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CIRCUIT COURT OF OREGON
FOR LANE COUNTY

BY _____

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR LANE COUNTY

OLIVIA CHERNAIK, a minor and
resident of Lane County, Oregon; **LISA
CHERNAIK**, guardian of Olivia
Chernaik; **KELSEY CASCADIA
ROSE JULIANA**, a minor and resident
of Lane county, Oregon and **CATHY
JULIANA**, guardian of Kelsey Juliana,

Plaintiffs,

v.

JOHN KITZHABER, in his official
capacity as Governor of the State of
Oregon; and the **STATE OF OREGON**,

Defendants.

Case No. 16-11-09273

**AMENDED COMPLAINT FOR
DECLARATORY JUDGMENT
AND EQUITABLE RELIEF**

(Claim not Subject to Mandatory
Arbitration)

Plaintiffs allege:

1.

This is a proceeding for declaratory and equitable relief under Oregon Revised Statutes (ORS) Chapter 28. Plaintiffs are children and their families who live in Oregon, and their personal and economic well-being is directly dependent upon the health of the State's natural resources held in trust for the benefit of its citizens, including water resources, submerged and submersible lands, coastal lands, forests, and wildlife. All of these resources or assets, and

1 therefore the future of the children, are currently threatened by the impacts of climate change.
2 In bringing this action, the children seek a declaration from the Court that the State of Oregon
3 and Governor John Kitzhaber have violated their duties to uphold the public trust and protect
4 the State's atmosphere as well as the water, land, fishery, and wildlife resources from the
5 impacts of climate change.

6 2.

7 Plaintiffs are Oregon youth and their families whose personal and economic well-being
8 is and will continue to be threatened with injury from climate change due to increasing
9 temperatures and excessive heat, rising sea levels, loss of water resources, diseases and pests,
10 loss of agricultural and soil productivity, changes in precipitation patterns, extreme weather
11 events, flooding, and other consequences of climate change.

12 3.

13 The survival, health, recreational, scientific, cultural, inspirational, spiritual,
14 educational, aesthetic, emotional well-being, and other rights and interests of Plaintiffs are and
15 will be increasingly adversely and irreparably injured by Defendants' failure to protect the
16 natural resources the State holds in trust for its citizens.

17 4.

18 Plaintiffs Olivia Chernaik is a minor and Lisa Chernaik is her mother and both reside in
19 Lane County, Oregon. Olivia and Lisa Chernaik enjoy and gain great educational, aesthetic,
20 scientific, and other benefits from visiting the Oregon coast. They enjoy walking on the beach
21 and observing tidal pools. Olivia Chernaik visits the Oregon coast at least once a year either
22 with her family or on school field trips. Lisa Chernaik has visited the Oregon coast since she
23 was child and still takes her family on trips to Newport and Depoe Bay. Olivia and Lisa
24
25
26

1 Chernaik's ability to engage in these activities is and will continue to be harmed by the State's
2 failure to protect trust resources from the impacts of climate change and the resulting loss of
3 beaches and shorelines from erosion and rising sea levels. Lisa Chernaik wants her children to
4 enjoy the sea lions and seals at Cape Arago and the beautiful gardens at Shore Acres
5 throughout their lives as she has done but as a direct and consequential result of accelerating
6 climate change this recreational pursuit will be negatively impacted by climate change.

7
8 5.

9 Lisa Chernaik also enjoys preparing and serving fish for her family including salmon,
10 halibut, and Pacific shrimp. The ability of her family to enjoy these foods is and will continue
11 to be harmed by the State's failure to protect trust resources from the impacts of climate
12 change and the resulting heating of the ocean and consequent impacts on fisheries and other
13 sea life.

14
15 6.

16 Olivia and Lisa Chernaik grow fruit and vegetables in their backyard and enjoy picking
17 berries together. Their ability to engage in these activities together will be harmed by the
18 State's failure to protect trust resources from the impacts of climate change and the resulting
19 reductions in water availability, drought, increases in pests, rising temperatures, and weather
20 changes.

21
22 7.

23 Lisa Chernaik has seasonal allergies and is allergic to tree and grass pollen. She is
24 concerned that her allergies will worsen due to the impacts of climate change and that her
25 children may also develop allergies. She is harmed by the State's failure to protect trust
26

1 resources from the impacts of climate change and the resulting rising temperatures and weather
2 changes that will lead to increased allergy and related health problems.

