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BEFORE THE ARIZONA CORPORATION COMMISSION

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Arizona Corporation Commission
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SUSAN BITTER SMITH

IN THE MATTER OF THE FORMAL COMPLAINT AGAINST MOHAVE ELECTRIC COOPERATIVE, INC. FILED BY ROGER AND DARLENE CHANTEL.	DOCKET NO. E-01750A-09-0149 MOHAVE ELECTRIC COOPERATIVE, INCORPORATED'S RESPONSE TO COMPLAINANTS' MOTIONS 1) TO ENFORCE, 2) TO POSTPONE AND 3)TO HEAR ISSUES

Pursuant to the Procedural Order dated September 9, 2013, Mohave Electric Cooperative, Incorporated ("MEC") responds to Complainants Motion to Enforce Arizona Administrative Codes R14-2-211(A)(5) & (6), R14-2-202(B)(1) & (2), R14-2-208(A)(1) and (F)(1). MEC also hereby responds to the two additional Motions filed by Complainants on September 16, 2013: Motion to Postpone Most of the Issues at the Hearing on September 25, 2013 and Motion to Hear Issues on the Emergency Notice of Action Submitted to Steve Olea of the Arizona Corporation Commission. For the reasons stated herein, the Motions to Enforce and to Postpone should be denied and the Motion to Hear Issues granted.

I. Motion to Enforce

Complainants' Motion to Enforce requests the Administrative Law Judge enter an Order[1] to (1) require MEC to reinstate electricity service pursuant to A.A.C. R14-2-211(A)(5) & (6); (2) require MEC to file an application to abandon pursuant to A.A.C. R14-

[1] Such action exceeds the authority of an Administrative Law Judge. Therefore, MEC treats the motion as if requesting the Commission issue such an order.

2-202(B); and (3) require Staff to visually inspect MEC poles between mile markers 66 and 80. As explained below, the motion is without merit and must be summarily denied.

A. R-14-2-211(A) (5) & (6) – Termination of Service

Complainants contend that they are entitled to an order requiring MEC to restore their electric service because MEC violated A.A.C. R14-2-211(A)(5) & (6) when it disconnected their service in 2008. The contention is without merit and has been resolved adverse to the Complainants by the Court of Appeals in *Chantel v. Mohave Electric Cooperative*, Memorandum Decision, April 16, 2012 ("Decision"), p. 8.[2]

Subsections 5 and 6 of R14-2-211(A) provide:

> 5. A utility may not disconnect service where the customer has an inability to pay and:
>
> a. The customer can establish through medical documentation that, in the opinion of a licensed medical physician, termination would be especially dangerous to the health of a customer or a permanent resident residing on the customer's premises, or
>
> b. Life supporting equipment used in the home that is dependent on utility service for operation of such apparatus, or
>
> c. Where weather will be especially dangerous to health as defined or as determined by the Commission.
>
> 6. Residential service to ill, elderly, or handicapped persons who have an inability to pay will not be terminated until all of the following have been attempted:
>
> a. The customer has been informed of the availability of funds from various government and social assistance agencies of which the utility is aware.

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[2] A copy of the Decision is attached as Exhibit A to MEC's Motion to Reconsider Motion to Dismiss Formal Complaint.

b. A third party previously designated by the customer has been notified and has not made arrangements to pay the outstanding utility bill.

(emphasis added)

Complainants contend that, due to Mr. Chantel's alleged sleep apnea condition, the foregoing rules applied when MEC disconnected their service in 2008. However, these sections only apply where disconnection is due to the customer's inability to pay for service. Complainants were disconnected due to a hazardous condition they created, not for failure to pay for service. The Court of Appeals has already disposed of this contention, as follows:

> Moreover, MEC did not disconnect the Chantels' electrical service because of an unpaid bill. MEC offered undisputed evidence in support of its motion for summary judgment that it disconnected the Chantels' service because the county directed MEC to do so because of safety concerns caused by the structure the Chantels had built directly beneath the electrical lines. (*citations omitted*) Additionally, MEC provided the Chantels with more than adequate notice of the pending shut-off. Pursuant to A.A.C. R14-2-211(B)(1)(a), a utility may disconnect service without notice when there is 'an obvious hazard to the safety or health of the consumer or the general population,' and MEC provided the Chantels both written and personal notice prior to de-energizing the lines.

