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**IN THE SUPERIOR COURT FOR THE STATE OF ALASKA**  
**FIRST JUDICIAL DISTRICT AT KETCHIKAN**

FILED in the Trial Courts State of Alaska  
First Judicial District at Ketchikan

MARIE-JEANNE CADLE, AND JANE )  
DOES #1 THROUGH #8, for and on )  
behalf of themselves and all others )  
similarly situated, )

JUN 25 2010

Clerk of the Trial Courts

By \_\_\_\_\_ Deputy

Plaintiffs, )

vs. )

Case No. 1KE-10- 334 -CI

DEPARTMENT OF LAW, STATE OF )  
ALASKA, and DIVISION OF )  
CORPORATIONS, BUSINESS, AND )  
PROFESSIONAL LICENSING, STATE )  
OF ALASKA. )

Defendants. )

**COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF AND**  
**MOTION FOR RETURN OF PROPERTY**

**INTRODUCTION AND SUMMARY OF CLAIMS**

COME NOW the plaintiffs Marie-Jeanne Cadle and Jane Does #1 through #8,<sup>1</sup> by and through counsel, Keene & Currall, P.C., and the American Civil Liberties Union of Alaska Foundation (ACLU), and pursuant to Alaska Civil Rule 65 and Alaska Criminal Rule 37, moves this Court for an injunction against

<sup>1</sup> The "Jane Doe" plaintiffs seek the court's permission to proceed by way of a pseudonym, based on the privacy interest at stake in the matter.

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THIS MATTER IS  
FORMALLY ASSIGNED TO  
WILLIAM B. CAREY  
SUPERIOR COURT JUDGE

1 the defendants and an order for return of property, against the Department of Law  
2 for the State of Alaska and the Division of Corporations, Business, and  
3 Professional Licensing, in the Department of Commerce, Community, and  
4 Economic Development for the State of Alaska.

5 1. The plaintiffs, on behalf of themselves and all others similarly  
6 situated, respectfully seek an order that Defendants return, either to A Woman's  
7 Place clinic in Ketchikan or to the individual plaintiffs, the original files and any  
8 and all copies of medical records or other paperwork seized by Defendants  
9 containing private patient information.  
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11 2. The plaintiffs also seek an injunction to prevent the Department of  
12 Law from conducting similar searches and seizures of medical records belonging  
13 to the plaintiffs or to other patients and an injunction imposing certain restraints  
14 on the Department of Law in the conduct of search and seizure of records to  
15 protect the privacy of the plaintiffs and others whose private information may be  
16 subject to search and seizure by the government.  
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18 3. The plaintiffs also seek an order precluding the Defendants from  
19 using any patient information seized on January 27, 2010 in any public document,  
20 at trial, or in any other public proceedings.  
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22 4. This class action arises from a search conducted at A Woman's  
23 Clinic in Ketchikan and the seizure of medical records conducted by Rebecca  
24 Starry, an investigator with the Medicaid Fraud Control Unit (MFCU) of the  
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1 Defendant Department of Law, in conjunction with members of the Ketchikan  
2 Police Department. In the course of the raid on January 27, 2010, Ms. Starry  
3 seized hundreds of entire medical files, far exceeding the scope of the search  
4 warrant – warrant IKE-10-22 – issued for the clinic.

5 5. In the course of the seizure of medical records, members of the  
6 Ketchikan Police Department read through the medical records of women  
7 patients. The daughter of a patient at the clinic whose file was seized was told by  
8 a Ketchikan police officer that her mother had tested positive for a sexually-  
9 transmitted infection shortly after the raid, which the plaintiffs believe arose as a  
10 result of information obtained in the seizure.  
11

12 6. Ms. Starry brought the seized records back to Anchorage, where  
13 those records have been held since January 27, 2010. The MFCU has provided no  
14 notice to the women affected by the raid. Patients have simply discovered that  
15 their charts are gone when they have gone to the clinic and found that their  
16 records are missing. The lack of notice has left many patients without their charts  
17 at important times, making it difficult to seek treatment, to address billing  
18 disputes, and to undergo necessary medical procedures. The MFCU did not  
19 provide Ms. Small an inventory of which files had been taken in the January raid  
20 until May 12, 2010, shortly after counsel for the plaintiffs sent a letter threatening  
21 to sue and listing the failure to account for the files as one of several deficiencies  
22 in the MFCU's handling of the files.  
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7. While the MFCU retained the records seized from A Woman's Place, the Department received a subpoena dated March 1, 2010 from the Division of Corporations, Business, and Professional Licensing ("the Division"). The subpoena requested certain financial records seized from A Woman's Place. The MFCU gave the Division records seized in the raid, including actual medical records not mentioned in the subpoena. The patients were never told that their information had been subject to subpoena, nor that the MFCU was considering conveying their records to the Division, and had no opportunity to oppose the subpoena.

