

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA**

**WARREN R MARCOUX,**

Plaintiff,

v.

Civil Case No.

**RICHARD L SWEARINGEN IN HIS  
OFFICIAL CAPACITY AS COMMIS-  
SIONER OF THE FLORIDA DEPART-  
MENT OF LAW ENFORCEMENT,**

Defendant.

\_\_\_\_\_ /

**VERIFIED COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE RELIEF**

The Plaintiff, Warren R. Marcoux, by and through his undersigned counsel, files this Verified Complaint for Declaratory and Injunctive Relief against Richard L. Swearingen, in his official capacity as Commissioner of the Florida Department of Law Enforcement (“FDLE”).

This is an action under 42 U.S.C. §1983 to challenge the constitutionality of Florida’s sex offender registration law, Fla. Stat. §943.0435, as applied to Plaintiff and other individuals who no longer reside in the State of Florida.

Plaintiff requests that the District Court declare Fla. Stat. §943.0435 to be in violation of his rights under both the United States and Florida Constitutions, as applied to himself and other individuals who no longer reside in the State of Florida, and permanently enjoin the Defendant from maintaining Plaintiff's sex offender registration and publicly disseminating Plaintiff's personal information and designation as a "Sexual Offender" through the Internet public registry maintained by FDLE.

### **Jurisdiction and Venue**

1. This action arises under the Fourteenth Amendment to the United States Constitution and 42 U.S.C. §1983.
2. This action also arises under the Florida Constitution's Rights to Privacy, Article I, §23 and the Florida Constitution's Due Process clause, Article I, §9.
3. This Court has subject-matter jurisdiction under 28 U.S.C. §§1331 and 1343.
4. This Court has supplemental jurisdiction over the state law claim under 28 U.S.C. §1367.
5. Declaratory relief is authorized by 28 U.S.C. §§2201 and 2202.
6. Venue properly lies within this district under 28 U.S.C. §1391(b) as it was Plaintiff's last residence in Florida, it is the district in which Plaintiff last registered and it is the district in which Defendant is located and performs his official duties.

### **Parties**

7. Plaintiff, a resident of Ontario, Canada, is subject to the lifetime public dissemination of his personal information and designation as a “Sexual Offender” on the FDLE sex offender website, even though he does not reside, work, or attend school in the State of Florida.

8. Defendant Richard L. Swearingen is the Commissioner of the FDLE, which is responsible for implementing many of Florida’s registration requirements. These requirements include creation and maintenance of the Florida sex offender registry and the website containing information about the registrants, and disclosure of the information to law enforcement agencies, commercial social networking websites, and the public. He has statutory authority to implement the relief Plaintiff seeks pursuant to Fla. Stat. §943.03.

9. At all relevant times, Defendant Swearingen and his agents acted, and continue to act, under color of state law.

### **Standing**

10. Plaintiff has standing to bring this action, as he has suffered an injury-in-fact caused by the Defendant, acting under color of law, in the Defendant continuing to publish his information on the Florida sex offender registry even though he left the State years ago, and has not returned.

11. Plaintiff's initial injury occurred on July 18, 2017, when he left the State of Florida to permanently reside in Canada.

12. Plaintiff continues to suffer injury every day that Defendant maintains him on the Registry and publicly disseminates his information through the Internet.

13. The statute of limitations for §1983 claims is determined by a state's residual personal injury statute. *Owens v. Okure*, 488 U.S. 235, 249-250 (1989). In Florida, that is four (4) years. Fla. Stat. § 95.11(3)(p). A §1983 claim accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action." *Corn v. City of Lauderdale Lakes*, 904 F.2d 585, 588 (11th Cir. 1990).

### **Statement Of Facts and Law**

14. On October 27, 2010, Plaintiff entered a guilty plea in Alachua County, Florida, to the offense of Sexual Assault of a 16/17-Year-Old ("Qualifying Offense").