Decision at p. 8. Moreover, the trial court's Judgment,[3] which was affirmed on appeal, finds:

> MEC was not negligent in de-energizing the transmission lines. MEC had no choice in its course of action due to actions by the Plaintiffs and the mandate from the MCSSD [Mohave County Special Services Division]. Under industry guidelines, the Building was constructed too close to the already existing transmission lines. The Plaintiffs constructed the Building without notice to the County or MEC, without permission and without addressing various legal issues.

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[3] A copy of the Judgment is attached as Exhibit B to MEC's Motion for Reconsideration.

Judgment, p. 4, lines 7-10.

This Decision is *res judicata* as between the parties and must be followed by the Commission. *Electrical District No. 2 v. Arizona Corp. Com'n*, 155 Ariz. 252, 259, 745 P.2d 1383, 1390 (1987) ("*ED2*").

B. R14-2-202(B)(1) & (2) – Abandonment of Utility Service

Complainants next contend that MEC has abandoned its electric lines without first filing an application to discontinue or abandonment of utility service pursuant to A.A.C. R14-2-202(B). They request an order from the Commission compelling MEC to file such an application. Again the contention is without merit.

A.A.C. R14-2-202(B) provides:

> Application for discontinuance or abandonment of utility service
>
> 1. Any utility proposing to discontinue or abandon utility service currently in use by the public shall prior to such action obtain authority therefore from the Commission.
> 2. The utility shall include in the application, studies of past present and prospective customer use of the subject service, plant, or facility as is necessary to support the application.
> 3. An application shall not be required to remove individual facilities where a customer has requested service discontinuance.

(emphasis added). A.R.S. 40-285C also exempts "property which is not necessary or useful in the performance of the duties to the public" from being subject to the approval of the ACC prior to sale, lease or other disposition.

As discussed above, the Court of Appeals has determined MEC properly discontinued service to the Complainants due to a hazardous condition created by the Complainants. Such action is authorized by pursuant to A.A.C. R14-2-211(B)(1)(a) without

any notice to the customer or application to the ACC. Because the line serving the Complainants also served a railroad signal, MEC had to reroute the distribution line to avoid the hazardous condition created by Complainants while continuing to serve MEC's other customer. The rerouting left the portion of its facilities crossing the Complainants' property in place, but de-energized and serving no members of the public. Those facilities are not currently "in use by the public" and have not been in use by the public for many years. Again, the rule cited by the Complainants simply has no application in this situation.[4]

C. R14-2-208(A)(1) and (F)(1) – Provision of Service

Finally, the Complainants request Staff to determine whether MEC's "poles are safe and compliant with Arizona Administrative Codes R14-2-208(F)(1) and R14-2-208(A)(1)." Motion at 2. This request is directed to Staff - a non-party to this proceeding. Moreover, the court has addressed the issue and, once again, resolved it adverse to Complainants.

Subsection F1 provides, in part, that each utility shall construct all facilities in accordance with the provisions of certain codes and standards. Subsection A1 provides that each utility shall be responsible for the safe transmission and distribution of electricity until it passes the point of delivery to the customer. As the Complainants acknowledge, MEC indicates "the lines in question were built within code specification in 1949 and remain within tolerances today." Motion at p. 3, lines 12-14.

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[4] Complainants also contend they have "submitted a consent form [to MEC] to enter property occupied by the Complainants in order to remove poles and lines" and MEC has "refused to sign the consent form." Motion at p. 2, lines 20 – 23. First, this statement is inconsistent with Complainants current, but incorrect, position that MEC has no authority to remove these same facilities without a Commission order following formal application. Second, the statement is, at best, a distortion of the facts. MEC is the one that first approached the Complainants with an offer to remove all of the de-energized facilities from their property. As the communications were exchanged pursuant to Rule 408 of the Arizona Rules of Evidence, they and their content are inadmissible. Suffice it to say no agreement relating to the removal of the facilities has ever been reached between MEC and the Complainants.