8. The MFCU continues to hold hundreds of medical records and other records containing the plaintiffs' sensitive information. The MFCU is continuing an investigation into Eileen Small, the proprietor of A Woman's Place. The plaintiffs reasonably fear that the investigation of Ms. Small may lead to charges and that their private medical information from medical records not described in the search warrant could be used in the prosecution, exposing themselves to further unwarranted public attention and ridicule.

9. The actions of the defendants have violated the plaintiffs' right against unreasonable search and seizure and right to privacy under the Alaska Constitution.

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**JURISDICTION AND VENUE**

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10. This action is a complaint for injunctive relief brought pursuant to AS 09.40.230 and AS 22.10.020. Venue is proper under AS.22.10.030 and Rule 3 of the Alaska Rules of Civil Procedure.

11. This action is also a motion for return of property brought pursuant to Alaska Rule of Criminal Procedure 37(c). Venue is proper in the district where the property was seized. Alaska Rule of Criminal Procedure 37(c).

**PARTIES**

12. Marie-Jeanne Cadle is a resident of Alaska and has been seen at A Woman's Place. She had a medical record containing confidential medical information at A Woman's Place clinic prior to January 27, 2010. Her file was seized by the MFCU on that date, and her file is still held by the MFCU.

13. Plaintiffs Jane Doe #1 through #8 are each residents of Alaska and have each been seen at A Woman's Place for medical treatment. The anonymous plaintiffs range in age from teenagers to over seventy. Each plaintiff had a medical record containing confidential medical information at A Woman's Place clinic prior to January 27, 2010. Each plaintiff's file was seized by the MFCU on that date, and each plaintiff's file is still held by the MFCU. As the patient-plaintiffs are seeking to preserve their privacy and discussion of their medical treatment may arise in the course of the litigation, the patient-plaintiffs seek to proceed under pseudonyms.

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14. Defendant Department of Law is an administrative agency of the state of Alaska.

15. The Division of Corporations, Business, and Professional Licensing is a unit of the Department of Commerce, Community Development, and Economic Development, an administrative agency of the State of Alaska.

### STATEMENT OF FACTS

16. On January 27, 2010, in the course of a criminal investigation, a representative of the Defendant Department of Law seized hundreds of medical records from A Woman's Place clinic in Ketchikan.

17. The medical records of the plaintiffs include highly private medical information that a reasonable person would expect to be shared only with a medical provider, especially information shared in the course of obstetrical and gynecological treatment.

18. The medical records collectively contain information about sexually transmitted infections, the numbers of patients' sexual partners, positive pregnancy tests, miscarriages, abortions, reports of sexual abuse, discussion of sexual practices, sexual dysfunction, mental illness, and other information that patients would reasonably expect to remain confidential.

19. In light of the seizure of the records, numerous plaintiffs feel that they can no longer trust the information given to health care providers to be kept

1 private. One plaintiff stated, “if there was a chance that someone would take my  
2 records, I would never tell my doctor anything.”

3 20. Another plaintiff stated, “I am terrified to see a doctor because my  
4 records might just disappear.”

5 21. A third plaintiff stated that, since the time of the records seizure,  
6 she has sought treatment with a new provider. In the course of her initial intake  
7 and screening, she deliberately failed to report important medical information to  
8 her new provider for fear that her new medical record might also be taken.

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10 22. One plaintiff reported having panic attacks from the anxiety of  
11 knowing that her medical records were being read by and held by an unknown  
12 party or parties.

13 23. A Woman’s Place is a medical clinic located at 355 Carlanna Lake  
14 Road within the city of Ketchikan. The clinic has provided health care services to  
15 women, including obstetric and gynecological services, for many years.

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17 24. The owner of A Woman’s Place is Eileen Small, who trained as a  
18 certified nurse-midwife and an advanced nurse practitioner. She has seen patients  
19 as a provider at her clinic for many years.

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21 25. Rebecca Starry, acting as an investigator for the MFCU, filed three  
22 search warrants, including the warrant at issue in this matter – 1KE-10-22 – with  
23 the District Court at Ketchikan, which was signed by the Honorable Kevin Miller  
24 on January 26, 2010.

