IN THE UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF CALIFORNIA

THE COMMITTEE CONCERNING COMMUNITY IMPROVEMENT, et al., Plaintiff, vs. CITY OF MODESTO, et al., Defendant.	No. CV-F-04-6121 REC/DLB ORDER GRANTING IN PART, GRANTING IN PART WITH LEAVE TO AMEND, AND DENYING IN PART DEFENDANTS' MOTIONS TO DISMISS AND DIRECTING THE FILING OF A FIRST AMENDED COMPLAINT

On November 8, 2004, the court heard defendants' motions to dismiss.

Upon due consideration of the record and the arguments of the parties, the court grants these motions in part and denies them in part as set forth herein.

On August 18, 2004, The Committee Concerning Community Improvement, South United Neighbors, David Caro, Manuel Espino, Hortencia Franco, Lupe Huesca, Florinda Laureno, Ena Lopez, Blanca Martinez, Griselda Martinez, Salvador Gutierrez Martinez,

Jazmin Mercado, Juan Mercado, Magdalena Mercado, Juan Perez, Gloria Pimentel, Alfonso Rivera, Darren Schaeffer, and Elvira Villalobos filed a Complaint against the City of Modesto, County of Stanislaus, Stanislaus County Sheriff, Stanislaus Regional 911, and Lee Weidman, Jim Ridenour, Janice Keating, Bob Dunbar, Denny Jackman, Garrad Marsh, Will O'Bryant, Paul Caruso, Jeff Grover, Tom Mayfield, Pat Paul, and Ray Simon, each of whom are sued in their official capacities. The Complaint alleges in pertinent part:

> 8. Plaintiffs reside in 'islands' of unincorporated County land, inhabited primarily by Latinos, surrounded by the southwestern region of the City of Modesto. These predominantly Latino unincorporated areas in which Plaintiffs live have informal names that are well known by the residents and by officials of the City and the County. Among the predominantly Latino unincorporated areas are neighborhoods known informally as 'Bret Harte,' 'the Garden,' 'No Man's Land' and 'Robertson Road' (herein referred to as 'the Latino Unincorporated Neighborhoods').
> ....
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> 9. Plaintiff Committee Concerning Community Improvement ('CCCI') is a voluntary, community-based organization founded with the goal of acquiring and improving municipal services for Bret Harte. CCCI members are either homeowners or leaseholders in Bret Harte. CCCI was formed because the founding members were concerned about hazardous conditions and crime in their community. Members of CCCI have met and do meet regularly to plan and attempt strategies for improving municipal services in their neighborhood.
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> 10. Plaintiff South United Neighbors ('SUN') is a voluntary, community-based organization founded with the goal of acquiring and improving municipal services for No Man's

> Land. SUN members are either homeowners or leaseholders in No Man's Land. SUN was formed because the founding members were concerned about hazardous conditions and crime in their community. Members of SUN have met and do meet regularly to plan and attempt strategies for improving municipal services in their neighborhood.

The individually named plaintiffs are alleged to be Latinos or Latinas residing in one of the described neighborhoods. The Complaint alleges extensive "Background Facts".

The First Cause of Action is for violation of the Fair Housing Act, 42 U.S.C. § 3604(b) and alleges that defendants "have discriminated in the provision of service and facilities in connection with plaintiffs' housing including but not limited to an ongoing discriminatory failure to provide adequate law enforcement protection and emergency services, and other basic services such as lighting and sidewalks, street maintenance, refuse removal, and drainage to Plaintiffs based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino Unincorporated Neighborhoods ...."

The Second Cause of Action is for denial of equal protection in violation of 42 U.S.C. § 1983. The defendants named therein are the City, the City Council, the County, and the Board of Supervisors. The Second Cause of Action alleges that defendants "have implemented their annexation decisions in a manner that intentionally discriminates against Plaintiffs based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino Unincorporated

Neighborhoods ...." The Second Cause of Action further alleges that defendants "have denied services that are available to other residents of the City and County to Plaintiffs in a manner that intentionally discriminates against Plaintiffs based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino Unincorporated Neighborhoods ...."

The Third Cause of Action is for violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin). Named as defendants are the City, the City Council, the County and the County Board of Supervisors. The Third Cause of Action alleges that defendants "receive federal financial assistance to provide many of the services described herein including, but not limited to, for annexation and land use decisions and for the provision of municipal services including sidewalks, street lights, drainage, sewage, law enforcement protection and bilingual services" and that defendants "provide such services in a manner that intentionally discriminates against Plaintiffs based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino Unincorporated Neighborhoods ...."

The Fourth Cause of Action is for violation of the California Fair Employment and Housing Act, California Government

Code § 12955(1). Named as defendants are the City, the City Council, the County, and the County Board of Supervisors. The Fourth Cause of Action alleges that defendants "through public land use practices, decisions, and authorizations, provide municipal services as described herein in a manner that discriminates against Plaintiffs based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino Unincorporated Neighborhoods ...."

The Fifth Cause of Action is for violation of California Government Code § 11135 (denial of benefits or discrimination under any program or activity funded directly by the state or receives any financial assistance from the state on the basis of ethnic group identification or color) and 22 CCR 98000-98413. Named as defendants the City, the City Council, the County, the Board of Supervisors, and the County Sheriff. The Fifth Cause of Action alleges that defendants "receive financial assistance from the state of California to provide many of the services described herein including, but not limited to, for the annexation and land use decisions and for the provision of municipal services including sidewalks, curbs, gutters, sewage, law enforcement protection and bilingual services", that defendants "provide such services in a manner that has the purpose or effect of unlawfully denying Plaintiffs full and equal access to the benefits of programs that are conducted, operated and administered by the state based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino

Unincorporated Neighborhoods", and that defendants "provide such services in a manner that has the purpose or effect of subjecting Plaintiffs to discrimination under programs that are conducted, operated and administered by the state based in substantial part on the race, ethnicity, ancestry, color or national origin of the residents of the Latino Unincorporated Neighborhoods", all in violation of California Government Code § 11135(a) and its implementing regulations.

The Sixth Cause of Action is for common law and statutory nuisance in violation of California Civil Code §§ 3479, 3480 and/or 3481. Named as defendant is the County. The Sixth Cause of Action alleges that plaintiffs own or lease property in the County, that "[b]y unreasonably failing to install or maintain services including, but not limited to drainage, sidewalks, street lights, traffic control signs, properly maintained roads, [the County has] created conditions that are harmful to the health of Plaintiffs, are indecent or offensive to the senses, and/or are an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life and property", that "[t]hese conditions have interfered and do interfere with Plaintiffs' use or enjoyment of their land and are a substantial factor in causing Plaintiffs' harm", that "[t]hese conditions affect a substantial number of people in the community and are of the nature that an ordinary person would be reasonably disturbed by them."

