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ALAMEDA COUNTY

JUL 16 2009

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Attorneys for Plaintiff
Patient Zero

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA**

PATIENT ZERO

Plaintiff,

v.

CALIFORNIA DIVISION OF
OCCUPATIONAL SAFETY AND
HEALTH; LEN WELSH, Chief of
Cal/OSHA; ADULT INDUSTRY
MEDICAL HEALTHCARE
FOUNDATION.

Defendants.

Ng
Case No. **09463124**

VERIFIED COMPLAINT

[Demand For Jury Trial]

Verified Complaint

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INTRODUCTION

1. Plaintiff—a patient who tested positive for HIV—brings this action in order to enforce the right of privacy regarding medical information guaranteed by the federal and state constitutions, and federal and state laws. Through this action, Plaintiff asks this Court to enjoin a state agency from unlawfully intruding into Plaintiff's privacy by compelling a clinic providing HIV testing to disclose confidential and sensitive medical and personally identifying information that the clinic is prohibited by law to provide, and the state agency is not authorized by law to compel.

PARTIES

2. Plaintiff PATIENT ZERO¹ is an individual who received testing in 2009 for Human Immunodeficiency Virus ("HIV") at the Adult Industry Medical Health Care Foundation ("AIM") facility located in Sherman Oaks, California. Plaintiff now and at all times relevant to this Complaint resides in Los Angeles County.

3. Defendant CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF OCCUPATIONAL SAFETY AND HEALTH ("CAL/OSHA") is a state agency established pursuant to California Labor Code §§ 6300 et seq. in order to enforce and administer laws, standards, and orders governing the safety of employment and places of employment.

4. Defendant LEN WELSH is the Chief of CAL/OSHA. As such, he supervises and manages the Division, and is and at all relevant times was acting

Plaintiff PATIENT ZERO uses a pseudonym in order to avoid the very harm at issue in this action. PATIENT ZERO is filing this action in order to protect against the disclosure of confidential, private, and sensitive medical information including identifying information about PATIENT ZERO's identity.

1 under color of law and within the scope of his employment. He is sued in his
2 official capacity.

3 5. Defendant ADULT INDUSTRY MEDICAL HEALTH CARE
4 FOUNDATION (“AIM”) is a non-profit corporation headquartered in Sherman
5 Oaks, California. AIM provides HIV and STD testing and treatment, counseling
6 services and support group programs. In addition to HIV-related services, AIM
7 also provides condoms, pap smears, psychiatric assessment, drug and alcohol
8 counseling, cosmetic surgery information, chiropractic healing, and support
9 groups. AIM runs two facilities located in Los Angeles County. AIM serves
10 many patients who work in the adult entertainment industry, as well as patients
11 who do not work in the adult entertainment industry.

12 VENUE

13 6. Venue is proper in this Court pursuant to Code of Civil Procedure § 395
14 because Defendant CAL/OSHA, the issuer of the subpoena, is located in Alameda
15 County. .

16 STATEMENT OF FACTS

17 7. Many people living with HIV continue to suffer stigma and discrimination
18 because of their HIV status and because many people in the United States
19 continue to lack scientifically accurate knowledge about HIV and AIDS. This
20 lack of accurate knowledge can fuel unfounded fear of contagion and personal
21 prejudice against people living with HIV. An April 2009 survey conducted by the
22 Kaiser Family Foundation² found that 42 percent of individuals in the survey
23 would be uncomfortable with an HIV-positive roommate, and 23 percent would
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27 ² “2009 Survey of Americans on HIV/AIDS: Summary of Findings on the Domestic
28 Epidemic,” Kaiser Family Foundation, April 2009. Available at
<http://www.kff.org/kaiserpolls/upload/7889.pdf>.

1 be uncomfortable with an HIV-positive co-worker. One-third of Americans (34
2 percent) harbor at least one misconception about HIV transmission, mistakenly
3 believing that HIV can be transmitted through sharing a drinking glass (27
4 percent); touching a toilet seat (17 percent), or swimming in a pool with someone
5 who is HIV positive (14 percent).

