

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

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U.S. DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
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LORETTA G. WHYTE
CLERK

PRISON LEGAL NEWS and
HUMAN RIGHTS DEFENSE CENTER
Plaintiffs

VERSUS

MARLIN GUSMAN, Sheriff, Orleans
Parish, CARLOS LOUQUE, Warden,
House of Detention, KEVIN WINFIELD,
Warden, Old Parish Prison, CHARLES
EZEB, Warden, Temporary Jails, JERROD
SPINNEY, Warden, Conchetta, BONITA
PITTMAN, Warden, Templeman V,
J. DOE 1, Mailroom Supervisor,
OPSO and J. DOE 2,
Mailroom Employee, OPSO,
Defendants

* NUMBER:

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* SECTION:

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* JUDGE:

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* MAG. SECTION:

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* MAGISTRATE:

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11-2277

SECT. S MAG. 4

COMPLAINT

INTRODUCTION

This lawsuit involves a challenge to the policies and practices of defendants which have resulted in the unlawful censorship and exclusion of books and magazines protected by the 1st and 14th Amendments to the U.S. Constitution which are published and distributed by plaintiffs, and which were sent via U.S. mail to individual subscribers in custody at the Orleans Parish Prison (OPP). Plaintiffs also challenge defendants' policies and practices which fail to provide adequate notice and an opportunity to be heard to review decisions censoring and excluding books and magazines distributed by plaintiffs to OPP prisoners, in violation of due process of the law. The law on these issues is well-established. Defendants have acted in an arbitrary and unreasonable manner in contravention of over thirty years of well-settled case law.

Statement of Claims

1. Plaintiffs Prison Legal News and Human Rights Defense Center bring this civil rights action for redress of violations of their rights to free speech and expression and due process under the law, seeking injunctive and declaratory relief, as well as damages.

2. At all relevant times defendants have acted under color of law and in the course and scope of their employment. Defendants have violated and continue to violate plaintiffs' constitutional rights protected by the First and Fourteenth Amendments to the U. S. Constitution. The actions of the defendants have caused and continue to cause injuries to the plaintiffs, as described herein.

Jurisdiction and Venue

3. This action is brought pursuant to 42 U.S.C. Sec. 1983 and 1988. Jurisdiction is based on 28 U.S.C. Sec. 1331, 1343(a)(3) and (4), and the aforementioned federal statutory and constitutional provisions.

4. Venue is proper in this Court under 28 U.S.C. Sec. 1391 as the events complained of occurred within this district.

Parties

5. Plaintiff Prison Legal News (hereafter referred to as PLN) is a monthly prison law magazine distributed across the nation to prisoners, attorneys, judges, law libraries and other subscribers. Plaintiff PLN is also a book distributor, specializing in books and materials regarding prisoners' rights and issues related to the criminal justice and corrections systems. Plaintiff PLN is a project and wholly owned subsidiary of the plaintiff Human Rights Defense

Center which is a non-profit, tax exempt (IRS section 501(c)(3)) corporation. Human Rights Defense Center is the publisher of PLN. PLN's offices are in Brattleboro, Vermont.

6. Defendant Marlin Gusman is the elected Sheriff of Orleans Parish. He has overall responsibility for the policies, procedures, operations and supervision of the Orleans Parish Sheriff's Office, its employees, agents, and assigns, including all correctional facilities under the control of his office, including the Orleans Parish Prison (OPP). Orleans Parish Prison is composed of several correctional facilities including House of Detention (HOD), Old Parish Prison, Temporary Jails (the Tents), Templeman V, and Conchetta. Defendant Gusman is a final policymaker for the Orleans Parish Sheriff's Office and the Orleans Parish Prison. He is sued in his official and individual capacity. He is a resident, of full age of majority, of the Eastern District of Louisiana.

7. Defendant Carlos Louque is an employee of the Orleans Parish Sheriff's Office, acting under the direction and supervision of Defendant Gusman. He is the warden of the House of Detention (HOD), one of the facilities comprising the Orleans Parish Prison. HOD is sometimes also referred to as CLU. He has responsibility for the policies, procedures and operations of the HOD, its employees, agents and assigns, including receipt and distribution of books, magazines and other reading materials to prisoners. On information and belief, he is a final policymaker for HOD regarding mail delivery policies and procedures for persons in custody at HOD. He is sued in his official and individual capacity. He is a resident, of full age of majority of the Eastern District of Louisiana.