Complainants raised these same issues in the Emergency Formal Complaint filed March 24, 2009. See Formal Complaint, p. 3 ¶ 5 (under Legal issues and Facts).[5] Complainants then asserted the same allegations in its Verified Complaint filed in the Mohave County Superior Court.[6] In particular, Complainants alleged breach of contract and breach of the covenant of good faith and fair dealing arising out of, *inter alia*, MEC's obligation, pursuant to Arizona Administrative Code § 14-2-208(F), "to construct and maintain wooden power poles such as the ones located on and around the Chantels' Property in accordance with the ANSI C2 National Electrical Safety Code. . . ." Verified Complaint ¶ 16. The Complaint further alleged the lines "were hanging dangerously low over the Property" and that certain wooden poles "were bending and cracking" creating "safety concerns" which conditions, according to Complainants, were expressed to MEC, among others. *Id.* at ¶¶ 17-18.

In granting summary judgment on the breach of contract and covenant of good faith claims, the trial court expressly found that the Complainants never "provided any evidence that the transmission lines were an actual safety concern". Judgment, p. 3, lines 17 – 18. Again, the Commission is bound by these determinations. *ED2,* 155 Ariz. at 259. Complainants have shown no changed circumstances that warrant ordering the Commission Staff to undertake such an inspection at this time.[7]

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[5] Filed in this Docket on March 24, 2009.

[6] A copy of which is attached hereto as Exhibit A.

[7] MEC is aware that Staff did physically inspect the MEC facilities on September 18, 2013. MEC was present and was not requested to take any corrective action related to its poles and lines. In fact the comments made at the time leads MEC to believe that Staff has no issue with the condition of MEC's facilities.

D. Conclusion Re: Motion to Enforce

As discussed above, Complainants have presented absolutely no basis to warrant enforcement of the cited rules against MEC. The contentions being reasserted by Complainants were resolved adverse to them by the Superior Court and affirmed on appeal by the Court of Appeals. The Motion for Enforcement must be summarily denied.

II. MOTION TO POSTPONE

Complainants, by their Motion to Postpone Most of the Issues at the Hearing on September 25, 2013, contend the "issues in this complaint are about the safety, location of lines and location buildings" and therefore "most" of the issues in the complaint should be postponed until Staff has completed an inspection of MEC's lines and poles and submitted a report thereon. As discussed above, both Complainants' formal ACC complaint and their verified complaint filed with the Mohave County Superior Court raise the safety and location of MEC's facilities. These allegations have been resolved by a final non-appeal judgment adverse to Complainants in the civil action they filed in Mohave County Superior Court. The Commission is bound by this determination. *ED2,* 155 Ariz. at 259; *see also, Hall v. Lalli*, 194 Ariz. 54, 57, 977 P.2d 776,779 (1999) and *W. Cable v. Industrial Commission*, 144 Ariz. 199, 203, 696 P.2d 1348, 1352 (App. 1984) (final judgment of court of competent jurisdiction is *res judicata* as between the same parties on all issues that were or might have been determined in the former action.) It therefore is not only unnecessary, but would be inappropriate to postpone the procedural conference and delay a final resolution of this matter. The Motion to Postpone must be summarily denied.

III. MOTION TO HEAR ISSUES ON THE EMERGENCY NOTICE OF ACTION

By their Motion to Hear Issues on the Emergency Notice of Action, Complainants request certain issues be considered at the procedural conference scheduled for

September 25, 2013 at 1:00 p.m. The issues they request be considered were raised in their formal ACC complaint and the verified complaint filed in superior court, plus their more recent claim that MEC has abandoned facilities without complying with A.A.C. R14-2-202. Mohave agrees argument on these issues should be heard at the procedural conference together with all other pending motions and that a decision should be promptly rendered on all pending motions as follows:

1. Denying Complainants' Motion to Postpone;
2. Granting Complainants' Motion to Hear Issues on the Emergency Notice of Action;
3. Granting MEC's Motion for Reconsideration of its Motion to Dismiss and granting MEC's Motion to Dismiss;
4. Denying Complainants' Motion to Transfer; and
5. Denying Complainants' Motion to Enforce.

