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10 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SAN FRANCISCO

12 Unlimited Jurisdiction

13 ERIC PARKE, ANDREW SCHULTZ and) Case No. CGC-05-442624
14 ROYAL SLEEP CLEARANCE CENTER,)
15 INC., a California corporation, On Behalf Of) CLASS ACTION
16 Themselves, All Others Similarly Situated, and)
17 in the Interest of the General Public of the State) FIRST AMENDED COMPLAINT FOR
of California,) DECLARATORY AND INJUNCTIVE
18 Plaintiffs,) RELIEF AND DAMAGES; VIOLATIONS
19 vs.) OF CALIFORNIA BUSINESS AND
20) PROFESSIONS CODE §§ 17200 ET SEQ.,
CARDSYSTEMS SOLUTIONS, INC., a) UNFAIR, UNLAWFUL AND DECEPTIVE
21 corporation; MERRICK BANK) BUSINESS PRACTICES; VIOLATIONS OF
CORPORATION, a corporation; VISA) SECURITY REQUIREMENTS FOR
22 INTERNATIONAL SERVICE) CUSTOMER RECORDS, CIVIL CODE §§
ASSOCIATION, a corporation; VISA U.S.A.) 1798.80 ET SEQ.; NEGLIGENCE
23 INC., a corporation; MASTERCARD)
24 INTERNATIONAL INCORPORATED, a)
corporation; and DOES 1-200, inclusive,)
25)
26 Defendants.)

27 Plaintiffs Eric Parke, Andrew M. Schultz and Royal Sleep Clearance Center, Inc. (“Royal
28 Sleep”) bring this action on behalf of themselves, all others similarly situated and in the interest of

FIRST AMENDED COMPLAINT
CLASS ACTION FOR DECLARATORY AND INJUNCTIVE RELIEF AND DAMAGES
Case No. CGC-05-442624

1 the general public. The allegations pertaining to plaintiffs are made upon personal knowledge. The
2 allegations pertaining to defendants Cardsystems Solutions, Inc., (“Cardsystems”), Merrick Bank
3 Corporation (“Merrick Bank”), Visa International Service Association (“Visa International”), Visa
4 U.S.A. Inc. (“Visa USA”) (Visa International and Visa USA referred to herein collectively as
5 “Visa”), MasterCard International Incorporated (“MasterCard”) and Does 1-200 (hereinafter all
6 referred to collectively as “defendants”) are made upon information and belief, and formed after an
7 inquiry reasonable under the circumstances.

8 9 I. INTRODUCTION

10 1. This action is brought on behalf of plaintiffs individually, as representatives of the
11 common or general interest pursuant to Cal. Civ. Proc. Code 382, and as class representatives for all
12 others similarly situated in California against Visa, MasterCard, Merrick Bank and Cardsystems to
13 redress defendants’ negligent data security, violations of consumers’ rights of privacy, defendants’
14 failure to protect those rights, and defendants’ failure and on-going refusal to timely inform
15 consumers of unauthorized third party access to their credit card account and other nonpublic and
16 private financial information. This action arises from Cardsystems’ failure to maintain adequate
17 computer data security of consumer credit card data and the reasonably foreseeable exploitation of
18 such inadequate security at defendant Cardsystems by computer “hackers,” causing the compromise
19 of the privacy of private information of approximately Forty (40) Million consumer credit card
20 account holders. This breach of security was caused by Cardsystems’ negligence in data security,
21 including its failure to maintain a proper firewall and computer security system, failure to properly
22 encrypt data, its unauthorized storage and retention of data, its violation of Payment Card Industry
23 Data Standard(s) and rules and regulations it was bound to obey for the benefit of consumers
24 concerning the storage of consumers’ private identifying transaction and credit card information, and
25 its violation of California laws requiring the implementation and maintenance of security for
26 customer information, Civil Code §§ 1798.80 *et seq.* Subsequent to the compromise of private
27 consumer information, defendants unduly delayed or failed to inform in a timely fashion the
28 appropriate entities and consumers whose data was compromised of their vulnerabilities and

1 exposure to credit card (or other) fraud such that consumers could make an informed decision as to
2 whether to change credit card numbers, close the exposed accounts, check their credit reports, or
3 take other mitigating actions. Defendants have failed to provide regular credit reports and credit
4 monitoring at their own expense to those whose private data was exposed and left vulnerable. This
5 has caused, and continues to cause, millions of consumers fear, apprehension, and damages
6 including extra time, effort, and costs for credit monitoring, and extra time, effort, and costs
7 associated with replacing cards and account numbers, and burden, and is harming both consumers'
8 and merchants' ability to protect themselves from such fraud. This lawsuit seeks to remedy this
9 reprehensible situation.

10 2. As a result of wrongful acts and omissions of the defendants in this case, California
11 consumers and merchants have been exposed to what is almost certainly the largest compromise of
12 credit card security and the greatest potential for credit card fraud to ever occur in United States
13 history.

14 II. GENERAL FACTUAL ALLEGATIONS

15 A. The Parties

16 3. Plaintiff Eric Parke resides in Marin County, California. Eric Parke is the holder of
17 several Visa and MasterCard credit card accounts which he used, in part, in the City and County of
18 San Francisco. Plaintiff Eric Parke has been exposed to the possibility of unauthorized use of his
19 credit card accounts and nonpublic information as a result of the security breach that occurred at
20 Cardsystems, as described herein, and has a reasonable apprehension that the security of one or more
21 of his credit card accounts, financial transactions, security information and codes, and other non-
22 public information pertaining to him, has been compromised as a result of the security vulnerabilities
23 that occurred at Cardsystems, as described herein. The acts and omissions of defendants described
24 herein have caused plaintiff Parke an undue burden to monitor and detect fraudulent use of his credit
25 card accounts and has, on information and belief, caused plaintiff Eric Parke to lose control of his
26 private financial information to a "hacker".

27 4. Plaintiff Andrew Schultz resides in Marin County, California. Andrew Schultz is the
28 holder of a Visa ATM debit card which he used, in part, in the City and County of San Francisco.

1 The security of Schultz's Visa ATM debit card account, financial transactions, security information
2 and security codes, and other non-public information pertaining to him, has in fact been
3 compromised as a result of the security vulnerabilities at Cardsystems, as described herein. The acts
4 and omissions of defendants described herein have caused plaintiff Andrew Schultz to lose control
5 of his private account, security, and financial information to an unauthorized third party, and has
6 caused Schultz an undue burden and time, effort, and expense to monitor, mitigate, and detect
7 fraudulent use of his Visa debit card account.

