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9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF ORANGE**

11
12 WILLIAM THOMPSON and SIMON
13 COLE,

14 Plaintiffs,

15 v.

16 TODD SPITZER, COUNTY OF
17 ORANGE, and DOES 1–10,

18 Defendants.

Case No.

**COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

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INTRODUCTION

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2 1. This action seeks to restrain the Orange County District Attorney
3 (“OCDA”) from coercing often indigent persons charged with misdemeanors into
4 forfeiting their constitutional rights through the unlawful collection of DNA for the
5 OCDA’s private DNA database—“BILL.”¹ Since launching BILL in 2007, the
6 OCDA has taken the DNA of alleged misdemeanants who accept DNA-driven plea
7 deals, whereby prosecutors offer defendants leniency in misdemeanor proceedings
8 in exchange for defendants surrendering their DNA to be stored in BILL
9 *indefinitely* and without adequate controls on the use and dissemination of this
10 sensitive material. These alleged misdemeanants frequently lack the opportunity to
11 consult with counsel and the legal competence to provide informed consent before
12 submitting their DNA to BILL. Because DNA collection is often part of a package
13 deal, alleged misdemeanants also lack power to decline only the DNA portion when
14 the threat of jail time and a criminal record looms large. This program’s coercive
15 nature, coupled with its ineffectiveness as a crime prevention tool, is unauthorized
16 by the California Penal Code and violates the U.S. and California Constitutions.

17 2. Although BILL was purportedly created in response to Proposition 69,
18 BILL exceeds the mandate of Proposition 69. Proposition 69 passed in 2004 and
19 amended California Penal Code §§ 295 and 296 to allow DNA to be collected from
20 all felons charged with sex crimes and all misdemeanants required to register as sex
21 offenders or arsonists.² Neither Proposition 69 nor any other state law authorize
22 creating a private database outside the California DNA Data Bank Program (“CAL-
23 DNA”) or federal Combined DNA Index System (“CODIS”). Moreover, there is
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26 ¹ “BILL is not an acronym; it is simply the name chosen by the database administrator.” *DNA: Whose Is It, Orange County Crime Lab’s or the District Attorney’s?*, OC Grand Jury,
27 <http://www.ocgrandjury.org/pdfs/DNA/DNA-Report.pdf>.

28 ² Cal. Prop. 69 §§ 1, 3.

1 no legal authorization for the collection of DNA from misdemeanants other than
2 those alleged to have committed sex crimes or arson, who are required to register as
3 sex offenders or arsonists as specified in California Penal Code § 296. As a result
4 of this unlawful expansion of such authorized and limited DNA databases, the
5 OCDA now privately and permanently owns the DNA of over 182,000 people³
6 whose DNA would not otherwise be included in the CAL-DNA or CODIS
7 databases, without any controls on the use or dissemination of such information and
8 without any outside scrutiny of these invasive practices. As of April 2019, BILL
9 was larger than the DNA databases maintained by 25 states.

10 3. BILL has not even achieved its stated objectives. BILL was meant to
11 store the DNA of individuals charged with certain crimes in order to “substantially
12 reduce the number of unsolved crimes; to help stop serial crime by quickly
13 comparing DNA profiles of qualifying persons and evidence samples with as many
14 investigations and cases as necessary to solve crime and apprehend perpetrators; to
15 exonerate persons wrongly suspected or accused of crime; and to identify human
16 remains.”⁴ But BILL has proved to be ineffective: In 2018, there was a DNA hit
17 rate of just 0.0067,⁵ meaning *only* 0.67% of samples collected by the OCDA for
18 BILL matched past crime scene DNA profiles, and because of some overlap
19 between BILL and CODIS, even this small portion of matches may include the
20 DNA of persons alleged to have committed felonies.

21 4. Not only do DNA-driven plea deals coerce defendants into forfeiting
22 their DNA, but defendants also must pay the OCDA for this invasion of privacy.

24 ³ Orange County Board of Supervisors, *Agenda Staff Report on DNA Processing Cost Recovery*
25 *Fee Update and Contract for DNA Databasing Testing* (Apr. 9, 2019).

