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COURTESY COPY

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

PEOPLE OF THE STATE OF CALIFORNIA, by and through Dennis Herrera, City Attorney for the City and County of San Francisco,

Plaintiff,

vs.

OAKDALE MOB, a criminal street gang sued as an unincorporated association; and Does 1-500 inclusive,

Defendants.

Case No. CGC-06-456-517

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S EX PARTE APPLICATION FOR ORDER TO SHOW CAUSE RE: PRELIMINARY GANG INJUNCTION

Hearing Date:	November 22, 2006
Time:	9:30 a.m.
Dept:	Dept. 301
Judge:	Honorable Peter Busch
Complaint Filed:	September 27, 2006
Trial Date:	None yet

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I. INTRODUCTION

The City Attorney's Office is seeking a far-reaching injunction that will dramatically enhance police presence and power in the Oakdale community. Many residents of Oakdale oppose the injunction as an unwarranted interference with their personal freedom of movement and association. On its own, the Oakdale community has made significant strides in reducing the incidence of youth violence and other crimes targeted by the City. The truce that was brokered by members of the community is only one example of the positive steps taken to improve the quality of life in the community through cooperation, not the exertion of yet more police power. As a result of these efforts, conditions in the community have truly changed for the better. The City's portrayal of Oakdale residents as "filled with fear, intimidation, anxiety and quite invasion of privacy" is both misleading and insulting to many members of the community.

Shanteak Harris has longstanding ties to the Oakdale Community, and he has become a valued asset to that community. Mr. Harris was instrumental in brokering the successful cease fire that brought significant relief from violence in the Bayview area. He continues to benefit the community by his involvement in the Safe Haven and Stop the Violence programs for students, and the Mayor's Communities of Opportunity program that employs residents on community renovation and improvement projects. He serves as a model and mentor to the young people of Oakdale, and he is dedicated to helping them avoid his mistakes. The City's attempt to enjoin Mr. Harris's presence in the Oakdale community is wholly misguided, and emblematic of the baselessness, or staleness, of many of its essential allegations

The City cannot prevail on the merits as to Mr. Harris for the following reasons: First, the City has failed to prove that the ostensible defendant or Mr. Harris constitutes a public nuisance within the community. As a corollary, the City has also failed to show that it will be irreparably harmed if the injunction is not granted. There has been no credible showing that the issuance of the preliminary injunction will improve the lives of the residents in the Oakdale community. To the contrary, there is every reason to conclude that granting the preliminary injunction will impinge the liberty of the whole community, not only that of Mr. Harris.

Accordingly, the City is not entitled to a preliminary injunction that will cause unjustifiable harm to Mr. Harris and the Oakdale community.

II. FACTUAL AND PROCEDURAL BACKGROUND

In December 2005, the City Attorney's office first publicized its intention to seek gang injunctions to combat violence and improve the quality of life in selected San Francisco communities. Oakdale was chosen as the test community for this strategy. For ten months, the City Attorney ("Plaintiff") gathered evidence to demonstrate the need for injunctive relief in Oakdale. That evidence consists entirely of police declarations and records. At no time during this extended period did the Plaintiff or any of the 65 declarant police officers solicit the input of community organizations, leaders or ordinary residents. Declaration of Jim Queen ("Queen Decl.") ¶ 4. Accordingly, the application for a gang injunction is not supported by a single declaration from community members.

On September 27, 2006, the Plaintiff filed its Complaint for a permanent injunction against the Oakdale Mob, which is alleged to be a criminal street gang, and against 500 Doe defendants. The Complaint names no individual defendants, although twenty-three individuals are designated for service of process as alleged members of the Oakdale Mob, and the Complaint alleges that there are eighty members in the gang. The Plaintiff provided actual notice to only three alleged gang members. Defendant-Intervenor Shanteak Harris was named in the list of twenty-three alleged gang members, and he was one of the three individuals served with the Complaint.

Along with the Complaint, the Plaintiff filed an Ex Parte Application for Order to Show Cause re: Preliminary Gang Injunction ("preliminary injunction motion"), which was scheduled for hearing on October 30, 2006. On learning of the action and the City's application for a preliminary injunction, the President of the African-American Community/Police Relations Board ("the Board") scheduled a meeting to address residents' concerns. Declaration of Damone Hale ("Hale Decl.") ¶ 5. The meeting took place on October 4, which led to a meeting by the Board with City Attorney Dennis Herrera. Hale Decl. ¶ 5. In response to the Board's objection

regarding lack of consultation and communication, the Plaintiff responded that he knew about the Board, but had made no attempt to contact Board members. Queen Decl. ¶ 7.

