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**IN THE SUPERIOR COURT OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA**

NICK COONS, RED SEVEN
COMPUTERS, JACK GIBSON, CHUCK
KIRKHUFF, and INTERIOR
CONCEPTS,

Plaintiffs,

vs.

HUGH HALLMAN, SHANA ELLIS,
BEN ARREDONDO, MARK
MITCHELL, JOEL NAVARRO, ONNIE
SHEKERJAN, COREY WOODS, and
CITY OF TEMPE,

Defendants.

Case No. CV2009-036734

**COMPLAINT and APPLICATION
FOR ORDER TO SHOW CAUSE**

INTRODUCTION

1. For some time, local governments Arizona have been engaged in an increasingly frenzied competition to bestow subsidies, in the form of tax incentives and otherwise, upon private developers and retail businesses to increase the odds that certain retailers locate within their boundaries. Such subsidies distort the normal and fair operation of market forces and impose substantial burdens upon taxpayers. Fortunately, the framers of the Arizona Constitution, fresh from the experience of rampant corporate subsidies in their own time, crafted several provisions

in our state's organic law intended to prevent such mischief. The Legislature, recently faced with disregard by local governments, tightened up and extended those provisions in 2007.

2. The Sea Life Aquarium subsidy at issue in this case, which provides a subsidy of over \$148,000 to the owner of a United Kingdom-based development company that is building a private, for-profit visual and interactive display of sea creatures, exemplifies the type of subsidy the framers of the Constitution and our current Legislature intended to restrict. The Plaintiffs are Tempe taxpayers and business owners who do not receive government subsidies, yet who are forced to bear the cost for businesses that do receive subsidies. The Plaintiffs seek to enforce the Arizona Constitution's guarantees that limit the exercise of government power to truly public purposes and that prevent unjust enrichment of favored interests to the detriment of the taxpaying public.

PARTIES, JURISDICTION, AND VENUE

3. Plaintiff Nick Coons is a resident and taxpayer in Tempe and majority owner of Plaintiff Red Seven Computers, an Arizona corporation founded in 1997 to repair, upgrade, and sell new computer equipment. Plaintiff Red Seven Computers employs four people in its Tempe office besides Mr. Coons and remits transaction privilege taxes to the City of Tempe.

4. Plaintiffs Jack Gibson and Chuck Kirkhuff are residents and taxpayers in Tempe.

5. Plaintiff Interior Concepts, an Arizona Corporation founded in 1985, provides expert guidance and a wide selection of interior finishes including carpet, hardwood, laminate, and ceramic. It employs approximately ten people in two offices, including three employees in its Tempe office. It remits transaction privilege taxes to the City of Tempe.

6. Defendant Hugh Hallman is mayor of the City of Tempe and a member of the Tempe City Council. He is sued in his official capacity only.

7. Defendant Shana Ellis is vice mayor of the City of Tempe and a member of the Tempe City Council. She is sued in her official capacity only.

8. Defendant Ben Arredondo is a member of the Tempe City Council and is sued in his official capacity only.

9. Defendant Mark Mitchell is a member of the Tempe City Council and is sued in his official capacity only.

10. Defendant Joel Navarro is a member of the Tempe City Council and is sued in his official capacity only.

11. Defendant Onnie Shekerjian is a member of the Tempe City Council and is sued in her official capacity only.

12. Defendant Corey Woods is a member of the Tempe City Council and is sued in his official capacity only.

13. Defendant City of Tempe is a municipal corporation organized under the laws of the State of Arizona. The entirety of the City is located within Maricopa County, a metropolitan statistical area with a population exceeding two million.

14. Jurisdiction over this action and its claims and application for order to show cause is provided by A.R.S. §§ 12-123, 12-1831, and 12-1801; and Ariz. R. Civ. P. 6(d).

15. Venue is proper pursuant to A.R.S. § 12-401.

FACTS COMMON TO ALL CLAIMS

16. On August 20, 2009, the Tempe City Council unanimously approved Resolution No. 2009.96, authorizing the Mayor to execute a Development Agreement for Sea Life Aquarium.