8. Defendant Kevin Winfield is an employee of the Orleans Parish Sheriff's Office, under the direction and supervision of Defendant Gusman. He is the warden of Old Parish

Prison, one of the facilities comprising Orleans Parish Prison. He has responsibility for the policies, procedures and operations of Old Parish Prison, its employees, agents and assigns, including receipt and distribution of books, magazines and other reading materials to prisoners. On information and belief, he is a final policymaker for Old Parish Prison regarding mail delivery policies and procedures for persons in custody at Old Parish Prison. He is sued in his official and individual capacity. He is a resident, of full age of majority of the Eastern District of Louisiana.

9. Defendant Bonita Pittman is an employee of the Orleans Parish Sheriff's Office, under the direction and supervision of Defendant Gusman. She is the warden of Templeman V, one of the facilities comprising Orleans Parish Prison. She has responsibility for the policies, procedures and operations of Templeman V, its employees, agents and assigns, including receipt and distribution of books, magazines and other reading materials. On information and belief, she is a final policymaker for Templeman V regarding mail delivery policies and procedures for persons in custody at Templeman V. She is sued in her official and individual capacity. She is a resident, of full age and majority of the Eastern District of Louisiana.

10. Defendant Charles Ezeb is an employee of the Orleans Parish Sheriff's Office, under the direction and supervision of Defendant Gusman. He is the warden of the Temporary Jails (Tents), one of the facilities comprising Orleans Parish Prison. He has responsibility for the policies, procedures and operations of the Tents, employees, agents and assigns, including receipt and distribution of books, magazines and other reading materials. On information and belief, he is a final policymaker for the Temporary Jails (Tents) regarding mail delivery policies and procedures for persons in custody at that facility. He is sued in his official and individual

capacity . He is a resident, of full age and majority of the Eastern District of Louisiana.

11. Defendant Jerrod Spinney is an employee of the Orleans Parish Sheriff's Office, under the direction and supervision of Defendant Gusman. He is the warden of Conchetta, one of the facilities comprising Orleans Parish Prison. He has responsibility for the policies, procedures and operations of Conchetta, its employees, agents and assigns, including receipt and distribution of books, magazines and other reading materials. On information and belief, he is a final policymaker for Conchetta regarding mail delivery policies and procedures for persons in custody at Conchetta. He is sued in his official and individual capacity. He is a resident of full age and majority of the Eastern District of Louisiana.

12. Defendant J. Doe 1 is an employee of the Orleans Parish Sheriff's Office, under the direction and supervision of defendants Gusman, Louque, Winfield, Pittman, Ezeb and Spinney. He/she is a supervisory official at Orleans Parish Prison responsible for implementation of the policies, procedures and operations of the Orleans Parish Prison regarding mail receipt and distribution of books, magazines and other reading materials to prisoners. Defendant Doe 1 also supervises OPSO employees, agents and assigns with duties related to mail receipt and distribution to prisoners. He/she is sued in his/her official and individual capacity and, on information and belief, is a resident of full age and majority of the Eastern District of Louisiana..

13. Defendant J. Doe 2 is an employee of the Orleans Parish Sheriff's Office, under the direction and supervision of the defendants Gusman, Louque, Winfield, Pittman, Ezeb, Spinney and J. Doe 1. He/she is responsible for implementation of the policies, procedures and operations of the Orleans Parish Prison regarding mail delivery of books, magazine and other

reading materials. Defendant Doe 2 is sued in his/her official and individual capacity and, on information and belief, is a person of full age and majority and a resident of the Eastern District of Louisiana.