At the October 30 hearing, this Court, expressing concern about the constitutional and other implications of issuing a preliminary injunction, issued a temporary restraining order more limited in scope than the preliminary injunction sought by the City. The Court then set the hearing date on the preliminary injunction motion for November 22, 2006.

On November 13, 2006, Shanteak Harris filed an Ex Parte Motion for Leave to Intervene, and a motion for a continuance of the November 22 hearing date. The motion for a continuance was denied without prejudice, and the hearing on the motion to intervene was then scheduled on November 22.

In the meantime, in marked contrast to Plaintiff's police-only approach, Defendant Intervenor reached out to the community – his community – for its reaction to the proposed gang injunction. As the attached declarations unequivocally show, the reaction of community and religious leaders, activists and longtime residents is uniform opposition to this injunction. Their declarations paint a very different, and more positive, picture of the community and its residents than the bleak and terrifying picture Plaintiff wants the Court to see.

Oakdale is a close-knit, caring community that is making every effort to save its youth from the current epidemic of violence. The attached declarations describe the array of services and programs the community has developed to support and provide opportunities for its young people. *See e.g.* Declaration of Reverend Ernest L. Jackson ("Jackson Decl.") ¶¶ 4-18. The declarations further attest to the successes of these community efforts in reducing crime and improving the quality of life for all of Oakdale's residents. Plaintiff's marked preference for unfettered police power over cooperation with the community is the wrong message and the wrong solution for the real problems facing Oakdale's residents. *See e.g.* Queen Decl. ¶ 10; Declaration of Betty Higgins ("Higgins Decl.") ¶ 7; Declaration of Jaron Browne ("Browne Decl.") ¶ 3.

Shanteak Harris is a "dedicated, committed and positive member of the community." Jackson Decl. ¶ 19. He is involved in a variety of projects that contribute to the safety and

stability of the neighborhood. The singling out of Mr. Harris for exclusion is thus a cause for particular concern and apprehension to those who care about and work with Oakdale's youth. Jackson Decl. ¶ 17.

III. ARGUMENT

A. The Requirements for the Issuance of a Preliminary Injunction Have Not Been Met.

In order to obtain a preliminary injunction, Plaintiff must show that it is likely to prevail on the merits at trial. If Plaintiff is successful on this point, the Court must weigh the interim harm plaintiff is likely to sustain if the injunction is denied against the harm defendant will suffer if the preliminary injunction issues. *People ex rel. Gallo v. Acuna*, 14 Cal. 4th 1090, 1109 (1997).

1. Plaintiff Has Not Shown That It Is Likely to Prevail at Trial.

At this early point in the litigation, it is uncertain whether Plaintiff will be able to prevail on the merits. One overarching defect in Plaintiff's case is that the evidentiary showing is based entirely on declarations from police officers. Plaintiff has failed to produce any declarations from community members in support of the preliminary injunction. Thus, Plaintiff's evidence is entirely a reflection of outside voices rather than those of the community members who live and work there.

In sharp contrast to Plaintiff, Mr. Harris has produced, in the limited time granted by the Court, nine declarations from community leaders, members, and activists opposing the preliminary injunction, and indicating that they are not afraid of the alleged gang. Clearly, residents themselves do not feel they are living in an "urban war zone." For example, Betty Higgins has lived in and around the "zone" for the past fifty years, and raised her children there. Higgins Decl. ¶ 2. In all that time, neither she nor her children have ever been threatened by the alleged gang or its members. *Id.* at ¶¶ 4, 6. Perhaps most important, she does not believe that it is the gang who is responsible for what crime does exist in the community. *Id.* at ¶7. These experiences and beliefs are echoed by other community members, including Nicole Clay, a stay-at-home mother living within the "Zone." Declaration of Nicole Clay ("Clay Decl.") ¶¶2-6. *See also*, Declaration of Kevyn Lutton ("Lutton Decl.") ¶¶ 2-5; Declaration of Tino Tuufuli ("Tuufuli Decl.") ¶¶ 2, 4-6.

