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.**	**▲COURT USE ONLY▲** Case No. 2009CV100 Div. 1

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REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RETURN OF PROPERTY PURSUANT TO COLO.R.CRIM.P. 41(E) AND MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

INTRODUCTION

On October 17, 2008, deputies from the Weld County Sheriff's Department seized and examined nearly 5,000 confidential tax files kept in the office of tax preparer Amalia Cerrillo ("Cerrillo"). Plaintiffs filed this action seeking an injunction to stop the continuing violation of their constitutional rights.

Defendants present a cacophony of tangential challenges in their response, complaining variously about the format of the hearing; the precise nature of the injunctive relief sought; the timing of the action; and the Plaintiffs' supposed ill-fitting analogies. But this case raises a

single determinative issue: was the search and seizure of the 5,000 tax files reasonable under all of the circumstances, or did the Defendants' conduct violate Plaintiffs' constitutional rights?

The Fourth Amendment to the United States Constitution and Article II, Section 7 of the Colorado Constitution prohibit unreasonable searches and seizures. That the officers have a warrant to search premises does not in all cases render a search conducted pursuant to that warrant reasonable. To determine whether a search and seizure satisfies the independent reasonableness requirement, the court must balance the extent of the intrusion on the individuals' privacy interests against the importance of the governmental interest alleged to justify the intrusion.

Here, the government invaded the privacy of nearly 5,000 separate individuals, seizing and searching documents that reveal the most intimate details of a taxpayer's personal and financial life. The documents were retained by a tax preparer operating under a duty to maintain the confidentiality of the files. The government had no particularized cause to believe evidence of a crime would be found in one file as opposed to any of the other 5,000 individual files. Yet that is precisely what is needed to legitimate a search – probable cause to believe that evidence of a crime will be found in a *particular* place, not in one of 5,000 places, and especially not in one of 5,000 places in which 5,000 separate individuals have their own expectations of privacy.

Weighed against that substantial intrusion is a minimal governmental interest. The scope of authority sought by the government here is extraordinarily broad: the ability to seize and examine potentially hundreds of thousands of tax return files from tax preparation services across Colorado upon a mere acknowledgement that the company has at some point filed taxes for undocumented workers using an Individual Tax Identification Number ("ITIN"). And yet the

governmental interest alleged – enforcement of identity theft laws against illegal immigrants – is, under these particular circumstances, necessarily limited.

Through a series of statutes and regulations, Congress has created a comprehensive scheme to encourage all wage earners, regardless of immigration status, to file tax returns. The scheme manages the tension between federal law enforcement agencies' need to enforce immigration laws and the IRS's need to promote confidence in, and compliance with, the voluntary tax assessment system. Confidentiality of tax return information is the lynchpin of the scheme. The enactment of broad confidentiality rules reflects Congress's belief that not only do taxpayers have a reasonable expectation of privacy in the personal information they are required to turn over to the IRS, but that such privacy protection is also an important component of continued voluntary compliance with the tax laws. No one disputes that it would be more efficient for the IRS to simply disclose evidence of immigration violations to the Department of Homeland Security or other law enforcement agencies; but federal law prohibits that disclosure.

Thus, Congress has already determined that the relative government interest in using taxpayer information to investigate non-tax related crimes must give way to taxpayers' and the IRS's interest in maintaining confidentiality of tax return information and use of the information only for tax-related purposes. In light of this comprehensive scheme, and the Congressional choice it represents, Defendants' seizure and search of 5,000 taxpayer files cannot be justified based on a compelling governmental interest in law enforcement. Indeed, Defendants' conduct interferes with the scheme and upsets the balance of interests struck by Congress.

The seizure and search in this case was unreasonable as a matter of federal and state constitutional law. A preliminary injunction should issue to halt the Defendants' continuing constitutional violations.

ARGUMENT

I. THE SEARCH OF 5,000 TAXPAYER FILES WAS UNREASONABLE UNDER THE TOTALITY OF THE CIRCUMSTANCES.

A. Reasonableness Is An Independent Requirement in Determining The Constitutionality of A Search or Seizure.

Reasonableness is an independent requirement under federal and state constitutional law. A search could be unreasonable, though conducted pursuant to an otherwise valid warrant, by "intruding on personal privacy to an extent disproportionate to the likely benefits from obtaining fuller compliance with the law." *United States v. Torres*, 751 F.2d 875, 883 (7th Cir. 1984). In *Wilson v. Arkansas*, 514 U.S. 927, 929-30 (1995), for example, officers conducted a search of a home pursuant to a search warrant based on probable cause. The search was nonetheless unreasonable, the Supreme Court ruled, because the officers failed to knock and announce prior to entering the home. Similarly, the Court in *Tennessee v. Garner*, 471 U.S. 1, 8 (1985), ruled that although officers had probable cause to arrest a suspect, the seizure was unreasonable because it was effectuated through the use of deadly force.

