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Attorneys for Plaintiffs

**IN THE THIRD JUDICIAL DISTRICT COURT OF UTAH  
STATE OF UTAH**

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UTAH ASSOCIATION OF CRIMINAL	)	
DEFENSE LAWYERS, Heather WEBB,	)	
Nicholas WELCH, and Karon BARNES,	)	<b>COMPLAINT (CLASS ACTION)</b>
On behalf of themselves and all	)	
others similarly situated,	)	Civil No.
	)	
Plaintiffs,	)	Judge
	)	
vs.	)	
	)	
LOHRA MILLER, as District Attorney for	)	
Salt Lake County, and SALT LAKE	)	
COUNTY,	)	
	)	
Defendants.	)	

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## **PARTIES**

1. The named Plaintiffs are the Utah Association of Criminal Defense Lawyers (“UACDL”), Heather Webb, Karon Barnes, and Nicholas Welch.

a. The UACDL is an association of lawyers engaged in defense of accused persons. UACDL’s members include lawyers who have been denied discovery because they would not pay the Schedule of Fees.

b. Ms. Webb, Ms. Barnes, and Mr. Welch are defendants in criminal cases pending in the Third Judicial District who have been denied discovery because they would not pay the Schedule of Fees.

2. Defendants are Lohra Miller in her capacity as the District Attorney for Salt Lake County (“Ms. Miller” or the “District Attorney”) and Salt Lake County (the “County”).

## **NATURE OF THE CASE**

3. Plaintiffs, like the members of the class they seek to represent (defined below), are defendants in criminal cases pending in the Third Judicial District being prosecuted by Salt Lake County District Attorney’s Office, under the direction of Lohra Miller, the Salt Lake County District Attorney.

4. Prior to June 2009, defendants obtained copies of documents and information in the hands of Salt Lake County prosecutors by filing a motion under Utah Rule of Criminal Procedure 16 and without charge. Similarly, prosecutors were able to obtain discovery from defendants by filing an appropriate request under Rule 16 and also without charge. In June 2009,

Ms. Miller sought to impose fees on defendants as a precondition for producing documents and information in criminal cases. No reciprocal policy applies – defendants are not paid for the discovery they provide the District Attorney.

5. The fees proposed by Ms. Miller and adopted by the County (the “Schedule of Fees”) are illegal. The fees are not reasonable, they do not reflect actual costs, they were adopted in contravention of state and municipal law, and they illegally impair or burden the rights of defendants in criminal cases under both the United States and Utah Constitutions. The Schedule of Fees is a tax on non-indigent defendants and impermissible because not authorized by or adopted pursuant to state law.

6. By imposing the Schedule of Fees, Ms. Miller and the County improperly and illegally interfere with and burden the rights of defendants, who are, as a matter of law, presumed innocent, to defend against charges brought by the District Attorney. Imposing the Schedule of Fees interferes with defendants’ rights under the Sixth Amendment of the United States Constitution both to the presumption of innocence and to the disclosure by prosecutors of all exculpatory evidence. Imposing the Schedule of Fees interferes with defendants’ rights under the United States Constitution to a speedy trial. The Schedule of Fees violates Article I, Section 12 of the Utah Constitution, which guarantees that an accused shall not “be compelled to *advance money or fees* to secure” his or her rights in a criminal case.<sup>1</sup> The Schedule of Fees was adopted in violation of Utah Code Section 63G-2-203 (setting out procedure for charging a reasonable fee for actual costs of providing records in response to information requests) and is

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<sup>1</sup> Emphasis added.

therefore illegal. The Schedule of Fees was adopted in violation of Salt Lake Municipal Code Sections 2.82.090 and 3.42.070 (setting out requirements for charging reasonable fee for actual costs of responding to information requests). Imposition of the Schedule of Fees is inconsistent with the requirements and intent of the Utah Rules of Criminal Procedure and with the professional and ethical duties of the District Attorney (and District Attorney's Office), including Rule of Professional Conduct 3.8.

