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Shelter Reform Action Committee's Complaint
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with the City's Answer
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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THE SHELTER REFORM ACTION COMMITTEE,
GARY KASKEL and MARIE ANN MAR, in their
capacities as co-chairpersons of THE SHELTER
REFORM ACTION COMMITTEE,

Plaintiff,

- against -

ANIMAL CARE AND CONTROL OF NEW YORK CITY,
INC. (f/k/a THE CENTER FOR ANIMAL CARE AND
CONTROL, INC.), THE CITY OF NEW YORK, THE
DEPARTMENT OF HEALTH AND MENTAL HYGIENE
OF THE CITY OF NEW YORK, MICHAEL R.
BLOOMBERG, as the Mayor of the City of New York,
THOMAS FRIEDEN, ADRIAN BENEPE, JOHN
M.B. O'CONNOR, JAY KUHLMAN, JOYCE YANG,
BRUCE DONIGER and JOHN DOE,

VERIFIED
COMPLAINT
*[VERIFIED
ANSWER]*

Index No
107636/06

Defendants.
-----X

Plaintiffs, THE SHELTER REFORM ACTION COMMITTEE and GARY KASKEL and MARIE ANN MAR, in their capacities as co-chairpersons, by their attorney JAMES M. VISSER, ESQ. complaining of the Defendants allege herein upon information and belief:

[Defendants ANIMAL CARE AND CONTROL OF NEW YORK CITY, INC.. THE CITY OF NEW YORK, the DEPARTMENT OF HEALTH AND MENTAL HYGIENE OF THE CITY OF NEW YORK, MICHAEL R. BLOOMBERG, THOMAS FRIEDEN, ADRIAN BENEPE, JOHN M, B. O'CONNOR, JAY KUHLMAN, JOYCE YANG, and BRUCE DONIGER, and CHIEF DOUGLAS ZEIGLER s/h/a JOHN DOE, answer the complaint herein as follows:]

THE PARTIES

1. At all times hereinafter mentioned SHELTER REFORM ACTION COMMITTEE (hereinafter, "SRAC") is and was an unincorporated association based in the City of New York. SRAC is comprised of individuals who live in, and humane organizations that are based in, the City of New York. The individuals and organizations advocate the humane treatment of animals in the City.

[1. Deny knowledge or information sufficient to term a belief as to the truth of the allegations contained in paragraph 1 of the complaint.]

2. At all times hereinafter mentioned, Plaintiff GARY KASKEL was and still is a resident of the City of New York, County and State of New York; and was and is a co-chairperson of SRAC; and was and still is a pet owner in the City of New York.

[2. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained In paragraph 2 of the complaint.]

3. At all times hereinafter mentioned, Plaintiff MARIE ANN MAR was and still is a resident of the City of New York, County and State of New York; and was and is a co-chairperson of SRAC; and was and still is pet owner in the City of New York

[3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint..]

4. Defendant, ANIMAL CARE AND CONTROL OF NYC, INC. (hereinafter "ACC") is a 501(c)(3) not-for-profit corporation incorporated by the Corporation Counsel of the City of New York in late 1994 under the original name the "Center for Animal Care & Control Inc." ACC's stated purpose is to carry out animal management functions and duties for the City. (See Certificate of Incorporation, attached hereto as Exhibit 1.) It also acts as temporary custodian for the public for lost and stray animals.

[4. Deny the allegations contained in paragraph 4 of the complaint, except to admit that Animal Care and Control of NYC, Inc. ("ACC") is a 501(c)(3) not for profit corporation formed for the charitable purposes of providing animal care and control.]

5. Defendant THE CITY OF NEW YORK (hereinafter, "the City") was and still is a municipal corporation organized and existing under the laws of the State of New York.

[5. Admit the allegations contained in paragraph 5 of the complaint.]

6. Defendant THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE (hereinafter, "DOH") is the agency of the City of New York primarily charged with safeguarding public health in the City. N.Y.C. Charter §§ 551-68. DOH administers and enforces the New York City Public Health Code, 24 R.C.N.Y. §§ 1.10 et seq., including its animal control policies and procedures. 24 R.C.N.Y. §§ 161.01-161.25. DOH's chief executive officer is the City Health Commissioner, N.Y.C. Charter § 551, a position currently held by Thomas Frieden, M.D.

[6. Admit the allegations contained in paragraph 6 of the complaint.]

7. Defendant MICHAEL R. BLOOMBERG (hereinafter, "Mayor Bloomberg") is the duly elected and qualified Mayor of the City of New York.

[7. Admit the allegations contained in paragraph 7 of the complaint.]

8. Defendant THOMAS FRIEDEN, M.D. (hereinafter, "Commissioner Frieden") is the Commissioner the DOH and is an *ex-officio* member of the board of directors of defendant ACC. Commissioner Frieden is also the chairman of ACC's board of directors.

