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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN DIEGO**

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|-----------------------------|---|------------------------------|
| JOSE VIDRIO, and, |) | |
| DOUGLAS MELTZER |) | Case No.: |
| |) | |
| Plaintiffs, |) | COMPLAINT FOR DAMAGES |
| |) | |
| v. |) | |
| |) | (1) Negligence |
| |) | (2) Outrageous Conduct |
| SCRIPPS HEALTH, d/b/a GREEN |) | (3) Punitive Damages |
| HOSPITAL |) | (4) Medical Monitoring |
| |) | (5) Vicarious Liability |
| Defendant. |) | |

Plaintiff, by and through his attorneys, for his claims against Defendant, alleges as follows:

I. Nature of Case

1. This case involves an indescribable nightmare imposed on a vulnerable group of people—hospital patients undergoing surgery. Defendant employed a long-time drug addict, Rocky Allen, as a surgical technician without adequately conducting a background check, without adequately supervising him, and without putting in place adequate safeguards to protect the patients entrusted to their care. Mr. Allen used his position to take

1 intravenous pain medication intended for surgery patients to satisfy his drug addiction,
2 replaced the syringe full of pain medication with a syringe full of saline solution, and then
3 re-used the needle he used to inject himself, thereby exposing patients to communicable
4 diseases he apparently carried, including HIV and hepatitis B and C. As a result, thousands
5 of unsuspecting and vulnerable patients received letters from Defendant disclosing that
6 they should be tested for HIV and hepatitis. Depending on the outcome of these tests,
7 Plaintiff was left with at least one of three outcomes: (1) he suffered extraordinary anxiety
8 awaiting a negative test result, but was still instructed to continue to get tested; (2) he
9 suffered extraordinary anxiety awaiting a positive test result and now suffers from a
10 diagnosis of HIV and/or hepatitis; and/or (3) he received saline rather than pain medication
11 and suffered extraordinary pain and suffering as a result of not receiving pain medication.

12 **II. Jurisdictional Allegations**

13 2. Jurisdiction is appropriate in this Court because it is not inconsistent with the
14 Constitution of the State of California or of the United States.

15 3. This Court has personal jurisdiction over Defendant because it maintains sufficient
16 minimum contacts with the State of California and has purposefully availed itself of the
17 laws of this State.

18 4. Venue in this district is proper because Defendant Scripps Health's principal place of
19 business is situated in San Diego County.

20 5. This case is not removable to federal court because the Complaint does not raise
21 federal question jurisdiction, Plaintiff is not diverse from Defendant, and no other basis for
22 removal exists.

23 **III. The Parties**

24 **A. Plaintiff.**

25 6. Plaintiff is a natural person who resides in and is a citizen of Florida.
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1 7. Plaintiff Jose Vidrio underwent medical treatment at Scripps Green Hospital between
2 May 9 and June 7, 2013 and received the letter described below, in February 2016,
3 instructing him to be tested for HIV and hepatitis. Plaintiff subsequently discovered that he
4 had been exposed to HIV and Hepatitis as a result of the reckless and negligent acts of the
5 Defendant, which caused Plaintiff to undergo blood testing and extreme emotional distress.
6 Plaintiff also suffered bodily injury as a result of the actions of the Defendant.

7 8. Plaintiff Douglas Meltzer underwent medical treatment at Scripps Green Hospital
8 between May 9 and June 7, 2013 and received the letter described below, in February 2016,
9 warning him that he had been exposed and instructing him to be tested for HIV and
10 Hepatitis. Plaintiff subsequently discovered that he had been exposed to HIV and Hepatitis
11 as a result of the reckless and negligent acts of the Defendant, which caused Plaintiff to
12 undergo blood testing and suffer extreme emotional distress. Plaintiff also suffered bodily
13 injury as a result of the actions of the Defendant.

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15 **B. Defendant.**

16 9. Defendant Scripps Health (“Scripps”), is a California corporation with its principal
17 place of business in San Diego that owns and operates Scripps Green Hospital in La Jolla,
18 employed Rocky Allen as a surgical technician, and treated each of the Plaintiff who were
19 patients of Scripps Green Hospital.

