

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEBRASKA

eScholar LLC,

Plaintiff,

v.

NEBRASKA DEPARTMENT OF  
EDUCATION, DEAN FOLKERS,  
in his individual capacity, and MATT  
HASTINGS, in his individual capacity,

Defendants.

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Case No. 8:20-cv-135 (CRG) (JMZ)

**VERIFIED AMENDED COMPLAINT  
AND JURY DEMAND**

Plaintiff, eScholar LLC, by its undersigned attorneys, for its Verified Amended  
Complaint against defendants Nebraska Department of Education, Dean Folkers and Matt  
Hastings, alleges as follows:

**A. PARTIES**

1. Plaintiff, eScholar LLC (“eScholar”) is a limited liability company organized and existing under the laws of the State of New York and has its principal place of business located at 222 Bloomingdale Road, Suite 107, White Plains, New York 10605.

2. Defendant Nebraska Department of Education (hereinafter, “NDE”) is an administrative agency within the executive branch of the Nebraska state government, and has its principal place of business at 301 Centennial Mall South, Lincoln, Nebraska 68508. NDE is a “government, governmental subdivision or agency” as defined in the Nebraska Trade Secrets Act, Neb. Rev. St. §87-502(3).

3. Defendant Dean Folkers (“Folkers”), sued herein in his individual capacity, is employed as the Chief Information Officer of defendant Nebraska Department of Education, and

has his principal place of business at 301 Centennial Mall South, Lincoln, Nebraska 68508.

4. Defendant Matthew Hastings (“Hastings”), sued herein in his individual capacity, is a Senior Administrator of Data, Research & Evaluation of the defendant Nebraska Department of Education, and has his principal place of business at 301 Centennial Mall South, Lincoln, Nebraska 68508.

**B. JURISDICTION AND VENUE**

5. NDE is subject to the *in personam* jurisdiction of this Court since it has its principal place of business within Nebraska.

6. Folkers is subject to the *in personam* jurisdiction of this Court since he has his principal place of business within Nebraska.

7. Hastings is subject to the *in personam* jurisdiction of this Court since he has his principal place of business within Nebraska.

8. Federal subject matter jurisdiction exists under 28 U.S.C. §1331, since the Second and Third Claims for Relief arise under federal copyright law, 17 U.S.C. §101 *et seq.* and the federal courts are vested with exclusive jurisdiction in copyright cases pursuant to 28 U.S.C. §1338(a).

9. Federal subject matter jurisdiction exists over the First, Fourth and Fifth Claims for Relief, since they arise out of the same case or controversy as the Second and Third Claims for Relief, and involve the same common nucleus of operative fact as the Second Claim. Any parties against whom solely state law causes of action are found to be stated are thus within the Court’s pendent party jurisdiction in accordance with 28 U.S.C. §1367(a).

10. To the extent sovereign immunity under the Eleventh Amendment of the United States Constitution might otherwise apply in favor of NDE, NDE has contractually waived

Eleventh Amendment immunity by reason of the November 1, 2004 Software License and Support Agreement (the “Software License”) and amendments to that Software License, described herein, with eScholar. The Software License states, in relevant part: “The parties consent to the jurisdiction of the federal and state courts of Nebraska for any legal action arising out of this Agreement.” Software License, Section 12. Under the relevant case law, this consent to be sued in federal court waives Eleventh Amendment sovereign immunity. *E.g., Baum Research and Development Co., Inc. v. University of Massachusetts*, 503 F.3d 1367, 1370 (Fed. Cir. 2007); *Oracle America, Inc. v. Oregon Health Insurance Exchange*, 145 F. Supp. 3d 1018, 1033-1035 (D. Ore. 2015).

11. Federal subject matter jurisdiction exists over the Fifth Claim for Relief (which is asserted against Folkers and Hastings under *Ex Parte Young*, 209 U.S. 123 (1908)), since that Claim does not seek monetary or other retrospective relief. Instead, the Fifth Claim for Relief demands only a judgment enjoining Folkers and Hastings, acting in their individual capacities, from ongoing and future infringement of eScholar’s copyright. Furthermore:

(a) Folkers and Hastings knew or reasonably should have known, that their conduct violated eScholar’s rights under the federal copyright statute.

(b) The wrongful conduct by Folkers and Hastings alleged herein is outside the scope of activity permitted by the copyright statute, including reasonable interpretations of fair use.

- and -

(c) Folkers and Hastings acted intentionally, with malice or with reckless indifference to eScholar’s federal statutory rights.