26 ⁴ Cal. Prop. 69 § 1(c).

27 ⁵ Orange County District Attorney, *OCDA DNA Database: 2018 Yearly Summary* (2018),
28 http://cams.ocgov.com/Web_Publisher/Agenda04_09_2019_files/images/O01019-000370A.PDF;
see also Andrea Roth, *Spit & Acquit: Prosecutors as Surveillance Entrepreneurs*, 107 CALIF. L.
REV. 405, 430, n.153 (2019).

1 As part of the plea deal, defendants must sign the DNA Collection Waiver Form
2 (“the Waiver”), through which they not only agree to surrender a DNA sample, they
3 forfeit their right to challenge the indefinite retention of their DNA and pay a \$110
4 DNA collection fee.

5 5. This coercive and invasive system permits the OCDA to pressure
6 individuals who are often unrepresented by counsel at the time to permanently sign
7 away the rights to their most personal information in exchange for dismissal of
8 charges. Individuals’ genetic information is then used at the OCDA’s sole
9 discretion, without any oversight. Plaintiffs bring this lawsuit to end the
10 misappropriation of California taxpayer funds for the OCDA’s unconstitutional
11 disregard for the DNA collection and retention guidelines set forth by the California
12 Penal Code.

13 **JURISDICTION AND VENUE**

14 6. This Court has jurisdiction over this action pursuant to California Code
15 of Civil Procedure §§ 187, 526a, and 1060. Venue is proper in the Superior Court
16 of Orange County under California Code of Civil Procedure §§ 393, 394, and 395
17 because Defendants are public officers situated in Orange County, and all acts and
18 omissions raised in this Complaint occurred in Orange County.

19 **PARTIES**

20 7. Plaintiff WILLIAM THOMPSON is a resident of Orange County,
21 California. In 2020, Mr. Thompson paid, and continues to pay, taxes in Orange
22 County, including income, property, and sales taxes. Mr. Thompson is a Professor
23 Emeritus of Criminology, Law and Society; Psychology and Social Behavior; and
24 Law at the University of California, Irvine. Mr. Thompson has an interest in
25 preventing the illegal and wasteful expenditure of County funds, including
26 Defendants’ expenditure of County funds on administering, implementing,
27 concealing, and defending the policies and practices addressed in this Complaint.
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1 collected since BILL's inception is presently unknown, the OCDA collects between
2 13,000 and 20,000 samples per year.

3 13. In 2004, California voters approved Proposition 69, the "DNA
4 Fingerprint, Unsolved Crime and Innocence Protection Act," which was a response
5 to the apparent "critical and urgent need to provide law enforcement officers and
6 agencies with the latest scientific technology available for accurately and
7 expeditiously identifying, apprehending, arresting, and convicting criminal
8 offenders and exonerating persons wrongly suspected or accused of crime."⁶ Under
9 Proposition 69, local law enforcement DNA laboratories are permitted to store
10 DNA collected in accordance with California Penal Code §§ 295 and 296 in a local
11 DNA database separate from CAL-DNA and CODIS.⁷ But California Penal Code
12 §§ 295 and 296 only allow DNA to be collected from felons and misdemeanants
13 charged with sex crimes or arson, while BILL collects DNA from a wide array of
14 other defendants.

15 14. Proposition 69 amended Penal Code §§ 295 and 296 to expand the
16 bases for mandatory DNA collection in California. According to Penal Code § 295,
17 California requires "DNA and forensic identification data bank samples from all
18 persons, including juveniles, for the felony and misdemeanor offenses described in
19 subdivision (a) of Section 296."⁸ Under Penal Code § 296, defendants must turn
20 over their DNA if they are convicted of any felony, if they are arrested or charged
21 with a felony or misdemeanor that would require them to register as a sex offender
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23 ⁶ Cal. Prop. 69 § 1(b).

24 ⁷ *Id.* § 5(d)

25 ⁸ Cal. Penal Code § 295(b)(2). This provision was intended to "assist federal, state, and local
26 criminal justice and law enforcement agencies within and outside California in the expeditious
27 and accurate detection and prosecution of individuals responsible for sex offenses and other
28 crimes, the exclusion of suspects who are being investigated for these crimes, and the
identification of missing and unidentified persons, particularly abducted children." Cal. Penal
Code § 295(c).

