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CONNIE MAZZEI
CLERK OF THE SUPERIOR COURT
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THE SUPERIOR COURT OF CALIFORNIA
COUNTY OF MONTEREY
MONTEREY BRANCH COURTHOUSE

THE PEOPLE OF THE STATE OF CALIFORNIA, EX REL. **EDMUND G. BROWN JR.,** AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

MONTEREY COUNTY AIDS PROJECT, A CALIFORNIA NONPROFIT CORPORATION, **WAYNE JOHNSON,** AN INDIVIDUAL, **KATHLEEN BANKS,** AN INDIVIDUAL, **GUY BLODGETT,** AN INDIVIDUAL, **JOHN CAMERON VANNOY (AKA JOHN CAMERON HAMILTON),** AN INDIVIDUAL, **JACOB AGAMAO,** AN INDIVIDUAL, **BRYAN BANKS,** AN INDIVIDUAL, **ARTHUR P. BOURDON,** AN INDIVIDUAL, **MICHAEL IBARRA,** AN INDIVIDUAL, **SHANDA LABOEUF,** AN INDIVIDUAL, **KATHLEEN M. MCFADDEN,** AN INDIVIDUAL, **LORRAINE T. FAHERTY,** AN INDIVIDUAL, **GARY J. AFFONSO,** AN INDIVIDUAL, **DANIEL T. YOSHIZATO,** AN INDIVIDUAL, **SCOTT ECCHER,** AN INDIVIDUAL, **KIMBERLY CELESTE BATISTE (ALSO KNOWN AS KIMBERLY BATISTE-REED),** AN INDIVIDUAL, **SUSANNAH MCNAMARA,** AN INDIVIDUAL, AND **DOES 1-20,** INCLUSIVE,

Defendants.

Case No. M105979

COMPLAINT FOR:

1. **AN ACCOUNTING OF CHARITABLE TRUST ASSETS;**
2. **DIVERSION AND IMPROPER DISTRIBUTION OF CHARITABLE ASSETS;**
3. **BREACH OF FIDUCIARY DUTY FOR FAILURE TO USE ASSETS FOR RESTRICTED PURPOSE;**
4. **BREACH OF FIDUCIARY DUTY FOR FAILURE TO TAKE ACTIONS TO RECOVER IMPROPERLY DIVERTED FUNDS;**
5. **NEGLIGENCE;**
6. **INVOLUNTARY TRUSTEES;**
7. **CONSTRUCTIVE TRUST;**
8. **INVOLUNTARY DISSOLUTION;**
9. **AND FOR OTHER EQUITABLE RELIEF AND DAMAGES**

Plaintiff, the People of the State of California, *ex rel.* Edmund G. Brown Jr., as Attorney General of the State of California, complains and alleges as follows:

INTRODUCTION

1. This is an action by the Attorney General in the name of the People of the State of California to preserve the remaining charitable assets of the Monterey County AIDS Project ("MCAP") which would otherwise be irretrievably lost due to the mismanagement and neglect of present and former members of its board of directors. In addition, as a result of MCAP's abdication of its charitable responsibilities, the Attorney General also seeks the recovery of assets improperly diverted, an accounting, and other relief.

2. Edmund G. Brown Jr. is the Attorney General of the State of California and as such is charged with the general supervision of all organizations and individuals who obtain, hold or control property in trust for charitable and eleemosynary purposes in this state. The Attorney General is authorized to enforce, in the name of the People, the provisions of the Supervision of Trustees and Fundraisers for Charitable Purposes Act (Gov. Code, § 12580, *et seq.*) and the Nonprofit Corporation Law (Corp. Code, § 5000, *et seq.*). The Attorney General is a necessary party to proceedings affecting the disposition of assets of a charitable trust because the duty to protect such assets is expressly placed upon the Attorney General by the Corporations Code. (*Los Angeles County Pioneer Soc. v. Historical Soc. of Southern California* (1953) 40 Cal.2d 852, 861.) Plaintiff is expressly authorized by Corporations Code sections 6510 and 6511 to file for involuntary dissolution MCAP because it is a California public benefit corporation.

3. On or about May 12, 2000, the Monterey County Superior Court issued an order ("Order") restricting the use of the proceeds from the sale of real property which had been bequeathed to MCAP and also restricted the use of established assets that were given to MCAP by an endowment. (A copy of the Order is attached to the Complaint as Exhibit 1.) The Court ordered that a "Housing Endowment" be established and that the principal of that fund could only be invaded upon MCAP's compliance with Court-ordered requirements. As set forth below, it is hereby alleged that the Housing Endowment was invaded without proper procedures in place and

without proper board of director oversight, and that the principal of the Housing Endowment was misappropriated, misused, and/or diverted by the named defendants and DOES 1-20.