The prayer for relief in the Complaint seeks the following

relief:

(i.) A declaratory judgment that the Defendants' policies, practices, and procedures in providing services to the Plaintiffs and annexing unincorporated areas have a discriminatory effect and violate state law and regulations, federal law and regulations, and the Constitution of the United States;

(ii) A declaratory judgment that the Defendants have engaged in intentional discrimination on the basis of race, ethnicity, ancestry or national origin against Plaintiffs and other residents of the Latino Unincorporated Neighborhoods by providing inferior basic services to Plaintiffs and the neighborhoods in which they reside;

(iii) A preliminary and permanent injunction enjoining the Defendants from continuing to follow the illegal policies, practices, and procedures that this complaint specifies; including but not limited to,

a. Enjoining Defendants from failing to provide the same level of services to the Latino Unincorporated Neighborhoods;

b. Enjoining Defendants from expending or allocating funds for law enforcement services, street and neighborhood maintenance, traffic control services, refuse removal and other municipal, county or public services in a manner that further promotes the disparate level of services between White unincorporated areas and urban neighborhoods and Latino Unincorporated Neighborhoods;

c. Enjoining Defendants from failing to establish law enforcement services and procedures in Latino Unincorporated Neighborhoods that are staffed and funded at levels comparable to

those in White unincorporated urban areas and which have comparable response times and are commensurate with the population densities of those areas;

d. Enjoining Defendants from failing to ensure that adequate bilingual staff fluent in Spanish, are hired and retained in order to provide equal access for Spanish speakers to public services;

(iv) A preliminary and permanent injunction commanding Defendants to take all steps necessary to dismantle the dual system of basic public services ....

A. Motions to Dismiss.

Three separate motions to dismiss have been filed. These motions have been filed by the City of Modesto, the County of Stanislaus, and the Consolidated Emergency Dispatch Agency (erroneously sued as Stanislaus Regional 911). The motions to dismiss are for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure.

B. Improper Defendants.

As noted, the Complaint names as defendants the individuals who are presently the Stanislaus County Sheriff, the Mayor of Modesto, the Vice-Mayor of Modesto, members of the City of Modesto City Council, and the members of the County of Stanislaus Board of Supervisors. All of these individuals are sued in their official capacities only.

Defendants move to dismiss the Complaint against these individuals because they have been sued in their official

capacities and not also in their individual or personal capacities.

When a governmental official is sued in his official and individual capacities for acts performed in each capacity, those acts are "treated as the transactions of two different legal personages." Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 543 n. 6 (1986). See also Kentucky v. Graham, 473 U.S. 159, 165-166 (1985).

The individually named defendants are dismissed from this action. As held in Luke v. Abbott, 954 F.Supp. 202, 204 (C.D.Cal. 1997):

> After the Monell holding, it is no longer necessary or proper to name as a defendant a particular local government official acting in official capacity. To do so only leads to a duplication of documents and pleadings, as well as wasted public resources for increased attorneys fees. A plaintiff cannot elect which of the defendant formats to use. If both are named, it is proper upon request for the Court to dismiss the official-capacity officer, leaving the local government entity as the correct defendant. If only the official-capacity officer is named, it would be proper for the Court upon request to dismiss the officer and substitute instead the local government entity as the correct defendant.

See also Vance v. County of Santa Clara, 928 F.Supp. 993, 996 (N.D.Cal. 1996)("The Court follows other District Courts in holding that if individuals are being sued in their official capacity as municipal officials and the municipal entity itself is also being sued, then the claims against the individuals are duplicative and should be dismissed.")

C. Improper Plaintiffs.

Defendants move to dismiss this action to the extent that it is brought by CCCI and SUN on the ground that these associations have failed to demonstrate legal standing to bring suit against the defendants.

Article III of the United States Constitution restricts the jurisdiction in the federal courts to the adjudication of "actual 'cases' and 'controversies,'" Allen v. Wright, 468 U.S. 737, 750 (1984), and standing to sue constitutes "[o]ne element of the case or controversy requirement." Raines v. Byrd, 521 U.S. 811, 818 (1997). "The standing inquiry focuses on whether the plaintiff is the proper party to bring [a] suit." Id. Article III sets "the irreducible constitutional minimum" that a plaintiff must satisfy in order to establish standing, and the Supreme Court has identified three elements that a plaintiff must demonstrate in order to meet this constitutional floor. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992). First, a plaintiff must demonstrate "an injury in fact," defined as "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent". Id. In addition, a plaintiff must also demonstrate "a causal connection between the injury and the conduct complained of," and that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." Id. at 561.

1. Derivative Standing.

As explained in Hunt v. Washington Apple Advertising Comm'n,

432 U.S. 333, 343 (1977):

> [A]n 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 its 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.

The court concludes that, with the amendment required as discussed infra, the allegations of the Complaint suffice to plead the derivative standing of CCCI and SUN.

Plaintiffs argue that the first criteria is satisfied because the Complaint alleges that the members of both CCCI and SUN are either homeowners or leaseholders in Bret Harte or No Man's Land. Plaintiffs point out that individual members of both CCCI and SUN are suing defendants in their own rights and note that defendants have not challenged the standing of these individuals. In a footnote to their opposition brief, plaintiffs assert that plaintiffs Juan Mercado and Magdalena Mercado are officers of CCCI, that plaintiff Jazmin Mercado is a member of CCCI, that plaintiff Darren Schaeffer is a founding member of SUN, and that plaintiff Hortencia Franco is a member of SUN.

However, the Complaint does not specifically allege that any of the individuals named as plaintiffs in the Complaint are also members of either CCCI or SUN. While the standing of a single member of an association is sufficient to support associational standing, see E.E.O.C. v. Nevada Resort Ass'n, 792 F.2d 882, 885-886 (9th Cir. 1986), the Complaint will need to be amended to

clarify these facts.

The second criterion set forth in Hunt is demonstrated by the allegations of the Complaint because the Complaint alleges that the purposes of CCCI and SUN is to "acquire and improve municipal services" for their members as well as address the "hazardous conditions and crime" in their members' respective neighborhoods. As plaintiffs contend, this action seeks to enjoin defendants from discriminating in the provision of municipal services, such as street and neighborhood maintenance, traffic control services, refuse removal and law enforcement, items that "are central to improving municipal services and hazardous conditions for the neighborhoods of CCCI's and SUN's members and thus germane to the purpose the [sic] Plaintiff organizations."

The third criterion set forth in Hunt is also demonstrated by the allegations of the Complaint because the relief sought by the Complaint, if granted, will inure to the benefit of those members of the association actually injured. In United Food and Commercial Workers Union v. Brown Group, 517 U.S. 544, 556-557 (1996), held in pertinent part:

> [O]nce an association has satisfied Hunt's first and second prongs assuring adversarial vigor in pursuing a claim for which member Article III standing exists, it is difficult to see a constitutional necessity for anything more ... [T]he third prong of the associational standing test is best seen as focusing on these matters of administrative convenience and efficiency, not on elements of a case or controversy within the meaning of the Constitution.

In their reply brief, defendants do not discuss the required criteria for associational standing set forth in Hunt. Rather, defendants are focusing their objections to the derivative standing of CCCI and SUN to the basic elements of Article III standing as described in Lujan. However, as explained in American Immigration Lawyers Ass'n v. Reno, 18 F.Supp.2d 38, 50-51 (D.D.C. 1998):

> A plaintiff's factual burden for establishing these elements [of Article III standing under Lujan] depends on the stage of the litigation ... 'At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, because on a motion to dismiss [a court] "presum[es] that general allegations embrace those specific facts that are necessary to support the claim."' ....

