs seek to block the actions of a junior college accrediting Commission. That Commission, the Accrediting Commission for Community and

Junior Colleges, has voted to terminate the accreditation of the City College of San Francisco effective July 31, 2014. The College is not party to these two suits.

One of the cases is brought by the City Attorney of San Francisco, on behalf of the people of the State. The other is brought on behalf of a putative class or classes by teachers, students, and unions who assert they are and would be harmed by the loss of accreditation. I refer to the latter set of plaintiffs as AFT, after the first named plaintiff.

Both cases involve California's Unfair Competition Law (UCL), found at Business and Professions Code (B&P) § 17200. Under that statute, plaintiffs may sue a defendant who has committed an "unfair" or "unlawful" or "fraudulent" practice. In this case the plaintiffs contend that the defendant Commission has committed unfair and unlawful practices. I discuss the UCL in more detail below, at § II C 3 (a).

Appended at page 54 is a plain English summary of the issues decided in connection with the preliminary injunction motions.

A. Motions Decided

The two sets of plaintiffs have each filed a motion for preliminary injunction. The Commission has filed an anti-SLAPP special motion to strike against AFT, and filed a motion to stay or abstain against the City Attorney. Here I grant in part and deny in part the City Attorney's motion for a preliminary injunction. I deny AFT's motion for a preliminary injunction, as well as the Commission's anti-SLAPP, abstention, and stay motions.

B. Motions For Leave to File Briefs by Amicus Curiae

Tom Torlakson, The State Superintendent of Public Instruction filed a "request" for leave to file his amicus curiae brief, which brief I take to be the December 9, 2013 letter addressed to

me appended to that request. This was copied to the parties before their briefing was complete. The request is granted.

SEIU Local 1021 filed a motion for leave to file brief of amicus curiae on or about December 20, 2013. I first saw it about a day before argument, and at argument counsel for the Commission had not yet seen it, much less had a chance to respond to it in writing. It would be unfair to grant leave here where the parties have not had the opportunity to address the brief, and the request is denied.

C. Procedural Background

On December 26 2013 I heard argument on motions for preliminary injunction brought by both the City Attorney and AFT. I also heard argument on the Commission's anti-SLAPP motion brought in the AFT case. On December 30 I heard argument on the Commission's motion to stay or abstain in the City Attorney's case.

D. Factual Background

The Commission includes 19 elected commissioners, supported by staff that does not participate in Commission decisions. Declaration of Barbara Beno in Support of Motion to Abstain, ¶ 3. The Commission accredits 133 institutions, including 112 in California. *Id.* at ¶¶ 2, 4. The Commission is currently recognized as an approved accreditor by the United States Department of Education (DOE), although it must periodically petition DOE for continued recognition. *Id.* at ¶¶ 7-8. Through this process DOE monitors and regulates the Commission.

Id. at ¶ 6. State funding to community colleges and federal funding to community college students both depend on the Commission accreditation. *Id.*[1]

The Commission maintains a set of standards and policies. *See id.* at ¶¶ 10-11, Exs. B-C. All Commission accredited institutions, including the College, go through reviews every 6 years. *Id.* at ¶ 12. That process includes these steps: (1) the institution completes a self-study assessing whether it meets each accreditation standard; (2) the Commission sends a team to examine the self-study and visit the institution, assessing whether it meets the accreditation standards; (3) the visiting team drafts a report containing findings as to whether the institution meets each standard and explaining any deficiencies; (4) the draft is provided to the institution so that it may correct factual inaccuracies; (5) a final report is prepared and sent to the Commission; (6) the Commission decides whether accreditation will continue, and whether any condition are imposed; and (7) the Commission's decision is communicated to the institution in an action letter. *Id.* at ¶¶ 12-13. Short of termination, the Commission may take any of three adverse actions (termed "sanctions") if it concludes that an institution has not met one or more standards. *Id.* at ¶ 13, Ex. G at 4-5. In order of severity, the possible sanctions are: (1) warning; (2) probation; and (3) show cause. *Id.* at Ex. G at 4-5. A show cause order may issue when the Commission finds substantial non-compliance with its eligibility requirements, or when the institution has not responded to the conditions imposed by the Commission within the specified time. *Id.* at Ex. G at 4. If the Commission orders show cause, the institution is required to show why its accreditation should not be withdrawn at the end of a stated period

[1] According to Beno, federal funding depends on accreditation by a DOE-approved accreditation agency and California funding is tied to approval by the Commission. Although AFT objects to Beno's recitation of this fact, it is undisputed that state and federal funding are tied to accreditation by the Commission.

by demonstrating that it has corrected the deficiencies noted by the Commission and come into compliance with the eligibility requirements. *Id.* at Ex. G at 4-5. The accredited status of the institution continues during the period of the show cause order. *Id.* at Ex. G at 5.

If the Commission terminates accreditation, the institution may invoke a two-step review process. *Id.* at ¶ 17, Exs. H-I. First, the institution requests review, identifying one or more of four bases for the request, a review committee is created, the review committee makes confidential findings that are sent to the Commission, and the Commission renders its decision. *Id.* at Ex. H at 1-4. Next, the institution may appeal the review decision to a "hearing panel." *Id.* at Ex. I at 3, 5-6.

An institution may then bring a civil action against a recognized accrediting agency involving the termination of accreditation, which must be brought in federal court. 20 U.S.C. § 1099b (f).

1. Factual Background for City Attorney's case

The City Attorney's papers focus their attention on a political dispute among those involved in community college governance. The Board of Governors of the California Community Colleges adopted recommendations of a Student Success Task Force (SSTF) in January 2012, after a meeting at which 22 students (13 from the College) and 22 faculty (10 from the College) testified, some against the recommendations. SB 1456 was then introduced in the California Senate to implement parts of the SSTF recommendations. Some College students and faculty were critical of SB 1456. The Commission strongly supported it and the SSTF recommendations. Barbara Beno, the Commission's President, wrote two letters expressing the Commission's strong support for SB 1456.