Courts analyze the reasonableness of a search or seizure by "assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). The question is whether the totality of the circumstances justifies a particular search or seizure. *Garner*, 471 U.S. at 9.

B. The Search Intruded on Plaintiffs' Expectations of Privacy in Their Tax Return Information.

A tax return and related information reveal the "skeletal outline of a taxpayer's personal and financial life." *Stone v. State Farm Mutual Automobile Ins. Co.*, 185 P.3d 150, 156 (Colo. 2008); *see also United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1991). Tax returns are confidential and taxpayers have a reasonable expectation of privacy in the tax return information furnished to the IRS. *Stone*, 185 P.3d at 156; *Report to Congress on Scope and Use of Taxpayer Confidentiality and Disclosure Provisions*, Office of Tax Policy, Department of Treasury at 4, 21-22, 33 (October 2000) ("*Report on Taxpayer Confidentiality*") (available at http://treas.gov/offices/tax-policy/library/confide.pdf).

Defendants' argument that disclosure of tax returns to the IRS somehow deprives the taxpayer of a reasonable expectation of privacy in the information misses the point. As part of the comprehensive federal scheme, the IRS may not disclose any tax return information. *See* 26 U.S.C. §§ 6103(a), 7213. Thus, when "citizens prepare[] their tax returns, they prepare[] them for the IRS, and no one else." *Report on Taxpayer Confidentiality* at 22. Taxpayers who use the services of a tax preparer have no lesser expectation that their tax return information will be kept private; a tax preparer is required under federal law to maintain the confidentiality of tax records. *See* 26 U.S.C. §§ 6713, 7216. And here, Cerrillo reassured her clients that that she would zealously guard the confidentiality of their tax return information.

Nor is it dispositive that federal courts have failed in some situations to recognize a taxpayer's expectation of privacy in his tax return information. Although the Colorado and United States Constitutions are generally co-extensive with respect to the validity of searches and seizures, *People v. Rodriguez*, 945 P.2d 1351 (Colo. 1997), the Colorado Supreme Court has

held that, in certain circumstances, Article II, § 7 of the Colorado Constitution affords broader protections than the Fourth Amendment. *See, e.g., People v. Corr*, 682 P.2d 20 (Colo. 1984) (reasonable expectation of privacy in telephone toll records); *People v. Sporleder*, 666 P.2d 135 (Colo. 1983) (reasonable expectation of privacy in telephone pen register); *Charnes v. DiGiacomo*, 612 P.2d 1117 (Colo. 1980) (reasonable expectation of privacy in bank records).

C. The Warrant Did Not Describe With Particularity The Place Where Evidence of A Crime Would Be Found.

A command of both the Fourth Amendment and Article II, § 7 is that no warrants shall issue except those particularly describing the place to be searched. Thus, a search warrant must be supported by probable cause to believe that evidence of a crime will be found in the particular place the warrant authorizes to be searched. *United States v. Grubbs*, 547 U.S. 90, 95 (2006).

Defendants contend the warrant was sufficiently particular because it described with some specificity the documents to be seized: all tax returns for 2006 and 2007 in which the ITIN name and number did not match the wage earnings documentation. Setting aside for the moment the fact that the portion of the warrant authorizing seizure of electronic documents contained no such limitation, the issue is not the particularity of the documents to be seized but rather the lack of probable cause to believe evidence would be found in any particular place.

The particularity requirement and the probable cause requirement go hand-in-hand: difficulty in pinpointing the precise place to be searched demonstrates a lack of probable cause to believe that the described items will be found in any one particular place, as required under the federal and state constitutions. *See, e.g., United States v. Alberta*, 721 F.2d 636 (8th Cir. 1983) (warrant authorizing search of "certain large green garbage bags" not sufficient description of where evidence might be found because officers could have searched anywhere on premises,

transforming warrant into general warrant). At some point, the search begins to look like a fishing expedition – the general rummaging the Fourth Amendment was designed to prevent.