Statement of Facts

14. Plaintiffs publish and distribute a monthly 56-page legal information magazine entitled "Prison Legal News" (PLN the magazine) dealing with the rights of incarcerated individuals. Each monthly issue of PLN the magazine provides updates on legal cases and court decisions, as well as information about important legal issues such as access to courts and counsel, disciplinary hearings, prison conditions, excessive force, mail censorship, jail litigation, visitation, access to telephones, religious freedom, prison rape, and the death penalty, among other related topics. PLN the magazine has been published continuously since 1990. The publication is core protected speech, which is not objectionable on security or other grounds. Prison Legal News has approximately seven thousand (7,000) subscribers nationwide, including prisoners in local, state and federal correctional facilities, attorneys, judges and law libraries.

15. Plaintiffs also publish and distribute forty-four (44) soft-cover legal and self help books by other publishers, regarding the criminal justice system. These reading materials are designed to foster a better understanding of criminal justice policies and issues and to allow prisoners to educate themselves about basic related issues including legal research, how to write a business letter, health care issues and similar topics. Subscribers to PLN the magazine at Orleans Parish Prison were also sent a complimentary copy of the soft-cover book "Protecting Your Health and Safety: Prisoners' Rights", (hereafter "Protecting Your Health and Safety") published by the Southern Poverty Law Center (SPLC), based in Montgomery, Alabama.

16. Beginning on September 15, 2010 and continuing to the present, thirty-five (35) individual prisoners in custody of the defendants have become, at various times, subscribers to PLN the magazine. Plaintiffs have sent to each subscriber, monthly, a copy of PLN the magazine, postage prepaid, via U.S. mail. These 35 subscribers have also been mailed a copy of the book “Protecting Your Health and Safety”.

17. Defendant Sheriff Gusman has adopted a policy and practice, implemented by and through the defendants and other OPSO employees and staff, that impermissibly infringes upon plaintiffs rights to distribute its books and magazines to prisoners confined in the Orleans Parish Prison.

18. Defendant Sheriff Gusman’s policy is made available to the public on his website, www.opcso.org. In the section entitled “Inmate Mail and Visitation” the policy states, under the caption “Other mail guidelines” as follows: “No books, magazines, newspapers or periodicals of any kind”.

19. Regarding magazines, newspapers and periodicals, Defendants’ written policy is a flat ban on any of these materials being distributed to prisoners through the mail. The policy is contained in the operations manual of the Orleans Parish Prison, Chapter: Inmate Communication and Mail, Index#1401.2 and states as follows:

“11. Magazines, Newspapers and Periodicals: Inmates may not receive magazines, newspapers, or any other periodicals through the mail. These items may be purchased through the inmate commissary”

20. The only magazines on the inmate commissary list, titled the “Orleans Commissary Menu” are Newsweek and Essence.

21. Regarding books, Defendants' written policy, also contained in Index #1401.2, states as follows:

“10. Books. Books may be accepted with the approval of the facility Warden. If approved, the book must have a soft-cover and come directly from the publisher (books received from bookstores, *or any other source*, and hard-cover books will be refused and returned). The books are then delivered to the facility Warden's Office. The context of the book must meet the approval of the facility Warden or the book will be refused and returned. If books are found unacceptable the Warden will return them to the Mail Room where they are documented in the return log book with the reason for refusal, the inmate name, and the inmate folder number. The books are then returned to the sender. It should also be noted that books are available for purchase through the inmate commissary.” (*Emphasis added*).

22. Defendants' policy totally prohibits soft-cover books mailed directly to prisoners from distributors such as plaintiffs, as well as bookstores. In addition, it delegates to each warden of the various facilities the unbridled discretion to censor and exclude soft-cover books, even those sent directly from the publisher, without providing any guidelines, standards or criteria for determining what is acceptable or “unacceptable”. There are also no requirements to provide notice to the sender of the book of the reasons for censorship and exclusion or the opportunity to be heard and procedures for review of the decision. Furthermore, there are no time limits within which the various wardens must make a decision regarding whether a book is acceptable or

“unacceptable.”