15. Plaintiff's Qualifying Offense was based on consensual sexual activity with the alleged victim, then 17.<sup>1</sup>

16. Plaintiff and the alleged victim started dating in 2007 when she was 17. Thereafter they conceived a daughter together and were subsequently married on June 27, 2009 (when the alleged victim was 19 years old).

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<sup>1</sup> The alleged victim had lied about her age when they first met. She said she was 19.

17. Two years after the fact, someone extrapolated that the daughter was conceived when the alleged victim was 17 and reported Plaintiff to the police.

18. At the time Plaintiff was charged with the Qualifying Offense, he was already married to the alleged victim.

19. Plaintiff had no prior criminal record. He was employed as a police specialist and computer instructor at a college (the alleged victim was not a student at the college). He was a sworn law enforcement officer.

20. Plaintiff has no subsequent arrests. Aside from the Qualifying Offense, Plaintiff has no other criminal history and has led an otherwise law-abiding life.

21. Because of the Qualifying Offense, Plaintiff underwent a psychosexual evaluation through the University of Florida College of Medicine Forensic Institute conducted by two qualified practitioners: Tonia Werner, M.D., Assistant Professor and Chief, Division of Forensic Psychiatry, and Carlos R. Rodriguez, M.D., Forensic Fellow, Department of Psychiatry. The evaluation determined that Plaintiff did not manifest any sexual deviant behaviors, including any specific interest in underage females.

22. Plaintiff presents a negligible risk of re-offense.

23. The trial court, finding good cause, withheld adjudication and imposed no penalty.

24. Plaintiff and his wife subsequently separated for reasons unrelated to the Registry and on February 28, 2017, their divorce was finalized. Plaintiff was awarded sole parental responsibility and custody of their daughter.

25. Unable to secure lucrative employment in Florida due to his registrant status, Plaintiff and his daughter moved to Ontario, Canada<sup>2</sup> in 2018 so that he can pursue a career that would utilize his education, skills, and experience in his chosen profession of law enforcement.

26. In Ontario, Plaintiff does not qualify for sexual offender registration.<sup>3</sup>

27. In fact, since the legal age of consent in Canada is 16 years old, and the conduct was consensual, Plaintiff's Qualifying Offense would not even constitute a crime there.

28. Shortly after moving to Canada, Plaintiff secured a job with the Ontario Department of Probation and Parole as a Probation Officer. His employer was fully aware of his criminal history in Florida.

29. As stated in the article that appeared on November 13, 2018, in the local newspaper, the Windsor Star, *"Not long after he was hired, a staff member learned through an online search that a man with the same name was listed on the Florida sex offender registry."*

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<sup>2</sup> Plaintiff was born in Canada and has dual citizenship.

<sup>3</sup> Per P.C. Kristina Garswood of the Windsor Police Service.

30. Anyone who performs an online search for “Warren Marcoux” will find the very first result is the Florida Sex Offender Registry.

31. In fact, within a couple of days after completing training for his position, a co-worker simply ‘Googled’ Plaintiff’s name, discovered the flyer FDLE broadcasts to the world with Plaintiff’s name, Plaintiff’s picture, and the statement “WARREN RICHARD MARCOUX is registered as a Sexual Offender”, and within no time it had circulated around the office.

32. Immediately thereafter, Plaintiff was fired.

33. Plaintiff was not fired because of his job performance or qualifications, but because of the stigma caused by the publication of his FDLE flyer online.

34. Plaintiff has interviewed for numerous positions and been repeatedly told that if not for Florida maintaining his flyer online, he would be hired.

35. The public dissemination of Plaintiff’s personal information by the FDLE on their sex offender website has directly caused Plaintiff’s employment to be terminated and has directly caused job offers made to Plaintiff to be rescinded.

36. Plaintiff is a highly qualified, educated, and credentialed candidate<sup>4</sup>, but has been unable to find gainful employment in his chosen profession because of FDLE’s

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<sup>4</sup> Plaintiff has a Master’s in Business Administration and a Master of Science in Criminal Justice with a Concentration in Critical Incident Management. Plaintiff has certifications in Local Agency Instructor Training, Emergency Planning, FCIC/NCIC, Terminal Agency Coordination, e-Agent Installation Training, D.U.I. Detection and Standardized Field Sobriety Testing, CJIS, Elder Abuse Investigations, Discriminatory Profiling and Human Diversity, many of which were awarded by Defendant, Florida Department of Law Enforcement.

maintenance and dissemination of his personal information, pursuant to Fla. Stat. §943.0435.