Here, the Complaint, upon amendment, will allege that members of each organization reside in the unincorporated areas represented by the respective organization. As noted, the Complaint alleges discrimination in the provision of municipal services to the residents of those unincorporated areas. Therefore, the court concludes that defendants' objections to the derivative standing of CCCI and SUN at the motion to dismiss stage are without merit.[1]

Consequently, the court grants defendants' motion to dismiss

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[1]The court notes that defendants raised specific and detailed objections to Article III standing that were not described in their opening brief. The court advises the parties that all legal and factual arguments in support of a motion should be presented in the opening brief in fairness to the opposing party and the court. The court also advises the parties that arguments raised for the first time in a reply brief may be disregarded by the court.

with regard to the derivative standing of CCCI and SUN with leave to amend to allege that individual plaintiffs are in fact members of CCCI and SUN.

2. Direct Standing.

An organization also may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular discrimination in question. See Havens Realty Corp. v. Coleman, 455 U.S. 363, 379 (1982); Smith v. Pacific Properties and Development Corp., 358 F.3d 1097, 1105 (9th Cir.), cert. denied, ___ U.S. ___, 125 S.Ct. 106 (2004).

Here, defendants concede that the allegations of the Complaint satisfy the requirement of frustration of the organizational missions of CCCI and SUN. However, defendants argue, the required showing of diversion of organizational resources to combat the particular discrimination in question is not satisfied.

With respect to the requirement of diversion of resources to combat the particular discrimination in question, plaintiffs assert in their brief:

> Rather than being able to improve neighborhoods either themselves or by securing outside resources, CCCI and SUN have been forced to divert their main resource - the time of their officers, members, and volunteers - to call attention to the lack of municipal services and attempt to secure them from the Defendants who refuse to shoulder their responsibility for a well established problem. See Complaint, ¶¶ 9, 10 ('Members ... have met and do meet regularly to plan

> and attempt strategies for improving municipal services in their neighborhood.') Essentially, CCCI and SUN must divert their members and volunteers to beg Defendants to do what Defendants are by law required to do. CCCI and SUN members and officers spend time writing letters to and attending community meetings with unresponsive local governments to attempt to overcome the effects of Defendants' past and ongoing discrimination. See Complaint, ¶¶ 5, 56, 79, 81, 85, 87 (allegations of discrimination). Because Tobacco Settlement funds were promised to address neighborhood conditions, but were ultimately diverted elsewhere, Plaintiff organizations have been obliged to devote resources to attempt to track these funds. Complaint, ¶¶ 76 [sic]. This diversion of organizational time and effort represents a significant drain on these organizations that courts recognize as injury sufficient to demonstrate direct organizational standing ....

In so arguing, plaintiffs rely on Havens, 455 U.S. at 379, wherein the Supreme Court held that the allegation that the organization "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices" as satisfying standing for the organization. The Supreme Court held:

> If, as broadly alleged, petitioners' steering practices have perceptively impaired HOME's ability to provide counseling and referral services for low- and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact. Such concrete and demonstrable injury - with the consequent drain on resources - constitutes far more than simply a set back to the organization's abstract social interests.

Plaintiffs also cite Fair Housing of Marin v. Combs, 285 F.3d 899, 905 (9th Cir.), cert. denied, 537 U.S. 1018 (2002). In Fair

Housing, the organization had alleged it "suffered injury to its ability to carry out its purposes ... [and] economic losses in staff pay, in funds expended in support of volunteer services, and in the inability to undertake other efforts to end unlawful housing practices." The Ninth Circuit held that "[t]he record supports the district court's finding that Fair Housing's resources were diverted to investigating and other efforts to counteract Combs' discrimination above and beyond litigation."

Defendants argue that the Complaint "does not evince expenditures of funds in any regard or any hindrance in their ability to undertake any other efforts related to their stated purpose."

However, the court does not read these cases as requiring that money actually be spent to combat discrimination before direct organizational standing can be established.

The court concludes that the allegations of the Complaint suffice to state the direct standing of CCCI and SUN in this action. Therefore, defendants' motion to dismiss on this ground is denied.

D. First Cause of Action.

The City of Modesto and the Consolidated Emergency Dispatch Agency (erroneously sued as Stanislaus Regional 911) move to dismiss the First Cause of Action for violation of the Fair Housing Act, 42 U.S.C. § 3604(b).[2]

[2]This is the only cause of action alleged against Consolidated Emergency Dispatch Agency.

Section 3604(b) provides in pertinent part that it shall be unlawful:

> To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities therewith, because of race, color ... or national origin.

Defendants argue that the Complaint fails to state a claim upon which relief can be granted because, for a claim to lie under Section 3604(b), the alleged discrimination in providing services must be in connection with the acquisition of a dwelling.

There is a split of authority on this issue. Two very recent cases from the Northern District of Texas describe this split and reach opposite conclusions.

In Cox v. City of Dallas, 2004 WL 370242 (N.D.Texas 2004) plaintiffs, who were existing homeowners, claimed that the city had a discriminatory purpose in the provision of municipal services in violation of Section 3604(b). In granting summary judgment for the city, the district court held in pertinent part:

> Section 3604(b) of the FHA makes it unlawful '[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.' ... To determine whether the scope of § 3406(b) extends beyond the sale or rental of housing, it is necessary to decide whether the language 'in connection with' refers to the 'sale or rental of a dwelling' or merely the 'dwelling' in general ... The majority of courts considering this question have concluded that the narrower reading of the

statute is more appropriate, holding that § 3604(b) applies to only to [sic] discrimination which precludes ownership of a dwelling. See Clifton Terrace Ass. Ltd. V. United Technologies Corp., 929 F.2d 714, 720 (D.C.Cir. 1991); Halprin v. Prairie Single Family Homes, 208 F.Supp.2d 896, 901 (N.D.Ill. 2002); see also Southend Neighborhood Improvement Ass'n v. County of St. Clair, 743 F.2d 1207, 1210 (7th Cir. 1984)(noting that § 3604(b) prohibits discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling); Laramore, 722 F.Supp. at 452 (finding the narrower reading of § 3604(b) to the most [sic] natural reading of the statute).

In Clifton Terrace, the plaintiffs claimed that the failure to service and maintain elevators in a federally subsidized low-income housing complex violated the FHA ... The court disagreed and noted that although withholding essential city services in a racially discriminatory manner could have an impact on the use and enjoyment of residential property rights, this did not necessarily mean that such a wrong could be redressed under the FHA ... The court found that redress for such action would be available in a suit brought under the equal protection clause of the Fourteenth Amendment ... The Clifton Terrace court specifically stated that § 3604(b), which addresses habitability, is 'limited to services and facilities provided in connection with the sale or rental of housing.' ....

In Halprin, the court noted that the Seventh Circuit had implicitly adopted the narrow reading of § 3604(b) ... There, the plaintiffs were homeowners whose home was subjected to attacks due to their religion ... The homeowners' association publically supported the threats against the plaintiffs, applied unwanted chemicals to plaintiffs' yard, and enacted rules targeted at restricting the plaintiffs' use of their home ... The court found that because the plaintiffs already owned their home at the time the problems began, they could not state

a claim for relief under § 3604(b) ... The court noted that the term 'services' as used in § 3604(b) applied to 'services in connection with the acquisition of housing, not its maintenance.' ....