In short, it must not be presumed that Plaintiff will prevail simply because *some* gang injunctions may be appropriate under *some conditions*. The Court must have more convincing evidence that Plaintiff will succeed on the merits before agreeing to issue a preliminary injunction that restricts the liberty interests of individuals as well as the community as a whole.

2. Plaintiff Has Not Shown that the Community Will Be Irreparably Harmed.

As noted above, the Court must weigh "the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm the defendant is likely to suffer if the preliminary injunction were issued." *Acuna, supra*, 14. Cal. 4th at 1109. Plaintiff alleges that the community will continue to suffer from the scourge of gang-related violence. However, the complete absence of any community declarations to that effect belies Plaintiff's claims. Further, Mr. Harris has produced several declarations from community members alleging precisely the opposite. *See, e.g.,* Clay Decl. ¶¶ 4-6; Higgins Decl. ¶¶4-6; Lutton Decl. ¶¶3-5.

More important, Plaintiff has utterly failed to provide any evidence that the issuance of the preliminary injunction will improve the lives of residents in the exclusion area. In contrast, Mr. Harris has presented numerous declarations in which community members, leaders and activists indicate both that they do not believe that the gang injunction is the appropriate solution to any problems in the community, and that Plaintiff not only failed to seek their input, but actively obstructed it. *See, e.g.,* Queen Decl. ¶¶ 7-8, 10; Jackson Decl. ¶ 21. Before the Court should issue an injunction that will significantly restrict the liberty of numerous individuals, there should, at a minimum, be evidence that community members believe they are truly harmed by the defendant's conduct.

B. No Preliminary Injunction Should Issue Because Plaintiff Has Not Met its Burden of Proof.

1. Plaintiff Has Failed to Prove the Prima Facie Elements Required for the Issuance of a Gang Injunction by Clear and Convincing Evidence.

Plaintiff must prove all elements required for the issuance of a gang injunction by clear and convincing evidence. *People v. Englebrecht*, 88 Cal.App.4th 1236 (2001). This heightened standard of proof is needed in the special context of gang injunctions "not because the personal

activities enjoined are sublime or grand but rather because they are commonplace, and ordinary." *Id.* at 1256. The *Englebrecht* court expressed the need for a standard of proof allowing a greater confidence in the decision reached because "particularly important individual interests or rights are at stake." *Id.* at 1254.

Clear and convincing evidence requires a finding of high probability. *Broadman v. Commission on Judicial Performance,* 18 Cal. 4th 1079 (1988). The evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong to command the unhesitating assent of every reasonable mind." *In re Angelia*, 28 Cal. 3d 908 (1981), *People v. Caruso*, 68 Cal. 2d 183 (1968). In order to satisfy the "clear and convincing" standard in the injunction context it must appear with reasonable certainty that the wrongful acts will be continued or repeated. *Russell v. Douvan*, 112 Cal. App. 4th 39 (2003).

Plaintiff has failed to establish by clear and convincing proof that the requisite elements for the issuance of a gang injunction have been met. To establish that a gang injunction is necessary under the public nuisance doctrine, Plaintiff must show that: 1) the entity they seek to enjoin is a criminal street gang, 2) that there is a public nuisance being caused by the Defendant, 3) that imposing the restrictions requested will effectively abate the nuisance, and that 4) each of the individuals who Plaintiff plans to enjoin is an "active gang member." *People v. Englebrecht*, 88 Cal.App.4th at 1242-1243.

2. <u>Plaintiff Has Submitted Insufficient Evidence to Show that the "Oakdale Mob" is a Criminal Street Gang or A Legal Entity Capable of Being Enjoined.</u>

Plaintiff named the Oakdale Mob as sole Defendant in this action and therefore must establish that the alleged gang is a legal entity capable of being sued and that it is a criminal street gang causing a public nuisance.

For the purposes of a gang injunction, the general definition of a criminal street gang in Penal Code section 186.22 is not determinative, as the Plaintiff would have this court believe. Indeed, the *Englebrecht* court made clear that, for the purposes of a gang abatement injunction, the Penal Code definition must be modified to include proof that "the group have as one of its primary activities not the commission of the enumerated crimes, but rather the commission of the acts constituting the public nuisance." *People v. Englebrecht*, 88 Cal.App.4th at 1258.