1 or arsonist, or if they are arrested or charged with murder or voluntary
2 manslaughter.⁹ This mandatory list is exhaustive—the law considers any other
3 surrender of DNA voluntary.

4 15. Once Proposition 69 was signed into law, the OCDA (whose lawyers
5 were among the “primary authors” of the initiative¹⁰) submitted Ordinance 07-003
6 to the Orange County Board of Supervisors, which would establish a database far
7 exceeding what the California Penal Code and the Constitution permit. Ordinance
8 07-003 allowed the collection of DNA from defendants *not* covered by Penal Code
9 §§ 295 and 296: It allowed the collection of DNA from individuals charged with
10 misdemeanors other than sex offenses or arson. It also allowed the County to
11 *permanently* retain DNA samples from individuals charged with misdemeanors.¹¹

12 16. In 2007, the Orange County Board of Supervisors unanimously
13 approved Ordinance 07-003 and authorized \$875,000 in funding to develop BILL.¹²
14 This authorization was only intended to cover startup costs, and in the years since
15 BILL’s creation, it has been funded in large part by fees collected from
16 misdemeanants. In 2017, BILL derived a significant portion of its budget—
17 \$724,761.70—from individual collection fees.¹³

18 17. The DNA samples in BILL are often obtained through a “voluntary”
19 exchange process. OCDA prosecutors offer to drop or reduce charges or
20 punishments to misdemeanor and low-level felony defendants¹⁴ in exchange for a
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23 ⁹ Cal. Penal Code § 296(a).

24 ¹⁰ Orange County District Attorney, *Board of Supervisors Meeting 4/9/2019 Position on Science
and Technology* (2019), [http://cams.ocgov.com/Web_Publisher/Agenda04_09_2019_files/
images/O01319-000370A.PDF](http://cams.ocgov.com/Web_Publisher/Agenda04_09_2019_files/images/O01319-000370A.PDF).

25 ¹¹ Roth, *supra* note 5, at 422–23 & n.97.

26 ¹² *Id.* at 422–23.

27 ¹³ Orange County District Attorney, *supra* note 10.

28 ¹⁴ The low-level felony defendants in these circumstances plead to misdemeanor charges as a
result of surrendering their DNA. Every defendant convicted of a felony is required to give their
DNA. Cal. Penal Code § 296(a)(2)(A).

1 sample of their DNA. In some instances, prosecutors raise charges upon the
2 rejection of a DNA-driven plea deal.

3 18. Misdemeanants who have already forfeited their DNA as part of a plea
4 deal lack the opportunity to secure certain plea deals in the future. As a result,
5 second-time misdemeanants are ineligible for certain diversion programs for which
6 individuals who have yet to surrender their DNA are eligible. Precluding a second-
7 time misdemeanant's opportunity to keep a clean record creates tangible hardships.
8 Criminal convictions of any nature affect individuals' rights to life, liberty, and
9 property due to discrimination in the work force, financial hardship, familial strain,
10 and many other personal challenges that accompany a criminal conviction. In
11 effect, these individuals face increased punishment simply because the OCDA
12 already has their DNA.

13 19. Prosecutors often present these plea deals to defendants at their
14 arraignment, a time at which defendants are protected by the Sixth Amendment
15 right to counsel, but, in practice in Orange County Superior Courts, often proceed
16 without consulting counsel. Observers have witnessed prosecutors at arraignment
17 proceedings offer DNA-driven plea deals by calling out certain defendants' names
18 in a courthouse waiting area, briefly meeting with them in the hallway of the
19 courthouse, and then offering the deal that includes the surrender of DNA. While
20 the OCDA insists this transaction is entirely voluntary, misdemeanor defendants
21 give up their DNA without understanding their other options or the consequences of
22 giving their DNA. This leads many defendants to relinquish their DNA to avoid
23 charges that would otherwise be dismissed in a fair trial or a longer procedure.
24 Persons facing this choice without counsel are coerced to accept a deal that is not in
25 their interest and that violates their rights.

