

DISTRICT COURT, NINETEENTH JUDICIAL DISTRICT

Court Address: Weld County Courthouse
901 9th Ave.
Greeley, CO 80631

**In re Search of Amalia's Translation and Tax Service;
and**

Amalia Cerrillo,

Luis Noriega, on behalf of himself and as class
representative,

John Doe, on behalf of himself and as class representative,

Frank Doe, on behalf of himself and as class representative,

Robert Doe, on behalf of himself and as class representative,

Plaintiffs,

v.

Kenneth R. Buck, in his official capacity as District Attorney
for the Nineteenth Judicial District;

John Cooke, in his official capacity as Weld County Sheriff,

Defendants.

Attorneys for Plaintiffs:

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In cooperation with the ACLU Foundation of Colorado

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Case No. 2009CV100

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**PLAINTIFFS' MOTION TO CERTIFY CLASS AND
REQUEST FOR EXPEDITED BRIEFING**

C.R.C.P. 121 § 1-15(8) Certification: Plaintiffs have been unable to confer with opposing counsel because this motion is filed in connection with Plaintiffs' Complaint, and thus Defendants' counsel has not yet entered an appearance. As soon as practicable, Plaintiffs' counsel will confer with Defendants' counsel regarding the relief sought in this motion. After conferral, Plaintiffs' counsel will file a separate certificate advising the Court of Defendants' position regarding the relief sought by the Plaintiffs in this motion.

INTRODUCTION

1. Plaintiffs Luis Noriega, John Doe, Frank Doe and Robert Doe (the "Client Plaintiffs") are clients of Plaintiff Amalia Cerrillo, a tax preparer whose client files were seized during an illegal search of her office on October 17, 2008. *See* Affidavit of Luis Noriega, attached as **Exhibit A**.¹

¹ John Doe, Frank Doe, and Robert Doe (the "Doe Plaintiffs") request leave of the Court to file affidavits in support of this Motion to Certify Class and Request for Expedited Briefing under pseudonym. Alternatively, if the Court directs, the Doe Plaintiffs can submit affidavits signed under their actual names to the Court for in camera review and/or under seal, subject to the protections and procedures of C.R.C.P. 121 § 1-5 and C.R.C.P. 26.

2. The Client Plaintiffs seek to represent a class of approximately 4,900 similarly-situated clients of Ms. Cerrillo. Pursuant to C.R.C.P. 23(b)(2), the Client Plaintiffs move for an order certifying this proceeding as a class action and naming them as representatives of a class (the "Client Class"), defined as follows:

All persons listed as taxpayers on any files containing tax returns or related information that Defendants seized during the search and seizure at Amalia's Translation and Tax Service on October 17, 2008, except for Servando Trejo and also excluding from the class any person who, as of the date Plaintiffs' Motion for Class Certification is filed, has already been charged or is the subject of an outstanding arrest warrant resulting from the Operations Number Games investigation.

3. The Client Plaintiffs and the Client Class members were subjected to an unlawful search and seizure and an unlawful invasion of their right of privacy. Defendants continue to retain copies of the illegally-seized confidential information. The Client Plaintiffs and the Client Class members are suffering irreparable injury and an ongoing violation of their right of privacy. The Client Plaintiffs seek injunctive and declaratory relief – but not damages – on behalf of the Client Class.

4. Plaintiffs request that the Court order expedited briefing on the issue of class certification so that this issue can be resolved at a hearing on PLAINTIFF'S MOTION FOR RETURN OF PROPERTY PURSUANT TO COLO.R.CRIM.P. 41(E) AND MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION.

ARGUMENT

I. APPLICABLE PRINCIPLES OF CLASS CERTIFICATION.

5. Given the similarities between C.R.C.P. 23 and the Federal Rule, Colorado courts look to federal law for guidance in interpreting and applying the class certification rule. *Goebel v. Colo. Dep't of Insts.*, 764 P.2d 785, 794 n.12 (Colo. 1988).

6. Class certification requires the satisfaction of Rule 23(a)'s four threshold requirements. If those requirements are met, the court then determines whether the action falls within one of three categories of suits set forth in Rule 23(b). *State v. Buckley Powder Co.*, 945 P.2d 841, 844 (Colo.1997); *Mountain States Tel. & Tel. Co. v. Dist. Court*, 778 P.2d 667, 671 (Colo.1989).