20 **IV. General Allegations**

21 10. Rocky Allen, a former employee of the Defendant, was indicted on felony charges
22 under 18 U.S.C. § 1365(a) of Tampering with a Consumer Product and 21 U.S.C. § 843(a)(3)
23 and (d)(1) for Obtaining a Controlled Substance by Deceit or Subterfuge by a federal grand
24 jury in Denver on February 20, 2016. The Indictment, a copy of which is filed in the United
25 States District Court in the District of Colorado as Document No. “1,” in Case No. 16-cr-67-
26 RM-1 charges:

1 On or about January 22, 2016 in the State and District of Colorado, the
2 defendant, **ROCKY ALLEN**, with reckless disregard for the risk that another
3 person will be placed in danger of bodily injury, and under circumstances
4 manifesting extreme indifference to such risk, tampered and attempted to
5 tamper with a consumer product, to wit: a syringe containing Fentanyl
6 Citrate, that affected interstate commerce, by removing the syringe containing
Fentanyl Citrate and replacing it with a similar syringe containing other
substance(s).

7 11. Rocky Allen engaged in similar reckless actions and conduct between May and June
8 2013 while employed by the Defendant. Defendant failed to conduct a sufficient background
9 check to learn of Mr. Allen's history of on-the-job substance abuse prior to his employment
10 with the Defendant. The substance abuse history of Rocky Allen was easily discoverable
11 based on the fact that he was court-martialed and discharged from the Navy in 2011 for
12 stealing the same drug (Fentanyl) while deployed with an Army unit in Afghanistan. During
13 that court-martial, Rocky Allen pleaded guilty to making a false official statement,
14 wrongfully possessing about 30 vials of Fentanyl, wrongfully possessing a syringe containing
15 Fentanyl, stealing Fentanyl, stealing a syringe containing Fentanyl, and falsifying records.
16 This information was available to any hospital calling to inquire about Allen's service history
17 (where he received his training as a surgical technologist). Any reasonable background
18 check would have revealed this conviction and substance abuse history.

19 12. Defendant is engaged in a particularly hazardous business of dispensing 'controlled
20 substances' such as Fentanyl to patients at their hospitals, and as such have a duty to use
21 special care to protect those patients.

22 13. Defendant is responsible to comply with federal laws and regulations governing the
23 security of Schedule II controlled substances, including:

24 a. Congress has enacted the Controlled Substances Act (CSA). The CSA and its
25 implementing regulations establish a framework through which the federal government
26 regulates the use of controlled substances for legitimate medical, scientific, research, and
27 industrial purposes, and prevents these substances from being diverted for illegal purposes.
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1 The CSA assigns various plants, drugs, and chemicals (such as narcotics) to one of five
2 schedules based on the substance's medical use, potential for abuse, and safety or
3 dependence liability. Schedule I contains substances that have no currently accepted medical
4 use and cannot safely be made available to the public under a prescription, while Schedule II
5 includes substances that have recognized medical uses and may be manufactured,
6 distributed, and used in accordance with the CSA. The order of the schedules reflects
7 substances that are progressively less dangerous and addictive. To restrict access to
8 chemicals used in the illicit manufacture of certain controlled substances, the CSA also
9 regulates 40 "listed chemicals." Unless specifically exempted by the CSA, any person who
10 handles controlled substances or listed chemicals (such as doctors, hospitals, pharmacies,
11 and scientific researchers) must register with the Drug Enforcement Administration (DEA) in
12 the U.S. Department of Justice, which administers and enforces the CSA. Registrants must
13 keep accurate and complete records of all transactions involving controlled substances,
14 maintain detailed inventories of the substances in their possession, and periodically file
15 reports with the DEA, as well as ensure that controlled substances are securely stored and
16 safeguarded in accordance with DEA regulations.