3 8.

4 Plaintiffs Kelsey Cascadia Rose Juliana is a minor and Catia Juliana is her mother.
5 They both reside in Lane County, Oregon. Kelsey Juliana enjoys and gains great educational,
6 aesthetic, scientific, and other benefits from hiking and backpacking in Oregon's forests and
7 especially old-growth forests with her father. She enjoys viewing big and various trees,
8 wildflowers, animals, and pastures of moss. She hikes at least once every other month and
9 frequently visit Mount Pisgah, Spenser Butte, Three Sisters, and Goodman Creek, and she
10 takes longer backpacking trips in the summer in different areas in Oregon. Her ability to
11 engage in these activities is and will continue to be harmed by the State's failure to protect
12 trust resources from the impacts of climate change and the resulting changes to the ecosystems
13 from drought and rising temperatures, and other changes in Oregon's weather patterns.
14

15 9.

16
17 Kelsey Juliana enjoys and gains great educational, aesthetic, scientific, and other
18 benefits from visiting the Oregon coast and return to the coast a few times each year to play in
19 the sand, look for plants, hunt for sea creatures in tidal pools, and play in the waves. She
20 frequently visits Newport and Yachats with her family. They also enjoy eating locally caught
21 salmon, tuna, and clams. Their ability to engage in these activities is and will continue to be
22 harmed by the State's failure to protect trust resources from the impacts of climate change and
23 the resulting loss of beaches and shorelines from erosion, rising sea levels, and the heating of
24 the ocean and consequent impacts on fisheries and other sea life.
25
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10.

1
2 Kelsey Juliana enjoys and gains great educational, aesthetic, scientific, and other
3 benefits from cross-country skiing, sledding, and snowshoeing and visiting Gold Lake and
4 Lang Pass to engage in these activities several times each winter. She also enjoys and gains
5 great educational, aesthetic, scientific, and other benefits from rafting, swimming, and other
6 water sports at Mount Pisgah or Goodman Creek nearly every week in the summer. She
7 enjoys picking and eating local huckleberries, thimbleberries, and wild mushrooms and her
8 family has an extensive garden at home in which they grow their own food. Kelsey Juliana
9 would very much like to continue to live in Oregon and have a garden to support herself
10 throughout her life. Kelsey Juliana's ability to engage in these activities is and will continue to
11 be harmed by the State's failure to protect trust resources from the impacts of climate change
12 and the resulting reductions in water availability, drought, increases in pests, rising
13 temperatures, and weather changes.
14

11.

15
16
17 The above-described health, recreational, scientific, cultural, inspirational, educational,
18 aesthetic, and other interests of Plaintiffs will be adversely and irreparably injured by
19 Defendants' failure to protect public trust resources by establishing and enforcing adequate
20 limitations on the levels of greenhouse gas ("GHG") emissions that will reduce the level of
21 carbon dioxide concentrations in the atmosphere to provide a livable future for these Plaintiffs
22 and all youth in Oregon.
23

24 ///

25 ///

12.

1
2 The harm to Plaintiffs' interests is caused by Oregon's failure to sufficiently cap and
3 annually reduce carbon dioxide emissions in the State and will be redressed by a favorable
4 order from the Court.

5
6 13.

7 Defendant John Kitzhaber is sued in his official capacity as the Governor of the State of
8 Oregon.

9
10 14.

11 Defendant the State of Oregon, acting through the Governor John Kitzhaber, a public
12 officer, has authority for administering the public trust in the State.

13 **The Public Trust Doctrine**

14
15 15.

16 In Oregon, the public trust doctrine stems from the common law and Constitutional and
17 statutory provisions. The origin of the public trust doctrine is that by the law of nature these
18 things are common to mankind -- the air, running water, the sea, and the shores of the sea.

19
20 16.

21 Under ORS section 537.525 the public trust doctrine applies to water resources and
22 provides "the right to reasonable control of all water within the state from all sources of water
23 supply belongs to the public." The State as a sovereign owns the navigable waters of the State
24 as "a trustee for the public."

25
26 17.

The submerged lands under navigable waters and tidal lands are also held in trust for
the citizens of the State.