12. Venue is proper because NDE consented to venue in this District in the Software License, as alleged in ¶10, *supra*. Venue also properly lies in this District pursuant to 28 U.S.C.

§1391(b)(2), since this action arises out events which occurred within this District, and because all defendants have principal places of business here.

**C. NATURE OF THE ACTION**

13. This action concerns NDE's infringement of the eScholar Uniq-ID© copyright (see **Exhibit A** hereto), and breach of a software license agreement (the Software License, as defined above) relating, *inter alia*, to the eScholar Uniq-ID© copyright (**Exhibit B** hereto), willful and unauthorized reverse engineering of eScholar's intellectual property, and illegal misappropriation and dissemination of eScholar's trade secrets.

14. The intellectual property at issue in this case is known as the eScholar Uniq-ID© system, a web-based software solution that qualifies as a trade secret and, literary expression, and therefore maintains, by law, federal copyright protection. eScholar Uniq-ID© system is industry leading and award-winning education management software system and is the recognized gold standard solution for the unique identification of students and staff across time, location and source. The eScholar Uniq-ID© system maintains the privacy of the individual's personally identifiable information in compliance with the Family Educational Rights and Privacy Act (FERPA), and other statutory and regulatory requirements. The eScholar Uniq-ID© system is the core application in eScholar's suite of educational data management software products. The eScholar software platform offering is currently used by ten state education agencies across the United States, numerous school districts and the United States Department of Education. The records of nearly 20 million of the nation's K-12 and post-secondary students are managed through eScholar's software products and services.

15. Despite repeated demands by eScholar that NDE cease and desist from violating eScholar's contractual and statutory rights, NDE has continued to violate those rights and

misappropriate eScholar's valuable intellectual property.

**D. FACTS RELATING TO ALL CLAIMS**

**(i) eScholar Uniq-ID© System**

16. eScholar is a software and systems developer in the educational marketplace. Its products and solutions assist with the decision-making of education agencies throughout the United States, by means of cutting edge software systems which facilitate the collection and complex analysis of data. eScholar's software applications includes statewide longitudinal data systems, pre-kindergarten through grade 12 longitudinal data systems, postsecondary longitudinal data systems, early childhood integrated data systems, data matching systems and unique identifier systems. These software solutions support the work and education of over 20 million individuals. Since 1999, eScholar software products and services has been recognized as an industry leader and innovator in education data integration and quality management marketplace.

17. The unique expressions embodied in the eScholar Uniq-ID© system are a trade secret, and the expression of those ideas is subject to the registered eScholar Uniq-ID© copyright. Hereinafter, the term "eScholar Uniq-ID Trade Secret" will be used to describe the trade secret, and the term "eScholar Uniq-ID© copyright" will be used to describe the copyrighted expression of that system.

18. Since 2003, eScholar has invested millions of dollars and substantial effort, and assigned its most talented product managers, software designers, architects, user interface designers, business analysts, developers, quality assurance analysts and documentation specialists to developing and commercializing the eScholar Uniq-ID© system. As noted, the eScholar Uniq-ID© system is the core software product included in eScholar's suite of

educational data management software products.

19. The eScholar Uniq-ID© system is what is referred to in the software industry as a “disruptive” technology, since it displaced prior technology and revolutionized database decision making within education agencies.

20. The copyrighted eScholar Uniq-ID© system User’s Manual describes the system as follows:

#### **Purpose**

The eScholar Uniq-ID® (eUID) application is designed for educational agencies to assign and maintain unique statewide person identifiers (also referred to as “unique identifiers”). The term “person” is inclusive of Students, Staff Members, and other Person categories.

#### **Capabilities**

The eUID application allows users to:

- **Assign a unique identifier** for every person in pre-kindergarten, kindergarten, elementary, and secondary public education depending on licensing.
- **Generate random State IDs** that are not constructed on any person demographic details of the person.
- **Identify and locate a person from the statewide eUID database** either using the State ID, Alias ID, person demographics (e.g., last name), or with a batch file.
- **Download unique identifiers** by batch or by location.
- **Search** by batch, agency name, or person name.
- **Claim person records who have transferred to a new school/district** and allow schools/districts to communicate with each other through emails generated by the application.
- **Multiple ways to submit person records** to the eUID application via batch mode, manual entry, Web Services, SIF, or Automatic File Processing.