4. The unrestricted assets of MCAP were also diverted, misappropriated, and/or misused by certain members of the MCAP board of directors and employees for personal use and for for-profit ventures and that this ongoing diversion, misappropriation, and/or misuse were concealed by several of the named defendants and DOES 1-20.

5. Any action brought by the Attorney General against trustees or other persons holding property in trust for charitable purposes or against any charitable corporation or any director or officer thereof to enforce a charitable trust or to impress property with a trust for charitable purposes or to recover property or the proceeds thereof for and on behalf of any charitable trust or corporation, may be brought at any time within ten (10) years after the cause of action shall have accrued. (Gov. Code § 12596.) The wrongful acts alleged in this complaint against all named defendants and DOES 1-20 are believed to have been perpetrated between the years of 2000 through 2009, inclusive, which is the relevant time period" referred to in this complaint.

6. At all times material herein, the named defendants and DOES 1-20 and each of them have been transacting business in part within Monterey County. The violations of law hereinafter described have been and are now being carried out in part within said County and elsewhere in the State of California. The actions of the named defendants and DOES 1-20 and each of them, jointly and severally, as set out below, are in violation of the laws and public policy of the State of California and are inimical to the rights and interests of the general public.

7. This action is brought because the Attorney General is seeking to recover charitable assets that were wrongfully diverted, used, and/or misappropriated by the named defendants and DOES 1-20 in this action. The named defendants and DOES 1-20 have failed to provide an adequate accounting of how those restricted charitable funds were spent and are believed to have used restricted funds in a manner inconsistent with the restrictions and with the charitable purposes of MCAP. In addition, named defendants and DOES 1-20 have failed to provide an adequate accounting of how MCAP's unrestricted charitable assets were spent.

THE PARTIES

8. Defendant MCAP is a California nonprofit public benefit corporation incorporated on November 5, 1985. MCAP provides support services, including housing assistance and hospice care, to persons affected by Acquired Immune Deficiency Syndrome ("AIDS"). MCAP is located at 780 Hamilton Avenue, Seaside, California and its principal place of business is in the County of Monterey, State of California. MCAP has a duly constituted board of directors which is responsible for the management and operation of MCAP.

9. On information and belief, defendant Wayne Johnson is a resident of Pacific Grove, California. Defendant Johnson was formerly the Executive Director of MCAP, a position he held during the relevant time period. Defendant Johnson received a salary as the Executive Director of MCAP and later received a salary as manager of the MCAP Benefit Shop. During his employment at MCAP, defendant Johnson held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or as a *de facto* member of the MCAP board of directors and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Johnson also had a duty to act in good faith, and in the best interest of MCAP, but failed to do so. On information and belief, defendant Johnson authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent. On information and belief, defendant Johnson was a signatory on MCAP bank checks, contracts, and on the release of fund requests submitted to invade the principal of the Housing Endowment, and MCAP's other unrestricted charitable assets.

10. On information and belief, defendant Kathleen Banks is a resident of Salinas, Calfornia. Defendant Kathleen Banks was the Executive Director of MCAP, a position she has held since 2006. Defendant Kathleen Banks received a salary as the Executive Director of MCAP. Prior to holding the Executive Director position, defendant Kathleen Banks was a salaried employee who was directly supervised by defendant Johnson. During the relevant time period, defendant Kathleen Banks held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a *de facto* member of the MCAP

board of directors and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Kathleen Banks also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which she failed to do. On information and belief, defendant Kathleen Banks authorized, decided, and/or approved how funds from the Housing Endowment, MCAP's unrestricted assets, and contributions from California donors would be spent.

11. On information and belief, defendant Guy W. Blodgett is a resident of Denver, Colorado. Defendant Blodgett is a former member of the board of directors of MCAP. On information and belief, Defendant Blodgett was a director during the relevant time period, and is believed to have been the Treasurer from 2002 through 2006. On information and belief, defendant Blodgett was a signatory on the release of fund requests submitted to invade the principal of the eHousing Endowment. On information and belief, during the relevant time period, defendant Blodgett held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Blodgett also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or de facto directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do. On information and belief, defendant Blodgett authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

12. On information and belief, defendant John Cameron Vannoy, also known as John Cameron Hamilton, is a resident of San Francisco, California. Defendant Hamilton was a resident of Monterey County is a former Chairperson of the MCAP board of directors, a position he held from 2002 through 2005. On information and belief, defendant Vannoy was also an employee of MCAP both before and after his board membership. During the relevant time

period, defendant Vannoy held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Vannoy also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Vannoy authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

