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IN THE UTAH SUPREME COURT

WEBER COUNTY, Plaintiff/Respondent, v. OGDEN TRECE, AKA CENTRO CITY LOCOS, an alleged criminal street gang sued as an unincorporated association; and DOES 1 through 200, Defendants.	Case No. 20100804-SC **SUPPLEMENTAL BRIEF OF PETITIONERS DANIEL CALLIHAN, EMMANUEL MONTOYA, ROMAN HERNANDEZ, AND EVAN BARROS**

Pursuant to this Court's Order dated October 19, 2010, Petitioners Daniel Callihan, Emmanuel Montoya, Roman Hernandez, and Evan Barros (collectively, "Petitioners") respectfully submit this Supplemental Brief.

I. Issue One: Whether the notice provided to the parties in this case was sufficient under the provisions of Rules 4 and 65A of the Rules of Civil Procedure?

Although the preliminary injunction entered below purports to bind almost 500 unnamed individuals, including Petitioners, the only named defendant in this case is Ogden Trece ("Trece"), alleged to be an "unincorporated association." Whether adequate notice was provided to Trece depends on whether it was properly served with process under Rule 4 and provided notice under Rule 65A(a)(1). The answer is clearly no.

The Utah Constitution provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7. This Court has long recognized that timely and adequate notice is "an essential requisite of procedural due process." *Nelson v. Jacobsen*, 669 P.2d 1207, 1213 (Utah 1983) (quotation omitted). To satisfy constitutional requirements, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Nelson*, 669 P.2d at 1212 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)).

Whether notice satisfies this test is based on the specific circumstances of each case. "[D]ue process is not a technical conception with a fixed content unrelated to time, place, and circumstances." *Dairy Prod. Servs., Inc. v. City of Wellsville*, 2000 UT 81, ¶ 49, 13 P.3d 581 (quotation omitted). "Instead, due process is flexible and, being based on the concept of fairness, should afford the 'procedural protections that the given situation demands.'" *Id.* (quoting *In re Worthen*, 926 P.2d 853, 876 (Utah 1996)). Regardless of

the specific facts, however, "[t]he minimum requirements are adequate notice and an opportunity to be heard in a meaningful manner." *Id.* (emphasis added); *see also Nelson*, 669 P.2d at 1211 ("Timely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness.").

Although this Court has generally followed the *Mullane* standard in determining whether notice was adequate, it has also recognized that it is not bound to move "in 'lockstep' with the United States Supreme Court's due process analysis." *Bailey v. Bayles*, 2002 UT 58, ¶ 11 n.2, 52 P.3d 1158. Rather, this Court has specifically acknowledged the possibility that Utah's "constitutional provisions [could] afford more rights than the federal Constitution." *Id.*; *see also id.* at ¶ 29 (Durham, C.J., concurring).[1]

Rules 4 and 65A(a)(1) of the Utah Rules of Civil Procedure reflect these minimum constitutional requirements and mandate that a party be properly served with process and notified prior to the entry of a preliminary injunction. Utah R. Civ. P. 4(d), 65A(a)(1). Here, the County failed to satisfy the requirements of either rule.

A. Rule 4 Notice and Service of Process.

The County alleged that Trece is an "unincorporated association" with nearly 500 members. The County's efforts to notify and serve process on Trece as an organization—a tactic essential to the County's position that every alleged member of Trece should now be bound by, and be criminally liable for violating, the wide-reaching

[1] The broader protections under the Utah Constitution include Article I, section 11, which ensures open courts and "no person shall be barred from prosecuting or defending before any tribunal in this State, by himself or counsel, any civil cause to which he is a party." Utah Const. art. I, § 11; *see also Bailey*, 2002 UT 58, ¶ 29 (Durham, C.J., concurring) ("[T]here is no federal counterpart to our 'open courts' or 'remedies' clause.").

terms of the preliminary injunction—consisted of the following: (i) effecting personal service on five individuals whom the County asserts are "known and identified" members of the gang (*see* Aff. of Brandon B. Miles dated Sept. 2, 2010, at ¶ 9, attached hereto as Ex. A); (ii) mailing notice to the last known address of twelve alleged gang members, at least three of which were returned as undeliverable (*id.* at ¶¶ 9, 12); and (iii) publishing a hyper-technical notice in the Ogden Standard-Examiner and on the website utahlegals.com.[2] (*See* Resp. to Mot. to Stay ("Resp. to Stay"), filed Oct. 19, 2010, at 3). Even if a purported "criminal street gang" could be sued as an unincorporated association under Utah law—which is doubtful, *infra* section A.4—the County's limited efforts to provide notice of this action fail to satisfy the requirements for proper service of process.[3]

1. **Personal Service.**

First, personal service on five individuals alleged to be mere "members" of Trece does not comply with the express requirements of Rule 4(d)(1)(E), which governs service on unincorporated associations. Under that rule, service on "an unincorporated association which is subject to suit under a common name" must be made upon "an

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[2] In obtaining permission from the district court to "serve" notice by publication, the County did not even attempt to show that personal service would be impossible or unduly burdensome, stating instead (without any evidentiary basis) only that service would be "impracticable and difficult." (Ex. A hereto at ¶ 4).