DATED this 23rd day of September, 2013.

CURTIS, GOODWIN, SULLIVAN,
UDALL & SCHWAB, P.L.C.

By: Larry K. Udall

Michael A. Curtis
Larry K. Udall
501 East Thomas Road
Phoenix, Arizona 85012-3205
Attorneys for Mohave Electric
Cooperative, Incorporated

PROOF AND CERTIFICATE OF MAILING

I hereby certify that on this 23rd day of September, 2013, I caused the foregoing document to be served on the Arizona Corporation Commission by delivering the original and thirteen (13) copies of the above to:

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing hand-delivered
this 23rd day of September, 2013 to:

Belinda A. Martin, Administrative Law Judge
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Janice Alward, Legal Division
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

COPY of the foregoing mailed and e-mailed
this 23rd day of September, 2013 to:

Roger and Darlene Chantel
10001 E. Highway 66
Kingman, Arizona 86401

Mary Walker

EXHIBIT A

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FILED

BY:_____

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VIRLYNN TINNELL
SUPERIOR COURT CLERK

IN THE SUPERIOR COURT OF ARIZONA

COUNTY OF MOHAVE

DUSTIN R. CHANTEL and ELIZABETH D. CHANTEL, husband and wife,

Plaintiffs,

vs.

MOHAVE ELECTRIC COOPERATIVE, INC., an Arizona non-profit corporation; JOHN and JANE DOES I-X; BLACK and WHITE CORPORATIONS I-X,

Defendants.

Case No. CV2009-02574

VERIFIED COMPLAINT

Plaintiffs Dustin R. Chantel and Elizabeth D. Chantel, husband and wife, by and through undersigned counsel, for their verified Complaint against Defendant Mohave Electric Cooperative, Inc., alleges as follows:

JURISDICTION AND PARTIES

1. Plaintiffs Dustin R. Chantel and Elizabeth D. Chantel (the "Chantels"), husband and wife, are residents of Mohave County, Arizona.

2. Upon information and belief, Defendant Mohave Electric Cooperative, Inc. ("MEC") is a non-profit corporation authorized to do business and doing business in Arizona.

3. The true identities of John and Jane Does I-X and Black and White Corporations I-X are presently unknown, but such people and entities were joint tortfeasors or otherwise

legally responsible in some manner for the events and actions that are the subject of this Complaint and contributed to Plaintiffs' damages. Plaintiffs will seek leave of Court to amend this Complaint to show the true names, capacities and relationships when they have been ascertained.

4. The events alleged in this Complaint occurred in Mohave County, Arizona. Defendant is or was present in Arizona, doing business in Arizona, and/or caused events to occur in Arizona out of which Plaintiffs' causes of action arise. The real property that is the subject of this lawsuit is located in Mohave County, Arizona. The amount in controversy exceeds the minimal jurisdictional amount.

5. Jurisdiction and venue are proper in this Court.

GENERAL ALLEGATIONS

6. Since December 1999 and to the present date, the Chantels owned real property located at 10001 East Highway 66, Kingman, Arizona 86401 (the "Property") and with the following legal description:

> THAT PORTION OF SECTION 5, LYING NORTH AND EAST OF U.S. HIGHWAY 66, TOWNSHIP 23 NORTH, RANGE 14 WEST OF THE GILA AND SALT RIVER BASE AND MERIDIAN, MOHAVE COUNTY, ARIZONA.

7. At all material times the Chantels have been customers of MEC, who delivered electrical power to the Chantels' residence, which is located on the Property.

8. The Chantels and MEC had a contractual relationship in which MEC was obligated to provide the safe delivery of electricity to the Chantels' residence in exchange for payment from the Chantels.

9. The Chantels have always made timely payments to MEC.

10. At all times since the Chantels have owned the Property, an overhead electrical power line has run across the southern portion of the Property (the "Old Line"), generally running in an east-west direction.

11. Defendant MEC is the owner and operator of the Old Line.

12. Defendant MEC has no recorded easement or right-of-way for the portion of the Old Line located on the Property.

13. MEC has asserted that it received permission from prior owners of the Property to run the Old Line across the Property.