8 5. Plaintiff Royal Sleep is a California corporation engaged in the retail sales business,
9 with its main place of business located in Carmichael, California. Plaintiff Royal Sleep, at all times
10 relevant herein, accepts and has accepted Visa and MasterCard credit card charges for merchandise.
11 Plaintiff Royal Sleep is subject to the chargeback charges and penalties imposed by Visa and
12 MasterCard, and has been exposed to the likelihood that it will be assessed additional such charges
13 and penalties due to the security vulnerabilities and breach described herein. The acts and omissions
14 of defendants described herein have caused Royal Sleep an undue burden and time, effort, and
15 expense to monitor for unauthorized charges and fraud in connection with credit card charges at its
16 retail store, and have exposed it to the likelihood of uncompensated purchases.

17 6. Plaintiffs bring this action on behalf of themselves, all others similarly situated,
18 and/or the general public.

19 7. Defendant Cardsystems Solutions, Inc., at all times relevant herein, is and was a
20 corporation organized under the laws of the State of Delaware, with its main offices located in
21 Tucson, Arizona. Cardsystems, at all times relevant herein, is and was in the business of providing
22 credit card processing services for credit cards used by consumers in the State of California, the
23 United States and abroad. Cardsystems is, and at all relevant times was, primarily engaged in the
24 business of providing hardware, software or interactive services, and does not act as a debt collector,
25 or engage in activities for which it is required to acquire a charter, license, or registration from a
26 state or federal governmental banking, insurance, or securities agency.

27 8. Defendant Merrick Bank Corporation, at all times relevant herein, is and was a
28 corporation organized under the laws of the State of Utah, with its main offices located in Utah.

1 Merrick Bank, at all times relevant herein, used Cardsystems Solutions, Inc. as its agent for
2 providing credit card processing, and, on information and belief, was the sponsoring member to Visa
3 and MasterCard that was responsible for the conduct, acts, errors, and omissions of Defendant
4 Cardsystems Solutions, Inc., and, along with the other defendants, knew or should have known of its
5 wrongful and negligent conduct, lack of security standards compliance, failure of multiple security
6 audits, and security vulnerabilities on or about the fourth quarter of 2004.

7 9. Defendant Visa International, at all times relevant herein, is and was a corporation
8 with its main office in San Francisco, California, doing business in the County of San Francisco and
9 the State of California. Visa, at all times relevant herein, is and was in the business of providing
10 network, merchant account credit card services and consumer credit card services to consumers and
11 businesses throughout the State of California, the United States, and abroad, and is and was
12 primarily engaged in the business of providing hardware, software or interactive services, including
13 but not limited to software and computer network services like VisaNet, for that purpose. .

14 10. Defendant Visa USA, at all times relevant herein, is and was a corporation with its
15 main office in San Francisco, California, doing business in the County of San Francisco and the
16 State of California. Cross-defendant VISA, at all times relevant herein, is and was in the business of
17 providing network, merchant account credit card services and consumer credit card services to
18 consumers and businesses throughout the State of California and the United States, and is and was
19 primarily engaged in the business of providing hardware, software or interactive services, including
20 but not limited to software and computer network services like VisaNet, for that purpose.

21 11. Defendant MasterCard, at all times relevant herein, is and was a corporation with its
22 main offices in Purchase, New York, doing business in the County of Alameda and the State of
23 California. Defendant MasterCard, at all times relevant herein, is and was in the business of
24 providing network, merchant account credit card services and consumer credit card services to
25 consumers and businesses throughout the State of California and the United States, and is and was
26 primarily engaged in the business of providing hardware, software or interactive services, including
27 but not limited to software and computer network services, for that purpose.

28 12. The true names and capacities whether individual, corporate or otherwise, of Does 1-

1 200 are at this time unknown to plaintiffs, who therefore sue said defendants by such fictitious
2 names and will ask leave of the Court to amend this complaint to reflect their true names and
3 capacities when the same are ascertained. On information and belief each of the said Doe defendants
4 is responsible in some manner for the events, acts and injuries described below and caused damage,
5 and are likely to cause damage, to plaintiffs and the General Public as alleged.

6 13. On information and belief, at all times mentioned herein, each and every defendant,
7 including Doe defendants, was the owner, agent, principal, employee, employer, master, servant,
8 partner, franchiser, franchisee, or joint venturer of each of his or her co-defendants, and in doing the
9 actions described below was acting within the scope of his or her authority in such ownership,
10 agency, employment, service, partnership, franchise and joint venture and with the permission and
11 consent of each co-defendant. Each of said Doe defendants is, therefore, liable under the law,
12 including but not limited to, under the doctrines of respondeat superior and the law of agency, to
13 plaintiffs for the acts, omissions and injuries inflicted upon and likely to be inflicted upon plaintiff
14 and the General Public, as described herein.

15 **B. The Security Breach**

16 14. On information and belief Cardsystems was, at all times relevant herein, in violation
17 of Visa and MasterCard rules against storing and retaining consumer credit card account and
18 transaction information and was in violation of the Payment Card Industry Data Security Standard,
19 as well as internal rules and regulations of Visa and MasterCard that it was bound to follow by,
20 including (without limitation), the following conduct: Cardsystems improperly stored and retained
21 credit card transaction and customer data in an unencrypted, unsecured, and unauthorized manner,
22 Cardsystems failed to all reasonable steps to destroy, or arrange for the destruction of a customer's
23 records within its custody or control containing personal information which is no longer authorized
24 to be retained by the business by failing to shred, erase, or otherwise modify the personal
25 information in those records to make it unreadable or undecipherable through any means;
26 Cardsystems failed to properly install, implement, and maintain a firewall to protect consumer data;
27 Cardsystems failed to properly analyze and restrict IP addresses to and from its computer systems; or
28 properly perform dynamic packet filtering; Cardsystems failed to properly restrict access to its

1 computers; Cardsystems failed to properly protect stored data; Cardsystems failed to encrypt
2 cardholder data and other sensitive information; Cardsystems failed to properly implement and
3 update adequate anti-virus and anti-spyware software that would properly prevent unauthorized data
4 transmissions caused by viruses, executables or scripts, from its servers or computer systems;
5 Cardsystems failed to track and monitor all access to network resources and cardholder data;
6 Cardsystems failed to regularly test security systems and processes or maintain an adequate policy
7 that addresses information security, or to run vulnerability scans.