[3] As a result of the County's failure to effectuate proper service of process on Trece, the district court lacked jurisdiction over the entity, and thus had no authority to enjoin it or any of its approximately 500 members, including Petitioners. *See Garcia v. Garcia*, 712 P.2d 288, 290 (Utah 1986) (holding without "effective service of process, [a] court [is] without jurisdiction"); *Meyers v. Interwest Corp.*, 632 P.2d 879, 880 (Utah 1981) ("It is axiomatic that a court acquires power to adjudicate by proper service of process which imparts notice that the defendant is being sued.").

officer, a managing or general agent, or other agent authorized by appointment or by law to receive service of process." Utah R. Civ. P. 4(d)(1)(E). The County neither alleged nor proved—nor could it—that any of the five individuals personally served were officers, managing agents, or general agents of Trece.[4]

Service on mere "members" of an unincorporated association is inadequate under Rule 4. *See, e.g., Beard v. White, Green & Addison Assocs., Inc.*, 336 P.2d 125, 126 (Utah 1959) ("Under [Rule 4], the person served must be more than a mere employee."). A person is not an agent of an unincorporated association merely because she is a member. *See Marchwinski v. Oliver Tyrone Corp.*, 461 F. Supp. 160, 165 (W.D. Pa. 1978) ("We know of no federal or state statute which makes a member of an unincorporated association an agent of such association for purposes of receipt of service of process."). Failure to serve an officer or agent as required by Rule 4 is a fatal defect in service of process. *See In re Schwenke*, 2004 UT 17, ¶¶ 24, 28, 89 P.3d 117 (service on common-area receptionist ineffective under Rule 4); *Wright v. Lane Cnty. Comm'rs*, 459 F.2d 1021, 1022 (9th Cir. 1972) (service on chairman of unincorporated bar organization's library committee inadequate).

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[4] Indeed, the County acknowledged that "[m]embers of Ogden Trece do not have a registered agent in the State of Utah or any other State that I am aware." (Ex. A hereto at ¶ 6 (emphasis added)). If Trece has no officers or agents, that is an argument against its status as an unincorporated association amenable to suit, as discussed below, and not a reason to ignore the plain language of Rule 4. As one court noted in rejecting just such an argument: "Plaintiffs argue that if a member cannot be served, the association cannot be sued. This is logical, but not syllogistic: it does not follow that therefore anyone may be served even if procedural requirements are not met." *Marchwinski*, 461 F. Supp. at 165.

The County's reliance on contrary authority from California is misplaced. California has an enabling statute that allows a court to authorize service on an unincorporated association through service on "one or more of the association's members" when the association lacks officers and agents. Cal. Corp. Code § 18220. Utah has no similar statute. Service in this state must comply with the requirements of Rule 4. Here it did not.

Furthermore, even if the County had alleged that the five personally served individuals (1.03% of the total alleged members) could reasonably be deemed "agents" of Trece under Rule 4—which it did not and could not credibly allege—service here was still improper. To satisfy due process requirements, "service upon an agent must be upon a person of sufficient character and rank to make it reasonably certain that the unincorporated association will be apprised of the service made through the agent." *Bailey v. Transp.-Commc'n Employees Union*, 45 F.R.D. 444, 447 (N.D. Miss. 1968); *see also In re Schwenke*, 2004 UT 17 at ¶ 25 (service on employee is effective only where she "had a significant amount of authority or apparent authority within the organization… [or] played an integrated role within the organization such that [she] would know what to do with papers; or where there were other assurances that the documents would reach the intended recipient").

A mere "member" of a loosely-organized "criminal street gang" is unlikely to occupy a position that ensures notice will be passed along to the gang as an entity. "[I]ndeed, a gang member is less likely to be responsible about such matters than a corporate employee." *People ex rel. Reisig v. Broderick Boys*, 59 Cal. Rptr. 3d 64, 78

(Cal. Ct. App. 2007) (holding service inadequate for gang as an entity). As the County has expressly admitted, criminal street gangs are inherently lacking in organization, have fluid and temporary membership, and are entirely unlike business organizations subject to notice through an agent. (*See* Ex. A hereto at ¶ 7 ("Ogden Trece, as an unincorporated association, does not have a known management structure, officers, directors, or like managerial personnel for which to personally service with process.")).[5]

Under these circumstances, the specific and flexible due process analysis employed by this Court, *e.g.*, *Dairy Prod. Servs.*, 2000 UT 81 at ¶ 49, weighs heavily against finding that personal service on five alleged members of an organization with hundreds of members and no management structure was reasonably calculated to reach the entity as a whole. *Cf. Nelson*, 669 P.2d at 12113 (finding technical notice to an "uneducated and inexperienced defendant" insufficient to satisfy due process).

