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8 Attorneys for Plaintiffs

9  
10 UNITED STATES DISTRICT COURT  
11 EASTERN DISTRICT OF CALIFORNIA

12  
13 LESTER MACHADO, D.D.S., M.D., LEVU  
EFTIME, D.D.S., ALAN HERFORD, D.D.S.,  
14 M.D., DAVID GILBERT, D.D.S., STEPHEN  
KREIZENBECK, D.D.S., KEITH HOFFMAN,  
15 D.D.S., CRAIG THIEDE, D.D.S., PETER  
SCHEER, D.D.S., W. FREDERICK STEPHENS,  
16 D.D.S., and RICHARD J. BERRIOS, D.D.S.,

17 Plaintiffs,

18 vs.

19 KATHLEEN HAMILTON, in her Official  
Capacity as Director, California Department of  
Consumer Affairs; GEORGETTA COLEMAN,  
20 Executive Officer, California Dental Board;  
ROGER SIMONIAN, D.D.S., President; KIT  
21 NEACY, D.D.S., Vice-President; RICHARD  
BENVENISTE, D.D.S., Secretary; LLEWELLYN  
22 CHIN, Public Member; ROBERT  
CHRISTOFFERSEN, D.D.S., Member; MARK  
23 GOLDENBERG, D.D.S., Member; KATHY  
HOLLADAY, Public Member; ALAN KAYE,  
24 D.D.S., Member; KATIE DAWSON, R.D.H.,  
Member; LA DONNA DRURY-KLEIN, R.D.A.,  
25 Member; and MICHAEL PINKERTON, Public  
Member, in their Official Capacities as Members  
26 of the California Dental Board; and  
CALIFORNIA DENTAL BOARD,

27 Defendants.  
28

No.

**COMPLAINT FOR INJUNCTIVE  
AND DECLARATORY RELIEF**

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1 Plaintiffs Lester Machado, D.D.S., M.D. ("Dr. Machado"), Levu Eftime, D.D.S.  
2 ("Dr. Eftime"), Alan Herford, D.D.S., M.D. ("Dr. Herford"), David Gilbert, D.D.S.  
3 ("Dr. Gilbert"), Stephen Kreizenbeck, D.D.S. ("Dr. Kreizenbeck"), Keith Hoffman,  
4 D.D.S. ("Dr. Hoffman"), Craig Thiede, D.D.S. ("Dr. Thiede"), Peter Scheer, D.D.S.  
5 ("Dr. Scheer"), W. Frederick Stephens, D.D.S., ("Dr. Stephens") and Richard J. Berrios,  
6 D.D.S. ("Dr. Berrios") (collectively "the Plaintiffs"), for their Complaint against the  
7 Defendants Kathleen Hamilton, Georgetta Coleman, Roger Simonian, D.D.S., Kit  
8 Neacy, D.D.S., Richard Benveniste, D.D.S., Llewellyn Chin, Robert Christoffersen,  
9 D.D.S., Mark Goldenberg, D.D.S., Kathy Holladay, Alan Kaye, D.D.S., Katie Dawson,  
10 R.D.H., La Donna Drury-Klein, R.D.A., Michael Pinkerton, and the California Dental  
11 Board (collectively "the Defendants" or "the Dental Board") allege as follows:

#### 12 JURISDICTION AND VENUE

13 1. This Court has original jurisdiction pursuant to 28 U.S.C. §§ 1331 and  
14 1343(a), and Plaintiffs seek declaratory and injunctive relief pursuant to 28 U.S.C.  
15 §§ 16551, 2201 and 2202 and 42 U.S.C. § 1983 and 1988. Furthermore, this matter  
16 arises under the First and Fifth Amendments to the United States Constitution, which  
17 are made applicable to the states by the Fourteenth Amendment to the United States  
18 Constitution.

19 2. Venue is proper in this district under 28 U.S.C. § 1391(b).

#### 20 NATURE OF ACTION

21 3. In this action, Plaintiffs challenge the constitutionality of the Letter-  
22 Order sent by Defendants to Plaintiffs dated January 24, 2000 ("Letter-Order"), a true  
23 and correct copy of which is attached hereto as Exhibit A.

24 4. The Dental Board's Letter-Order states its intent to clarify the scope of  
25 the dental licenses held by Plaintiffs and others similarly situated and to direct them  
26 to limit their practices accordingly. The Letter-Order purports to exclude from the  
27 scope of the dental licenses a number of surgeries and procedures for which Plaintiffs  
28 and others similarly situated are trained, that they have been performing for many

1 years or decades, and that have always before been deemed within the scope of their  
2 dental licenses. The Letter-Order was issued without notice and opportunity for  
3 hearing.

4 5. Plaintiffs assert that the Dental Board's Letter-Order violates their  
5 constitutional rights in that it constitutes an unlawful deprivation of their  
6 constitutionally protected property interests in their professional licenses without due  
7 process of law; it further constitutes a deprivation of their First Amendment rights  
8 without due process of law; and it further subjects them to disciplinary action by the  
9 Defendants or others as a result thereof.

#### 10 PLAINTIFFS

11 6. Plaintiffs are licensed to practice dentistry in the State of California by  
12 the Defendant Dental Board and/or are licensed to practice medicine in the State of  
13 California. All the Plaintiffs are specialists in oral and maxillofacial surgery, as the  
14 Commission on Dental Accreditation, the American Dental Association, and the  
15 American Association of Oral and Maxillofacial Surgery define that specialty.  
16 Plaintiffs are certified, or are eligible for certification, by the American Board of Oral  
17 and Maxillofacial Surgery ("ABOMS").

