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IN THE CIRCUIT COURT OF THE STATE OF OREGON  
IN AND FOR THE COUNTY OF MULTNOMAH

RUSSELL GIBSON and WILLIAM WEILLER, DDS, individually and on behalf of all other similarly-situated individuals,

Plaintiffs,

vs.

PROVIDENCE HEALTH SYSTEMS-OREGON, an Oregon non-profit corporation,

Defendant.

Case No. 0601-01059

**PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL**

**PERSONAL INJURY CLASS ACTION (Negligence/negligence per se)**

**Not subject to mandatory arbitration**

Plaintiffs allege:

**PRELIMINARY STATEMENT**

1.

This is a claim brought by plaintiffs Russell Gibson and William Weiller for themselves and for the class of similarly-situated current and former patients of Providence Health Systems for negligent loss and disclosure of protected health information and for violation of the Unlawful Trade Practices Act ORS 646.605 *et seq.* Plaintiffs claim that defendant was negligent in failing to safeguard protected health information when it allowed an employee to store in his or her car the patient care records of an estimated 365,000 patients. As defendant has admitted, the patient information was stolen. The information in question included social security

1 numbers, addresses, phone numbers, and patient information. As a result of the theft, the  
2 affected patients have been put in jeopardy of identity theft, with potential consequences that  
3 include abuse and misuse of confidential patient information, personal data, financial records,  
4 and benefit rights. Defendant has informed plaintiffs and the class of the theft but has failed to  
5 take any or sufficient actions to protect patients from misuse of this information; rather,  
6 defendant has informed plaintiffs and the class that they must take steps to protect themselves.  
7 Plaintiffs and the class seek an injunction requiring defendant to set up a system at its expense to  
8 request fraud alerts under the Fair Credit Reporting Act, to notify the Social Security  
9 Administration, to fund the monitoring of patients' credit reports, and to fund the repairs of  
10 credit fraud that may occur in the future. In addition, for themselves and for the class, plaintiffs  
11 seek damages for past and future out-of-pocket losses and past and future non-economic losses  
12 for impairment of access to credit, inconvenience and emotional distress.

### 13 PARTIES

14 2.

15 Plaintiff Russell Gibson resides in Oregon. He is a former patient of the Providence  
16 Health System who received a letter from Providence disclosing that computerized patient  
17 records of 365,000 patients were stolen from an employee's car where they had been stored  
18 overnight.

19 3.

20 Plaintiff, William Weiller, DDS, resides in Oregon. He is a former patient of the  
21 Providence Health System who received a letter from Providence disclosing that computerized  
22 patient records of 365,000 patients were stolen from an employee's car where they had been  
23 stored overnight.

24 4.

25 Defendant Providence Health System-Oregon is a domestic non-profit corporation  
26 licensed to do business and doing business in Oregon.

1 **JURISDICTION AND VENUE**

2 5.

3 All of the claims giving rise to this action accrued in Oregon. Defendant engages in  
4 regular, sustained business in Multnomah County. Further, patients affected by this case reside  
5 in Multnomah County. Defendant's Registered Agent, Data Research, Inc., is also located in  
6 Multnomah County.

7 6.

8 Plaintiffs and similarly-situated class members' claims are based only on State law.  
9 Plaintiffs make no federal claims in this case. Based on information and belief, the primary  
10 defendant is an Oregon corporation, and more than two thirds of the class reside in Oregon.  
11 Further, no individual plaintiff's or member of the proposed class's claim in this case is worth  
12 more than \$75,000.

13 **ALLEGATION OF FACTS COMMON TO ALL CLAIMS**

14 7.

15 On or about December 31, 2005, computer disks and tapes containing patient information  
16 were stolen from a car where the data was stored overnight. The car belonged to defendant or to  
17 defendant's agent or employee who was, at all material times, acting within the course and scope  
18 of his or her agency or employment.

19 8.

20 Defendant first reported the data loss on December 31, 2005. However, it did not inform  
21 patients and former patients of the incident until it sent a letter out on January 24, 2006.