17. Sea Life Aquarium is a planned 26,000 square foot aquarium next to Sports Authority in Arizona Mills Mall, Tempe. It is part of United Kingdom-based Merlin Entertainments Group, which is second to Disney as the largest operator of attractions worldwide. Merlin Entertainments owns Legoland amusement parks and Madame Tussauds wax museums, in addition to other amusement parks around the country and the world. It also operates a Sea Life Aquarium in California. One-day tickets are approximately \$19 for adults and \$12 for children, and annual memberships are \$130 to \$160.

18. On August 20, 2009, the Tempe City Council entered Development Agreement c2009-166, which provides for taxes and fees in excess of \$148,000 to be paid to the Developer of Sea Life Aquarium or waived for the Developer as follows: (a) rebate all Construction Sales Taxes to the Developer up to \$900,000 (§ 3.1.1); (b) rebate all transaction privilege (retail sales) taxes to the Developer up to \$78,000 (§§ 3.1.2); and (c) rebate all planning, engineering, and building safety processing fees (excluding water and sewer development fees and residential development taxes) paid by the Developer after January 1, 2009, and waive all future fees, up to \$70,000 (§ 3.2).

19. The City appears to already have rebated or reimbursed to the Developer, or waived for the Developer, development fees in excess of \$25,000.

20. The Development Agreement also provides for specific City assistance to the Developer, including: (a) City assistance to the Developer in location of marketing signs, including off-site advertising which is currently prohibited by the City's sign code (§ 3.3); (b) City assistance to the Developer with other governmental agencies, including the State of Arizona Department of Transportation and any state or local agencies whose approvals are required for the operation of the Project (§ 2.6); (c) a promise by the City not to impose on the Developer extraordinary plan or review requirements in connection with all requests for approval relating to Sea Life Aquarium (§ 2.4); and (d) appointment of a City representative to be available at all reasonable times to discuss and review the development of Sea Life Aquarium (§ 2.5).

21. After the City entered the Development Agreement, it issued a Staff Summary Report that the City must adopt a Notice of Intent to enter the Sea Life Aquarium Agreement at least 14 days before the Agreement is entered, make specific findings, and obtain a third party verification pursuant to A.R.S. § 9-500.11.

22. On October 8, 2009 (after the City entered the Sea Life Aquarium Agreement), the City adopted a Notice of Intent to enter the Agreement pursuant to A.R.S. § 9-500.11(K).

23. In response to public records requests, the City has not produced any records of findings or third party verification to date.

24. Sea Life Aquarium announced on or before September 3, 2009 that it was opening doors and promoting itself in the City of Tempe. The Aquarium is scheduled to open June 1, 2010.

25. Ordinarily, development in shopping malls occurs as a matter of course without the necessity of public subsidies or assistance. The vast majority of retail, commercial, and residential developments in Arizona take place without public subsidies.

26. The vast majority of businesses in Tempe and throughout Arizona pay their full share of taxes.

27. In the absence of Sea Life Aquarium, other businesses would be attracted to locate at Arizona Mills Mall.

28. In May 2005, recognizing the destructive nature of competition among cities to provide subsidies to commercial developers, Defendant Mayor Hallman reportedly joined Phoenix Mayor Phil Gordon and Chandler Mayor Boyd Dunn in signing an agreement not to offer tax subsidies to retail developers along their common borders. However, such subsidies have continued to proliferate in other areas across the state.

29. On September 25, 2009, Defendant Mayor Hallman joined Scottsdale Mayor Jim Lane and Paradise Valley Mayor Vernon Parker in opining in the *Arizona Republic* that a subsidy gift of tax rebates for a Phoenix mall developer was wrong and in violation of the Arizona Constitution: "The needless waste of taxpayer resources, the shift in tax burden to others, government's selective favoring of some and government's arbitrary creation of an unfair competitive advantage are all problems created by illegal gifts of public money to favored businesses." The Mayors' opinion continues, "When government gives taxpayer money to a favored business, it must tax the rest of the public with that missing share. Small businesses, or those less connected to government leaders, or those who cannot hire lawyers and lobbyists to

fight for their own subsidies, are left holding the bag.”

30. The Plaintiffs are among those “left holding the bag.” They all pay taxes to the City and receive services from the City, both of which are impacted by the City’s decision to expend over \$148,000. Plaintiffs Red Seven Computers and Interior Concepts generate transaction privilege taxes and employment opportunities in the City.

31. The Plaintiffs have equitable ownership over City funds and are liable to replenish such funds for deficiencies resulting from misappropriations, like the payments to be made to the Developer pursuant to the Sea Life Aquarium Agreement.