7. The effect of the changes imposed by Ms. Miller has been, and will continue to be, to impair the ability of defendants to prepare their cases and to deprive them of meaningful discovery, contrary to both the United States and Utah Constitutions and to improperly burden defendants and their counsel.

8. Ms. Miller refused to undertake any study, let alone the statutorily-required assessment, of the actual costs of providing discovery materials to defendants. Instead, Ms. Miller established a fee schedule based on nothing more than speculation. In a related case, the District Attorney admitted to the Court that it did not do an adequate analysis of the actual costs of preparing discovery, because it could not be bothered.<sup>2</sup> The District Attorney made no effort even to discuss with the Auditor how to make a determination of actual costs, although involvement of the Auditor is mandatory under municipal law.<sup>3</sup> As a result, the fees imposed by Ms. Miller are grossly disproportionate to the actual costs of discovery production, and impose

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<sup>2</sup> June 14, 2010 Order of Judge Adkins in *Utah v. Kimball*, case no. 091402051 at 3, 9 (“the District Attorney’s Office states that it ‘did not do an extensive analysis of the actual cost of preparing discovery’ because of the difficulty to figure the cost of the services”). (A copy of the Order is attached as Exhibit A.)

<sup>3</sup> *Id.*

improper burdens on defendants. Her fees are significantly higher than the costs recoverable in private litigation by public or private persons, whether before the state or federal courts.

9. Ms. Miller has set fees in order to force defendants – individuals who are *presumed innocent* – to fund the operations of the District Attorney’s office. Ms. Miller cannot justify the fee imposition by pointing to budgetary concerns. At the same time that Ms. Miller has imposed illegal fees on defendants attempting to obtain discovery materials, she sought three separate increases in her own salary. In fact, she is now paid *more* than the Attorney General of Utah. At the same time she was imposing fees on defendants, she created a public relations staff that is almost the same size as that of the office of the Los Angeles District Attorney, an agency serving a county more than nine times as populous, with ten times as many attorneys as in the Salt Lake District Attorney’s office. The cost of just one of Miller’s public relations employees would be more than adequate to cover all of the fees she is trying to extract from defendants who are doing no more than seeking access to the evidence they are entitled to under the United States and the Utah Constitutions.

10. On June 16, 2009, the Salt Lake County Council passed a resolution adopting a Schedule of Fees to be charged to non-indigent defendants in criminal matters. The District Attorney’s Schedule of Fees is as follows:

Initial Discovery:

\$20.00 in digital format

\$25.00 for up to 100 pages of b&w photocopies (8.5 x 11)

plus \$1 per page for color copies (8.5 x 11); copies above 100 pages are \$  
0.25 per page

Supplemental Discovery:

\$10.00 in digital format

\$10.00 plus \$0.25 per page for b&w copies and \$1 per page for color copies

Photographs:

\$5.00 per disc in digital format

\$1.00 per print (minimum)

Audio/video recordings:

\$20.00 per videotape

\$10.00 per audiotape

\$5.00 per digital recording

Mailing:

\$2.00 per mailing or actual cost, whichever is greater

Facsimiles:

\$2.00 for the first page, plus \$1.00 each additional page.

Courier delivery:

Actual charges.

11. As noted by Judge Adkins in his order of June 14, 2010, the District Attorney's Schedule of Fees was not based on and did not reflect a study of the actual costs of producing documents or responding to discovery.<sup>4</sup> Utah Code Section 63G-2-203 and Salt Lake Municipal Code 2.82.090 and 3.42.070 mandate that an investigation of actual costs be conducted prior to imposition of fees, and that the investigation demonstrate the reasonableness of the fees. The District Attorney never conducted the mandatory investigation and instead conducted a quick and incomplete survey of the fees charged by various other counties and municipalities, and, based on that survey, guessed what the costs to Salt Lake County might be. This incomplete survey is insufficient as a matter of law under the relevant code sections and, accordingly, these

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<sup>4</sup> *Id.* at p. 3, 8-9.

fees are illegal. Moreover, Section 63G-2-203 does not apply to cases in which the County or the District Attorney appears as a party and cannot be used as statutory authority for Ms. Miller's Schedule of Fees; it is intended to govern responses to requests for information from government entities, *i.e.*, GRAMA requests not discovery requests.

