

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[REDACTED]
AMERICAN CIVIL LIBERTIES UNION;
and AMERICAN CIVIL LIBERTIES
UNION FOUNDATION,

Plaintiffs,

v.

ALBERTO GONZALES, in his official
capacity as Attorney General of the United
States; ROBERT MUELLER, in his official
capacity as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN,
in his official capacity as Senior Counsel to
the Federal Bureau of Investigation,

Defendants.

**MOTION FOR LEAVE TO FILE
SECOND AMENDED
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

04 Civ. 2614 (VM)

FILED UNDER SEAL

**MOTION FOR LEAVE TO FILE SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

[REDACTED] and plaintiffs [REDACTED] American
Civil Liberties Union ("ACLU"), and American Civil Liberties Union Foundation
("ACLUF") request leave to file the attached Second Amended Complaint.

Plaintiffs filed the original Complaint in this action in April 2004 and an
Amended Complaint in May 2004. The Amended Complaint challenged the
constitutionality of 18 U.S.C. § 2709, as amended by the USA PATRIOT Act, Pub. L.
107-56, 115 Stat. 272 (Oct. 26, 2001) ("the NSL statute"), and challenged the validity of
a National Security Letter ("NSL") issued under that statute. In September 2004, this
Court invalidated the statute on its face. *See Doe v. Ashcroft*, 334 F.Supp.2d 471

(S.D.N.Y. 2004). The government appealed the decision and oral argument was heard by the Second Circuit in November 2005.

Before the Second Circuit issued a decision, Congress substantially amended the challenged law. See USA PATRIOT Improvement and Reauthorization Act of 2005, Pub. L. 109-177, 120 Stat. 195 (Mar. 9, 2006) ("PIRA"); USA PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. 109-178, 120 Stat. 278 (Mar. 9, 2006) ("ARAA"). In May 2006, therefore, the Second Circuit remanded the case to this Court "to receive amended pleadings, request new briefs, conduct oral argument, and, in due course, furnish its views on the constitutionality" of the amended NSL statute. *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006). The Second Amended Complaint that plaintiffs now seek leave to file challenges the constitutionality of the NSL statute as amended by the PIRA and ARAA.

Jeffrey Oestericher, counsel for defendants, has informed plaintiffs' counsel that defendants do not oppose the filing of the Second Amended Complaint. In accordance with procedures set forth by this Court in *Doe v. Ashcroft*, 317 F.Supp.2d 488 (S.D.N.Y. 2004), plaintiffs are filing this Motion and the attached Second Amended Complaint under seal. Plaintiffs intend to confer with defendants to ensure that public versions of these documents are filed within one business day, as the Court's procedures require.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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[REDACTED], AMERICAN CIVIL
LIBERTIES UNION; and AMERICAN CIVIL
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Plaintiffs,

v.

ALBERTO GONZALES, in his official capacity
as Attorney General of the United States;
ROBERT MUELLER, in his official capacity
as Director of the Federal Bureau of
Investigation; and MARION E. BOWMAN, in
his official capacity as Senior Counsel to the
Federal Bureau of Investigation,

Defendants.

**SECOND AMENDED COMPLAINT
FOR DECLARATORY AND
INJUNCTIVE RELIEF**

04 Civ. 2614 (VM)

FILED UNDER SEAL

**SECOND AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE RELIEF**

1. Plaintiffs [REDACTED] American
Civil Liberties Union ("ACLU"), and American Civil Liberties Union Foundation ("ACLUF")
challenge the constitutionality of the gag and secrecy provisions of 18 U.S.C. §§ 2709 and 3511
(collectively, "the NSL statute"), which authorize the FBI to impose a broad and effectively
permanent non-disclosure obligation on those served with national security letters ("NSLs"). *See*
18 U.S.C. §§ 2709 & 3511, as amended by the USA PATRIOT Act, Pub. L. 107-56, 115 Stat.
272 (Oct. 26, 2001) ("Patriot Act"); by the USA PATRIOT Improvement and Reauthorization
Act of 2005, Pub. L. 109-177, 120 Stat. 195 (Mar. 9, 2006) ("PIRA"); and by the USA
PATRIOT Act Additional Reauthorizing Amendments Act of 2006, Pub. L. 109-178, 120 Stat.
278 (Mar. 9, 2006) ("ARAA").