18.

1
2 The public trust doctrine has been extended beyond water to State owned lands, which
3 under the Article VIII, § 5(2) of the Oregon Constitution, are “managed for the greatest benefit
4 for the people of this state, consistent with the conservation of this resource under sound
5 techniques of land management.”

6
7 19.

8 Whether the public trust includes a particular resource is a question of law. The State’s
9 fiduciary duty under the public trust doctrine is to protect common uses, including, but not
10 limited to navigation, fishing, recreation, and hunting, as well as commerce (via water and road
11 ways) and energy production. The air or atmosphere is likewise necessary for health, welfare,
12 and commerce in Oregon as a public trust resource that is not subject to alienation by the State.

13 **Science Documenting The Climate Crisis**

14
15 20.

16 For more than 200 years, the burning of fossil fuels, such as coal and oil, together with
17 massive deforestation have caused a substantial increase in the atmospheric concentrations of
18 heat-trapping greenhouse gases. These gases prevent heat from escaping to space, like the
19 glass panels of a greenhouse. The extent of these gases in the atmosphere have changed and
20 fluctuated over geologic time but have reached an equilibrium -- Earth’s safe climate-zone --
21 which is necessary to life as we know it. However, as the concentrations of these gases
22 continue to increase in the atmosphere, the Earth’s temperature is climbing above Earth’s safe
23 climate-zone.

24
25 ///

21.

1
2 According to data from the National Oceanic and Atmospheric Administration
3 (“NOAA”) and the National Aeronautics and Space Administration (“NASA”), the Earth's
4 average surface temperature has increased by about 0.8°C (1.4°F) in the last 100-150 years.
5 The eight warmest years on record (since 1850) have all occurred since 1998. Coupled with
6 the increase in the temperature of the earth, other aspects of the climate are also changing, such
7 as rainfall patterns, snow and ice cover, and sea levels.
8

9
22.

10 Human-caused fossil fuel burning and the resulting climate change are already
11 contributing to numerous adverse impacts to public health, including increased rates of asthma,
12 cancer, cardiovascular disease and stroke, heat-related morbidity and mortality, food borne
13 diseases, and neurological diseases and disorders.
14

15
23.

16 Climate changes are currently occurring faster than even the most pessimistic scenarios
17 presented in the 2007 Intergovernmental Panel on Climate Change. A variety of studies
18 conclude that a further increase of average annual temperatures of 2° C (3.6° F) above current
19 levels would cause severe, widespread and irreversible impacts. Depending on the future rate
20 of greenhouse gas emissions, the future is likely to bring increases of 3 to 11 degrees
21 Fahrenheit above current levels.
22

23
24.

24 If the atmosphere passes certain thresholds or tipping points of energy imbalance and
25 planetary heating, the existing climatic conditions that exist today cannot be restored. These
26 thresholds include the melting of ice sheets and the thawing of tundra and permafrost. Each of

1 these events has catastrophic consequences on its own, such as the consequent rise in sea level
2 after ice sheets melt. Each of these events also spurs further events with negative climatic
3 effects. When sea ice melts the refractive capacity of the ice is lost and the heat energy is
4 absorbed by the ocean. The thawing of permafrost will result in the release of large quantities
5 of the greenhouse gas methane, which eventually converts into carbon dioxide in the
6 atmosphere. Current estimates place the amount of carbon sequestered in permafrost at around
7 900 gigatons worldwide. Release of such a large store would more than double the current
8 amount of carbon in the atmosphere, resulting in further rapid warming and consequent effects.
9

10 25.

11 A failure to take appropriate action will result in the severe alteration and potentially
12 the collapse of the earth's natural systems leaving a planet that is largely unfit for human life.
13

14 26.

15 There is still time to curb and reduce carbon dioxide emissions to avoid irrevocable
16 changes to the atmosphere. To limit average surface heating to no more than 1° C (1.8° F)
17 above pre-industrial temperatures, and to protect Oregon's public trust assets, the best available
18 science concludes that concentrations of atmospheric carbon dioxide cannot exceed 350 parts
19 per million or "ppm." As of 2011, atmospheric carbon dioxide concentrations are at least 390
20 ppm and are projected to exceed 400 ppm by 2020. Current atmospheric greenhouse gas
21 concentrations are the highest in at least 650,000 years.
22

23 27.

