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STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF INGHAM

BEN HANSEN, INTERNATIONAL CENTER
FOR THE STUDY OF PSYCHIATRY AND
PSYCHOLOGY, INC., and THE LAW
PROJECT OF PSYCHIATRIC
RIGHTS, INC.,

:
:
:
:
:
:
File No.
09-759-CZ

Plaintiffs,

-vs-

STATE OF MICHIGAN, DEPARTMENT OF
COMMUNITY HEALTH,

:
:
:
:
:

Defendants.

MOTION FOR SUMMARY DISPOSITION

BEFORE THE HONORABLE ROSEMARIE E. AQUILINA

Lansing, Michigan - September 23, 2009

APPEARANCES:

For the Plaintiff: The Jaques Admiralty Law Firm
BY: ALAN KELLMAN (P15827)
645 Griswold
Suite 1370
Detroit, MI 48226

For the Defendant: Department of Attorney General
BY: THOMAS QUASARANO (P279872)
PO Box 30754
Lansing, MI 48909

Reported by: Genevieve A. Hamlin, CSR-3218

30TH JUDICIAL CIRCUIT COURT
313 West Kalamazoo Street, Lansing, MI 48933

I N D E X

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WITNESS:

PAGE

None

* * *

EXHIBITS:

None

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Lansing, Michigan
September 23, 2009
2:10 p.m.

R E C O R D

THE COURT: This is file 09-759-CZ, Ben Hansen versus Community Health Department.

MR. QUASARANO: Good afternoon, Your Honor. If it please the Court, Thomas Quasarano, assistant attorney general on behalf of the state department and moving party.

MR. KELLMAN: Good afternoon, Your Honor, Alan Kellman on behalf of plaintiffs. Mr. Hansen is with us in court today.

THE COURT: Thank you very much. He is with us in court?

MR. KELLMAN: Yes, he is.

THE COURT: Did you want to sit up here, sir?

MR. HANSEN: Not really.

THE COURT: It certainly is your right.

MR. KELLMAN: I think he's comfortable there.

THE COURT: All right. That's fine. Counsel, you may proceed.

MR. QUASARANO: Thank you, Your Honor.

1 I'll introduce to the Court Doctor Eggleston and Mary
2 Greco. Doctor Eggleston is with the department of
3 community health and Mary Greco is the FOIA
4 coordinator.

5 THE COURT: And let me extend the same
6 offer, would you like to come up here and sit? No?
7 All right. Everyone wants a seat in the back, just
8 like school.

9 MR. QUASARANO: Or church.

10 THE COURT: Or church, yes. Thank you.
11 Counsel, you may proceed.

12 MR. QUASARANO: Yes. I know you had an
13 opportunity to reviews the briefs, but I'll just
14 generally indicate what we have here is a request
15 under the FOIA for basically three records, two of
16 those records are identified in briefs as Michigan
17 children under five years of age detail by drugs and
18 quality indicators, so a very detailed report, and a
19 second report entitled patients on five or more
20 concurrent behavioral drugs, and those two reports
21 were denied under FOIA to the plaintiffs citing the
22 medical -- let me give you the full title -- Release
23 of Information For Medical Research and Education
24 Act, which I'll just refer to as release of
25 information act.

1 There was a third document that was
2 generally described by the plaintiffs as an
3 electronic copy of Michigan Medicaid data listing all
4 fields available in children under age 18 and then
5 listing a series of drugs and asking for the provider
6 name and license number, and that was denied under
7 the FOIA citing the FOIA's privacy exemption and the
8 FOIA's deference to medical records where the
9 identity of a patient would be released, so we have
10 in the first case then another statute that we argue
11 supercedes FOIA. In the second case, even though
12 they fall within FOIA as public records, they're
13 permitted to be exempted for the legislative purposes
14 spelled out there.

15 The plaintiffs also argue, not in their
16 complaint but in their brief, that there's an equal
17 protection issue; that the information was disclosed
18 to some other unspecified person, to which DCH would
19 dispute that, but even for the sake of argument,
20 let's say that this information had been released, it
21 would not have been done intentionally, and if you
22 indulge me in an analogy, an incarcerated individual
23 mistakenly released by a penal facility couldn't set
24 grounds to release all other inmates prematurely, but
25 which DCH has taken the position that it's been

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1 consistent with disclosure or not disclosure of this
2 type of information.