The foregoing cases are consistent with the legislative history of the FHA. The declaration of policy of the FHA states: "It is the policy of the United States to provide, within constitutional limitations, for fair housing throughout the United States.' 42 U.S.C. § 3601. In commenting upon the import of that declaration, Senator Mondale explained, 'Obviously, this [§ 3601] is to be read in context with the entire bill, the objective being to eliminate discrimination in the sale or rental of housing ... Without doubt, it means to provide for what is provided in the bill. It means the elimination of discrimination in the sale or rental of housing. That is all it could possibly mean.' 114 Cong.Rec. 4975 (1968).

Plaintiffs cite to the only court which has found that an established homeowner stated a valid claim under § 3604(b). In Campbell v. City of Berwyn, 815 F.Supp. 1138 (N.D.Ill. 1993), the plaintiffs purchased a home and were subsequently subjected to racially motivated attacks and threats. After a period of time, 24-hour police protection of the home was terminated ... The plaintiffs claimed the termination of police protection violated their rights under § 3604(b) ... Although the court recognized that § 3604(b) 'prohibits discrimination in the provision of services or facilities in connection with the sale or rental of a dwelling because of race,' it ruled that the plaintiffs's allegation was sufficient to state a claim under the statute ... However, the Campbell court did not specifically address the issue of what effect current ownership of a home would have on a plaintiff's ability to obtain relief under 3604(b). ....

This Court follows the weight of authority as set out by those courts which have specifically considered the issue of whether

> the homeowners can state a cause of action under § 3604(b) for the discriminatory provision of services and which is consistent with the legislative history. Accordingly, the Court holds that § 3604(b) applies only to discrimination in the provision of services that precludes the sale or rental of housing. Because Plaintiffs here have not alleged discrimination related to the acquisition of their homes, the City is entitled to summary judgment on Plaintiffs' claims brought under § 3604(b).

In Lopez v. City of Dallas, 2004 WL 2026804 (N.D. Texas 2004), a similar claim was made by existing homeowners. In ruling that the homeowners had stated a claim upon which relief could be granted, the district court, after noting the split of authority, held in pertinent part:

> The regulation of the Department of Housing and Urban Development ... which interprets the meaning of 42 U.S.C. § 3604(b) states, in relevant part:
>
> > (a) It shall be unlawful, because of race, color, sex, handicap, familial status, or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.
> >
> > (b) Prohibited actions under this section include, but are not limited to:
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> > ...
> >
> > (4) Limiting the use of privileges, services, or facilities associated with a dwelling because of race, color, religion, sex, handicap, familial status, or national origin of an owner, tenant, or a person associated with him or her.

24 C.F.R. § 100.65 (2004).

Therefore, HUD interprets the 'in connection therewith' language in § 3604(b) as referring to the 'sale or rental of a dwelling,' rather than the 'dwelling' in general. See 24 C.F.R. § 100.65(a) ('to deny or limit services or facilities in connection with the sale or rental of a dwelling'). However, HUD broadly interprets the requirement that the services be 'in connection with the sale or rental of a dwelling' to include the discriminatory limiting of the use of services 'associated with a dwelling.' 24 C.F.R. § 100.65(b)(4). Under HUD's interpretation of § 3604(b), Defendant's alleged provision of different and inferior municipal services to the dwellings in Cadillac Heights because of the race of its residents falls within the conduct prohibited by 24 C.F.R. § 100.65(b)(4), and thus violates § 3604(b). Therefore, the Court must determine how much weight to afford HUD's interpretation of § 3604(b).

As explained by the Supreme Court, when a court reviews an agency's construction of the statute which it administers, the court should engage in the following analysis:

> First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a

permissible construction of the statute.

Chevron v. Natural Res. Defense Council, 467 U.S. 837, 842-43 ... (1984).

HUD administers the Fair Housing Act and is authorized by statute to make rules to implement Subchapter I of the Act, which includes § 3604. See 42 U.S.C. § 3608(a) ('The authority and responsibility for administering this Act shall be in the Secretary of Housing and Urban Development.'); see also 42 U.S.C. § 3614a ('The Secretary may make rules (including rules for the collection, maintenance, and analysis of appropriate data) to carry out this subchapter.'). Therefore, the Court must engage in the Chevron analysis to determine whether to follow HUD's interpretation of § 3604(b) ....

First, the Court finds that Congress has not directly spoken to whether the discriminatory provision of municipal services to a dwelling is actionable under § 3604(b). The ambiguity of the statute is evidenced by the split of authority interpreting its meaning. Second, the Court finds that HUD's interpretation is based on a permissible construction of the statute. The statute can reasonably be interpreted to require the discriminatory provision of services to be in connection with the sale or rental of a dwelling. Further, the 'in connection with the sale or rental of a dwelling' requirement can permissibly be broadly interpreted to encompass '[l]imiting the use of ... services ... associated with a dwelling because of race ... of an owner, tenant, or a person associated with him or her.' 24 C.F.R. § 100.65(b)(4). Therefore, pursuant to the deference mandated by Chevron, the Court will follow HUD's interpretation of § 3604(b). Because Plaintiffs' allegation that Defendant violated this provision by providing different and inferior municipal services to the dwellings in Cadillac Heights because of the race of its residents falls within the scope of conduct prohibited by 24 C.F.R. § 100.65(b)(4), Plaintiffs' allegation is

actionable under § 3604(b).

However, as defendants argue, the district court in Lopez is wrong in its interpretation of the HUD regulation. The language in Section 100.65(b)(4) relates back to the language in Section 100.65(a):

> (a) It shall be unlawful, because of race, color ... or national origin, to impose different terms, conditions or privileges relating to the sale or rental of a dwelling or to deny or limit services or facilities in connection with the sale or rental of a dwelling.
>
> (b) Prohibited actions under this section include, but are not limited to:
>
> ...
>
> (4) Limiting the use of privileges, services or facilities associated with a dwelling because of race, color ... or national origin of an owner, tenant or a person associated with him or her.

[Emphasis added]. In addition, the court refers to Section 100.5(b), defining the scope of the regulations:

> This part provides the Department's interpretation of the coverage of the Fair Housing Act regarding discrimination related to the sale or rental of dwellings, the provision of services in connection therewith, and the availability of residential real estate-related transactions.

Therefore, as defendants contend, Lopez clearly misread Section 100.65(b)(4), taking the language out of context of Sections 100.5(b) and 100.65(a). Defendants contend that, [a]t best, the HUD regulations taken as a whole are ambiguous, which means there can be no deference under Chevron."

In addition, the court concurs with defendants that Lopez misapplies the Chevron analysis.

"'We interpret a federal statute by ascertaining the intent of Congress and by giving effect to its legislative will.' ... 'Deference to the [agency's] interpretation ... is only appropriate if Congress' intent is unclear.' ...." Padash v. I.N.S., 358 F.3d 1161, 1168 (9th Cir. 2004). If the court ascertain congressional intent by employing "traditional tools of statutory construction", deference is not required. Id. In using the traditional tools of statutory construction, a court looks to the plain and ordinary meaning of the term at issue, must analyze the statutory provision in question in the context of the governing statute as a whole, presuming congressional intent to create a coherent regulatory scheme, and examines whether the construction is consistent with, and supported by, congressional intent as revealed by an examination of the purpose underlying the statutory scheme. Id. at 1169-1172. See also United States v. Buckland, 289 F.3d 558, 564-565 (9th Cir.), cert. denied, 535 U.S. 1105 (2002):

> '"[T]he starting point for interpreting a statute is the language of the statute itself."' ... 'If the statutory language is unambiguous, in the absence of a clearly expressed legislative intent to the contrary, that language must ordinary be regarded as conclusive.' ... Where the language is not dispositive, we look to the congressional intent 'revealed in the history and purposes of the statutory scheme.' ....