8 15. Some time beginning in the fourth quarter of 2004, and, on information and belief,
9 continuing through May 2005, due to security vulnerabilities at Cardsystems, computer “hackers”
10 (unauthorized third parties) gained access to Cardsystems’ computer data and compromised the
11 security of approximately Forty (40) Million credit card accounts and related security, identity and
12 transaction data, including (without limitation) such data of California residents. Most of these
13 accounts are Visa and MasterCard credit card accounts.

14 16. One or more unauthorized persons who accessed Cardsystems’ computer data gained
15 unauthorized access to the personal financial, credit and debit account, identifying, and other
16 nonpublic information of plaintiffs herein.

17 17. The compromised and stolen data was private and sensitive in nature and was left
18 unencrypted by Cardsystems on its servers and included (without limitation), on information and
19 belief, consumers’ first and last names, credit card account numbers, bank names, transactional data,
20 magnetic stripe data, PIN verifications values, CVV2 and CVC2 card validation and security codes,
21 other credit card security and access codes and other personal identifying information.

22 18. Cardsystems has claimed that it did not discover the breach of its security until May
23 22, 2005. But as early as April 2005 MasterCard detected multiple instances of fraud that it traced
24 back to Cardsystems. Further, on information and belief, Cardsystems and other defendants knew or
25 should have known of Cardsystems unreasonable data security prior to April 2005 as it was not in
26 compliance with industry data standards, failed multiple security audits, and was notified by other
27 entities on or around the fourth quarter of 2004 that such consumer data was exposed and/or
28 compromised and failed to take prompt remedial action or to take steps to notify impacted

1 consumers directly or indirectly through other entities.

2 19. On information and belief, all of the defendants herein knew, or should have known,
3 that Cardsystems failed two security audits over the two years preceding the security breach
4 described herein, had data security vulnerabilities that made it reasonably foreseeable that a third
5 party could obtain unauthorized access to such consumer data, and was not in compliance with the
6 Payment Card Industry Data Security Standard, as well as internal rules and regulations of Visa and
7 MasterCard and legal security requirements that it was bound to follow, yet said defendants allowed
8 Cardsystems to continue to process credit card transactions, despite its known security
9 vulnerabilities and failure to comply with standards.

10 **C. Failure To Timely Report The Security Breach**

11 20. Cardsystems failed to report the security breach of the credit card account information
12 until on or about May 23, 2004, when it reported it to the Federal Bureau of Investigation (“FBI”).
13 Subsequently, it informed Visa and MasterCard.

14 21. No public disclosure of the security breach was made until weeks after Cardsystems
15 disclosed it to Visa and MasterCard (and months after the breach occurred). MasterCard waited until
16 late on June 17, 2005, to “generally” publicly disclose the breach of security and compromise of
17 consumers’ private information (but it did not specifically disclose it to the specifically affected
18 consumers or merchants even then)—despite the fact that it apparently knew or had reason to know
19 of the breach (based on its awareness of incidents of fraud traceable to Cardsystems) as early as last
20 April, and was informed by Cardsystems of the enormity of the breach on or about May 23, 2005
21 (about three weeks before it disclosed it to the public).

22 22. Defendants, by failing to timely disclose the security compromise or data theft to
23 affected consumers and merchants, are attempting to shift the burden of discovering resultant fraud
24 away from themselves—even though they are responsible and are in a better position to discover and
25 prevent fraud—to consumers and merchants. They have deceptively informed consumers that their
26 liability for credit card fraud is limited in that they have failed to make it clear to consumers that this
27 is only the case if the consumer discovers and reports the fraud within a certain time period of
28 discovering a fraudulent charge on his or her credit card statement and proves up the fraud. If a

1 consumer is not informed that his account information has been compromised, he will not know to
2 closely examine his account statement. Even if the consumer does examine his or her statement,
3 fraud is often difficult to detect, because of the complex nature of the credit card codes and merchant
4 codes used to report charges. As such it is statistically likely that numerous consumers will be
5 paying for fraudulent charges and related costs caused by defendants wrongful conduct herein as
6 defendants attempt to shift the burden for their own misconduct and have caused increased risk to
7 the system.

8 **D. Breaches Of California Consumers’ Privacy Rights—Generally**

9 23. California law gives the protection of its citizens’ privacy the highest priority.
10 Citizens’ rights to privacy have been compromised and infringed by the acts and omissions of
11 defendants described herein. California Constitution, Article 1, Section 1, states:

12 All people are by nature free and independent and have inalienable rights.
13 Among these are enjoying and defending life and liberty, acquiring,
14 possessing and protecting property, and pursuing and obtaining safety,
happiness, and *privacy*. (Emphasis added).

15 The common law in California also recognizes and protects citizens’ rights of privacy, as do many
16 California statutes.

17 24. California statutes that manifest a strong public policy protecting citizens’ rights of
18 privacy and the confidentiality of consumers’ confidential financial and identifying information
19 include (without limitation) the California Financial Information Privacy Act (Finance Code §§ 4050
20 *et seq.*); Civil Code §§ 1798.80 *et seq.* (protecting customer information and requiring notice of
21 unauthorized disclosure), California Credit Reporting Act, and other laws. For example, Finance
22 Code § 4052.5 states, “a financial institution shall not sell, share, transfer, or otherwise disclose
23 nonpublic personal information to or with any nonaffiliated third parties without the explicit prior
24 consent of the consumer to whom the nonpublic personal information relates.” Finance Code § 4057
25 makes it unlawful to negligently disclose or share nonpublic information. Civil Code § 1798.81.5(a)
26 explicitly states:

27 “It is the intent of the Legislature to ensure that personal information about
28 California residents is protected. To that end, the purpose of this section is to
encourage businesses that own or license personal information about Californians

1 to provide reasonable security for that information.”
2 That statute requires businesses that own or license consumers’ personal information to implement
3 and maintain reasonable security procedures and practices to protect such information from
4 unauthorized access, destruction, use, modification or disclosure, and to ensure that third parties to
5 whom they disclose such information, pursuant to contract, do the same. Civil Code § 1798.82
6 imposes civil liability for failing to disclose any breaches of security of unencrypted personal
7 information. Civil Code § 1798.81 makes it unlawful for a business to fail to destroy customer
8 records within its custody or control containing personal information, which is no longer to be
9 retained.