2. Mail Sent to Last Known Addresses.

The County also apparently mailed notice to the "last known addresses" of twelve members of Trece (*see* Resp. to Stay at 3), at least three of which were returned as undeliverable (Ex. A hereto at ¶¶ 9, 12). For the same reasons discussed above, this

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[5] *See also* Scott E. Atkinson, *The Outer Limits of Gang Injunctions*, 59 Vand. L. Rev. 1693, 1720 (2006) ("Many experts agree that gangs...are generally not very organized. In particular, very few gangs have a bureaucratic structure with a discernable hierarchy."); Expert Declaration of James Hernandez, attached as Ex. C to Add. E, Petition for Permission to Appeal Interlocutory Order, at ¶ 12 ("Gang membership is often short lived. Data from the United States Department of Justice indicates that 69.4% of gang members are involved for one year or less and that 26% are involved for three years or less."); *id.* at ¶ 22 (describing a California gang as "not an organized criminal enterprise, but a name taken by an unorganized and highly fluid social network... with membership being informal and difficult to define with precision").

mailed notice to a handful of additional people (a mere 1.85% of the total alleged members) was not reasonably calculated to give notice to the entity as a whole.

In addition, Utah Rule of Civil Procedure 4(d) does not permit service by mail on an unincorporated association unless the "defendant's agent authorized by appointment or by law to receive service of process signs a document indicating receipt." Utah R. Civ. P. 4(d)(2)(B). Service of process in the State of Utah is invalid if "there is no statute or rule of court providing for such procedure." *Lloyd v. Third Judicial Dist. Court*, 495 P.2d 1262, 1263 (Utah 1972) (refusing to allow plaintiffs to effect service by mail, which "would require us to violate our own established law by directing the lower court to attempt to obtain jurisdiction in a manner unknown to our legal procedure"). The County obtained neither written receipt from an authorized agent nor permission from the court to effect service by mail as alternative service under Rule 4(d)(4). As a result, its selective mailings fail to meet the requirements of Rule 4.

3. Service by Publication.

Publication of a hyper-technical notice in the Ogden Standard-Examiner and on the website utahlegals.com—summarily approved by the district court as valid "service," without notice or hearing, the day after the motion was filed—also violated due process and the requirements of Rule 4.[6] Service by publication is authorized only "[w]here the identity or whereabouts of the person to be served are unknown and cannot be ascertained

[6] Counsel has been unable to locate any notice in the online archives of the Standard-Examiner. A copy of the notice from utahlegals.com is attached hereto as Ex. B. Significantly, the notice did not even inform Trece or its members that they had the right to appear and argue at the hearing on the motion for preliminary injunction.

through reasonable diligence, where service upon all of the individual parties is impracticable under the circumstances, or where there exists good cause to believe that the person to be served is avoiding service of process." Utah R. Civ. P. 4(d)(4)(A).

Notably, however, service by publication is not a means to effect service on a person who is not the proper recipient of service by normal means; it is merely a way to reach the proper party to be served. *See* Utah R. Civ. P. 4(d)(1)(E). Therefore, even if service by publication were reasonably calculated to reach all members of Trece—which it was not—it still would not constitute valid service on an unincorporated association. If the County is correct that Trece has no officers or agents, then publication could not have been effective no matter how widespread.

To meet the requirements of due process, service by publication must be "'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity' to participate in that action." *Carlson v. Bos*, 740 P.2d 1269, 1275 (Utah 1987) (quoting *Mullane*, 339 U.S. at 314). "[T]he words 'under all the circumstances' embody the idea that a plaintiff must act diligently and take such steps in attempting to give the defendant actual notice of the proceeding as are reasonably practicable." *Id.* At a minimum, "[s]ervice by publication is inappropriate where no personal inquiry is made at a last known address within the state." *Weber v. Snyderville W.*, 800 P.2d 316, 319 (Utah Ct. App. 1990).

The County's dubious assumption that a significant number of Trece members regularly read the legal notices section of the Standard-Examiner, or peruse the Utah Legals website, is supported by no record evidence. And as the United States Supreme

Court has noted, "[c]hance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper." *Mullane*, 339 U.S. at 315. That such notice in this case was directed to Trece as an entity, without including the names of the specific individuals purportedly bound by the proposed injunction, makes notice by publication even less reasonable. *See id.* ("The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract.").

The County asserts that it knows the identities of approximately 500 members of Trece, and that it maintains a dynamic "database" compiling the members' personal information.[7] Indeed, at the time it initiated this case, the County claimed to have recently reviewed documentation showing criminal activities of approximately 50 alleged members of Trece. Yet there is no evidence that the County (i) sought to personally serve any of those individuals, (ii) made personal inquiry at their last known addresses, or (iii) made any other effort to notify these known individuals. Under these circumstances, "service" by publication violates due process. *See Mullane*, 339 U.S. at 318 (holding that service by publication was inadequate for known beneficiaries of trust, "not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand").

[7] The fact that Trece consists of a large number of alleged members does not relieve the County of its burden to use its records to locate those members for proper service. *See Carlson*, 740 P.2d at 1276 (noting that *Mullane* relieves plaintiffs faced with a large number of potential defendants only of the duty to "search beyond ordinary business records to find addresses").