Furthermore, Plaintiff takes the oxymoronic stance that the "Oakdale Mob" is a criminal street gang responsible for countless criminal acts enumerated in Section 186.22(e) of the Penal Code and, *at the same time*, is, under the Corporations Code, an "unincorporated association," defined as "an unincorporated group of two or more persons joined by mutual consent *for a common **lawful** purpose*, whether organized for profit or not." Corp. Code section 18035(a) (emphasis added). Plaintiff has simply failed to provide a lawful purpose qualifying the Oakdale Mob as an unincorporated association capable of being sued.[1]

3. Plaintiff Has Presented Insufficient Evidence Showing that the Defendant is Causing a Public Nuisance.

The public nuisance doctrine is an equitable remedy by which to protect community interests. *People ex. rel. Gallo v. Acuna* 14 Cal.4th at 1103. Courts have refused to grant injunctions on behalf of the state except where the objectionable activity can be brought within the terms of the statutory definition of public nuisance. *Id.* at 1107, citing *People v. Lim*, 18

[1] Not every group of individuals that associates together may be considered an unincorporated association. Rather, the group must have some system of organization and means of functioning as a group, such that "fairness requires the group be recognized as a legal entity." *Barr v. United Methodist Church*, 90 Cal. App. 3d 259, 266 (1979). The evidence indicates that the Oakdale Mob is an extremely amorphous entity with little or no structure. There is no evidence of meetings at which either the leadership or the members make decisions about how the group will conduct its affairs. The most that the State's allegations show is some sort of loose affiliation or identification. In fact, Plaintiff concedes that the "Oakdale Mob has an informal structure. Informal gangs have a tendency to be looser and more fluid in their structure and their associations." *Broberg Decl at ¶ 22*. Where, as here, the relief sought acts not against the entity but against the individuals that the State claims are its members or "associates," it cannot be said that "fairness requires" that the Oakdale Mob, as the sole defendant in this action, be treated as a legal entity.

Cal.2d 872, 878-879 (1941). A public nuisance is one which affects at the same time the entire community or neighborhood. Civ. Code Section 3480. To be enjoinable, the interference with community interests must be both substantial and unreasonable, which requires a real and appreciable invasion of Plaintiff's interests. *Id.* at 1105.

Plaintiff makes blanket assertions that the "Oakdale Mob" threatens the quality of life and the safety of residents in the "Safety Zone" without presenting the necessary evidence to verify this claim. Plaintiff attaches declarations from San Francisco police officers reciting criminal or suspected criminal activity by named individuals. This is simply not enough. An injunction to abate a public nuisance stems from the willingness to vindicate the value of community and the collective interests it furthers rather than punish criminal acts. *Id.* Plaintiff fails to include a single declaration from a member of the community to verify that what the police claim on their behalf is true and accurate.

In stark contrast to the evidence presented in the instant case, the *Acuna* court relied heavily on the declarations submitted by community members, in finding cause for an injunction against 38 named defendant gang members. *Id.* at 1118 ("One Rocksprings resident recounted an incident in which gang members had threatened to cut out the tongue of her nine-year-old daughter if she talked to the police… Another resident reported her neighbor's property had been vandalized and the resident threatened after complaining to police that gang members had urinated in her garage."). Here, Plaintiff has simply failed to show that this injunction vindicates community interests.

In fact, members of the community have spoken out to oppose this remedy and to challenge Plaintiff's claim that this provides necessary or useful relief for the people living in Oakdale. Ms. Betty Higgins, a retired Muni driver who raised two adult children in the "Safety Zone," stated that she does, "not believe that a gang injunction is the solution to the problems in

our community." Higgins Decl. ¶ 7. Ms. Tino Tuufuli, who has lived in the Oakdale neighborhood for over 18 years and is the mother of a six-year old, states that, "my neighborhood is not dominated by gangs, and I do not fear that I will be hurt by gang confrontations if I go outside." Tuufuli Decl. ¶ 4. Ms. Tuufuli readily allows her children to play in the "Zone" without fear they will be threatened by gang members. *Id.* She has never experienced gang members blocking the sidewalks or streets, activities Plaintiff contends are commonplace. *Id.* Ms. Nicole Clay, the Secretary of the Tenants' Association and the mother of two adolescents—ages 11 and 16—states, "I do not believe that a gang is responsible for crime in the area, nor do I believe a gang injunction is the solution for the problems in our area." Clay Decl. ¶ 6. Jim Queen, who has been a community activist in the "Zone" for over 39 years and is a founding member of the African-American Community Police Relations Board, states that, though he is in the "Zone" regularly, he has "not experienced gang violence, harassment or intimidation" and unequivocally states that he does "not believe the community is dominated by gangs." Queen Decl. ¶ 8.