The City Attorney paints the accreditation saga of the College against the backdrop of that political dispute. The Commission's 17-member 2012 site evaluation team the Commission sent to the College included (a) 3 individuals from colleges that were represented on the SSTF; (b) 7 individuals from community college districts that supported SSTF recommendations and/or SB 1456; and (c) Beno's husband, Peter Crabtree. Only one member was listed as a professor. In a July 2, 2012 letter written by Beno, the Commission notified the College that it was required to 'show cause' why its accreditation should not be withdrawn at the Commission's next meeting in June 2013. The College was required to submit a show cause report by March 15, 2013, to be followed by a site visit.

The College submitted the show cause report by the deadline. The 9-member show cause visiting team included 5 members from the original site visit team, all of which were affiliated with community college districts that supported SSTF recommendations. Two of the new members were also affiliated with districts that supported SSTF recommendations. Again, only one professor was on the team. In June 2013, after reviewing the visiting team's report, the Commission voted in a closed session to terminate the College's accreditation, effective July 31, 2014. None of the deficiencies that formed the basis for the Commission's decision to terminate the College's accreditation focused directly on the College's quality of education.[2] However, the cited areas of non-compliance at least indirectly addressed the quality of education, and no party has demonstrated that the cited defalcations were insufficient bases for the sanctions.

[2] *See* Declaration of S. Ichino In Support Of City Attorney Motion, Ex. O at 2 (listing areas of significant noncompliance as institutional effectiveness, instructional programs, student support services, library and learning support services, physical resources, technology resources, financial resources, decision-making roles and processes, and board and administrative organization, as well as other policies).

The College's current special trustee and interim chancellor agree with the contents of the evaluation reports and the interim chancellor agrees with the College's present show cause accreditation status on the merits. Further, the Fiscal Management Crisis & Management Assistance (FCMAT) team published reports in September 2012 and July 2013.[3] The latter report documented a host of recommendations, and difficulty in bringing the College to adopt past recommendations.

2. **Factual Background for AFT's case**

AFT traces the core facts underlying this dispute to 2006, the last time the Commission reviewed the College's accreditation prior to 2012. In 2006, the Commission renewed the College's accreditation, finding that it substantially met or exceeded accreditation standards. *See* AFT Request for Judicial Notice in Support of AFT Motion (RJN), Exs. 1-4[4] at 4-6 (finding that the College met eligibility requirements and complies with the standards for accreditation, noting that the College made considerable progress in addressing past recommendations), 1-5[5]. However, the Commission required the College to respond to 8 recommendations. RJN, Ex. 1-4 at 5-6. In particular, the Commission identified concerns that should receive the College's focused attention and emphasis. *Id.* at 5. These recommendations concerned planning and assessment, student learning outcomes, and financial planning and stability. *Id.*; *see also* RJN Ex. 1-5. In the action letter, the Commission required the College submit a progress report in 2007 addressing its financial planning and stability. RJN, Ex. 1-5. The Commission also stated

[3] AFT's objection to Beno's declaration pertaining to the existence of these reports are overruled. The reports are relevant and are within her personal knowledge due to her position at the Commission.

[4] This is the 2006 evaluation team report. Its existence and findings are judicially noticed pursuant to Evidence Code § 452(h).

[5] This is the 2006 action letter, announcing the Commission's action. The Commission also cites to this document, referencing the RJN. Its existence and contents are judicially noticed. Evidence Code § 452(h).

that the College's regular midterm report, scheduled for 2009, should address all eight recommendations, focusing on the three identified above. RJN, Ex. 1-5.

The College submitted the required report in 2007, and the Commission reminded the College that it was required to submit a midterm report in 2009. RJN, Exs. 1-6, 1-7.[6] The Commission stated that the 2009 midterm report should place special emphasis on the Commission's recommendations concerning financial planning and stability. RJN, Ex. 1-7.

The College submitted its midterm report in 2009. RJN, Ex. 1-8.[7] The Commission then again required the College to submit a follow-up report in 2010, this time addressing both student learning outcomes and financial stability. RJN, Ex. 1-9.[8] The College submitted the required progress report. RJN, Ex. 1-10.[9] The Commission accepted the report, but opined that the College was in danger of failing to comply with the accreditation standards governing financial resources as a result of its short- and long-term financial outlook. RJN, Ex. 1-11.[10] Specifically, the Commission questioned the College's ability to keep up with unfunded liabilities resulting from post-employment benefits, again required a report, this time in conjunction with the 2012 accreditation review, and instructed the College to provide information on how it would make a minimum annual required contribution payment into an irrevocable trust to address these liabilities. *Id.*

The 2012 evaluation team issued fourteen recommendations, two of which were to improve effectiveness, ten of which were to "fully meet" a given standard, and two of which

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[6] These are the progress report and letter accepting the progress report. The existence and contents of both documents are judicially noticed.
[7] The unopposed request for judicial notice of the midterm report is granted.
[8] The unopposed request for judicial notice of the Commission letter is granted.
[9] The unopposed request for judicial notice of the 2010 progress report is granted.
[10] The unopposed request for judicial notice of the 2010 letter is granted.

were to "meet" a given standard. RJN, Ex. 1-13 at 5-8.[11] The two falling into the final category pertained to financial planning and stability and financial integrity and reporting. *Id.* at 7. Thereafter, the Commission ordered show cause. RJN, Ex. 1-14.[12] The letter stated that the College was in substantial noncompliance with eligibility requirements, accreditation standards, or policies. *Id.* at 1. The letter restated all fourteen recommendations, and criticized the College for failing to address several of the recommendations issued in 2006. *Id.* at 2, 4-7. The letter emphasized concerns that the College failed to plan for reduced funding, pushing it to a financial breaking point. *Id.* at 2. The show cause letter gave the College just under a year to show compliance; indeed the College's show cause report was due in about nine months along with a closure report, and the site evaluation was conducted about ten months after the order to show cause. *Id.* at 1.