4. Amenability of a "Criminal Street Gang" to Suit.

Even if the County had complied with Rule 4, its attempt to employ Rule 4 service against a "criminal street gang" is based on the questionable assertion that Trece is an unincorporated association "which is subject to suit under a common name." Utah R. Civ. P. 4(d)(1)(E). Although a few lower California courts have concluded that criminal street gangs can be sued as unincorporated associations, that conclusion is legally suspect and bad policy. This Court should decline to adopt it.

Amenability to suit is a prerequisite to valid service of process. "Rule 4(h) cannot be successfully invoked to serve an unincorporated association unless it is determined that the entity to be served has the capacity to be sued." Charles A. Wright & Arthur R. Miller, 4A FEDERAL PRACTICE & PROCEDURE § 1105 (3d ed.) (discussing identical federal rule). Under Utah law, an unincorporated association is amenable to suit only if is engaged in "transacting business" under a common name. *Herbertson v. Willowcreek Plaza*, 923 P.2d 1389, 1392 (Utah 1996); *see also* Utah R. Civ. P. 17(d).

Although the meaning of the phrase "transacting business" necessarily varies by context, *see J.M. & M.S. Browning Co. v. State Tax Comm'n*, 107 Utah 457, 465, 154 P.2d 993, 996-97 (1945), it cannot reasonably be argued that criminal activity constitutes the "transaction of business" under Rule 17(d). Indeed, throughout the common law, a fundamental requirement of an unincorporated association has been that it be formed "for a lawful purpose." *Broderick Boys*, 59 Cal. Rptr. 3d at 74; *see also Peoples Gas Sys., Inc. v. Acme Gas Corp.*, 689 So.2d 292, 298 n.8 (Fla. Ct. App. 1997) (holding that an unincorporated association consists of "a number of individuals… associating themselves

together under a common name for the accomplishment of some lawful purpose"). There is no authority for the proposition that "a criminal group [can be] treated as an unincorporated association." *Broderick Boys*, 59 Cal. Rptr. 3d at 74.

The County alleges that Trece is solely a "criminal street gang," which conducts no lawful business and associates only for criminal purposes:

> Ogden Trece exists only as a criminal organization. It exists to commit crime, to fight with rival gangs, to control as much of the drug trade in Ogden as it can and to intimidate law abiding citizens. There is no political, social, religious or other beneficial cultural benefit to this gang's existence.

(Resp. to Stay at 12 (emphasis added)). If the County is taken at its word, then Trece cannot be considered an unincorporated association amenable to suit under Rules 17(d) and 4(d)(1)(E), and this Court should decline to recognize it as such. This case presents a perfect example of why doing so would be both bad law and bad policy. Serving a few scattered members of a loosely-organized group with no defined organizational structure cannot be reconciled with the due process requirements of notice reasonably calculated to reach and bind the entity as a whole. If the County wishes to pursue civil injunctive relief against individuals it believes are engaged in criminal activity, then it should be required to proceed against them individually, providing each individual with notice and an opportunity to be heard, and not seek to bind hundreds of individuals through specious service on a "criminal street gang" as a purported "unincorporated association."

B. Notice Required by Rule 65A.

Similar to Rule 4, Rule 65A contains clear and mandatory notice requirements that must be satisfied before injunctive relief may issue: "No preliminary injunction shall be

issued without notice to the adverse party." Utah R. Civ. P. 65A(a)(1). "[T]he text of this rule is clear: courts simply cannot issue injunctions without providing notice to the adverse party." *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1252-53 (10th Cir. 2006) (vacating injunction based on inadequate notice under identical federal rule). "[A] preliminary injunction granted without adequate notice and a fair opportunity to oppose it should be vacated and remanded to the district court." *United States v. Holy Land Found. for Relief & Dev.*, 445 F.3d 771, 792-93 (5th Cir. 2006).

For the reasons set forth above, the County's meager efforts to notify a handful of alleged Trece members failed to provide adequate notice to the actual adverse party, i.e., Trece—let alone all of its hundreds of alleged members. Trece itself did not appear at the preliminary injunction hearing, nor was it represented. These facts demonstrate a failure of the notice requirement under Rule 65A.[8]

The lack of adequate notice here is particularly troubling because the preliminary injunction obtained by the County restrains constitutional liberties. The United States Supreme Court has specifically condemned as facially invalid ex parte injunctions that restrain First Amendment rights. *See Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 180 (1968) ("[T]here is no place within the area of basic freedoms guaranteed by the First Amendment for such [injunctive] orders where no showing is

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[8] The County's failure to provide adequate notice was not limited to the preliminary injunction hearing. After the hearing, the County inserted into the final order two more unconstitutional provisions—a "hardship exemption" and an "opt-out" provision—neither of which was presented or argued at the hearing. The district court approved these provisions without providing Petitioners notice or opportunity to be heard. That, too, is a violation of Rule 65A(a)(1). *See Wyandotte Nation*, 443 F.3d at 1252-53.

made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.").