17 b. The CSA creates a "closed system" of distribution in which distribution may
18 lawfully occur among registered handlers of controlled substances, referred to as
19 "registrants." Central to this closed system of distribution is the registration of all persons or
20 entities authorized by the DEA to handle controlled substances. The DEA has described the
21 movement of a controlled substance from manufacture to the patient as follows:

22 A controlled substance, after being manufactured by a DEA-registered
23 manufacturer, may be transferred to a DEA-registered distributor for
24 subsequent distribution to a DEA registered retail pharmacy. After a
25 DEA-registered practitioner, such as a physician or a dentist, issues a
26 prescription for a controlled substance to a patient (i.e., the ultimate
27 user), that patient can fill that prescription at a retail pharmacy to obtain
28 that controlled substance.

1 In this system, the manufacturer, the distributor, the practitioner, and the retail pharmacy
2 are all required to be DEA registrants, or to be exempted from the requirement of
3 registration, to participate in the process. All registrants are required by the CSA to maintain
4 complete and accurate inventories and records of all regulated transactions involving
5 controlled substances and listed chemicals, as well as provide adequate security controls to
6 prevent their diversion. Therefore, a controlled substance should always be under the control
7 of a DEA-registered person until it reaches the patient or is destroyed. The CSA's regulatory
8 requirements ensure that all controlled substances are accounted for from their creation until
9 their dispensing or destruction. This includes all controlled substances utilized in
10 Defendant's hospitals.

11 c. In addition to registration requirements, the CSA contains several recordkeeping
12 provisions. A registrant authorized to handle controlled substances must keep accurate
13 records and maintain detailed inventories in compliance with applicable federal and state
14 law. For example, a registrant must maintain a complete and accurate record of each
15 substance manufactured, received, sold, delivered, or otherwise disposed of by the
16 registrant.

17 d. The CSA further provides special control mechanisms for licensed practitioners
18 and pharmacists who dispense controlled substances in Schedules II-V to patients for
19 legitimate medical purposes. Because controlled substances classified as Schedule I drugs
20 are deemed to have no accepted medical purpose in the United States, they may only be
21 used for research, and practitioners may not prescribe them to patients. Under the CSA,
22 only licensed medical practitioners are authorized to prescribe controlled substances listed
23 in Schedules II-V to patients. A prescription for a controlled substance must be "issued for
24 a legitimate medical purpose by an individual practitioner acting in the usual course of his
25 professional practice." Accordingly, practitioners have a responsibility to ensure that the
26 controlled substance is properly prescribed and dispensed. No controlled substance in
27 Schedules II may be dispensed to a patient by a pharmacist without a written prescription
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1 from a practitioner, except in certain cases where the practitioner administers the
2 controlled substance directly to the patient.

3 e. For the purposes of ensuring the secure storage and distribution of controlled
4 substances, all applicants and registrants must generally “provide effective controls and
5 procedures to guard against theft and diversion of controlled substances.” DEA regulations
6 further require all applicants and registrants to substantially comply with specific security
7 standards for storage of controlled substances.

8 f. DEA registrants may need to dispose of controlled substances in their
9 possession when they are expired, damaged, contaminated, or otherwise unwanted. Under
10 the CSA and DEA regulations, there are specific options for registrants to dispose of
11 controlled substances which provide control.

12 g. DEA registrants are advised to perform background checks on any employee that
13 is going to be in an environment where controlled substances are accessible.

14 h. Defendant was a DEA registrant at all times pertinent hereto, and Rocky Allen
15 was hired for a position of surgical technologist which would allow him access to Fentanyl
16 and other controlled substances during the course of his employment.

17 14. Defendant’s hospitals are designed to provide a safe and sterile environment during
18 surgeries and related care to assist the practitioners who prescribe and dispense the use of
19 controlled substances, and they enact rules and policies designed to protect patients during
20 the course of receiving health care at its hospitals. Three agencies place responsibility for
21 security of all drugs in the healthcare setting on the pharmacy: Drug Enforcement Agency
22 (www.deadiversion.usdoj.gov); The Joint Commission (www.jointcommission.org); and
23 American Society of Health-System Pharmacists (www.ashp.org). Each state has a
24 Pharmacy State Board that has a number of regulatory requirements. The DEA provides
25 pharmacy registrants, including hospitals, with a manual that advised them to perform
26 background checks on prospective employees. A copy of the manual can be found on the
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1 world wide web at the DEA Diversion website
2 (<http://www.deadiversion.usdoj.gov/pubs/manuals/pharm2/index.html>).

