June 5, 2017

The Honorable Hannah-Beth Jackson
Chair, Senate Judiciary Committee
State Capitol, Room 2187
Sacramento, CA 95814

Re: AB 814 (Bloom) – Consumer protection: enforcement powers
As Amended on March 23, 2017 – OPPOSE

The Civil Justice Association of California and the above organizations must **OPPOSE** Assembly Bill 814, by Assembly Member Richard Bloom, which seeks to extend the power of pre-litigation administrative subpoena to the city attorneys of four charter cities in California.

The power of pre-litigation administrative subpoena was expressly provided by the California Legislature to authorized district attorneys in 1977 (Government Code §16759); when a district attorney reasonably believes there has been a violation of the Unfair Competition Law (UCL), s(he) is authorized to exercise "all the powers granted to the Attorney General as head of a department" to investigate the potential violation. Those powers include the authority to issue a pre-litigation administrative subpoena, which is, as noted by the California Supreme Court in *Brovelli v. Superior Court* (1961) 56 Cal.2d 524, 529, a power that "is not derived from a judicial function but is more analogous to the power of a grand jury, which does not depend on a case or controversy in order to get evidence but can investigate 'merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.'" Briefly, an action does not have to be filed for such a subpoena to be issued upon an entity and the standard to do so is disturbingly low. It should also be noted that enforcement under Business and Professions Code (BPC) §17200 does not exempt specific industries, unlike many other states' unfair practices statutes; the law applies to any "person," broadly defined as "all natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

When the authority to prosecute UCL violations was bestowed upon county counsels and city attorneys, BPC §16759 was never amended by the Legislature to provide the power of pre-litigation subpoena to those positions. While proponents of AB 814 purport this to have been a mere oversight, it would appear that California legislators have intentionally declined to mention either city attorneys or county counsel in §16759 and have instead intended for this vast and broadly interpreted bestowment of power to remain with those government officials whose statutory roles are those of the chief law enforcement officers in the State.

While the listed organizations maintain strong opposition to the expansion of power to issue pre-litigation administrative subpoenas, in an attempt to work with the author and sponsor, we have collectively delineated the specific issues with the policy proposal and offered amendments that would at the least provide businesses and organizations in California with judicial due process and protection from unwarranted searches that precede an actual action being filed.

Motion to Quash

Refusal to comply with a pre-litigation administrative subpoena authorizes its issuer to petition the superior court for an order to compel compliance (Gov. Code §11187). Unlike the process for subpoenas issued following the filing of an action, respondents to a pre-litigation administrative subpoena must wait to be compelled to comply before filing a motion to quash or amend the subpoena. It is during that waiting period that the public and shareholders may become aware of the subpoena yet, likely unaware that it has been issued without any allegations of wrongdoing being filed in a court since, absent the filing of a motion to compel, there is no opportunity to raise objections to this type of subpoena. As a matter of public policy, if a government official can issue this type of subpoena based only upon his or her reading of a newspaper article, it is reasonable for the entity served with the subpoena to be able to seek relief from the courts rather than, as currently construed, be left to simply wait for the city attorney to petition the court to compel compliance. Our coalition has offered the following

amendment that would allow a person subject to a pre-litigation administrative subpoena to bring a motion to quash or amend it in a manner consistent with traditional subpoenas:

> **Any person subject to a subpoena issued pursuant to this subdivision may file a motion to quash with the court who may make an order quashing the subpoena entirely, modifying it, or directing compliance with it upon those terms or conditions as the court shall declare, including protective orders. In addition, the court may make any other order as may be appropriate to protect the person from unreasonable or oppressive demands, including unreasonable violations of the right or privacy of the person or the privacy of subjects included in the demand and demands relating to potential violations that are outside the jurisdiction of the city attorney.**

Delegation of Subpoena Power

Reading BPC §16759 and §17204 in harmony with Gov. Code §11822, it is not ultimately clear whether the Attorney General and county district attorneys may delegate their express power to issue administrative subpoenas and/or to share information resulting from those subpoenas. To clarify the legislative authorization, our coalition of organizations proposes the following amendment:

> **A city attorney shall not delegate powers granted pursuant to this subdivision.**

This amendment ensures that this power remains with the City Attorney for the purpose of protecting the public and not, instead, to enrich private plaintiff's attorneys routinely retained by local governments to sue California businesses.

It should be noted that, in an August 2011 opinion issued by Attorney General Kamala D. Harris, the Legislature, in enacting Section 16759 to extend the power of pre-litigation subpoena administrative power to district attorneys, intended for delegations of the power to extend to officers of his or her own department. Therefore, contrary to the author's and proponents' claim that AB 814 simply expands this power from 59 to 63 elected government officials, the bill actually expands the power to four city attorneys and all officers within those departments.