Furthermore, Plaintiff presents insufficient evidence to show that the criminal activities described as constituting a public nuisance were committed at the direction or for the benefit of the Oakdale Mob. Individuals who are members of organizations clearly retain the ability to act in their individual capacity. Evidence that they may also be members of or have former allegiances to a group does not establish that any given action was performed in association with that group. To establish that the Oakdale Mob is responsible for the activities of individuals, Plaintiff would need to present evidence showing that the group directed these actions or benefited from them, such as retaining some portion of drug sale profits, supplying weapons, etc.

4. Plaintiff Has Presented Insufficient Evidence That Enjoining the Activities Requested Will Accomplish the Purported Objective of the Injunction

Plaintiff has not shown that the restrictions in the proposed order will accomplish the purported objective of the injunction and that the scope of its terms are the narrowest possible to prevent the alleged harm. "It is a familiar doctrine of equity that the scope of the injunction will be limited to the wrongful act sought to be prevented." *Magill Bros. v. Bldg. Service Employees' Int'l Union*, 20 Cal. 2d 506, 512 (1942) (enjoining union members from making false statements but preserving their right "to picket peacefully and honestly."). This ensures that individuals are not deprived of liberty without just cause. Plaintiff has failed to make this showing.

Second, Plaintiff has presented no evidence to show that gang injunctions, as a general strategy, are an effective remedy for preventing the nuisance activity that Plaintiff purportedly aims to abate. In fact, Jim Queen, who has extensive experience in addressing community issues states, based on his long-standing participation with this community, "I firmly believe that the gang injunction is not the right answer for violence in the community," and "will negatively impact families in the area." Queen Decl. ¶ 9. Before imposing probation-like restrictions on nearly 100 individuals, there must be assurances that this limitation on individual liberty will achieve an actual reduction in harm.

5. Plaintiff Has Presented Insufficient Evidence to Establish that Shanteak Harris is an Active Member of the Alleged Oakdale Mob and that His Activities Contribute to the Nuisance to be Abated.

Plaintiff bears the burden of proving by clear and convincing evidence that each individual it intends to bind is an active gang member in terms of the nuisance activity. *People v. Englebrecht*, 88 Cal.App.4th at 1261. Active gang membership in the gang injunction context requires that the individual to be bound participate or act in concert with the enjoined entity to help cause the nuisance and that the participation or acting in concert with "be more than nominal, passive, inactive or purely technical." *Id.* The *Englebrecht* court further rejected the State's argument that the criteria established for gang membership by the Gang Task Force amount to a definition of gang membership for the injunction context. *Id*. ("Those factors may

provide a useful guide for determining if a defendant is a gang member but they do not ultimately define the concept of membership in the gang abatement injunction context.").

Officer Broberg's allegations regarding Shanteak Harris are found at paragraphs 390-411 of his declaration. Contrary to Plaintiff's intentions, these paragraphs establish, in fact, that Mr. Harris is not an active member of any gang or a nuisance to the community. Mr. Harris's last charged criminal act occurred in October 7, 2002. Broberg Decl., ¶ 397. The declaration, moreover, shows not a single criminal act, other than alleged loitering, since then. To the contrary, Officer Broberg concedes that Mr. Harris was instrumental in brokering the cease fire agreement that has been the most effective remedy for gang violence initiated by the community. Broberg Decl. ¶ 408.

The declarations of community leaders, as well as longtime residents, thoroughly refute Officer Broberg's assertion that Mr. Harris is an active member of the Oakdale Mob or poses any threat of nuisance to the community. *See generally,* Jackson Decl.; Queen Decl. The declarations show not only that Mr. Harris is not loitering or trespassing in the Oakdale area, but more forcefully that he makes a valuable contribution to the safety and well-being of the community.