37. New acquaintances shun Plaintiff when they find the FDLE flyer online.

38. Plaintiff's daughter recently turned 12 years old. He is keenly aware of the wide usage of the Internet by children, and the bullying perpetrated by teenagers which is particularly felt and feared by the children of registrants who, as well-documented, experience much anxiety, depression, and suicide.

39. Plaintiff has not been present in the State of Florida since he left on July 18, 2018. However, despite being notified that Plaintiff has left the state, FDLE has continuously maintained his sex offender registration and disseminates his personal information on the public FDLE sex offender website, which explicitly notates, "WARREN RICHARD MARCOUX is registered as a Sexual Offender."

40. The FDLE continuously maintains sex offender registration and disseminates personal information on the public FDLE sex offender website for more than twenty-eight thousand (28,000) people who no longer live in the State of Florida<sup>5</sup>.

41. The FDLE continuously maintains sex offender registration and disseminates personal information on the public FDLE sex offender website for more than thirteen hundred (1,300) people who are dead<sup>6</sup>.

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<sup>5</sup> <https://offender.fdle.state.fl.us/offender/publicDataFile.jsf>

<sup>6</sup> *Id.*

42. The stated legislative purpose behind the Florida Sexual Offenders Registration Act, is “that sexual offenders, especially those who have committed offenses against minors, often pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is a paramount government interest. ... Releasing information concerning sexual offenders to law enforcement agencies and to persons who request such information, and the release of such information to the public by a law enforcement agency or public agency, will further the governmental interests of public safety.” Fla. Stat. §943.0435(12)

43. FDLE has the authority to disseminate this information at its discretion through the Internet, as long as the information is not confidential or otherwise exempt from disclosure. Fla. Stat. §943.043(1).

44. Pursuant to this authority, FDLE has established a website on which it adds individuals required to register, broadcasts their name, photograph, and other details on the Internet and maintains them on the website even after they leave the State of Florida, are deported, or even after they die.

45. §943.0435 also does not provide for a procedure to determine an offender’s risk-level or whether the offender is either “dangerous”, “non-dangerous”, “low risk” or “high risk” before their personal information is publicly disseminated on the FDLE sex offender website.

46. Maintenance of Plaintiff on the FDLE sex offender website is not a federal requirement.<sup>7</sup>

47. The provision of the Florida Sexual Offenders Registration Act criminalizing noncompliance, §943.0435(9), is likewise unenforceable against Plaintiff.<sup>8</sup>

48. Because Plaintiff does not maintain an actual presence or jurisdictional nexus with the State, Florida lacks the power to enforce the sex offender registration laws against him, thereby negating his obligation to register and abolishing the State's authority to maintain and publicly disseminate his personal information.

49. In addition, Florida's maintenance and public dissemination of Plaintiff's information is not rationally related to Fla. Stat. §943.0435's stated legislative purpose, which is to protect the citizenry of Florida from the danger posed by sex offenders and predators located within the State.

50. Plaintiff is no longer located in the State (or even in the Country) and therefore does not pose a threat to the citizens of Florida.

51. Plaintiff left Florida nearly four years ago, has never returned to Florida, and never intends to return to Florida.

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<sup>7</sup> Pursuant to the plain text of the federal sex offender registration law, 34 U.S.C. §20913, Plaintiff, is not required to register in Florida and is not subject to federal criminal penalties for failing to register in Florida. Federal law requires registration only in a state in which a person resides, works, or attends school.

<sup>8</sup> To trigger the criminal penalty, an offender would have to fail to register with the sheriff's office or the DHSMV while necessarily present within the State. Permanent, temporary, or transient presence in the State is an essential element to the crime of failing to comply with the registration requirements of §943.0435.