7. Class certification is a procedural issue, not a merits-based issue. *LaBrenz v. American Family Mutual Ins. Co.*, 181 P.3d 328, 334 (Colo. App. 2007) ("court does not inquire into the merits of the lawsuit" for Rule 23 certification purposes), *cert denied* (2008). The court's inquiry is limited to determining whether the proposed class satisfies the requirements of Rule 23. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974); *Anderson v. City of*

Albuquerque, 690 F.2d 796, 799 (10th Cir. 1982). In conducting the inquiry, the court must take the substantive allegations of the complaint as true. See *LaBrenz*, 181 P.3d at 334; *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999). Any doubt regarding the propriety of class certification should be resolved in favor of certification, as the decision is subject to later modification. C.R.C.P. 23(c)(1); *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968).

II. THE REQUIREMENTS OF RULE 23(A) ARE SATISFIED IN THIS CASE.

8. Class certification requires satisfaction of the following requirements: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. C.R.C.P. 23(a). All four requirements of Rule 23(a) are satisfied in this case.

A. Impracticability of Joinder – Rule 23(a)(1).

9. Rule 23(a)(1) requires that “the class [be] so numerous that joinder of all members is impracticable.” Here, Defendants seized the tax returns of approximately 4,900 of Ms. Cerillo’s clients. Defendants copied an unknown number of the paper files and also copied Ms. Cerillo’s electronic files stored on the hard drive of her computer. Defendants retain copies of the tax return information of all members of the Client Class. Thus, Rule 23(a)(1)’s numerosity requirement is satisfied. See *Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 436 (10th Cir. 1978) (class actions are “viable in instances where as few as 17 to 20 persons are identified as the class”); *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 276 (10th Cir. 1977) (error to deny class certification on numerosity grounds where class consisted of between 41 and 46 persons).

B. Commonality – Rule 23(a)(2).

10. To satisfy Rule 23(a)(2)’s commonality requirement, plaintiffs need only show that a single issue of law or fact is common to the class. *J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1288 (10th Cir. 1999); see also *Anderson*, 222 F.R.D. at 537 (finding commonality requirement satisfied based on two common questions of fact). For that reason, the commonality requirement is often “easily met.” 1 Herbert B. Newberg, *Newberg on Class Actions* § 3.10, at 274 (4th ed. 2002) (“Newberg”).

11. Here, all factual issues regarding the Affidavit for Search Warrant, the search warrant, and the execution of the search and seizure are common to the entire Client Class.

12. Additionally, numerous questions of law are common to the Client Class including: (1) whether the plaintiffs have a reasonable expectation of privacy, protected by Article II, Section 7 of the Colorado Constitution and/or the Fourth Amendment to the United States Constitution, in the confidential tax-related information maintained by their tax preparer;

(2) whether the search warrant satisfied the particularity requirement; (3) whether the search violated the reasonableness requirement under Article II, Section 7 and/or the Fourth Amendment; (4) whether the search warrant failed to comply with Colorado statutory requirements and C.R.Crim.P. 41; (5) whether the search and seizure violated the plaintiffs' constitutional right of privacy; (6) whether the Defendants could have obtained the information they sought through means that were less intrusive; and (7) whether the customers whose confidential information is retained by the Defendants are suffering irreparable injury.

13. In *Johns v. DeLeonardis*, 145 F.R.D. 480 (N.D.Ill. 1992), a federal district court certified a class of dozens of Gypsies who had allegedly been the subject of an illegal police search at a meeting of the Chicago Gypsy Counsel. There, the court held that “[w]here the defendant engages in a single course of conduct that results in injury to the class as a whole, a common core of operative facts is usually present, and Rule 23(a)(2) is satisfied.” *Id.* at 483. The same reasoning applies to this case, where all the Plaintiffs were the subject of a single course of conduct—the unconstitutional seizure, copying, and continued retention of their confidential information by the Defendants. Thus, Rule 23(a)(2)'s commonality requirement is satisfied.