12. As is obvious from even a cursory review of the Schedule of Fees, the fees bear no relationship whatsoever to actual costs. For example, the Initial Disclosure Packet in hard copy costs \$25.00 for up to 100 black and white photocopies. Assuming such a packet actually included 100 copies, that is a charge of \$0.25 per page for black and white copies, a charge two and half times the amount recoverable in an award of costs in a civil trial and about three times the cost per page at any commercial copy service. Even worse, most Initial Discovery packets contain far fewer than 100 pages. The overwhelming majority of such packets have less than a quarter of that number of pages, and a very significant portion of Initial Discovery packets include fewer than 10 pages. The District Attorney's Schedule of Fees in most cases ends up charging a defendant between \$0.75 and \$3.00 per page for black and white copies. Such charges bear no relation to the statutory standard for providing discovery – actual cost.

13. The other fees imposed by the District Attorney's Schedule of Fees are equally disconnected from actual costs. In each of the first six categories, the charges are wildly inflated. The charges are not calculated based on the costs of making digital copies, or the actual costs of facsimile transmissions, etc. Because the District Attorney made no effort to investigate actual costs of providing discovery, the fees are improper and illegal.

14. As an accounting matter, the fees paid by non-indigent defendants do not defray in any way the actual costs of providing discovery. The funds go into the County's General Fund and are used to support the general operations of the District Attorney's Office. In effect, then, fees paid by defendants – to get the discovery they are entitled to under state and federal law to defend against criminal charges – fund the District Attorney's outsized salary (which is *larger* than that paid the Attorney General) and her public relations department, which rivals in size that of the Los Angeles District Attorney. The fees are set to offset budget gaps by the County and the District Attorney, not to pay for discovery itself.

15. Ms. Miller's imposition of the Schedule of Fees is unreasonable and illegal as is further demonstrated by how far her practice deviates from the treatment of discovery in criminal cases by other enforcement authorities in Utah. The United States Attorney does not charge for discovery. The Attorney General of Utah also does not impose fees on discovery for defendants in criminal cases. Neither do Cache, Summit, or Wasatch Counties. Davis, Weber, and Washington Counties charge a \$5.00 flat fee.

16. Remarkably, Ms. Miller's Schedule of Fees in criminal cases is more onerous and higher than the County's general policy on producing information or documents under GRAMA. The County Guidelines provide that:

Paper copies up to 11x17: \$0.25 per page;

Large paper copies: actual reproduction costs;

Photographs: Actual reproduction costs;

Audio, video, other media: Actual reproduction costs;



Electronic media currently used: Actual reproduction costs.<sup>5</sup>

That the County charges less for responding to GRAMA requests than Ms. Miller seeks for responding to discovery requests in criminal cases further undermines the claim that the Schedule of Fees reflects actual costs to the District Attorney's office, and supports the idea that the fees are a reflection of political goals and a desire to burden defendants without regard either to Constitutional rights or to professional duties. Materials produced as a result of a GRAMA request are very different from what is at stake in a request for documents and information under the Rules of Criminal Procedure. A GRAMA request is a voluntary inquiry, made for a variety of possible purposes, from curiosity to political investigations. But no one goes to jail because a GRAMA request can't be paid for – GRAMA requests are voluntary in a way no requests under the Rules of Criminal Procedure are. There is no justification for charging criminal defendants more than GRAMA requests.

17. About 80% of the approximately 18,000 cases filed by the District Attorney's Office are assigned to the Salt Lake Public Defender Association (or a similar agency). The Schedule of Fees does not apply to those represented by public defenders. The Fee falls only on those who do not qualify for public defenders. But the presumptive financial cut-off for those able to receive a public defense is an income 150% of the poverty line – an annual income of just \$30,975 for a family of four (\$15,315 for a single person). Someone supporting a *family of four* who earns *just \$14.90* an hour will be charged fees to obtain discovery from the District

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<sup>5</sup> See Salt Lake County Policy 2060 Attachment A. (Exhibit B.) See also Auditor's Office GRAMA Fees. The Auditor charges \$0.18 for paper copies, and actual costs of reproduction. (Exhibit C.)