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26. The affidavit for the warrant (“In the Matter of Search Warrant Authorizations No. 1KE-10-21/22/23 SW” – hereinafter “affidavit”) alleged that Ms. Starry had been told by Colleen Nelson, an investigator with the Division, that Ms. Small’s Advanced Nurse Practitioner license had been suspended as of July 29, 2009. The affidavit also indicates that a representative of the Drug Enforcement Agency (DEA) informed Ms. Starry that Ms. Small’s DEA number and prescriptive authority had been suspended as a result.

27. The affidavit also alleged that Ms. Small had billed the Alaska Medicaid program for services rendered to 37 patients after July 29<sup>th</sup>, 2009, and that seven different pharmacies had billed Medicaid for prescriptions written by Ms. Small after the date of license revocation.

28. The affidavit indicates that Ms. Starry at the time of seeking the warrant “was still waiting for some of the pharmacies to compile copies of the prescriptions dispensed after Ms. Small lost her prescriptive authority.” Ms. Starry indicates in the affidavit that she had “begun a database of patients Ms. Small prescribed medications (including DEA controlled substances) for and has compiled a list of at least 150 patients. . . .”

29. Ms. Starry also cited in support of her affidavit a police report from a Ketchikan Police Detective recounting an interview with the office manager at A Woman’s Place. The affidavit indicated that Ms. Small had put prefilled prescriptions in the patient files, leaving only the date empty. When the patient



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arrived, the office manager would fill in the date and give the prescription to the patient.

30. Ms. Starry asserted in her affidavit: “Generally, proof of health care theft requires that *all of the medical records of all of a provider’s patients*, both Medicaid and non-Medicaid patients alike, be obtained and compared to the invoices bills and statements received by Medicaid, and to the invoices, bills, and statements sent to other insurance companies and other payers.” (emphasis added).

31. Based on Ms. Starry's broad assertion of the MFCU's health care fraud investigative techniques, the apparent policy of the MFCU is to conduct these large-scale seizures of medical and billing records in most cases of alleged health care fraud, regardless of the circumstances.

32. The warrant affidavit indicated the items sought included all materials “for the period of time between July 30, 2009 and” the date of the warrant’s submission, namely “any and all medical records of any kind for all patients of Eileen Small . . . includ[ing] but not limited to complete medical records whether of diagnosis, prognosis, and/or treatment to include charts, chart notes, x-rays, laboratory reports, diagnostic and/or treatment codes.”

33. The warrant further authorized seizure of many other documents dated from July 30, 2009 or later, including business records, billing records, bank statements, checks, or any correspondence relating to those documents.

34. On January 27, 2010, Ms. Starry went to A Woman's Place with members of the Ketchikan Police Department to serve the warrant, seizing a wide variety of written records and other materials.

35. The inventory provided as the receipt for the materials seized from A Woman's Place did not particularly describe which files were taken, but does indicate that "12 small and 3 large boxes containing [patient] files, business records, drugs, [and] prescription pads" were taken from the clinic.

36. A subsequent inventory of files by the Department of Law indicated that the medical files of 398 patients were seized.

37. Where records were seized, the entire medical file was seized, not simply the papers, documents, or entries dated July 30, 2009 or later.

38. The contents of the patient files were reviewed by Ms. Starry and employees of the Ketchikan Police Department.

39. The Department of Law took possession of the medical files seized, has held them since the date of the seizure, and currently holds the files in question. Plaintiffs believe they will continue to hold the files until either a determination is made that no charges will be filed or until proceedings against Ms. Small are concluded.

40. On March 1, 2010, the Division of Corporations, Business, and Professional Licensing submitted a subpoena to the Department of Law seeking

1 productions of insurance billing records, Medicaid billing records, and bank  
2 records seized from A Woman's Place.

3 41. Apparently in response to the subpoena, the MFCU conveyed  
4 certain records, including patient medical records not requested in the subpoena,  
5 to the Division of Corporations, Business, and Professional Licensing.

6 42. The MFCU did not notify patients that any records had been sought,  
7 nor that the MFCU was considering sending copies of medical records to the  
8 Division.

9 43. The MFCU did not oppose the subpoena in any way.

10 44. To the best of the knowledge of the plaintiffs, no patients were  
11 aware that any records were subject to the Division's subpoena. Thus, the  
12 plaintiffs took no action to oppose the subpoena.

13 45. The MFCU refuses to return the original medical records, in whole  
14 or in part, to the clinic or to the patients, although the MFCU has expressed a  
15 willingness to provide copies to patients in need of their records. The Division  
16 was made aware of the illegal nature of the seizure of patient files in a letter from  
17 plaintiffs' counsel dated April 30, 2010. The Division has not returned any copies  
18 of files nor replied to that letter.