Here, although the term "therewith" can be seen as

ambiguous, Lopez did not engage in any analysis of the legislative history or statutory purpose of Section 3604(b). As noted, the court in Cox did and concluded that the legislative history supported a construction of the term "therewith" did not apply to services to an established homeowner.

The court finds those cases limiting the scope of Section 3604(b) to discrimination in the provision of services in connection with the acquisition of a dwelling persuasive and does not find the analysis of Lopez to be an accurate reflection of the scope of the regulation or an appropriate analysis under the Chevron criteria.

Therefore, the court dismisses the First Cause of Action for failure to state a claim upon which relief can be granted.[3] That being the case, this action is dismissed against the Consolidated Emergency Dispatch Agency.

E. Fifth Cause of Action.

1. Private Right of Action under California Government Code § 11135.

Defendants move to dismiss the Fifth Cause of Action on the ground that California Government Code § 11135 does not provide for a private right of action.

In so moving, defendants rely on Arriaga v. Loma Linda Hospital, 10 Cal.App.4th 1556, 1561-1564 (1992), wherein the

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[3]Plaintiffs' claims that services were discriminatorily provided are still subject to the claim of denial of equal protection in violation of Section 1983.

Court of Appeal held that "the intention of the Legislature in enacting section 11135 was clear: to provide an alternative administrative remedy for discrimination by state-funded programs, not to add an additional private remedy for damages to those remedies already existing."

Plaintiffs respond that the holding in Arriaga is no longer good law. In so arguing, plaintiffs note that after Arriaga was decided, the Legislature amended California Government Code § 11139 to provide:

> This article and regulations adopted pursuant to this article may be enforced by a civil action for equitable relief, which shall be independent of any other rights and remedies.

The primary task in construing a statute is to determine the Legislature's intent. Brown v. Kelly Broadcasting Co., 48 Cal.3d 711, 724 (1989). The court turns first to the words of the statute itself. When the statutory language is clear and unambiguous, there is no need for construction and courts should not indulge in it. People v. Overstreet, 42 Cal.3d 891, 895 (1986). The plain language of the statute establishes what was intended by the Legislature and it is unnecessary to look beyond the plain words of the statute to determine intent. People v. Statum, 28 Cal.4th 682, 690 (2002).

In arguing that the plain meaning of Section 11139 establishes that no private right of action exists under Section 11135, defendants contend:

> Notably, [Section 11139] states that a civil action is possible, but does not state that

> the civil action is, in fact, a private right of action. In fact, sections immediately preceding section 11139 indicate to the contrary: administrative hearing to determine violations of section 11135 (Govt.Code § 11136); actions to curtail state funding to a local entity (Govt.Code § 11137); and imposing a duty on state agencies to promulgate regulations for the disbursement of funds (Govt.Code § 11138) ... Had the Legislature intended for a private right of action pursuant to section 11135 to exist, either on its own or through section 11139, it could have done so in a clear manner in one of the many instances in which these statutes were amended ... It did not do so. Therefore, rules of statutory construction require that the plain language of the statute prevail, and pursuant to the statute, no private right of action exists under section 11135.

The court does not agree with defendants. The language in Section 11139 is clear and unambiguous and provides a private right of action for equitable relief to enforce Section 11135.

Therefore, the court denies defendants' motions to dismiss on this ground.[4]

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[4]Because of this conclusion, the court does not consider the legislative history provided by plaintiffs or defendants' objections to the court's consideration of the legislative history.

In addition, the court disregards defendants' assertion that Arriaga has been cited as good law since the amendment to Section 11139. Defendants refer the court to Fields v. Marin Housing Authority, 2002 WL 145842 (N.D.Cal. 2002), wherein the district court stated in a footnote:

> While California Government Code § 11135 extends the protections and prohibitions of Title II to state-funded programs and activities, plaintiff has not alleged a claim under section 11135. Considering that plaintiff has been given three prior opportunities to amend his complaint, no leave to amend shall be granted at this time to plead a claim under section 11135. Moreover,

2. Exhaustion of Administrative Remedies.

Defendants further argue that the Fifth Cause of Action is asserted pursuant to Section 11135 and 22 CCR §§ 98000 et seq. and that plaintiffs are required to exhaust administrative remedies before bringing such a claim

Section 98001 provides that "[t]he rights and remedies under this Division are not exclusive and do not affect rights and remedies provided by law or contract." Section 98003 provides:

> Exhaustion of administrative remedies available under this Division or implementing regulations shall not be a prerequisite to the bringing of actions for judicial enforcement of violations of Chapters 2 or 3 or regulations implementing such Chapters if a showing is made that the state agency involved has not adhered to the time limit set forth in Section 98346 of this Division.

Defendants argue that the Complaint asserts claims pursuant to Chapter 3 of Division 8 which requires exhaustion of administrative remedies unless the complaining party shows that the state agency in question has not followed the provisions of Section 98346 in investigating an administrative complaint. Defendants assert that plaintiffs have not exhausted their

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> even if leave to amend were proper, it is far from clear that section 11135 even permits private enforcement actions in federal or state court. Compare Arriaga v. Loma Linda Univ., 10 Cal.App.4th 1556 (1992), with Greater Los Angeles Council on Deafness v. Zolin, 812 F.2d 1103 (9th Cir. 1987).

This footnote cannot be construed as authority that no private right of action under Section 11135 exists notwithstanding the amendment to Section 11139. The issue is simply not discussed.

administrative remedies nor have they pleaded that any defendant exceeded any time limitation provided by statute. Therefore, defendants contend, plaintiffs have failed to state a claim upon which relief can be granted and cannot amend to do so.

Plaintiffs respond that defendants' argument ignores Section 98001 and the authority for that regulation, i.e., Section 11139. Plaintiffs argue that Section 98003 "does not address exhaustion of administrative remedies for actions brought under statute [but] addresses exhaustion of remedies prior to judicial enforcement of the regulations themselves." Because, plaintiffs assert, they are suing under the statute and are not suing to enforce any regulations or administrative scheme, exhaustion of administrative remedies is not required and the Complaint states a claim upon which relief can be granted.

There is no question that the caption of the Fifth Cause of Action states that it is for violation of Section 11135 and 22 CCR 98000-98413. There is also no question that the Fifth Cause of Action alleges that defendants have acted "in violation of California Government Code § 11135(a) and its implementing regulations." Therefore, plaintiffs' disclaimer in their brief that they are suing only under Section 11135 is not substantiated by the pleading in the Complaint. Because the Complaint clearly demonstrates that plaintiffs are suing to enforce the state regulation, Section 98000, plaintiffs necessarily are bound by the exhaustion requirements of Title 22.