3 Also, we would point out that where the
4 case of the law of the case doctrine was raised in
5 the state's brief and plaintiff believes that does
6 not apply, I would just emphasize that the -- the law
7 of the case is in the Hansen Court of Appeals'
8 decision, even though unpublished, where the Court
9 properly determined it was not necessary to publish
10 it, it does rely on published decisions which speak
11 to this type of database, and why under the release
12 of information act it's not considered public record
13 and therefore not subject to FOIA.

14 These databases generally deal with what --
15 the term that I've come to learn anonymization,
16 a-n-o-n-y-m-i-z-a-t-i-o-n. I'm an old wordsmith, but
17 anonymization, the idea that these databases must
18 remain anonymous. The data administrator such as DCH
19 are anonymizing this to protect the privacy of
20 individuals. This sort of anonymization is either
21 based on social norms or ethics or it's based on the
22 law, and in this case DCH points out it's based on
23 the law and, of course, the law embraces social norms
24 and ethics to protect individual privacy, so DCH
25 singled out identifying information and did disclose

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1 the balance of the information -- quite a lot of
2 information has been disclosed to the plaintiffs in
3 this case and in the earlier case, even to the extent
4 that this Court permitted Mr. Hansen and his counsel
5 to look at the withheld information in an in camera
6 sort of way to show them that, in fact, this
7 information did contain data that can be
8 reconstructed, therefore reidentifying individuals,
9 because the FOIA, as the Court knows, is a wide open
10 gate and there's no protective orders. Once it's
11 out, it's out. Whatever we do for one requester,
12 pretty much we as the state or any other local unit
13 of government would have to do for all other
14 individuals.

15 Lastly, I would say that where plaintiff
16 indicates that the Supreme Court in denying leave,
17 the plaintiff's leave for application, did have a
18 problem with the case, I would point out it was
19 Justice Markman who was concerned that when the trial
20 court awarded fees and costs, that the Court did
21 distinguish between three FOIA requests, two of which
22 were filed obviously late for which the trial court
23 awarded fees and a third one was not late, and all
24 the Supreme Court said in that opinion was -- or not
25 opinion but in response to the application for leave,

1 that the Court did distinguish for fees but did not
2 touch the issue of non-disclosure under the FOIA.
3 Ultimately, what plaintiff may need to do is go to
4 the legislature if they believe that this should be a
5 parole disclosure situation. Thank you, Judge.

6 THE COURT: Thank you. Counsel, response.

7 MR. KELLMAN: Good afternoon, Your Honor.

8 THE COURT: Good afternoon.

9 MR. KELLMAN: Let me begin just to briefly
10 respond to Mr. Quasarano's remarks and be very clear
11 that we have at no time sought any information with
12 regard to any private individual. We are not
13 interested in any identifying information whatsoever.
14 I do not believe those were in the request. If that
15 is their interpretation of them, we would certainly
16 take issue with that, and I just want the Court to
17 clearly understand that we are not seeking
18 information about any individual, period. So there
19 is no issue about identification.

20 THE COURT: What about the argument he
21 ended with, which is that the information -- you had
22 an opportunity to review it and the information could
23 be reconstructed so it could lead to identification?

24 MR. KELLMAN: I don't believe that that's
25 the case. The information we're talking about is

1 getting the names of certain drugs. We're not asking
2 to whom the drugs were given. We're asking what
3 drugs were given out as part of this program that
4 were the subject of this study.

5 THE COURT: Also aren't you asking which
6 doctors?

7 MR. KELLMAN: No. Well, actually, in one
8 of the requests, yes, but that information has
9 already been released and Mr. Quasarano is now
10 telling us that that was not intentional. I think,
11 quite frankly, that that is an issue that needs to be
12 explored during discovery. I mean, if it's not
13 intentional and -- does that in effect remove the
14 waiver argument? I don't really have an answer to
15 that yet. I think that's a little premature for us
16 to be indicating that. For the purpose of this
17 motion, I think it must be accepted as true that what
18 they did was release this information.

