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JERE N. SULLIVAN, JR, (State Bar No. 73476)
1141 Pacific Street, Suite A
San Luis Obispo, CA 93401
(805)543-8869

Attorney for PEACHY CANYON WINERY (incorrectly sued as PEACH CANYON CELLARS), DOUGLAS P. BECKETT, and NANCY L. BECKETT, Trustees of the BECKETT FAMILY TRUST

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAREK MOLSKI, an individual; and DISABILITY RIGHTS ENFORCEMENT EDUCATION SERVICES: HELPING YOU HELP OTHERS, a California public benefit corporation,

Plaintiffs,

v.

PEACHY CANYON WINERY (incorrectly sued as PEACH CANYON CELLARS); DOUGLAS P. BECKETT and NANCY L. BECKETT, Trustees of the BECKETT FAMILY TRUST,

Defendants,

Case No. 03-6266 - TJH

POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS

Date: December 6, 2004
Time: 10:00 a.m.
Place Department 17

Assigned Judge: Hon. Terry J. Hatter, Jr.
Trial Date: None

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I INTRODUCTION

In this action, Plaintiffs allege that Defendant Peachy Canyon winery, incorrectly sued as Peach Canyon Cellars, a winery, whose tasting room facility is located in Templeton, California, failed to meet the "structural" requirements of Title III of the Americans with Disabilities Act ("ADA".[1] Rather than seeking voluntary pre-filing compliance with these requirements without the necessity of further clogging the Federal Court calendars[2] and engaging in a waste of sunk costs expended in considering them, Plaintiffs seek injunctive relief that would compel Defendants to comply with the ADA and, of course, pay their attorney's fees and costs. However, whether cast in terms of lack of justiciability due to mootness or lack of standing arising from an absence of a redressible injury-in-fact, summary judgment must be entered on behalf of Defendants as to the Plaintiffs' first cause of action for injunctive relief under the ADA since Defendants have complied with all ADA structural requirements.

Having once determined that no justiciable controversy exists relative to Plaintiffs' ADA claim, Plaintiffs perforce lose the ADA as their source of "original jurisdiction" in this Court. When that "original jurisdiction" is lost, dismissal of all Plaintiffs' supplemental State-law causes of action is mandated by Fed.R.Civ.P. 12(h) and 28 U.S.C. § 1367(c)(3) due to Defendants' present suggestion that the Court has lost its subject matter jurisdiction over the

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[1] 42 U.S.C. § 12182 (104 Stat. 365).

[2] It should be noted that this particular plaintiff, through this particular attorney, has filed literally hundreds of actions identical in their pleadings to this one ("cookie- cutter complaints") in the United States District Court for the Central District of California. While some have settled, scores of them have been filed. This Court, of course, may and should take judicial notice of the fact of these lawsuits having been filed. See Fed. R. Evid. 201; Schweitzer v. Scott, 469 F.Supp. 1017 (C.D.Cal. 1974).

Plaintiffs' case in its entirety. See, e.g., Herman Family Revocable Trust v. Teddy Bear, et al., 254 F.3d 801 (9th Cir. 2001).

Alternatively, and should the Court determine that it somehow retains jurisdiction over Plaintiffs' supplemental State-law causes of action, even though it is still early in the action and Plaintiffs have undertaken no activity implicating this Court, other than the filing of the complaint, summary judgment must be entered on these same bases as to the Plaintiffs' Third and Fifth Causes of Action seeking injunctive relief under California's Unfair Competition Law[3] and California Health & Safety Code § 19955.

The reasons for this rest on three factors. The first is that injunctive relief to require compliance with the requirements of the ADA is the only relief that could be afforded Plaintiffs by this Court on the First Cause of Action since, assuming they obtained success on the merits, compensatory or other monetary damages are not authorized by the ADA.[4] The same is also true relative to the California Unfair Competition Law[5] and California Health & Safety Code § 19955.[6] Second, through efforts that began before the filing of the Complaint, Defendant has brought Peachy Canyon Cellars into compliance with the ADA and all relevant State laws. Third and as a result, Plaintiffs lack "any reality of the threat of repeated injury"

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[3] Cal. Bus. & Prof. Code §§ 17200 et seq..