2. An agent of defendant Federal Bureau of Investigation ("FBI") served an NSL on plaintiff [REDACTED] in [REDACTED]. The NSL directed [REDACTED] to disclose the name, [REDACTED] addresses, [REDACTED], and other sensitive information relating to one of [REDACTED] clients. The [REDACTED] NSL also referenced the NSL statute's gag provisions, then codified in 18 U.S.C. § 2709(c), and expressly prohibited [REDACTED] and "any officer, employee or agent" of [REDACTED] from "disclosing to any person" that the FBI had sought information from it.

3. Although the [REDACTED] NSL was served more than two years ago, plaintiffs remain subject to the gag provisions today. To avoid violating the gag provisions, plaintiffs have filed this Amended Complaint under seal.

4. Plaintiffs filed the original Complaint in this case in April 2004 and an Amended Complaint in May 2004. The Amended Complaint challenged the NSL statute, as then codified in 18 U.S.C. § 2709, under the First, Fourth, and Fifth Amendments, and challenged the validity of the [REDACTED] NSL. In September 2004, this Court invalidated the statute. *See Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). The government appealed the decision and oral argument was heard by the Second Circuit in November 2005. Before the Second Circuit issued a decision, however, Congress enacted the PIRA and ARAA, substantially amending the challenged law. In May 2006, the Second Circuit remanded the case to this Court "to receive amended pleadings, request new briefs, conduct oral argument, and, in due course, furnish its views on the constitutionality" of the amended NSL statute. *Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

5. The PIRA and ARAA amendments remedied some of the NSL statute's defects but rendered other defects more severe. In its current form, the NSL statute invests the FBI with authority to issue gag orders prohibiting NSL recipients from disclosing that the FBI has sought

or obtained information from them. The gag orders are issued by the FBI unilaterally, without prior judicial review. While the statute permits NSL recipients to challenge gag orders in court, reviewing courts are permitted to modify or vacate such orders only in extraordinary circumstances, and in some contexts they are statutorily required to defer to the FBI's determination that secrecy is necessary.

6. For these reasons and others set forth below, plaintiffs seek, *inter alia*, a declaration that the NSL statute's gag and secrecy provisions are unconstitutional on their face and as applied; a declaration that the [REDACTED] NSL is unconstitutional; an injunction prohibiting the FBI from seeking to enforce the gag and secrecy provisions against plaintiffs or others; and an injunction preventing the FBI from seeking to enforce the [REDACTED] NSL.

JURISDICTION AND VENUE

7. This case arises under the United States Constitution and the laws of the United States and presents a federal question under Article III of the United States Constitution and 28 U.S.C. § 1331. The Court has authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201, *et seq.* The Court has authority to award costs and attorneys' fees under 28 U.S.C. § 2412. Venue is proper in this district under 28 U.S.C. § 1391(e).

PARTIES

8. At the time the [REDACTED] NSL was served, plaintiff [REDACTED] was an operating Internet access and consulting business incorporated and located in [REDACTED] [REDACTED]
[REDACTED]

9. Plaintiff [REDACTED] was [REDACTED] President and [REDACTED] [REDACTED] has been subject to the NSL statute's gag provisions for more than two years and [REDACTED] remains subject to those provisions today.

10. Plaintiff ACLU is a nationwide, non-profit, non-partisan organization with more than 500,000 members dedicated to the constitutional principles of liberty and equality. The ACLU is a 501(c)(4) organization. The ACLU's activities include lobbying Congress on legislation that affects civil liberties and analyzing and educating the public about such legislation. The ACLU sues on its own behalf and on behalf of its members.

