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IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

COALITION OF HUMAN ADVOCATES FOR K9'S & OWNERS, an unincorporated, association, Plaintiff, v. STATE OF CALIFORNIA; CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants.	Case No. C06-1887 MMC **PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFF'S FIRST AMENDED COMPLAINT** Date: 2/2/2007 Time: 9:00 a.m. Dept.: 19TH floor, Courtroom 7 Judge: Hon. Maxine Chesney Trial Date: None Set

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I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

In 2005, at Defendants' urging, the California Legislature enacted SB 861. Prior to the enactment of SB 861, California law prohibited local governments from enacting programs to control "potentially dangerous or vicious dogs...in a manner that is specific as to breed." *See*, Defendants' Request for Judicial Notice (RFJN), Exhibit B, at page 3. In its final form, SB 861 amended then-existing law and allowed local governments to adopt breed-specific regulations for dogs. SB 861 was introduced by State Senator Jackie Speier.

SB 861 arose as a reaction to a dog mauling incident in SAN FRANCISCO. *See,* Defendants' Points and Authorities, page 2, lines 10-18. Originally, Mayor Newsom and the Board of Supervisors of the CITY AND COUNTY OF SAN FRANCISCO pushed for a strict ordinance that, while purporting to be short of an outright ban, contained such severe restrictions that the original ordinance effectively operated as an outright ban. For example, under the original proposed ordinance, local communities could require that pit bull owners carry $1 million insurance policies, muzzle their dogs in public, and construct kennels to house their dogs. *See*, Plaintiff's RFJN, Exhibit A, filed herewith. Mayor Newsom was quoted in at least one source as saying, "You've got dogs that literally can kill...If we can't change people's behavior and make them think what's in their best interest, then that's when government comes along and becomes a bit paternalistic."[1]

As "vicious dog" legislation, however, Senator Speier was confronted with overwhelming expert testimony and opposition from organizations like the California Veterinary Medical Association and the American Veterinary Medical Association. As a result, Senator Speier amended SB 861 several times, responding to various criticisms from dog owners, experts, and her fellow legislators. For the Court's reference, CHAKO provides a complete history of SB 861, and its various forms, obtained from the State's official legislative information website. *See,*

[1]Mayor Newsom's quote can be read at www.cbsnews.com/stories/2005/06/06/national/main699773.shtml.

Plaintiffs' RFJN, Exhibit B, filed herewith.

In its final form, SB 861 was disguised as legislation giving local jurisdictions the power to control "irresponsible breeding." Although SB 861 states that "no specific breed of dog is inherently dangerous or vicious," the legislative debate that occurred prior the passage of SB 861 clearly demonstrates that Senator Speier had only one breed of dog on her mind - pit bulls. Moreover, the legislative debate clearly demonstrates that Senator Speier was seeking to control pit bulls - not because of overpopulation - but because of a belief that pit bulls are inherently dangerous or vicious dogs.[2]

In the wake of SB 861, Defendants enacted Ordinance No. 268-05. Ordinance No. 268-05 provides that no person may knowingly own or keep a pit bull in SAN FRANCISCO "that has not been spayed or neutered," unless (a) the pit bull is under eight weeks of age; (b) the pit bull cannot be sterilized without a high likelihood of suffering serious bodily harm or death due to a physical abnormality; (c) the pit bull has been present in the CITY for less than thirty days; (d) the owner has properly obtained or submitted an application for a breeding permit; (e) the owner contends the dog is not a pit bull is seeking to have that issue adjudicated by the ANIMAL CARE AND CONTROL DEPARTMENT; or (f) the pit bull is a show dog. S.F. Health Code § 43.1.

In order to determine whether a dog is or is not a pit bull, Ordinance No. 268-05 defines "pit bull" as "any dog that is an American Pit Bull Terrier, American Staffordshire Terrier, Staffordshire Bull Terrier, or any dog displaying the physical traits of any one or more of the above breeds, or any dog exhibiting those distinguishing characteristics that conform to the

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[2]The entire debate on SB 861 can be accessed at www.calchannel.com/search.php?date=083105&source=senate&type=floor&title=&Search=Submit.

standards established by the American Kennel Club ("AKC") or United Kennel Club ("UKC") for any of the above breeds.[3] S.F. Health Code § 43(a).

Violation of Ordinance 268-05, depending on whether the violation is an initial or subsequent violation, is punishable by fines or even imprisonment for up to six months. S.F. Health Code § 43.2(a), (b).

When Defendants enacted Ordinance No. 268-05, Defendants made no exception for pit bull or pit bull mix service dogs. On March 10, 2006, CHAKO filed a Complaint for Injunctive and Declaratory Relief against Defendants. CHAKO contends that, in failing to make exception for pit bull or pit bull mix service dogs, Defendants violated the Americans With Disabilities Act, the Rehabilitation Act, California Government Code section 11135, California's Unruh Civil Rights Act (Civil Code section 51), and California's Disabled Persons Act (Civil Code section 54). CHAKO'S contention is based, in part, on the fact that premature sterilization of a service dog can result in that dog being unable to properly perform its working duties, particularly for individuals with mobility-related disabilities.

In addition, as more specifically set forth below, CHAKO contends that sterilization of service dogs often requires a recovery time of up to ten days, depending on whether the procedure results in complications to the animal. During this time, the service dog is unable to fulfill its duties to its disabled owner, which can have the unintended, adverse effect of isolating or excluding disabled individuals from civic life until their service dog recovers. By not exempting service dogs from Ordinance No. 268-05, or making reasonable, alternative accommodations for disabled persons, CHAKO contends Defendants violated the ADA and the other statutory provisions referred to above.

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[3]For ease of reference, CHAKO refers to these dogs as "pit bulls or pit bull mixes."

Finally, CHAKO contends that Ordinance No. 268-05 violates various provisions of the Federal and State Constitutions as set forth in its Complaint, including that Ordinance No. 268-05's definition of "pit bull" is void-for-vagueness in violation of the Due Process Clause of the 14th Amendment.