24 To reduce carbon dioxide in the atmosphere to 350 ppm by the end of the century, best
25 available science concludes that carbon dioxide emissions must not increase and must begin to
26 decline at a global average of at least 6 percent each year, beginning in 2013, through 2050.

1 After 2050, carbon dioxide emissions should decline at 5 percent per year. To further reduce
2 greenhouse gas concentrations, carbon must also be sequestered by preserving and replanting
3 forests and conserving soils, protecting oceans, and improving agricultural practices to capture
4 the excess carbon dioxide from the atmosphere.

5 **Climate Change in Oregon**

6 28.

7 The Oregon legislature established the Oregon Climate Change Research Institute
8 (OCCRI) in 2007 to foster climate change research. The OCCRI concluded in 2010 that “[t]he
9 human race is profoundly altering the composition of Earth’s atmosphere, chiefly by burning
10 fossil fuels, and there is strong evidence that these changes are responsible for much of the
11 global increase in temperature since the mid-20th century.”
12

13 29.

14 The impacts in Oregon of human caused climate change are predicted to be severe if
15 carbon dioxide emissions are not curtailed in the near term. The OCCRI, in its most recent
16 Climate Assessment Report, predicted that increases in average annual temperatures of .2-1° F
17 per decade would likely cause a wide range of adverse impacts that threaten Oregon’s
18 economy and environment, including, *inter alia*:
19

- 20 a. A reduction of Cascade snow packs by 50 percent by mid-century along with
21 reduced summer precipitation will result in significant decreases in summer stream
22 flows and water supply;
23
24 b. Impacts to Oregon’s \$1.6 billion per year agricultural industry, including drought,
25 disease and limitations on the availability, quality and costs of irrigation water as
26

1 well as the displacement of current agricultural zones resulting, for instance, in the
2 Willamette Valley no longer being viable for growing pinot noir wine grapes;

3 c. Increasing sea levels of at least 2-4 feet and greater storm intensity will result in
4 severe coastal erosion, flooding, loss of beach areas and elevation, loss of coastal
5 wetlands, and inundation and damage of coastal infrastructure.

6 d. Changes to the marine environment including ocean temperature, salinity, dissolved
7 oxygen levels and acidity, which can inhibit the formation of calcium carbonate
8 shell and skeletons for a wide range of marine organisms like oysters and plankton;

9 e. Increased wildlife in both western and eastern Oregon, and an increase in pests and
10 diseases affecting Oregon forest species.
11

12 30.

13 Climate change also poses risks to the health of all Oregonians. According to the
14 OCCRI, “extreme weather (such as floods, droughts, severe storms, heat waves and fires) can
15 directly affect human health as well as cause serious environmental and economic impacts.”
16 Among these impacts are the disruption of natural systems, which gives “rise to the spread or
17 emergence of vector-, water-, and food-borne diseases in areas where they either have not
18 existed, or where their presence may have been limited.” Other impacts include “increase[d]
19 cases of allergies, asthma and other respiratory conditions among susceptible populations” due
20 to “[a]ir pollution and increases in pollen count” and the exacerbation of “lung health
21 problems” due to “exposure to smoke from wild land and forest fires, as well as from the
22 projected increases in air pollution levels in our region.”
23
24

25 ///

31.

1
2 Climate change will also “impose substantial costs to Oregonians.” One example is the
3 costs associated with fighting wild fires. In 2009 Oregon’s Climate Leadership Initiative
4 concluded that “there could be 50% more wildfire acreage by 2020 and 100% more wildfire
5 acreage by 2040 in Oregon” and that “[u]sing linear projects based on a business-as-usual
6 approach . . . firefighting costs in Oregon could increase to \$97 million in 2020, \$200 million
7 in 2040, and \$444 million in 2080.” Costs such as these “may be substantially reduced if
8 global GHG emissions and thus climate changes (precipitation and temperature variability) are
9 lessened through GHG mitigation policies and adaptation.”
10

11 32.