[8. Admit the allegations contained in paragraph 8 of the complaint.]

9. Defendant ADRIAN BENEPE (hereinafter, "Commissioner Benepe") is the Commissioner of the New York City Parks Department and is an *ex-officio* member of the board of directors of defendant ACC.

[9. Admit the allegations contained in paragraph 9 of the complaint.]

10. Defendant BRUCE DONIGER (hereinafter, "Mr. Doniger") is a member of the board of directors of defendant ACC and, upon information and belief, is the president and CEO of the J.E. & Z.B Butler Foundation in Manhattan.

[10. Admit the allegations contained in paragraph 10 of the complaint.]

11. Defendant JAY KUHLMAN, D.V.M. (hereinafter, "Dr. Kuhlman") is a member of the board of directors of defendant ACC and is also the owner of the Gramercy Veterinary Hospital in Manhattan.

[11. Admit the allegations contained in paragraph 11 of the complaint.]

12. Defendant JOHN M.B. O'CONNOR (hereinafter, "Mr. O'Connor") is a member of the board of directors of defendant ACC and, upon information and belief, is employed by John Wiley and Company in Manhattan.

[12. Admit the allegations contained in paragraph 12 of the complaint.]

13. Defendant JOYCE YANG (hereinafter, "Ms. Yang") is a member of the board of directors of defendant ACC, and, upon information and belief, is a non-practicing attorney residing in New York City.

[13. Admit the allegations contained in paragraph 13 of the complaint.]

14. Defendant JOHN DOE is an *ex-officio* member of the board of directors of defendant ACC. The *ex-officio* position is supposed to be filled by the New York City Deputy Police Commissioner for Community Affairs, however, the position was eliminated in the Police Department and no action was taken by the board of ACC to address this change. So, the missing board member remains unknown.

[14. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs 14 of the complaint.]

VENUE

15. Venue is properly placed in the Supreme Court New York County pursuant to CPLR § 503 because plaintiffs' county of residence is New York and defendants principal offices are in New York County.

[15. Admit the allegations contained in paragraph 15 of the complaint.]

STANDING

16. Plaintiffs as taxpayers and an association of taxpayers are allowed to challenge State and municipal expenditures. (See General Municipal Law § 51 and *Boryszewski v. Brydges*, 372 N.Y.S.2d. 623, 334.)

[16. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 16 of the complaint.]

17. Plaintiffs have standing to sue as taxpayers under the State Finance Law Article 7 A (s) 123 to 123(i) because the Mayor and the City acted outside their authority in not issuing a request for proposals for shelter providers before renewing and or extending ACC'S contract.

[17. Deny the allegations contained in paragraph 17 of the complaint.]

18. Plaintiffs have standing to sue as taxpayers under the State Finance Law Article 7 A (s) 123 to 123(i) because the Mayor and the City acted outside their authority in creating a not-for-profit charity completely under the Mayor's and City's control whose single source of funding is the City.

[18. Deny the allegations contained in paragraph 18 of the complaint.]

19. Plaintiffs have common law taxpayer standing to sue. (See *Boryszewski v. Brydges*, 37 N.Y. 2d. 361(1975)). The plaintiffs can challenge the contract between the City and ACC because the contract for shelter providers was not bid out competitively. Since the City is required to provide shelters pursuant to a legislative mandate, it is impermissible to insulate the contracting process for same from judicial scrutiny. Therefore, the taxpayers have standing to sue because the Mayor and City cannot create an impenetrable barrier to insulate the contracting process from review.

[19. Deny the allegations contained in paragraph 19 of the complaint.]

20. Plaintiffs have standing to sue as the intended third-party beneficiaries to a municipal contract, and as actual aggrieved persons as a result of the actions of Defendants and as such can object to the City and Mayor expending money in a manner not properly inuring to the public benefit and them as pet owners.

[20. Deny the allegations contained in paragraph 20 of the complaint.]

21. Plaintiffs have standing to seek declaratory and injunctive relief in as much as the Mayor's and the City's alleged actions with respect to the transfer of the animal control functions to ACC violated state and Municipal Law regarding bidding and procurement procedures. (See General Municipal Law (s) 103) The provision was enacted to protect municipalities and their taxpayers, *AEP Resources Service Co. v. Long Island Power Authority* 1999, 179 Misc. 2d 639 (1999).

[21. Deny the allegations contained in paragraph 21 of the complaint.]

22. The plaintiffs have standing as pet owners since they are in the zone of interest of the pet licensing law as a class of persons the law was meant to protect.

[22. Deny the allegations contained in paragraph 22 of the complaint.]

23. The plaintiff's have standing with respect to their taxpayer claim regarding the unlawful procurement and contract award to ACC of the of the city shelter operations since the General Municipal Law mandates that bids on public contracts

involving expenditures of more than twenty thousand dollars be awarded to the lowest responsible bidder. (See General Municipal Law (s) 103.)