[4] See 42 U.S.C. §§ 2000a-3(a)(authorizing only actions for injunctive relief) and 12188(a)(1)(same); 28 C.R.D. §§ 36.501 and .505; Pickern v. Holiday Quality Foods, Inc., 293 F.3d 1133, 1136 (9th Cir. 2002)("Damages are not allowable to individuals....")

[5] See Cal. Bus. & Prof. Code § 17203 (limiting private remedies to equitable relief); Brown v. Allstate Ins. Co., 17 F.Supp.2d 1134, 1140 (S.D.Cal. 1998); Dean Witter Reynolds, Inc. v. Superior Court, 211 Cal.App.3d 758, 774, 259 Cal.Rptr. 789 (1989)(compensatory damages are not recoverable).

[6] See Cal. Health & Safety Code § 19953 (providing the remedy for a violation of § 19955 is limited to "an action to enjoin the violation")' Botosan v. Fitzhugh, 13 F.Supp.2d 1047, 1052 (S.D.Cal. 1998); Donald v. Café Royale, Inc., 218 Cal.App.3d 198, 183, 266 Cal.Rptr. 804 (1990).

required for standing under Article III of the United States Constitution or an actual "Case" or "Controversy" since Defendants' purported violation of the ADA has been permanently remedied and is thus not "capable of repetition." In either instance, the result is a loss of the statutory basis for this Court's original jurisdiction and, resultantly, of any jurisdiction for the Court to consider the supplemental State-law causes of action pursuant to 28 U.S.C. § 1367(c)

II STATEMENT OF UNDISPUTED MATERIAL FACTS

1. Plaintiff Jarek Molski is a person who claims physical disabilities. Complaint, ¶ 2.

2. Plaintiff "Disability Rights Enforcement, Education Services: Helping You Help Others," is a California public benefit corporation whose membership is purportedly composed of, among others, persons with physical disabilities. Complaint, ¶ 6.

3. Defendant Peachy Canyon Winery (incorrectly sued as Peach Canyon Cellars) is a vineyard and winery, duty licensed by the California Alcoholic Beverage Control Board, with a Tasting Room located in the unincorporated area of Templeton, County of San Luis Obispo, State of California. The tasting room is open to members of the public during designated hours for purposes of such members of the public tasting wines produced by Peachy Canyon and purchasing the same. Affidavit of Douglas P. Beckett, ¶ 2 (hereinafter "D.Beckett Aff.").

4. Defendants Douglas P. Beckett and Nancy L. Beckett are trustees of the Defendant Beckett Family Trust which is the owner and operator of Peachy Canyon Winery. D. Beckett, Aff., ¶ 3.

5. On or about August 9, 2003, Plaintiff Molski has averred he visited Peachy Canyon Cellars. Complaint, ¶ 19.

6. At the time of his purported visit, Plaintiff Molski alleges that certain architectural barriers existed at the winery and its grounds that denied him the proper and legally required access to a public accommodation consisting of the following:

"a. lack of handicapped accessible parking signage;

b. lack of disabled van accessible parking stall(s);

c. lack of accessible ramp to the outside patio;

d. lack of a handicapped-accessible unisex public restroom;

e. lack of accessible wine-tasting/retail counter (the existing counter was too high);

f. lack of accessible ramp to the gazebo;

g. lack of accessible paths of travel to the picnic area...."

Complaint, ¶ 24.

5. On or about September 2, 2003, Plaintiffs filed the instant lawsuit without providing Defendants with any prior notice of the alleged architectural barriers specified above.

D. Beckett Aff., ¶ 4.

6. By letter dated September 26, 2003, served with the Complaint, Thomas Frankovich, Esq., Plaintiff's attorney of record, gave notification of the filing of the lawsuit and service of the complaint to Defendant Nancy L. Beckett. Affidavit of Nancy L. Beckett, ¶ 3 ("hereinafter N. Beckett Aff.).

7. In the September 26, 2003 letter, Mr. Frankovich, on behalf of his clients, stated:

"We believe the following architectural barriers could be addressed/removed within ninety (90) days:

a. Provide van accessible parking – your current space, partially painted and partially signed may not be wide enough. The van stall might have to be moved;

b. Provide a van accessible parking sign and tow-a-way sign;

c. Install grab bars in the restroom and set the elements (i.e. toilet paper holder) in the correct place and at the correct height;

d. Provide ramps to the rear patio and gazebo;

e. Provide accessible pathways to the picnic area;

f. lower the wine tasting counter (a portion of 6 feet in length, and no higher than 36")" N. Beckett Aff., ¶ 3.