52. If Plaintiff, *hypothetically*, should return to Florida, he understands that he would have to register a temporary, permanent, or transient address within 48 hours.

53. Keeping Plaintiff on the Florida registry does nothing to solve sex crimes against Floridians or to help them protect themselves from being victimized.

54. There is no logical reason for FDLE to continue to include Plaintiff on its sex offender registry and website.

55. Any interest the Defendant might have in continuing to publish increasingly stale information about Plaintiff does not suffice to subject him to the above-described impacts.

56. Both the United States and Florida Constitutions protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property. See U.S. Const. amend. XIV, § 1 (“nor shall any State deprive any person of life, liberty, or property, without due process of law”); Art. I, § 9 Fla. Const. (“No person shall be deprived of life, liberty, or property, without due process of law”).

57. When a state enacts legislation that infringes on fundamental rights, courts will review the law under a strict scrutiny test and uphold it only when it is “narrowly tailored to serve a compelling state interest.” *Reno v. Flores*, 507 U.S. 292, 302 (1993).

58. The Florida Constitution expressly ensures a right to privacy. Article I, §23 "embraces more privacy interests, and extends more protection to the individual in those interests, than does the federal Constitution." *In re T W*, 551 So. 2d 1186, 1192 (Fla. 1989). It includes the right to determine if, when and how information about oneself is communicated to others, especially in a damaging context.

59. Encroachment on this right is presumptively unconstitutional and must be justified by a *compelling state interest* which the law serves through *the least restrictive means*.

60. The case at bar invokes substantive due process with regard to Plaintiff's fundamental right to pursue his profession and Plaintiff's right to privacy.

61. §943.0435 is not narrowly tailored to serve the State's compelling interest in protecting Florida citizens from future sexual offenses and preventing sex offenders from subverting the purpose of the statute; instead, the law is jurisdictionally overbroad and unduly burdensome.

62. There is simply no logical connection between the stated legislative purpose of the statute and the continued public dissemination of Plaintiff's personal information over the Internet.

63. The application of §943.0435 to Plaintiff, and others who are similarly situated, through the repeated worldwide publication and dissemination of stale information on the Internet, serves no conceivably legitimate interest of the State.

64. The application of §943.0435 to Plaintiff, and others who are similarly situated subjects him and his family to the exact harms Article I, §23 is intended to prevent.

65. The application of §943.0435 to Plaintiff, and others who are similarly situated is not the least restrictive means to ensure the protection of the Florida community from high-risk sex offenders.

66. FDLE's online sex offender registry is not limited to the confines of the jurisdictional borders of Florida, or a one-time publication of his personal information: a simple Google search of the term "Warren Marcoux" returns the FDLE profile and his image at the top of the first page of results and provides the description "WARREN RICHARD MARCOUX is registered as a Sexual Offender" without even clicking on the link.

67. The public dissemination of his information by FDLE guarantees that *anyone* who searches Plaintiff's name on the Internet, for *any* reason, at *any* time, from *any* place and on a continuous basis, will discover his personal information along with the label "Sexual Offender,".

68. "The substantive component of the Due Process Clause forbids the government from depriving a person of life, liberty, or property in such a way that... interferes with rights implicit in the concept of ordered liberty." *Squaw Valley Development Co. v. Goldberg*, 375 F.3d 936, 948 (9th Cir. 2004) (internal quotation

marks omitted). “A threshold requirement to a substantive or procedural due process claim is the plaintiff’s showing of a liberty or property interest protected by the Constitution.” *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62 (9th Cir. 1994).

69. “The Supreme Court has recognized that the liberty component of the Fourteenth Amendment’s Due Process Clause includes the right to pursue a profession.” *Ming Wei Liu v. Board of Trustees of Univ. of Ala.*, 330 F. App’x 775, 780 (11th Cir. 2009) (citing *Connecticut v. Gabbert*, 526 U.S. 286, 291-92 (1999)). Cases recognizing the right “all deal with a complete prohibition of the right to engage in a calling, and not [a] sort of brief interruption.” *Gabbert*, 526 U.S. at 292.