[23. Deny the allegations contained in paragraph 23 of the complaint.]

24. Plaintiffs have standing to sue with regard to the composition of ACC'S board of directors because ACC is a "quasi public" agency that is funded almost exclusively with City money. Although ostensibly seen as a "private " not-for-profit corporation, ACC is in reality the "alter ego" of the New York City Department of Health, created by the City of New York to perform "animal control" functions for the City in City-owned animal shelters under an exclusive, multimillion dollar contract with the City. Justice Lebedeff's of this Court recognized ACC was subject to the FOIL and Open Meetings Laws in a January 28, 1999 opinion regarding SRAC'S request for same. (See Justice Lebedeff's opinion attached herewith as Exhibit 2.)

[24. Deny the allegations contained in paragraph 24 of the complaint, except to admit that the ACC was created by the City of New York to perform animal control functions, and to admit that Justice Diane Lebedeff issued an opinion regarding the applicability of FOIL laws to ACC and respectfully refer the Court to that decision for its complete language and contents and an interpretation thereof.]

25. CPLR § 1001 (a) requires that a party whose interest may be adversely affected by a potential judgment is a necessary party and shall be made a party in the action. *Cybul v. The Village of Scarsdale*, 17 AD3d 462 (2005). The failure to join a necessary party is grounds for dismissal of the action. *Red Hook Gowanus Chamber of Commerce v The New York City Board of Standards and Appeals*, 18 AD3d 558 (2005) *Horowitz v. Sax*, 16 Ad3d 161 (2005) *East Bayside Home Owners Association v. Chin*, 12 Ad3d 370 (2004) ACC's interest are so closely intertwined or sharply adverse to the interest of the various parties in the action, and it is undeniably clear that ACC will be directly affected by the outcome herein, ACC is a necessary party.

[25. Deny the allegations contained in paragraph 25 of the complaint, except admit that CPLR § 1001 (a) provides for inclusion of necessary parties and respectfully refer the Court to the statutory and case law cited for their complete language and contents and an interpretation thereof.]

BACKGROUND

26. At all times hereinafter mentioned, Defendant, THE CITY OF NEW YORK, (hereinafter, "City") was and still is a municipal corporation organized and existing under the laws of the State of New York.

[26. Admit the allegations contained in paragraph 26.]

27. Defendant THE NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE (hereinafter, "DOH") is the agency of the City of New York primarily charged with safeguarding public health in the City pursuant to the N.Y.C. Charter §§ 551-68.

[27. Admit the allegations contained in paragraph 27.]

28. Defendant, DOH administers and enforces the New York City Public Health Code, 24 R.C.N.Y. §§ 1.10 et seq., including its animal control policies and procedures pursuant to 24 R.C.N.Y. §§ 161.01-161.25.

[28. Admit the allegations contained in paragraph 28.]

29. Defendant, DOH's chief executive officer is the City Health Commissioner pursuant to, N.Y.C. Charter § 551.

[29. Admit the allegations contained in paragraph 29, except to admit that the Commissioner of the City's Department of Health and Hygiene is the Chairman of the Board of ACC.]

30. Defendant Thomas Frieden, M.D. is the current DOH Commissioner.

[30. Admit the allegations contained in paragraph 30.]

31. DOH's principal office is at 125 Worth Street, New York, New York 10013.

[31. Admit the allegations contained in paragraph 31.]

32. Mayor Bloomberg has designated defendant DOH to oversee all matters pertaining to animals pursuant to the New York State Agriculture and Markets Law and the New York City Charter.

[32. Deny the allegations contained in paragraph 32 of the complaint.]

33. Defendant ACC has an exclusive, multimillion dollar contract with the DOH to carry out animal management duties for the City.

[33. Deny the allegations contained in paragraph 33 of the complaint, except admit that ACC has a contract with the City, acting through its Department of Health, to carry out animal control duties for the City.]

34. Defendant ACC has its principal office and corporate headquarters at 11 Park Place, New York, New York 10007.

[34. Admit the allegations contained in paragraph 34 of the complaint.]

35. Defendant ACC's offices at 11 Park Place are leased by the City of New York.

[35. Deny the allegations contained in paragraph 35 of the complaint.]

36. Defendant ACC pays no rent to the City.

[36. Admits the allegations contained in paragraph 36 of the complaint.]

37. Defendant ACC operates City-owned animal shelters in Manhattan, Brooklyn and Staten Island, and rents intake centers in Queens and the Bronx.

[37. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 37 of the complaint, except to admit that ACC occupies City-owned property in Manhattan, Brooklyn, and Staten Island, and occupies property rented by the City in Queens and the Bronx.]

38. Defendant ACC was formerly known as The Center for Animal Care and Control.

[38. Admit the allegations contained in paragraph 38 of the complaint.]