11. Plaintiff ACLUF is a 501(c)(3) organization that educates the public about civil liberties and employs lawyers who provide legal representation free of charge in cases involving civil liberties. As counsel to [REDACTED] and [REDACTED] and privy to the information contained in the [REDACTED] NSL, lawyers employed by plaintiff ACLUF have been subject to the NSL statute's gag provisions for more than two years and remain subject to those provisions today.

12. Defendant Attorney General Alberto Gonzales heads the United States Department of Justice (DOJ), which is the agency of the United States government responsible for enforcement of federal criminal laws and domestic intelligence investigations. Defendant Attorney General Alberto Gonzales has ultimate authority for supervising all of the operations and functions of the DOJ. The DOJ includes the FBI, the agency authorized to use the law challenged in this case.

13. Defendant Robert Mueller is the Director of the FBI and is responsible for supervising all of that agency's operations. The FBI is the agency authorized to use the law challenged in this case.

14. Defendant Marion E. Bowman is Senior Counsel, National Security Affairs, in the FBI's Office of the General Counsel. Defendant Marion E. Bowman signed the [REDACTED] NSL.

STATUTORY LANGUAGE AT ISSUE

The NSL Statute

15. The NSL statute was enacted as part of the Electronic Communications Privacy Act (ECPA), which Congress enacted in 1986. *See* Pub. L. 99-508, Title II, § 201[a], 100 Stat. 1867 (Oct. 21, 1986) (codified as 18 U.S.C. § 2510, *et seq.*).

16. In its current form, the NSL statute authorizes the FBI to issue NSLs ordering "electronic communication service provider[s]" to disclose "subscriber information," "toll billing records information," and "electronic communication transactional records" upon a certification that the information sought is "relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities." 18 U.S.C. § 2709(a) & (b)(1).

17. An "electronic communication service" is "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15).

18. As originally enacted, the NSL statute could be used only against people suspected of espionage. The original provision permitted the FBI to issue an NSL only if it could certify that (i) the information sought was relevant to an authorized foreign counterintelligence investigation; *and* (ii) there were specific and articulable facts giving reason to believe that the subject of the NSL was a foreign power or foreign agent. *See* 18 U.S.C. § 2709 (1988).

19. In 1993, Congress extended the reach of the statute. It authorized the FBI to issue an NSL if it could certify that (i) the information sought was relevant to an authorized foreign

counterintelligence investigation; and (ii) there were specific and articulable facts giving reason to believe that *either* (a) the subject of the NSL was a foreign power or foreign agent, *or* (b) the subject had communicated with a person engaged in international terrorism or with a foreign agent or power "under circumstances giving reason to believe that the communication concerned international terrorism." Pub. L. 103-142, 107 Stat. 1491 (Nov. 17, 1993).

20. In 2001, through the Patriot Act, Congress extended the reach of the NSL statute again by deleting the individualized suspicion requirement altogether. *See* Pub. L. 107-56, Title V, § 505(a), 115 Stat. 365 (Oct. 26, 2001). As a result of the Patriot Act, the FBI may now use NSLs to obtain sensitive information about innocent individuals who have no connection to espionage or terrorism. *See* 18 U.S.C. § 2709(b).

21. The NSL statute does not require the FBI to seek judicial review before issuing an NSL. However, after the decision of this Court in *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004), Congress amended the statute to permit those served with NSLs to "petition for an order modifying or setting aside the request." 18 U.S.C. § 3511(a). If the recipient of an NSL files such a petition, the reviewing court may modify or set aside the NSL "if compliance would be unreasonable, oppressive, or otherwise unlawful." *Id.*

22. Under the amended statute, the FBI may affirmatively seek judicial enforcement of an NSL by "invok[ing] the aid of "any district court of the United States within the jurisdiction in which the investigation is carried on or the person or entity [served with the NSL] resides, carries on business, or may be found." *Id.* § 3511(c). If a court issues an order requiring compliance with an NSL, non-compliance may be punished by the court as contempt. *Id.*

23. The NSL statute permits the FBI to disseminate information obtained through NSLs with the approval of the Attorney General. *Id.* § 2709(d). Nothing in the statute forecloses

the Attorney General from authorizing dissemination to other government agencies, to private entities, or to foreign intelligence services.