18 7. Plaintiffs possess a constitutionally-protected property interest in their  
19 licenses and have the rights, under the Constitution of the United States, to perform  
20 all procedures properly within the scope of their licenses, to earn a livelihood through  
21 the performance of such procedures, and to advertise and otherwise inform members  
22 of the public and other professionals of their training and experience in performing  
23 such procedures.

#### 24 DEFENDANTS

25 8. The Defendant Director of the California Department of Consumer  
26 Affairs, Defendant Executive Director of the Dental Board and the Defendant Dental  
27 Board Members are sued in their official capacities only. They are collectively  
28 responsible for implementing, administering and enforcing the various provisions of

1 the statutes governing the practice of dentistry in the State of California. The Director  
2 of the California Department of Consumer Affairs (hereinafter "the Director") and the  
3 Board, through its Executive Officer and other officers and members, are mandated by  
4 the State of California to enforce the provisions of the California Business and  
5 Professions Code ("the Code") that apply to dentists, as well as to enforce the  
6 provisions of the Dental Practice Act itself.

7 9. Defendants are further responsible for investigations of dentists relating  
8 to the implementation and enforcement of the provisions of Dental Practice Act and  
9 the regulations enacted pursuant to that Act.

10 **FACTUAL ALLEGATIONS APPLICABLE TO ALL COUNTS**

11 10. Oral and Maxillofacial Surgery ("OMS") is one of eight areas of dental  
12 practice recognized by the American Dental Association ("ADA") as a "specialty"  
13 area of practice.

14 11. An oral and maxillofacial surgeon must first obtain a D.D.S. degree and  
15 then complete an accredited postgraduate program in oral and maxillofacial surgery.

16 12. There are multiple accredited, postgraduate programs in oral and  
17 maxillofacial surgery in the State of California including those at Loma Linda  
18 University, the University of California-Los Angeles, the University of Southern  
19 California, the University of California-San Francisco, and the University of the  
20 Pacific. All of these programs must comply with the criteria for accreditation  
21 established by the Commission on Dental Accreditation ("CDA") and therefore all  
22 programs are required to teach OMS postgraduate students cosmetic oral and  
23 maxillofacial surgical procedures, including the procedures deemed beyond the scope  
24 of dental licensure by the Dental Board, in its January 24, 2000 Letter-Order to  
25 dentists, including Plaintiffs. Basic surgical principles relating to all areas of oral and  
26 maxillofacial surgery are taught in an accredited OMS postgraduate program.

27 13. OMS training also consists of an in-depth understanding of physical  
28 diagnosis, pathophysiology and clinical medicine, as well as comprehensive training

1 in anesthesia, which requires an in-depth knowledge of anatomy, physiology and  
2 pharmacology as they are related to pain and anxiety management.

3 14. OMS training includes a structured, didactic course in physical  
4 diagnosis similar to that provided to medical students and often given jointly.  
5 Didactic and clinical training are provided to a level of competence in all aspects of  
6 pain and anxiety control, including general anesthesia/deep sedation. OMS residents  
7 must complete a core medical/surgical year that includes training during rotations to  
8 the medical, surgical and anesthesia services, with the requirement that OMS  
9 residents function at the level of a resident in the respective services.

10 15. Oral and maxillofacial surgeons (“OMSs”) are also trained in  
11 esthetic/oral and maxillofacial surgery and, during training, must be able to recognize  
12 and diagnose congenital, developmental and acquired esthetic facial deformities.  
13 Both skeletal and soft tissue alterations of facial form must be provided, including but  
14 not limited to esthetic surgery such as rhinoplasty (repair of a partial or complete  
15 defect of the nose with tissue taken from elsewhere; a plastic operation to change the  
16 shape or size of the nose), septoplasty (an operation to correct defects or deformities of  
17 the nasal septum), blepharoplasty (any operation for the correction of a defect in the  
18 eyelid), rhytidectomy (elimination of wrinkles from, or reshaping of, the face by  
19 excising any excess skin and tightening the remainder; the so-called “face-lift”),  
20 genioplasty (a surgical procedure whereby the shape or size of the chin is altered),  
21 lipectomy (surgical removal of fatty tissue), facial implants, otoplasty (reparative or  
22 plastic surgery of the auricle of the ear) and scar revision.

23 16. OMS training includes a broad range of dentoalveolar surgical  
24 procedures. Management of dentoalveolar injuries, infections, and pathologic  
25 conditions and other hard and soft tissue surgeries related to the alveolar structures  
26 are major aspects of OMS training and practice. Additional significant areas of OMS  
27 training and practice include diagnosis of oral disease and lesions of systemic diseases  
28 manifested in the oral cavity and various hard and soft tissue biopsy techniques, the

1 removal of erupted and impacted teeth, the use of hard and soft tissue grafts, and  
2 preparation of the mouth for prostheses.

3 17. OMSs are also trained to perform the reconstruction of the oral and  
4 maxillofacial region with implant devices designed to support various prostheses,  
5 combined with an in-depth knowledge of bone and soft tissue physiology,  
6 biomaterials and the biomechanics of implant reconstruction.

7 18. Microneurosurgery, through clinical correlations of pathophysiology of  
8 nerve dysfunction and repair, testing modalities for neurosensory and neuromotor  
9 defects and methods of repair, is also a part of the OMS training, and OMSs are  
10 trained in the diagnosis and treatment planning of persons suffering from  
11 neurosensory and neuromotor deficiencies, including experience in repair or revision  
12 of a damaged sensory nerve of the face.