Here, the Defendants claimed to have probable cause to believe they would find evidence of a crime somewhere in the 5,000 confidential files maintained in Cerrillo's office. But aside from Servando Trejo's file, none of the other approximately 4,999 files could be identified as the place where evidence of a crime was likely to be found. The general search that ensued was not merely a "search of a single business that contains evidence of numerous crimes," as the Defendants cursorily contend. It was not just Cerrillo's property, after all, that the officers rummaged through in an attempt to nail down the particular place where evidence might be found. Instead, the government conducted 5,000 separate searches and invaded 5,000 separate individuals' expectations of privacy in an attempt to uncover evidence of a crime.

Another analogy: suppose officers knew that drugs were being stored in a post office box at a UPS store. Could officers open all 5,000 post office boxes on the authority of a single warrant to search the business for drugs? Even though the officers had probable cause to believe drugs would be found in the UPS store, the search is still unreasonable because there is insufficient probable cause to believe the drugs will be found in any one post office box *and* the search involves intrusion into areas in which thousands of separate individuals have expectations of privacy. *See United States v. Di Re*, 332 U.S. 581, 587 (probable cause to search car for evidence of crime did not authorize search of passenger); *Ybarra v. Illinois*, 444 U.S. 85, 94-96 (1979) (search warrant for bar did not authorize search of patrons); *United States v. Robertson*, 833 F.2d 777, 783-84 (9th Cir. 1987) (search warrant for defendant's premises did not authorize search of backpack belonging to different person); *United States v. Sporleder*, 635 F.2d 809, 813

(10th Cir. 1980) (search warrant for premises did not authorize search for evidence in defendant's pockets); see also *Chandler v. Miller*, 520 U.S. 305, 308 (1997) (holding drug testing statute unconstitutional because it allowed searches without particularized suspicion).

That officers here were searching for papers is of no constitutional significance. The particularity requirement applies with equal force to a search for documentary evidence. "[A] warrant authorizing the search for a person's papers poses significant risks to privacy." *People v. Hearty*, 644 P.2d 302, 312 (Colo. 1982). Thus, officers must "take care to assure that [such searches] are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Id*. at 312-13 (quoting *Andresen v. Maryland*, 427 U.S. 463, 482 n. 11 (1976) (internal quotation marks omitted)).

D. Upholding This Search Grants The Government Near Limitless Authority to Examine All Citizens' Tax Return Information.

The scope of authority sought by the Defendants is extraordinarily broad. There is no reason to think that the Defendants (and similarly-situated state officials across Colorado) will be satisfied with uncovering evidence of identity theft at one tax preparer's office in Greeley, Colorado. Instead, there is a strong likelihood that, should the search of these 5,000 tax files be upheld, the Defendants will conduct a similar search of H&R Block, Liberty Tax Service, Jackson Hewitt Tax Service and any other company providing tax preparation services in Weld County. Evidence at the hearing will establish that all tax preparers are encouraged by the IRS to prepare tax returns using an ITIN for undocumented workers who are ineligible for a SSN. And undocumented workers are required by law to file tax returns.

Under the Defendants' theory, a search warrant can be obtained merely on the basis of a tip from a taxpayer or an acknowledgement by a company's employee that the company has, in

the last several years, prepared a tax return using an ITIN for an undocumented worker. Armed with the warrant, state deputies can then sift through the tens of thousands of tax return files maintained in Weld County tax preparation offices in an attempt to uncover mismatching ITINs and social security numbers. This kind of full-scale invasion of privacy rights should not be condoned.

E. The Governmental Interest is Minimal And Does Not Justify Intruding On 5,000 Taxpayers' Expectations of Privacy.

Every individual who earns wages in the United States, regardless of immigration status, is required to file a tax return with the IRS. *See Zamora-Quezada v. Commissioner of Internal Revenue*, 1997 WL 663164 (U.S. Tax Ct. Oct. 27, 1997). Individuals who are not eligible to obtain a social security number ("SSN") – including undocumented aliens working without authorization in the United States – can apply for an ITIN to be used exclusively for tax filing purposes. *Understanding Your IRS: Individual Taxpayer Identification Number ITIN*, Department of Treasury, Internal Revenue Service, Publication 1915 at 6-7, 9 (Rev. 1-2009) (available at www.irs.gov). The ITIN program has been successful in bringing millions of taxpayers into the tax system. Letter from IRS Deputy Commissioner Mark E. Matthews to Samuel C. Rock, Esq., April 9, 2004 ("Matthews Letter"), attached as **Exhibit 1**, at 1.