19 THE COURT: Well, but they're saying they
20 didn't. You're saying they did. I don't have an
21 identifying who, what, when, where, why, how.
22 There's been no offer of proof. We could have a
23 hearing as to an offer of proof of that, but they
24 say, yes, you say, no, or vice-versa, whatever it is.
25 There's nothing here except one man's word against

1 another. I trust both counsel. I think you're not
2 going to lie to this Court, but of course you know I
3 have to make rulings on facts and evidence, not on
4 assertion; yes, it happened, no it didn't. That puts
5 us into a hearing. Would you like to go there?

6 MR. KELLMAN: If need be, but I think this
7 is their motion for summary disposition, and for the
8 purpose of this motion for summary disposition, the
9 facts that we have challenged that are pled in our
10 complaint and that are the subject of the affidavits
11 that were submitted by Mr. Hansen and Professor Karon
12 must be accepted as true. What I think should occur
13 here is that the motion should be denied. I think
14 that we should have some discovery, and that we may
15 be -- once we have an actual record in this case,
16 arguing some of the same points that we're doing
17 today, but I don't think without a record that it is
18 timely for the Court to make a decision on this.

19 I think the waiver issue is a very real
20 issue. I respectfully disagree with Mr. Quasarano
21 and his remarks about the law of the case. The law
22 of the case does not govern here, and if the Court --
23 I'm sure you did -- took a look at our argument with
24 respect to the cases that were cited in the earlier
25 unpublished Hansen case, the Court will see that the

1 statute that they're relying on is commonly referred
2 to as the peer review immunity statute. This has to
3 do with data that's gathered to protect other
4 professionals who could be subject to malpractice
5 claims or disciplinary proceedings or the like.
6 There is only one case in the entire state of
7 Michigan that actually applies the peer review
8 immunity statute as an exemption to FOIA, and that is
9 the unpublished case -- the unpublished decision in
10 the Hansen case. The Court of Appeals chose not to
11 publish it. That was obviously their choice, and
12 just to correct, I think, what Mr. Quasarano had to
13 say about the Supreme Court and his remarks about
14 what Justice Markman had to say, there were two other
15 justices that would have granted the release, so
16 there is some controversy, and that's the nature of
17 this.

18 THE COURT: Thank you.

19 MR. KELLMAN: But I think that what we need
20 here is we need some details, okay? In the case here
21 I would like to know, and I think the Court should
22 know, you know, who actually made this decision, what
23 was the basis of this decision, you know, how did
24 these documents that we're comparing -- that we're
25 requesting compare to the earlier ones that were

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1 released, and we're talking about -- I would ask the
2 Court to distinguish, if we have -- if the Court
3 believes that there is some distinction to be made
4 between the three sets of documents that are being
5 asked for, keep in mind that the Michigan children
6 under five by age detail -- this one along with the
7 patients on five or more concurrent behavioral drugs
8 is not the one where the prescribers' names were
9 released. We are looking at three different sets of
10 documents, and it is the electronic copy of the
11 Medicaid data that Mr. Quasarano was referring to
12 where the prescribers' names were released. So I
13 think that that also needs to be -- it is possible --
14 I'm not suggesting that it would be -- that you
15 should do so, but it is possible that you could issue
16 a decision that would distinguish your ruling based
17 on the exact items that we're requesting.

18 And I would like to know, you know, why is
19 it -- what was the basis for not releasing these
20 documents? I mean, if you look at what has already
21 been released and you look at what it is that was not
22 released, I mean, in our papers, already been
23 released are the Michigan behavioral pharmacy
24 reports, concurrent drug reports, summaries, targeted
25 prescriber change reports, PQIP impact analysis, et

1 cetera, et cetera, et cetera. Now we're simply
2 asking for what are the names of the drugs. What is
3 the difference? What is the significance of not
4 releasing the names of the drug as compared to what's
5 already released? I don't understand. What is it
6 that is confidential about the names of these drugs?
7 To me it doesn't add up. It makes no sense as to why
8 we would receive all of this other information but
9 not be given the names of the drugs. What is -- it
10 just simply doesn't add up.