8. In his September 26, 2003 letter, Mr. Frankovich also opined to Defendant Beckett that "[w]e do not believe you have any bona fide defense to your continuing obligation to identify and remove architectural barriers...," that "[w]e do not want to see you waste your money on needless litigation ...," and that if Peachy Canyon Cellars were to agree to make the changes within a reasonable time all that would be necessary to end the litigation would be to enter into a settlement agreement paying Mr. Frankovich's attorneys fees and paying Plaintiff some unspecified amount of damages.

9. All structural requirements of the ADA have been met by Peachy Canyon Cellars. Affidavit of Craig Smith, ¶ 4.

10. Since the filing of the complaint in this action, Plaintiffs have engaged in no discovery and filed no motions or other documents with the Court for its consideration and decision. Affidavit of Jere N. Sullivan, ¶ 2.

III ARGUMENT

A. The Standards For Consideration Of A Motion For Summary Judgment And To Dismiss, Respectively

Summary judgment should be granted if there is no genuine issue as to any material fact when the evidence and all justifiable inferences are viewed in the light most favorable to the non-moving party and the moving party is entitled to relief as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 371, 323, 106 S.Ct. 1548, 91 L.Ed.2d 265 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242. 251. 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The court must undertake a dual inquiry into the genuineness and materiality of any purported factual issues. Indeed, it is well-settled that the duty of the Court is to scrutinize the evidence and reasonable inferences to determine whether there

is sufficient probative evidence to permit "a finding in favor of the opposing party based on more than mere speculation, conjecture, or fantasy." O.S.C. Corp. v. Apple Computer, Inc., 792 F.2d 1464, 1467 (9th Cir. 1986)(quoting Barnes v,. Arden Mayfair, Inc., 759 F.2d 676, 681 (9th Cir. 1985). As a result, where the record taken as a whole cold not lead a rational trier of fact to find for the non-moving party, disposition by summary judgment is appropriate. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 474 U.S. 574, 586-87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)("When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts .... Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'"). In adjudging a motion for summary judgment, it is not the court's role to weigh the evidence. Instead, it is sole function is to decide whether there exists a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. at 249, 106 S.Ct. 2505.

Under this approach, this Court should grant summary judgment to Defendants. Since the lack of standing due to the absence of a redressible injury-in-fact or an absence of a "Case" or "Controversy" rendering the case moot is clear and unmistakable, no genuine issue of material fact exists. Dismissal of the remainder of the complaint is also required since, without the source of its original jurisdiction to entertain the causes of action, the Court simply lacks jurisdiction to even address the supplemental State-law claims.

B. Plaintiffs Lack Standing And Otherwise Fail To Present A Case Or Controversy Relative To Their ADA Cause Of Action Since An Injunction May Not, As A Matter Of Law Or Fact, Issue Against Defendants

Defendants have complied with the structural requirements of the ADA. Undisputed Mat. Fact No. 9; Smith Aff., ¶ 4. The elements of that compliance – duly marked van accessible parking for the disabled, restrooms with metal bars and re-situated elements for use by the disabled, ramps to the patio and gazebo, a lowered tasting room bar, and accessible pathways to the picnic area – deprive Plaintiffs of any "reality of the threat of repeated injury" under the ADA. In doing so, it deprives Plaintiffs of any standing to seek injunctive relief or any justiciable cause of action over which the Court has jurisdiction.

The underlying law that governs a determination of whether standing exists is reasonably well-established. Article III, ¶ 2 of the United States Constitution restricts federal courts to deciding "Cases" or "Controversies" and thus imposes what the Supreme Court has described as the "irreducible constitutional minimum of standing," – injury in fact, causation, and redressibility. Lujan v. National Wildlife Fed'n, 504 U.S. 555, 560, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). To establish Article III standing, a plaintiff must therefore allege, and ultimately prove, that he has suffered an injury in fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief. See Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 103, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998); Bennett v. Spear, 520 U.S. at 162, 117 S.Ct. 1154 (1997). These core requirements are designed to ensure that the exercise of federal jurisdiction is consistent with separation of powers and limited to those suits "traditionally thought to be capable of resolution through the judicial process." Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472, 102 S.Ct. 752, 70 L.Ed.2d 33 (1982)(quoting Flast v. Cohen, 392 U.S. 93, 97, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968).