13 19. OMSs are taught surgical correction of skeletal deformities of the oral  
14 and maxillofacial region, at a level of competency in orthognathic surgery which  
15 includes the analysis of facial form, diagnosis of malocclusions and their relationships  
16 of facial form, the biomechanics of orthodontics, comprehensive treatment planning  
17 and surgical procedures. The OMS also learns to correct deformities of the mandible  
18 and maxilla, as well as other deformities of the facial skeleton, correct functional and  
19 esthetic orofacial and craniofacial deformities of the mandible, maxilla, zygoma and  
20 other facial bones, including but not limited to ramus and body procedures, subapical  
21 segmental osteotomies and craniofacial operations.

22 20. The OMS must become competent in the evaluation and management of  
23 patients with hard and soft tissue defects of the maxillofacial region, involving  
24 reconstructive procedures, which restore form and function, and in the assessment,  
25 treatment planning, and surgical and comprehensive management of the patient. This  
26 competency includes both bone grafting and soft tissue grafting procedures,  
27 vestibuloplasties, augmentation procedures, temporomandibular joint reconstruction,  
28 management of continuity defects and other reconstructive surgery.

1           21.    OMS training includes the diagnosis, evaluation and management of  
2   temporomandibular joint disorders (“TMJ”), differential diagnosis of head, neck and  
3   facial pain, non-surgical treatment options, and surgical management of TMJ  
4   disorders. Another integral part of the OMS’s training is the comprehensive  
5   management of trauma of the oral and maxillofacial region, which includes learning  
6   the principles of shock management, fluid and electrolyte balance, resuscitation and  
7   surgical airway procurement, assessment management and treatment of maxillofacial  
8   and multiple systems trauma.

9           22.    During training, the OMS must successfully complete an Advanced  
10   Trauma Life Support course. Trauma management includes, but is not limited to,  
11   surgical management of the airway, including performance of tracheostomies,  
12   treatment of fractures of the dentoalveolar, mandible, maxilla, zygoma, nose, orbit,  
13   naso-frontal-orbital-ethmoidal and midface region and repair of soft tissue of the head  
14   and neck region. The OMS is trained in the emergency department and must, during  
15   training, be available to the emergency services at all times.

16           23.    Plaintiffs herein have been, and continue to be, called to various hospital  
17   emergency rooms to treat accident or other trauma victims. Such treatment routinely  
18   includes extensive cosmetic oral and maxillofacial surgical procedures and/or  
19   reconstructive surgical procedures.

20           24.    A significant part of the OMS’s practice includes the evaluation and  
21   treatment of infectious, inflammatory and benign neoplastic lesions involving the oral  
22   and maxillofacial region.

23           25.    The American Dental Association defines oral and maxillofacial surgery  
24   as follows: “Oral and maxillofacial surgery is the specialty of dentistry which  
25   includes the diagnosis, surgical and adjunctive treatment of diseases, injuries, and  
26   defects involving both the functional and esthetic aspects of the hard and soft tissues  
27   of the oral and maxillofacial region.” “Maxillofacial” is defined in Stedman’s Medical

1 Dictionary as “pertaining to the jaws and face, particularly with reference to  
2 specialized surgery of this region.”

3 26. Criteria used by the nationally-recognized Joint Commission on  
4 Accreditation of Healthcare Organizations (“JCAHO”) have been accepted for nearly  
5 50 years. Under these criteria, hospitals grant clinical privileges to medical staff  
6 members, including OMSs, based upon each member’s education, training, current  
7 competence and experience. Cosmetic/esthetic oral and maxillofacial surgery  
8 performed by OMSs are a natural extension of the knowledge and expertise gained by  
9 these specialists in performing complex trauma and reconstructive surgery.  
10 Accredited hospitals have granted hospital privileges to Plaintiffs and other OMSs for  
11 the purpose of performing those procedures encompassed within the scope of training  
12 of OMSs, including the esthetic and cosmetic aspect of oral and maxillofacial surgery  
13 deemed beyond the scope of a dental license in the Defendant Dental Board’s Letter-  
14 Order at issue herein.

15 27. OMSs have been successfully performing cosmetic oral and maxillofacial  
16 surgical procedures for at least the past 30 years, in conjunction with complex facial  
17 reconstructive and trauma surgeries, and for the past 10 years as elective procedures,  
18 according to the American Association of Oral and Maxillofacial Surgeons  
19 (“AAOMS”).

20 28. The Commission on Dental Accreditation (“CDA”) is the autonomous  
21 accrediting body recognized by the United States Department of Education  
22 (“USDOE”), which accredits undergraduate (D.D.S.) dental schools in California and  
23 throughout the United States, and accredits oral and maxillofacial programs in  
24 California and across the country. The CDA is also responsible for setting forth the  
25 Standards for Advanced Education in the respective dental specialty programs and  
26 for the undergraduate dental programs leading to the DDS degree. Compliance with  
27 those standards is necessary for accreditation by the CDA, which in turn is necessary

1 for postgraduate OMS programs and students to be eligible for any applicable federal  
2 funds

3 29. "Dentistry" is defined by the CDA in the Standards for Advanced  
4 Specialty Education ("the Standards") as the evaluation, diagnosis, prevention and/or  
5 treatment (nonsurgical, surgical or related procedures) of diseases and/or conditions  
6 of the oral cavity, maxillofacial area and/or adjacent and associated structures and  
7 their impact on the human body; provided by a dentist, *within the scope of his/her*  
8 *education, training and experience*, in accordance with the ethics of the profession and  
9 applicable law.

10 30. "Oral and Maxillofacial Surgery" is defined in the Standards as  
11 including the diagnosis, surgical and adjunctive treatment of diseases, injuries and  
12 defects involving both the functional and esthetic aspects of the hard and soft tissues  
13 of the oral and maxillofacial region. The CDA relies on Stedman's Medical Dictionary  
14 definition of "maxillofacial," which states as follows: "pertains to the jaws and the  
15 face, particularly with reference to specialized surgery of this region."