The show cause evaluation report indicates that the College did not meet numerous standards and eligibility requirements and failed to address several recommendations in the 2012 evaluation team report.[13] Declaration of William K. Rentz in Support of AFT Motion, Ex. B.[14] Thereafter, the Commission acted to terminate the College's accreditation in a non-final decision, effective July 31, 2014, for substantial noncompliance. *Id.* at Ex. C. In its letter, the Commission found more violations than were found in the evaluation report. *Id.* at Ex. C at 2-3. The report also emphasized that disagreements in the College's governing system and active

[11] The unopposed request for judicial notice of the 2012 evaluation report is granted.
[12] The unopposed request for judicial notice of the 2012 show cause letter is granted.
[13] The College failed to meet the following standards: I.B.4, II.A.2, II.A.3, II.B.1, II.B.3, II.C.1, III.A.2, III.A.6, III.B.2, III.D.1.a-c, III.D.2, III.D.2a-c, e, III.D.3, III.D.3a, c, f, h, III.D.4, IV.A.2, IV.A.3, IV.A.4, IV.A.5, IV.B.1, IV.B.2. Rentz Declaration, Ex. B at 17, 22, 24, 29, 31, 35, 38, 42-43, 48-55, 57-59, 61-62. The College met the remaining standards. The College failed to meet the following eligibility requirements: 5, 17, 18, and 21. *Id.* at 63. These concerned administrative capacity, financial resources, financial accountability, and integrity in relations with the Commission. *Id.* The College met the remaining 17 eligibility requirements. *Id.* As to the 14 recommendations, the Commission found that the College had partially addressed 10 and addressed 4. *Id.* at 66-77.
[14] The contents of the declaration include attorney argument, but there is no objection and so I consider it.

protests indicated that the College would be unable to bring itself into compliance, particularly with its financial management deficiencies. *Id.* at Ex. C at 3-5.

Current College leadership has publicly stated that the Commission had a proper basis to take both of the above adverse actions. In addition, the 2013 state Fiscal Crisis Management report identified deficit spending and insufficient funds, among many "critical issues observed throughout the funding and administrative services unit."[15]

Like the City Attorney, AFT complains of Beno's role with the Commission, the Commission's political involvement in the SSTF, and Crabtree's membership on the 2012 evaluation team, as well as the composition of the evaluation teams. In addition, AFT submits evidence that the Commission requires board members governing community college to speak with one voice. [16] AFT also argues that the Commission's evaluation teams are biased because they include parties interested in JPA trusts, into which institutions like the College are encouraged by the Commission to deposit funds to prefund retiree benefit.[17]

As to harm, AFT submits a plethora of declarations from College faculty, students, and union officers.

E. Current Status: A Summary

In June 2012, the Commission issued a "show cause" letter requiring the College to show cause why its accreditation should not be withdrawn. The College was required to make this showing by June 2013. In June 2013, the Commission acted to terminate the College's accreditation effective July 31, 2014. That decision is not final. The College has requested that

[15] Declaration of Krista A. Johns in Support of Opposition to the City Attorney Motion, Ex. F at 3.
[16] Declaration of Rafael Mandelman in Support of AFT Motion, ¶ 16.
[17] AFT Motion, 21-24.

the Commission review its decision. If the Commission's decision stands, the College's accreditation status will remain "show cause" until it is terminated. After the decision becomes final and after an administrative appeal, the College will have an opportunity to challenge that decision in federal court.

The plaintiffs in the two cases before me are not entitled to participate in any of these future events.

II. DISCUSSION

A. Abstention

The Commission raises abstention both as a defense to the preliminary injunction motions and as a separate motion in the City Attorney case.

"[B]ecause the remedies available under the UCL, namely injunctions and restitution, are equitable in nature, courts have the discretion to abstain from employing them."[18] This case, *Desert Healthcare,* traced the abstention doctrine in UCL cases to decisions involving the intersection of federal and state law.[19] It noted that in *Diaz*[20] "Plaintiffs [sought] the aid of equity because the national government [had] breached the commitment implied by national immigration policy. It is more orderly, more effectual, less burdensome to the affected

[18] *Desert Healthcare Dist. v. PacifiCare FHP, Inc.*, 94 Cal.App.4th 781, 795 (2001).

[19] *Id.* at 794.

[20] *Diaz v. Kay-Dix Ranch*, 9 Cal.App.3d 588, 599 (1970). This case was decided under former C.C. § 3369. *Diaz* was an extreme case, in which the injunction sought would "have the cumulative effect of a statutory regulation, administered by the superior court through the medium of contempt hearings. The injunctive relief sought ... would subject farm operators to burdensome, if bearable, regulation, and the courts to burdensome, if bearable, enforcement responsibilities." *Diaz*, 9 Cal.App.3d at 599.

interests, that the national government redeem its commitment. Thus the court of equity withholds its aid."[21]

> The Court of Appeal recently described the scope of the abstention doctrine:
> As a general matter, a trial court may abstain from adjudicating a suit that seeks equitable remedies if 'granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency.' .... A court also may abstain when 'the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency.' .... In addition, judicial abstention may be appropriate in cases where 'granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress.'[22]

Importantly, the Court noted that abstention is generally appropriate only if there is an alternative means for resolving the issues raised in the complaint.[23]

Abstention is not proper when a court is called on to perform a basic judicial function, such as statutory interpretation, and the bases for abstention are not implicated.[24]

The City Attorney's complaint does not involve determining complex economic policy, and the Court can remedy the wrong asserted in this case – the Commission's decision to order show cause and terminate the College's accreditation based on improper procedures – through an injunction that is not burdensome to monitor and enforce. For example, I could issue a final order requiring the Commission to start the review process anew.[25]

I understand the Commission's concerns that, depending on the liabilities found, the court's order might address a variety of details the subject (at least to some extent) of highly

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[21] 94 Cal.App.4th at 795.
[22] *Klein v. Chevron, U.S.A., Inc.*, 202 Cal.App.4th 1342, 1362 (2012), quoting *Arce v. Kaiser Foundation Health Plan, Inc.*, 181 Cal.App.4th 471, 496 (2010).
[23] 202 Cal.App.4th at 1369.
[24] *See Arce*, 181 Cal.App.4th at 499-502.
[25] Compare *Klein*, 202 Cal.App.4th at 1372 (trial court abused its discretion in abstaining where one form of potential injunctive relief may entail significant burdens that the court would be ill-equipped to manage, but that potential relief was neither the only relief plaintiffs requested nor the only possible remedy in that case).

complex federal regulations and DOE oversight,[26] but this sort of argument is best used to urge the court prudentially to circumscribe whatever relief it might afford, not to wholly eviscerate the plaintiff's ability to seek any sort of relief at all.