22 9.

23 The stolen data included patient names, addresses, phone numbers, social security  
24 numbers and patient care information, which is health information that is confidential, as defined  
25 by state statute, common law and federal statute. (ORS 40.235, 40.240; ORS 192.518 *et seq.*; 45  
26 CFR §§160.103).

10.

The theft of data exposed plaintiffs and members of the class to loss of privacy, to past and future out-of-pocket losses associated with monitoring credit reports and placing and maintaining fraud alerts, to credit injuries inherent in credit monitoring and placing and maintaining fraud alerts, and to repair costs of credit damage caused by the theft of data.

**CLASS ALLEGATIONS**

11.

The proposed class consists of current and former patients of Providence Health Systems whose patient information was stored on computer backup disks and tapes that were stolen from an employee or agent of Providence Health Systems and/or Providence Home Services. The proposed class excludes all officers and directors of defendant, Judge Marilyn Litzenberger and her judicial staff, and any partner or employee of the law firm of Davis Wright Tremaine.

12.

Based on information and belief, plaintiffs estimate that there are more than 365,000 members of the class. Members of the classes are so numerous that joinder of all or most of them is impracticable.

13.

There are questions of fact and law common to the class in that each class member has suffered an injury as a result of defendant's conduct. Common questions of law and fact predominate over any questions affecting only individual class members.

Common questions include:

- A. Whether defendant was negligent in handling patient information that was stored on computer backup disks and tapes;
- B. Whether defendant complied with the requirements of the Health Insurance Portability and Accountability Act and its implementing regulations;
- C. Whether defendant complied with ORS 192.518, the Protected Health Information Act;

- 1 D. Whether defendant took appropriate steps to secure the stolen information, including  
2 encryption and securing the tapes and disks;
- 3 E. Whether plaintiffs and members of the class are entitled to equitable relief to require  
4 defendant to fund the future costs associated with the monitoring of patient credit  
5 information for class members;
- 6 F. Whether plaintiffs and class members are entitled to equitable relief to require defendant  
7 to fund the future costs of credit repair for those class members who suffer financial loss  
8 from identity theft;
- 9 G. Whether plaintiffs and members of the class will be entitled to damages for past and  
10 future out-of-pocket expenses, impairment of credit, inconvenience and emotional  
11 distress caused by defendant's failure to secure the confidential information;
- 12 H. Whether defendant's sales of medical devices and medical services are subject to the  
13 Unlawful Trade Practices Act, ORS 646.605;
- 14 I. Whether defendant violated ORS 646.608(1)(e) by representing that it would secure,  
15 protect and maintain privileged patient information when it did not;
- 16 J. Whether the requirements of state and federal law that place conditions on the sales of  
17 services create "representations" as defined by ORS 646.608(2) that are inherent in every  
18 covered transaction; and
- 19 K. Whether the trial court's remedial authority set forth in ORS 646.636 includes the power  
20 to order equitable relief in order to prevent or mitigate future harm?

21 14.

22 The claims of the named plaintiffs are typical of the claims of the class in that:

- 23 A. All claims involve identical conduct in that the loss arose from a single incident that  
24 occurred on or about December 31, 2005;
- 25 B. Defendant sent identical letters to plaintiffs and members of the class advising them of  
26 the loss of data and advising them to take the same precautions to protect themselves;

- 1 C. The named plaintiffs seek equitable relief and damages for themselves and the class;  
2 D. The injuries suffered by the named plaintiffs and the class members differ only in the  
3 amount of damage; and  
4 E. The named plaintiffs' claims for relief are based upon the same legal theories as are the  
5 claims of the class members.

6 15.

7 The named plaintiffs will fairly and adequately protect and represent the interests of the  
8 class in that:

- 9 A. Their claims are typical of the claims of the class members;  
10 B. They are represented by attorneys who are qualified and competent and who will  
11 vigorously prosecute this litigation; and  
12 C. Their interests are not antagonistic to or in conflict with the interests of the class  
13 members.