#### **Benefits**

The eUID application provides users with numerous benefits including:

- **A powerful matching engine** that uses complex logic to match person records.
- **A tracking and logging process for all uploads/submissions of data** and updates to the data.
- **An easy-to-use interface** for all functionality within the application.
- **An organized and structured approach** to assigning unique identifiers.

- **Maintenance and troubleshooting** of unique identifiers.
- **Secure and role-based access.**

21. eScholar's concept of a system for the assigning and managing unique identifiers for students is described by the New York State Education Department, as "provide[ing] a single source of standardized individual student records and other education-related (course, attendance, teachers/staff *etc.*) data for the analysis at the local, regional and State levels to improve student and teacher performance and to meet State and Federal accountability requirements. . . [.]”<sup>1</sup>

22. eScholar has allocated, and continues to allocate, substantial personnel and substantial resources to update and enhance the eScholar Uniq-ID© system. It currently employs a product manager, a business analyst, four software developers, a system architect and two quality assurance (software testing) analysts who are directly responsible for the upgrades, maintenance, service and support of the eScholar Uniq-ID© system. Those employees are supported by a number of software support engineers, user interface analysts and information technology engineers.

23. The eScholar Uniq-ID© system, first developed in 2003 in prototype form and first commercialized in 2004, has undergone 11 versions (eight versions have related copyright registrations currently filed with the U.S. Copyright office starting with version 1.0, first published in 2004, with a copyright registration in 2006 (see **Exhibit A** hereto)) and eScholar has scheduled the release of version 12 in 2021.

24. eScholar has sent its product managers, business analysts, software designers and developers to a wide variety of classes, conferences, training sessions and seminars, including



courses held by Edward Tufte (regarded as a pioneer in the field of data visualization) for the sole purpose of improving upon its protected software.

25. eScholar has made extensive capital investments in acquiring and distributing online tutorials and books for use by its technical staff, and has directed its product managers, business analysts, user interface designers, and software designers and developers to allocate substantial time and resources toward improving and enhancing the eScholar Uniq-ID© system.

26. eScholar's personnel meets regularly with users of the eScholar Uniq-ID© system around the country to obtain feedback on the software system. It also employs user interface web page design specialists to make the system user's experience as simple and intuitive as possible, and to minimize the need for user training and to maximize the user's efficiency and effectiveness.

27. The focus on user interface design reflects the fact that the technology and engineering that underlies the eScholar Uniq-ID© system design is not obvious. The proprietary system developed by eScholar to optimize the user interface includes:

- unique approach to the workflow or steps a user takes to interact with the system, often referred to as "screen flows"
- unique methods of selecting and organizing data elements;
- a unique system appearance and layout of various data fields;
- unique spacing between the fields;
- use of background color (including the use of yellow color in select areas of the web page) to enhance certain data elements;
- use of action buttons and their unique positioning on the web page;



- use of red lettering to notify system users of certain data; and
- specific approaches for labeling (for the system user) data fields, which include unique field names, locations, font size, color and shading, all intended to maximize utilization of the limited real estate on the web page, while providing ease of effort and maximum efficiency and effectiveness for the system user.

28. This proprietary user interface system design was solely developed over years by eScholar that comprises an “original work” within various definitions set forth in the Copyright statute, 17 U.S.C. §1701, and is protected under the eScholar Uniq-ID© copyright. This copyright original work uniquely expresses, enhances the value of, and facilitates the uses of, the eScholar Uniq-ID Trade Secret. eScholar has made substantial revisions to the functionality, appearance and overall user experience over the course of publishing eleven versions of the eScholar Uniq-ID© system, each time with the objective to improve system functionality, remove superfluous capabilities and unnecessary information and simplify and improve the user experience. (See **Exhibit D** hereto.)

29. eScholar has invested significant capital and resources in selecting and developing the functions of the eScholar Uniq-ID Trade Secret, and in as well as in the system’s design, layout, screen flow, graphics and field displays as expressed in the eScholar Uniq-ID© copyright. As result of that investment, the eScholar Uniq-ID© system enables the user to easily view data, and to efficiently perform tasks such as generating a unique student or staff identifier, resolving potential duplicate records, and issuing reports.

30. eScholar’s decisions, choices and priorities regarding the type and order of functionality to incorporate in the eScholar Uniq-ID© system is original work, and that work expresses, enhances the value of, and facilitates, the eScholar Uniq-ID Trade Secret (defined

above). Both the work protected by eScholar Uniq-ID© copyright and the eScholar Uniq-ID Trade Secret have resulted from eScholar's substantial investment of capital and resources.