39. Defendant, ACC is a dual registrant under both Article 7-A and the EPTL with the New York State Attorney Generals Charities Bureau as Center for Animal Care and Control, Inc.

[39. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 39 of the complaint.]

40. Defendant, ACC is a quasi-public agency funded with public monies.

[40. Deny knowledge and information sufficient to form a belief the allegations contained in paragraph 40 of the complaint, except to admit that the ACC is funded with public monies, and respectfully refer questions of law as to the ACC's status to the court.]

41. ACC is subject to the Freedom of Information Law.

[41. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 41 of the complaint and respectfully refer questions of law and interpretations of prior judicial decisions to the court for review and interpretation.]

42. ACC is subject to the Open Meetings Law.

[42. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 42 of the complaint and respectfully refer questions of law and interpretations of prior judicial decisions to the court for review and interpretation.]

43. Defendant, ACC is a charitable not-for profit corporation governed at all relevant times by a board of seven directors who are also ACC's only members. (See Amended By-Laws of ACC § 2.2, attached hereto as Exhibit 3.)

[43. Admit the allegations contained in paragraph 43 of the complaint.]

44. The entire ACC board is chosen by the Mayor of the City of New York.

[44. Admit the allegations contained in paragraph 44 of the complaint.]

45. Three ACC directors serve on the Board as ex-officio directors by virtue of being appointed by the Mayor as Commissioners of: the Departments of Health; Parks; and Deputy Police Commissioner for Community Affairs.

[45. Admit the allegations contained in paragraph 45 of the complaint.]

46. The four remaining ACC directors are directly appointed by the mayor or the person the mayor appoints as deputy mayor. (See Exhibit 3, Amended By-Laws § 2.2, p. 2.)

[46. Admit the allegations contained in paragraph 46 of the complaint.]

47. Upon information and belief, no such position as Deputy Police Commissioner for Community Affairs exists, having been eliminated more than one year ago after a departmental reorganization. Thus ACC has a "phantom" board member who cannot participate in or contribute to ACC affairs because there is no such ex-officio person.

[47. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 47 of the complaint.]

48. The terms of office for the appointed ACC directors are staggered such that one director's term expires every year.

[48. Deny the allegations contained in paragraph 48 of the complaint.]

49. The Mayor appoints all of the directors of defendant ACC as they are removed or their terms expire. (See Exhibit 3, Amended By-Laws § 2.3, Terms of Office.)

[49. Deny the allegations contained in paragraph 49 of the complaint.]

50. The Mayor has failed to appoint board members to ACC in a timely fashion when positions become vacant, and the positions have remained vacant for long periods of time.

[50. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 50 of the complaint.]

51. One ACC board seat went vacant for more than 18 months in 1999 and 2000, when attorney Todd Davis resigned from ACC's board.

[51. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 51 of the complaint.]

52. In order for the board to vote on anything, an ex-officio director must be present to constitute a quorum.

[52. Deny the allegations contained in paragraph 52 of the complaint.]

53. Since Defendant, ACC requires a two-thirds majority vote to add directors or amend the by-laws, the mayor is always in indirect but complete control of what the organization does. (See Exhibit 3, Amended By-Laws § 3.6, Vote Required.)

[53. Deny the allegations contained in paragraph 53 of the complaint.]

54. The majority of ACC's income comes directly or indirectly from public funds in the form of an exclusive contract with the DOH to exclusively provide "animal care and control services in the City of New York." (See Exhibit 1, Certificate of Incorporation, p. 2.)

[54. Deny the allegations contained in paragraph 54 of the complaint, except to admit that the majority of ACC's funding is received from the City of New York pursuant to a contract with the City for the provision of animal care and control services.]

55. Defendant, ACC was not made a City agency in part, so it could operate as a charity and “solicit grants and contributions from the public or from other sources for any corporate purposes.” (See Exhibit 1, Certificate of Incorporation, p.3)

[55. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 55 of the complaint.]

56. The ACC appears to be independent, but is structured such that it is completely controlled by the Mayor’s office.

[56. Deny the allegations contained in paragraph 56 of the complaint.]

57. City money allocated for the DOH contract with ACC is a line item on the DOH budget.

[57. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 57 of the complaint.]

58. The DOH contract with ACC is not subject to City Council approval.

[58. Admit the allegations contained in paragraph 58 of the complaint.]

59. The DOH contract with ACC is not subject to competitive bidding.

[59. Deny the allegations contained in paragraph 59 of the complaint.]

60. ACC's first permanent executive director was a City employee, Martin Kurtz, who was director of the veterinary public health services unit at DOH.

[60. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 60 of the complaint, except to deny that Martin Kurtz was an active City employee when he accepted a position with the ACC.]

61. ACC's second permanent executive director was a City employee, Marilyn Haggerty-Blohm (hereinafter, "Mrs. Blohm"), who was employed in the Mayor's Office of Operations.