13. On information and belief, defendant Daniel T. Yoshizato is a resident of Carmel-By-The-Sea, California. Defendant Yoshizato is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. During the relevant time period, defendant Yoshizato held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Yoshizato also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Yoshizato authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

14. On information and belief, defendant Jacob Agamao is a resident of Salinas, California. Defendant Agamao is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. During the relevant time period, defendant Agamao held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Agamao also had a duty to act in good faith, and in the best interest of MCAP,

including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Agamao authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

15. On information and belief, defendant Bryan Banks is a resident of Salinas, California. Defendant Bryan Banks is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. Defendant Bryan Banks was also the Secretary during a portion of the relevant time period, responsible for maintaining board meeting minutes. During the relevant time period, defendant Bryan Banks held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Bryan Banks also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or de facto directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do. On information and belief, defendant Bryan Banks authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

16. On information and belief, defendant Arthur P. Bourdon is a resident of Monterey, California. Defendant Bourdon is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. On information and belief, in the years 2004 and 2005, Defendant Bourdon was also employed by MCAP as a Certified Public Accountant and as a bookkeeper. During the relevant time period, defendant Bourdon held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Bourdon also had a duty to act in good faith, and in the best interest of MCAP, including making

reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Bourdon authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

17. On information and belief, defendant Michael Ibarra is a resident of Pacific Grove, California. Defendant Ibarra is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. During the relevant time period, defendant Ibarra was also an employee of MCAP. On information and belief, during the relevant time period, defendant Ibarra was also compensated by MCAP as an independent contractor who was hired to run a massage program for MCAP. During the relevant time period, defendant Ibarra held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Ibarra also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Ibarra authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

18. On information and belief, defendant Shanda LaBoeuf is a resident of Seaside, California. Defendant LaBoeuf is a former member of the board of directors of MCAP, a position she held at some point during the relevant time period. During the relevant time period, defendant LaBoeuf held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Banks also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto*

directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which she failed to do On information and belief, defendant LaBoeuf authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

19. On information and belief, defendant Kathleen M. McFadden is a resident of Salinas, California. Defendant McFadden is a former member of the board of directors of MCAP, a position she held at some point during the relevant time period. During the relevant time period, defendant McFadden held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant McFadden also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which she failed to do On information and belief, defendant McFadden authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

20. On information and belief, defendant Lorraine T. Faherty is a resident of Damariscotta, Maine. Defendant Faherty is a licensed attorney and a current member of the California State Bar. Defendant Faherty is a former member of the board of directors of MCAP, a position she held at some point during the relevant time period. During the relevant time period, defendant Faherty held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Faherty also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which she failed to do On information and belief, defendant

Faherty authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

21. On information and belief, defendant Gary J. Affonso is a resident of Salinas, California. Defendant Affonso is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. During the relevant time period, defendant Affonso held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Affonso also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Affonso authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

22. On information and belief, defendant Scott Eccher is a resident of Monterey County, California. Defendant Eccher is a former member of the board of directors of MCAP, a position he held at some point during the relevant time period. During the relevant time period, defendant Eccher held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Eccher also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or de facto directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which he failed to do On information and belief, defendant Eccher authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

23. On information and belief, defendant Kimberly Celeste Batiste, also known as Kimberly Batiste-Reed, is a resident of Seaside, California. Defendant Batiste is a former

member of the board of directors of MCAP, a position she held at some point during the relevant time period. During the relevant time period, defendant Batiste held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant Batiste also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which she failed to do On information and belief, defendant Batiste authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

24. On information and belief, defendant Susannah McNamara is a resident of Salinas, California. Defendant McNamara is a licensed attorney and a current member of the California State Bar. Defendant McNamara is a former member of the board of directors of MCAP, a position she held at some point during the relevant time period. During the portion of the relevant time period that she served on the board, defendant McNamara held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP, and owed fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. Defendant McNamara also had a duty to act in good faith, and in the best interest of MCAP, including making reasonable inquiries when other MCAP officers or directors or *de facto* directors appeared to be engaged in wrongdoing including misappropriating funds or improperly using restricted charitable assets, which she failed to do On information and belief, defendant McNamara authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent.

25. Does 1 through 20 are the fictitious names of the named defendants and DOES 1-20 who were directors, officers, or key employees of MCAP during the time set forth in the complaint, and those who have acted on behalf of or as agent, servant or employee of one or more of the named the named defendants and DOES 1-20, or who have participated or acted in concert with one or more of the named defendants and DOES 1-20, but whose true names and capacities,

whether individual, corporate or otherwise, are presently unknown to plaintiff. Plaintiff is informed and believes that the named defendants and DOES 1-20 have directly or indirectly participated in and are responsible for the acts and omissions which are more specifically described herein. Because plaintiff is presently uninformed as to the true names and capacities of these the named defendants and DOES 1-20, the People sue them herein by fictitious names but will seek leave to substitute their names when their true names are discovered.

