

1 DENNIS J. HERRERA, State Bar #139669
City Attorney
2 PETER J. KEITH, State Bar #206482
Chief Attorney
3 Neighborhood and Resident Safety Division
SAMUEL C. RAY, State Bar #308921
4 Deputy City Attorney
Fox Plaza
5 1390 Market Street, Sixth Floor
San Francisco, California 94102-5408
6 Telephone: (415) 554-3868
Facsimile: (415) 437-4644
7 E-Mail: samuel.ray@sfcityatty.org

8 Attorneys for Plaintiffs
9 CITY AND COUNTY OF SAN FRANCISCO and
PEOPLE OF THE STATE OF CALIFORNIA

10
11 SUPERIOR COURT OF THE STATE OF CALIFORNIA
12 COUNTY OF SAN FRANCISCO
13 UNLIMITED JURISDICTION

14 CITY AND COUNTY OF SAN
FRANCISCO, a Municipal Corporation; and
15 the PEOPLE OF THE STATE OF
CALIFORNIA, by and through Dennis J.
16 Herrera, City Attorney for the City and County
of San Francisco,
17 Plaintiffs,
18 vs.
19 GREGORY GARVER and DOES ONE
20 through FIFTY,
21 Defendants.

Case No. CGC-17-560891
**PLAINTIFFS MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR DEFAULT JUDGMENT AND
PERMANENT INJUNCTION AGAINST
DEFENDANT GREGORY GARVER**
Hearing Date:
Hearing Judge:
Time: 9:00 AM
Place: Dept. 514
Date Action Filed: August 23, 2017
Trial Date: Not Yet Set

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SUMMARY OF CASE

This action arises out of Defendant Gregory Garver’s (“Defendant Garver”) unlawful and unfair business practices in his ownership and use of the property located at 1160 Mission Street, Unit 812, San Francisco, California (the “Property”), which is intended for low-income households as part of the San Francisco Mayor’s Office of Housing and Community Development’s Inclusionary Affordable Housing Program. This program requires developers to set aside a certain number of units to be sold to low or middle income households at below market rates. The purchasing households agree to abide by restrictions and conditions; including requirements that they be first-time homebuyers and that they live in the Property as a primary residence.

Since at least 2012, Defendant has failed to reside in the Property as a primary residence and instead has used the Property for rental income – leasing it to rent paying tenants. Defendant Garver rented out the Property from at least November 2012 until at least July 2016 and again from at least May 2017 through at least June 2017. Defendant Garver regularly solicits the Property for rent on Trulia.com, Hotpads.com, Craigslist.com, Facebook.com and other apartment listing websites. Defendant Garver has also listed the Property for sale at market rate.

On August 23, 2017, Plaintiffs the People of the State of California (the “People”) and the City and County of San Francisco (the “City”) (collectively “Plaintiffs”), filed a Complaint against Defendant Garver alleging causes of action for violations of the San Francisco Planning Code, violations of the Unfair Competition Law (“UCL”), codified as Business and Professions Code section 17200, et al., and for public nuisance. The Complaint and Summons were personally served on Defendant Garver in the vicinity of the Property on September 6, 2017.

On December 5, 2017, Default was entered against Defendant Garver when he failed to properly respond to the Complaint. Plaintiffs now request entry of Default Judgment against Defendant Garver for civil penalties, attorneys’ fees, and costs. Plaintiffs also request a Permanent Injunction, ordering Defendant Garver to comply with the restrictions of the Program or sell the Property in accordance with the requirements and procedures of the BMR Program. The injunctive relief should also authorize the appointment of a receiver, should Defendant Garver be unable or unwilling to comply with the terms of the injunction.

STATEMENT OF FACTS

1
2 Defendant Garver has owned the Property, located in San Francisco's South of Market District,
3 since December 2008. (Declaration of Cissy Yin ("Decl. Yin") ¶8, Exh. A; Request for Judicial
4 Notice ("RJN") ¶4, Exh. D.) The Property is a one-bedroom, one-bathroom condominium located in
5 the Soma Grand – a 246-unit condominium complex. (Declaration of Stefan Hafenegger ("Decl.
6 Hafenegger") ¶2.)