23. The only books on the inmate commissary list are the Bible, the Koran, a dictionary and a listing of ten (10) “Best Sellers, titles and authors unstated, which are identified on the commissary list, sequentially, as “Best Seller 1”, “Best Seller 2”, etc. On information and belief, the actual titles change periodically, though virtually all of the titles appear to be what is known as mass-market popular fiction with titles such as “Swimsuit”, “Sizzle”, “Miss Liz’s Passion/Home on the Ranch”, “Big Girl: A Novel”, etc. Books from genres such as serious classical and contemporary literature, poetry, history, science, philosophy, politics, theater, criminal justice, self-help, etc. are not included on the “Best Seller” Nos. 1-10 commissary list. A soft-cover copy of Dante’s *Inferno*, which is not on the “commissary menu” at the jail, was sent via U.S. mail in Oct., 2011 by a local New Orleans bookstore to an OPP prisoner, which resulted in the book being censored and excluded by defendants and returned, stamped “Return to Sender”, with no further information provided.

24. Under the defendants’ written policies there is no requirement for “prior approval” by facility wardens for magazines. There is also no procedure for publishers or distributors to mail magazine subscriptions to individual subscribers in defendants’ custody. Only those magazines which are on the inmate commissary list, *Newsweek* and *Essence*, are permitted.

25. PLN the magazine and the soft-cover books distributed by plaintiffs are not on the Orleans Parish Sheriff’s Office inmate commissary list (the “commissary menu”) and therefore cannot be ordered by prisoners in the custody of defendants through the jail commissary.

26. Index #1401.1, “Inmate Access to Policies and Procedures-Mail” also states that during intake prisoners are to be provided with an “Inmate Orientation Form which includes

rules governing the handling of inmate mail.” The Inmate Orientation Form provided to OPP prisoners has no provisions advising prisoners of their rights to order or to have access to magazines or soft-cover books through the mail from bookstores or distributors, including those published or distributed by plaintiffs.

27. Defendants’ have a pre-printed form, the Orleans Parish Sheriff’s Office “Mail Return Form”, which is presumably designed to accompany mail which is being returned to the sender. This pre-printed form provides a checklist of potential reasons for mail being returned to the sender (“This letter/package was returned by the Orleans Parish Sheriff’s Office Mailroom for the following reasons checked below.”). The category relevant to books and magazines addressed to prisoners which are being returned, states,

“Books, magazines and newspapers (including newspaper articles, xeroxed copies of books, and books printed off of the Intranet) [sic] are prohibited. These items must be purchased through the Commissary or must be approved by the facility Warden prior to being sent.”

28. On information and belief this form is intended to provide notice to the sender of rejected mail of the reasons for the rejection. However, this form merely states a blanket policy prohibiting all books, magazines and newspapers sent directly to prisoners and fails to specify why a particular book, magazine or newspaper is being rejected. The form also fails to provide any information for publishers, distributors or bookstores of how to submit books to the various facility wardens so as to obtain “prior approval” or any information regarding how a publisher, distributor or bookstore can distribute its reading materials through the inmate commissary list. There is also no notice of any procedures for appealing if a warden has censored and excluded

reading materials. Additionally, if a book, magazine or newspaper is censored and excluded based upon its content (or “context” as Index #1401.2 policy states) there is no provision in the OPSO Mail Return Form to require or provide information specifying or explaining any content-based rejection. The form itself combines books, magazines and newspapers even though, according to Index#1401.2, the facility warden’s prior approval requirement only applies to books, not to magazines, newspapers or periodicals, which can only be purchased through the commissary.

29. Defendants’ policies and practices regarding soft-cover books, magazines, and periodicals are unconstitutional on their face and as applied regarding books and magazines sent by publishers and distributors such as plaintiffs, via U.S. mail, to prisoners confined at OPP.

30. Defendants have also failed to establish a constitutionally valid policy or practice to provide adequate notice to plaintiffs and an opportunity to be heard regarding the reasons for exclusion of soft-cover books, magazines and periodicals and the procedures for appealing same.

31. On information and belief, numerous copies of PLN the magazine have not been delivered to OPP subscribers due to the policies and practices of the defendants, despite plaintiffs regularly mailing the magazine every month via U. S. Mail, postage prepaid and addressed to the individual subscribers at OPP.

32. Plaintiffs have received nineteen (19) returned copies of the December, 2010 issue of PLN the magazine, which were mailed to subscribers at OPP. No information at all was provided to explain the censorship and exclusion of this issue and no “Mail Return Form” was furnished with the returns. The addresses of the subscribers were merely scratched out and the magazine returned without explanation.