14. Prior to September 16, 2008, the Chantels' residence received electricity from another overhead electrical power line that was connected to the Old Line.

15. Numerous wooden poles support the Old Line. The average distance between most of the wooden poles along the Old Line is approximately 300 feet. However, a distance of approximately 700 feet exists between two wooden poles that cross the Chantels' Property.

16. MEC, pursuant to Arizona Administrative Code § 14-2-208(F), is required to construct and maintain wooden power poles such as the ones located on and around the Chantels' Property in accordance with the 1997 ANSI C2 National Electrical Safety Code, which permits a maximum distance of 300 feet to exist between power poles of the type at issue.

17. In or around 2006, the Chantels noticed the power lines connected to the Old Line were hanging dangerously low over the Property and certain wooden poles from the Old Line that are located on the Property were bending and cracking.

18. Since 2006, the Chantels have expressed their safety concerns regarding the low hanging power lines and the bending and cracking power poles to, among others, Defendant MEC and requested that MEC repair the Old Line.

19. Despite numerous requests from the Chantels, Defendant MEC failed to repair the Old Line or otherwise take any action to correct the dangerous condition of the power poles and the lines.

20. During the summer of 2008, the Chantels began building, at a substantial cost, a functional piece of artwork under the low hanging power lines to catch or deflect any lines or wooden poles that might break and fall in order to protect themselves, their guests and invitees, and their property from the dangers posed by the power poles and lines.

21. On or about September 16, 2008, Defendant MEC built a new overhead electrical power line that ran parallel to the Old Line, but was located immediately south of the Property (the "New Line"), approximately 75 feet away from the Old Line.

22. Immediately after the completion of the New Line, and without any substantial warning, MEC abruptly disconnected the electricity to the Chantels' residence.

23. After their electricity was disconnected, the Chantels made numerous requests to MEC asking it to reinstate electricity.

24. MEC refused, and continues to refuse, to reinstate electricity to the Chantels' residence unless the Chantels pay approximately $12,000 for the costs of building the New Line.

25. As a result of Defendant MEC's disconnection of electricity, the Chantels have been forced to find alternative sources of electricity, including, but not limited to, generators and solar power systems, at considerable cost.

26. The generators that the Chantels have been using, in addition to being very costly, are not an adequate source of electricity because they cannot provide the constant supply of electricity necessary to power the Chantels' residence, including a medical device that Dustin R. Chantel relies on.

27. The solar system that the Chantels have been using, in addition to being very costly, is not an adequate source of electricity because weather conditions affect its ability to provide the constant supply of electricity necessary to power the Chantels' residence.

28. As a result of Defendant MEC's disconnection of electricity, Dustin R. Chantel suffered physical injuries.

COUNT ONE
(Breach of Contract)

29. The Chantels incorporate the foregoing allegations as though fully set forth herein.

30. At all time mentioned herein, a valid and binding contract existed between MEC and the Chantels.

31. MEC has breached its contractual obligations owed to the Chantels.

32. The Chantels have been damaged, in an amount to be proven at trial, as a direct and proximate result of MEC's breach.

33. The Chantels have incurred special damages, including, but not limited to, the cost of constructing the artwork and finding alternative sources of electricity.

34. In addition to recovery of the damages discussed above, the Chantels are entitled to a permanent injunction ordering MEC to perform under its contract with the Chantels by reestablishing power to the Chantels' residence and maintaining the safe delivery of that power.

35. The Chantels are entitled to costs of suit and reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and 12-341.01.

COUNT TWO
(Breach of the Covenant of Good Faith and Fair Dealing)

36. The Chantels incorporate the foregoing allegations as though fully set forth herein.

37. Arizona law implies a covenant of good faith and fair dealing in all contracts.

38. MEC's actions, as alleged above, constitute a breach of the implied covenant of good faith and fair dealing.

39. The Chantels have been damaged as a direct and proximate result of MEC's breach of the implied covenant of good faith and fair dealing.