Attorney. These defendants must find the money to pay a criminal defense attorney, on top of ensuring that there is money for food and housing, medical care, clothing for children and school costs, etc. While a very few defendants are wealthy, virtually all of the non-indigent defendants are at the very edge of falling into poverty. Imposing even apparently minor fees forces choices between defending against criminal charges and feeding the family. Nor is it any answer to claim that the fees are paid by the defense attorneys; that is economic ignorance, at best. The fees for discovery are reflected in what criminal defense lawyers must charge their clients. The effect is, inevitably, to raise the fees necessary to obtain private counsel, and to increase the number of defendants who will have to be defended by the public defenders or go without any representation at all.

18. While many cases do not involve extensive discovery, some cases do, but in both circumstances the Schedule of Fees is improper and illegal. Where discovery is limited, the charges are unreasonable and excessive. For example, in an ordinary DUI prosecution, the discovery record is likely to come to no more than a few pages, yet the defendant is charged \$25 for those few pages – that often amounts to a rate of \$8 or \$10 per page. In complex cases, the Schedule of Fees works a mirror wrong: in shaken-baby cases, for example, discovery runs to thousands of pages and will include multiple photographs, etc. The defendant then is charged hundreds of dollars for access to material essential to presenting any defense.<sup>6</sup> Prosecution of financial crimes will raise the same sort of problems – the relevant record will be voluminous. Yet the defendant (and the defendant’s family) will be placed in an impossible financial position:

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<sup>6</sup> The changing nature of medical expertise simply highlights the impropriety of charging defendants for access to discovery. *See, e.g., State v. Hales*, 2007 UT 14.

they have the modest income that places them outside the protection of public defenders but lack the wealth to pay for even reasonable levels of discovery from the prosecution.

19. By imposing the Schedule of Fees, the District Attorney and the County impose conflicts between defendants and their counsel, delay trials, and increase public defender burdens on the County, while interfering with defendants' rights under the United States and Utah Constitutions. Trials are delayed while defense attorneys wait for the District Attorney to process payments and then assemble and produce discovery, forcing defendants to choose between, on the one hand, the speedy trial guaranteed under the United States and Utah Constitutions, and, on the other hand, effective representation. Without discovery, defense attorneys cannot effectively counsel clients on the advisability of plea offers, nor properly assess the value of trial or even of further independent investigation. Even where the outcome of the case is a plea agreement, without adequate access to discovery, it is inevitable that more factually-innocent defendants will enter pleas and be convicted.<sup>7</sup> Ms. Miller and the County manipulate application of the Schedule of Fees to increase general revenues and to selectively punish defendants and their counsel. For example, The District Attorney has interfered with responses to subpoenas by inducing the subpoena subject to provide documents to the District Attorney instead of responding to the subpoena and then demanded that the issuer of the subpoena pay the District Attorney to produce illicitly obtained documents under the Schedule of Fees.

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<sup>7</sup> See Exhibit D ("Confessing to Crime But Innocent", *New York Times*, September 13, 2010); "The Substance of False Confessions", Brandon L. Garrett, 62 *Stanford Law Review* 4: 1061.

20. Imposing the Schedule of Fees forces non-indigent defendants to pay the District Attorney, the prosecutor, for material to which the defendants are entitled as a matter of law. The Schedule of Fees imposed by Salt Lake County forces a defendant to pay the County for the County's prosecutor to turn over the very sort of evidence which the defendant has an absolute right to, and which the prosecutor has an ethical duty to provide to the defense, whether or not requested. The County's Schedule of Fees forces prosecutors to choose between abiding by County policy or their duties under the Utah Rules of Professional Conduct.