6 8. Locally, a 2006 survey of health care providers in Los Angeles County
7 found significant evidence of continuing discrimination against people living with
8 HIV in health care. This survey found that of the surveyed providers, 56 percent
9 of skilled nursing facilities, 26 percent of plastic and cosmetic surgeons, and 47
10 percent of obstetricians refused to treat people living with HIV, and had no lawful
11 explanation for their discriminatory policies.³

12 9. HIV stigma is a significant source of psychological damage⁴ and is strongly
13 associated with depression, anxiety, and hopelessness.⁵ Moreover, the
14 psychological damage associated with HIV stigma is linked to deterioration in
15 overall health. Increased levels of depressive symptoms in persons living with
16 HIV consistently correlate with increased delay in seeking medical care, treatment
17 non-adherence, disease progression, suicidal ideation, and mortality.⁶

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21 ³ Sears, B. & Ho, D., *HIV Discrimination in Health Care Services in Los Angeles County: The*
22 *Results of Three Testing Studies*, Williams Institute, UCLA School of Law (2006). Available
at <http://www.law.ucla.edu/williamsinstitute/publications/Discrimination%20in%20Health%20Care%20LA%20County.pdf>.

23 ⁴ Vanable, et al., *Impact of HIV-Related Stigma on Health Behaviors and Psychological*
24 *Adjustment Among HIV-Positive Men and Women* 10(5) *AIDS and Behavior*, 473-482 (2006).

25 ⁵ Lee, R.S., et al., *Internalized Stigma Among People Living with HIV-AIDS*, 6(4) *AIDS and*
Behavior, 309-319 (2002).

26 ⁶ Heckman, T.G., et al. (2004); see also Chesney & Smith, *Critical Delays in HIV Testing and*
27 *Care: The Potential Role of Stigma*, 42(7) *American Behavioral Scientist*, 1158-1170 (1999)
28 (delay in seeking medical care); Vanable, et al. (2006) (treatment non-adherence); Leserman, et
al., *Impact of Stressful Life Events, Depression, Social Support, Coping, and Cortisol on*
Progression to AIDS, 157(8) *American Journal of Psychiatry*, 1221-1228 (2000) (disease
progression).

1 10. Because of the stigma and discrimination that persons living with HIV
2 continue to suffer where their HIV status is widely known, they often disclose
3 their HIV status to only a limited number of people in their lives.

4 11. The State of California has enacted an extensive statutory scheme to protect
5 the confidentiality of medical information relating to HIV. While the State of
6 California requires that health care providers and laboratories report cases of HIV
7 infection to the local health officer using patient names in order "to assure that
8 California remains competitive for federal HIV and AIDS funding," (Cal. Health
9 & Safety Code § 121022), the State has put strong safeguards into place to ensure
10 that this private and identifying information is kept confidential and may not be
11 disclosed beyond the local and state departments of health. For example, Cal.
12 Health & Safety Code § 120975 provides that, except in three specifically
13 enumerated circumstances, "no person shall be compelled in any state, county,
14 city, or other local civil, criminal, administrative, legislative, or other proceedings
15 to identify or provide identifying characteristics that would identify any individual
16 who is the subject of a blood test to detect antibodies to HIV." Cal. Health &
17 Safety Code § 120980 creates liability for any person who negligently or willfully
18 discloses the results of an HIV test to any third party in a manner that identifies or
19 provides identifying characteristics of the person to whom the tests results apply,
20 unless doing so pursuant to written authorization or expressly enumerated law.
21 The code section requiring clinics to report HIV cases to local public health
22 officers also specifically limits this disclosure to these reports only, further
23 provides that "reported cases of HIV infection shall not be disclosed,
24 discoverable, or compelled to be produced in any civil, criminal, administrative,
25 or other proceeding," and requires state and local health department employees to
26 sign confidentiality agreements that include information related to the penalties
27 for a breach of confidentiality. Cal. Health & Safety Code § 121022 (d), (e).
28 Additionally, public health records relating to HIV that are developed or acquired

1 by state or local public health agencies are confidential and cannot be disclosed,
2 discoverable, or compelled to be produced in any civil, criminal, administrative,
3 or other proceeding. Cal. Health & Safety Code § 121025. "Confidential public
4 health record" means any paper or electronic record maintained by the department
5 or a local health department or agency, or its agent, that includes data or
6 information in a manner that identifies personal information, including, but not
7 limited to, name, social security number, address, employer, or other information
8 that may directly or indirectly lead to the identification of the individual who is
9 the subject of the record. Cal. Health & Safety Code § 121035.

10 12. PATIENT ZERO received HIV testing at AIM facilities multiple times in
11 2009. On June 6, 2009, PATIENT ZERO was informed by AIM that the results
12 of an HIV test performed by AIM showed that PATIENT ZERO had preliminarily
13 tested positive for HIV.