10 25. Defendants have failed in a variety of ways to use reasonable care and to fulfill their
11 other legal duties to protect cardholders from loss and the fear of loss due to breaches of security
12 regarding their accounts and other private information, to minimize the burden on consumers from
13 such breaches, and to protect consumers’ privacy rights. These breaches include (without
14 limitation) the failure to employ and maintain adequate data security measures and systems to
15 prevent “hackers” or others from stealing private information, unauthorized retention of cardholder
16 information, the failure to follow the Payment Card Industry Data Security Standard, as well as
17 violations of internal Visa and MasterCard rules and regulations. Defendants have further breached
18 their duties to both cardholders and merchants who accept credit cards by failing to timely inform
19 those cardholders’ directly or through other entities whose account security has been compromised
20 that this occurred, so that they can investigate and protect themselves against loss from the
21 unauthorized use of their credit card accounts. The benefits of requiring defendants to inform
22 customers that their account security has been compromised and to provide periodic credit reports
23 and monitoring far outweighs any burdens. The amount of consumer apprehension, anxiety and
24 burden caused by defendants’ on-going refusal to do so is immense. Defendants’ failure to notify
25 consumers that their accounts have been compromised so they can opt to change their account
26 numbers and get new cards is inexcusable. It should be ordered forthwith.

27 **III. JURISDICTION AND VENUE**

28 26. This Court has jurisdiction over the causes of action asserted herein pursuant to

1 California Constitution, Article VI, § 10, because this case involves causes of action not given by
2 statute to other trial courts or administrative agencies.

3 27. This Court has jurisdiction over defendants because each defendant is a corporation
4 that conducts substantial business in the State of California. The Visa defendants are California
5 corporations, and have their main office in San Francisco, California. Each of the defendants have
6 significant business contacts with this state, have sufficient minimum contacts with California or
7 otherwise intentionally avail themselves of consumer markets within California through their
8 business activities, advertising or marketing in California, so as to render the exercise of jurisdiction
9 by California courts and the application of California law to the claims of the plaintiffs and the
10 general public permissible under traditional notions of fair play and substantial justice.

11 28. Venue is proper in this county as the acts upon which this action is based occurred in
12 part in this county. The general public was damaged and subjected to irreparable harm in this venue
13 due to defendants' unfair, unlawful and deceptive business activities in this county. Further,
14 defendants received substantial compensation and profits in this county.

15 IV. CLASS ACTION ALLEGATIONS

16 29. Plaintiffs bring this action on their own behalf, and on behalf of all other persons
17 similarly situated (the Classes), in addition to the general public, pursuant to the provisions of CCP
18 § 382 and CC §§ 1781.

19 30. The Class that plaintiff Eric Parke and Andrew Schultz seek to represent (the
20 "Consumer Class") is defined as:

21 All California residents who possessed Visa or MasterCard accounts on
22 the dates that the security of defendant Cardsystems was compromised,
23 and the privacy or security of whose credit card, check card, or debit card
24 account, transaction, or nonpublic information was compromised.

25 31. The class that plaintiff Royal Sleep seeks to represent (the "Merchant Class") is
26 defined as:

27 All California merchants who have accepted or will accept Visa or
28 MasterCard charges for merchandise, from the date that the security of
defendant Cardsystems was compromised, and who may be exposed to
chargeback fees or penalties as a result of such security compromise.

1
2 32. The Classes are composed of millions of persons and thousands of businesses, the
3 joinder of which would be impracticable. The individual identities of the individual members are
4 ascertainable through defendants' records or by public notice.

5 33. There is a well-defined community of interest in the questions of law and fact
6 involved affecting the members of the Classes. The questions of law and fact common to the
7 Classes predominate over questions affecting only individual class members, and include, but are
8 not limited to, the following:

- 9 a. Whether defendant Cardsystems and other defendants breached one or more duties or
10 in failing to keep cardmembers' account, transactions, and other nonpublic information
11 secure;
- 12 b. Whether all defendants, or any of them, breached one or more duties in failing to
13 inform directly or indirectly in a timely fashion cardmembers (the security of whose
14 accounts or other nonpublic information was compromised) of the occurrence of such a
15 compromise of security;
- 16 c. Whether all defendants, or any of them, were negligent or violated statute(s) in failing
17 to keep cardmembers' account, transactions, and other nonpublic information secure;
- 18 d. Whether all defendants, or any of them, were negligent or violated statute(s) in failing
19 to inform directly or indirectly in a timely fashion cardmembers (the security of whose
20 accounts or other nonpublic information was compromised) of the occurrence of such a
21 compromise of security;
- 22 e. Whether all defendants, or any of them, were negligent or violated statute(s) when
23 Cardsystems failed to all reasonable steps to destroy, or arrange for the destruction of a
24 customer's records within its custody or control containing personal information which is
25 no longer authorized to be retained by the business by failing to shred, erase, or otherwise
26 modify the personal information in those records to make it unreadable or undecipherable
27 through any means;
- 28 f. Whether the Consumer Class is entitled to notice as to whether the security of their

- 1 credit card account or other nonpublic information was compromised as a result of a
2 breach of security at Cardsystems;
- 3 g. Whether the Consumer Class is entitled to any other remedies, such as on-going
4 credit monitoring, on account of the breach of duties of defendants, or any of them;
 - 5 h. Whether the Merchant Class is entitled to an injunction and/or a waiver of chargeback
6 fees or penalties for chargebacks that occur as the result of the breach of Cardsystems'
7 security;
 - 8 i. Whether the Classes are entitled to declaratory relief;
 - 9 j. Whether the Classes are entitled to injunctive relief;
 - 10 k. Whether the Classes are entitled to an award of reasonable attorneys' fees and costs
11 of suit.

12 34. Plaintiffs are adequate representatives of the Classes above because their interests do
13 not conflict with the interests of the class members they seek to represent, and they are similarly
14 situated with members of their Classes. Plaintiffs will fairly and adequately represent and protect
15 the interests of the Classes, and plaintiffs' interests are not antagonistic to the Classes. Plaintiffs
16 have retained counsel who are competent and experienced in the prosecution of class action
17 litigation.

