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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LOG CABIN REPUBLICANS, a non-profit corporation,  
  
Plaintiff,  
  
v.  
  
UNITED STATES OF AMERICA and  
ROBERT M. GATES, SECRETARY  
OF DEFENSE, in his official capacity,  
  
Defendants.

Case No. CV04-8425 VAP(Ex)

**SUPPLEMENTAL  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION  
TO MOTION FOR SUMMARY  
JUDGMENT**

Date: April 26, 2010  
Time : 2:00 p.m.  
Place: Crtrm. of Judge Phillips

1 Plaintiff Log Cabin Republicans (“Log Cabin”) submits this supplemental  
2 memorandum to address the Court’s concerns, explained in its April 21 tentative  
3 decision, about its standing to assert its claims. As explained below, Log Cabin  
4 does have standing.

5  
6 **I.**

7 **APRIL 28, 2006, NOT OCTOBER 12, 2004, IS THE**  
8 **OPERATIVE DATE TO DETERMINE STANDING**

9 Log Cabin acknowledges the requirement, stated in many cases, that standing  
10 is determined at the commencement of an action. Neither the case cited by the  
11 government in its motion on this point<sup>1</sup> nor any of the cases cited in the Court’s  
12 tentative ruling<sup>2</sup>, however, address the situation presented by this case, where the  
13 Court granted the government’s Rule 12(b)(1) motion to dismiss Log Cabin’s  
14 original complaint for lack of jurisdiction, the Court granted Log Cabin leave to file  
15 a first amended complaint, and Log Cabin filed a first amended complaint adding  
16 allegations regarding Mr. Nicholson and John Doe to support its standing to sue.  
17 The cases in the brief and tentative decision all state the general principle without  
18 addressing the effect of the filing of an amended complaint.

19 The dismissal of Log Cabin’s original complaint and the filing of the first  
20 amended complaint rendered the original complaint of no legal effect and obsolete.  
21 Loux v. Rhay, 375 F.2d 55, 57 (9th Cir. 1967); W. Schwarzer, A. Tashima, J.  
22 Wagstaffe, Federal Civil Procedure Before Trial, § 8:1550 (citing King v. Dogan,  
23 31 F.3d 344, 346 (5th Cir. 1994) and Carver v. Condie, 169 F.3d 469, 472 (7th Cir.  
24 1999)). As the Ninth Circuit stated in Loux v. Rhay: “The amended complaint  
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26 <sup>1</sup> Biodiversity Legal Found. v. Badgley, 309 F.3d 1166, 1171 (9th Cir. 2002)  
(cited in motion at 8, lines 9-10 and in reply brief at 3, n.4).

27 <sup>2</sup> Skaff v. Meridien N. Am. Beverly Hills, LLC, 506 F.3d 832, 839 n.5, 850 (9th  
28 Cir. 2007); Friends of the Earth, Inc. v. Laidlaw Env’tl. Serv., 528 U.S. 167, 180  
(2000); Utah Ass’n of Counties v. Bush, 455 F.3d 1094, 1101 (10th Cir. 2006).

1 supersedes the original, the latter being treated thereafter as non-existent.” 375  
2 F.2d at 57. This is especially true because Judge Schiavelli’s March 2006 order  
3 granted the government’s motion under Rule 12(b)(1) for lack of jurisdiction; in  
4 other words, he found that the Court never had jurisdiction over the original  
5 complaint. The Court therefore only acquired jurisdiction over the case upon the  
6 filing of the first amended complaint.

7 Thus, Log Cabin suggests that the “commencement of the litigation” for  
8 purposes of determining its standing to sue is as of the date of the filing of the first  
9 amended complaint, April 28, 2006, not the date of the filing of the original  
10 complaint, October 12, 2004. In that regard, it is important to recall that the  
11 Court’s March 2006 order allowing leave to amend and requiring Log Cabin to  
12 identify a member injured by DADT did not require it to name a member who had  
13 been injured as of October 12, 2004.<sup>3</sup>

14 Support for Log Cabin’s position is found in cases more specifically  
15 addressing the issue in the standing context. Several recent cases involving  
16 amended complaints hold that standing is to be determined by reviewing the  
17 operative complaint at the time. In County of Riverside v. McLaughlin, 500 U.S.  
18 44, 111 S.Ct. 1661, 114 L. Ed. 2d 49 (1991), for example, one plaintiff filed a  
19 complaint. Later, a second amended complaint was filed, adding three additional  
20 plaintiffs. The defendant claimed that the plaintiffs lacked standing. In analyzing  
21 this claim, the Supreme Court reviewed it as of the time of the filing of the second  
22 amended complaint, not as of the time of the filing of the original complaint. *Id.* at  
23 51. (“The County does not dispute that, **at the time the second amended**  
24 **complaint was filed**, plaintiffs James, Simon, and Hyde had been arrested without  
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26 <sup>3</sup> In its June 9, 2009 order, this Court denied the government’s Rule 12(b)(1)  
27 motion to dismiss the first amended complaint for lack of jurisdiction, despite the  
28 government’s arguments that Log Cabin did not comply with Judge Schiavelli’s  
March 2006 order and did not adequately allege standing in the first amended  
complaint.