Taxpayers filing with an ITIN frequently have a mismatching SSN which appears on the W-2 or other wage earning forms. *See* Testimony of IRS Commissioner Mark W. Everson, Public Hearing Before the Subcommittee on Social Security and Subcommittee on Ways and Means, U.S. House of Representatives, 109th Congress, 2d Session, Feb. 6, 2006 ("Everson Testimony"), attached as **Exhibit 2**, at 12. Although the mismatched ITIN and SSN might be evidence that a wage earner is not authorized to work in the United States, the IRS is broadly

restricted under 26 U.S.C. § 6103 from disclosing taxpayer information to third parties, including other government agencies. Matthews Letter at 1-2.

Congress enacted the strict confidentiality requirements of § 6103 based on a recognition that taxpayers reasonably expected their tax information to be kept private and that "if the IRS abused that reasonable expectation of privacy, the loss of public confidence could seriously impair the tax system." *Report on Taxpayer Confidentiality* at 21. *See also United States v. Richey*, 924 F.2d 857, 861 (9th Cir. 1991) (government's interest in preserving confidentiality of tax information two-fold: to ensure compliance with tax laws and to ensure each individual taxpayer's right to privacy). In considering the scope of the confidentiality provision, Congress was particularly sensitive to the issue of sharing information for purposes of prosecuting non-tax crimes. *Id*. at 64. In then end, Congress struck the balance in favor of encouraging compliance with the voluntary tax system by broadly protecting from disclosure the information contained in a taxpayer's files. *Id*. at 22. *See also Church of Scientology of California v. IRS*, 484 U.S. 9, 16 (1987) (one of major purposes of revising § 6103 was to tighten restrictions on use of return information by entities other than IRS).

The IRS continues to resist disclosure of taxpayer information for purposes of enforcing immigration and other non-tax criminal laws. When asked whether enforcement of "immigration or other laws" justified an exception to the presumption of confidentiality under § 6103, then-Commissioner Everson said no: "We believe that any use of confidential taxpayer information for non-tax purposes carries a risk of reducing voluntary compliance with the tax laws, undermining the primary objective of the IRS and reducing the availability and utility of the information sought." Everson Testimony at 70.

The federal scheme implemented through the ITIN program and the confidentiality provisions of § 6103 reflect Congress's intent to encourage voluntary participation in the tax system by maintaining the confidentiality of tax return information, even at the expense of law enforcement interests. Congress has already determined that the government's interest in using tax return information to prosecute non-tax crimes must give way to the competing interest of increasing tax revenue through the encouragement of voluntary compliance – a policy implemented through its protection of the taxpayer's reasonable expectation of privacy in tax return information. Accordingly, the Defendants' interest in prosecuting identity theft does not constitute a compelling interest justifying a search, without particularized probable cause, of confidential tax files. *See Losavio v. Robb*, 579 P.2d 1152, 1157 (Colo. 1978) (quashing, as unreasonable, grand jury subpoena for production of tax returns in context of criminal tax investigation because government could not show compelling interest in the confidential information).

II. THE WARRANT IN THIS CASE AUTHORIZED AN OVERBROAD SEARCH BECAUSE IT FAILED TO DESCRIBE WITH PARTICULARITY THE THINGS TO BE SEIZED.

A warrant must describe not just the particular place where there is probable cause to believe evidence of a crime will be found; the warrant must also describe the particular things to be seized. This particularity requirement makes general searches impossible and prevents the seizure of one thing under a warrant describing another. *Marron v. United States*, 275 U.S. 192, 196 (1927).

Even on its face, without reference to the reasonableness requirement, the search warrant in this case was invalid because it failed to describe with particularity the things to be seized. Defendants assert that the description of the documents in paragraph one of the warrant (all tax

returns filed with an ITIN for tax years 2006 and 2007 in which the ITIN name and number do not match the wage earnings documentation) is sufficiently specific to satisfy the particularity requirement. But that argument ignores the fact that the warrant also authorized a full-scale seizure of all electronic records in Cerrillo's office, with no indication of which documents were covered by the warrant. Defendants' only answer to that deficiency is that the officers, relying on "context," would have known which records to seize.[1] But that gives the officers more discretion than the federal and state constitutions permit.