14 16.

15 A class action is superior to other available methods for the fair and efficient adjudication  
16 of this case in that:

- 17 A. Prosecution of separate actions against the defendant creates a risk of inconsistent or  
18 varying adjudications, with incompatible standards of conduct for defendant;  
19 B. Plaintiffs seek equitable relief with respect to the class as a whole;  
20 C. Common questions of law and fact predominate over factors affecting only individual  
21 members;  
22 D. Individual class members have little interest in controlling the litigation due to the high  
23 cost of each individual action, the relatively modest amount of damages suffered by any  
24 individual plaintiff, and because plaintiffs and their attorneys will vigorously pursue the  
25 claims;  
26

1 E. As far as plaintiffs know, no other class action that purports to address this issue has been  
2 commenced against this defendant;

3 F. This forum is desirable as defendant does business here;

4 G. A class action will be an efficient method of adjudicating the claims of the class members  
5 who have suffered relatively small monetary damages as a result of the same type of  
6 conduct by defendant; and

7 H. In the aggregate, class members have claims for relief that are significant in scope relative  
8 to the expense of the litigation.

9 17.

10 Plaintiffs previously filed for equitable relief only and then gave notice and demand on  
11 defendant as required by ORCP 32H. The applicable period has run. Accordingly, plaintiffs  
12 now allege claims for money damages, in addition to the claims for equitable relief.

13 **FIRST CLAIM: NEGLIGENCE**

14 **Count 1: Negligence Per Se**

15 18.

16 ORS 192.518(1) provides that Oregonians have the right to have their protected health  
17 information safeguarded. Oregon common law provides that medical information provided to a  
18 physician or nurse is confidential and privileged. Federal regulations in 45 CFR Parts 160 and  
19 164 set forth standards for protecting patient information. For example, 45 CFR Section 164.306  
20 provides that patients are entitled to have their health information protected to ensure  
21 confidentiality and integrity, including against reasonably anticipated threats or hazards to the  
22 integrity and continuing security of such data.

23 19.

24 Plaintiffs and members of the proposed class are members of the class of people intended  
25 for protection by the state statute, common law rule and federal regulations. Theft of data, threat  
26

1 of identity theft, credit fraud, and other types of fraud are among the types of harm that the rules  
2 were meant to prevent.

3 20.

4 Defendant was negligent in failing to comply with the standards set forth ORS 192.518 *et*  
5 *seq.* and 45 CFR Parts 160 and 164.

6 21.

7 Defendant's negligence caused or contributed to plaintiffs' and class members' injuries.  
8 Plaintiffs and class members suffered financial injury in the form of past and future costs to  
9 monitor credit reports, recurring future costs to notify and re-notify credit bureaus of fraud alerts,  
10 costs of notification to the Social Security Administration, the Immigration and Naturalization  
11 Agency, the Internal Revenue Service, State and Local law enforcement agencies and possible  
12 future costs of repair of identity theft.

13 22.

14 Plaintiffs and class members lack an adequate remedy at law in that the monitoring needs  
15 are on-going to minimize future harm. Further, monetary damages will not fully and adequately  
16 compensate plaintiffs and class members for future harm and on-going monitoring costs.

17 23.

18 Plaintiffs and the class are entitled to an injunction that requires defendant to pay for on-  
19 going monitoring of credit reports, notify Social Security of the data loss, fund recurring credit  
20 bureau fraud alerts and pay for the future cost of possible loss and damage due to identity theft.

21 24.

22 Plaintiffs and class members have suffered economic damages in the form of past out-of-  
23 pocket expenses for credit monitoring services, credit injury, postage, long distance and time loss  
24 from employment to address these issues. Plaintiffs and class members will continue to suffer  
25 these damages in the future, all to their economic damage in an amount to be proved at trial. In  
26 addition, plaintiffs and class members have suffered non-economic damages in the past and will

1 do so in the future in the form of impairment of access to credit inherent in placing and  
2 maintaining fraud alerts, as well as worry and emotional distress associated with the initial  
3 disclosure and the risk of any future subsequent identity theft, all to their non-economic damage  
4 in amounts to be proved at trial.