FACTUAL ALLEGATIONS

26. MCAP holds all of its assets in trust for charitable purposes and has its principal place of business in the County of Monterey. MCAP is exempt from taxation under section 23701d of the California Revenue and Taxation Code, and section 501(c)(3) of the Internal Revenue Code of the United States. The Articles of Incorporation state MCAP's charitable purpose as follows:

"The specific purposes of this corporation are as follows:

1. To reduce the negative consequences of Acquired Immune Deficiency Syndrome [AIDS] and AIDS-Related Complex [ARC] in Monterey County California.

2. To reduced the incidence of AIDS and provide psycho-social support to persons with AIDS, their families, and significant others.

3. To provide support and act as a resource for groups and individuals affected by AIDS."

27. In 1999, MCAP came into possession of real property which was bequeathed to MCAP by Douglas E. Madsen, a Monterey County resident. In the court order for the distribution of the Madsen Will, it was explicitly stated that the real property was to be used "to house active AIDS patients, with funds derived in whole or in part from the monies derived from the residue of the estate." The "residue of the estate" was $373,149.96 in cash and some paintings with an appraised value of more than $500.00. There was also a provision in the Madsen Will stating that the "funds to be derived therefrom were to be used for operational expenses of the real property." As such, the real property, cash and in-kind donations became

permanently restricted charitable assets. Additionally, the Madsen Will named four trustees to monitor these restricted assets.

28. In 2000, MCAP filed an Application to Remove Restrictions on Property Contained in Gift Instrument ("Application") pursuant to Probate Code section 18507. This application also moved to "exonerate the trustees referred to in the gift instrument."

29. MCAP stated in the Application that it wanted to sell the property because the property was not well-maintained and it was not practical to house AIDS patients so far away from medical healthcare facilities. MCAP represented in the Application that it would put the money from the sale of the property in a court-ordered endowment fund (the "Housing Endowment") and use the interest generated by that fund (which it estimated at $70,000-$80,000) for housing benefits or program support.

30. On or about May 12, 2000, after the hearing on the Application, the Monterey County Superior Court issued its Order allowing for the exoneration of the trustees and allowing the sale of the Madsen property with the proceeds of sale to be turned over to MCAP. However, the Court explicitly restricted the proceeds from sale of the real property, along with the previous cash bequest of $373,149.96, stating that all of these assets were to be placed in a separate Housing Endowment.

31. The Order also stated that the Housing Endowment monies and any income derived therefrom were to be "used by MCAP solely for the purpose of providing housing for people with the HIV disease." The Order explicitly defined what constituted "providing housing." (See Exhibit 1, 2:9-16.) The Order did not state that funds from the Housing Endowment could be used for general program costs or salaries of employees, officers or directors.

32. The Order placed further restrictions on the principal of the Housing Endowment, stating that MCAP had to adopt "reasonable standards of investment, invasion and use of the principal and income from the Housing Endowment as may be appropriate under the circumstances." (Exhibit 1)

33. In or about September of 2000, the real property restricted by the Order was sold for approximately $1,550,000.00. On information and belief, that money was placed in an account at

the First National Bank in Monterey, but it was not placed in an account with the $373,149.96 as instructed by the Court. On information and belief, the named defendants and DOES 1-20 never combined these two accounts.

34. On information and belief, the named defendants and DOES 1-20 never adopted reasonable standards of investment, invasion and use of the principal and income from the Housing Endowment as required by the Order.

35. On information and belief, the named defendants and DOES 1-20 did not keep adequate records or minutes of the board meetings at which decisions were made to withdraw monies from the Housing Endowment.

36. On information and belief, in late 2002, the named defendants and DOES 1-20 violated the Order by invading the Housing Endowment principal without documenting the withdrawals in board meeting minutes and without fully documenting in any type of financial records what the monies were used for. This conduct continued and withdrawals were made until the Housing Endowment was completely depleted in 2007. The named defendants and DOES 1-20 breached their fiduciary duties to MCAP by failing to maintain adequate board meeting minutes evidencing that there was reasonable inquiry by the board as to whether the funds were being withdrawn and spent in accordance with the restrictions. The named defendants and DOES 1-20 also breached their fiduciary duties to MCAP by failing to maintain adequate board meeting minutes evidencing board approval for the withdrawals from the Housing Endowment.