26 20. A defendant who agrees to provide a DNA sample in exchange for
27 dropped or reduced charges or punishment is required to sign a Waiver, which
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1 states that the defendant waives their right to ever have their DNA sample removed
2 from the database and/or challenge the collection, retention, and use of the sample
3 in court.¹⁵ The Waiver purportedly turns the DNA surrender “voluntary” and
4 allows its collection to be permanent, by allowing the OCDA to circumvent Penal
5 Code § 299, which requires that a person’s DNA sample be destroyed and
6 expunged if their conviction or charge does not qualify them for inclusion in the
7 database under § 296.¹⁶

8 21. Signing the Waiver may seem voluntary in theory, but in practice, it is
9 coercive. By compelling individuals who lack meaningful choice to give up their
10 DNA and associated privacy rights in exchange for a better plea deal or dismissal,
11 Defendants have acted beyond the scope of their legal authority. The Waiver also
12 deprives Orange County residents of their right to due process by demanding that
13 they surrender their right to challenge the retention of their DNA indefinitely.

14 22. Defendants forfeiting their DNA are also required to pay a \$110
15 administrative fee, which is subject to increase upon the Board of Supervisors’
16 approval.¹⁷ Since 2007, the Board has approved increases in the required
17 administrative fee imposed on criminal defendants in order to maintain the
18 program. The Board of Supervisors most recently increased the required fee from
19 \$75 to \$110 in 2019,¹⁸ which raised BILL’s annual revenue from \$1,080,000 in
20 Fiscal Year 2018 to \$1,584,000 in Fiscal Year 2019.¹⁹

21 23. A defendant’s DNA sample is collected at an OCDA collection site
22 (located in all five of the main county courthouses) by a Sample Collection
23 Investigative Assistant. In addition to forfeiting their DNA, a defendant must also

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25 ¹⁵ Roth, *supra* note 5, at 457.

26 ¹⁶ Cal. Penal Code § 299.

27 ¹⁷ Orange County Board of Supervisors, *supra* note 3.

28 ¹⁸ *Id.*

¹⁹ See Orange County District Attorney, *Fee Checklist for ASR Submission* (Mar. 5, 2019),
http://cams.ocgov.com/Web_Publisher/Agenda04_09_2019_files/images/O01119-000370A.PDF.

1 submit to being fingerprinted and photographed. DNA samples are then sent for
2 analysis across the country to a lab operated by Bode Cellmark Forensics, Inc.
3 (“Bode”). Bode tests each sample within thirty days and sends the resulting DNA
4 profile back to the OCDA, where is then uploaded into BILL. According to the
5 County’s contract with Bode, Bode should expect to process anywhere from 13,000
6 to 20,000 samples collected from County residents. In 2018, Bode processed
7 14,436 samples from BILL.

8 24. There are no safeguards in place to protect how the DNA is
9 transferred, stored, or used. Details concerning how Orange County residents’
10 DNA is protected while transferred to Bode, and while in Bode’s possession, are
11 unknown to the public. It is also unknown how long Bode keeps Orange County
12 residents’ biological information, or if Bode stores or otherwise disseminates this
13 information. The County’s contract with Bode explains that there is no requirement
14 that Bode destroy County residents’ DNA information upon the completion of
15 testing. Individuals who forfeit their DNA are unaware of whether and how Bode
16 uses their personal DNA data, constituting a serious violation of privacy. County
17 residents are also unaware of how the County stores and disseminates their DNA
18 information, as BILL is not subject to the same controls mandated by CAL-DNA
19 and CODIS.