16 31. Before OMS training programs can be accredited by the CDA, they must  
17 meet the minimum standards set forth in the Standards for Advanced Specialty  
18 Education Programs in Oral and Maxillofacial Surgery ("OMS Standards"). These  
19 OMS Standards require programs to be a minimum of 48 months of full-time training  
20 in a hospital-based residency. Some programs also offer a medical degree (M.D.).

21 32. Since both the four-year OMS programs and the medical degree-  
22 integrated programs must meet the OMS Standards, training in oral and maxillofacial  
23 surgery is identical in both types of programs. Surgical experience in all accredited  
24 OMS programs includes maxillofacial esthetic cases, including but not limited to the  
25 following procedures: blepharoplasty, brow lifts, treatment of skin lesions,  
26 cheiloplasty (plastic surgery of the lips), genioplasty, otoplasty, rhinoplasty and  
27 rhytidectomy.

1           33.     Plaintiffs are informed and believe after significant inquiry and thereon  
2 allege that surgical procedures deemed beyond the scope of dental licensure in the  
3 Defendants' January 24, 2000 Letter-Order are not deemed beyond the scope of dental  
4 licensure for an OMS in any other states within the United States. Many states have  
5 expressly deemed such procedures within the scope of the practice of dentistry.

6           34.     The Maryland State Board of Dental Examiners has previously  
7 determined that face lifts, blepharoplasty, rhinoplasty and collagen injections are  
8 within the scope of the practice of dentistry because OMSs are trained to be competent  
9 in those areas in CDA-accredited OMS residency programs affiliated with accredited  
10 hospitals or teaching institutions. That Board has also determined that hair  
11 transplants, when performed as a required adjunctive procedure secondary to a  
12 primary procedure within the scope of dentistry, such as transplants performed as  
13 adjunctive procedures to orthognathic surgery or reconstruction after a facial trauma  
14 or cleft surgery, are within the practice of dentistry. The Maryland Board found that  
15 the above-mentioned procedures are included within the practice of dentistry under  
16 the definition of "associated structures" contained in the Maryland statute, based  
17 upon lengthy and credible testimony of the history of the procedures performed.

18           35.     The Minnesota Board of Dentistry has stated that it would support the  
19 ability of OMSs with the appropriate education, training and competence to perform  
20 certain cosmetic oral and maxillofacial surgical procedures, as such procedures were  
21 included in the curricula of the dental schools and residency training programs and,  
22 as such, are protected as within the scope of dentistry under Minnesota law. The  
23 Minnesota statute includes the phrase "associated structures" in its definition of  
24 dentistry.

25           36.     In 1999, the Georgia legislature passed a new definition of dentistry, in  
26 conformance with the ADA's definition of dentistry enacted in 1997, recognizing the  
27 modern, evolving scope of the practice of dentistry, which includes OMS as a  
28 specialty. The Georgia definition of dentistry recognizes that the practice of dentistry

1 involves the “oral cavity, maxillofacial area, or the adjacent or associated structures, or  
2 any combination thereof, and their impact on the human body provided by a dentist,  
3 within the scope of his or her education, training, and experience . . . .” The Georgia  
4 Board of Dentistry has determined that OMSs have the requisite education, training  
5 and experience to perform procedures they are taught in residency training programs,  
6 including cosmetic/esthetic oral and maxillofacial surgical procedures deemed  
7 beyond the practice of dentistry by the Defendants’ Letter-Order of January 24, 2000.

8         37. The New Jersey Board of Dentistry has declared that OMSs, with the  
9 appropriate training, can perform rhinoplasty and septoplasty surgery, cosmetic oral  
10 and maxillofacial surgical procedures.

11         38. Mississippi’s relevant statute explicitly permits OMSs to perform  
12 reconstructive and related surgical procedures to the head and neck. It includes  
13 within the scope of practice of dentistry “surgery of the head or neck incident to the  
14 practice of oral surgery.” Miss. Code Ann. § 73-9-3.

15         39. Section 1625 of the California Business and Professions Code, Division 2,  
16 Chapter 4, Dentistry, defines “Dentistry” as “the diagnosis or **treatment, by surgery**  
17 or other method, of diseases and lesions and **the correction of malpositions** of the  
18 human teeth, alveolar process, gums, jaws, **or associated structures.**” (emphases  
19 added).

20         40. Stedman’s Medical Dictionary defines “associated” as “[a]ny item or  
21 individual grouped with others by some common factor.” The head and neck are  
22 certainly “grouped with” the “human teeth or jaws” on the human body and share the  
23 same “common factor” of interconnected skeleto-muscular tissues.

24         41. Plaintiffs and other OMSs in California have long performed cosmetic  
25 oral and maxillofacial surgical procedures, in conjunction with dental procedures,  
26 trauma injuries, and as independent cosmetic oral and maxillofacial surgical  
27 procedures, such as rhinoplasty, septoplasty, blepharoplasty, and other esthetic

1 procedures, under the above-referenced definition of dentistry found in Section 1625  
2 of the Code.

3 42. Section 1638 of the Code defines OMS as “the diagnosis and surgical and  
4 adjunctive treatment of diseases, injuries, and defects, which involve both functional  
5 and **esthetic** aspects of the hard and soft tissues of the oral and maxillofacial region”  
6 (emphasis added).