11 And with all due respect to Ms. Greco's
12 affidavit, to my knowledge she's not a lawyer and it
13 really wouldn't matter but I don't find that there is
14 any factual material in her affidavit, rather it
15 is -- it's a number of conclusions. She said, I
16 determined that it was not appropriate to release
17 these drugs, that they were confidential, and those
18 are conclusions. Those are for the Court to reach.

19 And I see no reason whatsoever why there
20 shouldn't be a de novo review of what has occurred.
21 The Freedom of Information Act is quite clear that
22 there is to be a de novo review at the circuit court
23 level, even if -- and we don't concede this, but even
24 if the peer review immunity statute were to be
25 construed to be applicable, that doesn't mean there

1 shouldn't be a court review. Why wouldn't there be a
2 court of review? Why is it that a department of the
3 State of Michigan would be able to make a decision
4 about Medicaid dollars, tax dollars, and say, that's
5 it? That's all there is to it. I'm sorry, Judge,
6 but you're not entitled to review this. We're right,
7 that's the end of the story. That's not -- that's
8 not consistent with the FOIA statute.

9 And then I would just simply -- and I know
10 it's in our papers, but look at what the purpose of
11 the peer review immunity statute is. This is
12 something that I touched on earlier. It has to do
13 with providing immunity for professionals. It
14 doesn't have to do with not releasing raw data that
15 can be used or possibly be used for educational
16 purposes or for research purposes or -- and another
17 part of the exception has to do with the financial
18 end of it. And I'm not at this point suggesting one
19 way or the other that there's been any financial
20 impropriety. I'm not. I don't want to be wildly
21 pointing the finger at anybody, but we have all read
22 enough about what's going on with big pharmaceutical
23 houses that, you know, it's still something that can
24 be explored and can be reviewed.

25 So I would request, Your Honor, that the

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1 motion be denied. Clearly Mr. Quasarano can bring it
2 again. If we agree on some relatively short
3 discovery period, and as I said in my papers, it
4 could very well be that he and I could agree on a set
5 of facts and come back before Your Honor and argue
6 the law based on those stipulated facts. Thank you.

7 THE COURT: Sir, the previous issues argued
8 and -- that went to the Court of Appeals and
9 ultimately the Supreme Court, aren't they rather
10 identical to what's before me?

11 MR. KELLMAN: We have different parties.
12 We have additional parties here. We have one
13 additional request as part of it. There's a great
14 deal of similarity. Would I say that they're
15 identical? I don't know. We've never had a chance,
16 okay? We never had a chance to make a record in that
17 case.

18 Let me remind the Court, if you will, of
19 the background of that case. That case was dismissed
20 on statute of limitation grounds. There was never
21 any hearing.

22 THE COURT: Two of them were.

23 MR. KELLMAN: Two of them.

24 THE COURT: Two out of the three.

25 MR. KELLMAN: Two out of the three were.

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1 We went to the Court of Appeals and the Court of
2 Appeals basically said, well, you're right, at least
3 with respect to the third count, there was no statute
4 violation, but we on our own, okay, as a matter of
5 judicial efficiency are going to rule as a matter of
6 law, okay? I respectfully disagree. I think that we
7 were at least entitled to establish a record. So for
8 me to agree with you that we have the exact same
9 scenario, I can't do that because we didn't have a
10 record there and we don't have one here yet.

11 THE COURT: Okay, fair enough.

12 MR. KELLMAN: Thank you.

13 THE COURT: Thank you. Response?

14 MR. QUASARANO: Yes. Just very briefly,
15 Your Honor. Plaintiff hasn't pled in the complaint
16 that there is an equal protection allegation, nor
17 that there was an earlier release. It's not in the
18 complaint, so that's really not before the Court
19 other than it was raised somewhat in the brief. If
20 plaintiffs want to make an amended request for
21 information and delete that which the DCH would
22 determine would be identifiers, certainly we're more
23 than happy to cooperate. We cooperated --

24 THE COURT: Let me stop you right there.

25 Sir, did you hear what he just said?

1 MR. KELLMAN: Yes.

2 THE COURT: Now, I'm prepared to make a
3 ruling, but if you're prepared to amend your request,
4 they're saying they're going to look at it.