On June 22, 2006, Defendants filed its first Motion to Dismiss pursuant to FRCP 12(b)(1) and 12(b)(6). On August 16, 2006, the Court granted Defendants' Motion to Dismiss, granting leave to amend. CHAKO filed a First Amended Complaint on September 15, 2006, addressing the issues raised in Defendants' first Motion to Dismiss. On October 4, 2006, Defendants filed a second Motion to Dismiss, which is now pending before the Court.

II. ARGUMENT

A. MOTIONS TO DISMISS UNDER FRCP 12(b)(6) ARE DISFAVORED, AND A CIVIL RIGHTS COMPLAINT ALLEGING DISABILITY DISCRIMINATION SHOULD BE LIBERALLY CONSTRUED TO EFFECT THE UNDERLYING PURPOSES OF REMEDIAL STATUTES ADDRESSING THE RIGHTS OF DISABLED PERSONS

Under the well-established rules governing FRCP 12(b)(6) motions to dismiss, the Defendants must meet a high burden to warrant dismissing CHAKO'S complaint. "A complaint should not be dismissed unless it appears *beyond doubt* the plaintiff can prove *no set of facts* in support of his claim that would entitle him to relief." *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754 (9th Cir. 1994), cited in *Buckey v. County of Los Angeles*, 968 F.2d 791, 794 (9th Cir. 1990) (Emphasis added.); see also, *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1990).

As the Defendants accurately point out on page 7 of their Motion, the material allegations in CHAKO'S Complaint must be taken as true and construed in the light most favorable to CHAKO. *Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). "All well-pled allegations are accepted as true and all reasonable inferences are drawn in plaintiff's favor." *Mruz v. Caring,*

Inc., 991 F.Supp. 701, 707 (D.N.J. 1998), citing *Associated Gen'l Contractors of Calif. v. California State Council of Carpenters*, 459 U.S. 519, 526 (1983).

Finally, civil rights complaints - in particular - must be construed liberally in favor of the plaintiff. *Buckey v. County of Los Angeles, supra,* 968 F.2d at page 794, citing *Gobel v. Maricopa County*, 867 F.2d 1201, 1203 (9th Cir. 1989); see also, *Owen v. City of Independence*, 445 U.S. 622, 636 (1980) [Remedial legislation is construed broadly to achieve its primary purpose.].

In this case, for example, CHAKO alleges in its first five claims - "the disability claims" - that Defendant's Ordinance No. 268-05 discriminates against disabled persons under the ADA, Sectio 504 of the Rehabilitation Act, CA Government Code section 11135, the CA Unruh Civil Rights Act, and the CA Disabled Persons Act by failing to make exceptions for service dogs and guide dogs assisting the disabled in its attempts to regulate pit bulls and pit bull mixes in the CITY AND COUNTY OF SAN FRANCISCO. The statutes that form the basis of CHAKO'S disability claims are all remedial in nature.[4] As such, CHAKO'S complaint should be liberally construed to effect the statutes' underlying purposes which is to remedy discrimination against disabled persons and to provide full and equal accommodation for disabled persons to the privileges and benefits of civic life.

For example, in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 504, 119 S.Ct. 2139, the United States Supreme Court observed that the ADA is remedial legislation wherein "Congress sought...to 'provide a comprehensive national mandate for the discrimination against individuals with disabilities'." *Id.*, citing 42 U.S.C. § 12101(b)(1).

Similarly, Section 504 of the Rehabilitation Act is remedial in nature. *Jones v.*

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[4]In fact, CHAKO contends that each of its claims are based on provisions of law that can fairly be said to be "remedial". For brevity's sake, however, CHAKO limits its argument on this point to the first five disability claims.

Metropolitan Atlanta Rapid Transit Author., 681 F.2d 1376, 1380 (11th Cir. 1982). In addition, the 9th Circuit has recognized a private right of action under CA Government Code section 11135, which LOCAL DEFENDANTS do not dispute in their motion to dismiss. *Greater Los Angeles Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103 (9th Cir. 1987).[5] Moreover, a number of Federal Courts have recognized that the Unruh Civil Rights Act is to be liberally construed to effect its purposes. See, e.g., *Hubbard v. Twin Oaks Health and Rehab. Ctr.*, 408 F.Supp.2d 923 (E.D. Cal. 2004); *Beliveau v. Caras*, 873 F.Supp. 1393 (C.D. Cal. 1995); *Aikins v. St. Helena Hosp.*, 843 F.Supp. 1329 (N.D. Cal. 1994) (J. Smith, Fern M.).

Furthermore, Defendants do not dispute that the ADA, the Rehabilitation Act, Government Code section 1135, or Civil Code section 54 applies to their actions. As the 9th Circuit wrote in *Armstrong v. Wilson*, 124 F.3d 1019, 1023 (9th Cir. 1997) regarding the ADA, "the ADA broadly "defines 'public entity' as 'any State or local government [and] any department, agency, special purpose district, or other instrumentality of a State or States or local government'...This 'include[s] every possible agency of state or local government'." *Id.*, quoting *Crawford v. Indiana Dep't of Corrections*, 115 F.3d 481, 485 (7th Cir.1997). "Quite simply, the ADA's broad language brings within its scope 'anything a public entity does'." *Id.*, quoting *Yeskey v. Pennsylvania Dep't of Corr.*, 118 F.3d 168, 171 & n. 5 (3d Cir.1997), aff'd 524 U.S. 206, 118 S.Ct. 1952 (1998) (quoting 28 C.F.R. Pt. 35 , App. A, preamble to ADA regulations.

Under these standards, Defendants' motion to dismiss CHAKO'S first five claims for disability discrimination under FRCP 12(b)(6) should be denied.

B. DEFENDANTS' ARGUMENT REGARDING STANDING AS TO CHAKO'S DISABILITY CLAIMS LACKS MERIT BECAUSE CHAKO MEETS THE REQUIREMENTS FOR ASSOCIATIONAL STANDING AS TO THOSE CLAIMS

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[5]CHAKO acknowledges, however, that there is disagreement among courts on this point. *See*, e.g., *Arriaga v. Loma Linda Univ.*, 10 Cal.App.4th 1556, 13 Cal.Rptr.2d 619 (1992).