Therefore, the Fifth Cause of Action does not state a claim

upon which relief can be granted and is dismissed.[5]

F. Failure to State a Claim for Relief Against City of Modesto.

1. No Duty to Provide Municipal Services.

In addition to the arguments set forth above, the City moves to dismiss the Complaint as alleged against it on the ground that those claims alleging that the Latino Unincorporated Neighborhoods receive fewer municipal services that white unincorporated areas fails to state a claim upon which relief can be granted as a matter of law because the City has no duty to provide public services beyond its own boundaries to unincorporated territory, Latino or white.

The court denies this motion. In United Farmworkers of Florida Housing Project, Inc. v. City of Delray Beach, 493 F.2d 799, 808 (5th Cir. 1974), the Fifth Circuit held:

> [W]e recognize that once a municipality begins to offer services beyond its incorporated area, it can no more refuse those services to an 'outsider' for racial reasons that it can refuse those services for racial reasons to one of its very own residents. While a city may have no obligation in the first instance to provide

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[5]Defendants further argue in their reply brief that the Fifth Cause of Action is insufficiently pleaded because the Complaint does not allege what programs or activities receiving state financial assistance are being conducted in a discriminatory manner and there might not be any that are relevant to plaintiffs' claims. Although not necessary to resolve because of the court's conclusion, the Supreme Court and the Ninth Circuit have made clear, such specificity in pleading a cause of action is not required under Rule 8, Federal Rules of Civil Procedure. This is a matter for discovery, not pleading.

> services to anyone outside its geographical limits, once it begins to do so, it must do so in a racially nondiscriminatory manner.

As plaintiffs argue, while there may be no statute requiring the City to provide services to unincorporated areas, the Complaint alleges that predominantly white unincorporated areas receive better services and protections from the City than the Latino Unincorporated areas. Therefore, the Complaint states a claim against the City for discrimination in the provision of services regardless of whether the City has a statutory duty to do so.

The City asserts in its reply brief that plaintiffs' concession that the City has no general duty to serve unincorporated area "nullifies any racial discrimination claim based on a comparison of services between City and County areas." In so arguing, the City contends that plaintiffs' concession nullifies the allegations in paragraphs 81 and 82 of the Complaint that all defendants "are responsible for providing services and/or ensuring that basic services are provided to the unincorporated communities in the Modesto area and have discriminated and are intentionally discriminating against the residents of the Latino Unincorporated Neighborhoods ... on the basis of race ...." The City argues that these allegations are conceded by plaintiffs to be untrue with regard to the City and contend that plaintiffs "should replead their complaint to make clear what services plaintiffs claim each defendant is required to provide to Latino unincorporated neighborhoods." In addition, the City argues that the "bare allegation" that the City has

discriminated in the provision of municipal services "is insufficient to provide fair notice to the City of the claims against it." The City contends that paragraphs 56, 58, 59, 69 and 72 in the Complaint upon which plaintiffs rely in contending that the Complaint alleges in detail that predominantly white unincorporated areas receive better services and protections from the City than the Latino Unincorporated areas merely say that residents receive fewer and poorer services that white unincorporated areas without any allegation that the City provides services to white unincorporated areas. In addition, the City contends that the allegations in paragraphs 63 and 64 that "certain neighborhoods in predominantly White unincorporated urban areas are served by the Modesto Police and the Sheriff under informal joint policing agreements" and that "the Modesto Police is more likely to respond to emergencies in the White unincorporated urban areas that in the Latino Unincorporated Neighborhoods" constitutes "an admission that the City provides police services to Latino as well as white areas and that it does so through contractual arrangements with the County." The City asserts that nowhere in the Complaint is it alleged "that the City has undertaken on its own the general responsibility to provide any <u>specific</u> service to any <u>specific</u> white unincorporated area." The City asserts that there are many reasons why City might provide services to some unincorporated areas and not others that would not be discriminatory because of race or national ancestry. The City asserts that plaintiffs have done no

investigation and make untrue allegations of racism without pleading specific facts regarding what specific services plaintiffs claim are to provided to what specific white unincorporated areas that are not provided to the Latino unincorporated areas. The City argues that these claims should be dismissed with leave to amend.

The court does not agree. Although the Complaint's allegations that the City is required to provide municipal services to unincorporated areas must be corrected given plaintiffs' concession, the allegations of discrimination in the municipal services the City does provide to unincorporated areas suffices to withstand dismissal for failure to state a claim. The City can flesh out these allegations through discovery.

Therefore, the court denies the City's motion to dismiss to the extent that the Complaint alleges discrimination by the City in the provision of municipal services to unincorporated areas.

2. Annexations.

The City moves to dismiss the claims alleged against it based on the City's failure to annex or propose annexation on the ground that the City does not approve annexations.

Annexations are governed by a number of statutory provisions set forth in the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000, California Government Code §§ 56000 et seq., which amended the Cortese-Knox Local Government Reorganization Act 1985, which in turn repealed and replaced the Knox-Kisbet Act, the Municipal Organizations Act of 1977, and the

District Reorganization Act of 1965.

The California Legislature has provided for the establishment of a local agency formation commission, referred to as a LAFCO, in every county, with the power to review and approve or disapprove with or without amendment, wholly, partially, or conditionally, proposals for the annexation of territory to a city. See L.I.F.E. Committee v. City of Lodi, 213 Cal.App.3d 1139, 1144-1145 (1989). The Stanislaus County LAFCO is not a defendant in this action. The City has no power to reject an annexation approved by LAFCO. Id.

Plaintiffs argue that they seek "declaratory and injunctive relief to end the City's reliance on discriminatory factors in its land use decisions, including in particular its annexation practices, not mandatory annexation." Plaintiffs assert that the "City's liability is rooted in its power to initiate and facilitate annexations proceedings, its discretion in taking the steps necessary to effect such annexations (including its refusals to work with the County to provide the agreements necessary for annexation to go forward), and its power to withhold its approval from any alternate annexation proposals."[6]

[6]In their brief, plaintiffs referred the court to California Government Code § 56658 as authority for these contentions. After defendants and the court pointed out at oral argument that Section 56658 contains no provisions that the City may propose an annexation or that the City may withhold its approval from any alternate annexation proposals, plaintiffs referred the court to the statutory provisions discussed in the body of the Order. Even then, as discussed, plaintiffs' citations to statutory authority were incomplete. The court advises counsel for both parties that it expects any citations of authority with regard to arguments

At oral argument, plaintiff referred the court to California Government Code § 56828 and to Greenwood Addition Homeowners Association v. City of San Marino, 14 Cal.App.4th 1360 (1993), as authority that the City and the County must reach agreement on revenue sharing before a certificate of filing of an application for annexation can be issued by LAFCO.

As made clear in Greenwood Addition Homeowners Association, the statutory authority supporting plaintiff's position is set forth in California Revenue and Taxation Code § 99(b), which provides in pertinent part:[7]

> (4) Upon receipt of the estimates pursuant to paragraph (3) the local agencies shall commence negotiations to determine the amount of the property tax revenues to be exchanged between and among the local agencies. This negotiation period shall not exceed 60 days.
>
> ...
>
> (6) Notwithstanding any other provision of law, the executive officer shall not issue a certificate of filing pursuant to Section 56658 of the Government Code until the local agencies included in the property tax revenue exchange negotiation, within the 60-day negotiation period, present resolutions

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being made to the court to be complete and accurate. Failure to do so is a waste of valuable time and resources and may result in the court and the parties being unprepared for oral argument or delay in resolving an issue.