"[W]hen notice is a person's due, process which is a mere gesture is not due process." *Jackson Const. Co., Inc. v. Marrs*, 2004 UT 89, ¶ 18, 100 P.3d 1211 (citing *Mullane*, 339 U.S. at 315). The County's self-proclaimed hope that Trece and all of its alleged members would get proper notice of the injunction proceedings through informal word-of-mouth does not pass constitutional muster:

> In a situation where the defendant is an unincorporated association formed for limited purposes... service on any one of the members, without more, cannot reasonably be expected to reach the association as a whole, nor can we say that such service is reasonably calculated to do so. It may be that news of the summons and complaint would spread among some of the building-members; however, due process requirements cannot be met by notice through hearsay and rumor.

Marchwinski, 461 F. Supp. at 166.

II. Issue Two: Whether the preliminary injunction hearing conducted in the district court satisfied the requirements of due process and of Rule 65A(d) and (e)?

The preliminary injunction hearing conducted by the district court violated due process, as well as the requirements of Rule 65A(d) and (e).

A. Due Process.

Because Trece, the only named defendant in this proceeding, never received adequate process or notice, was not represented by counsel, and did not appear at the preliminary injunction, the hearing unquestionably violated due process. *See Nelson*, 669 P.2d at 1211 ("Timely and adequate notice and an opportunity to be heard in a

meaningful way are the very heart of procedural fairness."). The district court chose to proceed with the hearing based on the appearance of individuals whom the County asserted had been served on Trece's behalf, but who clearly did not represent the entity as a whole. The resulting preliminary injunction entered against the entity was essentially granted ex parte, without adequate notice, and in violation of due process.

In addition to the due process issues discussed above, the district court further violated Petitioners' due process rights when it based its ruling on evidence introduced in a different trial involving entirely different parties, claiming it could take "judicial notice" of such evidence even though the parties in this case had no opportunity to hear or test that evidence. This decision by the district court was clear error and a violation of the parties' rights to due process. *See State v. Shreve*, 514 P.2d 216, 217 (Utah 1973).

B. Rule 65A(d).

Rule 65A(d) requires, among other things, that every "order granting an injunction shall set forth the reasons for its issuance"; that it "be specific in its terms and shall describe in reasonable detail...the act or acts sought to be restrained"; and that it bind only the parties to the action and "their officers, agents, servants, employees, and attorneys, and...those persons in active concert or participation with them who receive notice...of the order." Utah R. Civ. P. 65A(d). The district court's Order Granting Preliminary Injunction ("Order") fails all three of these requirements.

First, the Order contains no findings or conclusions whatsoever regarding the four factors the County was required to show under Rule 65A(e). It simply states that Trece

constitutes a public nuisance.[9] This cursory conclusion is insufficient to "set forth the reasons for [the Order's] issuance." *Id.*

Second, the Order is riddled with ambiguity and unconstitutionally vague provisions that fail adequately to specify the conduct to be enjoined.[10] Utah law requires an injunction to be "clear and certain in its terms," and permits the dissolution of an injunction when it is "so vague and uncertain in its terms that the parties restrained or enjoined are not able to determine what they are restrained from doing." *Thompson v. Liquor Control Comm'n of Utah*, 52 P.2d 463, 646 (Utah 1935). To survive a vagueness challenge, an injunction must be of sufficient clarity to give people "of ordinary intelligence" "a reasonable opportunity to know what is prohibited." *Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 383 (1997) (quotation omitted). This Order does not meet those standards.

Third, the Order sweeps far more broadly than the permissible scope of covered parties set forth in Rule 65A(d) because it purports to cover not just Trece, but also "all members of defendant Ogden Trece," even though those members were not party

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[9] The district court's bench ruling was no better, simply reciting the factors in perfunctory fashion. (*See* Transcript of Ruling ("Ruling"), attached to Supp. of Record filed Oct. 8, 2010, at 7).

[10] For instance, the Order (i) lacks any definition of what constitutes a "member" of Trece, (ii) lacks any standard for determining who is a "known member" for association purposes, (iii) fails to specify whose knowledge is relevant—i.e., the member himself or the person accused of unlawful association, (iv) lacks any definition of what constitutes "annoying," "confronting," "harassing," or "challenging" conduct, concepts which are inherently subjective and subject to arbitrary enforcement, (v) lacks a clear knowledge standard for unlawfully being in the presence of firearms, alcohol, or controlled substances, (vi) lacks any definition of "graffiti tool," which could encompass almost any object, and (vii) vaguely commands the parties to "obey all laws."

defendants. (Order at 2). There was no finding by the district court that each of Trece's members is an officer or agent, nor a requirement that members purportedly enjoined by the Order be acting "in active concert" with Trece. Utah R. Civ. P. 65A(d). This failure to limit the scope of the Order violates Rule 65A(d). *See Rockwell Graphic Sys., Inc. v. DEV Indus., Inc.*, 91 F.3d 914, 920 (7th Cir. 1996) ("A court must consider the extent of the alleged 'active concert or participation' of third parties with those named in the injunction in determining whether the injunction's prohibitions shall apply to those third parties."); *cf. People v. Englebrecht*, 106 Cal. Rptr. 2d 738, 756 (Cal. Ct. App. 2001) (gang injunctions may apply only to "an active gang member," and not to an individual whose connection to the gang is "nominal, passive, inactive, or purely technical").