Questions of standing are not reviewed under FRCP 12(b)(6); rather, questions of standing are reviewed as a jurisdictional issue under FRCP 12(b)(1). Standing "is a threshold jurisdictional requirement, derived from the case or controversy language of Article III of the Constitution." *Public Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 117 (3d Cir. 1997). Admittedly, it is the burden of the party seeking to invoke the Federal Courts' jurisdiction to demonstrate that it has standing. *FEW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 231, 110 S.Ct. 596 (1990).

CHAKO agrees with Defendants that the appropriate test to apply to determine if an association has standing to prosecute a suit in Federal Court is set forth in *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 97 S.Ct. 2434 (1977). The *Hunt* test provides that "[An association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 343. See also, *Property Owners of Whispering Palms, Inc. v. Newport Pacific, Inc.*, 132 Cal.App.4th 666, 673 (2005), quoting *Hunt*.

However, CHAKO disagrees that it cannot meet the test set forth in the first prong of *Hunt*. As an initial matter, Defendants read the requirement of the first prong of *Hunt* too narrowly. Defendants assert that the only way CHAKO could meet the first prong of *Hunt* is if CHAKO has the following member: "(1) she lives in San Francisco or is visiting for longer than thirty days; (2) her disability is mobility-related; (3) she uses a service animal to address the mobility restrictions; (4) her service animal is a pit bull between the ages of eight weeks and four years who is unsterilized; and (5) sterilizing that pit bull would prevent it from doing the work it was trained to perform." See, Defendants' Points and Authorities, page 9, lines 17-24.

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Although it is the duty of the plaintiff to "clearly and specifically set forth facts sufficient to satisfy [the] standing requirement," the level of specificity necessary to avoid dismissal for lack of standing should not be "exaggerated." *Clark v. McDonald's Corp.*, 213 F.R.D. 198, 206 (D. N.J. 2003), citing *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83, 86-87, 88 (3d Cir. 1991), followed by *Small v. General Nutrition Companies, Inc.*, 388 F.Supp.2d 83, 99.

In *Clark*, a case involving architectural barriers under the ADA, the defendants sought to defeat the associational standing of Access Today, a disability-rights organization. The defendants claimed that Access Today lacked standing because it failed to identify its members in its complaint, failed to plead which members had which disabilities, failed to plead which members visited which stores on which dates, failed to plead the discriminatory conduct encountered, and failed to plead which members planned to visit which stores in the future. In rejecting the defendants' argument, the Court in *Clark* wrote that the defendants' argument presented precisely the type of "exaggerated" pleading requirement rejected in *Hosp. Council*. *Clark, supra*, 213 F.RD. at 216-217.

In addition, the facts pleaded by the plaintiff (like a 12(b)(6) motion) must be accepted as true on a 12(b)(1) motion, and the Court may "presume that the general allegations in the complaint [as to standing] encompass the specific facts necessary to support those allegations." *Id.*, citing *Pennell v. City of San Jose*, 485 U.S. 1, 7, 108 S.Ct. 849 (1988); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 104, 118 S.Ct. 1003 (1998). CHAKO asserts that Defendants' strained reading of the standing requirement is similar to the argument advanced and rejected in *Clark*.

In its First Amended Complaint, which must be accepted as true, CHAKO pleaded:

"35. Plaintiff has members that are "qualified individuals with a disability" within the meaning of Title II of the ADA and who also reside in SAN FRANCISCO. Plaintiff

also has at least one member living in SAN FRANCISCO, who is a "qualified individual with a disability," and who requires and/or has the assistance of an already-sterilized "Pit Bull" service dog for mobility, for assistance in leaving the home, to go about a daily routine of grocery shopping, attending appointments, socializing outside the home, and generally those same activities, benefits, and privileges enjoyed by non-disabled persons.

36. Plaintiff also has at least one member living in SAN FRANCISO, who is a "qualified individual with a disability," and who requires and/or has the assistance of an intact service dog that, although not a "Pit Bull," could be and is reasonably likely to be confused or mistaken as either a "Pit Bull" or "Pit Bull"-mix subject to the ambit of the Local Ordinance; which is used for mobility, for assistance in leaving the home, to go about a daily routine of grocery shopping, attending appointments, socializing outside the home, and generally those same activities, benefits, and privileges enjoyed by non-disabled persons.

37. At least one of Plaintiff's disabled member's "Pit Bull" service dog has reached an age where it is no longer able to effectively perform its working functions. If Plaintiff's disabled member elects to obtain a younger, intact "Pit Bull" service dog, which Plaintiff's disabled member wants to do and which Plaintiff contends is its disabled members' right to do under the ADA, Plaintiff's disabled members will be forced to either violate the Local Ordinance or comply with the Local Ordinance and risk being without the assistance of their "Pit Bull" service dog for a period as long as 10 days or risk the death of the service dog. Because the Local Ordinance does not allow for an exception or reasonable accommodation for service or guide dogs, Plaintiff's members only way to avoid the Local Ordinance altogether is to obtain a service or guide dog that is not a "Pit Bull" or "Pit Bull"-mix breed subject to the Local Ordinance. This requirement of the Local Ordinance on Plaintiff's disabled members is more restrictive than the ADA's

protections for disabled persons using service dogs, which does not dictate what breed of dog can or should act as a service dog, and, accordingly, violates the ADA by chilling and deterring disabled persons from exercising their full and complete rights under the ADA."

Although one of the individuals identified in CHAKO's First Amended Complaint, the individuals referred to in these paragraphs are not the same person. With respect to Ms. Berry, in particular, she needs to replace her current pit bull service dog because the dog is getting too old to adequately perform the duties she needs it to perform to exist on some level of parity with non-disabled persons. Ms. Berry would like to get another pit bull service dog but is fearful that, if she does so, and does not comply with Defendants' ordinance, she will violate the law. See, Defendants' Request for Judicial Notice, Exhibit E, Declaration of Turanesha Berry. All that is required under *Hunt* is that "the association must allege that its members, or any one of them, are suffering immediate or *threatened* injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin* (1975) 422 U.S. 490, 511, 95 S.Ct. 2197. (Emphasis added.)