7 The Property is part of San Francisco's Inclusionary Affordable Housing Program (the
8 "Program"). (Decl. Yin ¶6.) The Program, administered by the San Francisco Mayor's Office of
9 Housing and Community Development ("MOHCD") and guided by San Francisco Planning Code
10 section 415 (formerly codified as section 315), aims to make housing more affordable for qualifying
11 low to middle income San Franciscans by requiring housing developers to set aside a certain
12 percentage of units to be rented or sold at a Below Market Rate ("BMR"), known as BMR units.
13 (Decl. Yin ¶3; RJN ¶10, Exh. J.) In order to purchase a BMR unit, qualifying purchasers must agree to
14 abide by the restrictions and conditions of the Program, including that: (1) they must reside in the
15 BMR unit as a primary residence; and (2) that they must refrain from renting out the BMR unit, in
16 whole or in part, without written consent of MOHCD. (Decl. Yin ¶3.) The restrictions and conditions
17 of the Program are memorialized in a Procedures Manual, with MOHCD periodically publishes
18 pursuant to its authority and mandate under the Planning Code. (Decl. Yin ¶4.) To date, MOHCD has
19 published three Procedures Manuals – in 1992 ("1992 Manual"), 2007 ("2007 Manual"), and 2013
20 ("2013 Manual"). (*Ibid.*) The Procedures Manual in effect at the time of the initial purchase of the
21 BMR unit governs the regulation of that unit until it is sold. (*Ibid.*)

22 The Property, along with twenty-eight other units in the Soma Grand, was designated as a
23 BMR unit by virtue of San Francisco Planning Commission Motion No. 16692. (Decl. Yin ¶7.) This
24 designation was recorded with the San Francisco Assessor-Recorder's Office ("Assessor-Recorder")
25 on August 21, 2006 as a "Notice of Special Restrictions Under the Planning Code" ("Notice of Special
26 Restrictions"). (Yin Decl. ¶7, Exh. A.)

27 Defendant Garver purchased the Property in 2008. (Decl. Yin ¶8, Exh. B; RJN ¶4, Exh. B.) As
28 required by MOHCD, to purchase a BMR unit, Defendant Garver agreed to abide by the restrictions

1 and conditions of the Program, subject to the provisions of the 2007 Manual. (Decl. Yin ¶¶9, 12-4,
2 Exh. C.) Defendant Garver signed a BMR Affidavit (“Affidavit”) affirming that he understood that the
3 Property was a BMR unit that was subject to the restrictions and conditions of the Program. (Decl. Yin
4 ¶12, Exh. D.) In the Affidavit, Defendant Garver further affirmed that he understood that he could not
5 rent the Property and that he must occupy the Property as a primary residence. (*Ibid.*) Defendant
6 Garver also signed an “Acknowledgment” – which was recorded with the Assessor-Recorder –
7 acknowledging that he had received a copy of the 2007 Manual and the Notice of Special Restrictions
8 and that he understood and would comply with the conditions and restrictions contained therein. (Decl.
9 Yin ¶13, Exh. E.) Further, Defendant Garver granted MOHCD a promissory note (“Promissory Note”)
10 secured by a deed of trust (“Deed of Trust”). (Decl. Yin ¶14, Exh. F, G.) In the Promissory Note,
11 Defendant Garver once again acknowledged that he had received the 2007 Manual and the Notice of
12 Special Restrictions. (*Ibid.*)

13 Despite understanding the restrictions and conditions of the Program, starting in at least
14 November 2012, Defendant Garver began renting out the Property to rent paying tenants. (Decl. Yin
15 ¶15; Declaration of Melissa Lall (“Decl. Lall”) ¶5; Decl. Hafenegger ¶4.) Tenant Stefan Hafenegger
16 (“Mr. Hafenegger”) located the Property listed for rent on Craigslist.com and when he inquired about
17 the listing, Defendant Garver responded. (Decl. Hafenegger ¶¶2-3; Decl. Lall ¶5.) Defendant Garver
18 showed Mr. Hafenegger the Property and provided Mr. Hafenegger with a lease agreement (“Lease”),
19 which both Defendant Garver and Mr. Hafenegger signed on October 25, 2012. (Decl. Hafenegger ¶3,
20 Exh. A.) The Lease was a 6-month lease that converted to a month-to-month lease after the initial six-
21 month period. (*Ibid.*) Mr. Hafenegger paid Defendant Garver \$3,000 as a security deposit and \$2,400
22 per month to rent the Property. (*Ibid.*) Mr. Hafenegger moved into the Property on approximately
23 November 1, 2012 and lived there until approximately July 31, 2016. (Decl. Hafenegger ¶4.) During
24 Mr. Hafenegger’s tenancy, he made a total of forty-six (46) rental payments to Defendant Garver.
25 (*Ibid.*) During Mr. Hafenegger’s tenancy, Defendant Garver never resided at the Property. (Decl.
26 Hafenegger ¶4; Decl. Lall ¶5.) Defendant Garver regularly received mail at the Property, which – per
27 Defendant Garver’s request – Mr. Hafenegger forwarded to an address in Palm Springs, California.

