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Via TrueFiling

Honorable Presiding Justice Peter J. Siggins
Honorable Associate Justices Ioana Petrou and Rebecca A. Wiseman
California Court of Appeal
First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-3600

Re: *City & County of San Francisco v. Uber Technologies, Inc., et al.*, No. A153205
Request for Publication (California Rules of Court 8.1105, 8.1120)

Dear Justices Siggins, Petrou, and Wiseman:

I write on behalf of the City and County of San Francisco (the "City"), the League of California Cities (the "League"), and the California State Association of Counties ("CSAC"). The City, the League, and CSAC respectfully request that this Court publish its opinion in *City & County of San Francisco v. Uber Technologies, Inc., et al.*, No. A153205 ("*SF v. Uber*"), filed on May 17, 2019.

The Court's opinion affirmed a Superior Court order enforcing the City's administrative subpoenas to Uber, Inc. and its related entities (collectively, "Uber"), so that the City may investigate whether Uber is violating any of several state and municipal laws. Uber had specifically refused to produce the subpoenaed information, most notably the reports it submits periodically to the California Public Utilities Commission (CPUC).

The Court rejected Uber's argument that the Superior Court lacked jurisdiction to enter its order, and Uber's efforts to apply Public Utilities Code section 1759, which prohibits trial courts from acting "to enjoin, restrain, or interfere with the [CPUC] in the performance of its official duties[.]" (Pub. Util. Code § 1759, subd. (a).) The Court agreed with the Superior Court that this argument is premature, because an investigation is not litigation, and it is not yet certain what action (if any) the City will take based on the information it receives.

Instead the Court applied the proper standard, set by *California Restaurant Association v. Henning* (1985) 173 Cal.App.3d 1069 ("*Henning*"). The Court determined that: (a) the City properly issued the subpoenas pursuant to its administrative power; (b) the demand for Uber's CPUC Reports relates to inquiries the City is authorized to make; (c) the subpoenas seek reasonably relevant information and are not too indefinite; and (d) the parties' protective order assuages any confidentiality concerns. Therefore the Superior Court had jurisdiction and acted

properly to enforce the City's subpoenas.

A. The *SF v. Uber* Opinion Meets the Standard for Publication.

Rule of Court 8.1105(c) provides that an opinion "should be certified for publication in the Official Reports" if it meets any one of nine enumerated standards. The *SF v. Uber* opinion meets at least four of those standards.

First, the opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions[.]" (CRC 8.1105(c)(2).) There are few, if any, published opinions in which a court has addressed whether Section 1759 applies in the context of pre-litigation investigations. On page 11 of its opinion, the Court notes the novelty of Uber's argument: "Uber does not cite any cases where enforcement of an administrative subpoena was preempted under section 1759."

Instead of section 1759 or the pre-emption cases favored by Uber, the Court applied the *Henning* standard, as well as: *United States v. Morton Salt Company* (1950) 338 U.S. 632 (the power to make an administrative inquiry is not derived from judicial function, but analogous to the power of a grand jury) (Opinion p. 6); *People ex. rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132 ("*Orloff*") (Section 1759 does not insulate a public utility from any and all civil actions) (Op. 10); and *Younger v. Jensen* (1980) 26 Cal.3d 397 (jurisdictional conflict is purely hypothetical; City may use subpoenaed documents to look into the question of its jurisdiction) (Op. 8).

The Court's opinion applies all of the above cases in the context of the City's investigation into whether Uber, an entity regulated in certain respects by the CPUC, has violated laws of general application, including state nuisance and/or anti-discrimination law, and municipal law pertaining to workers' rights. Publication will provide valuable guidance to future government entities pursuing similar investigations.

Second, *SF v. Uber* "explains … an existing rule of law[.]" (CRC 8.1105(c)(3).) The Court rejected Uber's overbroad reading of preemption law—including the implication that a City may not pursue any investigation of an entity otherwise regulated by the CPUC—and "decline[d] to limit the scope of a trial court's ability to enforce an administrative subpoena based on the possibility of the CPUC issuing rules allowing it to disclose similar records at an unknown time and manner." (Op. 14.)

The opinion mentions several actions the City might pursue at the close of its investigation without running afoul of the test for section 1759 preemption articulated in *San Diego Gas & Electric Co. v. Superior Court (Covalt)* (1996) 13 Cal.4th 893 (Op. 12-15), then concludes "we do not and cannot know at this juncture what the City Attorney will choose to pursue, let alone whether or not any legal action it undertakes will hinder, aid, or have no impact upon the CPUC in its regulation of [Transportation Network Companies ("TNCs") like Uber]." (Op. 15.) Therefore the Superior Court acted within its "jurisdiction to enforce the administrative subpoenas under section 1759 and the *Covalt* test." (*Ibid*.)

Third, *SF v. Uber* "[a]ddresses … an apparent conflict in the law[.]" (CRC 8.1105(c)(5).) It harmonizes the CPUC's regulatory authority under Article XII of the California Constitution and the Public Utilities Act with the City's constitutional authority (under Article XI) to enforce laws of general application, and investigate potential unlawful activity within its borders. In so doing, the Court recognizes that CPUC regulation does not immunize TNCs from any and all oversight by city or county governments. (*See* Op. 10, 15, both citing *Orloff*.)

Fourth, and perhaps most significantly, *SF v. Uber* "[i]nvolves a legal issue of continuing public interest[.]" (CRC 8.1105(c)(9).) TNCs are an increasingly ubiquitous feature of city life that can present challenges for city and county governments in areas including parking, traffic, congestion, pollution, and worker compensation. For example, the San Francisco County Transportation Authority found, in a report released last October, that "TNCs accounted for approximately 50% of the change in congestion in San Francisco between 2010 and 2016[.]" (TNCS & CONGESTION, available at https://www.sfcta.org/sites/default/ files/2019-05/TNCs_Congestion_Report_181015_Finals.pdf [last accessed 6/1/19], p.4.)

SF v. Uber provides important guidance to cities and counties faced with these challenges. The Court's opinion protects municipal authority to conduct investigations and obtain information essential to determining whether the entities that have added thousands of cars to the roads are complying with the law.

Publication would also caution future litigants against opting to defy a valid administrative subpoena under the guise of an argument similar or identical to Uber's. The City issued its administrative subpoenas more than two years ago; Uber has successfully avoided production of its CPUC Reports for that entire period. Publication would make it less fruitful for a future litigant to pursue the argument that CPUC regulation releases it from any obligation to cooperate with a lawful investigation.

B. The City, the League, and CSAC Have an Interest in Publication.

The City is the Petitioner below, and Respondent to Uber's appeal in this Court. The City relies on the authority granted it by the San Francisco Administrative Code and the California Constitution to issue administrative subpoenas in a variety of contexts. The City has a strong interest in publication of *SF v. Uber*, to recognize that authority and protect the City's ability to conduct investigations and enforce the law.

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

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CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

For the foregoing reasons, the City, the League, and CSAC respectfully request publication of the Court's May 17, 2019 opinion. Thank you for your consideration of this request.

Very truly yours,

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