12 In 2007, the Oregon Legislature passed HB 3543, which set the following goals for
13 Oregon: by 2010, arrest and begin to reduce Oregon’s greenhouse gas emissions; by 2020,
14 reduce greenhouse gas levels to 10 percent below 1990 levels; and by 2050 reduce greenhouse
15 gas levels that are at least 75 percent below 1990 levels. The goals set by the Oregon
16 Legislature in 2007 are inadequate to meet the State’s greenhouse gas reductions that will be
17 required in order to protect Oregon’s trust assets and attain carbon dioxide concentrations of
18 350 ppm.
19

20 33.

21 According to the Oregon Global Warming Commission, Oregon’s per capita emissions
22 in 2005 were 18 thousand metric tons of carbon dioxide equivalent (“MTCO_{2e}”) or total gross
23 greenhouse gas emissions of 69,591,000,000 tons. Though lower than the national average,
24 these per capita emissions are “nearly double the European Community average.”
25
26

34.

1
2 According to the OCCRI, “[t]he sources of Oregon’s greenhouse gas emissions can be
3 broadly listed as energy [including transportation], agriculture, industrial processes, and waste
4 management.”

35.

5
6 Oregon has the ability to curtail greenhouse gas emissions, increase carbon
7 sequestration, and take the steps necessary to protect the public trust assets of the State from
8 the adverse impacts of climate change. In 2004, the Governor’s Advisory Group on Global
9 Warming developed a detailed plan to reduce Oregon’s emissions at least 75 percent below
10 1990 levels by 2050. The plan called for investment in energy, land use, and materials
11 efficiency; replacing greenhouse gas-emitting energy technologies with cleaner technologies;
12 and increased biological sequestration (or carbon capture and storage). Although Oregon’s
13 targets are inadequate to achieve the necessary reductions mandated by the best available
14 science, the State has already developed a detailed implementation plan that includes a
15 majority of the necessary greenhouse gas reductions.
16
17

36.

18
19 Despite having a concrete greenhouse gas reduction and mitigation plan in place,
20 Oregon is falling significantly behind the targets set by that plan. In 2008 and again in 2009,
21 the Oregon Global Warming Commission found that Oregon is failing in its efforts to meet the
22 2020 and 2050 goals set by the Legislature, which even in themselves would fail to achieve the
23 necessary greenhouse gas reductions according to the best available science. As the Global
24 Warming Commission found in 2009, “the state will likely fall well short of meeting its 2020
25 emission reduction goal, and, by extrapolation, clearly is not on track to meet its 2050 goal.”
26

37.

1
2 A zero-carbon energy system is still possible within the next thirty to fifty years.
3 Actual physical emissions of carbon dioxide from fossil fuels can be eliminated with
4 technologies that are now available or reasonably foreseeable and at reasonable cost. The
5 phase out of fossil fuels by about 2050 is possible by implementing the following: 1) a cap on
6 fossil fuel use that declines to zero by 2050 (or a gradually rising carbon tax); 2) increasingly
7 stringent efficiency standards for buildings, appliances, and motor vehicles; 3) elimination of
8 subsidies for fossil fuels, nuclear energy, and biofuels from food crops; 4) investment in a
9 vigorous and diverse research, development and demonstration program that includes smart
10 grid and storage technologies and electrification of transportation; 5) banning new coal-fired
11 power plants and closing existing plants; 6) carbon-free state, local, and federal governments;
12 and 7) adoption of energy standards that gradually shift Oregon over to renewable energy
13 sources.
14

15 **FIRST CLAIM FOR RELIEF**

16 **(Declaratory Judgment -- Public Trust)**

17
18 38.

19 Plaintiffs re-allege and hereby incorporate by reference herein all the preceding
20 paragraphs.

21 39.

22 Defendants have a fiduciary obligation as a sovereign government to hold vital natural
23 resources in trust for the benefit of their citizens. In Oregon, the res of the public trust includes
24 Oregon's water resources, submerged and submersible lands, islands, shorelands, coastal areas,
25 wildlife, and fish for the purposes of conservation, pollution abatement, maintenance and
26

1 enhancement of aquatic and fish life, habitat for fish and wildlife, ecological values, in-stream
2 flows, commerce, navigation, fishing, recreation, energy production, and the transport of
3 natural resources. The State, as trustee for the people, bears the responsibility of preserving
4 and protecting the right of the public to the use of public trust assets for these recognized
5 purposes.

6
7 40.