14 13. On and after June 11, 2009, it was widely reported in news media that a
15 patient at AIM had tested positive for HIV.

16 14. None of these news reports contained PATIENT ZERO's legal name or
17 other information publicly identifying PATIENT ZERO.

18 15. Many of these news reports speculated that the individual had tested
19 positive was an actress in the adult film industry. AIM's website publicly states
20 that it is a non-profit "formed to care for the physical and emotional needs of sex
21 workers and people who work in the adult entertainment industry through our HIV
22 and STD testing and treatment, our counseling services and our support group
23 programs."

24 16. Upon information and belief, after providing PATIENT ZERO with the
25 results of the HIV test, AIM staff and PATIENT ZERO timely contacted all
26 persons who may have been exposed to HIV as a result of PATIENT ZERO's
27 HIV positive status, including any within the adult entertainment industry. Upon
28 information and belief, AIM issued a quarantine for any individuals in the adult

1 entertainment industry who may have been exposed to HIV as a result of
2 PATIENT ZERO's HIV positive status and offered them testing for HIV.

3 17. Upon information and belief, AIM reported PATIENT ZERO's HIV case,
4 including PATIENT ZERO's legal name, to the Los Angeles County Department
5 of Public Health in accordance with the requirements of California Health &
6 Safety Code § 12022.

7 18. On June 17, 2009, CAL/OSHA conducted a surprise inspection of the AIM
8 facility in Sherman Oaks, California. Upon information and belief, this inspection
9 included requests for the patients' medical records, including the medical records
10 of PATIENT ZERO. Upon information and belief, AIM personnel refused to
11 produce any patients' medical records to CAL/OSHA at that time.

12 19. It was reported by the Associated Press on June 17, 2009 that, following the
13 inspection of the AIM facility by CAL/OSHA, a CAL/OSHA spokesman stated
14 that "investigators plan to issue subpoenas this week to access patient records."⁷

15 20. On July 3, 2009, PATIENT ZERO learned that CAL/OSHA had issued a
16 subpoena to AIM. On July 7, 2009, counsel for PATIENT ZERO procured a copy
17 of a subpoena issued to AIM by CAL/OSHA dated June 19, 2009 (attached hereto
18 as Exhibit A). A copy of this subpoena was never served on PATIENT ZERO by
19 CAL/OSHA.

20 21. The subpoena issued by CAL/OSHA includes requests for confidential
21 public health records as defined by Cal. Health & Safety Code §121035. It also
22 includes requests for personally identifying information of AIM patients who
23 tested positive for HIV that could reasonably be expected to identify or lead to the
24 identification of PATIENT ZERO.

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⁷ "State inspects LA clinic for adult film actors," *The Mercury News*, 6/17/09.

1 22. After the close of business on July 13, 2009, counsel for PATIENT ZERO
2 learned that CAL/OSHA had scheduled investigatory interview with AIM staff for
3 Thursday, July 16, 2009 in Oakland, California to begin at 1 PM.

4 23. Based on (a) the prior request on June 17, 2009 by CAL/OSHA to AIM for
5 patient medical records; (b) publicly reported statements by CAL/OSHA
6 representatives that CAL/OSHA intended to seek patient medical records from
7 AIM for patients who tested positive for HIV; and (c) the subpoena issued by
8 CAL/OSHA to AIM that included requests for confidential medical information
9 and personally identifying information for patients including PATIENT ZERO,
10 counsel for PATIENT ZERO objected to CAL/OSHA conducting interviews of
11 AIM without a prior written agreement by CAL/OSHA confirming that
12 CAL/OSHA would not request the disclosure of information that would violate
13 PATIENT ZERO's privacy rights during the interviews, and that CAL/OSHA
14 would withdraw any and all such requests included in CAL/OSHA's subpoena to
15 AIM. These objections were communicated in a letter to CAL/OSHA that was
16 sent by e-mail, fax, and mail on July 14, 2009. In the same letter, counsel for
17 PATIENT ZERO requested that CAL/OSHA provide this written agreement by
18 noon on July 15, 2009 or agree by noon on July 15, 2009 to postpone the
19 interviews of AIM staff until after such written agreement could be reached.

20 24. Cal/OSHA did not respond to this letter as of the time of filing, although
21 receipt by special counsel for Cal/OSHA was confirmed.