C. Typicality—Rule 23(a)(3).

14. Rule 23(a)(3) requires that “the claims or defenses of the representative parties [be] typical of the claims or defenses of the class.” A class representative's claim is typical if it “arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir.1983) (quoting Herbert Newberg, *Class Actions* ¶ 1115(b) at 185 (1977)).

15. The typicality inquiry is intended to assess whether the action can be efficiently maintained as a class action and whether the named plaintiffs have incentives that align with those of absent class members so as to assure that the absent class members' interests will be fairly represented. *Baby Neal v. Casey*, 43 F.3d 48, 57 (3d Cir.1994) (citations omitted). The typicality requirement is usually met when the same unlawful conduct was directed at or affected both the representative and the class to be represented, irrespective of some variation in fact patterns that underlie individual claims. *Benzing v. Farmers Insurance Exchange*, 179 P.3d 103, 111 (Colo. App. 2007).

16. In this case, the claims asserted by the Client Plaintiffs coincide precisely with the claims asserted on behalf of the proposed Client Class. The Client Plaintiffs named as class representatives allege that they suffered an illegal search and seizure and a violation of their right of privacy as a result of the illegal search. They further allege that Defendants' continued retention of copies of the illegally-seized materials constitutes an ongoing violation of their right of privacy for which they seek a declaratory judgment and interim and permanent injunctive relief. The Client Plaintiffs' claims are therefore typical of the claims of the class as a whole.

17. In this case, the claims of the class representatives arise from the same event and same course of conduct as the claims of the class members. As the court explained in *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988), the key to meeting the typicality requirement is that “the claims of the class representatives and class members are based on the same legal or remedial theory.” That is precisely the case here. The claims of the class representatives are based on the same legal and remedial theory as the claims of the class members. Accordingly, Rule 23(a)(3)'s typicality requirement is met.

D. Adequacy of Representation – Rule 23(a)(4).

18. Adequacy of representation involves two inquiries: “(1) do the named plaintiffs and their counsel have any conflicts of interest with other class members and (2) will the named plaintiffs and their counsel prosecute the action vigorously on behalf of the class?” *Rutter & Willbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1187-88 (10th Cir. 2002). These criteria are satisfied in this case. The Client Plaintiffs do not have any conflicts of interests with the absent members of the proposed class. As to the effectiveness of counsel, Class Plaintiffs are represented by attorneys associated with the ACLU of Colorado who are experienced in civil rights and class action litigation.

III. CLASS CERTIFICATION IS APPROPRIATE PURSUANT TO C.R.C.P. 23(b)(2).

19. Certification is appropriate pursuant to C.R.C.P. 23(b)(2) when “[t]he party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” C.R.C.P. 23(b)(2).

20. It is well established that “civil rights actions are the paradigmatic 23(b)(2) class suits, for they seek classwide structural relief that would clearly redound equally to the benefit of each class member.” *Marcera v. Chinlund*, 595 F.2d 1231, 1240 (2d Cir. 1979) (allowing class certification in suit seeking visitation for jail prisoners), *vacated on other grounds*, 442 U.S. 915 (1979). More specifically, “[t]he writers of Rule 23 intended that subsection (b)(2) foster institutional reform by facilitating suits that challenge widespread rights violations of people who are individually unable to vindicate their own rights.” *Baby Neal v. Casey*, 43 F.3d 48, 64 (3d Cir. 1994).

21. Indeed, the leading treatise on class actions explains that Rule 23(b)(2) was drafted with precisely this kind of civil rights case in mind:

Rule 23(b)(2) was drafted specifically to facilitate relief in civil rights suits. Most class actions in the constitutional and civil rights areas seek primarily declaratory and injunctive relief on behalf of the class and therefore readily satisfy Rule 23(b)(2) class action criteria.

8 Newberg, § 25.20, at 550.

22. Here, the Complaint indisputably challenges conduct that applies equally to the entire Client Class. This is, therefore, a case in which the Defendants have “acted or refused to act on grounds generally applicable to the class,” and the pursuit of “final injunctive relief or corresponding declaratory relief with respect to the class as a whole” is appropriate. C.R.C.P. 23(b)(2).

CONCLUSION

23. Plaintiffs have satisfied all of the criteria for class certification under Rule 23. Accordingly, Plaintiffs respectfully request that the Court certify the proposed Client Class and allow the Client Plaintiffs to proceed as class representatives.