The Commission's professed fear that this court would be casting itself in the place of the DOE regulator, taking over the administrative details of regulation without the expertise to do so, confuses (a) forward-looking enforcement of the federal regulations and policies to determine the conditions of the Commission's work, which certainly does require the attention of regulatory experts, with (b) the evaluation whether in the past the Commission has or has not complied with the putative standards. This latter effort may require review of a complex regulatory scheme (something courts must do from time to time) but which has a single and simple result, a finding that the Commission has or has not violated extant standards. This can be done without future engagement in the quotidian business of regulation.

There is no alternative forum in which to remedy the wrongs set forth in the complaint. Perhaps the Commission's allegedly tainted procedures[27] can be reviewed by a federal judge if the College challenges the Commission's decision.[28] But that will not provide the relief the City Attorney now seeks. If the City Attorney is right on the merits (and for purposes of this motion

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[26] For example, at the December 30 hearing, the Commission referred me to *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 33 (1st Cir. 1998) which described a "sophisticated regulatory web that governs the relationship between accrediting agencies and accreditation applicants."

[27] The City Attorney focuses solely on the procedures used to reach the decision, but does not attack the merits of the decision itself. *See* City Attorney Reply, 3. Indeed, the City Attorney concedes that the court may be ill-suited to second-guess the merits of the accreditation decision. *Id.*

[28] In such cases, federal courts, including at least two district courts in California, have applied the doctrines of common law due process or fair procedure to review the accrediting agency's decision. *See W. State Univ. of S. Cal. v. American Bar Ass'n*, 301 F.Supp. 2d 1129, 1135-38 (C.D.Cal. 2004) (granting preliminary injunction on common law due process theory); *Whittier College v. American Bar Ass'n*, 2007 WL 1624100, at *7-*10 (C.D. Cal. May 7, 2007) (denying preliminary injunction on common law fair procedure claim). Aside from issues concerning the College, the record here does not indicate the Commission is more generally failing to fulfill its function. *See* Johns Declaration, Ex. B.

I assume he is), if he has properly stated a cause of action (and the Commission does not suggest otherwise at this stage), then the interests he represents cannot be accommodated by a federal review after final dis-accreditation; by then the College may be at best a shell of its former self, bereft of much of the faculty and students, and they will have already suffered the harm this state action seeks to prevent.

A more difficult question is posed by one of the City Attorney's alternative requests for relief, which is in effect to stop the Commission from all its work unless and until it comes into compliance with a variety of policies and governing rule and regulations. This may involve the court's interference with the regulatory framework governing accreditation. 20 U.S.C. § 1099b provides for the DOE's recognition of accrediting agencies. Under 20 U.S.C. § 1099b(a)(6) an accreditation agency must, to be recognized by the DOE, apply specified review procedures throughout the accrediting process and, before an adverse action becomes final, must provide the institution an appeal hearing at the institution's request. An institution may challenge the termination of accreditation by way of a civil action brought in the appropriate United States district court.[29] The City Attorney's request that this court stop the Commission from continuing to accredit *any* schools in the state[30] until it fixes the alleged problems with its process—problems which are generally a matter between the DOE and the various accrediting

[29] 20 U.S.C. § 1099b(f). The Ninth Circuit has held that this statutory scheme does not preempt state tort claims by students against school accrediting associations. *See Keams v. Tempe Technical Institute, Inc.*, 39 F.3d 222, 224 (9th Cir. 1994). But *Keams* did not involve a challenge to termination of accreditation, but a suit for damages allegedly suffered as a result of wrongful accreditation and failure to monitor. The Court noted that it is plausible that private litigation may assist the DOE in policing accreditors by stimulating examination of particular agencies. *Id.* at 227. But the matter in this case has not been briefed as a preemption issue. In remanding this case, the District Court held that § 1099b(f) does not completely preempt state law claims. *People ex rel. Herrera v. Accrediting Commission for Community and Junior Colleges*, 2013 WL 5945789, at *5 (N.D. Cal. Nov. 4, 2013). The Court ruled that in the absence of complete preemption, federal preemption is a defense and does not authorize removal to federal court. *Id.*

[30] Opposition, 12-13 (City Attorney seeks "concrete statewide relief").

commissions it regulates—threatens to embroil this state court in the detailed interpretation and application of federal rules and regulations.[31]

Although the City Attorney may seek overbroad forms of injunctive relief, this case does not *necessarily* require the court to do anything more than determine whether the Commission acted unfairly or unlawfully in ordering show cause and terminating the College's accreditation. That does not require the court to make complex policy judgments. The issue is not measured, as the Commission argued before me, by the *maximum* extent of the relief sought by the complaint—some of which might well implicate complex policy matters beyond the ken of this court—but rather by whether *any* relief necessarily implicates such policy matters.[32]

B. **Request for Stay**

The Commission requests a stay on these bases: (1) the dispute is not yet ripe because the Commission's determination is not yet final; (2) the College has not yet exhausted its administrative remedies; and (3) as to the request to enjoin the Commission to comply with federal guidelines, the matter is currently being reviewed by the DOE.

The ripeness doctrine is based on the recognition that judicial decisions are best made in the context of established facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.

> The controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests.... It must be a real and substantial controversy admitting

[31] However, there is no indication that the remedies afforded by 20 U.S.C. § 1099b are exclusive. *See* 20 U.S.C. § 1099b; *see also People ex rel. Hererra v. Accrediting Commission for Community and Junior Colleges*, 2013 WL 5945789, at *5 (N.D. Cal. Nov. 4, 2013) (if Congress intended § 1099b(f) to apply to any lawsuit involving adverse accreditation decisions, it would have said so).

[32] *Klein v. Chevron U.S.A., Inc.*, 202 Cal.App.4th 1342, 1368 (2012).

of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law upon a hypothetical set of facts.[33]

Here, the Commission made an adverse show cause decision and a termination decision. Although the termination decision is not final, plaintiffs challenge both decisions on procedural grounds. The facts underlying those decisions are extant. The harm caused by the challenged Commission's actions is assertedly being felt now.[34] Whether or not the dispute may to some extent be mooted by a future decision by the Commission, it is ripe for resolution on the present facts. For this reason this case is distinguishable from those in which plaintiffs claim failure to accredit as the injury – but where the failure is not yet manifest.[35] Certainly the Commission believes that only a bad *result*, or processes which can be shown to lead to a bad result, can properly be the subject of this suit; but that is a matter for the merits, and I discuss it in the context of the motions for preliminary injunction.