To qualify as a constitutionally sufficient injury-in-fact, the asserted injury must be "concrete and particularized" as well as "actual or imminent, not 'conjectural' or 'hypothetical.'" Lujan, 504 U.S. at 560, 112 S.Ct. 2130. Standing must, of course, exist separately for each form of relief sought. City of Los Angeles v. Lyons, 461 U.S. 95, 109, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983). The "actual or threatened injury" required by Article III

may "exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing...." Warth v. Seldin, 422 U.S. 490, 500, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). However, even in that instance, the "injury" must be redressible by the relief sought. Steel Co., 523 U.S. at 103-04, 118 S.Ct. 1003. In fact, to support standing, particularly standing to obtain injunctive relief, the plaintiff's injury must be actual and imminent to ensure that the court avoids deciding a purely hypothetical case in which the projected harm will ultimately fail to occur. Lujan, 504 U.S. at 564-65 n. 2, 112 S.Ct. 2130 (noting that "[a]lthough imminence is concededly somewhat an elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes – that the injury is certainly impending"(internal quotation marks omitted). In other words, "Supreme Court precedent teaches us that the injury in fact requirement ... is qualitative, not quantitative, in nature. Ass'n of Com. Orgs. For Reform Now v. Fowler, 178 F.3d 350, 357-58 (5th Cir. 1999).

Standing and justiciability must, of course, exist throughout the course of the litigation and, assuming that they existed at the time of the filing of the Complaint, they can be lost in the course of litigation by the occurrence of events that change the factual dynamics. See, e.g., Arizonians for Official English v. Arizona, 520 U.S. 43, 68 n. 22, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) ("requisite personal interest that must exist at the commencement of the litigation (standing... [must] continue throughout its existence (mootness)"), quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 63 L.Ed.2d 479 (1980); Blair v. Shanahan, 38 F.3d 1514, 1518 (9th Cir. 1994)("'Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case....'", quoting Burke v. Barnes, 439 U.S. 361, 363, 107 S.Ct. 737, 93 L.Ed.2d 732 (1987).

That the Plaintiffs have lost their standing to seek injunctive relief in the course of this litigation – due to Defendants' post-filing compliance with the requirements of the ADA – is clear from application of City of Los Angeles v. Lyons, and Steel Co. v. Citizens For A Better Environment, 523 U.S. 83, 118 S.Ct. 1003. Indeed, Lyons clearly mandates this conclusion relative to Plaintiffs' request for injunctive relief (the only relief available to them under the

ADA and, as noted earlier, various of the State laws upon which they base their supplemental causes of action). First, it is clear that "[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects." Lyons, 461 U.S. at 102, 103 S.Ct. 1660 (quoting O'Shea v. Littleton, 414 U.S. 488, 493-94, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974)). Rather, the injury-in-fact at which the equitable relief is aimed to redress must be "'real and immediate, not 'conjectural' or hypothetical.'" Ibid. As in Lyons where the Supreme Court held that standing to seek the requested injunction depended (and was defeated by) the question of whether Lyons was "likely to suffer future injury from the use of the chokeholds by police officers," [id. At 105, 103 S.Ct. 1660], the situation here is whether Plaintiffs are likely to again find themselves unable, should they or any disabled person every visit Peachy Canyon Winery, to equally avail themselves of the facility because of the absence of ADA "structure" or the presence of ADA "barriers." Clearly they are not. See Smith Aff., ¶ 4. Thus, the injunctive, relief they seek can in no way redress their past injury or prevent any imminent future injury. They thus lack standing.