C. Rule 65A(e).

Petitioners have already briefed the failure of the County to demonstrate the requisite factors for issuance of a preliminary injunction under Rule 65A(e), and will not repeat those arguments in detail here. Although there are serious problems with the County's showing on irreparable harm and likelihood of success on the merits, the most glaring deficiencies relate to the other two factors—i.e., balance of harms and public interest. Even though the district court expressly conceded it had no idea whether the County's unprecedented remedy would actually abate gang-related crime, it nevertheless entered the Order, speculating that it was worth "taking a chance." (Ruling at 6.) This violated Rule 65A(e).

Because the Order radically curtails fundamental rights of the hundreds of individuals it purports to enjoin, it was incumbent upon the County to clearly demonstrate

at least that the reduction in gang-related crime from the injunction was so certain and decisive that the benefit of the injunction outweighed its monumental constitutional harm. *See* Utah R. Civ. P. 65A(e)(2); *City of New York v. Andrews*, 719 N.Y.S.2d 442, 449 (N.Y. Sup. Ct. 2000) (movant seeking civil injunction to abate criminal activity must show that a "benefit is likely to result from the injunction"). The district court, however openly admitted that the effect of the injunction was unknown, and made no finding that crime abatement was likely:

> It may not work. I don't know. It may be that the citizens of Ogden will come to law enforcement and say, we don't want it. We don't like it. But I think, at least for the time being, I think it's worth at least taking a chance.... It may not work. I don't know.

(Ruling at 6-7 (emphasis added)). This statement of uncertainty was followed immediately by the ruling that "the Court is going to grant the preliminary injunction against Ogden Trece." (*Id.* at 7).

The uncertainty expressed in the Ruling contrasts sharply with the County's assertion that it presented substantial evidence demonstrating the long-term effectiveness and reductions in crime resulting from gang injunctions in the State of California.[11]

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[11] The County also submitted "evidence on the history of Ogden Trece," including photographic evidence of Trece "symbols, artwork, graffiti, writings and tattoos" (Resp. to Stay at 3), and evidence of specific crimes allegedly committed by members of the Trece (*id.* at 4). This included numerous items of evidence, including hearsay evidence, from the trial of Rico Parea—of which the trial court incorrectly determined, over defense counsel's objection, it could take judicial notice. (*E.g.*, 09/14/10 hrg. audio file 2 at 8:09-9:10 (court noting at 8:45-8:50, "I would think everything involving State versus Parea would be something I can take judicial notice."). It also included numerous photographs of perfectly legal and constitutionally protected activities and things such as artwork on one alleged member's phone (*id.* at 7:32-8:09 (Officer Powers noting, "it's pretty good artwork, actually, if it wasn't used for such a bad purpose")), as well as

(Resp. to Stay at 4-5.) What the County characterizes as "statistics from several studies in California that showed there had been a reduction in crime and a reduction in gang-related calls" (*id.* at 4) is actually just testimony from Officer Powers, who testified, over Petitioners' objections, that he was primarily repeating information supposedly received from other law enforcement officials and sources in California.[12] Moreover, the few statistics offered by Officer Powers (9/14/10 hrg. audio file 3 at 17:47-18:43) were not specific as to the time period in which the supposed decreases in crime occurred, or what evidence (if any) demonstrated that the purported decreases resulted from the "gang injunctions" themselves as opposed to other law enforcement efforts such as community policing or targeted outreach.

In fact, on cross-examination (*id.* at 49:50-51:53), Officer Power admitted that these statistics were compiled by some (or several) unknown and untested sources. Officer Powers simply found the statistics posted on a website for the City of Monrovia, California, and did nothing to verify whether they were valid and reliable.[13]

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numerous photographs of alleged members' tattoos (*e.g.*, *id.* at 11:24-11:30, 12:08-14:10, 15:20-16:57). Both artwork and tattoos are constitutionally protected forms of free expression. *Anderson v. City of Hermosa Beach*, 2010 U.S. App. Lexis 18838 (9th Cir. Sept. 9, 2010).

[12] *See* Audio recordings filed with this Court Oct. 9, 2010, including: 09/14/10 hrg. audio file 3 at 7:00-7:46 (including ruling on hearsay objection); 16:30-17:45 (same); 18:46-20:00 (same, with trial court noting at 18:54-19:08, "Well, again, he's just testifying as to what his experience has been, people that he's talked to, articles that he's read. I don't see what the problem is. It's, it's . . . this is something they have to be able to establish in order to get the injunction." (emphasis added)).