28

1 (*Ibid.*) Mr. Hafeneger terminated his tenancy at the Property and moved out at the end of July 2016,
2 due a rent increase. (Decl. Hafeneger ¶5; Decl. Lall ¶5.)

3 Beginning in December 2016, Defendant Garver made repeated attempted to rent out the
4 Property in online classifieds and social media sites such as Facebook.com, Craigslist.com,
5 Trulia.com, and Hotpads.com. (Decl. Lall ¶ 7, Exh. A; Decl. Yin ¶17, Exh. H.) Defendant Garver
6 listed the Property for rent on at least the following dates: April 12, 2017, April 18, 2017, June 2,
7 2017, June 14, 2017, and November 21, 2017. (*Ibid.*) Defendant Garver also listed the Property for
8 sale on July 19, 2017. (*Ibid.*) From May 2017 through June 2017, Defendant Garver again began
9 renting the Property for profit to rent paying tenants. (RJN Exh. A (“Complaint”) 6:25-27.)

10 PROCEDURAL HISTORY

11 Plaintiffs filed their Complaint against Defendant Garver on August 23, 2017. (RJN, Exh. A.)
12 On September 6, 2017, Defendant Garver was personally served with the Complaint, Summons, etc.
13 (RJN, Exh. B.) When Defendant Garver did not file a proper responsive pleading, Plaintiffs filed a
14 Request for Entry of Default, which was entered on December 5, 2017. (RJN, Exh. C.)

15 LEGAL ARGUMENT

16 I. THE COURT SHOULD ENTER DEFAULT JUDGMENT AGAINST DEFENDANT GARVER

17 A plaintiff may seek default judgment if: (1) a defendant fails to answer a complaint despite
18 being properly served; and (2) default has been entered against the defendant. (Code Civ. Proc.
19 §585(b).) At the hearing on a motion for entry of default judgment, plaintiff need only establish a
20 prima facie case in order for the court to grant default judgment. (*Johnson v. Stanhiser* (1999) 72
21 Cal.App.4th 357, 361.) The court “shall hear the evidence offered by the plaintiff, and shall render
22 judgment in plaintiff’s favor for that relief, not exceeding the amount stated in the complaint, . . . as
23 appears by the evidence to be just.” (Code Civ. Proc. §585(b).) The court “may permit the use of
24 affidavits, in lieu of personal testimony, as to all or any part of the evidence” heard at the default
25 judgment hearing. (Code Civ. Proc. §585(d).)

26 The party against whom default has been entered “confesses the material allegations of the
27 complaint . . .” for the purposes of the hearing. (*Johnson, supra*, 72 Cal.App.4th at 361.) Thus, the
28

1 court can and should accept all of the allegations of the Complaint as true. (*Bristol Convalescent Hosp.*
2 *v. Stone* (1968) 258 Cal.App.2d 848, 859 [defaulting defendant admits “the absolute verity of all the
3 allegations of the complaint giving rise to liability”]; *Los Angeles v. Los Angeles F.&M. Co.* (1907)
4 150 Cal. 647, 649 [defaulting defendant admits the absolute verity of all the allegations of the
5 complaint and no amount of evidence could establish the facts more effectually for the purposes of
6 rendering the judgment against such defendant].)

7 **A. Default Property Was Entered Against Defendant**

8 Plaintiffs’ personally served Defendant Garver on September 6, 2017. (RJN, Exh. B.)
9 Defendant Garver did not timely respond, and default was entered against him on December 5, 2017.
10 (RJN, Exh. C.)

11 **B. Plaintiffs Have Established a Prima Facie Case Against Defendant**

12 Plaintiffs have established each of the three causes of action alleged in the complaint: (1) for
13 violations of the San Francisco Planning Code; (2) for violations of the Unfair Competition Law; and
14 (3) for general and *per se* public nuisance.

15 The facts and evidence show that, since at least November 2012, Defendant Garver failed to
16 reside at the Property, and instead treated it as an income property, marketing it for rent and sale and
17 leasing it to rent paying tenants. Thus, Defendant Garver unequivocally violated the San Francisco
18 Planning Code, the Unfair Competition Law, and created a public nuisance. Plaintiffs are entitled to
19 entry of Default Judgment against Defendant Garver on all causes of action alleged in the Complaint.