Looked at from another perspective, albeit one reaching the same result, the Plaintiffs' ADA cause of action is moot and, hence, not justiciable due to the absence of any "Case" or "Controversy." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000)(mootness, like standing, is a jurisdictional issue derived from Article III's requirement of "case" or "controversy"). Because an ongoing violation is needed to, for instance, obtain an injunction, the mootness doctrine serves the purpose of weeding out those cases in which a live controversy no longer exists. Application of that doctrine is, however, stringent in a situation such as that present here. It is settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of that practice." City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289, 102 S.Ct. 1070, 71 L.Ed.2d 152 (1982). Otherwise, "the courts would be compelled to leave '[t]he defendant ... free to return to his old ways." Id. At 289 n. 10, 102

S.Ct. 1070 (quoting United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S.Ct. 894, 97 L.Ed. 1309 (1953). Thus, the applicable standard for determining whether mootness exists because of a defendant's voluntary conduct is: "A case might become moot if subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." United States v. Concentrated Phosphate Export Assn., 393 U.S. 199, 201, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968).

That is the situation here. There is no way in which the Plaintiffs, who do after all bear the burden of establishing justiciability, [see, e.g., Powers v. Eichen, 229 F.3d 1249 (9th Cir. 2000)], can establish any means by which Defendants' "allegedly wrongful behavior" could reasonably be expected to recur. After all, permanent fixtures to the realty were installed at great cost to Defendants and there is absolutely no evidence of any lack of good faith by the Defendants. Indeed, there is ample evidence establishing the contrary. The Ninth Circuit reached a similar conclusion in Dufresne v. Veneman, 114 F.3d 952 (9th Cir. 1997), a case involving a challenge under the ADA to aerial spraying of pesticides to combat "Medflies." The Court found that the "[p]laintiffs' claims for injunctive relief have been rendered moot by a positive turn of events: The Medfly is considered eradicated in the State of California." Id. at 954. The Court rejected the plaintiffs' argument that mootness was overcome because "there is some possibility in future spraying," because

> "this possibility is too remote to preserve a live case or controversy. In Mayfield v. Dalton, 109 F.3d 1423 (9th Cir. 1997), two servicemen seeking to challenge a military policy [were] separated from active duty before we decided the appeal. They argued their claims were not moot because they could 'still ... be required to return to active duty in an emergency situation.' Id. at 1425. We held that because 'the recall could happen only at some indefinite time in the future and then only upon the occurrence of future events now unforeseeable,' the claims were moot. Id. As in that case, "' such speculative contingencies afford no basis for our passing on the substantive issues presented.' Id."(Citations omitted)

The Plaintiffs' claims for injunctive relief are thus moot and, accordingly, Plaintiffs have failed to maintain the requisite case or controversy needed by this Court to maintain its original jurisdiction of the cause.

C. Defendants, Pursuant To Fed.R.Civ.P 12(h)(3), Suggest That This Court Lacks Jurisdiction Of The Subject Matter Due To Plaintiffs' Lack Of Standing And Must Thus Dismiss The Supplemental Causes Of Action

Once it is determined that Plaintiffs' ADA claim is non-justiciable, in that Plaintiffs lack standing to seek (or their claim is moot for) the only substantive remedy allowed under the ADA (injunctive relief),[7] it necessarily follows that the Court is deprived of jurisdiction over the supplemental State law claims of the remaining five (5) causes of action. 28 U.S.C. § 1367, which governs federal court jurisdiction over "pendent" state-law claims, provides that

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[7] As a general rule, a plaintiff who prevails on the ADA claim could be entitled to an award of attorney's fees. It is well-settled, however, that the presence of such a remedy would not provide the requisite injury-in-fact needed to establish standing to maintain a cause of action injunctive relief. See, e.g., Steel Co., 523 U.S. at 105-109 and n. 9, 118 S.Ct. 1003 ("The litigation must give the plaintiff some other benefit besides reimbursement of costs that a byproduct of the litigation itself. An 'interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim.'") Of course, attorneys fees are not available in this action should the court grant summary judgment for Defendant and dismiss the action since Plaintiffs would then not be the "prevailing party" in fact or to the extent that it could claim they were the "catalyst" for Defendants' compliance with the ADA. See Buckhannon Board v. West Virginia D.H.H.R., 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001).

> "in any civil action in which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III ...."

28 U.S.C. § 1367(a)(West. Supp. 2004). Under § 1367(c)(3), "the district court may decline to exercise supplemental jurisdiction over a claim under subsection (a) if – the district court has dismissed all claims over which it has original jurisdiction." That, according to controlling Ninth Circuit precedent, also includes where summary judgment has been granted as to the original jurisdiction claim.