32. By subsidizing Sea Life Aquarium, the City has and/or will, either (a) collect from Tempe residents, consumers, taxpayers, and/or businesses \$148,000 more than it would otherwise collect without the subsidy, and/or (b) fail to distribute \$148,000 in services to Tempe residents, consumers, taxpayers, and/or businesses than it otherwise would without the subsidy.

33. None of the Plaintiffs have sought or received special treatment from the City through tax incentives or otherwise.

34. The framers of the Arizona Constitution were keenly concerned about the widespread practice of granting corporate subsidies, and adopted multiple provisions that were designed to proscribe such subsidies. The Legislature strengthened those provisions by statutes, which are directly implicated by the City’s Sea Life Aquarium Agreement.

I. Gift Clause

35. Article 9, § 7 of the Arizona Constitution (the “Gift Clause”) provides that neither the State nor any city “shall ever give or loan its credit in the aid of, or make any donation or grant,

by subsidy or otherwise, to any individual, association or corporation. . . .”

36. The Gift Clause “was intended to prevent governmental bodies from depleting the public treasury by giving advantages to special interests . . . or by engaging in non-public enterprises.” *Wistuber v. Paradise Valley Unified Sch. Dist.*, 141 Ariz. 346, 349, 687 P.2d 354, 357 (1984) (citations omitted). “[I]t is clear that the drafters of this provision intended that government property or funds were not to be given to private industry.” *City of Tempe v. Pilot Properties, Inc.*, 22 Ariz. App. 356, 362, 527 P.2d 515, 521 (1974).

37. A “subsidy” is “a grant of funds or property from a government, to a private person or company to assist in the establishment or support of an enterprise deemed advantageous to the public.” *State Tax Comm’n v. Miami Copper Co.*, 74 Ariz. 234, 241, 246 P.2d 871, 876 (1952).

38. The City of Tempe determined by Resolution No. 2009.96 that Sea Life Aquarium is an enterprise deemed advantageous to the public. The Aquarium is entirely privately owned and is intended and expected to generate substantial profit for its owners and investors.

39. Through the Development Agreement, the City gives advantages to Sea Life Aquarium, depletes the public treasury, gives funds to a private industry, and ultimately provides a subsidy.

40. A payment by the State or a subdivision is not proper under the Gift Clause unless “(1) the agreement serves a public purpose and (2) there is neither donation *nor* subsidy to a private association.” *Wistuber*, 141 Ariz. at 348, 687 P.2d at 356.

41. Promoting economic development, retail uses, employment, an urban core, an increased tax base, and related benefits—even if laudable goals that a City may pursue—are not a valid public purpose for which a City may expend public funds under the Gift Clause. *Turken v.*

Gordon, 220 Ariz. 456, 470-71, 207 P.3d 709, 723-24 (App. 2008) (review granted by the Arizona Supreme Court, CV09-0042PR).

42. Private or personal interests also must be considered in the Gift Clause analysis. *Id.* at 467, 207 P.3d at 720. A court asks the following: (i) Is money paid or property transferred to a private enterprise? (ii) What is the direct object of the public payment, not just its indirect effects? (iii) Are the claimed benefits merely the result of private activities, or do they directly result from the government's actions? (iv) Does the public expenditure purchase property that will be owned or controlled by the government? (v) Do the funds provide a public service, or employ staff or agents who provide such a service?; (vi) Do the payments pay a private party to engage in private business? *Id.* at 467-68, 207 P.3d at 720-21.

43. Taxpayer support for the development of an entertainment attraction in a shopping mall, for which the profits will inure completely to the benefit of private owners and investors, does not constitute a public purpose.

44. Under the Development Agreement, the "Developer desires to further the City's social service and community development efforts by offering a reduced rate or discount to visiting Tempe school organized group trips to the Project for students under age 18" (§ 2.7.1).

45. A "desire" to offer a group school discount is not a public purpose that can justify an expenditure of public funds under the Gift Clause.

46. Many amusement parks and attractions, including the Sea Life Aquarium in California and other Merlin Entertainments Group attractions, offer discounts for school organized group trips in the absence of a city subsidy.

47. The additional benefits derived from the Agreement by the City of Tempe, if any, are not equivalent to the payments to which the City has agreed, and are so inequitable and unreasonable as to amount to an abuse of discretion on the part of Defendants.