5 MR. QUASARANO: We'll look at.

6 THE COURT: Do you want to stop here and go
7 do that and see if that gets you where you need to
8 be, or not?

9 MR. KELLMAN: I would request that you hear
10 the next motion, let me talk to my client about that,
11 because I'm not -- we did not request any identifier
12 information on those first two pieces, but I would
13 like to, if I may beg the Court's indulgence.

14 MR. QUASARANO: And one thing I do want to
15 add --

16 THE COURT: Let's have him make his record,
17 and before I make my rulings you tell me where you're
18 at, so I read and reread so I'm ready to rule, I
19 appreciate both your arguments, but I'll give you a
20 few minutes to talk to your client when he's
21 finished.

22 MR. KELLMAN: Okay.

23 THE COURT: Thank you, counsel. Sorry for
24 the interruption.

25 MR. QUASARANO: No. Thank you, Your Honor.

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1 As to clarify as to the first two classes of records,
2 those were denied under the release of information
3 act so our position remains that those are not public
4 records as defined under the statute. As to the
5 third category of record, those were denied within
6 the FOIA on the privacy and medical privacy
7 exemptions. As to that one, certainly I'm sure DCH
8 would be willing to reconsider an amended FOIA
9 request to protect identities, because that was a
10 determination made within the FOIA versus the first
11 records, and I am repeating myself, that we feel are
12 not subject to disclosure and, therefore, there's
13 really no point in discussing somehow or another
14 giving to a non-review entity, which would be the
15 plaintiffs in this case, access to records that are
16 not subject to disclosure, period.

17 But with that clarification, we'll wait to
18 see what plaintiffs say. Thank you, Judge.

19 THE COURT: All right. Thank you. We're
20 going to take a break from this matter and handle the
21 next.

22 (At or about 2:36 p.m., hearing adjourned.)

23 THE COURT: We're back on the record on
24 file 09-759-CZ. Have counsel -- we have both counsel
25 here at the podium. You've had an opportunity to

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1 speak. What is -- what's the status?

2 MR. KELLMAN: Your Honor, the status is --
3 on behalf of the plaintiffs, a couple remarks first
4 and then I'll specifically answer your questions.

5 THE COURT: Okay.

6 MR. KELLMAN: Taking the three requests
7 separately, with regard to the Michigan -- the
8 request for information on the Michigan children
9 under five years of age detail by drugs and quality
10 indicator, and with respect to the information sought
11 on patients on five or more concurrent behavioral
12 drugs, there was no -- at any time an identifier
13 information sought, and Mr. Quasarano may remember,
14 and he's certainly able to comment on this if he'd
15 like, these are the documents that he turned over to
16 me in camera previously and then we turned them back,
17 and whatever identifier information there was on
18 these documents had been redacted, and we have never
19 sought it and we do not seek it today. So that -- I
20 just want the record to be clear on that.

21 THE COURT: Sir, in regard to that?

22 MR. QUASARANO: Yes, Your Honor. As I
23 mentioned before we took our break, those first two
24 categories of records fall clearly within the release
25 of information act, so under the guidance of the

1 trial court we allowed Mr. Kallman and his client to
2 look at the records, but it was done under a
3 protective order, so those aren't subject to
4 disclosure under FOIA because of the release of
5 information act language, and that's what the Court
6 of Appeals had determined.

7 As to the third class which Mr. Kellman
8 will be addressing, that was under the privacy
9 exemptions of the FOIA and that's the one I was
10 referring to in terms of an amended request.

11 MR. KELLMAN: So just so we're clear, we're
12 not talking about identifier information on those
13 first two and when that was turned over for a private
14 viewing, whatever identifier information was there
15 had been redacted, and it's those documents that we
16 are currently requesting.

17 THE COURT: But you're requesting them in
18 the redacted form?

19 MR. KELLMAN: Yes.

20 THE COURT: What's the objection in the
21 redacted form exactly?

22 MR. QUASARANO: Well, Your Honor, again,
23 it's because of the interpretation of the release of
24 information act that DCH has decided not to release
25 those records to a third party that does not fall

1 within that limited list of statutory recipients, and
2 as you know from that list and release of information
3 act, it is very specific, so we don't get to the
4 privacy concerns. The only reason there was a
5 redaction is the trial court recognized that if we're
6 going to do a cooperative in camera, not the judge
7 looking at the records but plaintiff and counsel,
8 that at least those identifiers would be removed, so
9 it's not a privacy concern, it's a non-public record
10 concern, and that's the position they've taken.