[13] *See id.* at 50:07-50:17; 51:00-51:27 (Q: "So this is actually the City of Monrovia compiling facts from some other source . . . that . . . that these injunctions were . . . successful, or at least that they reduced to these levels, right?" A: "That would be my

The error in admitting such untested "statistics" to demonstrate the effectiveness of gang injunctions was amply demonstrated by the County's own witness, Greg Anderson, on the second day of the hearing. Mr. Anderson, a deputy district attorney from Fresno County, California, admitted that there are no statistically valid studies—including his own—demonstrating the long-term effectiveness of "gang injunctions."[14] Mr. Anderson also admitted that his own research of the supposed effectiveness of "gang injunctions" was limited to extremely short periods of time, such as four to six months (*id.* at 1:07:55-1:08:03), with no long-term analytical follow-up to gauge the long-term effectiveness, or not, of the "gang injunctions" about which he was permitted to testify.[15]

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assumption. I don't know where they got the stats from or what they did to confirm it, if that's what you're getting to." (emphasis added)); *id.* at 51:00-51:27; 51:27-51:33 (Q: "Did you talk to anyone in the City of Monrovia about how that came about to be on their website?" A: "Ah, no I didn't.").

[14] *See* 09/27/10 hrg. audio file 1 at 1:33:17-1:33:28 (Mr. Anderson testifying, "As far as statistical conclusions? No, I don't think there's really been any study, if you were to judge it from academia, from statistical validation, that has been statistically valid at all." (emphasis added)).

[15] *See, e.g.*, 9/27/10 hrg. audio file 1 at 1:08:35-1:09:30; 1:09:29-1:10:12 (Q: "So, but getting back to Sanger, so we don't really know, you can't make, a statistically valid conclusion under your standards . . . that the gang injunction is effective? Is that correct?" A: "Yeah, I, I have a pretty high standard for that. I think that, uh, uh, I'm fairly critical when we see things in the paper, in the media, that this is what happened because this is the percentage or, like, polls. Um, so that's why, again, I did the four criteria to make a decision." Q: "But even that, under that design model, that's still not sufficient for determining statistically conclusive that the, the gang injunction is effective in Sanger. Is that right?" A: "If you were to say statistically? That is correct."). Despite Mr. Anderson's candid admission that he had no objective scientific or statistical basis to opine as to the long-term effectiveness of gang injunctions, the trial court deemed him qualified to testify as an expert on, among other things, the "effect of gang injunctions." *See id* at 1:10:18-1:11:30 (court stating at 1:11:23-1:11:29, "He certainly knows a hell of a lot more than anyone in this courtroom, doesn't he? About that subject?").

Thus, although the County is correct that Mr. Anderson testified as to community surveys and interviews he conducted following the entry of certain gang injunctions in California (Resp. to Stay at 5), Mr. Anderson's testimony was necessarily limited to the first several months following entry of those injunctions—several of which have been in place for over a decade, with no long-term analysis of whether they are now, or were ever, effective at reducing incidents of gang-related crime. To the contrary, evidence submitted to the trial court demonstrated that "gang injunctions" are not only ineffective, but that they can also result in long-term increases in crime and may impede other, more successful law enforcement efforts at reducing gang-related crime.[16]

"A court of law cannot act on subjective beliefs but must insist on proof." *Andrews*, 719 N.Y.S.2d at 451. The district court found that the injunction "may not work. I don't know." (Ruling at 7). Its decision nonetheless to enter the Order, based on the court's belief that it was "worth at least taking a chance" (*id.* at 6), violated Rule 65A(e). Because there was no proof that the preliminary injunction would have any actual benefit, much less the compelling proof necessary to justify the curtailment of fundamental rights of hundreds of citizens, the Order should be reversed.

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[16] This evidence was submitted as attachments to Petitioners' briefing on the constitutional infirmities of the proposed injunction, and was used, in part, in the cross-examination of Mr. Anderson (*e.g.*, 09/27/10 hrg. audio file 1 at 1:30:04-1:36:42). It is thus incorrect for the County to assert that "no such evidence [was] presented during the hearing for the preliminary injunction." (Resp. to Stay at 6.)

RESPECTFULLY SUBMITTED this 22nd day of October 2010.

By: David C. Reymann

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 22nd day of October 2010, a true and correct copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONERS DANIEL CALLIHAN, EMMANUEL MONTOYA, ROMAN HERNANDEZ, AND EVAN BARROS** was served via U.S. mail, postage prepaid, on the following:

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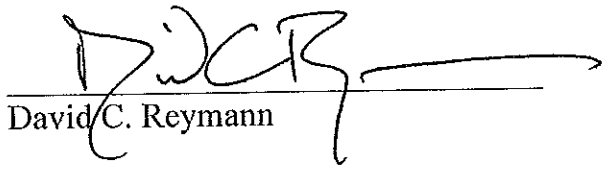

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EXHIBIT A

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IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY
STATE OF UTAH, OGDEN DEPARTMENT

WEBER COUNTY, Plaintiff, vs. OGDEN TRECE, AKA, CENTRO CITY LOCOS, a criminal street gang sued as an unincorporated association; and DOES 1 through 200, inclusive, Defendant.	**Affidavit in Support of Alternative Service by Publication** CASE NO. 100906446 SEP - 8 2010 JUDGE: ERNIE W. JONES

STATE OF UTAH)
ss
COUNTY OF WEBER)

THE UNDERSIGNED, being duly sworn, deposes and says on information and belief:

1. That I am an attorney assigned to handle this case.

2. On January 26, 2010, Weber County began a lawsuit against Ogden Trece, AKA Centro City Locos.

3. Although members of Ogden Trece hold themselves out as and operate as an organized entity, the gang does not have an address of record.