48. For all those reasons, the payments pursuant to which the City is obligated under the Agreement constitute a subsidy and an impermissible gift to a corporation, which exceeds Defendants' lawful powers in violation of Ariz. Const. Art. 9, § 7.

II. Arizona Statutes

49. Cities may appropriate and spend public monies for and in connection with economic development activities pursuant to A.R.S. § 9-500.11, provided, of course, that the payments also comport with the Arizona Constitution. They may enter retail development tax incentive agreements to pay, refund, credit, rebate or otherwise provide a retailer with sales, use or transaction privilege taxes only if certain requirements are met.

50. The requirements under A.R.S. § 9-500.11 include: (a) the city must adopt a notice of intent to enter the agreement at least 14 days in advance; (b) the city must find that (i) the proposed tax incentive is anticipated to raise more revenue than the amount of the incentive, and (ii) the business would not locate in the city in the same time, place, or manner without a tax incentive; and (c) the findings must be verified by an independent third party in advance.

51. A.R.S. § 42-6010 prohibits certain cities from offering or providing tax incentives, including waivers, exemptions, deductions, credits, rebates, discounts, deferrals, and other abatements or reductions, as an inducement for or in exchange for locating a retail business facility in the city. Tempe is among the cities subject to the prohibition in A.R.S. § 42-6010.

52. According to Resolution No. 2009.96, the Developer represented to the City that Sea Life Aquarium at Arizona Mills Mall would be feasible only with the City's assistance, and the City believed that benefits would accrue if the Sea Life Aquarium were developed in Tempe.

53. The City agrees by the terms of the Development Agreement to provide tax incentives that are inducements for or in exchange for the Developer locating Sea Life Aquarium in Tempe.

54. The City admitted in an October 8, 2009 Staff Summary Report that the Sea Life Aquarium Development Agreement is subject to the requirements of A.R.S. § 9-500.11, but responses to public records requests reveal that Defendants did not adopt a notice of intent, make the required findings, or verify the required findings in advance of entering the Sea Life Aquarium Agreement. Defendants adopted a notice of intent to enter the Sea Life Aquarium Agreement on October 8, 2009—approximately seven weeks *after* entering the Agreement.

55. The tax rebates pursuant to which the City is obligated under the Agreement also exceed Defendants' lawful powers in violation of A.R.S. § 42-6010.

56. To the extent A.R.S. § 42-6010 does not prohibit the Agreement, Defendants failed to follow the requirements in A.R.S. § 9-500.11 and therefore exceeded their lawful powers in entering the Agreement.

III. Equal Privileges or Immunities

57. Article 2, § 13 of the Arizona Constitution provides, "No law shall be enacted granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

58. Pursuant to the Tempe Resolution and Agreement, the Sea Life Aquarium Developer has been granted a privilege to receive tax and fee rebates and waivers, and an immunity from paying what otherwise would be its full tax and fee obligations, which are not available to other businesses within the City of Phoenix, even if those businesses generate substantial tax revenues and employment opportunities.

59. Neither Plaintiff Red Seven Computers nor Plaintiff Interior Concepts are eligible for or receive a rebate of taxes or fees, and both are obligated to contribute their full share of taxes to the City of Tempe. Neither are eligible for or receive City assistance in location of marketing signs, City assistance in dealings with other governmental agencies, an exemption from extraordinary plan or review requirements, or an appointed City representative available at all reasonable times to discuss their businesses.

60. Defendant City's actions discriminate among businesses in the City of Tempe, depriving Plaintiffs privileges or immunities that have been made available exclusively to a United Kingdom-based Developer. The discriminatory treatment is not rationally related to a legitimate governmental purpose.

61. Accordingly, the terms of the Agreement violate Plaintiffs' right to equal privileges or immunities in violation of Ariz. Const. Art. 2, § 13.

IV. Special Law

62. The Sea Life Aquarium Resolution does not address a general matter related to the police powers of the City of Tempe, but rather authorized Defendant Mayor Hallman to execute and implement an Agreement with a specific Developer in accordance with specified terms.

63. Art. 4, Part 2, § 19 of the Arizona Constitution provides, “No local or special laws shall be enacted in any of the following cases,” including “(9) Assessment or collection of taxes”; “(13) Granting to any corporation, association, or individual, any special or exclusive privileges, immunities, or franchises”; and “(20) When a general law can be made applicable.”