19 46. Shortly after the seizure of medical records from the clinic, the  
20 daughter of a patient encountered a Ketchikan police officer. That officer taunted  
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her with the information that her mother had tested positive for a sexually transmitted infection.

47. The information indicating the patient's positive test was contained in the patient's medical record which had been stored at A Woman's Place until the seizure of the record by Ketchikan police officers and Ms. Starry.

48. Based on the proximity in time to the raid, the fact that her disease status was not public knowledge prior to the raid on the clinic, and the fact that the individual reporting her disease state was a police officer, the plaintiffs believe that the officer discovered that information from the medical records in question.

49. The plaintiffs have received other credible reports of misuse of the medical records by Ketchikan police officers and disclosure of patient information, although some witnesses fear retribution, are concerned about the consequences of such disclosure in a small town, or are reluctant to come forward and again have private medical information exposed to public view.

50. The Defendant Department of Law holds the medical records for the purpose of preparing a criminal case against Ms. Small. Even redacted use of the medical information of the plaintiffs in any public document, trial, or proceeding could lead to identification of the plaintiffs and exposure of the plaintiffs to public ridicule or condemnation.

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51. The Defendant Division holds copies of the medical records for the purpose of preparing a case for professional discipline before the nursing board, also a public proceeding creating a public record. Even redacted use of the medical information of the plaintiffs in a public document or in a disciplinary or other public proceeding could lead to identification of the plaintiffs and exposure of the plaintiffs to public ridicule or condemnation.

**CLAIMS FOR RELIEF**

**Claim 1: Violation of the Plaintiffs' Rights Against Unreasonable Search and Seizure Under the Alaska Constitution**

52. Plaintiffs re-allege and incorporate herein paragraphs 1 through 51, as though they were fully set forth.

53. The Alaska Constitution guarantees the security of the people “in their persons, houses and other property, papers, and effects, against unreasonable searches and seizures . . . .” Alaska Const., Art. I, Sec. 14. The Alaska Constitution also guarantees that any warrants issued by a court shall issue only upon a showing of probable cause and shall “particularly describ[e] the place to be searched, and the persons or things to be seized.” *Id.*

54. The touchstone for a cognizable interest in papers and property, for the purposes of article I, section 14, is “an expectation of privacy.” *Beltz v. State*, 221 P.3d 328, 333 (Alaska 2009).

55. Plaintiffs, as the subjects of their medical records, have a legitimate expectation of privacy in those records, whether or not they hold a property interest in them. *See Ferguson v. City of Charleston*, 532 U.S. 67, 78 (2001) (“The reasonable expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent.”).

56. To the extent that the defendants may argue that the records within the scope of the search warrant were intermingled with the records not within the scope of the search warrant, the Ninth Circuit devised a policy for such circumstances, permitting the seizure of records provided that the government “should seal[] and hold[] the documents pending approval by a magistrate of a further search,” rather than seize the both sets of documents and permit review of all the documents by the prosecuting authority. *U.S. v. Tamura*, 694 F.2d 591, 595-96 (9th Cir. 1982); *see also U.S. v. Comprehensive Drug Testing, Inc.*, 579 F.3d 989, 994-1001 (9<sup>th</sup> Cir. 2009).

57. Defendants’ aforementioned policies and practices violate the Plaintiffs’ right to be free from unreasonable searches and seizures under the Alaska Constitution, Article I, Section 14.

Claim 2: Violation of the Right of Privacy in the Alaska Constitution

1 58. Plaintiffs re-allege and incorporate herein paragraphs 1 through 57,  
2 as though they were fully set forth.

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4 59. Article I, Section 22 of the Alaska Constitution guarantees that the  
5 “right of the people to privacy is recognized and shall not be infringed.” Alaska  
6 Const., Art. I, Sec. 22.

7 60. Alaska’s privacy clause is “more robust and broader in scope” than  
8 the federal right to privacy. *State v. Planned Parenthood of Alaska*, 171 P.3d  
9 577, 581 (Alaska 2007) (citation and internal quotation omitted).

10  
11 61. The earliest draft of the privacy clause considered included the  
12 following language:

13 Neither warrants nor writs of investigation in abrogation of privacy  
14 shall issue, except upon probable cause and upon a showing of a  
15 legitimate and pressing need, supported by oath or affirmation,  
16 particularly describing the information or data sought and the person  
17 whose privacy may be affected, and particularly setting forth the  
18 reasons for the search or investigation. The legislature shall provide for  
19 the prosecution and punishment of public officials and private parties  
20 who act in violation of this section, and shall provide civil remedies to  
21 redress and prevent such violations. The legislature shall provide for  
22 the protection and security of information available to the State to the  
23 extent necessary to protect the rights of the individual recognized in  
24 this section and shall further provide for the protection and security of  
25 information gathered under this section by the State.