21. The Salt Lake City Police Department, like other law enforcement agencies, provides two copies of their reports to the District Attorney, for the very purpose of making a copy of the material available to defense counsel. The Salt Lake City Police Department does not charge the District Attorney for even one copy, let alone two. Other agencies followed suit. The District Attorney, however, in an effort to create a revenue stream, has recently requested that law enforcement agencies stop providing two copies of reports and other documents – so that she could charge for copies and add to the general revenue of the County. What the District Attorney has done, then, is to try to create conditions to enable her to manufacture fees to charge defendants; in essence, Ms. Miller is creating costs for defendants. Such manipulation of processes does not accord with the duties of a lawyer or a public official; it is more like playing a game of three card monte with the vulnerable – and presumed innocent -- defendant.

22. Ms. Miller's efforts to enforce the Schedule of Fees has actually made things worse, not just for defendants, but for the courts and the County. Ms. Miller's insistence on charging for discovery has created new delays in criminal matters. Discovery now comes to

defense counsel later, forcing delays in trial dates and delays in plea negotiations. These delays raise costs to the courts, because cases remain on the docket longer and because Ms. Miller's discovery process inevitably results in additional disputes and motions concerning discovery.

23. The delays in producing discovery cause problems beyond raising costs for the courts, the County, counsel (both defense and prosecution), and defendants. The delays also result in violations of the Rules of Criminal Procedure. Rule 16 requires that the prosecutor make all disclosures "as soon as practicable following the filing of charges". That standard is not met when discovery takes four to six weeks to obtain following request or order of a court. A defendant (or the defendant's counsel) does not have "reasonable access to discovery" when discovery is not made available for four to six weeks.

24. The Rules of Criminal and Civil Procedure do not contemplate, and are inconsistent with, the efforts of Ms. Miller and the County to charge for discovery responses. Rules of Procedure, whether Civil or Criminal, have the force of law in both state and federal proceedings. Under the Rules of Criminal Procedure, the District Attorney is required to disclose the discovery materials Ms. Miller and the County now want to charge for. Nothing in the Rules of Criminal Procedure authorizes charging for discovery. On the contrary, the Rules make disclosure mandatory, and require that all discovery be made available on a reasonable basis. Conditioning availability on fees is inconsistent with Rule 16.

#### **CLASS DEFINITION**

25. The Plaintiff Class consists of those charged or prosecuted by the District Attorney of Salt Lake County since June 16, 2009, or their counsel, and who have been charged

for discovery under the Schedule of Fees, including a subclass of those who were unable to obtain discovery from the District Attorney because they did not pay the charges imposed by the District Attorney for discovery in criminal matters.

### **JURISDICTION AND VENUE**

26. This Court has jurisdiction pursuant to Section 78B-6-401 and 408 of the Utah Code. Venue is proper under Section 78B-3-303 of the Utah Code.

27. This Complaint may be brought without recourse to administrative remedies. The Plaintiff Class seeks injunctive relief and does not seek monetary damages, other than costs and attorney's fees. No administrative procedure applies to this controversy.

### **CLASS ACTION ALLEGATIONS**

28. The Plaintiff Class consists of over 1,000 individuals, making joinder of all members impractical.

29. There are questions of law and fact common to the class, including whether the County adopted the Schedule of Fees in violation of state and municipal law; whether the fees imposed under the Schedule of Fees are reasonable; whether the fees imposed under the Schedule of Fees fairly represent the actual costs of providing discovery; whether the Schedule of Fees violates the Constitutions of the United States and Utah by interfering with the right to speedy trial or by interfering with the right to a presumption of innocence or by violating the guarantee of Article I, Section 12 of the Utah Constitution. These, and other issues, involve the same issues of fact and law, and so would be more appropriately decided through class action than individual trials. The claims of the representative plaintiffs are typical of the claims of the

class. The representative plaintiffs will fairly and adequately represent the interests of the class. The interests of the representative plaintiffs and the class are identical in all material respects.

30. Prosecution of separate actions by individual plaintiffs risks inconsistent standards of conduct for the County.

31. The parties opposing the class, the County and Ms. Miller, have acted on grounds generally applicable to all of the class members.