64. A municipal ordinance “has the force and effect of law.” Sutherland Statutory Construction § 30:1 (6th ed.); *see also* A.R.S. § 9-240. The Special Law Clause has historically operated as a restraint on local government enactments. *E.g.*, *Sherman v. City of Tempe*, 202 Ariz. 339, 45 P.3d 336 (2002); *see also* *City of Tucson v. Grezaffi*, 200 Ariz. 130, 23 P.3d 675 (App. 2001); *Smith v. City of Tucson*, 153 Ariz. 372, 736 P.2d 1184 (App. 1987); *State v. Loughran*, 143 Ariz. 345, 693 P.2d 1000 (App. 1985).

65. A resolution is an impermissible special law unless “(1) the classification is rationally related to a legitimate governmental objective, (2) the classification is legitimate, encompassing all members of the relevant class, and (3) the class is elastic, allowing members to move in and out of it.” *Gilbert v. Maricopa County*, 213 Ariz. 241, 246, 141 P.3d 416, 421 (App. 2006).

66. The Resolution by its express terms creates an exclusive class of one, identifying a single corporation with which Defendant Mayor Hallman was empowered to negotiate under terms favorable to the Developer.

67. For the reasons set forth above, the classification is not rationally related to a legitimate governmental objective.

68. In order to secure the stated benefits of the Agreement—specifically tax revenues,

employment, tourism, economic welfare, and a regional attraction—the classification consisting of a single Developer does not encompass all members of the relevant class; and the class is not elastic, allowing other members to move in and out of it.

69. The Resolution and resulting Agreement create an exclusive class consisting of one Developer that is entitled to preferential treatment in the assessment or collection of taxes and receipt of special City benefits.

70. The Resolution and resulting Agreement grant to a corporation special and exclusive privileges and immunities.

71. The purported public benefits identified in the Resolution can be secured through the application of a general law.

72. For all the foregoing reasons, the City's actions constitute a special law in violation of Ariz. Const. Art. 4, Part 2, §§ 19(9), (13), and (20).

V. Grounds for Preliminary Injunction

73. The traditional criteria for granting preliminary injunctions are (i) strong likelihood of success on the merits; (ii) possibility of irreparable harm without an injunction; (iii) balance of hardships weighs in favor of an injunction; and (iv) public policy favors an injunction. *Shoen v. Shoen*, 167 Ariz. 58, 63, 804 P.2d 787, 792 (App. 1990).

74. Arizona uses a sliding scale to evaluate the criteria. *Smith v. Ariz. Citizens Clean Elections Comm'n*, 212 Ariz. 407, 410, 132 P.3d 1187, 1190 (2006). For example, the movant may show either probable success on the merits and the possibility of irreparable harm, or that the balance of hardships favors an injunction and the case presents serious questions. *Shoen*,

167 Ariz. at 63, 804 P.2d at 792. “The greater and less reparable the harm, the less the showing of a strong likelihood of success on the merits need to be,” and vice versa. *Smith*, 212 Ariz. at 411, 132 P.3d at 1191.

75. Plaintiffs’ likelihood of success on the merits is substantial. The 2008 Court of Appeals decision in *Turken*, 220 Ariz. 456, 207 P.3d 709, is on point, holding that a city retail sales tax rebate for a private for-profit development violates the Gift Clause. Indeed, this Agreement does not even create a façade of consideration, which the City of Phoenix attempted to do through a lease for public parking spaces. Also, a statute enacted after the *Turken* case was filed clearly prohibits the tax rebate incentives here. A.R.S. § 42-6010. In the absence of application of the prohibition statute, Plaintiffs’ likelihood of success under Arizona statutes is undisputable because Defendants admit in a Staff Summary Report that the requirements in A.R.S. § 9-500.11 apply, yet they admit in responses to public records requests that they failed to comply. Finally, there is a strong likelihood of success on the merits for Plaintiffs’ Special Law and Equal Protection claims for the reasons above.