18 35. A class action is superior to other available means for the fair and efficient
19 adjudication of plaintiffs' and class members' claims. Plaintiffs and the members of the Classes
20 have suffered irreparable harm as a result of defendants' unfair, deceptive and unlawful conduct.
21 Because of the size of the individual class members' claims, few, if any, class members could
22 afford to seek legal redress for the wrongs complained of herein. Absent the class action, the
23 members of the Classes will continue to suffer losses and the violations of law and wrongs
24 described herein will continue without remedy. Defendants continue to deny wrongdoing and to
25 engage in the unfair, unlawful and deceptive conduct that is the subject of this complaint.

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28 ///

1 personal financial and other nonpublic information, and the burden of monitoring their financial and
2 credit accounts and taking other actions to protect themselves from fraud or potential fraud,
3 monetary loss, and injury to their credit and finances. The amount of such damages will be proven
4 at trial, but is in excess of the minimum jurisdiction of this court.

5
6 **SECOND CAUSE OF ACTION**
7 **(Failure to Require From Third Parties The Implementation**
8 **And Maintenance Of Reasonable Security Procedures)**
9 **[Civil Code § 1798.81.5(c)]**
10 **(By Parke, Schultz and the Consumer Class Against Cardsystems, MasterCard, Visa and Visa**
11 **International)**

12 41. Plaintiffs incorporate by reference into this cause of action all of the allegations
13 contained in the preceding paragraphs of this complaint.

14 42. On information and belief, defendants, and each of them, at all relevant times herein,
15 disclosed and disclose “personal information” (as defined in Civil Code § 1798.81.5) about
16 plaintiffs Parke, Schultz and the Consumer Class, pursuant to a contract with one or more
17 nonaffiliated third parties.

18 43. On information and belief, defendants, and each of them, failed to require that said
19 third parties implement and maintain reasonable security procedures and practices appropriate to
20 the nature of plaintiffs’ personal information that they retain and retained, to protect such
21 information from unauthorized access, destruction, use, modification or disclosure.

22 44. On information and belief, defendants, and each of them, knew or reasonably should
23 have known that Cardsystems was, at all relevant times herein, failing to implement and maintain
24 reasonable and adequate security procedures to protect plaintiffs’ personal financial and other
25 nonpublic information from unauthorized access, disclosure or use. On information and belief, in
26 the recent period prior to the security breach described herein, Cardsystems had failed at least two
27 audits of its security systems, and defendants herein were aware of these failures.

28 45. As a direct and proximate result of defendants’, and each of their, acts and omissions
described herein, plaintiffs have suffered damages including, but not limited to, loss of and invasion
of privacy, loss of property, loss of money, loss of control of their personal financial and other

1 nonpublic information, fear and apprehension of fraud and loss of money and control over their
2 personal financial and other nonpublic information, and the burden of monitoring their financial and
3 credit accounts and taking other actions to protect themselves from fraud or potential fraud,
4 monetary loss, and injury to their credit and finances. The amount of such damages will be proven
5 at trial, but is in excess of the minimum jurisdiction of this court.

6
7 **THIRD CAUSE OF ACTION**
8 **(Failure To Take Reasonable Steps To Destroy Customer Personal Information)**
9 **[Civil Code § 1798.81]**
10 **(By Parke, Schultz and the Consumer Class Against All Defendants)**

11 46. Plaintiffs incorporate by reference into this cause of action all of the allegations
12 contained in the preceding paragraphs of this complaint.

13 47. Defendants failed to all reasonable steps to destroy, or arrange for the destruction of a
14 customer's records within its custody or control containing personal information which is no longer
15 authorized to be retained by the business by failing to shred, erase, or otherwise modify the personal
16 information in those records to make it unreadable or undecipherable through any means;

17 48. Defendants, and each of them, at all times relevant herein, retained and failed to
18 destroy personal financial data, credit card transaction data, and other nonpublic information of
19 plaintiffs that they were required to destroy in accordance with the Payment Card Industry Data
20 Security Standard, as well as internal rules and regulations of defendants Visa and MasterCard.

21 49. Defendants, and each of them, unlawfully retained such personal information of
22 plaintiffs, and failed to erase, destroy or otherwise modify it so as to make it undecipherable, as
23 required by Civil Code § 1798.81.

24 50. As a direct and proximate result of defendants', and each of their, acts and omissions
25 described herein, plaintiffs have suffered damages including, but not limited to, loss of and invasion
26 of privacy, loss of property, loss of money, increased monitoring costs, loss of control of their
27 personal financial and other nonpublic information, fear and apprehension of fraud and loss of
28 money and control over their personal financial and other nonpublic information, and the burden of
29 monitoring their financial and credit accounts and taking other actions to protect themselves from

1 fraud or potential fraud, monetary loss, and injury to their credit and finances. The amount of such
2 damages will be proven at trial, but is in excess of the minimum jurisdiction of this court.

3 **FOURTH CAUSE OF ACTION**
4 **(Failure To Disclose Security Breach)**
5 **[Civil Code § 1798.82]**

6 **(By Parke, Schultz and the Consumer Class Against All Defendants)**

7 51. Plaintiffs incorporate by reference into this cause of action all of the allegations
8 contained in the preceding paragraphs of this complaint.

9 52. Defendants, and each of them, unreasonably delayed informing anyone about the
10 breach of security of plaintiffs' personal, financial and other nonpublic information for weeks or
11 months after they knew it had occurred.

12 53. To date, the vast majority of plaintiffs have still not been informed that the breach of
13 security of their personal, financial and other nonpublic information occurred.

14 54. Defendants, and each of them, failed to disclose to plaintiffs, in the most expedient
15 time possible and without unreasonable delay, the breach in security of unencrypted personal
16 financial and other nonpublic information of plaintiffs when they knew or reasonably believed such
17 information had been acquired by an unauthorized person or persons.

18 55. No law enforcement agency determined or instructed any defendant, herein, that
19 notification of any plaintiff would impede a criminal investigation.

20 56. As a direct and proximate result of defendants', and each of their, acts and omissions
21 described herein, plaintiffs have suffered damages including, but not limited to, loss of and invasion
22 of privacy, loss of property, loss of money, loss of control of their personal financial and other
23 nonpublic information, fear and apprehension of fraud and loss of money and control over their
24 personal financial and other nonpublic information, and the burden of monitoring their financial and
25 credit accounts and taking other actions to protect themselves from fraud or potential fraud,
26 monetary loss, and injury to their credit and finances. The amount of such damages will be proven
27 at trial, but is in excess of the minimum jurisdiction of this court.