CHAKO's members referred to in the First Amended Complaint would be, essentially, house-bound if they had to go without their service dogs while they recover from sterilization procedures and are unable to perform their working functions. See, Defendants' Request for Judicial Notice, Exhibit E, Declaration of Turanesha Berry. As CHAKO has pleaded in its First Amended Complaint, the recuperation time for a dog that undergoes sterilization procedures, depending on the gender of the dog and on whether the procedure leads to complications, can be as long as 1 - 10 days. Sterilization procedures also carry with them the risk of death to the animal. Defendants have made no attempt to accommodate disabled individuals in their ordinance.

Admittedly, the membership CHAKO alleges in its First Amended Complaint do not *currently* own intact pit bull service dogs. Ms. Berry would like to obtain a younger, intact pit

bull service dog to replace her older service dog. CHAKO's other member, as alleged in the First Amended Complaint, owns an intact service dog that is reasonably likely to be confused with a "Pit Bull" and required by law to be sterilized under Defendants' ordinance. If that is the case, that member would also suffer the loss of services provided by her service dog as pleaded by CHAKO in its First Amended Complaint while the service dog recuperates from mandatory sterilization procedures. This loss would occur regardless of the dog's age.[6] CHAKO contends that this is enough to grant associational standing to CHAKO under FRCP 12(b)(1).

Under the ADA, all a disabled person must demonstrate in order to show an injury-in-fact under FRCP 12(b)(1) "is a real and immediate threat that a particular barrier will cause future harm." *Bacon v. City of Richmond*, 386 F.Supp.2d 700, 705 (E.D. Va. 2005). In *Bacon*, a case involving architectural barriers in public schools, the District Court observed:

> "The Court is not persuaded that the law requires a handicapped plaintiff, or one with an appropriate relationship to a disabled person...to suffer the public humiliation of unsuccessfully attempting to enter a public school facility in order to have standing under the ADA [or] RA."

Ibid.

By analogy, CHAKO's members need not suffer the actual loss of their service dogs after they are sterilized in order to have standing to challenge Defendants' ordinance. It is enough that Defendants' ordinance threatens them with a real and future harm.

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[6]CHAKO emphasizes this point because Defendants contend that CHAKO can only have associational standing if it has a member that owns an intact pit bull service dog between the ages of 8 weeks and 4 years of age. CHAKO disagrees. Under Defendants' ordinance, a disabled person would be required to sterilize her pit bull or pit bull mix service dog regardless of the dog's age. Even if a disabled person obtains an intact pit bull or pit bull mix service dog that is older than 4 years of age, she still faces the risk of having to go with the service dog for 1 - 10 days while the dog recovers from forced sterilization procedures and is unable to adequately and safely perform its working duties. Therefore, the age of the pit bull or pit bull mix service dog is not as weighty a factor as Defendants' contend.

C. PARTICIPATION OF CHAKO'S MEMBERS IS NOT REQUIRED AS TO ANY OF CHAKO'S CLAIMS BECAUSE CHAKO SEEKS ONLY INJUNCTIVE AND DECLARATORY RELIEF, NOT DAMAGES

It is almost a "bright-line rule" that cases involving merely claims for injunctive or declaratory relief do not require the individualized participation of an association's members. *Clark, supra,* 213 F.R.D. at 207, citing *Pennsylvania Psychiatric Society v. Green Spring Health Services, Inc.*, 280 F.3d 278, 284 (3d Cir. 2002). As Defendants acknowledge, the 9th Circuit applies this "bright-line rule". See, Defendants' Points and Authorities, page 12, fn. 7; see also, *Associated General Contractors v. Coalition for Economic Equity*, 950 F.2d 1401 (9th Cir. 1991); *California Sportfishing Protection Alliance*, 209 F.Supp.2d 1059 (E.D. Cal. 2002).

This "bright-line rule" has been applied to claims for violations of the ADA. In *Access 4 All, Inc. v. 539 Absecon Boulevard, LLC*, 2006 WL 1804578 (D. N.J.), the District Court of New Jersey, relying on *Clark*, rejected a defense motion to dismiss for lack of standing, writing:

> "In the instant matter, Plaintiffs are seeking injunctive relief 'including an order to make all readily achievable alternations to the facility to the extent required by the ADA...Indeed, no award of damages is sought by Access...Thus, an individualized assessment of Plaintiff's members to determine the measures that Defendant must take to become ADA compliant is not necessary..."

Id. at page 6.

Like the situation in *Access 4 All*, CHAKO seeks only injunctive and declaratory relief. CHAKO seeks no monetary damages. The participation of CHAKO's individual members is not necessary for the Court to determine if Defendants' ordinance complies with the ADA, particularly on CHAKO'S allegation that Defendants' ordinance does not adequately accommodate disabled persons. That being said, *Hunt's* third prong does not prohibit all individual participation by an association's membership. *Small, supra,* 388 F.Supp.2d at 99, citing *Hosp. Council of W. Pa. v. City of Pittsburgh*, 949 F.2d 83 (3d Cir. 1991),

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In any event, testimony regarding the time a service dog may need to recover from sterilization procedures and its inability to perform tasks such as mobility assistance or pulling wheelchairs during its recovery period can be established by expert testimony and not involve CHAKO's membership at all.

D. DEFENDANTS' ARGUMENT THAT A DISABLED PERSON CAN USE A SERVICE DOG THAT DOES NOT FALL WITHIN ITS ORDINANCE IGNORES THE RIGHTS OF DISABLED PERSONS AND IS NOT A REASONABLE ACCOMMODATION FOR PERSONS WITH DISABILITIES

Rather than simply make an exception for intact pit bull or pit bull mixes that act as service dogs, Defendants' answer to the conundrum faced by disabled persons like CHAKO's members is: simply get a service dog that is not a pit bull or pit bull mix or get a dog that is already sterilized. See, Defendants' Points and Authorities, pages 9, fn. 6; 10. Defendants write:

> "Accordingly, if CHAKO members could enjoy access *through the use of other service animals*, such as sterilized pit bulls or some other type of dog, there is no disability discrimination."