Second, there is no administrative remedy available to plaintiffs, so they cannot be subject an exhaustion requirement. Whether or not the College must exhaust its administrative remedy before it brings suit is irrelevant; this is not for example an action for mandamus predicated on actions by an administrative agency; it is a B&P § 17200 claim, with original jurisdiction in this court.[36]

Finally, I note the DOE is currently in the midst of its review of the Commission's own status. In the future, the DOE may require the Commission to change its procedures; or not.

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[33] *Santa Teresa Citizen Action Group v. City of San Jose*, 114 Cal.App.4th 689, 708 (2003), quoting *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal.3d 158, 170-71 (1982) (internal quotations omitted).

[34] *Western*, 301 F.Supp.2d at 1137-38 (because harm if accreditation is withdrawn is substantial, Western need not wait for the axe to fall before seeking an injunction).

[35] *Staver v. Am. Bar Ass'n,* 169 F. Supp. 2d 1372, 1377 (M.D. Fla. 2001) (argued by the Commission at the December 30 hearing).

[36] *Compare, Farmers Ins. Exch. v. Superior Court,* 2 Cal. 4th 377, 390 (1992).

The present complaints do not presume such future action, one way or the other. The pendency of this DOE review may well weigh heavily as a matter of prudence (or perhaps, more strongly, under doctrines of e.g., primary jurisdiction) in my evaluation of remedies, but should not be used now to obliterate every possible remedy.

C. Motions for Preliminary Injunction

1. Standards

A preliminary injunction is an order sought by a plaintiff prior to a full adjudication of the merits of its claim.[37] The purpose of such an order is to preserve the status quo until a final determination following a trial.[38]

A plaintiff is ordinarily required to present evidence of irreparable injury or interim harm that it will suffer if an injunction is not issued pending an adjudication on the merits.[39] In deciding whether to issue a preliminary injunction, a court must usually weigh two factors: (1) the likelihood that the moving party will ultimately prevail on the merits; and (2) the relative interim harm to the parties from issuance or non-issuance of the injunction.[40] The trial court's determination must be guided by the mix of the potential merit and interim-harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. *Id.* For example, if there is an extreme disproportionality of harms favoring a plaintiff, the strength of the case on the merits may be correspondingly less. But in any event, a

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[37] *White v. Davis*, 30 Cal.4th 528, 554 (2003).
[38] *Costa Mesa City Employees' Ass'n v. City of Costa Mesa*, 209 Cal.App.4th 298, 305 (2012).
[39] *White*, 30 Cal.4th at 554.
[40] *O'Connell v. Superior Court*, 141 Cal.App.4th 1452, 1463 (2006), quoting *Butt v. State of California*, 4 Cal.4th 668, 677-78 (1992).

trial court must not grant a preliminary injunction, regardless of the balance of interim harm, unless there is *some possibility that the plaintiff will ultimately prevail* on the merits.[41]

In this case, that rule countenancing an injunction when there is 'some possibility' of ultimate success is decisive.

When a governmental entity (1) tries to enjoin the violation of an ordinance, and (2) establishes that it is reasonably probable to succeed on the merits, a rebuttable presumption arises that the harm to the public outweighs the harm to the defendant. The presumption kicks in when the statute as here specifically provides for injunctive relief.[42] As discussed below, this presumption is not important here because the balance of harms tips sharply in favor of an injunction in any event.

2. Relief Requested

The City Attorney asks me to stop the Commission from (1) finalizing the termination of the College's accreditation before the end of trial in this action; and (2) taking adverse accreditation action against *any* institution unless the Commission changes its policies to comply with federal regulations. AFT asks me to issue an order that (1) as with the order requested by the City Attorney, bars the Commission from finalizing the termination of the College's accreditation before the trial in this action, and (2) requires the Commission to place the College back on accredited status, i.e., rescinding the Commission's show cause and termination actions.

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[41] CALIFORNIA PRACTICE GUIDE: CIVIL PROCEDURE BEFORE TRIAL § 9:531 (2012), citing *Butt.*

[42] *IT Corp. v. County of Imperial*, 35 Cal.3d 63, 72 (1983). See *People ex rel. Brown v. Black Hawk Tobacco, Inc.*, 197 Cal.App.4th 1561, 1565, 1567 (2011)(for UCL claims, court applies the presumption under *IT Corp*).

3. **Likelihood of Success on the Merits**

(a) Requirements under the UCL

Both lawsuits rely on a common legal theory: the Commission committed unfair and unlawful business practices in violation of California's unfair competition law (UCL) in its conduct leading to its decision to terminate the College's accreditation.

The UCL extends to "unfair competition," defined to include "any unlawful, unfair or fraudulent business act or practice."[43] "Its coverage is sweeping, embracing anything that can properly be called a business practice that at the same time is forbidden by law."[44] A practice may violate the UCL even if it is not prohibited by another statute. Unfair and fraudulent practices are alternate grounds for relief.

As our Supreme Court recently noted, "[t]he standard for determining what business acts or practices are 'unfair' in consumer actions under the UCL is currently unsettled." *Zhang v. Superior Court,* 57 Cal.4th 364, 380 n.9 (2013), citing *Aleksick v. 7-Eleven, Inc.*, 205 Cal.App.4th 1176, 1192 (2012) (public policy that is predicate for action must be tethered to specific constitutional, statutory, or regulatory provisions); *Ticconi v. Blue Shield of California Life & Health Ins. Co.*, 160 Cal.App.4th 528, 539 (2008) (courts balance utility of defendant's conduct against the gravity of the harm to the alleged victim and consider whether the practice offends established public policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers);[45] *Camacho v. Automobile Club of Southern California*, 142 Cal.App.4th 1394, 1403 (2006) (consumer injury must be substantial, and neither outweighed

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[43] *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal.4th 163, 180 (1999); B&P § 17200.
[44] *Cel-Tech*, 20 Cal.4th at 180 (internal quotations and citations omitted).
[45] *Ticconi* cites *Smith v. State Farm Mutual Automobile Ins. Co.*, 93 Cal.App.4th 700, 718-19 (2001). The City Attorney argues that I should apply the *Smith* test. I discuss this test further below, § II C 3 (e) (ii).

by countervailing benefits nor avoidable by consumers); *Progressive West Ins. Co. v. Superior Court*, 135 Cal.App.4th 263, 285-87 (2005) (impact of the act or practice on victim is balanced against reasons, justifications and motives of the alleged wrongdoer).