1 warrants and were being held in custody without having received a probable cause  
2 determination”) (emphasis added).

3 In Thomas v. Mundell, 572 F.3d 756 (9th Cir. 2009), one plaintiff, the  
4 County Attorney for Maricopa Country, filed a complaint on February 28, 2006,  
5 alleging constitutional law violations arising from a separate probation department  
6 program for DUI offenders; on March 13, 2006, three individual plaintiffs were  
7 added in a first amended complaint. The defendants contested the standing of all  
8 plaintiffs and the district court granted their motion to dismiss for lack of standing.  
9 The Ninth Circuit affirmed but, of importance here, separately analyzed the  
10 standing of the original plaintiff and the plaintiffs added by the first amended  
11 complaint and did not analyze whether the new plaintiffs had standing at the time of  
12 the filing of the original complaint.

13 Similarly in Jadwin v. County of Kern, No. 1:07-CV-00026-OWW-DLB,  
14 2009 WL 2424565 (E.D. Cal. August 6, 2009), plaintiff had filed a second amended  
15 complaint and the Court evaluated his standing as of the date of the filing of the  
16 second amended complaint, ruling: “Whether a plaintiff has standing is evaluated  
17 as of the time the operative complaint is filed.”<sup>4</sup> Id. at \*6 (citing McLaughlin and  
18 Thomas). See also Bochese v. Town of Ponce Inlet, 405 F.3d 964, 978 (11th Cir.  
19 2005) (looking to amended complaint as operative pleading for standing analysis);  
20 Lynch v. Leis, 382 F.3d 642, 647 (6th Cir. 2004) (reviewing amended complaint for  
21 standing analysis); Focus on the Family v. Pinellas Suncoast Transit Authority, 344  
22 F.3d 1263, 1275 (11th Cir. 2003) (noting that McLaughlin undertook standing  
23 analysis as of the time the second amended complaint was filed). Kerr Corp. v. 3M  
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25 <sup>4</sup> Skaff does state that standing “cannot be established by showing later actions of  
26 post-filing intent,” 506 F.3d at 839 n.5, but that footnote was simply quoting a  
27 finding of fact made by Judge Real, in which he appears to have rejected the notion  
28 that events occurring after the filing of the complaint on file could constitute an  
injury to the plaintiff sufficient for standing purposes. Of note is the fact that the  
Ninth Circuit’s per curiam opinion in Skaff reversed Judge Real’s decision that the  
plaintiff lacked standing.

1 Co., 2006 WL 6005803 (W.D. Wis. 2006) at \*2 (treating amended answer with  
2 counterclaims as the operative pleading for purposes of evaluating standing).

3 With our apologies for not bringing these authorities to the attention of the  
4 Court and opposing counsel sooner, these authorities show that the Court's tentative  
5 ruling is incorrect in focusing on the date of the filing of the original complaint  
6 (October 12, 2004), as opposed to the date of filing of the first amended complaint  
7 (April 28, 2006), under the circumstances of this case. Consequently, Log Cabin  
8 contends, as it did in its opposition to the government's motion, that Mr. Nicholson  
9 was a Log Cabin member as of the relevant date.

10  
11 **II.**

12 **LT. COL. JOHN DOE WAS A LOG CABIN**  
13 **MEMBER BEFORE OCTOBER 12, 2004**

14 The Court's tentative ruling also questioned whether Log Cabin had  
15 adequately shown that Lt. Col. John Doe was a member of Log Cabin before  
16 October 12, 2004. Log Cabin is attempting to locate additional evidence showing  
17 the exact date in 2004 on which he became a Log Cabin member and expects to be  
18 in a position to present it to the Court at the hearing on the motion.

19  
20 **III.**


21 **CONCLUSION**

22 We apologize for not addressing these aspects of the standing issue better in  
23 our opposition to the government's motion but we hope the Court will see that the  
24 law requires the Court to evaluate Log Cabin's standing as of the date of the filing  
25 of its first amended complaint (April 28, 2006), not the date of the filing of its  
26 original complaint (October 12, 2004), despite the general statements in the  
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1 Biodiversity case cited by the government and the cases cited in the Court's April  
2 21 tentative decision. We look forward to discussing these issues with the Court at  
3 the upcoming hearing on the government's motion.  
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6 Dated: April 22, 2010

WHITE & CASE LLP

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