33. In Oct. 2010, plaintiffs sent via U.S. mail a copy of the August, 2010 issue of PLN the magazine to an OPP subscriber. This issue was returned to the sender, with a “Mail Return Form” with the category regarding returns of books, magazines, etc. checked off. In addition, the form had a hand-written notation next to the category saying “Prison Legal News” with no further explanation. The identity or position of the individual(s) who filled out the form was not provided. No notice of any opportunity or procedure for review or appeal of this decision was provided to plaintiffs.

34. Plaintiffs also received correspondence from five (5) OPP subscribers to PLN the magazine who informed plaintiffs that they never received their subscriptions. Plaintiffs received no notice from the defendants regarding the failure to deliver these subscriptions. Plaintiffs also never received a return of the magazines.

35. Plaintiffs also mailed thirty-five (35) copies of the soft-cover book “Protecting Your Health and Safety” to subscribers in the Orleans Parish Prison. Eight (8) copies of this book were returned to plaintiffs. None of them had a Mail Return Form enclosed. The outside of the packages containing the books were variously marked as follows:

1. “Return to Sender” stamped.
2. “Legal”, “Refused by Warden”, and CLUS6-03, handwritten. “Return to Sender” stamped.
3. “Refused by Warden”, handwritten.
4. “Return to Sender” stamped. CLU N602 handwritten.
5. “Refused by Warden” and CLUS6-03 handwritten. “Return to Sender” stamped.

6. "Refused by Warden" and TP5N(?) handwritten. "Return to Sender" stamped.

7. "Return to Sender" stamped. "See enclosed" with arrow, handwritten.

8. HODS7-01 and what appears to be the prisoner's folder number are handwritten. "Return to Sender" stamped.

For those marked "Refused by Warden", the name of the Warden(s) refusing the publication was not provided nor were any reasons given for the censorship and exclusion of the book. No notice of any opportunity or procedure for review or appeal of these decisions was provided to plaintiffs.

36. On Sept 15, 2010 a copy of "Protecting Health and Safety" was sent by plaintiffs, via U.S. mail, postage prepaid to a PLN subscriber at OPP. That copy of the book was returned to plaintiffs in Oct., 2010 in the original packaging. A "Mail Return Form" was enclosed, with the category regarding returns of books, magazines, etc. checked off. In addition, there was a handwritten notation stating "Anything prison related." The identity or position of the individual(s) who filled out the form was not provided. No notice of any opportunity or procedure for review or appeal of this decision was provided to plaintiffs.

37. In addition to those eight (8) books which were returned to plaintiffs, plaintiffs have received correspondence from another four (4) subscribers at OPP advising that they never received their copies of the book. The books sent to those 4 subscribers were never returned to plaintiffs. Plaintiff received no notice from the defendants of the failure to deliver these books. Plaintiffs return address was furnished on all magazines and book packages which were mailed to OPP subscribers.

38. One PLN subscriber in custody of the defendants reported receiving, “brochures, ‘Prison Legal News’ booklet and the book on ‘Protecting Your Health and Safety’”. However, the December 2010 issue of PLN the magazine addressed to that same subscriber was censored and excluded and returned to plaintiffs with no explanation and no Mail Return Form.

39. On information and belief, defendants are not making individualized determinations about the content of each publication before censoring and excluding them, in violation of clearly established First Amendment law.

40. In addition, the censorship and exclusion of these publications by defendants is arbitrary and random and void of any constitutionally valid standards or criteria.

41. The defendants’ written policy that allows censorship and exclusion of books protected by the 1st Amendment on the grounds of being “unacceptable”, is void for vagueness and overbroad.

42. The contents of PLN the magazine and “Protecting Your Health and Safety” are protected speech and expression and these publications have been unlawfully censored and excluded by defendants.

43. Plaintiffs have not been provided with adequate notice regarding the censorship and exclusion of their magazine and books nor have plaintiffs been provided with a meaningful opportunity to be heard or to contest the decisions of the defendants which prevent individuals in custody at the Orleans Parish Prison from receiving the plaintiffs’ publications or the books plaintiffs distribute.