7 43. Pursuant to Section 1638 of the Code, a person licensed under the  
8 Medical Practice Act of California, but not licensed to practice dentistry in California,  
9 “may apply to the [dental] board on a form prescribed by the [dental] board for an  
10 oral and maxillofacial surgery permit.”

11 44. Section 1638 also provides that the Dental Board “may issue an oral and  
12 maxillofacial surgery permit to an applicant who has furnished evidence satisfactory  
13 to the board that he or she is **currently certified or eligible for certification in oral  
14 and maxillofacial surgery by a specialty board recognized by the Commission on  
15 Accreditation of the American Dental Association** and holds a current license in  
16 good standing to practice medicine in the state.” (emphasis added).

17 45. Plaintiffs who possess dual degrees have the same training in the  
18 procedures at issue as that provided to single degree dentists (DDS), and receive said  
19 training in the same postgraduate OMS programs, accredited by the CDA.

20 46. Multiple hospitals in California have granted privileges to Plaintiffs and  
21 other OMSs who regularly perform surgical procedures, including but not limited to  
22 esthetic surgery such as rhinoplasty, blepharoplasty, rhytidectomy, genioplasty,  
23 lipectomy, facial implants, otoplasty and scar revision (see Paragraph 22 above);  
24 dentoalveolar surgical procedures, including management of dentoalveolar injuries,  
25 infections, and pathologic conditions and other hard and soft tissue surgery related to  
26 the alveolar structures; diagnosis of oral disease and lesions of systemic diseases  
27 manifested in the oral cavity, utilizing various hard and soft tissue biopsy techniques;  
28 the removal of erupted and impacted teeth; hard and soft tissue grafts; surgical

1 correction of skeletal deformities of the oral and maxillofacial region; correction of  
2 deformities of the mandible and maxilla, as well as other deformities of the facial  
3 skeleton; correction of functional and esthetic orofacial and craniofacial deformities of  
4 the mandible, maxilla, zygoma and other facial bones, including but not limited to  
5 ramus and body procedures, subapical segmental osteotomies and craniofacial  
6 operations; surgical management of TMJ disorders; assessment, management and  
7 treatment of maxillofacial and multiple systems trauma; surgical management of the  
8 airway, including performance of tracheostomies, treatment of fractures of the  
9 dentoalveolar, mandible, maxilla, zygoma, nose, orbit, naso-frontal-orbital-ethmoidal  
10 and midface region and repair of soft tissue of the head and neck region.

11 47. Plaintiffs and other OMSs have engaged in the practice of multiple  
12 procedures described in the foregoing paragraphs for the past several decades, with  
13 the full knowledge and consent, either express or implied, of the Defendant Dental  
14 Board. Prior to the Dental Board's issuing its Letter-Order of January 24, 2000, it had  
15 never threatened to take, nor had it ever taken, any disciplinary action against any  
16 single-degree (D.D.S.) or dual-degree (D.D.S., M.D.) OMS as a result of their having  
17 performed any of the procedures at issue.

18 48. Several Plaintiffs and other similarly situated California OMSs have  
19 advertised that they perform cosmetic/esthetic oral and maxillofacial surgical  
20 procedures, with the full knowledge and approval, explicit or implicit, of the Dental  
21 Board. **Plaintiffs are informed and believe and thereon allege that, before** its January  
22 24, 2000 Letter-Order, the Defendant Dental Board has never disciplined, or attempted  
23 **or threatened** to discipline, the Plaintiffs or any other OMSs who advertised the  
24 performance of such services.

25 49. Cosmetic oral and maxillofacial surgical procedures deemed beyond the  
26 scope of dental licensure by the Defendant Dental Board in its January 24, 2000 Letter-  
27 Order are the same surgical procedures performed by OMSs for trauma and

28

1 orthognathic surgery that the Defendant Dental Board has deemed lawful in its Letter-  
2 Order at issue.

3 50. The California Association of Oral and Maxillofacial Surgery  
4 (“CAOMS”), the American Association of Oral and Maxillofacial Surgeons (AAOMS),  
5 and the California Dental Association have presented numerous continuing education  
6 courses on cosmetic oral and maxillofacial surgical procedures to oral and  
7 maxillofacial surgeons/dentists in California in the past years, with full knowledge  
8 and approval of the Dental Board.

9 51. **Plaintiffs are informed and believe and thereon allege that**, at no time  
10 did the Defendant Dental Board inform any organization sponsoring continuing  
11 education courses in OMS that the organization was teaching procedures that were  
12 not within the scope of practice of dentistry. All said courses received prior approval  
13 from the Dental Board for continuing education credit purposes. The Dental Board  
14 awarded continuing education credit for license maintenance purposes for all such  
15 courses.

16 52. **Plaintiffs are informed and believe and thereon allege that** physicians  
17 have called on the American Medical Association (“AMA”) to curtail the cosmetic oral  
18 and maxillofacial surgical procedures performed by OMSs such as the Plaintiffs.

19 53. The AMA House of Delegates has noted that, “in order to accommodate  
20 the [ADA’s] Commission of Dental Accreditation’s Accreditation Standards for  
21 Advanced Specialty Education Programs in Oral and Maxillofacial Surgery (OMS),  
22 **the California Board of Dental Examiners [now, the California Dental Board]**  
23 **convened an ad hoc Committee on the Scope of Practice for OMS which identified**  
24 **the following procedures as falling under the scope of practice of OMS:**  
25 **rhytidectomy, blepharoplasty, rhinoplasty, otoplasty, cerficofacial liposuction, cleft**  
26 **lip and palate repair, resection of the parotid, craniofacial surgery, laser skin**  
27 **resurfacing, laser ablation of orofacial lesions, excision of skin lesions, abdominal**  
28 **fat grafts and treatment of sleep apnea, among others.”** (emphasis added).