70. To-date, Plaintiff has been unable to find gainful employment in his chosen profession because of FDLE’s maintenance of his registration and dissemination of his personal information pursuant to Fla. Stat. §943.0435.

71. Plaintiff is a highly qualified and credentialed candidate for positions, but the public dissemination of Plaintiff’s personal information on FDLE’s sex offender website has directly caused the termination of his employment and has directly impacted his ability to secure other gainful employment in his chosen profession, making it virtually impossible to find employment in his field.

72. Plaintiff is stigmatized by FDLE's public dissemination of his personal information because his inclusion on the sex offender website conveys the false message that he is a dangerous sex offender and a high-risk threat to public safety.

73. FDLE's application of §943.0435 to Plaintiff has effectively banned him from his profession. See *Clemons v. Dougherty County, Georgia*, 684 F.2d 1365, 1371 (11th Cir. 1982) (the standard for proving a deprivation of the liberty interest is to establish the state made "stigmatizing charges which foreclose his freedom to take advantage of other employment opportunities").

74. Fla. Stat. §943.0435 provides no procedure to determine a person's continuing dangerousness or for an individual to challenge their determination of present dangerousness.

75. FDLE has violated Plaintiff's procedural due process rights by publicly disseminating his personal information on its sex offender website without providing notice and an opportunity to be heard on whether he remains dangerous and poses a threat to the citizenry of Florida.

76. The Florida Supreme Court has recognized that the designation as a "Sexual Offender" constitutes a stigma and that Florida's registration law imposes "more than a stigma." See *State v. Robinson*, 873 So.2d 1205, 1213 (Fla. 2004).

77. Fla. Stat. §943.0435 is not narrowly tailored to justify the State of Florida's infringement upon Plaintiff's right to pursue his profession and is, accordingly, unconstitutional as applied to him and others similarly situated.

78. The irrebuttable presumption of dangerousness contained in §943.0435 violates fundamental rights. Under these circumstances, there must be an adequate fit between the classification and the policy it serves. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989).

79. While most registrants do not reoffend, Plaintiff (and others who no longer reside in Florida, or who are no longer even alive for that matter) in particular, poses no risk of doing so to Floridians, because he does not reside here. Therefore, the irrebuttable presumption of dangerousness does not serve its stated goals.

80. Every day FDLE maintains Plaintiff's registration and disseminates his personal information over the Internet pursuant to Fla. Stat. §943.0435, FDLE continues to unconstitutionally publish a "government blacklist, which when circulated or otherwise publicized to prospective employers effectively excludes [Plaintiff] from his occupation, much as if the [State of Florida] had yanked the license of an individual in an occupation that requires licensure." *Olivieri v. Rodriguez*, 122 F.3d 406, 408 (7th Cir. 1997).

**Plaintiff's First Claim for Relief**

**Defendant's dissemination of Plaintiff's information  
over the Internet Violates his Procedural and  
Substantive Due Process Rights under both the  
United States and Florida Constitutions**

81. Plaintiff hereby re-alleges and incorporates by reference Paragraphs 1 through 80, as though fully set forth herein.

82. Both the United States and Florida Constitutions protect individuals from arbitrary and unreasonable governmental interference with a person's right to life, liberty, and property. *See* U.S. Const. amend. XIV, §1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law"); Art. I, § 9 Fla. Const. ("No person shall be deprived of life, liberty, or property, without due process of law").

83. Defendant has violated Plaintiff's due process rights by maintaining his registration information and publicly disseminating it on the FDLE sex offender website without providing notice and an opportunity to be heard on whether he is dangerous or poses a threat to the citizens of Florida.

84. Defendant has deprived Plaintiff of the liberty interest by making stigmatizing charges which foreclose his freedom to take advantage of employment opportunities in his chosen profession.

85. Defendant, acting under color of law, continues to enforce and implement Fla. Stat. §943.0435 against the Plaintiff and others similarly situated, by maintaining and disseminating his personal information, in violation of his due process rights.