DATED: January 27, 2009.

JACOBS CHASE FRICK KLEINKOPF & KELLEY, LLC

This document has been filed via Lexis/Nexis File & Serve in accordance with C.R.C.P. 121 and the original document and signature are maintained on file.

s/ Elizabeth L. Harris

N. Reid Neureiter, #29747

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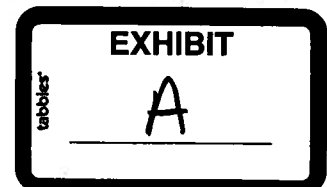
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DISTRICT COURT, NINETEENTH JUDICIAL DISTRICT Weld County Courthouse 901 9th Ave Greeley CO 80631	▲ COURT USE ONLY ▲
In re Search of Amalia's Translation and Tax Service	Case No. Courtroom
AFFIDAVIT OF LUIS D. NORIEGA	

1. My name is Luis Noriega.
2. I am 36 years old.
3. I have lived in Greeley, Colorado since 1992.
4. I live with my two children ages 8 and 10.
5. I have had my taxes prepared by Amalia Cerrillo since 2000.
6. I have filed federal and state taxes using a social security number. The tax returns also show social security numbers for my children.
7. My tax file contains private and confidential information. I have always understood that my confidential information would remain private.
8. I work at car salesman at an auto dealership. I am familiar with the importance of client confidentiality because of my work at the dealership. It is not permissible to disclose a customer's information, beyond the fact that they purchased a car. It is not allowed to disclose, even to a customer's relatives, the model purchased, the cost of the vehicle, the amount of payments, the purchaser's income, or interest on payments. If a name of person requesting information is not on the account, you cannot disclose the information.
9. I understand that when Amalia Cerrillo's office was searched, my tax records were among the files that were seized. It is my understanding that the officers seized paper files with my confidential tax-related information and also took confidential information about me that was stored on Amalia's computer. I understand that the law enforcement authorities continue to retain copies of my tax records and related information that were taken from Amalia's.



10. I believe my right of privacy has been violated by the search, seizure, and continued retention of electronic versions of my tax records by Weld County law enforcement.
11. I want Weld County to return or destroy all of my private information that they took from Amalia's. My privacy rights are being violated as long as my private and confidential information is in the hands of Weld County law enforcement.
12. My tax file contains private and confidential information, including information about my children, and custody and child support information. Other information in my tax files relates to rental property expenses, and medical expenses due to a traffic accident in which I was severely injured. Also included in the file is business expense information. All of this information is private, and no one has the right to probe through it.
13. I also believe that not only were my rights violated, but also the rights of other people like me that had their confidential information taken by the Sheriff.
14. My attorneys explained that the Court might give me permission to represent not just my own rights, but also the rights of others who had their privacy violated, if I am named as a "class representative."
15. I would like to represent the rights of everyone who had their confidential tax information seized, and I am willing to be a class representative. I believe that Weld County law enforcement should return or destroy my confidential information, and also return or destroy the confidential information of anyone else like me.
16. I am aware that another tax service competing with Amalia's Translation and Tax Services has been advertising on local radio station El Tigre.
17. In the advertisements running since January 16, 2009, the competitor to Amalia's business states that given the recent events related to seizure of tax documents, if people want to keep their tax information safe, they should go to Amalia's competitor instead of Amalia's.

FURTHER AFFIANT SAYETH NOT.

I swear/affirm under oath that I have read the foregoing Affidavit and that the statements set forth therein are true and correct to the best of my knowledge.

LUIS D. NORIEGA:

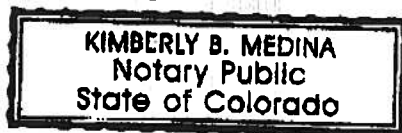
STATE OF COLORADO

CITY AND COUNTY OF Lanier

)
) **SS.**
)

On JANUARY 27, 2009, LUIS D. NORIEGA, the Affiant, personally appeared before me, and personally known to me or proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same.

Witness my hand and official seal.



My Commission Expires August 08, 2011

Notary Public

My commission expires: 8/8/11