The Gag and Secrecy Provisions

24. In its current form, the NSL statute authorizes the Director of the FBI or his designee (including a Special Agent in Charge of a Bureau field office) to impose a broad and effectively permanent gag order on any person or entity served with an NSL.

25. To impose such an order, the Director or his designee must "certify" that, absent the non-disclosure obligation, "there may result a danger to the national security of the United States, interference with a criminal, counterterrorism, or counterintelligence investigation, interference with diplomatic relations, or danger to the life or physical safety of any person." *Id.* § 2709(c)(1).

26. If the Director of the FBI or his designee so certifies, the recipient of the NSL is prohibited from "disclos[ing] to any person (other than those to whom such disclosure is necessary to comply with the request or an attorney to obtain legal advice or legal assistance with respect to the request) that the [FBI] has sought or obtained access to information or records under [the NSL statute]." *Id.*

27. The gag order is imposed by the FBI unilaterally, without prior judicial review. While the statute requires a "certification" that the gag is necessary, the certification is not examined by anyone outside the executive branch. No judge considers, before the gag order is imposed, whether secrecy is necessary or whether the gag order is narrowly tailored.

28. The gag provisions permit the recipient of an NSL to petition a court "for an order modifying or setting aside a nondisclosure requirement." *Id.* § 3511(b)(1). However, in the case of a petition filed "within one year of the request for records," the reviewing court may modify

or set aside the nondisclosure requirement only if it finds that there is "*no reason to believe* that disclosure *may* endanger the national security of the United States, interfere with a criminal, counterterrorism, or counterintelligence investigation, interfere with diplomatic relations, or endanger the life or physical safety of any person." *Id.* § 3511(b)(2) (emphases added).

Moreover, if a designated senior government official certifies that "disclosure may endanger the national security of the United States or interfere with diplomatic relations," the certification must be "treated as conclusive unless the court finds that the certification was made in bad faith." *Id.*

29. In the case of a petition filed under § 3511(b)(1) "one year or more after the request for records," the FBI Director or his designee must either terminate the non-disclosure obligation within 90 days or recertify that disclosure may result in one of the enumerated harms. *Id.* § 3511(b)(3). If the FBI recertifies that disclosure may be harmful, however, the reviewing court is required to apply the same extraordinarily deferential standards it applies to petitions filed within one year. *Id.* If the recertification is made by a designated senior official, the certification must be "treated as conclusive unless the court finds that the recertification was made in bad faith." *Id.*

30. Those who violate gag orders issued under the NSL statute may be subject to criminal penalties. See 18 U.S.C. § 1510(e) ("Whoever, having been notified of the applicable disclosure prohibitions or confidentiality requirements of [the NSL statute] . . . knowingly and with the intent to obstruct an investigation or judicial proceeding violates such prohibitions or requirements applicable by law to such person shall be imprisoned for not more than five years, fined under this title, or both.").

31. The PIRA and ARAA require that challenges to NSLs (and to gag orders associated with NSLs) be heard in extraordinary secrecy. A reviewing court is required to "close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records." *Id.* § 3511(d). The court is required to keep filings under seal "to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records." *Id.*

32. The reviewing court is also required, "upon request of the government," to "review *ex parte* and *in camera* any government submission or portions thereof, which may include classified information." *Id.* § 3511(e).

FACTUAL BACKGROUND

The [REDACTED] NSL

33. [REDACTED] Internet access and consulting business located and incorporated in [REDACTED]. [REDACTED] provided a number of Internet related services for its clients. For example, it provided space on the Web so that clients could post their own sites and store electronic files. [REDACTED]
[REDACTED] It provided clients with e-mail accounts. In some cases, it provided clients with the ability to access the Internet.

34. FBI agent [REDACTED] telephoned [REDACTED] President of plaintiff [REDACTED], on or about [REDACTED] to inform [REDACTED] that the FBI would be serving an NSL on [REDACTED]. Agent [REDACTED] did not describe the substance of the letter.