37. On information and belief, the named defendants and DOES 1-20 used MCAP's funds held in MCAP's general operating checking account for personal expenses. This conduct constituted diversion of MCAP's unrestricted assets and the board of directors knew or should have known of said conduct. The named defendants and DOES 1-20 breached their fiduciary duties to MCAP by failing to conduct reasonable inquiry to determine whether these expenditures paid out of MCAP's general operating account were proper.

38. On information and belief, at some time after 2002, the named defendants and DOES 1-20 improperly used funds from the Housing Endowment to pay the rent for the "MCAP Benefit Shop," a thrift shop in Monterey County.

39. On information and belief, at some time after 2002, the named defendants and DOES 1-20 failed to exercise any board oversight over the MCAP Benefit Shop and failed to maintain any inventory records or financial records for the MCAP Benefit Shop. Therefore, the named defendants and DOES 1-20 breached their fiduciary duty to conduct reasonable inquiry to determine whether the MCAP Benefit Store was complying with state and federal laws regulating the operation of nonprofit thrift stores. The named defendants and DOES 1-20 further breached their duty to account for MCAP's charitable assets.

40. On information and belief, there are no assets left in the Housing Endowment. The failure to adequately protect the Housing Endowment principal has resulted in the complete waste, dissipation, and loss of these charitable assets that were required to be dedicated for specific charitable purposes.

41. The Attorney General, on behalf of MCAP's beneficiaries, the People of the State of California, now seeks an accounting to determine whether MCAP has any remaining charitable assets and damages for the named defendants and DOES 1-20' wrongful conduct.

FIRST CAUSE OF ACTION

(For An Accounting)
(Corporations Code, §§ 5250 and 6320, *et seq.*)
(Against All Named Defendants and DOES 1-20)

42. Plaintiff realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 41 above.

43. Under Corporations Code section 5250 and 6320, the named defendants and DOES 1-20 have a fiduciary obligation to account for charitable assets, including keeping accurate and correct books and records of assets, contributions, and expenditures.

44. The named defendants and DOES 1-20 have breached their fiduciary obligations in managing and accounting charitable trust funds they received. Specifically, this conduct included:

- Failing to keep adequate records of expenditures;
- Pervasive commingling of restricted charitable assets from the Housing Endowment with MCAP's general bank accounts;

- Failing to prevent charitable funds from being spent for improper purposes;
- Failing to account for all of MCAP's charitable assets;
- Failing to account for cash expenditures; and
- Failing to conduct any reasonable inquiry into the questionable conduct of some of MCAP's directors, officers and *de facto* directors.

45. Because the named defendants and DOES 1-20 have continuously failed to properly account for MCAP's restricted assets, income and expenditures since at least 2000, an accounting is necessary under Corporations Code sections 5250 and 6320, *et seq*. to ascertain its total charitable assets and liabilities and to determine whether funds from the Housing Endowment were used consistent with the restriction placed on them by the Court's Order.

SECOND CAUSE OF ACTION

(For Diversion, Improper Distribution and Breach of Fiduciary Duty)
(Corporations Code § 5231, *et seq*.)
(Against All Named Defendants and DOES 1-20)

46. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained in Paragraph 1 through 45 above.

47. On information and belief, during the relevant time period, each of the named defendants and DOES 1-20 held a position of authority and control over the management of MCAP and its funds and assets by serving as an officer and/or a member of the board of MCAP and has owed, and continues to owe fiduciary duties of care and loyalty to MCAP and to its charitable beneficiaries. On information and belief, each named defendant and DOES 1-20 authorized, decided, and/or approved how funds from the Housing Endowment and contributions from California donors would be spent. On information and belief, each named defendant and DOES 1-20 either knowingly participated in the diversion of charitable assets, or failed to make reasonable inquiry into the conduct of other MCAP officers, directors, or de factor directors which would have prevented the diversion of charitable assets, during the relevant time period.

48. Under Corporations Code section 5231, the named defendants and DOES 1-20 had a duty to serve in good faith "with such care, including reasonable inquiry, as an ordinarily prudent

person in a like position would use under similar circumstances." Additionally, each of the named defendants and DOES 1-20 had a duty to protect restricted assets.

49. In this case, the named defendants and DOES 1-20 breached their fiduciary duties because:

- they knew or should have known that standards for invasion of principal were to be drafted; and
- they failed to draft standards that would protect the Housing Endowment from indiscriminate invasion; or
- alternatively, if the named defendants and DOES 1-20 drafted standards for invasion of principal, they failed to inquire whether the standards were consistent with the Order.

50. The breach of these duties resulted in the failure to protect the Housing Endowment from improper distributions.

51. Under Corporations Code section 5237, each of the named defendants and DOES 1-20 is jointly and severally liable for the making of any improper distribution of charitable assets.