22 **CAUSES OF ACTION**

23 **FIRST CLAIM FOR RELIEF**

24 (Cal. Civil Code §52.1, Cal. Constitution art. I, §1)

25 25. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.

26 26. Defendant CAL/OSHA and Defendant WELSH, acting under color of state
27 law, have issued a subpoena seeking to compel Defendant AIM to provide
28 confidential public health records, medical information, and identifying personal

1 information regarding PATIENT ZERO to CAL/OSHA. The provision of this
2 information would violate PATIENT ZERO's right to privacy under the
3 California Constitution, Article 1, section 1.

4 27. Defendants have scheduled interviews by CAL/OSHA of AIM employees
5 at which there is a reasonable likelihood that CAL/OSHA will seek disclosure of
6 information by AIM employees that, if made, would violate PATIENT ZERO's
7 right to privacy under the California Constitution, Article 1, section 1.

8 28. Defendant CAL/OSHA has refused to withdraw requests for PATIENT
9 ZERO's confidential information, and refused to agree not to seek such
10 information through further investigation.

11 29. The release of confidential information regarding PATIENT ZERO's
12 medical status and identity related to medical status would constitute irreparable
13 harm to PATIENT ZERO.

14 30. Unless enjoined by this Court, Defendant CAL/OSHA, and Defendant AIM
15 if compelled by CAL/OSHA, will violate PATIENT ZERO's right to privacy
16 under the California Constitution.

17 31. PATIENT ZERO seeks the declaratory and injunctive relief set forth in the
18 prayer for relief that would prevent AIM from disclosing PATIENT ZERO's
19 confidential medical information to CAL/OSHA and prevent CAL/OSHA from
20 compelling the disclosure of this information by AIM.

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SECOND CLAIM FOR RELIEF

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(42 U.S.C. §1983; U.S. Constitution, Fourth and Fourteenth Amendments)

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32. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.

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33. Defendant CAL/OSHA and Defendant WELSH, acting under color of state
law, have issued a subpoena seeking to compel Defendant AIM to provide
confidential public health records, medical information and identifying personal
information regarding PATIENT ZERO to CAL/OSHA. The provision of this

1 information would violate PATIENT ZERO's right to privacy under the Fourth
2 and Fourteenth Amendments to the United States Constitution.

3 34. Defendants have scheduled interviews by CAL/OSHA of AIM employees
4 at which there is a reasonable likelihood that CAL/OSHA will seek disclosure of
5 information by AIM employees that, if made, would violate PATIENT ZERO's
6 right to privacy under the Fourth and Fourteenth Amendments to the United States
7 Constitution.

8 35. Defendant CAL/OSHA has refused to withdraw requests for PATIENT
9 ZERO's confidential information, and refused to agree not to seek such
10 information through further investigation.

11 36. The release of confidential information regarding PATIENT ZERO's
12 medical status and identity related to medical status would constitute irreparable
13 harm to PATIENT ZERO.

14 37. Unless enjoined by this Court, Defendant CAL/OSHA, and Defendant AIM
15 if compelled by CAL/OSHA, will violate PATIENT ZERO's right to privacy
16 under the Fourth and Fourteenth Amendments to the United States Constitution.

17 38. PATIENT ZERO seeks the declaratory and injunctive relief set forth in the
18 prayer for relief that would prevent AIM from disclosing PATIENT ZERO's
19 confidential medical information to CAL/OSHA and prevent CAL/OSHA from
20 compelling the disclosure of this information by AIM.

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THIRD CLAIM FOR RELIEF

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(42 U.S.C. §1983; Due Process Clause of Fourteenth Amendment)

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39. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.

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26 40. Defendant CAL/OSHA and Defendant WELSH, acting under color of state
27 law, have issued a subpoena seeking to compel Defendant AIM to provide
28 confidential public health records, medical information and identifying personal
information regarding PATIENT ZERO to CAL/OSHA. The provision of this

1 information would violate PATIENT ZERO's right to informational privacy under
2 the Due Process Clause of the Fourteenth Amendment to the United States
3 Constitution.

4 41. Defendants have scheduled interviews by CAL/OSHA of AIM employees
5 at which there is a reasonable likelihood that CAL/OSHA will seek disclosure of
6 information by AIM employees that, if made, would violate PATIENT ZERO's
7 right to informational privacy under the Due Process Clause of the Fourteenth
8 Amendment to the United States Constitution.