86. Fla. Stat. §943.0435 is jurisdictionally overbroad and violates Plaintiff's constitutionally protected liberty interests.

87. Fla. Stat. §943.0435 is not the least restrictive means of furthering a compelling governmental interest.

88. As a direct and proximate result of Defendant's unlawful conduct, Plaintiff has and will suffer irreparable harm, which will continue absent injunctive relief.

### **Plaintiff's Second Claim for Relief**

#### **Defendant's dissemination of Plaintiff's information over the Internet Violates his Right to Privacy under the Florida Constitution**

89. Plaintiff hereby re-alleges and incorporates by reference Paragraphs 1 through 80, as though fully set forth herein.

90. Article I, §23 of the Florida Constitution provides "[e]very natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by

law.”<sup>9</sup>

91. “The essential core of [the informational] zone of privacy is the right “to prevent disclosure of... identity in a damaging context.” *Rasmussen v. South Florida Blood Serv., Inc.*, 500 So. 2d 533, 536 (Fla. 1987) (quoting *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457-58 (1977)). That is precisely what the FDLE is doing to Plaintiff.

92. Fla. Stat. §943.0435 is not the least restrictive means of furthering a compelling governmental interest.

93. As a direct and proximate result of Defendant’s unlawful conduct, Plaintiff has and will continue to suffer irreparable harm, which will continue absent injunctive relief.

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<sup>9</sup> Plaintiff is not seeking to have his criminal record expunged from the public record. Plaintiff is merely seeking to prevent the publication and aggressive dissemination of his information as part of the FDLE registry. “The challenged publication here is not the public court file that shows a conviction, but rather the internet publication of both the conviction and personal information compiled in a compilation of sex offenders.” *Doe v. Alaska Department of Public Safety*, 444 P.3d 116, at 128 (Alaska 2019). Cf *United States Department of Defense v. Federal Labor Relations Authority*, 510 U.S. 490, 500 (1994) (“[a]n individual’s interest in controlling the dissemination of information regarding personal matters does not dissolve simply because that information may be available to the public in some form”); *United States Dep’t of Justice v. Reporters Comm. For Freedom of Press*, 489 U.S. 749, 764 (1989) (noting that “[p]lainly there is a vast difference between the public records that might be found after a diligent search of courthouse files, county archives, and local police stations throughout the country and a computerized summary located in a single clearinghouse of information.”).

### **Relief Requested**

WHEREFORE, Plaintiff respectfully requests that this Honorable Court:

- a) Declare Fla. Stat. §943.0435 unconstitutional as applied to Plaintiff and others similarly situated, in violation of the Fourteenth Amendment to the United States Constitution as well as Article I, section 9 of the Florida Constitution and in violation of the Florida Constitution's Rights to Privacy, Article I, §23.
- b) Permanently restrain and enjoin the Defendant, including all of Defendant's officers, agents, servants, employees, attorneys, and other persons in active concert or participation with Defendant, from maintaining Plaintiff's sex offender registration and disseminating to the public Plaintiff's personal information; and,
- c) Grant such other and further relief as this Court deems just and proper in the circumstances.

RESPECTFULLY SUBMITTED: July 13, 2021.

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF FLORIDA

**WARREN R. MARCOUX,**

Plaintiff,

v.

Civil Case No.

**RICHARD L. SWEARINGEN**, in his  
official capacity as Commissioner of the  
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Defendant.

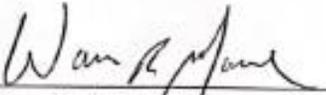
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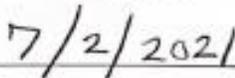
**DECLARATION OF WARREN R. MARCOUX**

I, Warren R. Marcoux, pursuant to 28 U.S.C. § 1746, state the following:

I have reviewed the Verified Complaint set forth in the above-referenced matter and I find the facts contained therein to be true and accurate to the best of my knowledge and belief.

I declare under penalty of perjury that the foregoing is true and correct.

  
\_\_\_\_\_  
Warren R. Marcoux

  
\_\_\_\_\_  
Date