See, Defendants' Points and Authorities, page 15, lines 17-18. CHAKO contends that Defendants' argument plainly ignores the rights of disabled persons and does not constitute a reasonable accommodation under the ADA

1. Defendants Cannot Dictate To Disabled Persons What Breed Of Dog They Can Or Cannot Have As A Service Dog

The ADA is silent on the issue of what specific breeds of dogs can act as service dogs, or even what species of animal can act as a service animal. However, a fundamental policy of the ADA is to ensure access to civic life by people with disabilities, which includes providing access to disabled persons and their service animals.[7] Under the implementing regulations of the ADA, a

[7]For excellent discussions about the ADA and City Governments, as well as general statements of the rules regarding service animals under the ADA, the Court is directed to the U.S. Department of Justice's websites at www.usdoj.gov/crt/ada/comprob.htm and www.ada.gov. *See*, Plaintiff's RFJN, Exhibit C, filed herewith.)

service animal can be ***any*** guide dog, signal dog, or ***other animal*** individually trained to work or perform tasks for an individual with a disability, including but not limited to, guiding individuals with impaired vision, alerting individuals with impaired hearing to intruders or sounds, providing minimal protection or rescue work, pulling a wheelchair, or fetching dropped items. 49 C.F.R. § 36.104. Both public and private entities must permit service animals to accompany individuals with disabilities in vehicles and facilities. 49 C.F.R. § 37.167(d). The ADA and its implementing regulations pre-empt all, conflicting local ordinances and such ordinances cannot be used as obstacles to the ADA. *Green v. Housing Authority of Clackamas County*, 994 F.Supp. 1253 (D. Or. 1998) [Housing authority violated both ADA and Rehabilitation Act by refusing to allow tenants to keep hearing assistance animals.]

Because the ADA is silent on the issue of what breed of dog can or cannot act as a service animal, or even what type of animal can act as a service animal, Defendants cannot graft an additional requirement onto the ADA that, effectively, forbids disabled persons living in the CITY AND COUNTY OF SAN FRANCISCO from having pit bull or pit bull mix service dogs, makes it more onerous for disabled persons to have such service dogs, or fails to reasonably accommodate disabled persons with such service dogs.[8]

Admittedly, there are cases which - on their face - stand for the proposition that a disabled person cannot dictate to an entity or employer his or her preferred method of accommodation. See, Defendants' Points and Authorities, page 16, lines 6 - 19. However, the cases cited by Defendants do not advance their position because each of those case involved situations where the entity or the employer made one or more (and sometimes several) attempts to provide a

[8]Indeed, disabled persons are vulnerable to attack while in public. One might well choose a pit bull service dog because of the public perception (albeit false perception) that pit bulls are dangerous, and a would-be attacker might pause before targeting a disabled person with a pit bull service dog. Under the ADA, a service dog is a dog that provides "minimal protection" to a disabled person. A would-be attacker's perception that a pit bull service dog might pose a threat - even if the dog did not actually pose a threat - certainly seems to qualify as "minimal protection" for a disabled person justifying a disabled person in choosing a pit bull service dog.

reasonable accommodation to the disabled person, which were summarily rejected by the disabled person. Here, when Defendants enacted Ordinance No. 268-05, Defendants made no attempt to accommodate disabled persons living in the CITY AND COUNTY OF SAN FRANCISCO - and ardently assert that they are not required to do so now.[9]

2. Defendants Have An Ongoing Duty To Modify Their Local Ordinances To Accommodate Persons With Disabilities

The ADA forbids public entities from denying a disabled person the opportunity to participate in civic life. 28 C.F.R. § 35.130(b)(2). No qualified individual with a disability shall, on the basis of disability, be excluded from participation in civic life by a public entity. 28 C.F.R. § 35.130(a). City governments are required to make reasonable modifications to policies, practices, or procedures to prevent discrimination on the basis of disability, which can include modifications to local laws, ordinances, and regulations that adversely impact persons with disabilities. 28 C.F.R. § 35.130(b)(7).

Recently, in *Crowder v. Kitagawa*, 81 F.3d 1480 (9th Cir. 1996), the 9th Circuit addressed a state regulation requiring the quarantining of all dogs entering the State of Hawaii for 120 days to prevent the spread of rabies to Hawaii. Despite the legitimate public health concern of preventing rabies, the 9th Circuit reversed the District Court's granting of summary judgment in Hawaii's favor, ruling that the quarantine regulation violated the ADA.

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In reaching its conclusion, the *Crowder* Court examined Congress' intent behind the

[9]For an example of a local ordinance similar to LOCAL DEFENDANTS' ordinance that *does* make an accommodation for disabled persons, *see* *Johnson v. Center for Animal Care and Control*, 192 Misc.2d 210 (2002), citing N.Y. Code § 17-804.

ADA, writing that "Congress declared its intent to address 'outright intentional exclusion' as well as 'the discriminatory *effects* of architectural, transportation, and communication barriers, *overprotective rules and policies*, [and] *failure to make modifications to existing facilities and practices*." *Crowder, supra,* 81 F.3d at 1483. (Emphasis added.) The *Crowder* Court also noted that Congress intended to protect disabled persons from actions arising out of a discriminatory animus as well as 'thoughtlessness,' 'indifference,' or 'benign neglect'." *Id.*, citing *Alexander v. Choate,* 469 U.S. 287, 295, 105 S.Ct. 712 (1985). Finally, the *Crowder* Court acknowledged that, although Hawaii's regulation was facially neutral in that it required all persons coming into Hawaii - disabled or not - to quarantine their dogs, the Court recognized disabled persons' "unique dependence upon guide dogs," and concluded that Hawaii's regulation denied "meaningful access" to persons with disabilities. *Id.* at 1484.