40. The Chantels are entitled to their attorneys' fees pursuant to A.R.S. § 12-341.01.

COUNT THREE
(Quiet Title/Declaratory Judgment)

41. The Chantels incorporate the foregoing allegations as though fully set forth herein.

42. MEC has asserted an interest in the Property that is adverse to the Chantels' ownership interest and MEC has wrongfully used and possessed the Property.

43. The Chantels claim an ownership interest in the Property that is superior to MEC's purported interest in the Property.

44. This cause of action is brought pursuant to A.R.S. § 12-1101, *et seq.*

45. Based upon the foregoing, the Chantels are entitled to an order quieting title to the Property in their favor.

46. An actual controversy has arisen and now exists between the parties as to their respective rights, status, and obligations regarding the Property. The Chantels are entitled to a judicial determination of the parties' respective rights, status, and obligations regarding the Property. This controversy will continue until resolved by this Court.

47. The Chantels are entitled to a declaratory judgment that they are the rightful owners of the Property.

COUNT FOUR
(Ejectment)

48. The Chantels incorporate the foregoing allegations as though fully set forth herein.

49. The Chantels are the rightful owners of the Property and are entitled to all interests in the Property thereof.

50. This cause of action is brought pursuant to A.R.S. § 12-1251, *et seq.*

51. MEC continues to use and possess the Property through its placement of the Old Line on the Property.

52. The Chantels are entitled to immediate possession and full use of the Property.

COUNT FIVE
(Recovery of Rents)

53. The Chantels incorporate the foregoing allegations as though fully set forth herein.

54. The Chantels are the rightful owners of the Property and are entitled to all interests in the Property thereof.

55. This cause of action brought pursuant to A.R.S. § 12-1271.

56. The Chantels are entitled to recover rents or the fair and reasonable satisfaction for MEC's unauthorized use and possession of the Property.

COUNT SIX
(Negligence)

57. The Chantels incorporate the foregoing allegations as though fully set forth herein.

58. MEC owed a duty to the Chantels to provide the safe delivery of electricity to their residence.

59. MEC breached that duty by, among other things, allowing too great of distance between the wooden poles supporting the Old Line on the Property and wrongfully disconnecting the electricity to the Chantels' residence.

60. MEC's negligence is the direct and proximate cause of Dustin R. Chantel's physical injuries.

61. The Chantels have sustained damages in an amount to proven at trial.

COUNT SEVEN
(Intentional Infliction of Emotional Distress)

62. The Chantels incorporate the foregoing allegations as though fully set forth herein.

63. MEC's acts, conduct, and omissions, as aforesaid, amounted to extreme and outrageous conduct that was intended to cause emotional distress to the Chantels and/or was done with reckless disregard for the near certainty that such distress would result from its conduct.

64. MEC's extreme and outrageous conduct caused the Chantels severe emotional distress.

COUNT EIGHT
(Punitive/Exemplary Damages)

65. The Chantels incorporate the foregoing allegations as though fully set forth herein.

66. This cause of action brought pursuant to A.R.S. § 40-423.

67. MEC's acts, conduct, and omissions, as aforesaid, were done intentionally, with an evil mind, and/or with conscious, calculated, and outrageous disregard for the substantial risk of harm to the Chantels, knowing that its acts, conduct, and omissions were conducted for its

own exclusive interest, thereby entitling the Chantels to an award of punitive and/or exemplary damages in an amount appropriate to punish Defendants and set an example.

WHEREFORE, Plaintiffs request the following relief:

(A) Awarding judgment in Plaintiffs' favor and against Defendant MEC on all claims;

(B) For all damages incurred by Plaintiffs, to be proven at trial, as a result of Defendant MEC's actions;

(C) For an award of punitive damages to Plaintiffs and against Defendant MEC in an amount appropriate to punish Defendants and set an example;

(D) Awarding Plaintiffs their costs of suit and reasonable attorneys' fees pursuant to A.R.S. §§ 12-341 and 12-341.01; and

(E) Awarding Plaintiffs such further relief as this Court deems just and proper.

JURY DEMAND

Plaintiffs request a jury trial on all questions raised by this Complaint.

DATED this 17th day of November 2009.

DESSAULES LAW GROUP

By: _____
Jonathan A. Dessaules
Douglas C. Wigley
Attorneys for Plaintiffs