20 **1. Defendant Garver Has Maintained the Property in Violation of the San**
21 **Francisco Planning Code, as Alleged in the First Cause of Action in the**
22 **Complaint**

22 Defendant Garver violated the following sections of the San Francisco Planning Code:

- 23 • Planning Code Section 174: by failing to abide by the conditions, stipulations, special
24 restrictions, and other limitations placed on the Property.
- 25 • Planning Code section 303(d) by failing to abide by the conditional use authorization
26 imposed on the Property by the San Francisco Planning Commission.
- 27 • Planning Code section 415 by failing to comply conditions and restrictions of the
28 Inclusionary Affordable Housing Program, including those imposed by the 2007
Manual.

1 San Francisco Planning Code section 174 states that “every condition, stipulation, special
2 restriction and other limitation imposed by administrative actions pursuant to this Code . . . shall be
3 complied with in the development and use of land and structures.” Failure to comply with any such
4 condition “shall constitute a violation of the provisions of this Code.” (Planning Code §174.) Planning
5 Code section 303(d) states that a violation of any condition imposed on a property constitutes a
6 violation of the Planning Code. Planning Code section 415 mandates that the San Francisco Planning
7 Department and the MOHCD “periodically publish a Procedures Manual for monitoring and
8 enforcement of the policies and procedures for implementation of this Program” and further states that
9 the Procedures Manual in effect at the time of the initial purchase “shall govern the regulation of that
10 unit.” Planning Code section 176 states that “[A]ny use, structure, feature or condition in violation of
11 this Code is hereby found and declared unlawful and a public nuisance.”

12 The evidence shows that Defendant Garver rented the Property from November 2012 through
13 July 2016 and again from May 2017 through June 2017, (Decl. Yin ¶15; Decl. Lall ¶5; Decl.
14 Hafeneger ¶4; Complaint 6:25-27), and that Defendant Garver failed to use the Property as a primary
15 residence. (Decl. Hafeneger ¶4; Decl. Lall ¶5.) Further, Defendant Garver made at least seven attempts
16 to rent or sell the Property. (Decl. Lall ¶ 7, Exh. A; Decl. Yin ¶17, Exh. H) Defendant Garver’s actions
17 violated Planning Code sections 174, 303(d), and 415, and violated the conditions and restrictions
18 placed on the Property by the 2007 Manual, the Affidavit, the Acknowledgment, and the Notice of
19 Special Restrictions.

20 The San Francisco Planning Code authorizes the San Francisco City Attorney to file a lawsuit
21 to enforce the provisions of the Planning Code and authorizes a civil penalty of not less than \$200 for
22 each day that Defendants committed or permitted violations of the Planning Code at the Property and
23 reasonable attorney’s fees and cost incurred by Plaintiffs in enforcing the Planning Code. (San
24 Francisco Planning Code §§176(b)(2), (c)(2), (f).) The Planning Code also authorizes injunctive relief,
25 including requiring Defendants to either comply with the Planning Code or otherwise sell the Property
26 to a qualified and deserving household. (Planning Code §§176(b)(2),(f).)

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1 **2. Defendant Garver Has Engaged in Unlawful and Unfair Business Practices**
2 **in Violation of the UCL, as Alleged in the Second Cause of Action in the**
3 **Complaint.**

4 The UCL, which confers standing on the San Francisco City Attorney to prosecute actions on
5 behalf of the People of the State of California, is exceptionally broad in scope. (Bus. & Prof. Code
6 §17204.) The UCL prohibits “any person” from engaging in “unfair competition,” which it defines to
7 mean and include “any unlawful, unfair, or fraudulent business act or practice.” (Bus. & Prof. Code
8 §§17200, 17203.)

9 “Because the [UCL] is framed in the disjunctive, a business practice need only meet one of the
10 three criteria [i.e. unfair, unlawful, or fraudulent] to be considered unfair competition.” (*McKell v.*
11 *Washington Mutual, Inc.* (2006) 142 Cal.App.4th 1457, 1471.) By defining unfair competition to
12 include any “unlawful . . . business practice,” the UCL “borrows violations of other laws and treats
13 them as unlawful practices that the unfair competition law makes independently actionable.” (*Cel-*
14 *Tech Comm’ns, Inc. v. Los Angeles Cellular Tel. Co.* (1999) 20 Cal.4th 163, 180 [internal quotation
15 marks omitted].) “Virtually any law – federal, state or local – can serve as a predicate for an action
16 under Business and Professions Code section 17200.” (*Ticconi v. Blue Shield of California Life &*
17 *Health Ins. Co.* (2008) 160 Cal.App.4th 528, 539.) For instance, a California court has recognized that
18 violations of a city’s building and health and safety laws constitute unlawful business practices under
19 the UCL. (*Hernandez v. Stabach* (1983) 145 Cal.App.3d 309, 314.)