Reverend Ernest L. Jackson, the Pastor of the Grace Tabernacle Church located at 1121 Oakdale Avenue, attests to Mr. Harris's commitment to improving the community. Reverend Jackson specifically describes his work with Mr. Harris to create a community center for the residents and children of Oakdale Avenue. Jackson Decl. ¶ 18; *see also*, Clay Decl. ¶ 4.

The injunction and exclusion of Mr. Harris from Oakdale would be a tremendous loss for the residents, most particularly the youth of the community. Not only has Plaintiff failed to meet its burden of proof by clear and convincing evidence, it has failed to adduce any evidence showing that Mr. Harris is an active gang member. Accordingly, Plaintiff's attempt to enjoin Mr. Harris as a purported member of the Oakland Mob must be denied.

C. **Any Injunction Issued by the Court Must Be Narrowly Tailored to Comply with Constitutional Mandates and Established Principles of Equity.**

The scope of the proposed injunction must be limited as a matter of constitutional law and in compliance with equitable considerations. To be constitutionally sustainable, the proposed order must "burden no more speech than necessary to serve a significant government interest." *Madsen v. Women's Health Center*, 512 U.S. 753, 761 (1994). Additionally, the equitable principle of public nuisance law requires that the provisions of the proposed order must be couched in the narrowest terms possible to achieve the purported goals of the injunction.

Provisions (5) No Trespassing, (6) Do Not Associate, and (8) Obey Curfew fail to meet these required standards. Each of these provisions enjoins more activities than necessary to abate the nuisance, lacks a sufficient nexus between the alleged harm and the proposed restrictions, and runs the risk of impacting more First Amendment activity than necessary to meet government's ends.

No Trespassing

This provision enjoins more activities than necessary to abate the alleged nuisance. Plaintiff has failed to show that trespassing is so extensive a problem within the community as to necessitate such a rigid restriction on all homes and buildings within the "Zone." Several community members who have resided in or near the "Zone" for periods of time ranging between twelve and fifty years have stated that they (1) have never had their property vandalized by gang members, and (2) have never had gang members come into their home without permission. *See* Clay Decl. ¶ 5; Higgins Decl. ¶ 6; Lutton Decl. ¶ 4; Tuufuli Decl. ¶ 5. Furthermore, obtaining written permission of the owner or owner's agent whenever not lawfully accompanied by the owner is overly burdensome on those enjoined.

Do Not Associate

This provision requires more enumerated exceptions in order to be valid. Unlike in *Acuna*, where the alleged gang members "engaged in no expressive or speech-related activities which were not either criminally or civilly unlawful," 14 Cal. 4th at 1121, Shanteak Harris and others Plaintiff seeks to enjoin have been involved in and continue to participate in lawful community

activities within the "Safety Zone." Mr. Harris, for example, is working on a project to renovate the Caheed Nursery Day Care Center in order to provide children in the community with a safe and healthy place to spend time. *See* Jackson Decl. ¶ 18. Particularly given that Mr. Harris has taken the lead in this project to recruit and hire workers to help with the renovation, *Id.* at ¶ 19, the association provision of the proposed injunction would prevent his continued participation in this type of lawful and positive community activity, unless broader exceptions are granted.

Furthermore, several alleged gang members have attended community meetings sponsored by the Mayor's Office of Community Development and Communities of Opportunities that were to address key issues of concern for community residents. Jackson Decl. ¶¶ 14 and 15. Future attendance at such meetings would be prohibited by the proposed injunction. As a result, the "injunction is destroying some of the very people who are trying to make positive changes." Queen Decl. ¶ 10. Without further enumerated exceptions, the proposed injunction will not only enjoin more activities than necessary, but also discourage alleged members from engaging in activities to better their community.

Obey Curfew

Plaintiff has failed to show that the curfew is necessary, i.e. that more of the activities to be enjoined take place at night. Additionally, the three exceptions provided in the proposed order are not sufficiently inclusive to allow for those enjoined to engage in lawful activities with the "Zone." For example, under the proposed injunction, enjoined individuals would not be permitted to participate in volunteer activities, such as those that provide positive nighttime activities for youth, to engage in legitimate recreational activities, or to attend family dinners and other entertainment events.