[7]At the time the Greenwood Addition Homeowners Association opinion was issued, Government Code § 56828 governed applications for annexation, determinations of acceptability and issuance of certificates of filing. However, by amendment enacted in 2000, the provisions governing applications for annexation, determinations of acceptability and issuance of certificates of filing were set forth in Government Code § 56658. Revenue and Taxation Code § 99 was also amended in 2000 to refer to Section 56658 rather than Section 56828.

> adopted by each such county and city whereby each county and city agrees to accept the exchange of property tax revenues."

The court in Greenwood Addition Homeowners Association concluded that "although section 99, subdivision (b) contemplates that the city and county affected by an annexation application will reach and adopt an agreement as to property tax revenues to be exchanged in the event the annexation becomes effective, the statute does not require the parties to do so, even though such agreement is a precondition to LAFCO's hearing and determining the application." 14 Cal.App.4th at 1375.

However, the only application for annexation of one of the Latino unincorporated areas was that submitted for the Bret Harte neighborhood in 1988. It is alleged that the application did not proceed because the City and the County were unable to reach agreement on revenue sharing. As noted, no applications for annexation of the Latino unincorporated areas by residents of the any of the Latino unincorporated areas have been made since. Therefore, plaintiffs' argument that a revenue sharing agreement reached between the City and the County would facilitate the approval of an annexation application by LAFCO is meaningless in the absence of an application.

At oral argument, plaintiff also referred the court to Government Code §§ 56653 and 56654 as authority that the City can propose annexation.

The court concludes from its review of Section 56653 and 56654 that they provide authority for the City to file an

application for annexation.[8] However, while these statutes also provide authority for plaintiffs' position that the City has the power to file an application for annexation, there is no statutory guarantee that such an application would be approved by LAFCO.

At oral argument, plaintiffs also referred the court to Government Code § 56375 as authority that LAFCO cannot disapprove an annexation proposed by a city of county islands.

The court concludes from its review of Section 56375 that it provides authority that the City may apply for annexation of areas to the City. However, it does not support plaintiff's argument that the City has control over whether county islands are annexed to the city.[9] Again, that decision is made by

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[8]Government Code § 56653(a) provides in pertinent part that "[w]henever a local agency ... submits a resolution for application for a change of organization or reorganization pursuant to this part, the local agency shall submit with the resolution of application a plan for providing services within the affected territory." Government Code § 56654(a) provides that "[a] proposal for a change of organization or a reorganization may be made by the adoption of a resolution of application by the legislative body of an affected local agency."

[9]Section 56375(a) provides in pertinent part:

> The commission shall have all of the following powers and duties subject to any limitations upon its jurisdiction set forth in this part:
>
> (a) ... However, a commission shall not have the power to disapprove an annexation to a city, initiated by resolution, of contiguous territory that the commission finds is any of the following:
>
> (1) Surrounded or substantially surrounded by the city to which annexation is

LAFCO.[10] As the City argues, plaintiffs' contention that the City can initiate annexations while LAFCO cannot "does not change the fact that only LAFCO has the statutory power in California to approve annexations" and that plaintiffs "cannot sue the City for annexation decisions made or not made by LAFCO."

At oral argument, plaintiffs also referred the court to

> proposed or by that city and a county boundary ... if the territory to be annexed is substantially developed or developing, is not prime agricultural land as defined in Section 56064, is designated for urban growth by the general plan of the annexing city, and is not within the sphere of influence of another city.
>
> (2) Located within an urban service area that has been delineated and adopted by a commission, which is not prime agricultural land, as defined by Section 56064, and is designated for urban growth by the general plan of the annexing city.
>
> (3) An annexation or reorganization of unincorporated islands meeting the requirements of Section 56375.3.

[10]The City argues in its brief that that an applicant for annexation must file a petition that meets specified criteria and is signed by 5% of landowners if the area sought to be annexed is uninhabited and by 5% of registered voters if the area is inhabited. If LAFCO approves the application, responsibility shifts to the city to determine landowner and/or registered voter approval in the area to be annexed. The application for annexation may fail if a majority of the inhabitants of the area to be annexed protest. See California Government Code §§ 56029, 57000 et seq. However, as noted by plaintiffs, a LAFCO cannot disapprove a city's request to annex an island which meets the requirements set forth in Sections 56375.3. Although standard annexation procedures require a city to hold an election if there is a substantial protest, this requirement does not apply to island annexation proceedings initiated on or after January 1, 2000 and before January 1, 2007. California Government Code § 56375.3; Manaster & Selmi, 5 California Environmental Law and Land Use Practice § 73.14[3].

Government Code § 56668.3. Section 56668.3(a) sets forth the factors to be considered by LAFCO if the proposed change of organization includes a district annexation (other than a special reorganization). Section 56668.3(b) provides in pertinent part:

> The commission shall give great weight to any resolution raising objections to the action that is being filed by a city or a district. The commission's consideration shall be based only on financial or service related concerns expressed in the protest.

Although this provision supports plaintiffs' position that the City has the power for facilitate the approval of an application for annexation by LAFCO, again this authority is meaningless in the absence of an application for annexation.

With regard to plaintiffs' contention that the City's liability is rooted in its power to initiate or facilitate annexation proceedings, the City notes that plaintiffs cite no authority "ever sanctioning a case for failing to file an application to another agency for annexation." The City further argues:

> The complaint ... does not allege that these plaintiffs ever requested the City to initiate annexation proceedings. Nor did plaintiffs ever seek annexation from LAFCO as they have a right and obligation to do before filing suit. Indeed, they say they do not even seek annexation as a remedy ....
>
> Plaintiffs cannot have a claim for failure to propose annexation when they have not requested it from either the City or LAFCO and do not seek annexation as a remedy.
>
> Contradictorily, plaintiffs seek an injunction 'in the future' ... forbidding the City from discriminating in the annexation

> process. This is not a cognizable legal claim but a generalized, 'obey the law' injunction that violates Rule 65's specificity requirement.

In so arguing, defendants refer the court to Burton v. City of Belle Glade, 178 F.3d 1175, 1200-1201 (11th Cir. 1999).

In Burton, the Eleventh Circuit affirmed the district court's ruling on summary judgment in connection with the plaintiffs' claim of vote dilution in violation of Section 2 of the Voting Rights Act of 1965. The Eleventh Circuit, after holding that the district court did not err in concluding that court-ordered annexation was not an appropriate remedy in that case to redress the claims under the Voting Rights Act, held in pertinent part:

> Turning to Appellants' alternate remedy, the district court correctly determined that an injunction ordering the City not to discriminate in future annexation decisions would not satisfy the specificity requirements of the Federal Rules of Civil Procedure. Under Rule 65(d), '[e]very order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained.' ... This specificity requirement is necessary 'to protect those who are enjoined "by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order."' ... Thus, an injunction must 'contain "an operative command capable of enforcement."' ... For example, in Payne v. Travenol Labs., Inc., 565 F.2d 895 (5th Cir. 1978), the former Fifth Circuit considered an injunction that prohibited 'discriminating on the basis of color, race, or sex in employment practices or conditions

> of employment.' ... Invalidating the injunction for failure to satisfy Rule 65(d)'s specificity requirement, the Court reasoned that where the terms of the injunction are as general as Title VII itself, the injunction does no more than instruct a defendant to 'obey the law.' ... A court is incapable of enforcing so broad and vague an injunction.
>
> Appellants seek to enjoin the City from discriminating on the basis of race in its annexation decisions. As this injunction would do no more than instruct the City to 'obey the law,' we believe that it would not satisfy the specificity requirements of Rule 65(d) and that it would be incapable of enforcement ... In short, an injunction prohibiting the City from discriminating against the Okeechobee Center in future annexation decisions is not an available remedy to redress Appellants' alleged injuries.