20 25. BILL has also proved to be ineffective as a tool for combatting or
21 solving crime. According to the OCDA, “8% of previously convicted criminals
22 commit 80% of all crimes Therefore, expanding the number of DNA profiles
23 in a misdemeanor database should lead to solving more crimes and to reducing the
24 recidivism rate.”²⁰ But despite the existence of well over 182,000 DNA samples in
25 BILL, the number of positive matches, or “hits,” remains extremely low. As of

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27 ²⁰ DNA: Whose Is It, *supra* note 1.
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1 2018, when the OCDA maintained DNA profiles of approximately 182,000
2 individuals, only 0.67% of samples collected matched DNA collected from a crime
3 scene.²¹ According to the County’s own data, the vast majority of this small
4 number of hits were to non-violent property crimes.²²

5 26. The DNA-driven plea deals that fuel BILL’s database end up
6 infringing on Orange County residents’ constitutional rights rather than solving
7 serious crimes. For example, BILL incentivizes prosecutors to exaggerate the
8 severity of a misdemeanor’s crime in order to secure a DNA sample. Using DNA-
9 driven plea deals as a bargaining tool, a prosecutor may threaten a misdemeanor
10 with a conviction, jail time, or a higher charge in order to ensure that the
11 misdemeanor forfeits their DNA. With the total lack of oversight on prosecutors
12 in negotiating plea deals, as well as the large number of unrepresented
13 misdemeanants, this program often deprives Orange County residents of the fair
14 criminal process to which they are entitled.

15 27. The OCDA’s practice of offering DNA-driven plea deals not only
16 taints the fairness of in-court criminal proceedings, it touches every stage of the
17 criminal process, including day-to-day interactions between Orange County
18 residents and the police. This program creates a perverse incentive to criminalize
19 harmless conduct and charge low-level misdemeanants with crimes they would
20 otherwise not be charged with—all under the guise of collecting DNA for
21 objectives that are manifestly not served by this program. Accordingly, this
22 program forces individuals who would otherwise never interact with the criminal
23 justice system to either permanently surrender their most private information or
24 face a criminal conviction.

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27 ²¹ Orange County District Attorney, *supra* note 5; Roth, *supra* note 5.

28 ²² In 2018, 80% of all DNA hits in BILL were to property crimes or other nonviolent crimes. *Id.*

1 **FIRST CAUSE OF ACTION**
2 **RIGHT TO PRIVACY**

3 **(Violation of Art. 1, § 1 of the California Constitution)**

4 28. Plaintiffs reallege and incorporate by reference paragraphs 1 through
5 27, inclusive, as if fully set forth herein.

6 29. Article One, Section One of the California Constitution protects the
7 unalienable right to privacy.

8 30. Individuals have a privacy right in their DNA, which contains
9 intimate identifying information. This legal privacy right protects against the
10 dissemination or misuse of sensitive and confidential information, such as DNA
11 data.

12 31. There is no compelling state interest for collecting the DNA of
13 misdemeanants and storing it indefinitely, especially given that BILL has proven
14 ineffective in matching DNA to crimes committed. Except for the convictions and
15 charges detailed in Penal Code §§ 295 and 296, the government has no right to
16 invade an individual's privacy by collecting, maintaining, and disseminating their
17 DNA. As such, the OCDA has no right to collect and store the DNA of individuals
18 not convicted of felonies or misdemeanors that would require sex offender registry
19 or registry as an arsonist.

20 32. Defendants' policies and practices of collecting and sharing DNA
21 information of all individuals involved in DNA-driven plea deals, without
22 disclosing how their DNA is used and without implementing legal safeguards
23 protecting the same, is a violation of the California right to privacy.

24 33. Defendants' policies and practices constitute an illegal or wasteful
25 expenditure of public funds justifying an injunction under California Code of Civil
26 Procedure § 526a.
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SECOND CAUSE OF ACTION
RIGHT TO COUNSEL

(Violation of U.S. Constitution Amend. VI; California Constitution Art. 1, § 15)

34. Plaintiffs reallege and incorporate by reference paragraphs 1 through 33, inclusive, as if fully set forth herein.

35. Defendants, acting under color of state law, deprived misdemeanants due process of law in violation of the Sixth Amendment to the U.S. Constitution and Article One, Section Fifteen of the California Constitution by the acts alleged above.

36. The Sixth Amendment to the U.S. Constitution and Article One, Section Fifteen of the California Constitution entitle all criminal defendants to representation, irrespective of financial means. Individuals forfeiting their DNA in exchange for a plea deal are subject to criminal prosecution and thus come under the protection of both the Sixth Amendment and Article One, Section Fifteen of the California Constitution.