3 15. Among the organizations that establish standards for the conduct of hospitals are
4 The Health Care Compliance Association (HCCA), a 501(c)(6) member-based association
5 for compliance professionals in the healthcare provider field. The HCAA advises members
6 through its internet site and via publications and seminars such as the annual Compliance
7 Institute. Related to the issue of health facility drug diversion, the HCAA provides training
8 to industry professionals and distributes Compliance Industry materials such as a handout
9 entitled: "[Health Facility Drug Diversion: Essential Compliance & Auditing Measures](#)," by
10 Kimberly S. New JD BSN RN (2013). The healthcare compliance industry, including
11 compliance professionals at the Defendant hospital, knew or should have known, but not
12 limited to, as follows:

13 a. 'Drug diversion' is theft of medication (including waste), from patients or health
14 care facilities for personal use.

15 b. CSA 'Schedule II' drugs are accepted for medical use with severe restrictions
16 due to a high potential for abuse.

17 c. Drug diversion by health care providers is universal among institutions in the
18 United States.

19 d. The major factors impacting the incidence of drug misuse by healthcare
20 professionals are access and availability of controlled substances.

21 e. Staff members in positions with increased autonomy are more likely to divert
22 drugs.

23 f. Impairment and addiction put patients at risk.

24 g. Drug diversion creates a strong likelihood of denying patients appropriate pain
25 relief.

26 h. Drug diversion has the potential to expose patients to bloodborne pathogens.

27 i. Drug diversion is typically associated with falsification of records (fraud).

1 j. Drug diversion is criminal theft.

2 k. Warning signs include:

3 (i) documentation of pain at the time medication is diverted;

4 (ii) evidence of substitution and tampering, including transmission of infection;

5 and

6 (iii) impairment.

7 l. Employees who are merely terminated from employment (and not prosecuted) for
8 drug diversion have a virtually zero percent chance of rehabilitation and present an
9 ongoing risk of injury to the public c.

10 16. The DEA, which registers providers of controlled substances under the CSA,
11 recognizes the importance of identifying potential drug diverters in the hiring process. The
12 DEA has promulgated regulations such as 21 C.F.R. § 1301.90, which states that obtaining
13 certain information by non-practitioners is vital to assess the likelihood of an employee
14 committing a drug security breach. The DEA states that detailed background questions
15 (and by implication, verification of responses) are essential to overall controlled substances
16 security. Thus, a higher level of care in the hiring process exists for hospitals with respect to
17 health care workers who will have possible access to controlled substances.

18 17. The DEA Pharmacist's Manual Sec. 5A states "theft of controlled substances from a
19 registrant is a criminal act" and advises registrants to "notify DEA and Local Police." DEA
20 regulation 21 CFR § 1301.74 states: "The registrant shall notify the Field Division Office of
21 the Administration in his area, in writing, of any theft or significant loss of any controlled
22 substances within one business day of discovery of the theft or loss."

23 18. Defendant is required to comply with Medicare rules and regulations as conditions
24 for participation, including:

25 § 482.13(c)(2) - The patient has the right to receive care in a safe setting.
26 Hospital must

27 (i) protect vulnerable patients, and

1 (ii) Identify and evaluate problems and patterns of incidents.

2 19. Drug diversion is a risk that hospitals are well aware of, as well as the injury to
3 patients that can occur as a result of the theft of injectable drugs. There have been
4 numerous notable cases of drug diversion prior to the incidents that form a basis for this
5 Complaint, of which the Defendant was aware or should have been aware, including but
6 not limited to:

7 a. Ashton Paul Daigle, a former surgical nurse charged in 2008 with 109 counts of
8 federal crimes, plead guilty to stealing patients' pain medication in Colorado.

9 b. Kristin Parker, a former surgical technician, who infected at least 18 hospital
10 patients with hepatitis C by stealing injectable painkillers and leaving behind her dirty
11 syringes was sentenced to 30 years in prison.