[61. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 61 of the complaint.]

62. Upon information and belief, Mrs. Blohm was terminated without cause and paid approximately \$200,000 in compliance with her employment contract.

[62. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 62 of the complaint.]

63. ACC's third permanent executive director was Ed Boks, who formerly ran the animal control department at Maricopa County, Arizona.

[63. Admit the allegations contained in paragraph 63 of the complaint.]

64. During Ed Boks' tenure, the euthanasia rate dropped by 30 percent and the adoption rate increased by 127 percent, saving the lives of approximately 60,000 animals.

[64. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 64 of the complaint.]

65. At ACC'S board meeting in December of 2004, Dr. Frieden made the statement that he "wouldn't lose a wink of sleep over animals euthanized because they were a danger to public health."

[65. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 65 of the complaint.]

66. At ACC's board meeting in December of 2004, board member John M.B. O'Connor made a statement, prompted by Commissioner Frieden, directing ACC's executive director, Ed Boks, to clear all public statements with the DOH prior to making them. Upon information and belief, this was a violation of Mr. Boks' employment contract.

[66. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 66 of the complaint.]

67. In December 2005, the ACC board failed to renew the two-year employment contract of Ed Boks.

[67. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 67 of the complaint.]

68. Upon information and belief, candidates for ACC's interim executive director were interviewed at the offices of the DOH in December 2004 and January 2005. Such interviews were conducted by DOH personnel.

[68. Deny the allegations contained in paragraph 68 of the complaint, except to admit that such interviews were conducted in January 2005.]

69. Upon information and belief, the current interim executive director was unilaterally hired by Commissioner Frieden without a board meeting.

[69. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 69 of the complaint.]

70. In the latest DOH-ACC contract renewal negotiations, ACC is being represented by an interim executive director.

[70. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 70 of the complaint.]

71. The Humane Society of the United States ("HSUS") and the National Animal Control Association ("NACA") both recommend municipal animal shelters be funded at levels of \$3.00 to \$5.00 per capita annually.

[71. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 71 of the complaint.]

72. Defendant DOH funds ACC at less than \$1.00 per capita annually.

[72. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 72 of the complaint.]

73. For Fiscal Year 2005, ACC received \$7,200,000 from the City under the current contract.

[73. Deny the allegations contained in paragraph 73 of the complaint.]

74. Upon information and belief, for Fiscal Year 2005, the City of Los Angeles expended \$15,600,000 on its municipal animal control department.

[74. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 74 of the complaint.]

75. The DOH-ACC contract is not a "fee for services" contract.

[75. Admit the allegations contained in paragraph 75 of the complaint.]

76. ACC has asked for such a "fee for services" contract and the City has rejected offering such a contract.

[76. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 76 of the complaint.]

77. ACC must deliver the services the City requires no matter how much funding they receive from the City, even when such funding is changed in the middle of a contract.

[77. Deny the allegations contained in paragraph 77 of the complaint.]

78. On May 12, 2000, Mayor Rudolph W. Giuliani signed Intro. 567-A into law which mandated a full animal service shelter for all five boroughs. To date, six years later, there is still no full service shelter in Queens or the Bronx.

[78. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 78 of the complaint.]

79. In September 2002, Mayor Bloomberg reduced ACC's budget 13% from \$8.3 million to \$7.2 million, forcing ACC field operations and the three shelters in Brooklyn, Staten Island and Manhattan to reduce their daily operations from 24 hours a day to 12 hours a day.

[79. Deny the allegations contained in paragraph 79 of the complaint.]

80. Animals in New York City become lost and strayed, and are subject to injury and death, 24 hours a day.

[80. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 80 of the complaint.]

81. ACC's contract does not provide enough money to medically treat all the sick and injured animals it receives each year.

[81. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 81 of the complaint.]

82. As a direct consequence of inadequate funding, policies, procedures and staffing, countless pets processed through ACC have been accidentally euthanized instead of being returned to their owners.

[82. Deny the allegations contained in paragraph 82 of the complaint.]

83. DOH's current contract with ACC expires on June 30, 2006.

[83. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 83 of the complaint.]

84. The DOH contract renewal negotiations with ACC are not now, nor have ever been, an "arms length negotiation".

[84. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 84 of the complaint, and respectfully refer questions of law to the Court.]

85. Plaintiffs have written to Mayor Bloomberg on January 25, 2002, January 31, 2002, May 30, 2002, July 1, 2002, December 16, 2002, and to Commissioner Frieden on February 8, 2002, June 26, 2002, July 25, 2002, August 7, 2002, September 24, 2002, March 17, 2004, June 14, 2004, about various ACC breaches and deficiencies, including about the need to expand ACC's board to create a more balanced representation of the community and increase ACC's ability to independently fundraise, and Plaintiffs have never received any responses from the Defendants.