The particularity requirement exists so that "nothing is left to the discretion of the officer executing the warrant." *Davis v. Gracey*, 111 F.3d 1472, 1478 (10th Cir. 1997). At a minimum, a proper warrant must allow the executing officers to distinguish between items that may and may not be seized, *United States v. Leary*, 846 F.2d 592, 602 (10th Cir. 1988), to prevent seizure of objects under the mistaken assumption that they fall within the magistrate's authorization. Here, it can hardly be said (although Defendants say it) that the warrant describes "as specifically as possible" the electronic records to be seized. There is no description at all of the electronic records to be seized, though the warrant authorizes a search of every computer and electronic storage medium in Cerrillo's office. For that reason, Defendants' reliance on *United States v. Hargus*, 128 F.3d 1358 (10th Cir. 1997), is misplaced. In *Hargus*, the warrant at least described "ten broad categories of records." *Id*. at 1363. Not even that minimal amount of guidance was provided by the warrant in this case.

[1] Defendants also dismiss Plaintiffs' particularity argument on the theory that only a cursory search of the electronic records has been conducted. But the validity of a search warrant under the federal and state constitutions does not turn on the fortuitousness of an officer's timing in examining seized documents – that the officer has apparently not yet undertaken a search as broad as the warrant authorizes does not make the warrant itself any more or less constitutionally permissible.

III. PLAINTIFFS ARE ENTITLED TO INJUNCTIVE RELIEF AS A REMEDY FOR DEFENDANTS' CONTINUING CONSTITUTIONAL VIOLATIONS.

A. Colo.R.Crim.P. 41(e) Does Not Provide An Adequate Remedy At Law.

Defendants contend that the hearing on Plaintiffs' motion challenging the validity of the search and seizure should proceed under Colo.R.Crim.P. 41(e) rather than under C.R.C.P. 65. Rule 41(e), insist the Defendants, provides an adequate remedy at law for the constitutional violations alleged and prevents litigation in a civil case of an issue more properly addressed in the context of a criminal proceeding. Both assertions are wrong.

First, an action under Rule 41(e) for return of property prior to initiation of any civil or criminal proceedings flowing from the seizure of the property is itself an equitable proceeding and thus cannot constitute an adequate remedy at law for C.R.C.P. 65 purposes. *In re Search Warrant for 2045 Franklin, Denver, Colorado*, 709 P.2d 597, 599 (Colo. App. 1985); *see also In re Search of Kitty's East*, 905 F.2d 1367, 1370-71 (10th Cir. 1990) (Rule 41(e) proceeding is equitable in nature and thus movant must show absence of adequate remedy at law).

Second, Plaintiffs seek return of their seized property, not suppression of evidence in a criminal proceeding. By definition, none of the proposed class members have been indicted, arrested, or otherwise charged with any criminal offense related to the Defendants' seizure of the tax files. Plaintiffs do not seek return of files of individuals who are the subject of a criminal prosecution "in esse." *See In re Search Warrant for 2045 Franklin*, 709 P.2d at 599. Thus, the request for injunctive relief is not a circuitous way to obtain relief more appropriately sought in a criminal proceeding. Plaintiffs may properly seek an injunction to restrain further violations of their constitutional rights and to recover their confidential tax records.

B. Plaintiffs' Request for Injunctive Relief Is Not Subject To Heightened Scrutiny.

Defendants claim that heightened scrutiny applies to Plaintiffs' request for injunctive relief because Plaintiffs seek to prevent the enforcement of a criminal statute and to obtain a mandatory, rather than prohibitory, injunction. Defendants have misapprehended the nature of Plaintiffs' action.

Plaintiffs do not seek to prevent enforcement of the state's identity theft statute. This is not an action challenging the constitutionality of a criminal statute or ordinance. *See Rathke v. MacFarlane*, 648 P.2d 648, 653 (Colo. 1982).

Nor do Plaintiffs seek a mandatory injunction. A mandatory injunction compels the doing of some act, whereas a prohibitory injunction forbids the continuation of a course of conduct. 11A Charles Wright and Arthur Miller, *Federal Practice and Procedure*, § 2942 (updated 2008). Here, Plaintiffs seek an injunction to restrain Defendants' continuing constitutional violations. Defendants currently retain the ability to search confidential records of the Plaintiffs and to disclose private information to third parties. An injunction prohibiting further searches and disclosures and requiring destruction of copies of records held by Defendants constitutes a prohibitory injunction. In any case, likely because of the ease with which an injunction can be characterized as mandatory or prohibitory, Colorado courts do not appear to apply different standards of proof to the different types of injunctions. *See Henderson*

v. Romer, 910 P.2d 48, 57 (Colo. App. 1996) (Taubman, J., concurring) ("dichotomy between mandatory and prohibitory injunctions has not always proved viable").[2]