52. As the damages recoverable under Corporations Code section 5237 is the amount of the illegal distribution, each named defendant and DOES 1-20 are jointly and severally liable for an amount to be determined at trial.

THIRD CAUSE OF ACTION

(Breach of Fiduciary Duty for Failure to Use Assets for Restricted Purpose)
(Corporations Code § 5231, *et seq.*)
(Against All Named Defendants and DOES 1-20)

53. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained in Paragraph 1 through 52 above.

54. Each of the named defendants and DOES 1-20 knew or should have known that the Housing Endowment was to be used solely for housing purposes pursuant to the Order.

55. Each of the named defendants and DOES 1-20 failed to review expenditures, and or conduct reasonable inquiry into the expenditures made using funds from the Housing Endowment to insure that these expenditures were consistent with the restricted purposes.

56. This breach of duty resulted in diversion of the Housing Endowment for improper purposes.

57. Each named defendant and DOES 1-20 are jointly and severally liable for all charitable funds which were diverted, in an amount to be determined at trial and/or through an accounting.

FOURTH CAUSE OF ACTION

(Breach of Fiduciary Duty for Failure to Take Actions to Recover Improperly Diverted Funds)
(Corporations Code § 5231, *et seq.*)
(Against All Named Defendants and DOES 1-20)

58. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained in Paragraph 1 through 57 above.

59. Each of the named defendants and DOES 1-20 knew or should have known that other directors and/or officers failed to use the Housing Endowment for the purpose for which it was restricted pursuant to the Order.

60. Each of the named defendants and DOES 1-20 failed to recover those improperly diverted funds or to take actions against those directors/officers who improperly spent the Housing Endowment.

61. This failure resulted in the complete depletion of the Housing Endowment for use for improper purposes.

62. Each named defendant and DOES 1-20 are jointly and severally liable for an amount to be determined at trial, and/or through an accounting.

FIFTH CAUSE OF ACTION

(Negligence)
(Corporations Code § 5231, *et seq.*)
(Against All Named Defendants and DOES 1-20)

63. Plaintiff re-alleges and incorporates by reference herein each and every allegation contained in Paragraph 1 through 62 above.

64. Each of the named defendants and DOES 1-20 had a duty of reasonable inquiry to insure that all of MCAP's employees, officers and directors used MCAP's funds for the charitable purposes set forth in MCAP's articles of incorporation, including use of the restricted assets in a manner consistent with the Order.

65. Each of the named defendants and DOES 1-20 knew or should have known that some of MCAP's employees, officers and directors used MCAP's funds in a manner inconsistent with MCAP's charitable purpose.

66. Each of the named defendants and DOES 1-20 breached their duty to insure that all of MCAP's employees, officers and directors used MCAP's funds for the charitable purposes set forth in MCAP's articles of incorporation, including use of the restricted assets in a manner consistent with the Order, by allowing funds to be diverted and/or by failing to take action against those directors/officers who improperly spent MCAP's charitable assets.

67. This breach resulted in the permanent depletion of the Housing Endowment and the use of MCAP's unrestricted assets for improper purposes.

68. Each named defendant and DOES 1-20 are jointly and severally liable for an amount to be determined at trial, and/or through an accounting.

SIXTH CAUSE OF ACTION

(Imposition of a Constructive Trust)
(Civil Code, §§ 2223 and 2224)
(Against All Named Defendants and DOES 1-20)

69. Plaintiff realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 68 above.

70. Pursuant to Civil Code sections 2223 and 2224, a constructive trust may be imposed where three conditions are satisfied: (1) the existence of a *res* (property or some interest in property), (2) the right of a complaining party to that *res*, and (3) some wrongful acquisition or detention of the *res* by another party who is not entitled to it. In addition, the imposition of a constructive trust is proper when one has acquired property to which he is not justly entitled, if it was obtained by actual fraud or by constructive fraud through the violation of some fiduciary or confidential relationship.

71. On information and belief, all named defendants and DOES 1-20 are Involuntary Trustees, as defined in Civil Code sections 2223 and 2224, because they knew or should have known that the funds in the Housing Endowment were restricted by the Order and that the Housing Endowment was only to be invaded after standards for invasion had been adopted by the board, and only for purposes stated in the Order. On information and belief, several of the named defendants, including but not limited to defendants Johnson and Vannoy, and DOES 1-20 wrongfully took control of restricted charitable assets and subsequently participated in making illegal distributions of those restricted assets. All of the other named defendants and DOES 1-20 participated in the diversion of assets from the Housing Endowment and have, by dissipating the Housing Endowment, benefitted from violating the charitable trust pursuant to which those assets were held.