[85. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 85 of the complaint.]

**AS AND FOR A FIRST CAUSE OF ACTION
AGAINST THE ACC BOARD OF DIRECTOR DEFENDANTS:
BREACH OF DUTY OF LOYALTY**

86. Plaintiffs repeat and re-allege paragraphs "1" through "85" as if same were set forth at length herein.

[86. Defendants repeat and reallege their response to the allegations contained in paragraphs 1-85 of the complaint with the same force and effect as though fully set forth at length herein.]

87. Pursuant to the Not for Profit Corporation Law, the first duty of loyalty of the ACC board of directors defendants (hereinafter, the "director defendants") is to ACC.

[87. Deny knowledge and information sufficient to form a belief as to the allegations contained in paragraph 87 of the complaint, and respectfully refer questions of law and statutory interpretation to the Court.]

88. ACC's status as a quasi-public agency gives the plaintiffs standing to challenge the composition and functioning of the board.

[88. Deny the allegations contained in paragraph 88 of the complaint.]

89. From ACC's inception, the director defendants have never substantively addressed the conflict of interest created by the by-laws conferring on the Mayor sole authority to appoint all of ACC'S directors.

[89. Deny the allegations contained in paragraph 89 of the complaint.]

90. When Plaintiffs multiple requests over the past several years to resolve this conflict were raised, the issue was never addressed.

[90. Deny knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 90 of the complaint.]

91. *Ex-officio* directors have a financial interest in one of the contracting parties, the City of New York, because they are employed by and receive their salary from the City.

[91. Deny the allegations contained in paragraph 91 of the complaint.]

92. The appointed directors have an interest and conflict in following the Mayor's wishes and desires with regard to ACC's contract with the City because the Mayor appoints them.

[92. Deny the allegations contained in paragraph 92 of the complaint.]

93. The *ex-officio* director defendants breached their duty of loyalty to ACC and engaged in prohibited self-dealing in violation of: (i) the Not for Profit Corporation Law, §§ 715 and 717; (ii) § 6 of the ACC Certificate of Incorporation; and (iii) the common law of the State of New York, by serving as department heads of the City while also serving as directors of the ACC while negotiating a contract between the two.

[93. Deny the allegations contained in paragraph 93 of the complaint.]

94. Although *ex-officio* board members can sit on the board, as long as they reveal their conflict of interest when they are involved on both sides of a negotiation, the *ex-officio* directors' votes should not and cannot be counted with respect to ratifying a contract because of their financial interest with the contracting party, to wit, the City. This conduct violates the Not for Profit Corporation Law § 715 (a) (1).

[94. Deny the allegations contained in paragraph 94 of the complaint.]

95. By voting in favor of the contracts and its renewals with the City, all of the directors breached their duty of loyalty to ACC and the Plaintiffs, in their roles as more clearly set out above, because the contract inadequately funds the humane treatment of animals.

[95. Deny the allegations contained in paragraph 95 of the complaint.]

96. Additionally, the appointed director defendants further breached their duty of loyalty to ACC when they voted with the *ex-officio* directors to approve the contract because allowing the *ex-officio* directors votes to count violated § 715 (a) (1) of the Not for Profit Corporation Law.

[96. Deny the allegations contained in paragraph 96 of the complaint.]

97. As a direct result of the breaches herein described, an inadequate amount of funding resulted in countless lost pets failed to be returned to their lawful owners and the deaths and suffering of countless animals. Plaintiffs were further damaged in not having an appropriate and responsive legislatively mandated animal control system in place.

[97. Deny the allegations contained in paragraph 97 of the complaint.]

**AS AND FOR A SECOND CAUSE OF ACTION
AGAINST THE DIRECTOR DEFENDANTS:
BREACH OF DUTIES OF DILIGENCE, CARE AND SKILL**

98. Plaintiffs repeat and re-allege paragraphs “1” thru “97” as if same were set forth at length herein.

[98. Defendants repeat and reallege their response to the allegations contained in paragraphs 1 -97 of the complaint with the same force and effect as though fully set forth at length herein.]

99. The director defendants failed to discharge their duty to ACC with the degree of diligence, care and skill which an ordinary prudent men would exercise under similar circumstances in like positions, all in violation of § 717 of the Not for Profit Corporation Law and by negligently permitting and/or acquiescing in conflicts of interest, self-dealing transactions and wasting of corporate assets set forth in detail above. In particular, the conflict is that City employees, *ex-officio* directors, were negotiating with their bosses.

[99. Deny the allegations contained in paragraph 99 of the complaint.]

100. Ex-officio director defendants, in particular defendant Commissioner Frieden, despite the guise of recusing himself, is violating § 717 of the Not for Profit Corporation Law by appointing his own employees at DOH to negotiate the ACC contract on behalf of the City.

[100. Deny the allegations contained in paragraph 100 of the complaint.]