C. Plaintiffs Are Suffering Immediate and Irreparable Injury.

Plaintiffs' action challenges the constitutionality of Defendants' search and seizure. When an alleged deprivation of a constitutional right is involved, no further showing of irreparable injury is necessary. *Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001). Defendants claim that Cerrillo's alleged harm to her business and reputation is the type of harm that can be remedied by money damages, making injunctive relief unnecessary. The Colorado Supreme Court disagrees. *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dist. Court of Denver*, 672 P.2d 1015, 1018 (Colo. 1983). And, there is an immediate threat of harm if the Defendants' unconstitutional conduct is not restrained. Defendants misconstrue this factor as imposing a filing deadline. The question is not how much time has passed from the date of the initial constitutional violation; the question is whether there is an immediate threat of future harm if an injunction does not issue. Here, the harm is continuing.

D. Granting An Injunction Will Serve the Public Interest.

Defendants argue that an injunction will disserve the public interest because of the strong public interest in prosecuting identity theft. No court has ever found a strong public interest in enforcement of laws through unconstitutional means.

[2] In jurisdictions that do apply separate standards, courts determine whether an injunction is mandatory or prohibitory by looking at the substance of the injunction and comparing it to the status quo ante – the last uncontested period preceding the injunction. *Dominion Video Satellite, Inc. v. Echostar Satellite Corp.*, 269 F.3d 1149, 1155 (10th Cir. 2001). Here, the last uncontested period occurred before Defendants' search and seizure, when all of the taxpayer files were retained by the tax preparer.

E. The Balance of Equities Favors Granting Injunctive Relief.

Defendants claim that the balance of equities favors denial of an injunction because class members who did not engage in identity theft suffered only a minimal invasion of their privacy rights. According to Defendants, those Plaintiffs' files were returned within a matter of a few days, uncopied, to the tax preparer. But that is simply inaccurate. As Defendants acknowledge, Defendants seized and continue to hold copies of all of Cerillo's electronic records, including all of the tax files kept in electronic form. In the meantime, the government continues to have access to confidential information to which it has no legal right to possess.

F. Injunctive Relief Will Preserve The Status Quo.

The status quo, for purposes of injunctive relief, is the last uncontested status of the parties before the dispute developed. *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 981 (10th Cir. 2004). Defendants, however, have their own theory – that status quo is determined at the time the action is filed. Consistent with that approach, Defendants argue that at the time Plaintiffs filed this action challenging the constitutionality of the search and seizure, Defendants had already taken possession of Plaintiffs' tax files. Thus, say Defendants, the status quo will be maintained by allowing Defendants to retain possession of the seized documents. Defendants' theory of status quo, however, has not been adopted by any court. Injunctive relief will return the parties to their status prior to the dispute and preserve the status quo.

G. The "Unclean Hands Doctrine" Does Not Preclude Injunctive Relief.

Defendants urge denial of injunctive relief on the ground that Plaintiffs' wrongful conduct bars them from obtaining an equitable remedy. First, thousands of the Plaintiffs whose

confidential tax files were seized and searched did not engage in any wrongful conduct. Second, the "unclean hands" doctrine does not empower a court of equity to deny relief for any and all inequitable conduct on the part of the plaintiff. Instead, "the inequitable conduct must be related to the plaintiff's cause of action." *Worthington v. Anderson*, 386 F.3d 1314, 1320 (10th Cir. 2004). Here, whether any of the Plaintiffs committed identity theft is unrelated to their claim that Defendants' search of Plaintiffs' tax files violated Plaintiffs' constitutional rights. In fact, to the extent any of Plaintiffs' conduct is related to this action, it is the filing of tax returns as required under federal law.

CONCLUSION

Defendants' search and seizure of Plaintiffs' confidential tax return information was an unreasonable search under the Fourth Amendment and Art. II § 7 of the Colorado Constitution and violated Plaintiffs' constitutional right to privacy. Accordingly, this Court should grant a preliminary injunction to restrain Defendants' further constitutional violations.

DATED: February 25, 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.

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CERTIFICATE OF SERVICE

I certify that on February 25, 2009, a true and correct copy of the foregoing **REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR RETURN OF PROPERTY PURSUANT TO COLO.R.CRIM.P. 41(E) AND MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION** was forwarded to the following via Lexis/Nexis File and Serve:

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