37. Defendants engage in an unconstitutional practice of pressuring individuals to surrender their right to privacy and accept plea deals that require the surrender of DNA without opportunity to be advised by counsel.

38. Plaintiffs are informed and believe and allege that each Defendant has knowingly, or with deliberate indifference to the constitutional rights of a person within the jurisdiction of the United States, maintained or permitted the official practice of obtaining DNA samples from coerced or involuntary misdemeanor plea deals.

39. Each Defendant is responsible for this unconstitutional action and policy by continuing to operate BILL in the manner alleged above.

40. Such act was the result of the policies, practices, and customs of Defendants, and are financed through taxpayer funds.

1 46. By exceeding the authority of Penal Code §§ 295 and 296, Defendants
2 have violated due process and deprived individuals of procedural and substantive
3 due process in the following ways:

- 4 a. Defendants pressure individuals to accept DNA-driven plea
5 deals without knowledge of their privacy rights or the
6 consequences of surrendering their DNA. This unfair system
7 forces individuals to immediately make a decision that forever
8 implicates their rights without an opportunity to be represented
9 by counsel.
- 10 b. Criminal convictions of any nature affect individuals' rights to
11 life, liberty, and property due to discrimination in the work
12 force, financial hardship, familial strain, and many other
13 personal challenges that accompany a criminal conviction.
- 14 c. By accepting the plea deal, individuals are deprived of their
15 right to a fair trial or to a longer procedure that may result in a
16 dismissal of the case.
- 17 d. The unconscionable and unenforceable Waiver constitutes an
18 invalid forfeiture of an individual's due process rights under the
19 U.S. Constitution and the California Constitution.

20 47. Such acts are the result of the policies and practices of Defendants and
21 were financed through taxpayer funds.

22 48. Defendants' policies and practices constitute an illegal or wasteful
23 expenditure of public funds justifying an injunction under California Code of Civil
24 Procedure § 526a.

1 **FOURTH CAUSE OF ACTION**
2 **ULTRA VIRES VIOLATION**

3 49. Plaintiffs reallege and incorporate by reference paragraphs 1 through
4 48, inclusive, as if fully set forth herein.

5 50. A government agency's action is *ultra vires*, and therefore void, if the
6 action is outside the scope of the agency's statutory authority. (*Lamere v. Super.*
7 *Ct.*, 131 Cal. App. 4th 1059, 1066 n.4 (2005).)

8 51. Penal Code §§ 295 and 296 authorize prosecuting attorneys to collect
9 DNA only from individuals who (1) plead guilty or no contest to or are convicted
10 of a felony, (2) are arrested for or charged with a sex offense or arson, (3) are
11 arrested for or charged with murder or voluntary manslaughter or an attempt to
12 commit same, or (4) are required to register under the Sex Offender Registration
13 Act or as an arsonist.

14 52. The OCDA collects DNA from individuals who are ineligible for
15 collection under Penal Code §§ 295 and 296. In doing so, the OCDA goes beyond
16 what it is statutorily authorized to do.

17 53. Because the OCDA is acting beyond the scope of the legal authority
18 granted in Penal Code §§ 295 and 296, these DNA-driven plea deals are *ultra vires*
19 of the authority provided to Defendants and should be declared invalid.

20 54. Defendants' policies and practices constitute an illegal or wasteful
21 expenditure of public funds justifying an injunction under California Code of Civil
22 Procedure § 526a.

23 **FIFTH CAUSE OF ACTION**
24 **WASTE OF TAXPAYER FUNDS**

25 55. Plaintiffs reallege and incorporate by reference paragraphs 1 through
26 54, inclusive, as if fully set forth herein.

1 identified herein, and stating that any current, past, and future Waivers are
2 unenforceable;

3 4. For an award of restitution to victims of Defendants' unlawful DNA
4 collection, in the amount of the fees charged to those victims;

5 5. For costs of suit and attorney's fees as provided by California Code of
6 Civil Procedure § 1021.5 or as otherwise provided by law; and

7 6. For such other relief as the Court deems just and proper.
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1 Dated: February 16, 2021

/s/ Michael Yoder

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