1           54.    The AMA House of Delegates further noted that several of the OMS  
2 training programs in California that are teaching the procedures listed above are state-  
3 funded.

4           55.    The AMA House of Delegates, California delegation, in response to the  
5 Dental Board's Ad Hoc Committee recommendation to include within the scope of  
6 practice of the OMS those areas listed above, issued the following resolution:  
7 "RESOLVED, That the American Medical Association encourage state medical  
8 societies to vigorously oppose state legislative proposals to expand the scope of  
9 practice of dentists or non-MD oral and maxillofacial surgeons licensed under the  
10 state's Dental Practice Act."

11           56.    On or about January 24, 2000, the Defendant Dental Board sent its  
12 Letter-Order to Plaintiffs and, **Plaintiffs are informed and believe and thereon allege**  
13 **to** all dentists licensed in California, rejecting the recommendations of its own Ad Hoc  
14 Committee, and stating as follows:

- 15           1.    California law currently prohibits a dentist from performing  
16                cosmetic procedures that are not part of the treatment, by surgery  
17                or other methods, of diseases, lesions or the correction of  
18                malpositions of the human teeth, alveolar process, gums, jaws, or  
19                associates structures. This includes unrelated cosmetic  
20                procedures.
- 21           2.    Cosmetic procedures performed on the body are clearly medical  
22                in nature and not within the scope of practice of dentistry.
- 23           3.    Rhinoplasty and septoplasty are medical procedures not within  
24                the scope of the practice of dentistry unless directly related to and  
25                part of the treatment for a dental condition; [sic] such as facial  
26                trauma or congenital maxillofacial anomalies.

27           The Board trusts this clarifies the scope of the dental license with respect  
28           to performing cosmetic surgery procedures and that you will limit your  
practice accordingly.

January 24, 2000 Letter-Order, Exhibit A. Through this Letter-Order, the Dental Board  
has unlawfully legislated, regulated and/or unilaterally constricted and/or restricted  
the scope of dental licensure of the Plaintiffs and the related advertising of Plaintiffs  
herein, and has exposed Plaintiffs to disciplinary action, or prosecution, in violation of  
their constitutional rights.

1           57. Many affected California dentists have performed procedures now  
2 declared to be prohibited in the January 24, 2000 Letter-Order. Those California  
3 dentists risk loss of licensure by the Dental Board, see Section 651(g) of the Code, and  
4 criminal penalties, see Section 651(f) of the Code.

5           58. In its Letter-Order, the Dental Board ostensibly permits “dual degree”  
6 (D.D.S., M.D.) oral surgeons to perform the procedures at issue, while permitting  
7 “single degree” OMSs (D.D.S.) to perform the procedures only in situations directly  
8 related to and as part of the treatment of a dental condition, such as facial trauma or  
9 congenital maxillofacial anomalies. In other words, the Dental Board has recognized  
10 the single-degree OMSs’ ability to perform the procedures for facial trauma or  
11 congenital maxillofacial anomalies, but is now prohibiting the single-degree OMSs  
12 from performing those same procedures for esthetic related reasons, stating that the  
13 performance of those procedures for esthetic reasons is beyond the scope of practice of  
14 dentistry, is medical in nature, and constitutes the unlicensed practice of medicine,  
15 while performance of those same procedures for facial trauma or congenital  
16 maxillofacial anomalies is ostensibly not medical in nature and does not constitute the  
17 unlicensed practice of medicine.

18           59. The Dental Board’s January 24, 2000 Letter-Order places the Plaintiffs  
19 and other similarly-situated California OMSs at imminent risk of being prosecuted for  
20 the “unlicensed practice of medicine.” **Plaintiffs are informed and believe and thereon**  
21 **allege that** the Defendant Dental Board has already commenced disciplinary  
22 investigations and/or proceedings against California OMSs pursuant to the mandates  
23 of its January 24, 2000 Letter-Order.

24           60. The Dental Board’s Letter-Order has placed the Plaintiffs and other  
25 similarly situated California OMSs at risk of suspension or revocation of their  
26 professional licenses.

27           61. The Dental Board has placed the Plaintiffs and other similarly situated  
28 California OMSs at risk of loss of their constitutionally protected property interest in

1 their professional license. Moreover, by virtue of its prohibitions, the January 24, 2000  
2 Letter-Order has already caused a loss of business and diminution in the income of  
3 Plaintiffs and others similarly situated.

4 62. The restrictions set forth in the Dental Board's Letter-Order are contrary  
5 to the scope of the required courses that must be taught to dentists in the accredited  
6 postgraduate programs in oral and maxillofacial surgery in California.

7 63. Plaintiffs Dr. Machado, Dr. Herford and Dr. Eftime teach in accredited  
8 postgraduate oral and maxillofacial surgery programs in California and must,  
9 pursuant to the accreditation criteria of the CDA, teach dentists in said programs  
10 those procedures deemed beyond the scope of the dental license in California by the  
11 Defendant Dental Board.

12 64. Said teaching obligations put these Plaintiffs at risk for aiding and  
13 abetting the unlawful practice of medicine, violating the directives of the Defendant  
14 Dental Board, facing disciplinary action by the Dental Board and/or criminal  
15 prosecution.

16 65. The restrictions set forth in the Dental Board's Letter-Order have  
17 unlawfully restricted the scope of dental licensure and the ability of the Plaintiffs to  
18 perform well-established reconstructive and cosmetic oral and maxillofacial surgical  
19 procedures that they have been performing for decades in California, and that are  
20 performed by other OMSs nationwide.