5 25.

6 Plaintiffs are entitled to recover and recoup fees and costs from any recovery under the  
7 common fund theory.

8 **Count 2: Common Law Negligence**

9 26.

10 Plaintiffs incorporate ¶¶1-18; 22-25.

11 27.

12 Defendant was negligent in failing to safeguard the data, in failing to encrypt it, in  
13 allowing its agent or employee to store such data in his or her car, and in failing to put in place  
14 policies that would protect such data from theft and disclosure.

15 28.

16 As a result of defendant's negligence, plaintiffs and class members suffered the  
17 previously-described injuries.

18 **SECOND CLAIM FOR RELIEF-UNLAWFUL TRADE PRACTICES ACT**

19 29.

20 Plaintiffs incorporate ¶¶1-17; 22-24.

21 30.

22 In pertinent part, the Unlawful Trade Practices Act ("UTPA") prohibits representations  
23 that "goods or services have \*\*\* characteristics" that they do not have. ORS 646.608(1)(e). The  
24 UTPA further prohibits representations that "goods or services are of a particular standard,  
25 quality or grade\*\*\*." ORS 646.608(1)(g).  
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31.

The UTPA defines a “representation” as “any assertion by words or conduct.”  
ORS 646.608(2).

32.

When it offered medical services and products for sale to consumers, defendant represented by its conduct that it would keep private information confidential because compliance with federal and state privacy standards is required in order to sell the particular type of service or business.

33.

Defendant violated the UTPA in one or more of the following ways that caused injury to plaintiffs and members of the class:

- A. In representing that all information gathered to sell its services or goods would be safeguarded and kept confidential when it knew that it lacked adequate means to safeguard such information; and
- B. In representing that the business of sale of services and goods would include privacy and confidentiality when it knew that the transactions were not confidential due to its inadequate data protection program.

34.

As a result of defendant’s statutory violations, plaintiffs and the proposed class suffered the previously-described out-of-pocket damages and will suffer additional future out-of-pocket damages in amounts to be proved at trial.

35.

Plaintiffs and the proposed class are entitled to attorney fees. ORS 646.638.

WHEREFORE, plaintiffs and the class seek relief against defendant as follows:

- a. An order certifying this matter as a class action;

- 1 b. The appointment of the undersigned as counsel of record for the class;  
2 c. An injunction requiring defendant to fund the costs of credit monitoring, credit  
3 reporting, benefit reporting and repair damages caused by identity theft;  
4 d. Economic damages for themselves and for the class in amounts to be proved at trial;  
5 e. Non-economic damages for themselves and for the class in amounts to be proved at  
6 trial;  
7 f. Judgment in their favor; and  
8 g. Attorney fees, costs and disbursements incurred in this action.

9 DATED this 22nd day of September, 2006

10 Respectfully submitted,

11 By: 

12 David F. Sugerman, OSB No. 86298  
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Attorneys and Trial Attorneys for  
Plaintiffs and the Proposed Class Attorney

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25 ///

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Page 11 - PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

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1 Plaintiffs demand a jury trial.

2 DATED this 22nd day of September, 2006

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Page 12 - PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **PLAINTIFFS' THIRD AMENDED COMPLAINT AND DEMAND FOR JURY TRIAL** on the following persons on this same day:

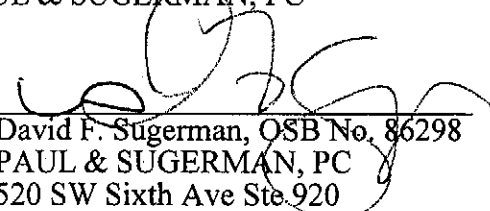
- by hand delivering
- by facsimile transmission
- by electronic mail
- by enclosing a copy in an envelope, properly addressed and with first-class postage, and placing in the mail in Portland, Oregon

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DATED this 22nd day of September, 2006

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