8 The atmosphere is a part of the public trust res and is therefore held in trust by the State for
9 the benefit of the present and future citizens of Oregon. The atmosphere does not lend itself to
10 private ownership and furthermore is necessary for humanity's survival. All Oregon citizens
11 have a paramount right over private interests to use the atmosphere consistent with public trust
12 purposes.

13
14 41.

15 The atmosphere is intricately linked with other public trust resources. Harm to the
16 atmosphere negatively affects water resources, submerged and submersible lands, islands,
17 shorelands, coastal areas, wildlife, and fish. Harm to the atmosphere also harms the public's
18 ability to use trust resources for the purposes of conservation, pollution abatement,
19 maintenance and enhancement of aquatic and fish life, habitat for fish and wildlife, ecological
20 values, in-stream flows, commerce, navigation, fishing, recreation, energy production, and the
21 transport of natural resources.

22
23 42.

24 Defendants, the sovereign trustees, have an affirmative fiduciary duty to prevent waste,
25 to use reasonable skill and care to preserve the trust property and to maintain trust assets. The
26 duty to protect the trust assets means that the sovereign must ensure the continued availability

1 and existence of healthy trust resources consistent with the purposes for which they are held in
2 trust for present and future generations.

3 43.

4 Defendants' failure to regulate and reduce carbon dioxide emissions violates its
5 fiduciary obligation to protect public trust assets.

6 44.

7 Defendants' failure to preserve and protect carbon sinks such as forests, soils and
8 agricultural land violates its fiduciary obligation to protect public trust assets.
9

10 45.

11 Defendants' waste of, and failure to preserve and protect the atmospheric trust and
12 additional trust assets has caused and will continue to cause imminent injuries described above.
13 Defendants' failure to protect these trust assets has interfered and will interfere with Plaintiffs'
14 and the public's use of trust assets for conservation, pollution abatement, maintenance and
15 enhancement of aquatic and fish life, fish and wildlife habitat, ecological values, in-stream
16 flows, commerce, navigation, fishing, recreation, energy production, and the transport of
17 natural resources.
18

19 46.

20 Defendants' failure to uphold their public trust obligations threatens the health, safety,
21 and welfare of Plaintiffs, as well as present and future generations of Oregon citizens.
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26

PRAYER FOR RELIEF

1 WHEREFORE, Plaintiffs pray for judgment as follows:
2

3 47.

4 A declaration that the atmosphere is a trust resource, and that the State of Oregon, as a
5 trustee, has a fiduciary obligation to protect the atmosphere as a commonly shared public trust
6 resource from the impacts of climate change for Plaintiffs and for present and future
7 generations of Oregonians.

8 48.

9 A declaration that water resources, navigable waters, submerged and submersible lands,
10 islands, shorelands, coastal areas, wildlife, and fish are trust resources, and that the State of
11 Oregon, as a trustee, has a fiduciary obligation to protect these assets as commonly shared
12 public trust resources from the impacts of climate change for Plaintiffs and for present and
13 future generations of Oregonians.

14 49.

15 A declaration that Defendants have failed to uphold their fiduciary obligations to
16 protect these trust assets for the benefits of Plaintiffs as well as current and future generations
17 of Oregonians by failing adequately to regulate and reduce carbon dioxide emissions in the
18 State of Oregon.

19 50.

20 An order requiring Defendants to prepare, or cause to be prepared, a full and accurate
21 accounting of Oregon's current carbon dioxide emissions and to do so annually thereafter.
22

23 51.

24 An order requiring Defendants to develop and implement a carbon reduction plan that
25 will protect trust assets by abiding by the best available science.
26

1 52.

2 A declaration that the best available science requires carbon dioxide emissions to peak
3 in 2012 and to be reduced by at least six per cent each year until at least 2050.

4 53.

5 That this Court retain continuing jurisdiction over this matter for purposes of enforcing
6 the relief awarded.

7 54.

8 That this Court award Plaintiffs their reasonable attorneys' fees and costs pursuant to
9 its equitable authority, as recognized by *Deras v. Myers*, 272 Or 47 (1975).

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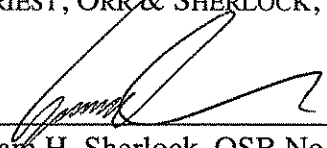
For such other and further relief as the Court deems just and equitable.

DATED this 16th day of May 2011.

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