Therefore, under the ADA, its implementing regulations, and *Crowder,* it is not necessary that CHAKO demonstrate that Defendants intentionally discriminated against disabled persons by enacting Ordinance No. 268-05. Moreover, the fact that the ordinance may be facially neutral in that it requires all owners of pit bulls or pit bull mixes living in the CITY AND COUNTY OF SAN FRANCISCO - disabled or not - to sterilize their animals is of no significance because disabled persons depend upon their service animals in a way that non-disabled persons do not.

Finally, as the *Crowder* Court wrote, "It is no response to assert that [a disabled person], like anyone else, can leave their dogs in quarantine and enjoy the public services they desire...[The general intent of Congress was to ensure that individuals with disabilities are not separated from their service animals..." *Crowder, supra,* 81 F.3d at 1485. "It should be further understood that a person with a disability using a guide, signal or service dog should not be separated from the dog. A person with a disability and his or her assistive animal function as a unit and should *never* be involuntarily separated...To require it would be discriminatory under the Americans With Disabilities Act." See, 135 Cong. Rec. S10,800 (1989). In other words, if a

disabled person wants to ride a city bus, for example, she should not have to do so without the assistance of her service dog and cannot be required to do so without violating the ADA.

Finally, the mere fact that a disabled person might be able to access services by other coping mechanisms does not obviate a public entity's obligation to make reasonable accommodations for disabled persons. Disabled persons need not prove that they have "no access" in order to plead a violation of the ADA or the Rehabilitation Act. *American Council of the Blind v. Paulson,* 2006 W.L. 3480268 at page 7.

Whether it was intended or not, the effect of Defendants' ordinance on persons with disabilities who own intact pit bull or pit bull mix service dogs is to separate those persons from their service dogs. As CHAKO has demonstrated, Defendants' ordinance results in a disabled person being unable to utilize the services of their service dog for a period of 1 to as many as 10 days, depending upon whether there are complications with the sterilization procedure.

In an effort to avoid the burden Defendants' ordinance places on disabled persons who own intact pit bull or pit bull mixes, and to distinguish the clear application of *Crowder* to this case, Defendants argue that the ADA does not forbid "isolated or temporary interruptions in service or access due to maintenance or repairs." See, Defendants' Points and Authorities, page 17, lines 27-28, citing 28 C.F.R. § 35.133(b). Defendants do not even appear to take their own argument seriously, as they "concede" that this regulation was probably not drafted with service animals in mind. See, Defendants' Points and Authorities, page 17, line 28 - page 18, line 3.

In fact, 28 C.F.R. § 35.133(b) is a regulation designed to address, primarily, the temporary interruption in service or access due to mechanical failures that cannot be reasonably avoided or anticipated by a place of public accommodation. Illustration of this regulation's true application can be seen, for example, in cases where elevators malfunction. See, e.g., *Martin v. Metropolitan Atlanta Rapid Transit Auth.*, 225 F.Supp.2d 1362 (N.D. Ga. 2002); *Cupolo v. Bay Area Rapid Transit,* 5 F.Supp.2d 1078 (N.D. Cal. 1997). Section 35.133(b) was never intended to be an

escape hatch to insulate discriminatory local ordinances that are purposefully enacted into law. Defendants' argument regarding Section 35.133(b) is a "red herring" that should not be taken seriously by this Court.

Admittedly, the separation that Ordinance 268-05 causes is not as protracted as the separation created by the state regulation in *Crowder*. However, the ADA sets forth no "bright line" that says 120 days (as in Crowder) is too much and 10 days (as is the case here) is not enough to make out an ADA violation. Neither do the cases interpreting the ADA. In fact, at least one District Court found a triable issue of fact as to whether a city's ordinance allowing backyard burning just *18 days* out of the year violated the rights of *one person* with respiratory and cardiac conditions. *Heather K. v. City of Mallard, Iowa*, 946 F.Supp. 1373 (N.D. Iowa 1996). Therefore, it is not necessary that Defendants' ordinance create a separation as long as the one created in *Crowder*, nor is it necessary that Defendants' ordinance affect all disabled persons living in the CITY AND COUNTY OF SAN FRANCISCO with service dogs before the ordinance violates the ADA.

Regardless of the length of the separation, Defendants' ordinance places a disabled person in the unenviable - and impermissible - position of either being excluded from civic life during the period of time that his service dog is recovering from mandatory sterilization procedure or having to make do without the assistance of the service dog. The ADA forbids a public entity from placing disabled persons in such a position, and requires that public entities make reasonable accommodations to their local ordinances for disabled persons.

3. Because DEFENDANTS' Ordinance Violates The ADA, CHAKO Has Also Stated Valid Causes Of Action Under The Rehabilitation Act, The Unruh Civil Rights Act, And The Disabled Persons Act

Interpretation and application of the Rehabilitation Act is closely linked to interpretation and application of the ADA. *Crowder*, *supra*, 81 F.3d at 1484. Moreover, Civil Code sections 51

and 54 both expressly state that a violation of the ADA shall also constitute a violation of those sections. Therefore, because Ordinance 268-05 violates the ADA, the ordinance also violates the Rehabilitation Act, Civil Code section 51, and Civil Code section 54.

In its original Motion to Dismiss, Defendants separately argued that CHAKO's claim based on the Unruh Civil Rights Act must be dismissed because the Unruh Civil Rights Act "does not protect citizens from discrimination by the government... ." In making this rather bald statement, Defendants relied entirely on *Spanish Speaking Citizens' Foundation, Inc. v. Low*, 85 Cal.App.4th 1179 (2000), relegating the more recent decision in *Gibson v. County of Riverside*, 181 F.Supp.2d 1057 (E.D. Cal. 2002) to a mere footnote.[10] *See*, Defendants' Points and Authorities in Support of First Motion to Dismiss, page 16, fn. 9.