101. Failure of the defendant directors to perform their duties with duty, skill and diligence resulted in ACC being inadequately represented during contract negotiations.

[101. Deny the allegations contained in paragraph 101 of the complaint.]

102. As a direct result of the breaches herein described, an inadequate amount of funding resulted in the countless deaths and suffering of animals, including the improper destruction and adoption of lost pets. The plaintiffs were further damaged by not having an appropriate and responsive, legislatively mandated, animal control system in place.

[102. Deny the allegations contained in paragraph 102 of the complaint.]

**AS AND FOR A THIRD CAUSE OF ACTION
AGAINST THE DIRECTOR DEFENDANTS, DOH AND MAYOR BLOOMBERG:
NEGLIGENCE**

103. Plaintiffs repeat and re-allege paragraphs “1” thru “102” as if same were set forth at length herein.

[103. Defendants repeat and reallege their response to the allegations contained in paragraphs 1 -102 of the complaint with the same force and effect as though fully set forth at length herein.]

104. Defendant directors acted in a negligent manner when they failed to use money the City Council allocated in 2000 to construct full service animal shelters in Queens and the Bronx. Their failure to timely investigate, prepare plans and execute construction resulted in the funding being withdrawn.

[104. Deny the allegations contained in paragraph 104 of the complaint.]

105. Defendant DOH acted in a negligent manner when it failed to use money the City Council allocated in 2000 to construct full service animal shelters in Queens and the Bronx. Its failure to timely investigate, prepare plans and execute construction resulted in the funding being withdrawn.

[105. Deny the allegations contained in paragraph 105 of the complaint.]

106. Defendant Mayor Bloomberg acted in a negligent manner when he failed to use money the City Council allocated in 2000 to construct full service animal shelters in Queens and the Bronx. Mayor Bloomberg's failure to insure that his designated department, namely the DOH, timely investigate, prepare plans and execute construction resulted in the funding being withdrawn.

[106. Deny the allegations contained in paragraph 106 of the complaint.]

107. Defendant directors acted in a negligent manner when they failed to use money the City Council allocated in 2000 to upgrade the Manhattan shelter, which, among other problems, has a defective heating-ventilating-air conditioning system (HVAC) that, upon information and belief, is the principal cause of upper respiratory congestion (known as kennel cough) in most of the animals being housed there. Their failure to timely investigate, prepare plans and execute repairs resulted in the funding being withdrawn and the discomfort, sickness and death of countless numbers of animals.

[107. Deny the allegations contained in paragraph 107 of the complaint.]

108. Defendant DOH acted in a negligent manner when it failed to use money the City Council allocated in 2000 to upgrade the Manhattan shelter, which, among other problems, has a defective heating-ventilating-air conditioning system (HVAC) that, upon information and belief, is the principal cause of upper respiratory congestion (known as kennel cough) in most of the animals being housed there. Their failure to timely investigate, prepare plans and execute repairs resulted in the funding being withdrawn and the discomfort, sickness and death of countless numbers of animals.

[108. Deny the allegations contained in paragraph 108 of the complaint.]

109. Defendant Mayor Bloomberg acted in a negligent manner when he failed to use money the City Council allocated in 2000 to upgrade the Manhattan shelter, which, among other problems, has a defective heating-ventilating-air conditioning system (HVAC) that, upon information and belief, is the principal cause of upper respiratory congestion (known as kennel cough) in most of the animals being housed there. Their failure to timely investigate, prepare plans and execute repairs resulted in the funding being withdrawn and the discomfort, sickness and death of countless numbers of animals.

[109. Deny the allegations contained in paragraph 109 of the complaint.]

110. As a direct result of the breaches herein described, (i) full service animal shelters were not built in Queens and the Bronx, (ii) infrastructure upgrades including the critical HVAC system at ACC's Manhattan shelter have not been made; (iii) ACC lost a substantial opportunity to meet its corporate mission, (iii) ACC lost an opportunity to properly care for and control the animal population in New York City; and (iv) the City does not have adequate facilities to handle the animal control issues that would arise in the event of an animal bird flu epidemic. Such breaches by defendant directors, DOH and Mayor Bloomberg resulted in the countless deaths and suffering of animals and significant harm to the plaintiffs in that a responsive and appropriate shelter system was not established.

[110. Deny the allegations contained in paragraph 110 of the complaint.]

**AS AND FOR A FOURTH CAUSE OF ACTION
THE MAYOR AND CITY FAILED TO FOLLOW PROCUREMENT PROCEDURES
REGARDING THE RENEWAL OF THE CONTRACT WITH ACC**

111. Plaintiffs repeat and re-allege paragraphs “1” thru “110” as if same were set forth at length herein.

[111. Defendants repeat and reallege their response to the allegations contained in paragraphs 1-110 of the complaint with the same force and effect as though fully set forth at length herein.]