Doubling of Efforts

It remains uncertain as to why it is necessary to expand this power to city attorneys when s(he) can simply work with his or her district attorney or the Attorney General to issue this type of subpoena. Accordingly, it is of great concern to our coalition that California's businesses and charitable organizations may become subject to pre-litigation administrative subpoenas for the same or substantially similar issues by more than one government entity. This repetition of effort due to the attempt by AB 814 to establish the office of City Attorney as an independent office that doesn't need to rely upon its City Council or District Attorney for oversight will lead to enormous delays in the judicial system and possibly exorbitant costs for recipients of the subpoenas without a real benefit to California's consumers. To ensure duplicative subpoenas are not issued by more than one government official under these circumstances, our coalition has offered the following amendment:

A district attorney or city attorney may not issue a subpoena to a person or entity pursuant to this section if a subpoena has already been issued regarding the same or similar conduct or allegations.

Constitutionality of AB 814

Lastly, under the California Constitution, cities may become charter cities and, thus, be granted complete authority over their municipal affairs. Accordingly, a state law relating to municipal affairs cannot preempt a city's charter and, thus, any change to those powers must be made at the local level.

AB 814 seeks to add the power of pre-litigation administrative subpoena authority to those powers granted to the city attorneys of four charter cities; the duties and powers of an individual city attorney are clearly a municipal affair for charter cities and local governments already retain the authority to amend their city charters and thus grant the power of pre-litigation subpoena power to their city attorney. For example, the City and County of San Francisco already authorized its city attorney to exercise pre-litigation administrative subpoena power via a change in its charter by voters within that jurisdiction (San Francisco Administrative Code Article XIV, amended in February 2000) while the City of San Diego did not proceed with a similar proposal (see Agenda Item 3, January 23, 2008 Committee on Rules, Open Government and Intergovernmental Relations of the City Council of the County of San Diego).

With respect a 2010 bill (SB 1168 (Cedillo)) that would have empowered the Los Angeles city attorney to empanel a grand jury and issue subpoenas to investigate potential criminal activity (a power currently held by the Attorney General and county district attorneys), in a letter requested by Los Angeles City Council Member Jan Perry regarding SB 1168, University of California, Irvine Dean and Distinguished Professor of Law Erwin Chemerinsky wrote:

> *"SB 1168 seeks to grant the City Attorney powers not conveyed by the City Charter. It is wrong to change the Charter by state law rather than by Charter amendment. Indeed, a court likely would strike down SB 1168 as exceeding the state's power as to a charter city. The state only may legislate as to a charter city as to matters of statewide concern."*

In a *Los Angeles Times* editorial dated June 11, 2010, Raphael J. Sonenshein, previous Executive Director of the Los Angeles Charter Reform Commission writes:

> *"The Legislature can override the city charter only in areas of statewide concern. If a major disaster or other calamity totally disrupted the normal structures of government, then perhaps the Legislature would carefully review the statewide impact and in an extreme case consider overriding the people's right to determine their own form of government. But one local official's case of subpoena envy hardly qualifies as such a crisis.*
>
> *Any city attorney who tries to go around voters and lobby the Legislature for additional, novel and unnecessary power is exactly the wrong person to be entrusted with it.*

There is no excuse…for trying to get around the voters and leaders of Los Angeles and damaging the hard-earned, locally driven, charter-based governance of Los Angeles."

Expansions in the powers of California's charter city attorneys should be provided by those who approved the charter: the voters. Legislative attempts to interfere with those local decisions are clearly preempted within the California Constitution.

The city attorney's role is to provide legal advice to city government, prosecute criminal misdemeanors, defend the city on civil matters and protect the city from legal liability. While certain city attorneys in California have been authorized to enforce Unfair Competition Law actions, it is disingenuous to claim that the Legislature committed an oversight by not providing those city attorneys with the ability to perform unwarranted searches on businesses and organizations before ever filing an action alleging wrongdoing. Should these city attorneys believe the extensive and far-reaching power of pre-litigation administrative subpoena power is necessary to perform invasive expeditions into the practices of California's economy-driving business owners and citizens, it should be done through those who put them in office.

For these reasons, we request your NO vote on AB 814. Should you have any questions, please contact Faith Conley (CJAC) at (916) 443-4900, ext. 1012 or FConley@cjac.org.

Sincerely,

Faith Conley
CJAC Vice President of Government Affairs

Cc: The Honorable Richard Bloom, California State Assembly
Members, Senate Judiciary Committee
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