72. On information and belief, the funds in the Housing Endowment were designated in the Order as restricted assets to be held in trust for MCAP's charitable beneficiaries and to be used only to "provide housing." On information and belief, instead of spending the restricted assets on housing, the named defendants and DOES 1-20 breached their fiduciary duties by transferring the restricted assets from the Housing Endowment into MCAP's general operating account and allowing the restricted assets, as well as MCAP's unrestricted assets, to be used to for expenditures unrelated to "housing" as defined in the Order.

73. On information and belief, the named defendantsand DOES 1-20 were unjustly enriched when they used restricted charitable assets to pay their salaries and to pay personal expenses incurred on MCAP credit cards.

74. On information and belief, some of the named defendants and DOES 1-20 were also unjustly enriched because they personally received restricted assets. As such, the conduct of those named defendants and DOES 1-20 has violated and continues to violate the charitable trust obligations of the named defendants and DOES 1-20.

75. In order to prevent unjust enrichment on the part of each of the named defendants and DOES 1-20, plaintiff is seeking to create a constructive charitable trust on behalf of the intended beneficiaries to allow for the recovery of MCAP's assets that were illegally distributed by the

named defendants and DOES 1-20. Because the named defendants and DOES 1-20 violated this trust, the charitable beneficiaries of MCAP have suffered and will continue to suffer in an amount to be determined at time of trial.

SEVENTH CAUSE OF ACTION
(Involuntary Dissolution)
(Corporations Code, § 6510 *et seq.*)
(Against Defendant MCAP)

76. Plaintiff realleges and incorporates by reference each and every allegation contained in Paragraphs 1 through 75 above.

77. The grounds upon which the Attorney General seeks involuntary dissolution of MCAP include mismanagement of the corporation and/or misappropriation/misapplication/waste of MCAP's charitable assets, both restricted and unrestricted, by its officers and directors.

78. On information and belief, those in control of MCAP withdrew approximately $1.8 million dollars of restricted charitable assets from the Housing Endowment which were then misappropriated, misapplied or wasted.

79. On information and belief, MCAP's officers and directors misappropriated, misapplied or wasted in excess of $1.0 million in unrestricted charitable assets.

80. On information and belief, MCAP is currently conducting no substantial charitable activities and is substantially failing to carry out its stated purpose.

81. By reason of each and all of the acts and things hereinabove alleged, MCAP has failed to comply with the trust which it assumed and has departed from the public and charitable purposes it was bound to serve. In order to determine the extent of such failure and departure and to correct it and prevent such from occuring repeatedly in the future, and in order to conserve and preserve the assets and property of MCAP for public and charitable purposes and prevent waste, dissipation, and loss of the same to irreparable damage of the People of the State of California, it is necessary that MCAP be dissolved and all assets be placed in trust with the plaintiff for distribution to a like-kind public benefit corporation.

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WHEREFORE, Plaintiff prays as follows:

1. For appropriate injunctive and equitable relief protecting all charitable assets in whatsoever form and in whoever of the named defendants and DOES 1-20's possession they may now be;

2. That an order issue directing that the named defendants and DOES 1-20 render to the Court and to plaintiff a full and complete accounting for all of MCAP's charitable assets from January 1, 2000 to the present, including substantiation of all withdrawals from the Housing Endowment, as well as all assets, annual revenue and expenditures, and substantiating that any restricted funds transferred out of the Housing Endowment were used in a manner consistent with the Court's order;

3. That an order issue requiring the return of all charitable assets diverted from the Housing Endowment, and from MCAP's unrestricted charitable assets, for which MCAP cannot account, be placed in a constructive trust for the intended charitable beneficiaries of MCAP and its directors to be used for the intended charitable purpose;

4. That an order issue precluding the named defendants and DOES 1-20 from serving in any fiduciary capacity as directors or officers with any other public benefit corporation or charitable trust;

5. That an order issue for the involuntary dissolution of MCAP pursuant to the provisions of Corporations Code sections 6514 and 6518, and for an order providing for satisfaction of all of its lawful debts, and establishing a procedure for determining the disposition of all remaining assets of MCAP in a manner consistent with the charitable purposes of MCAP and consistent with any restrictions that have been placed upon any remaining assets of MCAP;

5. For compensatory damages;

6. For Plaintiff's attorneys' fees and costs pursuant to Code of Civil Procedure section 1021.8 and Government Code sections 12597 and 12598.

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7. For such other relief as the Court may deem to be just and proper.