178 F.3d at 1200-1201.

Here, the Complaint prays for a declaratory judgment that "the Defendants' policies, practices, and procedures in ... annexing unincorporated areas have a discriminatory effect and violate state law and regulations, federal law and regulations, and the Constitution of the United States." The Complaint also prays for an injunction "enjoining Defendants from continuing to follow the illegal policies, practices, and procedures that this complaint specifies ...."

Plaintiffs argue that Burton does not control resolution of this aspect of the motion to dismiss. First, plaintiffs note that Burton involved a review of summary judgment and did not involve a motion to dismiss for failure to state a claim upon which relief can be granted. Furthermore, plaintiffs contend,

the availability of the remedy prayed for in the Complaint is not at issue in resolving a motion to dismiss for failure to state a claim. Therefore, plaintiffs argue, the court cannot dismiss the claims against the City based on annexation merely because the relief sought in connection with those claims may not be available.

The court concurs with plaintiffs that the apparent unavailability of the relief sought in connection with plaintiffs' claims against the City regarding annexation do not compel dismissal of these claims pursuant to Rule 12(b)(6). See Wright & Miller, 5 Federal Practice and Procedure 3rd, § 1255, pp. 508-509 ("[T]he demand for judgment is not considered part of the claim for that purpose ... Thus, the selection of an improper remedy in the Rule 8(a)(3) demand for relief will not be fatal to a party's pleading if the statement of the claim indicates the pleader may be entitled to relief of some other type.").

However, Burton supports the court's conclusion that plaintiffs have not stated a claim upon which relief can be granted against the City for its failure to initiate an application for annexation of the Latino unincorporated areas.

With regard to the alleged failure to facilitate applications for annexation of Latino unincorporated areas, the Complaint alleges at paragraph 52 that residents of the Bret Harte neighborhood petitioned for annexation in 1988 but that "the City and County refused to agree on financing that would allow a transfer of land to the City and the annexation request

was denied [by LAFCO]."

The City argues that plaintiffs cannot rely on this denial of annexation as a ground for relief against the City because it is barred by the statute of limitations applicable to the causes of action alleged in the Complaint.

Plaintiffs oppose this ground for dismissal, relying on the continuing violation doctrine:

> Plaintiffs' claims are rooted in the City and other Defendants' ongoing pattern and practice of racial discrimination and other illegal acts. The City is charged with a continuing violation of Plaintiffs' civil and other rights. The 1988 rejection of Bret Harte's annexation request is not the predicate act of Plaintiffs' claims, but rather an example of this ongoing pattern. Because the City is accused of a continuing violation, rather than a discrete act, the statute of limitations has not run.

The continuing violation doctrine allows courts to consider conduct that ordinarily would be time-barred when the untimely incidents represent an ongoing unlawful practice. See Inland Mediation Bd. v. City of Pomona, 158 F.Supp.2d 1120, 1147 (C.D.Cal. 2001). However, in Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 113 (2002), aff'd in part and rev'd in part Morgan v. Nat'l R.R. Passenger Corp., 232 F.3d 1008 (9th Cir. 2000), the Supreme Court invalidated the "related acts" method of establishing a continuing violation, stating that "discrete discriminatory acts are not actionable if time barred, even when they are related to acts alleged in timely filed charges." However, the Supreme Court in Morgan declined to address the

"systematic pattern-or-practice" method of the continuing violation doctrine. 536 U.S. at 115 n.9. The Ninth Circuit in Lyons v. England, 307 F.3d 1092, 1107 n.8 (9th Cir. 2002), the Ninth Circuit noted:

> Following Morgan, when a plaintiff alleges a systematic violation, each individual act of discrimination occurring within the limitations period may form the basis of an actionable claim, even if the discriminatory policy was initiated outside the limitations period.

The City responds that plaintiffs' invocation of the continuing violation doctrine is unavailing:

> Plaintiffs' complaint alleges but one instance in which residents of one of the designated Latino unincorporated areas sought annexation, the Bret Harte neighborhood in 1988. The annexation request was denied by LAFCO, not the City.
>
> Plaintiffs say they do not challenge the denial of any past annexation or seek annexation as a remedy ... Yet they allege it in their complaint, and elsewhere in their opposition they seek to impose liability for this incident ... and to obtain an injunction barring discrimination in the future based on this incident ....
>
> ...
>
> Plaintiffs unsuccessfully try to evade the statute of limitations based on the continuing violation doctrine ... That doctrine is plainly inapplicable to the 1988 unsuccessful annexation. There has not been a series of related acts but rather only one act 16 years ago. Continuing effects from a single alleged violation does not fall within the continuing violation doctrine ... Nor can plaintiffs assert a policy of discrimination based on this one incident 16 years ago nor on a failure to annex theory because the City did not make any annexation decisions, the

City did not have the power to annex and plaintiffs have failed to request it of either the City or LAFCO except once in 1988.

The court agrees with the City's position. Plaintiffs are attempting to bootstrap the single instance of the denial by LAFCO of the application for annexation of the Bret Harte unincorporated area, allegedly based on the failure of the City and the County to reach the prerequisite property tax sharing agreement, onto the allegations of discrimination in the provision of municipal services to unincorporated areas. Plaintiffs essentially are contending that, because they have alleged discrimination in the provision of municipal services to unincorporated areas, they can rely on the denial by LAFCO of the Bret Harte annexation application as evidence that the failure of the City to propose annexation of the Latino unincorporated areas since that failed application within the limitation period is based on discrimination even though plaintiffs themselves have not applied for annexation. It appears to the court that plaintiffs are attempting to equate apples and oranges. Because the only application for annexation was made in 1988, the court concludes that plaintiffs cannot proceed against the City on the theory that the failure by the City to propose annexation of the Latino unincorporated areas is based on discrimination.

Consequently, the court concludes that plaintiffs have not stated a claim upon which relief can be granted against the City of Modesto based on the City's failure to initiate or facilitate annexation of the Latino unincorporated areas.

ACCORDINGLY, IT IS ORDERED that defendants' motions to dismiss are granted in part, granted in part with leave to amend and denied in part.

IT IS FURTHER ORDERED that this action is dismissed against defendants Les Weidman, Jim Ridenour, Janice Keating, Bob Dunbar, Denny Jackman, Garrad Marsh, Will O'Bryant, Paul Caruso, Jeff Grover, Tom Mayfield, Pat Paul, Ray Simon, and the Consolidated Emergency Dispatch Agency (erroneously sued as Stanislaus Regional 911).

IT IS FURTHER ORDERED that plaintiffs shall file a First Amended Complaint in accordance with this order within 30 days of the filing date of this order.

Dated: Dec 28, 2004

ROBERT E. COYLE
UNITED STATES DISTRICT JUDGE