31. eScholar continues to assign its most talented staff, and allocate its personnel's creativity, and its financial resources to maintain the eScholar Uniq-ID© system as the gold standard in the education data management marketplace, while a large portion of this investment and effort is focused on continuing to improve the system user's ease of experience.

32. Other systems exist in the educational marketplace; however, those systems fail to deliver the high-quality user experience, functionality, and periodic improvements that come with new versions, together with reliability and customer support that attracts state education agencies to the eScholar Uniq-ID© system. The eScholar Uniq-ID© system's ability to assign and manage unique identifiers is exceptional among the market of competing products, and differentiates it as a superior product.

33. As of the time of filing this Amended Complaint, ten state educational agencies are currently licensing eScholar Uniq-ID© system (including Iowa, Kansas, Louisiana, Missouri, New Mexico, New York, North Carolina, Pennsylvania, South Carolina and Texas).

**(ii) Formation of the Software License**

34. On November 1, 2004, pursuant to the Software License (described above), eScholar licensed to NDE the eScholar Uniq-ID© system. On information and belief, NDE, like other education agencies, uses the licensed software to:

- assign and manage unique identifiers for students in grades K-12, early childhood educational programs and post-secondary (both undergraduate and graduate) public university programs;
- facilitate data analysis through the collection and integration of data; and

●comply with accountability reporting requirements mandated by both Nebraska and federal law.

35. The Software License specifically provides in Section 2(b) that the NDE shall not reverse engineer eScholar products, “except with the prior written consent of the President and Chief Executive Officer of eScholar LLC.”

36. The Software Licenses defines “Intellectual Property” as:

. . . all forms of intellectual property rights and protections owned by eScholar and may include, without limitation all right, title and interest in and to, (i) any computer programs, subroutines, charts, databases, manuals, assessments, document sequences and formats, business requirements, technical architecture, creative briefs, functional briefs, screen flows, design concepts, project schedules, cost estimates, needs assessments and documentation, tools and deliverables, and all derivative works derived from the above, (ii) trade secrets, and all trade secret rights and equivalent rights arising under the common law, state law, federal law and laws of foreign countries; (iii) copyrights, whether or not protected by copyright, under the common law, state law, federal law and laws of foreign countries; (iv) Marks, and (v) Confidential Information.

37. Exhibit 1 to the Software License defines the licensed intellectual property as both (a) the eScholar Uniq-ID system at issue in this lawsuit, but also a related product known as the (b) eScholar Complete Data Warehouse. Exhibit 1’s description of the licensed property was as follows:

<u>Software Description</u>	<u>Fee Payment</u>	<u>Schedule</u>
<u>eScholar Uniq ID</u>		
eScholar Uniq-ID System License & Support through October 31,2005	\$149,000.00	Upon contract signature
eScholar Uniq-ID System Subsequent Year Support	\$37,250.00	Nov. 1, 2005 and Nov. 1, 2006

eScholar Complete Data Warehouse SEA Edition

eScholar Complete Data Warehouse License & Support through October 31, 2005	\$283,000.00	Upon contract signature
eScholar Complete Data Warehouse Subsequent Year Support	\$70,750.00	Nov. 1, 2005 and Nov. 1, 2006

38. eScholar's exclusive rights to the original work relating to the intellectual property licensed to NDE (which include both the eScholar Uniq-ID© system and the eScholar Complete Data Warehouse) are described in a series of filings with the United States Copyright Office:

(i) Certificate of Registration TX 5-944-086, relating to the eScholar Complete Data Warehouse v1 data model, filed May 12, 2004.

(ii) Certificate of Registration TX 5-944-087, relating to the eScholar Complete Data Warehouse v2.03 data model, filed May 12, 2004.

(iii) Certificate of Registration TX 5-944-088, relating to the eScholar Complete Data Warehouse v3 data model, filed May 12, 2004.

(iv) Certificate of Registration TX 5-944-089, relating to the eScholar Complete Data Warehouse v3.1 data model, filed May 12, 2004.

(v) Certificate of Registration TX 5-944-090, relating to the eScholar Complete Data Warehouse v3.5 data model, filed May 12, 2004.

(vi) Certificate of Registration TX 5-944-091, relating to the eScholar Complete Data Warehouse v4 data model, filed May 12, 2004.

(vii) Certificate of Registration TX 5-944-092, relating to the eScholar Complete Data Warehouse v5 data model, filed May 12, 2004.