Zhang did not resolve this multiplicity of legal tests.

The UCL grants standing to (a) the City Attorney here as well as to (b) those who suffered injury in fact and lost money or property as a result of the unfair competition.[46]

(b) City Attorney's case

The City Attorney alleges nine business acts or practices. Four are assertedly both unfair and unlawful: (1) failing to include sufficient academic personnel on evaluation teams; (2) failing to have clear and efficient controls against conflicts of interest and the appearance of conflicts of interest; (3) failing to provide institutions with a detailed written report that clearly identifies any deficiencies in the institution's compliance with the agency's standards (specifically whether "recommendations" indicate noncompliance with an accreditation standard or an area for improvement); and (4) applying accreditation standards in a manner that subverted the open access mission set forth in California legislative declarations and embraced by the College.[47] The City Attorney asserts that the remaining five practices are only unfair: (1) including two individuals who created an actual or apparent conflict of interest on the College evaluation teams; (2) creating a conflict of interest by constituting evaluation teams comprised mainly of individuals from schools or districts politically aligned with the Commission; (3) evaluating the College while embroiled in a political fight over the proper mission for community colleges in California; (4) sanctioning the College because it opposed the

[46] B&P § 17204; *Kwikset Corp. v. Superior Court*, 51 Cal.4th 310, 322-27 (2011).
[47] Declaration of Sarah J. Eisenberg in Support of City Attorney's Motion, Ex. B.

Commission in a political dispute; and (5) employing the harshest sanction possible against the College and failing to provide the College adequate time to address the stated deficiencies.[48]

The Commission responds to the City's showing by relying on (1) the abstention doctrine; (2) the argument that the City Attorney's case turns on a superseded DOE letter; and (3) the argument that a third party cannot reverse an accreditation decision where the institution does not dispute the propriety of that decision. The Commission does not, at least in the context of this motion, contest the merits of the City's allegations.

I briefly discuss the Commission's defenses and then discuss the City Attorney's general theory of liability.

The abstention doctrine is discussed above.

The second argument is unpersuasive. The City Attorney has presented some evidence that the Commission failed to comply with federal regulations. The Commission has not produced authority that violations of those regulations cannot serve as predicate unfair or unlawful conduct under the UCL.[49] The City Attorney will probably be able to establish that the Commission engaged in the underlying conduct (which the City Attorney contends is unfair or unlawful).

I turn to the third defense. The City Attorney does not say that the Commission would not have reached the same accreditation decision if it had applied the proper procedures. He straightforwardly confesses that he has no idea if the Commission would or would not have come to the same determination. Instead, the City Attorney argues that the 'tainted'

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[48] *Id.*

[49] *Compare, Smith v. State Farm Mut. Auto. Ins. Co.*, 93 Cal.App.4th 700, 717-18 (2001)("An 'unlawful' business activity includes *anything* that can properly be called a business practice and that at the same time is forbidden by law. .... Virtually any law federal, state or local can serve as a predicate for an action under Business and Professions Code, section 17200.") (internal quotations omitted, emphasis in original).

procedures themselves are sufficient to justify an injunction reversing that decision.[50] The Commission, in contrast, contends that an injunction is not warranted unless I determine that, as a result of the alleged tainted procedures, it reached the wrong result.[51]

I examine these contentions of "taint."

The City Attorney begins by arguing there were insufficient *faculty* personnel on the Commission's site evaluation teams.[52] The City Attorney argues that any decision by an improperly constituted body, such as this one, is invalid.[53] In the case he cites, *Vuagniaux*, an improperly constituted medical disciplinary board *had no power to act* because it was not lawfully constituted, such that its decision was void.[54] But the City Attorney does not assert that the Commission site evaluation teams were likewise powerless to act because there were too few faculty representatives. The City Attorney relies on a federal regulation[55] which requires, as a criterion for DOE recognition of an accrediting agency, that an agency have academic and administrative personnel on its evaluation, policy, and decision making bodies. But the regulation does not purport to make an imbalance the basis for *voiding* a Commission decision, especially without any showing of prejudice. Nor does it literally specify the number of faculty personnel that must be assigned to an evaluation team.

Next, the City Attorney argues the Commission failed to maintain effective controls against conflicts of interest, or the appearance of such conflicts.[56] The City Attorney cites only one California case for the proposition that a decision must be actually *discarded* based on the

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[50] Reply in Support of City Attorney Motion, 3, 10.
[51] Opposition to City Attorney Motion, 10-11.
[52] City Attorney Motion, 10.
[53] *Id.*, citing *Vuagniaux v. Dep't of Prof. Reg.*, 208 Ill.2d 173, 185-86 (2003).
[54] *Vuagniaux*, 208 Ill.2d at 186.
[55] 34 C.F.R. § 602.15(a)(3).
[56] City Attorney Motion, 12, citing 34 C.F.R. § 602.15(a)(6).

appearance of impropriety absent any showing of prejudice.[57] But that case, *Christie,*[58] was decided under the statutory scheme governing the appearance of a conflict in a judge, and so is not helpful here. Where judges are concerned, we have clear law on voiding judgments when judges have conflicts of interest;[59] I see no evidence of such rules in the context of accrediting commissions, and so the reference to *Christie* is pointless, and begs the legal question.

What then is left of the City Attorney's position that he may succeed on the merits without a showing of prejudice, that is, without a showing that the assertedly illegal or unfair acts actually caused the Commission to reach the decisions it did which in turn inflicted the harm on the City Attorney's constituents? I raised the issue at argument, asking whether any violation, no matter how minor or immaterial, would be enough for the City Attorney to be entitled to the relief he seeks now and at trial. The answer was equivocal, but included the response that the violations and unfair acts here were serious, not trivial.