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FIFTH CAUSE OF ACTION
(Negligence)
(By All Plaintiffs Against All Defendants)

1
2
3 57. Plaintiffs incorporate by reference into this cause of action all of the allegations
4 contained in the preceding paragraphs of this complaint.

5 58. Defendants, and each of them, through their business relationship with the Consumer
6 Class and the Merchant Class herein, and with each other, assumed the duty to use reasonable care to
7 keep the credit card account and other nonpublic information of the Consumer Class that is, or was,
8 in their possession and control private and secure. By their acts and omissions described herein,
9 defendants, and each of them, unlawfully breached this duty.

10 59. The nonpublic information and private financial information of the Consumer Class
11 herein, that was compromised by the breach of Cardsystems' security, included, without limitation,
12 information that was being improperly stored, in violation of the Payment Card Industry Data
13 Security Standard, as well as Visa and MasterCard internal rules and regulations prohibiting credit
14 card processors from retaining or storing such information. Cardsystems was bound by such card
15 association rules and regulations. Said rules and regulation created a duty or reasonable care and a
16 standard of care that was breached by defendants, and each of them.

17 60. The breach of Cardsystems' security was the direct and proximate result, on
18 information and belief, of Cardsystems' failure to use reasonable care to implement and maintain
19 reasonable and appropriate security procedures and practices reasonably designed to protect the
20 credit card account and other nonpublic information of consumers, including, without limitation, the
21 Consumer Class herein. Said breach of security and unauthorized access to the private nonpublic
22 information of the Consumer Class herein was reasonably foreseeable.

23 61. Defendants were in a special and a fiduciary relationship with the Consumer Class by
24 reason of their entrustment with credit card account and other nonpublic information. By reason of
25 said special and fiduciary relationship, defendants had a duty of care to use reasonable means to
26 keep the credit card account and other nonpublic information of the Consumer Class that is in their
27 possession private and secure, and to inform Consumer Class members forthwith when any
28 compromise of the security of such information occurred. Defendants have unlawfully breached

1 these duties.

2 62. Pursuant to the right to privacy insured by California Const., Art. I, Section I,
3 defendants had a duty to use reasonable care to prevent the unauthorized access, use or
4 dissemination of the credit card account and other nonpublic information of the Consumer Class
5 herein. On information and belief, defendants unlawfully breached said duty.

6 63. The compromise of the security of said Consumer Class nonpublic information, and
7 the resultant, burden, fear, anxiety, emotional distress and other damages to the Classes herein were
8 the direct and proximate result of Cardsystems' violation of said Visa and MasterCard rules and
9 regulations. Cardsystems' conduct constituted unlawful negligence.

10 64. Pursuant to California Civil Code § 1798.81.5(b), defendants had a duty to implement
11 and maintain reasonable security procedures and practices with respect to the credit card account and
12 other nonpublic information of consumers, including, without limitation, the Consumer Class herein,
13 in order to protect such information from unauthorized access, use or disclosure. Defendants
14 negligently breached said duty.

15 65. Pursuant to California Civil Code § 1798.81.5(c), defendants had a duty to use
16 reasonable care to ensure that third parties to whom they disclose, pursuant to contract, the credit
17 card account and other nonpublic information of consumers, implement and maintain reasonable
18 security procedures and practices with respect to such personal information of consumers, including,
19 without limitation, the Consumer Class herein, in order to protect such information from
20 unauthorized access, use or disclosure. Defendants negligently breached said duty.

21 66. On information and belief, the Consumer Class's information that was disclosed to
22 unauthorized third parties, due to the breach of Cardsystems' security was not encrypted. Pursuant to
23 California Civil Code § 1798.82, defendants had, and continue to have, a duty to use reasonable care
24 to timely disclose the breach of security to all members of the Consumer Class whose personal
25 information was, or is reasonably believed to have been, acquired by unauthorized persons.
26 Defendants negligently breached this duty by, amongst other ways, delay and failure to properly
27 disclose.

28 67. Pursuant to Civil Code § 1798.81.5, defendants had a duty to use reasonable care to

1 take reasonable steps to destroy, and not retain, personal information of the Consumer Class herein,
2 within their custody or control, that is no longer to be retained. By the acts and omissions described
3 herein, defendants negligently breached this duty.

4 68. Pursuant to Civil Code § 1798.81 Defendants failed to all reasonable steps to destroy,
5 or arrange for the destruction of a customer's records within its custody or control containing
6 personal information which is no longer authorized to be retained by the business by failing to shred,
7 erase, or otherwise modify the personal information in those records to make it unreadable or
8 undecipherable through any means;

9 69. Pursuant to the California Financial Information Privacy Act, California Finance
10 Code §§ 4050 *et seq.*, defendants had the duty to use reasonable care to prevent the unauthorized
11 disclosure of nonpublic personal information of the Consumer Class to unaffiliated third parties. Fin.
12 C. § 4052.5. Defendants also had the duty to use reasonable care to refrain from negligently
13 disclosing nonpublic information pertaining to the Consumer Class to third parties. Fin. C. § 4057.
14 Defendants negligently breached these duties.

15 70. Defendants knew or should have known of Cardsystems failed multiple security
16 audits, were not in compliance with data security standards, and had numerous security
17 vulnerabilities and by allowing Cardsystems to process credit card transactions in light of the
18 sensitivity and importance of secure data processing under the circumstances were negligent in
19 entrusting Cardsystems to continue such data processing;

20 71. The doctrine of *res ipsa loquitur* applies to the acts and omissions of defendants
21 herein, and the damages they have caused. Plaintiffs' harm would not ordinarily have occurred in the
22 absence of negligence; defendants were in control of the cause of the harm; and plaintiffs' voluntary
23 actions did not cause or contribute to the events that caused them, or are causing them, harm.

24 72. As a direct and proximate result of defendants', and each of their, acts and omissions
25 described herein, plaintiffs have suffered damages including, but not limited to, loss of and invasion
26 of privacy, loss of property, loss of money, loss of control of their personal financial and other
27 nonpublic information, fear and apprehension of fraud and loss of money and control over their
28 personal financial and other nonpublic information, and the burden of monitoring their financial and

1 credit accounts and taking other actions to protect themselves from fraud or potential fraud,
2 monetary loss, and injury to their credit and finances. The amount of such damages will be proven
3 at trial, but is in excess of the minimum jurisdiction of this court.