39. eScholar's exclusive rights to the original work relating to the intellectual property licensed to NDE relating to eScholar Uniq-ID© system is described in the following series of filings with the United States Copyright Office:

(i) Certificate of Registration TX 6-347-172, relating to version 1.0 of eScholar Uniq-ID©, filed March 29, 2006, published April 5, 2004. (**Exhibit A** hereto)

(ii) Certificate of Registration TX 6-347-169, relating to version 2.0 of eScholar Uniq-ID©, filed March 29, 2006, published May 10, 2004.

(iii) Certificate of Registration TX 6-347-168, relating to version 3.0 of eScholar Uniq-ID©, filed March 29, 2006, published May 10, 2004.

(iv) Certificate of Registration TX 6-347-171, relating to version 4.0 of eScholar Uniq-ID©, filed March 29, 2006, published December 23, 2005.

(v) Certificate of Registration TX 6-626-360, relating to version 5.0 of eScholar Uniq-ID©, filed July 7, 2017, published June 22, 2006.

(vi) Certificate of Registration TX 7-427-441, relating to version 6.0 of eScholar Uniq-ID©, filed April 23, 2008, published August 2, 2008.

(vii) Certificate of Registration TX 7-484-081, relating to version 7.1 of eScholar Uniq-ID©, filed October 27, 2011, published May 7, 2009.

- and -

(viii) Certificate of Registration TX 7-484-095, relating to version 8.0 of eScholar Uniq-ID©, filed October 27, 2011, published September 17, 2010. (The filings listed at (ii) – (viii) are appended at **Exhibit C**.)

Hereinafter, the term “eScholar Uniq-ID© copyright” will refer to the rights registered by means of the eight filings, listed at (i) - (viii), *supra*.

40. The Software License was first amended in 2010 to expand license rights to provide NDE the right to assign and manage unique student identifiers for students enrolled in public postsecondary institutions in the State of Nebraska.

41. The Software License was further amended in a second amendment, dated March 18, 2013, to include additional software, *i.e.*, the eScholar Uniq-ID for Students Interstate ID eXchange. The second Amendment specifically stated: “Except as explicitly amended hereby, the Software License and Support Agreement shall remain unchanged and in full force and

effect.” (Hereinafter, the terms “Software License,” will refer to the original 2004 license, together with the first and second amendments.”)

42. As modified by the second amendment in 2013, the Software License did not have an expiration date.

43. A further amendment was issued by the NDE on November 5, 2018. Specifically, NDE formally notified eScholar in writing that it would be discontinuing the support contract for the eScholar Complete Data Warehouse. However, that notice stated that: “We will be continuing the eScholar Uniq-ID® for PK-12 and post-secondary for the 2018-19 year.”

44. NDE renewed all rights pertaining to the eScholar Uniq-ID© system by continuing to pay for support and maintenance of that system through October 31, 2019.

**(iii) Relevant Terms of the Software License**

45. Section 2(a) of the Software License provides that: “. . . eScholar grants [NDE] a non-exclusive, non-transferable license to use and copy for its own use the Licensed Products within the United States of America only for Licensee’s own internal, noncommercial computing operations.”

46. Section 2(a) of the Software License further provides that: “Any rights not expressly granted in this Agreement are expressly reserved.”

47. Section 2(b) of the Software License (“Restrictions on Use of the Licensed Product”) provides that:

Restrictions on Use of the Licensed Products. Licensee shall not Distribute the Licensed Products, in whole or in part, to any third party. Licensee is strictly prohibited from causing or permitting the reverse engineering, disassembly or decompilation, alterations or modifications to the Licensed Products, except with the prior written consent of the President or Chief Executive Officer of eScholar. Any violation of this paragraph 2(b) constitutes a material violation of this Agreement (subject to the applicable cure period provided herein).

48. Section 8 of the Software License provides:

eScholar retains all ownership rights in the Licensed Products, including any and all Intellectual Property Rights in the same, including any modifications to the Licensed Products. To the extent necessary to confirm these rights in the Licensed Products, Licensee hereby assigns to Property Rights it may now or hereafter possess in the Licensed Products, and Licensee agrees to execute all documents and take all actions that eScholar reasonably requests for eScholar to confirm such assignments and for filing in the United States or any other jurisdiction.