But this still is not good enough.

The issue is the extent to which the City Attorney must show a causal connection between the assertedly illegal or unfair acts on the one hand—including extremely serious such acts—and, on the other hand, the harms suffered. In this case we may phrase the issue: must the City Attorney show that the appearance of bias, or the reduced number of teachers on the evaluation panels, or the failure to issue the assertedly required written report (and so on), caused the issuance of the show cause letter? Or is the City Attorney correct that, whether or not the same result would have occurred with or without the assertedly unfair procedures (or

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[57] City Attorney Motion, 12-13.

[58] *Christie v. City of El Centro*, 135 Cal.App.4th 767, 776-77 (2006).

[59] E.g., C.C.P. §§ 170.3(a)(1); 170.1(a)(6)(A)(i), (iii); *Bates v. Rubio's Restaurants, Inc.*, 179 Cal.App.4th 1125, 1133 (2009).

"taint"), the show cause action must be set aside?[60] This issue of causation is central to the result on both motions for preliminary injunction, and I discuss it in further detail below at § II C 3 (d) & (e).

(c) AFT's case

AFT spends no time in its briefs discussing the elements of its UCL claim; it simply discusses a lengthy list of assertedly unfair and illegal practice engaged in by the Commission. These are the alleged practices: (1) the Commission violated common law fair procedure by taking adverse actions against the College without giving a clear indication that the College's failures were serious, irreparable, or had a noticeable effect on the College's quality of education; (2) the Commission failed to consider that the College's quality of education exceeds minimum standards; (3) the 2012 show cause order mischaracterized recommendations from the 2006 report as deficiencies; (4) the 2012 evaluation team included Crabtree, Beno's husband, at a time that Beno was politically opposing the College and after Beno wrote action letters in 2006, 2007, 2009, and 2010; (5) the Commission as a whole was conflicted due to the SSTF; (6) the 2012 evaluation team had only one teacher out of 17 evaluators; (7) the 2012 evaluation team included members of a JPA Trust, creating a conflict of interest; (8) the Commission applied the wrong burden of proof in 2012; (9) the Commission wrongly applied Government Accounting Standards Board (GASB) guidelines in considering the College's use of a pay-as-you-go approach to long term liabilities; (10) the College was not afforded an opportunity to appeal the 2012 show cause order; (11) the 2013 team was invalid because it

[60] To be clear, the City Attorney does not contest the merits of the Commission's decisions; no one knows, the City Attorney tells us, if the Commission's decisions are right or not. City Attorney's Reply at 1 line 6; at 3 note 2. At argument, AFT too noted that no one knows what the Commission would have done had it followed fair procedures and, for example, limited themselves to considering only the original 19 deficiencies identified in the show cause evaluation team report, as opposed to apparently considering a total of 30 deficiencies.

included members of the JPA trust; (12) the Commission gave the College insufficient time to show cause, in a break from its treatment of other institutions; (13) the Commission added deficiencies in its final report in 2013 without providing notice to the College; (14) the Commission improperly considered the failure of the College board to "speak as one;" and (15) the Commission ignored facts indicating the College had a balanced budget and financial reserves that met state standards.

While the general tenor of its papers suggests AFT's belief that the adverse accreditation decision resulted from the challenged practices, AFT does not demonstrate that. Instead, it argues (as does the City Attorney) that it need not show prejudice because the Commission's decision lacked procedural fairness, and because the decision was tainted by bias.[61]

The Commission, for its part, asserts the following defenses against AFT: (1) failure to join an indispensable party; (2) laches; (3) abstention (discussed above); (4) privilege; (5) ripeness (discussed above); and (6) lack of standing.

It is important to note the court is not now asked to rule on the ultimate merits of these defenses; the issue is simply whether these defense appear so strong at this point as to demonstrate that AFT is unlikely to prevail at trial. They do not. Because I conclude AFT is unlikely ultimately to prevail, quite aside from the impact of these defenses, I only discuss them briefly, and only if I have not addressed them elsewhere in this Memorandum Order. I then discuss the core theory of liability, common law fair procedure.

[61] AFT Motion at 8 (Commission procedures "infected"), 17 ("tainted").

(i) **Defenses To AFT's claims**

a. Failure to Join

It remains unclear whether it will be necessary to join the College; some of the relief sought (such as blocking the Commission's ability to finalize the accreditation termination) may not adversely affect the College.

b. Standing

There are three types of AFT plaintiffs: unions, College employees, and students. At least one of the unions and at least one of the College employees have a reasonable likelihood that they will be able to demonstrate economic damages resulting from the Commission's adverse accreditation decisions, although the evidence is murky.[62] And at least one student has probably demonstrated standing in showing that the uncertainty created by the College's accreditation status caused economic harm – for example incurring fees to apply to other schools.[63] *Kwikset*, 51 Cal.4th at 327 (plaintiff not required to allege that the challenged misrepresentations were the sole or even decisive cause of the injury producing conduct). The *causation* aspect of standing—whether the economic harm was *caused* by the unfair or illegal practices—is separately discussed below, § II C 3 (e).

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[62] Declaration of Chris Hanzo in Support of AFT Motion, ¶¶ 24-28 (faculty members have not had a salary increase since 2007-08, but have suffered a series of wage cuts beginning with cuts for the 2010-11 fiscal year); Declaration of Chris Hanzo in Support of Opposition to Anti-SLAPP Motion, ¶¶ 10, 16, 23 (College imposed unilateral wage cuts on AFT employees under pressure from the Commission, resulting in declining union dues); Declaration of Rachel Cohen in Support of Opposition to Anti-SLAPP Motion, ¶ 4 (teacher declares she lost pay as a result of unilateral the College pay cuts under pressure from the Commission adverse actions). Objections to these declarations are overruled because Hanzo and Cohen were in a position to have personal knowledge of the pay cuts, as a union officer and an affected individual, and the apparent bases for those pay cuts.