76. Because Plaintiffs have a protectable interest in the enforcement of the Arizona Constitution and statutes, “irreparable injury is presumed to follow if the interest is not protected.” See *Phoenix Orthopaedic Surgeons, Ltd. v. Peairs*, 164 Ariz. 54, 59, 790 P.2d 752, 757 (App. 1989) (*disapproved in part on other grounds, Valley Med. Specialists v. Farber*, 194 Ariz. 363, 366, 982 P.2d 1277, 1280 (1999)); accord, *The Power P.E.O., Inc. v. Employees Insurance of Wausau*, 201 Ariz. 559, 562, 38 P.3d 1224, 1227 (App. 2002) (presuming irreparable injury when the movant demonstrated likelihood of success).

77. Without a preliminary injunction, Plaintiffs' potential monetary injury may be irreparable. If the Developer of Sea Life Aquarium is correct that the project is not feasible without the City's assistance, the Developer may not be able to satisfy its financial obligations to the City (and taxpayers of Tempe, including Plaintiffs) should the Court invalidate the subsidy Agreement without issuing a preliminary injunction. *See The Power P.E.O., Inc.*, 201 Ariz. at 562, 38 P.3d at 1227 (granting preliminary injunction to prevent monetary harm when defendant admitted uncertain financial status). Also, the violation of constitutional rights alone is a sufficient showing of irreparable injury. 11A Fed. Prac. & Pro. § 2944 (3d ed.) (citing, *e.g.*, *Gilmore v. City of Montgomery, AL*, 417 U.S. 556 (1974) (granting preliminary injunction for equal protection claim)).

78. The possibility of hardships—over \$148,000—is significant without a preliminary injunction. The violation of constitutional rights is a less quantifiable but nonetheless significant hardship itself. *See id.* On the other hand, granting a preliminary injunction presents no hardship to Defendants. To the contrary, an injunction would free up City resources and increase City revenues. An injunction might create a hardship for the Developer, which may choose to modify or delay plans *temporarily*, but the balance tips in favor of the taxpayer Plaintiffs who face irreparable harm and demonstrate a substantial likelihood of success. *See The Power P.E.O., Inc.*, 201 Ariz. at 562, 38 P.3d at 1227 (“The balance of hardships favors [the movant] if it establishes ‘probable success on the merits and the possibility of irreparable injury’”) (quoting *Shoen*, 167 Ariz. at 63, 804 P.2d at 792)).

79. This case raises serious constitutional and statutory questions, and public policy

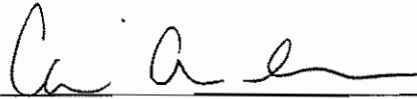
embodied both in our Constitution and statutes favors an injunction effectively requiring the Developer to pay all applicable fees and taxes under the law and to receive the same treatment as those similarly situated.

REQUEST FOR RELIEF

Plaintiffs request that this honorable Court award the following relief:

- A. Declare that City of Tempe Resolution No. 2009.96 is unconstitutional, and enjoin its further effect;
- B. Declare the terms of City of Tempe Development Agreement c2009-166 exceeds Defendants' powers and violate Plaintiffs' constitutional and statutory rights, and enjoin its enforcement;
- C. Preliminarily and permanently enjoin Defendants from performing under the development agreement;
- D. Award damages and costs according to proof at trial;
- E. Award costs and attorney fees pursuant to A.R.S. §§ 12-341, 12-341.01 and 12-348, and the private attorney general doctrine; and
- F. Order such additional relief as may be just and proper.

RESPECTFULLY SUBMITTED this 23rd day of November, 2009 by:



Clint Bolick (021684)

Carrie Ann Sitren (025760)

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Verification and Affidavit in Support of Order to Show Cause

State of Arizona

County of Maricopa

Carrie Ann Sitren, being first duly sworn, deposes and says:


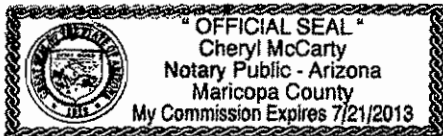
1. I have read the foregoing and know the contents thereof.
2. The statements and matters alleged are true of my own personal knowledge, except as to those matters stated upon information and belief, and as to such matters, I reasonably believe them to be true.
3. The statements and matters alleged show cause for the granting of an Order to Show Cause.

Dated this 23rd day of November, 2009.



Carrie Ann Sitren

Subscribed and sworn before me, the undersigned notary public, on this 30th day of November, 2009, by Carrie Ann Sitren.



Notary Public

My Commission Expires: 7/21/2013