D. <u>The Court Should Include Due Process Guarantees to Protect the Constitutional Interests Implicated by the Proposed Order.</u>

The due process protections enshrined in the Constitution provide a separate reason that the preliminary injunction, at least as proposed by Plaintiff, should not issue. Due process is composed of two requirements. The first one, of course, is providing adequate notice to

"interested parties." *See, e.g., Mullane v. Central Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

The other indispensable requirement of due process is ensuring that interested parties have "the opportunity to be heard." This opportunity cannot be emptied of all meaning by, for example, delaying notice until after the hearing, or shifting the burden of proof to disadvantage the opposing party. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-87 (1988); *Armstrong v. Manzo*, 380 U.S. 545, 551 (1965).[2] "It is an opportunity which must be granted at a meaningful time and in a meaningful manner." *Armstrong , supra*, 380 U.S. at 552. Thus, in *Armstrong*, the Supreme Court held that petitioner had been impermissibly and unconstitutionally disadvantaged when he learned that he had lost his parental rights only after the proceedings had been completed. The Court noted that permitting him to challenge the adoption after the fact effectively denied him the opportunity to be heard because it shifted the burden of proof to him to set it aside rather than keeping it where it lay initially. "Only that would have wiped the slate clean. Only that would have restored the petitioner to the position he would have occupied had due process of law been accorded to him in the first place." *Id.*

If the Court orders this injunction, the order will, undoubtedly, be served on individuals who have not had the opportunity to be heard.[3] In casting such a wide net, one that has the power to sweep up individuals' liberty, it is vital to build in due process protections to ensure that Plaintiff, at all times, retains its burden of proof. For any individual who contests their active gang membership for injunction purposes, Plaintiff must be required to make a *prima facie* showing, by clear and convincing evidence, that they meet the definition of "active gang

[2] Furthermore, this opportunity to be heard is not contingent on the likelihood of success of those Plaintiff seeks to bind. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, 86-7 (1988) ("Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits.") (internal citations omitted).

[3] These individuals fall into at least 3 classes: 1) those among the 23 individuals designated for service of process, some of whom may not have chosen or been able to secure counsel for this hearing and have not yet contested the issue of their active gang membership, 2) those who the City Attorney knows they intend to bind and have named as Oakdale Mob members in their declarations but for whom they have not presented clear and convincing evidence of gang membership, and 3) those who are as yet undiscovered, or simply go unmentioned by but are among the 80 Plaintiff estimates, and whom the City Attorney will later assert are gang members and serve with the Court's order.

member" set forth in *People v. Englebrecht*, 88 Cal. App. 4th at 1261, which is distinct from defining gang membership in the criminal context. Any lesser requirement permits Plaintiff to escape its burden of proof under *Englebrecht* simply by serving and naming as few people as possible, presenting as little evidence as possible, and yet binding those unnamed individuals under an injunction which restricts their liberty.[4] The Court must avoid a scenario wherein Plaintiff is free to serve the injunction on anyone it contends is a member of the Oakdale Mob, without being required to apply the definition of a gang member set forth in *People v. Englebrecht*, 88 Cal. App. 4th at 1261. Because gang membership is often a hotly contested issue, Plaintiff's allegations on the matter, once they have the injunction in hand, should not be allowed to supplant the allocation of proof judicially mandated in *Englebrecht*.

If Plaintiff attempts to serve this order on individuals when it has not yet proven that they are active gang members, there must be a procedure by which those individuals may come to court to challenge that allegation. At that hearing, the burden of proof must remain with Plaintiff. *Armstrong, supra*, 380 U.S. at 551. If that is not the case, Plaintiff may evade its burden of proof by limiting the number of people on which they initially present evidence, despite knowing the identities of the individuals they later intend to bind. Surely the Due Process Clause of the Constitution requires more.

IV. CONCLUSION

For the foregoing reasons, the preliminary injunction should not be issued.

[4] Although the *Acuna* court, in dictum, stated that the Plaintiffs could have named only the gang, it did not have the issue directly before it. Therefore, the court was not forced to grapple with the due process implications of that suggestion or consider how to preserve the individual rights at stake. To the contrary, the *Acuna* court relied heavily on the fact that the City "named as individual defendants all 38 gang members it was able to identify" and that, "the only individuals subject to the trial court's interlocutory decree in this case… are *named parties* to this action; their activities…have been and are being aggressively litigated." *See, e.g. Acuna, supra*, 14 Cal. 4th at 1114, 1115.

DATED: November 16, 2006

By: _____
Damone K. Hale

By: _____
Nina Wilder
Attorneys for Defendant-Intervenor