[63] Declaration of Shanell Williams in Support of Opposition to Anti-SLAPP Motion, ¶ 18 (incurred costs traveling to Skyline College to take a placement test); Declaration of Adriana Gutierrez in Support of Opposition to Anti-SLAPP Motion, ¶¶ 13-14, 22-23 (will lose scholarship if the College loses accreditation, will be forced to apply for college elsewhere an move). Objections to the declaration are overruled.

c. Privilege

The Commission tersely argues that AFT relies on privileged broadcasts made (1) "in any other official proceeding authorized by law;" or (2) communications, without malice, to a person interested therein, by one who is also interested or one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive of the communication to be innocent or who is requested by the person interested to give the information. C.C. § 47. The Commission does not tell us which communications are putatively within the scope of the privilege, and it does not mean, I think, that its *decisions* are immunized from challenge. The Commission just cites *Rubin*[64] for the proposition that the privilege applies in UCL cases. But that held only that a plaintiff could not plead around the litigation privilege by recasting a tort under the UCL. On the present record, this vaguely articulated defense does not undermine a showing AFT might make of a reasonable likelihood of success on the merits.

d. Laches

The Commission argues that AFT waited over a year after the 2012 show cause determination to ask for injunctive relief. I note this below,[65] and have determined not to modify the status quo as it pertains to that specific determination. Accordingly I need further discuss its impact on the merits.

(d) Common Law Fair Procedure

Plaintiffs invoke the College's common law fair procedure rights.

'Common law fair procedure' differs from 'common law due process' although they are close cousins. The latter applies to governmental entities. The former applies to *private*

[64] *Rubin v. Green*, 4 Cal.4th 1187, 1200-04 (1993).
[65] The laches argument is considered below, text at note 119.

institutions where judicial intervention is warranted by the public interest.[66] Common law fair procedure doctrine provides for deferential judicial review. It ensures that procedures allow the plaintiff an opportunity to be heard by an impartial decision-maker. The doctrine is not a vehicle for de novo review of an actor's decision, and it likely does not provide protections as broad as those under the due process equivalent.[67]

> Since the actions of a private institution are not necessarily those of the state, the controlling concept in such cases is fair procedure and not due process. Fair procedure rights apply when the organization involved is one affected with a public interest, such as a private hospital.... The distinction between fair procedure and due process rights appears to be one of origin and not of the extent of the protection afforded an individual; the essence of both rights is fairness. Adequate notice of charges and a reasonable opportunity to respond are basic to both sets of rights.[68]

Applebaum applied the fair procedure doctrine to a private hospital, concluding that the procedures used created a risk of bias that were too high to maintain the guarantee of fair procedure.[69]

It is on the basis of this somewhat nebulous doctrine that plaintiffs contend they will ultimately prevail at trial before this court. As the parties acknowledged at the hearing, the application of this doctrine in circumstances such as this has little precedent.

In California, the doctrine has been applied in medical privileges cases because judicial intervention in a private association's membership decisions is warranted where the considerations of policy and justice are sufficiently compelling.[70]

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[66] *See generally, Potvin v. Metro. Life Ins. Co.*, 22 Cal.4th 1060, 1070 (2000); *Palm Med. Grp., Inc. v. State Comp. Ins. Fund*, 161 Cal.App.4th 206, 215 (2008).

[67] Elizabeth L. Crooke, "Applicability of the Fair Procedure Doctrine" *L.A. Law* at 18, 19 (June 2009) (discussing *Pinsker* cases).

[68] *Applebaum v. Bd. Of Directors of Barton Mem'l Hosp.*, 104 Cal.App.3d 648, 657 (1980). *See also, Whittier College v. American Bar Ass'n*, 2007 WL 1624100, at *7 (C.D. Cal. May 7, 2007).

[69] *Applebaum*, 104 Cal.App.3d at 657-60. *See also Ezekial v. Winkley*, 20 Cal.3d 267, 278 (1977) (plaintiff stated a claim for wrongful denial of the common law right of fair procedure by alleging that dismissal from residency program at private hospital will effectively prevent his entry into medical specialty for which residency training was preparing him).

One important case, *El-Attar*, begins by noting two earlier *Pinsker* decisions, which held that a dentist had a judicially enforceable right to have his application for membership in a dental association considered in a manner comporting with the fundamentals of due process.[71] The Court stated the rule of those cases as follows: the common law fair procedure requirement

> may be satisfied by any one of a variety of procedures which afford a fair opportunity for an applicant to present his position. As such, this court should not attempt to fix a rigid procedure that must invariably be observed. Instead, the associations themselves should retain the initial and primary responsibility for devising a method which provides an applicant adequate notice of the 'charges' against him and a reasonable opportunity to respond.... Although the association retains discretion in formalizing such procedures, the courts remain available to afford relief in the event of an abuse of such discretion.[72]

Next, the *El-Attar* Court discussed Anton,[73] the first decision extending the doctrine to peer review decisions concerning staff privileges. From that decision, the Court concluded that judicial inquiry extends

> to the questions whether the respondent 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.[74]

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[70] *El-Attar v. Hollywood Presbyterian Medical Center*, 56 Cal.4th 976, 986 (2013); *see also Pinsker v. Pacific Coast Soc. of Orthodontists*, 12 Cal.3d 541, 550 (1974) (whenever a private association is legally required to refrain from arbitrary action, the association's action must be both substantively rational and procedurally fair).

[71] *El-Attar,* 56 Cal.4th at 987.

[72] *Id.*, noting that Pinsker was denied fair procedure because he was given no opportunity to respond to the charges against him – he was not notified of the reason the dental association rejected his application for membership.

[73] *Anton v. San Antonio Community Hospital*, 19 Cal.3d 802 (1977).

[74] *Id.* at 987-88. In 1989, the Legislature codified the common law fair procedure doctrine in the hospital peer review context. *Id.* at 988. The statute guarantees, among other things, a physician's right to notice and a hearing before a neutral arbitrator or an unbiased panel, the right to call and confront witnesses and to present evidence, and the right to a written decision by a trier of fact. *Id.* Significantly, the Legislature rejected *Anton's* rule that the courts were to make their review de novo using their independent judgment; instead, the deferential 'substantial evidence' standard is used. *See generally*, Craig W. Dallon, "Understanding Judicial Review of Hospitals' Physician Credentialing and Peer Review Decisions," 73 TEMP. L. REV. 597, 668-69 (2000).