Defendants did not assert this argument in their second Motion to Dismiss. Accordingly, CHAKO does not address this argument and contends that the Unruh Act does apply to Defendants in this case based on the holding and rationale of *Gibson v. County of Riverside*, 181 F.Supp.2d 1057 (E.D. Cal. 2002); *Nicole M. v. Martinez Unified School Dist.*, 964 F.Supp. 1369 (N.D. Cal. 1997), superseded by statute on other grounds; *Gates v. Superior Court*, 32 Cal.App.4th 481, 38 Cal.Rptr.2d 489 (1995); *Stoumen v. Reilly*, 37 Cal.2d 713, 234 P.2d 969 (1951); *Orloff v. Los Angeles Turf Club*, 36 Cal.2d 734, 227 P.2d 449 (1951); *Harris v. Capital Growth Investors XIV*, 52 Cal.3d 1141, 1151, 278 Cal.Rptr. 614, 617, 805 P.2d 873 (1991).

E. IN ITS 6TH CAUSE OF ACTION, CHAKO HAS ADEQUATELY PLEADED A VIOLATION OF ARTICLE I, SECTION 1 OF THE CALIFORNIA CONSTITUTION

In the 6th cause of action of the First Amended Complaint, CHAKO asserts that Defendants' ordinance violates Article I, Section 1 of the CA Constitution which provides that:

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[10]It should be noted that LOCAL DEFENDANTS refer, presumably inadvertently, to *Spanish Speaking Citizens'* as a case decided by the California Supreme Court. In fact, *Spanish Speaking Citizens* is an intermediate, appellate court opinion.

"All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Defendants argument with respect to CHAKO's 6th cause of action misses the mark. The thrust of the 6th cause of action is that the ordinance imposes a mandatory sterilization requirement on individuals who *already own* pit bulls or pit bull mixes. As CHAKO has pleaded, this requirement impairs the value of these individuals' property interests in such dogs because, at least with respect to individuals who own pure breeds, pure breeds of dogs cannot be shown in UKC, AKC, or ADBA conformation events. See, First Amended Complaint, ¶ 71. This inability to show these dogs dramatically reduces their property value to the individuals who own them, and violates Article I, Section 1.

Defendants' response that an individual can avoid this impairment by paying a simple, $100 fee, again, misses the mark. CHAKO concedes that the case law in this area is sparse, but it is not non-existent at Defendants' contend. An example of an analogous situation can be seen in *People v. Davenport*, 21 Cal.App.2d 292 (1937).

In *Davenport*, an individual who *already owned* certain securities was criminally prosecuted for selling those securities without first obtaining a broker's license. In reversing the defendant's conviction, the Court of Appeal wrote that, even if there were such a requirement under California law, such a requirement "would be unconstitutional as depriving a citizen of the state of an *inalienable* right...The sovereign people of the state of California in the most solemn manner known to the civilized world have guaranteed to each citizen the right of acquiring and possessing property which includes the right to dispose of such property in such innocent manner as he pleases and to sell it for such price as he can obtain." *Id.* at 863-864, citing Article I, § 1 of the California Constitution.

Individuals who already owned pure breed pit bulls that they acquired for AKC, UKC or ADBA show purposes – before the ordinance was passed – cannot be required to sterilize those animals without running afoul of Article I, section 1. Similarly, like the individual in *Davenport*, these individuals cannot be required to obtain a breeder's license in order to continue to enjoy the property interest they have already acquired.

By the express terms of its 6th cause of action, CHAKO concedes that the ordinance can be applied *prospectively* and not violate Article I, section 1. However, the ordinance cannot be applied *retrospectively* against individuals who had already perfected a property interest in intact pit bulls before the enactment of SB 861 and the local ordinance.

F. AT THE TIME OF FILING OF THE COMPLAINT, CHAKO HAD HAD AT LEAST ONE MEMBER MEETING THE REQUIREMENTS FOR STANDING ON CHAKO'S CLAIM THAT ORDINANCE 268-05 IS VOID-FOR-VAGUENESS UNDER THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT

Standing in Federal Court is determined at the time of filing of the Complaint. *Aspex Eyewear, Inc. v. Miracle Optics, Inc.*, 434 F.3d 1336 (C.A. Fed. 2006); *Lynch v. Leis*, 382 F.3d 642 (6th Cir. 2004). At the time of the filing of CHAKO'S Complaint, CHAKO had at least one member who resided in the CITY AND COUNTY OF SAN FRANCISCO and who owned an intact dog that is *not* an American Pit Bull Terrier, American Staffordshire Terrier, or Staffordshire Bull Terrer, but could fit the description of "pit bull" as that term is defined in Ordinance No. 268-05.[11] That person is still a member of CHAKO, and is now pleaded in paragraph 36 of the First Amended Complaint.

Defendants allege that CHAKO has solicited members to confer standing upon CHAKO. See, Defendants' Points and Authorities, page 19, line 24 - page 20, line 5. The membership alleged in CHAKO's First Amended Complaint are members that have existed since before the

[11]CHAKO attempted to locate this member prior to filing this Opposition, but was unable to do so at her last known address. It is possible that the member has moved, and CHAKO is still attempting to locate her.

initial Complaint was filed, and were not obtained as Defendants suggest. At the time of Defendants' first Motion to Dismiss, CHAKO was unable to locate its member who owned an intact dog that was likely to be confused to with a pit bull or pit bull mix. However, CHAKO has located this individual, and this individual was a member at the time the initial Complaint was filed. See, Dawn Capp Declaration, filed herewith.

G. CHAKO'S "VOID-FOR-VAGUENESS" CLAIM DOES NOT FAIL ON ITS MERITS

On the merits of the "void-for-vagueness" claim the case law is not nearly as uniform as Defendants' contend. Furthermore, CHAKO is unaware of any California cases applying the "void-for-vagueness" doctrine in the context of state or local laws directed at pit bulls.

In *American Dog Owners Assoc'n v. Lynn*, 404 Mass. 73, 533 N.E.2d 642 (1989), the Massachusetts Supreme Court addressed a local ordinance that went through a number of versions in its attempts to regulate pit bulls. Similar to Defendants' ordinance, earlier versions or the ordinance in *Lynn* had sought to regulate and control pit bulls by reference to breeds of dogs known as "American Staffordshire, Staffordshire Pit Bull Terrier, or Bull Terrier." *Id.* at 643-644. Ultimately, the ordinance was amended to define pit bulls by reference to "common understanding and usage" of that term. *Id.* at 646.