32. To the extent that there are individual issues of law or fact, the common issues of law and fact predominate over individual questions. A class action is superior to other methods for fair and efficient adjudication of the controversy.

#### **FIRST CAUSE OF ACTION**

33. The allegations of paragraphs 1 through 32, inclusive, are here incorporated as though set forth in full.

34. The Schedule of Fees was adopted in violation of Utah Code Section 63G-2-201 *et seq.*, because it was adopted without any investigation of reasonable or actual costs as mandated by state law. Section 63G-2-201 *et seq.*, does not apply to criminal proceedings. The Schedule of Fees does not reflect either actual costs or reasonable charges for discovery, and should not apply to criminal proceedings. The Schedule of Fees is *ultra vires* and unenforceable.

#### **SECOND CAUSE OF ACTION**

35. The allegations of paragraphs 1 through 34 inclusive are here incorporated as though set forth in full.

36. The Schedule of Fees was adopted in contravention of Salt Lake County Municipal Code Sections 2.82.090 and 3.42.060 because it was adopted without any investigation of reasonable or actual costs as mandated by Salt Lake County law. Sections 2.82.090 and 3.42.060 do not apply to criminal proceedings. The Schedule of Fees does not reflect either actual costs or reasonable charges for discovery, and should not apply to criminal proceedings. The Schedule of Fees is *ultra vires* and unenforceable.

### **THIRD CAUSE OF ACTION**

37. The allegations of paragraphs 1 through 36 inclusive are here incorporated as though set forth in full.

38. The Schedule of Fees improperly and illegally burdens, impairs, and interferes with the right of a defendant in a criminal case to discovery and production, including discovery and production of exculpatory and impeachment documents and information, in violation of the United States Constitution.

### **FOURTH CAUSE OF ACTION**

39. The allegations of paragraphs 1 through 38 inclusive are here incorporated as though set forth in full.

40. The County's imposition of the Schedule of Fees and accompanying process impede and impair the right under the Sixth Amendment of the United States Constitution of defendants to speedy trial in criminal cases.



### **FIFTH CAUSE OF ACTION**

41. The allegations of paragraphs 1 through 40 inclusive are here incorporated as though set forth in full.

42. The Schedule of Fees violates Article I, Section 12 of the Utah Constitution in that the County's enforcement of the Schedule of Fees effectively conditions a non-indigent defendant's right to a fair trial on payment of fees.

### **SIXTH CAUSE OF ACTION**

43. The allegations of paragraphs 1 through 42 inclusive are here incorporated as though set forth in full.

44. The Schedule of Fees is inconsistent with the Utah Rules of Criminal Procedure and therefore improper and illegal.

45. The Schedule of Fees is inconsistent with the Rules of Professional Conduct and other ethical rules binding on lawyers practicing in the District Attorney's Office, and neither the District Attorney nor any other lawyer employed by or acting for Salt Lake County or any of its agencies or divisions may request, impose, or condition discovery on payment under the Schedule of Fees.

### **SEVENTH CAUSE OF ACTION**

46. The allegations of paragraphs 1 through 45 inclusive are here incorporated as though set forth in full.

47. The Schedule of Fees is a tax being imposed without proper authorization and contrary to Utah law.

**PRAYER**

Wherefore, Plaintiffs pray the Court as follows:

1. To enter an injunction barring Salt Lake County and the District Attorney from imposing, acting on, demanding, or otherwise enforcing or attempting to enforce the Schedule of Fees or any replacement schedule of fees in criminal cases;
2. To enter an injunction barring Salt Lake County and the District Attorney from imposing, acting on, demanding, or otherwise enforcing or attempting to enforce fees or a schedule of fees for discovery in criminal cases;
4. For damages in the amount of the monies collected under the Schedule of Fees;  
and
5. For costs and attorney's fees incurred in prosecution of this case.

DATED this 12<sup>th</sup> day of October, 2010.

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By \_\_\_\_\_  
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