20 Moreover, a claim based on an “unlawful” business act or practice does not depend on whether
21 a private right of action exists with respect to the underlying law at issue. Section 17200 allows a
22 remedy even if the underlying statute confers no private right of action. (See *Stop Youth Addiction Inc.*
23 *v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 561-567.) Nor is an actual injury to the consuming public
24 or competitors a required element of proof of an unlawful prong violation of the UCL. (*People v.*
25 *E.W.A.P. Inc.* (1980) 106 Cal.App.3d 315, 319; see also *People v. Toomey* (1984) 157 Cal.App.3d 1,
26 23 [in action designed to protect the public, only the violation of the statute is necessary to justify
27 injunctive relief and civil penalties].) Nor is it necessary to show that the defendant intended to injure
28 anybody. (William L. Stern, *Bus. & Prof. Code § 17200 Practice* (The Rutter Group 2015) ¶3:21.)
“The Legislature intended th[e] sweeping language [of the UCL] to include anything that can properly

1 be called a business practice and that at the same time is forbidden by law.” (*Bank of the West v.*
2 *Superior Court* (1992) 2 Cal.4th 1254, 1266. [internal quotation marks omitted].)

3 Here, Defendant Garver treats his BMR unit as a rental income property – a business practice.
4 Defendant Garver’s actions violate the San Francisco Planning Code and constitute a public nuisance
5 – and are thus an unlawful business practices. Defendant Garver’s actions also constitute an unfair
6 business practice, as they unfairly disadvantage landlords who follow the law and purchased their
7 rental income property at market rate. Defendant Garver’s violations of state and local law constitute
8 “unlawful” and “unfair” acts within the meaning of the UCL and establish a prima facie case on
9 Plaintiff’s Second Cause of Action. (See *Hernandez, supra*, 145 Cal.App.3d at 314.)

10 **3. Defendant Garver Has Maintained the Property as a Public Nuisance and a**
11 ***Per Se* Public Nuisance, as Alleged in the Third Cause of Action in the**
12 **Complaint.**

13 Civil Code section 3479 defines a nuisance as “[a]nything which is injurious to health . . . or is
14 ... offensive to the senses, or an obstruction to the free use of property, so as to interfere with the
15 comfortable enjoyment of life or property.” A public nuisance is “one which affects at the same time
16 an entire community or neighborhood, or any considerable number of persons, although the extent of
17 the annoyance or damage inflicted upon individuals may be unequal.” (Civ. Code §3480.) To be
18 enjoined, the nuisance must also be substantial and unreasonable. (*People v. Acuna* (1997) 14
19 Cal.4th 1090, 1105.) As stated in San Francisco Planning Code section 176: any structure, lot, feature,
20 or condition in violation of the Planning Code is unlawful and is a *per se* public nuisance.

21 It is a settled point of law that a City is empowered to declare what constitutes a nuisance and
22 to take action to abate it. (Gov’t Code §38771 [“[b]y ordinance the city legislative body may declare
23 what constitutes a nuisance”]; *City and County of San Francisco v. Padilla* (1972) 23 Cal.App.3d 388,
24 401 [the violation of a local ordinance can constitute a public nuisance].) The Supreme Court has
25 outlined a court’s function relative to a statutory nuisance:

26 Where the Legislature has determined that a defined condition or activity is a
27 nuisance, it would be usurpation of the legislative power for a court to
28 arbitrarily deny enforcement merely because in its independent judgment the
danger caused by a violation was not significant. The function of the courts in
such circumstances is limited to determining whether a statutory violation in
fact exists . . . (*City of Bakersfield v. Miller* (1966) 64 Cal.2d 93, 100.)

1 Defendant Garver's violations of the restrictions and conditions of the Program include renting
2 out a BMR unit – otherwise reserved for low-to-middle income households – in the midst of a housing
3 crisis. Since at least 2012, Defendant Garver failed to occupy the Property as a primary residence.
4 Defendant Garver rented out the Property from at least November 2012 through at least July 2016 and
5 from at least May 2017 through at least June 2017. Defendant Garver repeatedly attempted to rent or
6 sell the Property. Therefore, Defendant Garver failed to comply with the restrictions, conditions,
7 stipulations, and limitations imposed by the Notice of Special Restrictions, BMR Affidavit, and the
8 2007 Manual – in violation of San Francisco Planning Code sections 174, 303(d), and 415. Thus,
9 Plaintiffs have established a prime facie case for public nuisance and *per se* public nuisance, as alleged
10 in the third cause of action of the Complaint.