4. There are approximately 485 known members of Ogden Trece that live in our community so locating and serving each individual would be impracticable and difficult.

5. Many of the members of Ogden Trece avoid law enforcement and service of process due to their dislike of the legal system.

6. Members of Ogden Trece do not have a registered agent in the State of Utah or any other State that I am aware.

7. Ogden Trece, as an unincorporated association, does not have a known management structure, officers, directors, or like managerial personnel for which to personally serve with process.

8. This makes it difficult if not impossible to give the gang "notice" of the Amended Complaint and the Application for a Temporary Restraining Order and serve them under traditional methods contemplated by Rule 4 of the Utah Rules of Civil Procedure.

9. As part of the initiation of the lawsuit, Weber County personally served five (5) known and identified gang members, and mailed twelve (12) others to their last known addresses, a copy of the Summons and all other documents associated with this case.

10. This would allow them to communicate with other non-incarcerated gang members and allow them to make arrangements to defend against the preliminary injunction.

11. At a hearing on August 31, six (6) of the individuals served with notice of this lawsuit appeared and were represented by Michael J. Boyle. They were: (1) Samuel Parsons, personally served; (2) Roman Hernandez, personally served; (3) David Callihan, personally served; (4) Evan Barros, personally served; (5) Emmanuel Montoya, personally served; and (6) Jaime Gomez, mailed to last known address.

12. Several of the packets mailed to the last known addresses of these gang members have been returned to our office as undeliverable including: (1) Daniel Salinas, (2) Dario Muniz, (3) Alex Mercado.

13. An individual who identified himself as Elmer Maes, which service was mailed to his last known address, called our office inquiring about the lawsuit.

14. Clearly the methods of service already attempted have had the effect of putting members of Ogden Trece on notice of the lawsuit.

15. However, to ensure that all members receive notice of the Amended Complaint and the Hearing requesting a Preliminary Injunction to all members of Ogden Trece, service by publication would enhance the notice already provided.

Wherefore, the affiant believes there is good cause to provide further notice of the Amended Complaint and Hearing requesting a Preliminary Injunction to all members of Ogden Trece, AKA Centro City Locos by publication of the Summons in the Ogden Standard Examiner and a website as required by Utah Law.

DATED this 2nd day of September 2010.

Branden B. Miles
Deputy Weber County Attorney

SUBSCRIBED and sworn to me this 2nd day of September 2010.

Amanda J. Seamons
Notary Public

AMANDA J. SEAMONS
NOTARY PUBLIC • STATE of UTAH
COMMISSION NO. 578640
COMM. EXP. 04-23-2013

EXHIBIT B

UTAH LEGAL NOTICES

IN THE SECOND JUDICIAL DISTRICT COURT OF

IN THE SECOND JUDICIAL DISTRICT COURT OF WEBER COUNTY STATE OF UTAH, OGDEN DEPARTMENT Plaintiff, WEBER COUNTY, vs. Defendant, OGDEN TRECE, AKA, CENTRO CITY LOCOS, a criminal street gang sued as an unincorporated association; and DOES 1 through 200, inclusive SUMMONS CASE NO. 100906446 JUDGE ERNIE W. JONES TO: OGDEN TRECE, AKA, CENTRO CITY LOCOS, a criminal street gang sued as an unincorporated association; and DOES 1 through 200, inclusive. You are summoned and required to answer to the Amended Complaint on file with the Second District Court-Ogden. Within 20 days after service of this summons, you must file your written answer with the clerk of the court at 2525 Grant Avenue, Ogden, Utah 84401, and you must mail or deliver a copy to plaintiff 's attorneys at the address listed above. If you fail to do so, judgment by default may be taken against you for the relief demanded in the Amended Complaint. The Amended Complaint is on file with the clerk of the court. You are also notified that a request for a preliminary injunction has also been filed with the Second District Court-Ogden. A hearing requesting a preliminary injunction will be held on September 14, 2010 at 1:30p.m. in front of the Honorable Ernie W. Jones at the Second District Court-Ogden located at 2525 Grant Avenue, Ogden, Utah 84401. DATED this 31th day of August 2010. __/s/ Dee W. Smith_____ DEE W. SMITH Weber County Attorney for Plaintiff Pub: September 4, 11, 28, 25, 2010. Same was also published online at www.utahlegals.com, according to Section 45-1-101, Utah Code Annotated, beginning on the first date of publication and for at least 30 days thereafter 427485.

Newspaper Administration