11 THE COURT: All right. Thank you. Now, as
12 to the third one?

13 MR. KELLMAN: As to the third one, we're
14 going to maintain our position. There are licensed
15 numbers that are there and we do think that that is
16 something that has been released. We believe that
17 that defense, if you will, has been waived, and, you
18 know, I can say to the Court that probably within the
19 next 48 hours, based on some information that my
20 client, Mr. Hansen, has gathered from different
21 sources, that he's going to be filing a qui tam
22 complaint through the Attorney General's office as
23 appropriate and there is legitimate reasons for this
24 information to be released. Financial integrity is
25 one of the exceptions under the release of

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1 information exceptions and it doesn't say that if
2 these exceptions come into play, that it's got to be
3 a, quote, review entity that receives it. It's not
4 how it's worded. It says any person.

5 MR. QUASARANO: I would point out, Your
6 Honor, if I may, that that third category of record
7 has not been denied under the release of information
8 act but under the FOIA's exemption provisions, and
9 there's a confusion here between the bases for
10 exemptions, so that is not relevant to the 13(1)(d)
11 argument. That is not what the DCH indicated, and
12 that's clear in the brief, and that's the one where
13 we indicated that identified version of the record,
14 but as far as pursuing that third category under the
15 release of information act, it was not withheld under
16 that act, so I'm not sure that that projected action
17 is necessary.

18 THE COURT: Okay.

19 MR. QUASARANO: Thank you, Judge.

20 THE COURT: After hearing the arguments and
21 looking at the history here and looking at the cases,
22 I am going to rule in the same vein as the Court of
23 Appeals and the Supreme Court and I am granting
24 defendant's motion for summary disposition pursuant
25 to (C)(7), (8), and (10) for the same reasons that

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1 the Court of Appeals and Supreme Court have ruled. I
2 believe that the department has been compliant.

3 MR. QUASARANO: Your Honor, if I may
4 address the Court from here?

5 THE COURT: You may.

6 MR. QUASARANO: Just so we have a complete
7 order to prepare for the record --

8 THE COURT: It's been done, counsel. You
9 may approach.

10 MR. QUASARANO: Oh, okay. I was referring
11 to the request for fees, which we're not pressing. I
12 just wanted to make sure that was addressed, that's
13 all. Thank you, Judge.

14 THE COURT: You may approach.

15 Certainly you all can appeal me, provide a
16 motion for reconsideration if I've erred, but I
17 certainly appreciate your time and effort.

18 MR. QUASARANO: Thank you, Judge.

19 THE COURT: Thank you. That's all for the
20 record.

21 (Whereupon hearing concluded at 2:51 p.m.)

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1 STATE OF MICHIGAN)
) SS
2 COUNTY OF EATON)

3 I, GENEVIEVE A. HAMLIN, Certified Shorthand
4 Reporter and Notary Public in and for the County of
5 Eaton, (Acting in Ingham County) State of Michigan,
6 do hereby certify that the foregoing was taken before
7 me at the time and place hereinbefore set forth.

8 I FURTHER CERTIFY THAT said witness was
9 duly sworn in said cause; that the testimony then
10 given was reported by me stenographically;
11 subsequently with computer-aided transcription,
12 produced under my direction and supervision; and that
13 the foregoing is a true and correct transcript of my
14 original shorthand notes.

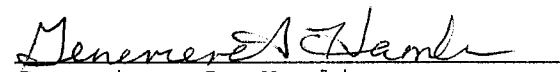
15 IN WITNESS WHEREOF, I have hereunto set my
16 hand and seal this 9th day of October, 2009.

17

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19

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Genevieve A. Hamlin
RPR-CM/CSR-3218 and Notary Public,
County of Eaton, State of
Michigan.

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My Commission Expires: 10-8-2011

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