11 **II. THE COURT SHOULD GRANT THE RELIEF REQUESTED**

12 Plaintiffs request the following relief from Defendant Garver:

- 13 1. Civil penalties for violations of the San Francisco Planning Code in the amount of
14 **\$61,000** for violations from May 1, 2017 through June 30, 2017; and
- 15 2. Civil penalties for UCL violations in the amount of **\$112,500** for unlawful and unfair
16 business practices committed each month from August 2013 through August 2017, and
- 17 3. A Permanent Injunction, ordering Defendant Garver comply with the restrictions and
18 conditions of the Program, including those imposed by the 2007 Manual, and henceforth maintain the
19 Property in compliance with the law; or sell the Property in accordance with the procedures
20 established by the 2007 Manual; or
- 21 4. The Appointment of a Receiver; and
- 22 5. Reasonable attorneys' fees in the amount of **\$34,050 plus \$1,554.30 in costs.**

23 As further detailed below, Plaintiffs are entitled to the requested relief.

24 **A. DEFENDANT GARVER SHOULD BE ORDERED TO PAY CIVIL PENALTIES
25 PURSUANT TO SAN FRANCISCO PLANNING CODE SECTION 176(c)(2)**

26 San Francisco Planning Code section 176(c)(2) provides that property owners **shall** be liable
27 for civil penalties of **at least** \$200 for each day that a violation of the Planning Code is committed or
28

1 permitted to continue.¹ Thus, the imposition of penalties under the Planning Code is mandatory and
2 cannot be waived.²

3 Here, the imposition of civil penalties in excess of the statutory minimum are warranted.
4 Defendant Garver willfully violated the San Francisco Planning Code for years by unlawfully renting
5 out the Property – a BMR unit otherwise reserved for deserving households – for profit to rent paying
6 tenants. Defendant Garver purchased the Property at well below market rate, under the condition that
7 he would occupy the Property and not rent it out. Thus, Defendant Garver intentionally profited from
8 and took advantage of San Francisco’s housing crisis by renting out a BMR unit and otherwise
9 depriving a deserving San Franciscan of an affordable home.

10 As such, Defendant Garver maintained the Property in violation of the Planning Code from at
11 least May 1, 2017 through June 30, 2017. Considering the egregiousness of Defendant’s conduct,
12 Plaintiffs request \$61,000 in Planning Code penalties (\$1,000 per day for 61 days between May 1,
13 2017 and June 30, 2017).

14 **B. PLAINTIFF PEOPLE OF THE STATE OF CALIFORNIA IS ENTITLED TO
15 CIVIL PENALTIES UNDER THE UCL**

16 Defendant Garver is liable to the People for civil penalties or up to \$2,500 for each violation of
17 the UCL. (Bus. & Prof. Code §17206.) Indeed, once a UCL violation is found in a case brought in the
18 name of the People of the State of California, it is error for a court not to impose penalties.³ (*People v.*
19 *Custom Craft Carpets* (1984) 159 Cal.App.3d 679, 686; see also Bus. & Prof. Code §17206(b) [“The
20 court *shall* impose a civil penalty for each violation of this chapter.”] [emphasis added].)

21 The People request **\$112,500** in civil penalties from Defendant Garver for violations of the
22 UCL from August 2013 through August 2017 (\$2,500 x 45 UCL violations). As further explained
23 below, the People’s request is warranted.

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26 ¹ Remedies provided in the Planning Code are cumulative to other remedies provided by law.

27 ² Pursuant to Government Code section 36901, the maximum penalty that can be imposed
28 cannot exceed \$1,000 per day.

³ Remedies provided for in the UCL are cumulative to remedies available under the San
Francisco Planning Code. (See Bus. & Prof. Code §17205.)

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1. Collectively, Defendants Committed At Least 45 Violations of the UCL

What constitutes a single violation of the UCL for purposes of imposing a civil penalty depends on the circumstances of the case, including the type of violation involved, the number of victims, and the repetition of the conduct constituting the violation. (*Toomey, supra*, 157 Cal.App.3d at 22 [citing *People v. Witzerman* (1972) 29 Cal.App.3d 169, 180].) In one case, each time a person read or responded to a single misleading newspaper advertisement was considered a separate violation under section 17206 violation because counting violations based on this criteria “would be reasonably related to the gain or the opportunity for gain” for defendant from the false advertisement. (*People v. Superior Court (Olson)* (1979) 96 Cal.App.3d 181, 197-98.) Applying this these factors where the defendant is a landlord who is unlawfully renting out a BMR unit, the violation should be considered on a monthly basis under section 17206 because such calculation properly takes into account the monthly nature of rentals. (*People v. Beaumont Inv., Ltd.* (2003) 111 Cal.App.4th 102, 130.) Moreover, each time Defendant Garver attempted to rent or sell the Property in violation of its restriction or condition should be considered a violation under section 17206.