4 73. As a direct and proximate result of defendants' failures and on-going refusal to timely
5 inform the Consumer Class as to whether their credit card account or other nonpublic information
6 was compromised or stolen when Cardsystems' security was breached, the Merchant Class has
7 suffered and, unless disclosure by defendants is required, will continue to suffer, the possibility and
8 the likelihood of incurring chargeback fees and penalties as a result of chargebacks resulting from
9 unauthorized charges on the Consumer Class's credit cards.

10
11 **SIXTH CAUSE OF ACTION**
12 **(Unfair, Deceptive And Unlawful Business Practices)**
13 **[Business & Professions Code §§ 17200 et seq.]**
14 **(By All Plaintiffs Against All Defendants)**

15 74. Plaintiffs incorporate by reference into this cause of action all of the allegations
16 contained in the preceding paragraphs of this complaint.

17 75. The above-described acts and omissions of defendants, and each of them, constitute
18 unfair, unlawful and deceptive business practices, in violation of California Business & Professions
19 Code §§ 17200 *et seq.*

20 76. The nonpublic information and private financial information of the Consumer Class
21 herein, that was compromised by the breach of Cardsystems' security, included, without limitation,
22 information that was being improperly stored, in violation of the Payment Card Industry Data
23 Security Standard, as well as internal Visa and MasterCard rules and regulations prohibiting credit
24 card processors from retaining or storing such information. Cardsystems was bound by such card
25 association rules and regulations. The compromise of the security of said Consumer Class nonpublic
26 information, and the resultant, burden, fear, anxiety, emotional distress and other damages to the
27 Classes herein were the direct and proximate result of Cardsystems' violation of said Visa and
28 MasterCard rules and regulations. Cardsystems' conduct constituted unlawful negligence.

77. Defendants unlawful and unfair business practices include, without limitation,

1 defendants', and each of their, unlawful negligence and violations of California Const., Art. I,
2 Section I; Civil Code §§ 1798.81, 1798.81.5 and 1798.82; Finance Code §§ 4052.5 and 4057, the
3 California Credit Reporting Act, the prohibition against unreasonable penalties contained in Civil
4 Code § 1671, and other laws of the State of California.

5 78. The breach of Cardsystems' security was the direct and proximate result, on
6 information and belief, of Cardsystems' failure to implement and maintain security procedures and
7 practices reasonably designed to protect the credit card account and other nonpublic information of
8 consumers, including, without limitation, the Consumer Class herein. Said breach of security and
9 unauthorized access to the private nonpublic information of the Consumer Class herein was
10 reasonably foreseeable.

11 79. Defendants, and each of them, through their business relationship with the Consumer
12 Class and the Merchant Class herein, and with each other, assumed the duty to keep the credit card
13 account and other nonpublic information of the Consumer Class that is in their possession private
14 and secure. By their acts and omissions described herein, defendants, and each of them, unlawfully
15 breached this duty.

16 80. Defendants were in a special and a fiduciary relationship with the Consumer Class by
17 reason of their entrustment with credit card account and other nonpublic information. By reason of
18 said special and fiduciary relationship, defendants had a duty of care to use reasonable means to
19 keep the credit card account and other nonpublic information of the Consumer Class that is in their
20 possession private and secure, and to inform Consumer Class members forthwith when any
21 compromise of the security of such information occurred. Defendants have unlawfully breached
22 these duties.

23 81. Pursuant to the right to privacy insured by California Const., Art. I, Section I,
24 defendants had a duty to use reasonable care to prevent the unauthorized access, use or
25 dissemination of the credit card account and other nonpublic information of the Consumer Class
26 herein. On information and belief, defendants unlawfully breached said duty.

27 82. Pursuant to California Civil Code § 1798.81.5, defendants had a duty to implement
28 and maintain reasonable security procedures and practices to with respect to the credit card account

1 and other nonpublic information of consumers, including, without limitation, the Consumer Class
2 herein, in order to protect such information from unauthorized access, use or disclosure. On
3 information and belief, defendants unlawfully breached said duty.

4 83. On information and belief, the Consumer Class's information that was disclosed to
5 unauthorized third parties, due to the breach of Cardsystems' security was not encrypted. Pursuant to
6 California Civil Code § 1798.82, defendants had, and continue to have, a duty to timely
7 disclose the breach of security to all members of the Consumer Class whose personal information
8 was, or is reasonably believed to have been, acquired by unauthorized persons. Defendants
9 unlawfully breached this duty by, amongst other ways, delay and failure to properly disclose.

10 84. Pursuant to the California Financial Information Privacy Act, California Finance
11 Code §§ 4050 *et seq.*, defendants breached unlawfully the requirement to prevent the unauthorized
12 disclosure of nonpublic personal information of the Consumer Class to unaffiliated third parties. Fin.
13 C. § 4052.5. Defendants also unlawfully breached their duty to refrain from negligently disclosing
14 nonpublic information pertaining to the Consumer Class to third parties. Fin. C. § 4057.

15 85. Pursuant to the California Constitutional Right to Privacy and California law there is
16 an explicit public policy, creating and affirming and continuing obligation on defendants herein, to
17 respect consumers' privacy and to provide reasonable consumer computer data security under the
18 circumstances, including, without limitation, the Consumer Class herein, and to protect the security
19 and confidentiality of their nonpublic personal information. Such duties include, without limitation,
20 the duty to ensure security, protect against anticipated threats, and protect against unauthorized
21 access. Defendants, and each of them, on information and belief, breached said duties.

22 86. As a direct and proximate result of defendants' failures and on-going refusal to
23 inform the Consumer Class as to whether their credit card account or other nonpublic information
24 was compromised or stolen when Cardsystems' security was breached, the Consumer Class has
25 suffered and, unless disclosure by defendants is required, will continue to suffer, fear, anxiety and
26 emotional distress as to the theft of their private information and the possibility or likelihood of
27 incurring unauthorized charges on their credit cards.