22 *See* 1972 Senate Joint Resolution No. 68, 7th Leg., 2d Sess.; *Valley Hosp. Assn.,*  
23 *Inc. v. Mat-Su Coalition for Choice*, 948 P.2d 963, 969 (Alaska 1997) (discussing  
24 the “legislative” history of the privacy clause, describing the draft language as the

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“only informative legislative history” of the clause, but declining to “limit” the meaning of the privacy clause exclusively to informational privacy).

62. One apparent intent of the legislature in proposing the privacy amendment was to impose special and unique obligations on the seizure of private information above and beyond the standard to obtain a search warrant.

63. The legislature was so concerned about the right to privacy that it considered requiring in the text of the clause civil remedies and even criminal penalties for “public officials” who violated the privacy rights of individual citizens.

64. The wanton seizure of and careless management of the most private medical information of hundreds of Alaskan women is precisely the kind of evil designed to be prevented by Alaska’s privacy clause.

65. Mandating special care in the taking and disclosure of private medical information is an appropriate remedy for such violations of the privacy clause.

66. Defendants’ aforementioned policies and practices violate the Plaintiffs’ right to privacy under the Alaska Constitution, Article I, Section 22.

**MOTION FOR RETURN OF PROPERTY**

67. Plaintiffs re-allege and incorporate herein paragraphs 1 through 66, as though they were fully set forth.



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68. Alaska Rule of Criminal Procedure 37 permits any “person aggrieved by an unlawful search or seizure” to move the court “for return of property and to suppress for use as evidence anything so obtained on the ground that the property was illegally seized.” Alaska R. Crim. P. 37(c).

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69. The plaintiffs, as individuals whose private medical information is contained in the records seized, are “aggrieved” within the meaning of the Rule, and thus may properly seek such relief under the Rule.

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70. The property – in this case the medical records and other patient files – was illegally seized, in violation of the state constitutional rights described above.

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71. The use of patient information obtained from illegally seized medical records in a public proceeding would potentially disclose individually identifying information and expose the Plaintiffs to public ridicule or condemnation.

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72. For these reasons, it is appropriate that the Court should grant the motion for return of property on behalf of the plaintiffs and preclude the use of any patient information seized pursuant to the search warrant in any public proceedings.

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**PRAYER FOR RELIEF**

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Plaintiffs seek and are entitled to the following forms of relief:

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73. That the Court assume jurisdiction over this matter;

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74. That the Court award plaintiffs injunctive relief;

75. That the Court order the return of all seized patient information, including medical charts and other patient records, to A Woman's Place clinic, or, in the alternative, to the individual plaintiffs themselves;

76. That the Court issue a preliminary and permanent injunction restraining defendants, their agents, employees, assigns and all persons acting in concert or participating with them, from conducting similar seizures of medical records without adopting appropriate protocols, approved by the Court, to prevent future requests for overbroad search warrants, seizures of files in excess of the scope of a search warrant, and improved protections for patient privacy.

77. That the Court declare that the right against unreasonable search and seizure and the right to privacy under the Alaska Constitution require that, where documents legitimately sought by the government and documents outside the scope of a legitimate search are inextricably intermingled, the defendants may seek no other search warrant than one:

- a. permitting the prosecuting authority to seize both sets of documents;
- b. immediately requiring the prosecuting authority to convey the documents to a neutral party (such as a magistrate or court master) under seal;

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c. stating that the neutral party should then review the documents and convey to the prosecuting authority copies of only those documents within the scope of the warrant, revealing no other information to the prosecuting authority or any other party; and

d. ordering the subsequent return of all records to the original record holder on an expedited basis.

78. That the Court enter a protective order preventing the Defendants Department of Law and Division from using any information seized from the medical records in seized from A Woman's Place in any indictment, complaint, public proceeding, or public document.

79. That the Court declare that the plaintiffs are "constitutional" and/or a public interest litigants under AS 09.60.010(c) and Alaska Civil Rule 82;

80. That the Court award plaintiffs their full reasonable costs and attorney's fees incurred during this litigation, under the applicable court rules and other provisions of law concerning the award of such costs and attorney's fees to public interest litigants enforcing constitutional rights; and

81. That the Court grant any other and further relief as may be justly and appropriately provided in light of the evidence presented to the Court.

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WHEREFORE plaintiffs respectfully request that the Court enter judgment in their favor on the claims made and for the relief requested by this Complaint.

DATED this 25<sup>th</sup> day of June, 2010.

Respectfully Submitted,



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