Herman Family Revocable Trust v. Teddy Bear, 254 F.3d 802 (9th Cir. 2001) is controlling as the need for this Court to dismiss all of Plaintiffs' supplemental causes of action once it loses its original ADA jurisdiction. In that case original jurisdiction was based on admiralty and maritime jurisdiction, 28 U.S.C. § 1333. The district court, even though it determined no such jurisdiction existed since "[c]ontracts for the sale of a slip are not maritime and admiralty jurisdiction does not apply," [id. at 804], did not dismiss the pendent claims. Instead, it continued on to determine the merits of the supplemental State-law claims. The Court of Appeal reversed, holding that the plain language of Section 1367

> "makes clear that supplemental jurisdiction may only be invoked when the district court has a hood of original jurisdiction on which to hang it. ... Without the hood of admiralty jurisdiction – the basis for original jurisdiction – the district court had no power under either § 1367 or Article III of the Constitution to adjudicate *any* claims in the lawsuit." (Emphasis in original; citations omitted)

Clearly, a dismissal on the grounds alleged in Defendants' motion does not qualify for the exception to the rule as enunciated in Herman Family Trust: where the court has ruled on the merits of cause of action giving rise to original jurisdiction, it may, in its discretion, reach the merits of the supplemental claims:

"If the district court dismisses all federal claims on the merits, it has discretion under § 1367 to adjudicate the remaining claims; if the court dismisses for lack of subject matter jurisdiction, it has no discretion and must dismiss all claims." Id., at 606.

In the absence of original jurisdiction because the Plaintiffs simply have no standing to maintain their ADA cause of action, the result must perforce be dismissal of all supplemental claims pursuant to Fed.R.Civ.P. 12(h)(3)("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). That suggestion now having been made by Defendants, the Court should dismiss the State-law supplemental causes of action.

D. **In The Event That Plaintiffs' Supplemental State Law Claims Are Not Dismissed, Summary Judgment Is Appropriate As To The Third And Fifth Causes Of Action Due To The Nonjusticiability**

In the untoward event that this Court does not dismiss the remainder of the Complaint for lack of subject matter jurisdiction, summary judgment should be entered for Defendants as to the Third and Fifth Causes of Action, respectively, for the same reasons it should be granted as to the ADA cause of action.

First and with regard to Plaintiffs' Fifth Cause of Action for equitable relief for purported violation of California's Unfair Competition Law, California Bus. & Prof. Code § 17203, like the ADA, limits private remedies to equitable relief. Brown v. Allstate Ins. Co., supra; Dean Witter Reynolds, Inc. v. Superior Court, supra (compensatory damages are not awardable). Since no basis for entry of an injunction exists, no claim has been stated upon which relief can be granted due to the lack of standing or mootness.

Second, the same result obtains to Plaintiffs' Third Cause of Action for purported violation of California Health & Safety Code § 19953. As with the ADA, the remedy for a

violation of §19955 is limited to "an action to enjoin the violation." See, Botosan v. Fitzhugh, supra; Donald v. Café Royale, Inc., supra.

V. Conclusion

For the reasons stated above and in the accompanying motion and affidavits as well as the record as a whole, Defendants' Motion for Summary Judgment should be granted and, concomitantly, the Court should accept Defendants' suggestion that the Court lacks jurisdiction over the subject matter and dismiss the Defendants' supplemental State-law claims pursuant to 28 U.S.C. § 1367.

Respectfully submitted,

JERE N. SULLIVAN, JR.
Attorney for Defendants
PEACHY CANYON WINERY et.al.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

I am employed in the County of San Luis Obispo, in the State of California. I am over the age of 18 and not a party to the within action; my business address is 1141 Pacific Street, Suite A, San Luis Obispo, California, 93401.

On November 4, 2004, I served the foregoing document described as: **POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AND MOTION TO DISMISS**, on the Plaintiff in this action, by placing a true copy thereof enclosed in a sealed envelope postage fully prepaid at San Luis Obispo, California, addressed as follows:

Sarah Kramer
The Frankovich Group
2806 Van Ness Avenue
San Francisco, CA 94109-1426

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed on November 4, 2004, at San Luis Obispo, California.

APRIL HOLTON