In an advisory opinion, the Massachusetts Supreme Court first addressed the "common understanding and usage" definition, holding that this standard was unconstitutionally vague. *Lynn, supra*, 533 N.E.2d at 646. The Court went on to address the earlier versions of the ordinance which, like Defendants' ordinance, sought to define the term "pit bull" by reference to particular breeds. In finding these earlier versions unconstitutionally vague, the Court wrote:

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> "The evidence regarding the first three ordinances indicated, however, that some dogs might appear to be 'Pit Bulls' yet belong to a breed 'commonly understood *not* to be "Pit Bulls,' and that some dogs, 'commonly understood' by the owner or dog registry to *be* a breed 'known as Pit Bull' might not *appear* to be 'Pit Bulls'..."

Id.

More recently, in *Toledo v. Tellings*, 2006 W.L. 513946,[12] the Ohio Court of Appeals invalidated a local ordinance similar to Defendants' noting that there was evidence that "more than ten non-pit bull breeds look very much like pit bulls..."[13] *Id.* at page 12. The Court went on to write:

> "[I]t is unlikely that the owner of a pit bull could ever overcome the state's 'prima facie' evidence, since, he or she would be required to 'prove a negative.' Without documentation to prove the dog's breed origins, a non-pit bull owner could easily be ensnared under the statute, even though unaware that his or her dog could 'fit the description' of his local dog warden agency... Based upon the facts presented, we conclude that the subjective identification of pit bulls may often include both non-pit bulls or dogs which are not vicious, to the extent that an ordinary citizen would not understand that he was breaking the law and which would result in the occurrence of arbitrary arrests and criminal charges...[W]e conclude that [the ordinances] are unconstitutionally vague."

Toledo, supra, at page 13-14.

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[12]So as not to mislead the Court, it should be noted that *Toledo* appears to have been accepted for review by the Ohio Supreme Court as of August 2, 2006. However, Westlaw shows that it is still citable authority, and for that reason, Plaintiff cites it here as at least persuasive authority for the Court.

[13]This problem can easily be seen by examining pictures of "pit bull" look-alikes and attempting to pick the dog that is actually a pit bull. See, www.pitbullsontheweb.com/petbull/findpit.html. The above-mentioned website offers viewers of ordinary intelligence the opportunity to try and pick the dog that is the pit bull from a choice of 25 pictures of dogs. This website illustrates the vagueness problem inherent with Defendants' ordinance.

Under Defendants' ordinance, a dog is a "pit bull" if it possesses 5 out of 8 characteristics identified by Animal Care and Control as pit bull characteristics. See, Young Declaration, Exhibit "A," filed herewith. CHAKO contends and has pleaded that these characteristics could easily apply to a wide variety of non-pit bull dog breeds. As such, a person of ordinary intelligence would not know whether his or her dog is a pit bull or pit bull mix.

Furthermore, by referring to the AKC and UKC definition of American Pit Bull Terrier, American Staffordshire Terrier and Staffordshire Bull Terrier, Defendants have not cured the vagueness problem with their ordinance. First, the UKC does not recognize a breed known as an American Staffordshire Terrier, while the AKC does not recognize a breed known as an American Pit Bull Terrier. In other words, neither of these organizations have definitions for *all three* of the breeds listed in Defendants' ordinance. Second, the definitions provided by these organizations can, as CHAKO has pleaded, apply to numerous other dogs, and offer little guidance to a person of ordinary intelligence.[14] Third, the definitions provided by the AKC and UKC are not uniform with each other and do not match the description provided by Defendants on Exhibit A to the Young Declaration. This creates further confusion and potential for misleading a person of ordinary intelligence, with the result being arbitrary enforcement of the ordinance.

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[14]The AKC breed standards can be found at www.akc.org/breeds. The UKC breed standards can be found at www.ukcdogs.com. These standards are often conflicting and are designed for breeders and judges of dog breeds, not for the person of ordinary intelligence trying to determine what breed his or her dog is.

III. CONCLUSION

For the foregoing reasons, CHAKO respectfully requests that the Court deny Defendants' Motion in its entirety. Alternatively, if the Court decides to grant Defendants' Motion as to any alleged pleading deficiencies, CHAKO respectfully requests leave to amend its Complaint.

Dated: December 20, 2006

LAW OFFICES OF ERIC G. YOUNG

By:_____/s/_____
Eric G. Young, Attorney for Plaintiff
COALITION OF HUMAN ADVOCATES FOR K9'S & OWNERS

CERTIFICATE OF SERVICE

Coalition of Human Advocates for K9's & Owners v. City and County of San Francisco
U.S. District Court (Northern Dist. Cal.) Case No. C06-1887 MMC

I, Eric G. Young, declare that I am over the age of 18 years, and am not a party to the within-entitled action. My business address is 100 B Street, Suite 340, Santa Rosa, California 95401

On **December 20, 2006,** I served on the parties in said cause the following document(s):

1) Plaintiff's Memorandum of Points and Authorities in Opposition to Defendants' Motion to Dismiss Plaintiff's First Amended Complaint

(X) **BY MAIL** - By placing a true and correct copy thereof in a sealed envelope with postage fully prepaid thereon and addressed as follows:

( ) - I personally deposited the aforementioned envelope with the U.S. Postal Service on the date set forth above.

(X) - I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepared at Santa Rosa, California, in the ordinary course of business. I am aware that, on motion of the party service, service is presumed invalid if postal cancellation date or postage meter date is more than one day after the date of deposit for mailing.

( ) **BY PERSONAL SERVICE** - I caused each such document to be delivered by hand to the person or persons noted as follows:

() **BY FACSIMILE** - I caused the said document(s) to be transmitted by Facsimile machine to the following person, address and/or number:

( ) **BY EXPRESS MAIL** - I caused the said document(s) to be deposited into a designated Express Mail box for pick up on the date of execution of this Declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and was executed on **December 20, 2006**, in Santa Rosa, California, County of Sonoma, State of California.

_____/s/_____
Eric G. Young