9 42. Defendant CAL/OSHA has refused to withdraw requests for PATIENT
10 ZERO's confidential information, and refused to agree not to seek such
11 information through further investigation.

12 43. The release of confidential information regarding PATIENT ZERO's
13 medical status and identity related to medical status would constitute irreparable
14 harm to PATIENT ZERO.

15 44. Unless enjoined by this Court, Defendant CAL/OSHA, and Defendant AIM
16 if compelled by CAL/OSHA, will violate PATIENT ZERO's right to
17 informational privacy under the Due Process Clause of the Fourteenth
18 Amendment to the United States Constitution.

19 45. PATIENT ZERO seeks the declaratory and injunctive relief set forth in the
20 prayer for relief that would prevent AIM from disclosing PATIENT ZERO's
21 confidential medical information to CAL/OSHA and prevent CAL/OSHA from
22 compelling the disclosure of this information by AIM.

23 **FOURTH CLAIM FOR RELIEF**

24 (Cal. Health & Safety Code §§ 120975 et seq.)

25 46. Plaintiffs incorporate the preceding paragraphs as if fully set forth here.

26 47. Defendant CAL/OSHA and Defendant WELSH, acting under color of state
27 law, have issued a subpoena seeking to compel Defendant AIM to provide
28 confidential public health records and personally identifying information for

1 PATIENT ZERO to CAL/OSHA. Compulsion of the provision of this
2 information violates Cal. Health & Safety Code §§ 120975 et seq.

3 48. Defendants have scheduled interviews by CAL/OSHA of AIM employees
4 at which there is a reasonable likelihood that CAL/OSHA will seek disclosure of
5 confidential public health records and personally identifying information by AIM
6 employees that, if made, would violate Cal. Health & Safety Code §§ 120975 et
7 seq.

8 49. Defendant CAL/OSHA has refused to withdraw requests for PATIENT
9 ZERO's confidential information, and refused to agree not to seek such
10 information through further investigation.

11 50. The release of confidential information regarding PATIENT ZERO's
12 medical status and identity related to medical status would constitute irreparable
13 harm to PATIENT ZERO.

14 51. Unless enjoined by this Court, Defendant CAL/OSHA, and Defendant AIM
15 if compelled by CAL/OSHA, will continue to violate California state law.

16 52. PATIENT ZERO seeks the declaratory and injunctive relief set forth in the
17 prayer for relief that would prevent AIM from disclosing PATIENT ZERO's
18 confidential public health records and other personally identifying information to
19 CAL/OSHA and prevent CAL/OSHA from compelling the disclosure of this
20 information by AIM.

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PRAYER FOR RELIEF

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Accordingly, Plaintiff prays for relief as follows:

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A. For a declaration that Defendants' actions violate the rights to

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privacy guaranteed in the California Constitution and the United

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States Constitution; that Defendants' actions violate California and

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federal laws and further that said constitutional and statutory rights so

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violated are present rights that must immediately be respected and

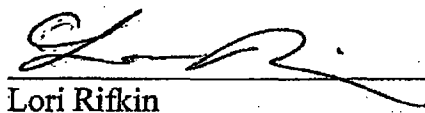
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protected.

- B. For an injunction prohibiting: (1) Defendants CAL/OSHA and WELSH from compelling or seeking to compel the disclosure of confidential public health records, medical information and/or identifying personal information regarding PATIENT ZERO to CAL/OSHA; and (2) Defendant AIM from disclosing confidential public health records, medical information, and /or identifying personal information regarding PATIENT ZERO to CAL/OSHA.
- C. For an award of reasonable attorneys' fees and costs.
- D. For a jury trial on all issues so triable.
- E. For such other relief as the Court may deem just and proper.

Dated: July 15, 2009

ACLU FOUNDATION OF SOUTHERN CALIFORNIA

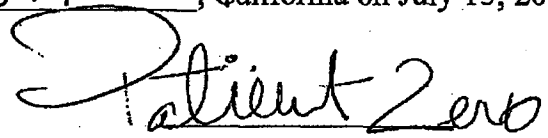

Lori Rifkin

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VERIFICATION

I declare under penalty of perjury under the laws of the State of California that I am a party to the above-entitled matter, that I have read the foregoing **VERIFIED COMPLAINT** and know the contents thereof, and that it is true and correct of my own knowledge, except as to those matters stated upon information and belief, and as to those matters I believe them to be true.

Executed at July 15, 2009 California on July 15, 2009.



PATIENT ZERO