21 66. The directives, mandates and restrictions set forth in the Dental Board's  
22 Letter-Order are having and will have a detrimental effect on California's citizens'  
23 right to choose a particular OMS who will best serve their reconstructive and related  
24 oral and maxillofacial surgical needs.

25 67. As a result of the Dental Board's Letter-Order, threatening prosecution  
26 or disciplinary action against their professional licenses, Plaintiffs and other similarly-  
27 situated California dentists have ceased to perform many of the oral and maxillofacial

28

1 surgical procedures they were trained to perform and had previously been  
2 performing with the explicit or implicit approval of the Board.

3 68. The Dental Board's Letter-Order **has already caused and is causing**  
4 injury and creates a threat of **additional** injury to the Plaintiffs and other similarly-  
5 situated California OMSs.

6 69. As a result of the Dental Board's Letter-Order, Plaintiffs and other  
7 similarly-situated California OMSs have suffered public ridicule and damage to their  
8 professional reputations by allegations and inferences that they have been unlawfully  
9 performing procedures beyond the scope of their licenses and further in violation of  
10 their respective hospital bylaws in hospitals in which Plaintiffs have hospital  
11 privileges.

12 70. As a result of the Dental Board's Letter-Order, many of the Plaintiffs and  
13 other similarly-situated California OMSs have suffered from restrictions placed upon,  
14 or the total loss of, their previously granted hospital privileges to perform the  
15 cosmetic oral and maxillofacial surgical procedures at issue.

16 71. The actions of the Plaintiffs and other similarly-situated OMSs have  
17 been chilled, in that they have ceased performing procedures they had previously  
18 performed, under the threat of prosecution and/or disciplinary action contained in  
19 the Dental Board's Letter-Order.

20 72. **Plaintiffs are informed and believe and thereon allege that** Plaintiffs and  
21 other similarly-situated OMSs are also in imminent risk of revocation or suspension of  
22 their licenses to practice dentistry as a result of having exercised their First  
23 Amendment right to engage in commercial free speech by advertising, or by having  
24 advertised, that they perform the cosmetic oral and maxillofacial surgical procedures  
25 at issue.

26 73. **Plaintiffs are informed and believe and thereon allege that** Plaintiffs and  
27 other similarly-situated California OMSs are at imminent risk of disciplinary action,  
28 including revocation and/or suspension of licensure, for performing cosmetic oral

1 and maxillofacial surgical procedures in situations that are not authorized in the  
2 Defendants' Letter-Order and that may be found to be non-trauma or non-medically  
3 necessary situations. Although no formal disciplinary action is presently pending  
4 against Plaintiffs, **Plaintiffs are informed and believe and thereon allege that** the  
5 Defendant Dental Board has commenced investigations of licensed dentists who have  
6 performed the cosmetic oral and maxillofacial surgical procedures deemed beyond  
7 the scope of dental licensure by the Board's January 24, 2000 Letter-Order.

8       74. **Plaintiffs are informed and believe and thereon allege that** Board has  
9 also has also communicated with hospitals that have granted privileges to perform  
10 those cosmetic oral and maxillofacial procedures recently deemed unlawful by the  
11 Defendant Dental Board for the purpose of placing the hospital staff status of  
12 **Plaintiffs and others similarly situated** in jeopardy. **Hospital staff status is a valuable**  
13 **property right protected under the United States Constitution.**

14       75. Plaintiffs are at risk today and have been unlawfully forced to abide by  
15 the Dental Board's directives, reflected in the Letter-Order at issue, and to forego  
16 performing procedures that have constituted part of their respective practices in  
17 cosmetic oral and maxillofacial surgery. Plaintiffs have also lost the income relating  
18 thereto. Alternatively, if Plaintiffs ignore the Dental Board's Letter-Order, they are  
19 placed at risk of civil and criminal penalties, public humiliation, and potential loss of  
20 license if they should continue to practice the procedures at issue as they have for the  
21 many years since they commenced practicing cosmetic oral and maxillofacial surgery  
22 in California.

23       76. Even if some avenue of exhaustion were arguably available, forcing  
24 Plaintiffs to risk civil penalties and criminal prosecution or to forego property rights  
25 inherent in their dental licenses that Plaintiffs have enjoyed for many years would  
26 violate constitutional principles. Given governmental immunities and other  
27 principles of law, Plaintiffs are very probably unable to recover damages for lost  
28 income during the period in which they forego property rights in compliance with the

1 January 24, 2000 Letter-Order, with the result that imposition of an exhaustion  
2 requirement would cause Plaintiffs to suffer damages without a remedy. Damages  
3 without remedy are recognized as creating irreparable harm, rendering administrative  
4 procedures inadequate and entitling Plaintiffs to seek judicial redress at this time.

5 77. There is no clearly defined administrative machinery in existence for the  
6 presentation, evaluation, and resolution of Plaintiffs' objections to the January 24, 2000  
7 Letter-Order. The Dental Board issued the January 24, 2000 Letter-Order without  
8 notice and opportunity for a hearing, bypassing rule-making procedures and avoiding  
9 formal public notice, comment and compliance with other procedural safeguards  
10 attached thereto. The Dental Board has stated its position and has established its  
11 enforcement policy, with the result that there are no administrative proceedings in  
12 this matter pending, scheduled, or available. Given the finality of the Dental Board's  
13 Letter-Order, any attempts to seek relief from the Dental Board would be futile.