12 c. David M. Kwiatkowski, 34, pleaded guilty in August, 2013, to 16 federal
13 charges, including tampering with a consumer product and obtaining controlled
14 substances through fraud. Prosecutors said that while he was working as a traveling
15 medical technician in several states, Mr. Kwiatkowski injected himself with syringes of
16 Fentanyl, a powerful painkiller, then filled them with saline and put them back into
17 circulation for patients. In 2012, thousands of patients were tested for Mr. Kwiatkowski's
18 strain of hepatitis C, an infectious disease that can cause cirrhosis, which can lead to cancer.
19 The 45 patients — one of whom died — who were identified by investigators represent one
20 of the biggest outbreaks of the disease in recent decades.

21 20. As a result of Plaintiff undergoing medical treatment at Defendant's hospital, he
22 and his immediate family members were placed at an increased risk of bloodborne
23 pathogens including HIV, hepatitis B and hepatitis C. Consequently, Plaintiff has been, and
24 will continue to need to be, tested for these potentially deadly viruses.

25 21. Plaintiff was placed at an increased risk of these bloodborne pathogens because
26 Defendant's former employee, Rocky Allen, was diverting drugs and using needles
27 prepared for surgical patients.

1 **V. First Claim for Relief**

2 **(Negligence)**

3 *(Brought on behalf of Plaintiffs Jose Vidrio and Douglas Meltzer)*

4 22. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth
5 herein.

6 23. While Plaintiff was under the care of Defendant, Defendant owed a duty to Plaintiff
7 to act with reasonable care for their safety and well-being, including but not limited to:

8 a. hiring and screening of employees with possible access to controlled substances,
9 such as Rocky Allen;

10 b. maintaining security and control of their premises, including access to areas
11 where controlled substances could be diverted;

12 c. keeping inventory and records of controlled substances;

13 d. maintaining physical security of controlled substances from distribution to
14 administration to the patient; and

15 e. discovering drug diversion through occurrence reporting and tracking.

16 24. Defendant breached this duty when hiring and failing to properly supervise Mr.
17 Allen as described herein and by failing to take preventative steps to stop employees such
18 as Mr. Allen from engaging in the conduct that exposed Plaintiff to the increased risk of
19 contracting bloodborne pathogens.

20 25. The negligence of Defendant caused damages and losses to Plaintiff.

21 26. The negligence of Defendant caused Plaintiff to experience extreme emotional
22 suffering and anxiety (manifested in sleeplessness, nightmares, etc.), and be subjected to
23 lab and blood testing causing risk of injury and anxiety for fear of contracting a potentially
24 life threatening bloodborne pathogen.

25 27. The negligence of Defendant caused harm to Plaintiff as described herein.

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VI. Second Claim for Relief

(Outrageous Conduct)

(Brought on behalf of Plaintiff Douglas Meltzer)

28. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

29. Defendant's conduct in hiring Rocky Allen, where special care was required, to work in an Operating Room environment where especially vulnerable persons are exposed to his criminal conduct, which was foreseeable, without performing an adequate background check was reckless and constitutes outrageous conduct. The conduct of Defendant in failing to report Allen to local law enforcement when he committed the crime of drug theft was further reckless and extreme outrageous conduct, as was the failure to immediately notify patients of the risk of HIV and Hepatitis created by his criminal conduct. Finally, the failure to maintain adequate security of Fentanyl and discover Allen's drug diversions was reckless and extremely indifferent to the rights and feelings of the Plaintiffs. According to the CDC, persons exposed to HIV and notified within 72 hours of exposure have a chance to take prophylactic medications to avoid infection.

30. Defendant's extreme and outrageous conduct was done with the intention of causing, or reckless disregard of the probability of causing, emotional distress to patients of the hospital, including Plaintiffs Jose Vidrio and Douglas Meltzer.

31. Defendant's conduct was engaged in engaged in with the realization that injury will likely result, including the injury of extreme emotional distress by patients such as Plaintiffs.

32. Defendant's conduct was the actual and proximate cause of the extreme emotional distress suffered by the Plaintiffs as described herein.