28 87. As a direct and proximate result of defendants' failures and on-going refusal to timely

1 inform the Consumer Class as to whether their credit card account or other nonpublic information
2 was compromised or stolen when Cardsystems' security was breached, the Merchant Class has
3 suffered and, unless disclosure by defendants is required, will continue to suffer, the possibility and
4 the likelihood of incurring chargeback fees and penalties as a result of chargebacks resulting from
5 unauthorized charges on the Consumer Class's credit cards, and uncompensated sales of
6 merchandise.

7 88. The assessment of chargeback fees and penalties by Visa and MasterCard against the
8 Merchant Class constitute unreasonable liquidated damages and unfair and illegal penalties, under
9 Civil Code § 1671, and the common law of the State of California, were unreasonable under the
10 circumstances existing at the time the agreements concerning them were made, and constitute an
11 unfair and unlawful business practice.

12 89. Defendants had a duty to the Consumer Class and the Merchant Class to inform
13 members of the Consumer Class forthwith and in a timely fashion of any breach of the security of
14 their credit card account and other nonpublic information, so that the Consumer Class could take
15 appropriate measure to avoid the incurring of unauthorized charges on their credit card accounts,
16 including, without limitation, canceling or changing the account number on said accounts.
17 Defendants, and each of them, by failing to inform members of the Consumer Class, directly or
18 indirectly of the compromise of the security of such information in a timely fashion have unlawfully
19 and unfairly breached this duty.

20 90. Defendants, and each of them, have, and continue to, hold themselves out as
21 fiduciaries who implement and maintain systems to ensure the security of consumers' credit card
22 account and other nonpublic information, including such information of the Consumer Class herein,
23 and who act to protect members of such class from unauthorized charges on their credit cards.
24 Based, in part on such representations, members of the Consumer Class herein have entrusted such
25 private information to defendants, and have opened credit card accounts with defendants. Such
26 representations of defendants are false and misleading, and constitute unfair and deceptive business
27 practices, in violation of Cal. Bus. & Prof. C. §§ 17200 et seq.

28 91. Defendants' breaches of statutory and common law duties described herein constitute

1 unfair and unlawful business practices, in violation of Cal. Bus. & Prof. C. §§ 17200 et seq.

2 92. Acts, omissions and events constituting unfair competition and unlawful, deceptive
3 and unfair business practices described herein occurred in, continue to occur in, and will, unless
4 enjoined, be likely to occur in the State of California.

5 93. As a direct and proximate result of the acts and omissions of defendants, and each of
6 them, described herein, plaintiff, the General Public, and the Classes herein have been misled and
7 are likely to be misled; and the privacy rights of plaintiff, the General Public and the Consumer
8 Class herein have been violated and are likely to be violated, unless defendants, and each of them,
9 are enjoined from said acts and omissions.

10 **SEVENTH CAUSE OF ACTION**
11 **(Declaratory Relief)**
12 **[California Code of Civil Procedure § 1060]**
13 **(Against All Defendants)**

14 94. Plaintiffs incorporate by reference into this cause of action all of the allegations
15 contained in the preceding paragraphs of this complaint.

16 95. An actual and present controversy exists concerning the duties and breaches of duties
17 of defendants with respect to the Classes herein.

18 96. Plaintiffs request a declaration that:

- 19 a. Defendants had a duty to keep the Consumer Class's credit card account, transaction
20 and other nonpublic information secure and breached such duty;
- 21 b. Defendants were negligent in the retention, maintenance, security investigation,
22 security auditing, and security of consumer credit card data;
- 23 c. Defendants were negligent in permitting Cardsystems, who defendants knew or
24 should have known failed security audits and had security vulnerabilities, to process
25 credit card transactions;
- 26 d. Defendants were negligent in permitting Cardsystems, who defendants knew or
27 should have known failed to comply with the Credit Card Industry Data Security
28 Standards, to process credit card transactions;
- e. Defendants were negligent in permitting Cardsystems, who defendants knew or

1 should have known, improperly retained and stored credit card data and transactions and
2 further retained and stored such data in an unencrypted or otherwise insecure format and
3 method to process credit card transactions;

4 f. Defendants violated Business and Professions Code 17200 et seq.;

5 g. Defendants violated California Const., Art. I, Section I;

6 h. Defendants violated Civil Code §§ 1798.81;

7 i. Defendants violated Civil Code § 1798.81.5

8 j. Defendants violated Civil Code § 1798.82;

9 k. Defendants violated Finance Code §§ 4052.5 and 4057

10 l. Defendants, and each of them, breached the duty to timely inform the Consumer
11 Class members the security of whose accounts or other nonpublic information was
12 compromised of the occurrence of such a compromise of security;

13 m. The Consumer Class is entitled to notice as to whether the security of their credit card
14 account or other nonpublic information was compromised as a result of a breach of
15 security at Cardsystems;

16 n. The Consumer Class is entitled to other appropriate remedies, including, without
17 limitation, on-going credit monitoring, on account of the breach of duties of defendants
18 provided by defendants;

19 o. The Merchant Class is entitled to a waiver of or injunction preventing chargeback
20 fees and penalties for chargebacks that occur as the result of Defendants' negligence or
21 statutory violations;

22 p. The Classes herein are entitled to injunctive relief;

23 q. The Classes are entitled to an award of damages;

24 r. The Classes herein are entitled to an award of reasonable attorneys' fees and costs of
25 suit.

26 **PRAYER FOR RELIEF**

27 WHEREFORE plaintiffs, on behalf of themselves, all others similarly situated and/or in the
28 interest of the general public as appropriate under California law, pray for judgment against

1 defendants as appropriate for the particular Causes of Action:

- 2 A. For the declaratory, equitable, preliminary and permanent injunctive relief,
3 according to statute;
- 4 B. For notice to consumers whose private information was compromised and regular
5 and periodic credit checks and reports with the results privately supplied to the
6 consumer plaintiffs and the consumer class by defendants;
- 7 C. For damages according to proof;
- 8 D. For attorneys' fees pursuant to, *inter alia*, C.C.P. § 1021.5, and other applicable
9 statutes and for costs of suit;
- 10 E. For such other and further relief as this Court may deem just and proper.

11 PLAINTIFFS HEREBY REQUEST A JURY TRIAL FOR ALL CLAIMS AND CAUSES OF
12 ACTION TRIABLE BY JURY

13 DATED: July 5, 2005

ROTHKEN LAW FIRM

LAW OFFICES OF MALLISON &
MARTINEZ

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15
16
17 By:



Ira P. Rothken, Esq.
Attorney for Plaintiffs