35. Agent [REDACTED] delivered an NSL to [REDACTED] President of plaintiff [REDACTED] on or about [REDACTED]. The letter, which is dated [REDACTED] was on FBI

letterhead and signed by Marion E. Bowman, Senior Counsel, National Security Affairs, Office of the General Counsel.

36. The letter stated that [REDACTED] is "hereby directed to provide the [FBI] the names, addresses, lengths of service and electronic communication transactional records [REDACTED]

[REDACTED]

[REDACTED]

37. The letter included a certification that "the information sought is relevant to an authorized investigation to protect against international terrorism or clandestine intelligence activities."

38. The letter stated, "You are further advised that Title 18, U.S.C., Section 2709(c), prohibits any officer, employee or agent of yours from disclosing to any person that the FBI has sought or obtained access to information or records under these provisions."

39. The letter further stated, "You are requested to provide records responsive to this request personally to a representative of the [REDACTED] of the FBI. Any questions you have regarding this request should be directed only to the [REDACTED]. Due to security considerations, you should neither send the records through the mail nor disclose the substance of this request in any telephone conversation." (Emphasis in original.)

40. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] (Emphasis in original.) [REDACTED]

[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

41. [REDACTED] asked Agent [REDACTED] whether [REDACTED] could consult a lawyer and [REDACTED] business partners about the [REDACTED] NSL. Agent [REDACTED] stated that [REDACTED] could do so.

42. On or about [REDACTED], Agent [REDACTED] left a voicemail for [REDACTED] inquiring about the status of [REDACTED] compliance with the [REDACTED] NSL.

43. On or about [REDACTED], [REDACTED] left a voicemail for Agent [REDACTED] requesting that any questions about the [REDACTED] NSL be directed to [REDACTED] legal counsel.

The April 2004 Complaint

44. Plaintiffs [REDACTED] ACLU, and ACLUF filed the original Complaint in this action in April 2004 and an Amended Complaint in May 2004. The Amended Complaint challenged the NSL statute under the First, Fourth, and Fifth Amendments. It also challenged the constitutionality of the [REDACTED] NSL.

45. In September 2004, this Court invalidated the statute on its face. *See Doe v. [REDACTED]*, 334 F.Supp.2d 471 (S.D.N.Y. 2004). The Court wrote, "[T]he compulsory, secret, and unreviewable production of information required by the FBI's application of 18 U.S.C. § 2709 violates the Fourth Amendment, and . . . the non-disclosure provision of 18 U.S.C. § 2709(c) violates the First Amendment." The Court enjoined the government from issuing NSLs under 18 U.S.C. § 2709 "or from enforcing the non-disclosure provision in this or any other case." *Id.* The Court stayed enforcement of the judgment pending appeal.

46. The government appealed the decision and oral argument was heard by the Second Circuit in November 2005. Before the Second Circuit issued a decision, however, Congress enacted the PIRA and ARAA. In May 2006, therefore, the Second Circuit remanded the case to this Court "to receive amended pleadings, request new briefs, conduct oral argument, and, in due course, furnish its views on the constitutionality" of the amended NSL statute. *See Doe v. Gonzales*, 449 F.3d 415 (2d Cir. 2006).

The Continuing Restraint on Plaintiffs' Speech

47. Although [REDACTED] plaintiffs have been subject to the gag provisions for more than two years and they remain subject to them today.

48. The gag provisions have prevented plaintiffs from disclosing information about the [REDACTED] NSL to the subject of the NSL, to [REDACTED] other clients, to the ACLU's members, and to the press and public.

49. At various times since plaintiffs commenced this action, the government has invoked the gag provisions to prevent plaintiffs from disclosing the mere fact that, at some unspecified time and place, the government issued an NSL to some unnamed Internet service provider; from disclosing the nature of the records that the [REDACTED] NSL seeks; and from disclosing that the case involves "sensitive" information or implicates "national security concerns." At one point the government relied on the gag provisions to insist that plaintiffs redact, from a letter to be filed on the public docket, a quotation from a Supreme Court opinion.