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VII. Third Claim for Relief

(Punitive Damages)

(Brought on behalf of Plaintiffs Jose Vidrio and Douglas Meltzer)

33. Plaintiff incorporates by reference all preceding paragraphs of this Complaint.

34. Defendant, through its conduct described above, was guilty of reckless indifference to the rights and feelings of Plaintiff, oppression, fraud, or malice.

35. Defendant, and its officers, knew or should have known of the extreme danger to patients and unfitness of Rocky Allen yet they employed him with a deliberate disregard of the rights or safety of others and/or ratified the wrongful conduct of Mr. Allen.

VII. Third Claim for Relief

(Medical Monitoring)

(Brought on behalf of Plaintiffs Jose Vidrio Douglas Meltzer)

36. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth herein.

37. The latency period for the manifestation of a bloodborne pathogen is estimated to be anywhere from several weeks to years after exposure.

38. Plaintiff has been exposed to toxic substances, including bloodborne pathogens, as a result of the actions of Defendant.

39. Plaintiff's exposure to bloodborne pathogens was caused by Defendant's negligence as follows:

- a. Failing to properly investigate Rocky Allen before hiring him;
- b. Failing to properly supervise Rocky Allen after hiring him;
- c. Failing to properly secure and maintain control of controlled substances;

- 1 d. Failing to properly secure areas where controlled substances could be accessed;
2 and
3 e. Failing to timely warn Plaintiff of their potential increased risk to bloodborne
4 pathogens as the result of Rocky Allen's employment.

5 40. Plaintiff's exposure to bloodborne pathogens was proximately caused by
6 Defendant's negligence as described herein.

7 41. Monitoring procedures exist that make the detection of bloodborne pathogens
8 possible.

9 42. Bloodborne pathogens are capable of early detection by way of existing scientific
10 methods including blood testing.

11 43. Because bloodborne pathogen screening is not conducted in the absence of
12 exposure, the prescribed monitoring regime is different from that normally
13 recommended in the absence of exposure. Plaintiff requires specialized screening
14 and care not within the purview of routine medical exams including prophylactic
15 medications.

16 44. According to contemporary scientific principles, the prescribed monitoring regime is
17 reasonably necessary to permit early diagnosis of a bloodborne pathogen leading to
18 benefits in treatment, management, and prevention or mitigation of long-term
19 health consequences, including death.

20 **VIII. Fourth Claim for Relief**
21 **(Vicarious Liability)**

22 *(Brought on behalf of Plaintiffs Jose Vidrio and Douglas Meltzer)*

23 45. Plaintiff incorporates by reference the preceding paragraphs as if fully set forth
24 herein.

25 46. At all times pertinent hereto, Rocky Allen was an agent and employee of Defendant,
26 and as such, Defendant is vicariously liable for his actions and conduct occurring
27 within the course and scope of his employment.
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VIII. Prayer for Relief

WHEREFORE, Plaintiff requests that judgment to be entered against Defendants as follows:

- a. For economic and compensatory damages on behalf of Plaintiff;
- b. For punitive damages on behalf of Plaintiff;
- c. For restitution;
- d. For actual damages sustained;
- d. For declaratory relief, including but not limited to declarations that:
 - i) Defendant's hiring process is inadequate;
 - ii) Defendant's supervisory practices are inadequate;
 - iii) Defendant's storage of medications and controlled substances is inadequate; and
 - iv) Defendant's are financially responsible for implementing and maintaining a fund for the medical monitoring of Plaintiff(s) who was exposed to bloodborne pathogens as well as the significant others of those exposed to bloodborne pathogens, and provision of prophylactic medications;
- e. For injunctive relief, including but not limited to an injunction requiring that:
 - i) Defendant establish proper hiring and supervisory practices and policies;
 - ii) Defendant establish proper protocol to secure and protect all controlled substances; and,
 - iii) Defendant be required to report all cases of drug diversion to federal and state law enforcement and regulatory agencies.
- f. For reasonable attorneys' fees, expert witness fees and reimbursement of all costs for the prosecution of this action;
- g. For prejudgment and post-judgment interest; and
- h. For such other and further relief as this Court deems just and appropriate.

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X. Jury Demand

Plaintiff demands a trial by jury on all claims so triable.

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