Dated: May 20, 2010

Respectfully Submitted,

EDMUND G. BROWN JR.
Attorney General of California
BELINDA J. JOHNS
Senior Assistant Attorney General
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Exhibit 1

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Attorneys for Applicant MONTEREY COUNTY AIDS PROJECT

FILED
MAY 18 2000
SHERRI L. PEDERSEN
CLERK OF THE SUPERIOR COURT
DEPUTY

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MONTEREY

In re the Application of

The MONTEREY COUNTY AIDS PROJECT, a California nonprofit corporation,

Case No. M 48154

ORDER AFTER HEARING ON PETITIONER'S MOTION TO REMOVE RESTRICTION ON USE OF REAL PROPERTY

Date: May 5, 2000
Time: 9:00 a.m.
Dept: 14
Judge: Honorable Robert O'Farrell

The motion of Monterey County AIDS Project, a California Public Benefit Corporation ("MCAP"), to remove any restriction on use of that certain real property, more particularly described in Exhibit A attached hereto, (the Madsen Property") came on regularly for hearing on May 5, 2000, the Honorable Robert O'Farrell presiding. MCAP appeared by Noland, Hamerly, Etienne & Hoss and Stephen W. Pearson. The Office of the Attorney General of the State of California and the Attorney General appeared by Richard Finn, Esq. There were no appearances by any other parties.

Based upon the written and oral presentations of the parties and good cause appearing, IT IS HEREBY ORDERED AS FOLLOWS:

1. MCAP may sell the Madsen Property free and clear of any restriction on the use thereof contained in the Will of Douglas Madsen.

2. Any restrictions on the use of the Madsen Property are hereby removed.

3. The net proceeds of sale from the Madsen Property shall be placed by MCAP in a separate endowment fund ("the Housing Endowment"), subject to the following terms and conditions:

a. The Housing Endowment and any income therefrom shall be used by MCAP solely for the purpose of providing housing to people with HIV disease;

b. For purposes of this Order, "providing housing" means acquiring, selling or operating residential facilities, owned, leased, developed or operated by MCAP for the use, rental or purchase by people with HIV disease; subsidizing housing costs for people with HIV disease; providing respite residential facilities and hospice facilities or residential hospice care for people with HIV disease; and making grants to other qualified non-profit or public benefit entities which, as a condition of receiving such grants, agree to acquire, sell or operate residential facilities, respite residential facilities, hospice facilities or residential hospice care to or for the benefit of people with HIV disease, or to subsidize housing costs for people with HIV disease;

c. MCAP shall from time to time adopt such reasonable standards of investment, invasion and use of the principal and income from the Housing Endowment as may be appropriate under the circumstances.

4. The residuary bequest from the Madsen Estate, presently held by MCAP in a segregated bank account, shall be added to the Housing Endowment, and shall thereafter be administered by MCAP as a part of the Housing Endowment, and shall be subject to all the terms and conditions of this Order.

5. MCAP is authorized to sell the Madsen Property to Eric Mathewson, pursuant to the terms and conditions of that certain Residential Purchase Agreement (And Receipt For Deposit) between the parties dated February 16, 2000, a copy of which is attached hereto as **Exhibit B**; provided, however, that prior to closing such sale, MCAP shall list the Madsen Property with a qualified real estate broker of its choice as hereafter provided.

6. The terms of the listing shall include (a) a 90-day listing period; (b) an "as-is" sale as to title and physical condition; (c) an all cash sale. The listing price shall be determined by MCAP after consultation with the listing broker and shall not be less than $1,200,000. The listing shall be available on the Monterey County multiple listing service.

7. If an escrow transferring the Madsen Property to a buyer other than Eric Mathewson, at an all cash price (net of commission) in excess of $1,128,000, and otherwise on the same terms and conditions as the sale to Mathewson, has not closed by 5 p.m. on August 25, 2000, then MCAP shall be free to sell the Madsen Property to Eric Mathewson, at the agreed price of not less than $1,150,000.00, subject to all the terms and conditions of the deposit receipt presently in effect between the parties. MCAP may keep Mathewson fully informed of any offers it receives on the Madsen Property.

8. The Trustees named in the will of Douglas Madsen, to wit, David Shipman, Myron E. Etienne, Jr., Marlene K. Turner and John Lamour are hereby exonerated from any responsibility for any actions by MCAP in connection with the Madsen Property and their status as trustees is terminated effective on signing this Order. No accounting shall be required of any of the said Trustees.

Dated: MAY 1 2 2000

JUDGE OF THE SUPERIOR COURT

ROBERT O'FARRELL

APPROVED AS TO FORM:

(signature on following page)

Richard F. Finn, Deputy Attorney General
California State Department of Justice

In re the Application of
Monterey County Aids Project, etc.
Case No. M 48154

ORDER AFTER HEARING