Here, from November 2012 through July 2016 and again from May 2017 through June 2017, Defendant Garver used his Property for rental income and accepted rent on a monthly basis. Beginning in at least December 2016, Defendant Garver posted the Property for rent or sale on at least six occasions. Following the holdings in *Beaumont* and *Olson*, there is ample evidence to support a finding that Defendant committed at least 45 violations of the UCL (Defendant collected rented on 39 occasions since August 2013 – four years prior to filing of this Complaint) where Defendant used or attempted to use the Property as rental income property, for which this Court must impose a penalty.

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2. The Court Should Impose \$2,500 Per Violation

The next question in the civil penalty analysis is the amount of penalty that should be imposed for each violation of the UCL. Section 17206 sets for the criteria for determining penalties: “in assessing the amount of the civil penalty, the court shall consider any one or more of the relevant circumstances presented by any of the parties to the case, including, but not limited to, the following: the nature and seriousness of the misconduct, the number of violations, the persistence of the misconduct, the length of time over which the misconduct occurred, the willfulness of the defendant’s

1 misconduct, and the defendant's assets, liabilities, and net worth." Here, Defendant Garver profited
2 from San Francisco's housing crisis by acquiring and renting out a BMR unit for years. The
3 misconduct was willful, longstanding, and pervasive. It is particularly egregious because it deprived a
4 deserving San Franciscan of a precious resources in this City – an affordable home. This misconduct
5 violates the restrictions of the Program, the San Francisco Planning Code, and has created a public
6 nuisance. A \$2,500 penalty per violation is appropriate.

7 **C. DEFENDANT GARVER WAS PUT ON NOTICE OF CIVIL PENALTIES
8 THEY FACED UPON DEFAULT**

9 The allegations in the body of the Complaint make clear that Defendant has been maintaining
10 the Property in violation of the law for years. The Complaint's "Prayer for Relief" sought at least
11 \$200 a day in civil penalties under the Planning Code and \$2,500 per violation for each unlawful act
12 and each unfair act alleged in the Complaint. (Complaint 12:18-22.)

13 The Complaint has given Defendant fair warning of his financial liability exposure. (See *Nat'l*
14 *Diversified Svcs, Inc. v. Bernstein* (1985) 168 Cal.App.3d 410, 417-18 [courts may look to allegations
15 in the body of the complaint to determine whether a defendant has been informed of the maximum
16 liability he or she will face for choosing to default]; *People ex rel. Lockyer v. Brar* (2005) 134
17 Cal.App.4th 659, 667-68 [complaint sought \$2,500 for each violation of the UCL proven at trial, but in
18 an amount of not less than \$1,000,000; court determined that complaint gave fair warning of an
19 exposure of at least \$3,750,000 -- \$2,500 multiplied by 1500 alleged violations].)

20 Accordingly, this court should impose the civil penalties requested by Plaintiffs.

21 **D. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF AGAINST
22 DEFENDANT GARVER**

23 Code of Civil Procedure section 731 authorizes a City Attorney to bring an action to abate a
24 public nuisance, while the San Francisco Planning Code and the UCL specifically authorize the
25 issuance of injunctive relief.

26 The San Francisco Planning Code provides that the City Attorney may institute proceedings for
27 injunctive relief "against any person for violations of the Planning Code." (Planning Code §176(g).)
28 Likewise, the UCL similarly authorizes the City Attorney to bring an action to enjoin unfair and/or
unlawful business practices. (Bus. & Prof. Code §17203.)

1 California courts have consistently approved injunctive relief as a proper remedy for nuisance
2 abatement on real property when the nuisance is caused by failure to maintain a property in
3 compliance with local and state health and safety laws. (*City and County of San Francisco v City*
4 *Investment Corp.* (1971) 15 Cal.App.3d 1031, 1042 [fire code]; *Padilla, supra*, 23 Cal.App.3d at 401
5 [planning code]; *Miller, supra*, 64 Cal.2d at 104 [building code].)

6 By way of the Injunction sought in this matter, Plaintiffs here seek to enforce the conditions
7 and restrictions of the Program and the San Francisco Municipal Codes. This action is consistent with
8 Plaintiffs' goal of maintaining and preserving the Property as a below market rate unit. There is no
9 adequate legal remedy available to Plaintiffs that can satisfy this goal. Defendant's ongoing refusal to
10 maintain the Property in compliance the conditions and restrictions of the Program threatens San
11 Francisco's affordable housing stock.