44. Defendants’ policy and practice fails to provide plaintiffs with any alternative means of exercising plaintiffs’ rights to free speech and expression in distributing plaintiffs’

publications and exchanging information with their readership, customers and supporters of otherwise legal reading materials. Neither PLN the monthly magazine or any of the books which plaintiffs distribute, are available through the Orleans Parish Prison commissary.

45. Accommodation of the free speech, free expression and due process of rights of plaintiffs with respect to materials protected by the First and Fourteenth Amendments to the U.S. Constitution, will not have any significant impact on the operations and security of the Orleans Parish Prison.

46. Readily available alternatives exist to defendants' current policies and practices which could easily meet any legitimate or significant interests of defendants without sacrificing the free speech and expression and due process of rights of plaintiffs, as well as other publishers and distributors of books and materials protected by the First Amendment to persons in the custody of the defendants.

47. Defendants know, should have known or must have known that their policies and practices were unconstitutional and violated plaintiffs rights to free speech, expression and due process.

48. Defendants' actions, as described herein, were done willfully, wantonly, maliciously and/or with reckless disregard.

49. Due to the defendants' actions as described herein, the plaintiffs have suffered damages, including violation of the plaintiffs' constitutional rights, including the right to disseminate plaintiffs' message, loss of potential subscribers, customers, correspondents and supporters, diversion of resources, loss of reputation, and other damages to be shown at trial.

50. Due to the defendants' actions as described herein, the plaintiffs have suffered and

will continue to suffer irreparable harm for which there is no adequate remedy at law.

Cause of Action I

Freedom of Speech and Expression

51. Plaintiffs re-allege and incorporate paragraphs 1 through 50 herein.

52. Defendants' policy and practice of arbitrary and unlawful exclusion of "Prison Legal News" the magazine and books and written materials distributed by plaintiffs, violates plaintiffs' rights of free speech and expression secured by the First and Fourteenth Amendments to the U.S. Constitution.

53. Plaintiffs have a constitutionally protected liberty interest in communicating with incarcerated individuals. This right is clearly established under existing case law.

54. The defendants' failure to establish constitutionally valid standards to govern the decision-making of facility wardens relative to censorship of publications sent on request via U.S. mail to prisoners in custody of the defendants, permits impermissible viewpoint discrimination and the rejection of reading materials for reasons unrelated to any legitimate penological interest, in violation of the 1st and 14th Amendments to the U.S. Constitution.

55. Defendants' policies and practices do not further any legitimate penological interest.

Cause of Action II

Due Process of Law

56. Plaintiffs re-allege and incorporate paragraphs 1 through 50 herein.

57. Defendants' policy and practice regarding rejection of publications protected by the 1st and 14th Amendments to the U.S. Constitution and published and distributed by plaintiffs,

fails to provide adequate notice and an opportunity to be heard, in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. This right is clearly established under existing case law.

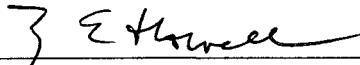
58. Defendants' failure to consistently provide plaintiffs with adequate notice and an opportunity to be heard that their publications were being rejected from distribution to their subscribers does not further any legitimate penological interest.

Prayer for Relief

THEREFORE, plaintiffs request that the Court:

1. Declare that the rights of the plaintiffs were violated by the defendants and that defendants policies and practices are unconstitutional;
2. Award compensatory and punitive damages against the defendants;
3. Grant declaratory and injunctive relief;
4. Grant reasonable attorneys' fees, litigation expenses and court costs pursuant to 42 U.S.C. Section 1988; and
5. Grant all other and further relief as appears reasonable and just, to which plaintiffs may be entitled.

Respectfully submitted,



Mary E. Howell, LSBA#7030
Attorney at Law
316 S. Dorgenois Street
New Orleans, LA 70119
(504) 822-4455
Trial Attorney

Elizabeth C. Cumming, LSBA#31685
Attorney at Law
316 S. Dorgenois Street
New Orleans, LA 70119
(504) 822-4455

John Adcock, LSBA#30372
Attorney at Law
P.O. BOX 750621
New Orleans, LA 70175
(504) 233-3125

ATTORNEYS FOR PLAINTIFFS

PLNGusman.Complaint09Sept11final