50. The gag provisions have prevented plaintiff [REDACTED] from participating in public debate about the Patriot Act. Though [REDACTED] has unique experience with the Act's surveillance provisions, the gag provisions prevented [REDACTED] from speaking publicly about [REDACTED] experience and from petitioning legislators to change the law.

51. The gag provisions silenced [REDACTED] at the time [REDACTED] voice would have been most valuable to public debate. Congress debated the reauthorization of the Patriot Act between the fall of 2005 and the spring of 2006; then, as now, the gag provisions prevented [REDACTED] from disclosing information about this lawsuit and the [REDACTED] NSL.

52. The gag provisions undermined plaintiff ACLU's capacity to petition Congress for changes to the Patriot Act. During the reauthorization debate, legislators asked the ACLU for specific examples of Patriot Act abuses. The gag provisions prevented the ACLU from disclosing details about this lawsuit and about the [REDACTED] NSL.

53. On July 5, 2006, counsel for defendants stated to counsel for plaintiffs that the FBI continues to regard plaintiffs as subject to a non-disclosure obligation.

54. In November 2005, the Washington Post reported that the FBI now issues more than 30,000 NSLs every year. See Barton Gellman, *The FBI's Secret Scrutiny: In Hunt for Terrorists, Bureau Examines Records of Ordinary Americans*, Washington Post (Nov. 6, 2005).

May 2006, the Justice Department disclosed that in the preceding year the FBI had issued more than 9,200 NSLs seeking detailed information about more than 3,500 U.S. citizens or legal residents, not including demands that sought only "subscriber information." See Dan Eggen, *FBI Sought Data on Thousands in '05*, Washington Post (May 2, 2006).

CAUSES OF ACTION

55. The NSL statute, on its face and as applied through the [REDACTED] NSL, violates the First Amendment by investing the FBI with the authority to suppress speech without meaningful judicial review and by failing to require that gag orders issued under the statute be narrowly tailored to a compelling government interest.

56. The NSL statute, on its face and as applied through the [REDACTED] NSL, violates the principle of separation of powers by effectively transferring to the executive branch the final authority to determine whether speech should or should not be suppressed.

57. The NSL statute, on its face and as applied through the [REDACTED] NSL, violates the First and Fifth Amendments by requiring courts that review non-disclosure orders and challenges to NSLs to close hearings and seal judicial documents even where there is no compelling need for secrecy.

58. The NSL statute, on its face and as applied through the [REDACTED] NSL, violates the First and Fifth Amendments by requiring courts that review non-disclosure orders and challenges to NSLs to review government filings *ex parte* and *in camera* upon the government's request.

59. The [REDACTED] NSL violates the First and Fourth Amendments by improperly demanding information that is constitutionally protected and irrelevant to any ongoing investigation.

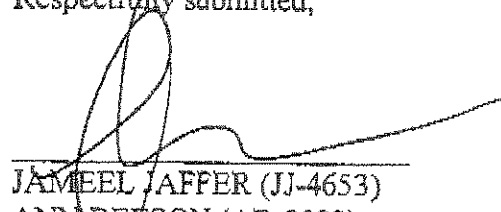
PRAAYER FOR RELIEF

WHEREFORE Plaintiffs respectfully request that the Court:

1. Declare that 18 U.S.C. §§ 2709(c) and 3511(b) are unconstitutional under the First Amendment and the principle of separation of powers.
2. Declare that 18 U.S.C. §§ 3511(d) and (e) are unconstitutional under the First and Fifth Amendments.
3. Declare that the [REDACTED] NSL is unconstitutional under the First, Fourth, and Fifth Amendments, and under the principle of separation of powers.

4. Permanently enjoin defendants from seeking to enforce the [REDACTED] NSL or from penalizing plaintiffs for failing to comply with it.
5. Permanently enjoin defendants from using 18 U.S.C. §§ 2709(c) and 3511(b), (d), and (e) against plaintiffs or any other person or entity.
6. Award plaintiffs fees and costs.
7. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,



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