112. The initial DOH contract with ACC, including renewals, expired on December, 31 2000 (see Exhibit 4, p. 3, §1 Term). Upon information and belief, DOH never made a second Request for Proposals (RFP) seeking competitive bids for the new contract.

[112. Deny the allegations contained in paragraph 112 of the complaint.]

113. No lawful procurement process or any competitive bidding for the shelter contract has been undertaken by the City of New York, thereby constituting, inter alia a violation of the New York City charter (s) 310 and 316and New York Gen Mun. Law (s) 51 and 103.

[113. Deny the allegations contained in paragraph 113 of the complaint.]

114. By failing to implement a lawful procurement process, the City and Mayor have caused waste with regard to public funds and injury, suffering and death to the animals in its charge, including lost pets.

[114. Deny the allegations contained in paragraph 114 of the complaint.]

115. Awarding the contract to ACC under the circumstances constitutes an award of the contract for monetary value to the ACC without an analysis of the prevailing market price, or any proof by the City that this course of action would provide appropriate shelter services.

[115. Deny the allegations contained in paragraph 115 of the complaint.]

116. The injury claimed by plaintiffs is within the zone of interest to be protected by the New York City Charter (s) 310 and 316 and the New York Gen. Mun. Laws (s) 51 and 103 in as much as those provisions provide protection against the City awarding contracts without first submitting them to a competitive procurement process, or at a minimum a cost analysis.

[116. Deny the allegations contained in paragraph 116 of the complaint.]

117. As a direct result of the breaches herein described, an inadequate amount of funding resulted in the countless deaths and suffering of animals and lost pets. The plaintiffs were further damaged in not having an appropriate and responsive animal control system in place.

[117. Deny the allegations contained in paragraph 117 of the complaint.]

WHEREFORE, the plaintiffs respectfully request and demand judgment against the defendants adjudging and decreeing as follows:

(a) The defendants, the mayor of The City of New York and the individual defendants as members of the board of the ACC be permanently enjoined and restrained from taking any action whatsoever to enter into a contract between the two until the conflicts of interest more fully described above are resolved;

(b) The plaintiffs have a preliminary injunction, restraining order, during the pendency of this action as to the acts complained of and threatened;

(c) The ACC be enjoined from entering into another contract, other than a six-month extension of the current contract for purposes of continuity, until new by-laws establishing an expanded board are implemented and adopted;

(d) The City and Mayor are temporarily enjoined from awarding and registering any contracts, other than extensions to ACC for a period not to exceed six months, until the ACC board is composed such that it will be free from City control and able to negotiate contracts with the City at arms-length;

(e) A permanent injunction for any ex-officio director from voting with regard to any funding from the City.

(f) Appointing a new board of directors and new members and officers of the ACC composed and selected in accordance with a proposal the plaintiff shall submit;

(g) Adopting prophylactic measures in accordance with a proposal plaintiff shall submit designed to avoid future conflicts of interest between directors, members and officers of ACC;

(h) Directing all defendants to account for their use of corporate assets and any profit or benefit obtained by them from their improper use of the ACC's assets;

(i) Directing that the defendant directors be surcharged for any losses to ACC which are the result of their misconduct, with appropriate interest;

(j) Granting the plaintiffs all costs, disbursements and attorney's fees that they incur in this action; and

(k) Granting any and other such further relief as to this court deems just and proper together with the costs and disbursements herein.

Dated: Bronx, New York
May 31, 2006

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FIRST DEFENSE

118. Plaintiffs fail to state a cause of action.

SECOND DEFENSE

119. Plaintiffs lack standing to bring this action.

THIRD DEFENSE

120. This action is barred by the equitable doctrine of laches.

FOURTH DEFENSE

121. This action is barred by the applicable statute of limitations.

FIFTH DEFENSE

122. The City of New York acted properly and pursuant to law to contract with the ACC for animal control services.

SIXTH DEFENSE

123. *Plaintiffs lack standing to object to the provisions for the composition and selection of the ACC's Board of Directors.*

SEVENTH DEFENSE

124. *To the extent that defendants were performing governmental, quasi-governmental, or administrative duties that were of a discretionary nature rather than ministerial functions, defendants claim qualified privilege and immunity from liability herein.*

EIGHTH DEFENSE

125. *The ACC Board of Directors and its individual members acted properly and pursuant to law to contract with the City of New York to provide animal control services.*

NINTH DEFENSE

126. *The ACC Board of Directors and its individual members have not breached any duty of loyalty to ACC.*

TENTH DEFENSE

127. *The ACC Board of Directors and it individual members have not breached any duty of diligence, care and skill.*

WHEREFORE, the SCA [sic] respectfully demands that the complaint herein be dismissed in its entirety and that the Court grant such other and further relief as may be just and proper.

Dated: *New York, New York*
July 21, 2006

Yours, etc.,

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By: */s/*
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