12 Should Defendant fail to comply with the Permanent Injunction, the Court should also
13 authorize Plaintiffs to pursue the appointment of a Receiver pursuant to California Code of Civil
14 Procedure section 564(b)(9) and California Business and Professions Code §17203.

15 **E. PLAINTIFFS ARE ENTITLED TO THEIR ATTORNEY'S FEES AND COSTS**

16 Planning Code section 176(c)(2) authorizes Plaintiffs to seek recovery "of any attorneys' fees
17 and costs . . . incurred by the City" in bringing a civil action for violations of the Planning Code.

18 Where attorneys' fees are recoverable by statute, the "inquiry in California ordinarily begins
19 with the 'lodestar,' i.e., the number of hours reasonable expended multiplied by the reasonable hourly
20 rate . . . The reasonable hourly rate is that prevailing in the community for similar work." (*PLCM*
21 *Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095.) This is also true where the party seeking fee
22 recovery is a government entity, such as Plaintiffs, even when Plaintiffs' counsel does not charge the
23 prevailing market rate to Plaintiffs. (*City of Santa Rosa v. Patel* (2010) 191 Cal.App.4th 65, 70-71.)
24 The court may make its own determination of the value of an attorney's services without the necessity
25 for expert testimony. (*PLCM Group, Inc., supra*, 22 Cal.4th at 1096.)

26 As further detailed in the Declaration of Deputy City Attorney Samuel Ray, filed herewith,
27 Plaintiffs expended public resources bringing this action against Defendant Garver, including
28 investigation, correspondence, drafting pleadings, and drafting this motion. During the pendency of

1 this action, Mr. Ray's time was billed at \$225 per hour, which given his level of experience, is below
2 market rate for his time. This rate represents the employee's actual salary plus overhead and fringe
3 benefits.⁴ For the purposes of this motion, Plaintiffs only seek recovery of these attorneys' time at their
4 current billed rates, rather than the higher marker rates.⁵ Plaintiffs request a total of **\$34,050** in
5 attorneys' fees for 150 attorney hours at \$225 per hour plus **\$1,554.30** in costs incurred so far. The
6 Court should award the reasonable fees and expenses requested by Plaintiffs.

7 **CONCLUSION**

8 For the reasons stated herein, Plaintiffs are entitled to the issuance of a Default Judgment and
9 Permanent Injunction, as well as an award of civil penalties, attorney's fees, and costs.

10 Dated: March 15, 2018

11 DENNIS J. HERRERA
12 City Attorney
13 PETER J. KEITH
14 Chief Attorney
15 SAMUEL C. RAY
16 Deputy City Attorney

17 By: /s/ Samuel C. Ray
18 SAMUEL C. RAY

19 Attorneys for Plaintiffs
20 CITY AND COUNTY OF SAN FRANCISCO and
21 PEOPLE OF THE STATE OF CALIFORNIA
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26 ⁴ When a government agency seeks to recovery attorneys' fees based on the attorneys' actual
27 salaries, it is proper to include an hourly overhead component consisting of employee fringe benefits
28 and office operation expenses. (See e.g., *City of Oakland v. McCullough* (1996) 46 Cal.App.4th 1, 7.)

⁵ Fee awards may reflect current rates at current experience levels to compensate for the delay
in fee recovery. (See e.g., *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 583-584.)

1 **PROOF OF SERVICE**

2 I, MORRIS ALLEN, declare as follows:

3 I am a citizen of the United States, over the age of eighteen years and not a party to the above-
4 entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building,
1390 Market Street, Sixth Floor, San Francisco, CA 94102.

5 On March 15, 2018, I served the following document(s):

6 **PLAINTIFFS MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
7 **MOTION FOR DEFAULT JUDGMENT AND PERMANENT INJUNCTION AGAINST**
8 **DEFENDANT GREGORY GARVER**

9 on the following persons at the locations specified:


10 Gregory Garver
11 1160 Mission Street, Unit 812
12 San Francisco, CA 94103

13 in the manner indicated below:

14 **BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and
15 correct copies of the above documents in addressed envelope(s) and placed them at my
16 workplace for collection and mailing with the United States Postal Service. I am readily
17 familiar with the practices of the San Francisco City Attorney's Office for collecting and
18 processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for
19 collection would be deposited, postage prepaid, with the United States Postal Service that same
20 day.

21 I declare under penalty of perjury pursuant to the laws of the State of California that the
22 foregoing is true and correct.

23 Executed March 15, 2018, at San Francisco, California.

24 
25 MORRIS ALLEN