14 78. The January 24, 2000 Letter-Order presents an issue of general public  
15 concern and a prompt resolution of the issues presented in this action is appropriate.  
16 Plaintiffs and similarly situated California dentists have engaged in the now-  
17 prohibited procedures for many years. The definition of the practice of dentistry,  
18 Business & Professions Code section 1625, has not been amended in a quarter century,  
19 yet the Dental Board has elected to alter the definition on its own, without receiving  
20 direction from the Legislature, without engaging in rule-making or other  
21 administrative procedures, and without consideration of the constitutional rights of  
22 the Plaintiffs and other California licensed dentists/oral and maxillofacial surgeons.

23 79. In many rural California communities, physician/surgeons trained and  
24 capable of performing the procedures at issue are scarce, and the most qualified and  
25 experienced professionals to perform such services are oral and maxillofacial surgeons  
26 such as the Plaintiffs. The January 24, 2000 Letter-Order deprives California residents  
27 of these services to their detriment and should be judicially addressed promptly.



1 investigations, public allegations of misconduct, loss of hospital privileges, public  
2 disciplinary hearings and public disciplinary action, as well as criminal prosecution,  
3 all of which flow from the deprivation of rights guaranteed by the Fifth and First  
4 Amendment of the United States Constitution, incorporated to the States by the  
5 Fourteenth Amendment.

6 85. Plaintiffs and other similarly-situated California OMSs who wish to  
7 truthfully inform the public of their education, training and certification to perform  
8 cosmetic oral and maxillofacial surgical procedures are in imminent risk of irreparable  
9 injury unless this Court declares the Dental Board's Letter-Order unconstitutional and  
10 grants Plaintiffs the injunctive relief sought.

11 **COUNT TWO**

12 **(As Applied Violation of First and Fifth Amendment Rights)**

13 86. Because the Dental Board has explicitly threatened to prosecute and/or  
14 discipline any California OMS who performs cosmetic oral and maxillofacial surgical  
15 procedures other than for trauma-related purposes, while at the same time allowing  
16 California OMSs to perform the same cosmetic oral and maxillofacial surgical  
17 procedures for trauma-related purposes, the Board's Letter-Order is an  
18 unconstitutional restriction of the Plaintiffs' and other similarly-situated California  
19 OMSs' protected property interest in their professional licenses without due process  
20 of law.

21 87. Because the Dental Board has explicitly threatened to prosecute and/or  
22 discipline any California OMS who performs cosmetic oral and maxillofacial surgical  
23 procedures other than for trauma-related purposes, while at the same time allowing  
24 California OMSs to perform the same cosmetic oral and maxillofacial surgical  
25 procedures for trauma-related purposes, the Board's Letter-Order is an  
26 unconstitutional restriction of the Plaintiffs' and other similarly-situated California  
27 OMSs' constitutionally protected right to engage in free speech without due process of  
28 law. Plaintiffs and other similarly-situated California OMSs who wish to truthfully

1 inform the public of their education, training and certification to perform cosmetic  
2 oral and maxillofacial surgical procedures are in imminent risk of irreparable injury  
3 unless this Court declares the Board's Letter-Order unconstitutional as applied to  
4 Plaintiffs and grants Plaintiffs the injunctive relief sought.

5 88. Plaintiffs and other similarly-situated California OMSs are in imminent  
6 risk of irreparable injury by the Dental Board by being subjected to investigations,  
7 public allegations of misconduct, public disciplinary hearings and public disciplinary  
8 action, as well as criminal prosecution, affecting a constitutionally-protected property  
9 interest in licensure, all of which flow from the deprivation of rights guaranteed by  
10 the First and Fifth Amendment of the United States Constitution, incorporated to the  
11 States under the Fourteenth Amendment, without due process of law.

12 89. Plaintiffs and other similarly-situated California OMSs who wish to  
13 truthfully inform the public of their education, training and certification to perform  
14 cosmetic oral and maxillofacial surgery, are in imminent risk of irreparable injury by  
15 the Dental Board by being subjected to investigations, public allegations of  
16 misconduct, public disciplinary hearings and public disciplinary action, as well as  
17 criminal prosecution, affecting a constitutionally-protected property interest in  
18 licensure, unless this Court declares that the Board's Letter-Order is unconstitutional  
19 and grants the Plaintiffs the injunctive relief sought.

### 20 COUNT THREE

#### 21 **(Violation of First Amendment Commercial Speech Rights)**

22 90. The Dental Board's Letter-Order is an unconstitutional infringement of  
23 the commercial free speech rights of the Plaintiffs and other similarly-situated  
24 California OMSs, which rights are guaranteed by the First Amendment of the  
25 Constitution as applied to the states through the Due Process Clause of the Fourteenth  
26 Amendment.

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1. A declaration that the Dental Board’s Letter-Order dated January 24, 2000 and its declared policy of restricting California OMSs from performing cosmetic oral and maxillofacial surgical procedures for esthetic reasons is unconstitutional on its face; and

2. A declaration that the Dental Board’s Letter-Order dated January 24, 2000 and its declared policy of restricting California OMSs from performing cosmetic oral and maxillofacial surgical procedures for esthetic reasons are unconstitutional as applied to the Plaintiffs; and

3. A permanent injunction prohibiting the Dental Board from implementing, or otherwise enforcing, the policies, mandates, and interpretations set forth in its January 24, 2000 Letter-Order; and

4. An award to Plaintiffs for all attorneys’ fees and costs incurred in bringing this action, pursuant to 42 U.S.C. § 1988; and

5. An order granting to the Plaintiffs all other relief to which they may be entitled at law or in equity.

DATED: January 23, 2001

FRANK R. RECKER & ASSOCIATES CO.

and

McDONOUGH, HOLLAND & ALLEN  
A Professional Corporation

By: \_\_\_\_\_  
ANN TAYLOR SCHWING

*Attorneys for Plaintiffs*