49. Section 10 of the Software License provides, in part:

Confidential Information. During the relationship established by this Agreement, either party may communicate to the other party or its agents, certain information that it considers confidential or proprietary. Each party will employ the same efforts to protect the other party's confidential and proprietary information that it applies to protect its own confidential and proprietary information.

"Confidential Information" of eScholar includes, without limitation, the Intellectual Property, pricing information with respect to this Agreement, cost estimates and deliverable schedules, if any, the Licensed Products, all software or related materials provided with the Licensed Products, and algorithms, methods, techniques and processes revealed by the Licensed Products.....

50. Section 5 of the Software License provides:

Licensee shall, upon termination of this Agreement: (i) discontinue all use of the Licensed Products; (ii) deliver to Licensor all diskettes or any other materials containing the Licensed Products and all other physical copies of the Licensed Products; (iii) destroy the Licensed Products and all copies of the Licensed Products contained in any computer memory or data storage apparatus under the control of Licensee; and (iv) certify to Licensor within one week after termination of this Agreement that Licensee has delivered to Licensor and destroyed the Licensed Products and all copies of the Licensed Products.

51. Section 5 of the Software License further provides:

Products and all copies of the Licensed Products. Licensee further agrees and acknowledges that any violations of this Section 5 shall entitle eScholar to Injunctive relief, without the necessity of proving the inadequacy of monetary damages or the posting of any bond or security, enjoining or restraining Licensee from any such violation or threatened violation.



(iv) **Intellectual Property and Trade Secrets**

52. eScholar prominently displays its eScholar Uniq-ID© copyright on the homepage of the system and in the footer of each page of the user guide for the eScholar Uniq-ID© system, which is provided to each licensee of the software.

(v) **Events Precipitating this Lawsuit**

53. NDE reverse engineered and/or copied critical and defining components of the eScholar Uniq-ID© Trade Secret to create the software system that NDE currently utilizes, which is called the ADVISOR Person ID system

54. The NDE ADVISOR Person ID system incorporates web pages that violate the eScholar Uniq-ID© copyright.

55. After the unlawful reverse engineering, infringement and misappropriation, as it admits in documents provided to eScholar, “NDE migrated all the previously generated IDs produced by eScholar’s Uniq ID system to the new ADVISOR Person ID system.”

56. Then, on January 15, 2020, NDE attempted to terminate the Software License as of October 31, 2019. On January 15, 2020, NDE emailed eScholar’s president, Wolf Boehme (“Boehme”), a letter, which referred to the “licensing status,” and stated that the NDE was terminating its use of the eScholar Uniq-ID© system. Boehme subsequently requested the NDE to clarify the effective date of the termination. NDE responded that the termination would be retroactive to November 1, 2019. (See **Exhibit E** hereto).

57. Shortly after receiving the purported termination notice from NDE, eScholar ascertained that NDE had purported to replace eScholar Uniq-ID© system with what NDE refers to as its ADVISOR Person ID System.

58. NDE falsely represented that it created the ADVISOR Person ID System independently, *i.e.*, that it did not improperly reverse engineer any elements of the eScholar Uniq-ID Trade Secret, or use any of the eScholar Uniq-ID© system's copyright protected work or expressions.

59. However, eScholar has obtained a document entitled ADVISOR Person ID Instructions from a Nebraska state website (**Exhibit F** hereto), which establishes infringing striking similarities between, at a minimum, a number of ADVISOR Person ID web pages, and the eScholar Uniq-ID© system web pages.

60. On January 21, 2020, eScholar demanded that NDE remove all copies of the eScholar Uniq-ID© system from any and all systems under NDE's control and/or the control of its contractors, including "under the control of your contractors including any hosting vendor". In this fashion, eScholar elected to rescind the Software License.

61. On January 22, 2020, upon identifying the infringing web pages, eScholar sent an email to NDE (**Exhibit G** hereto) in which eScholar alleged that NDE had reversed-engineered components of the eScholar Uniq-ID Trade Secret and used components of the eScholar Uniq-ID© copyright, in violation of the Software License.

62. On February 7, 2020, eScholar issued a formal cease and desist demand (**Exhibit H**), which commanded NDE to terminate and refrain immediately from any further use of the ADVISOR Person ID System, and pay damages. The demand also requested NDE to disclose to eScholar a complete description of the kind and amount of access NDE's software designers and developers had been given to the eScholar Uniq-ID© system. In this fashion, eScholar confirmed its election to rescind the contract.

63. NDE had complete and unfettered access to the eScholar Uniq-ID Trade Secret.

64. In particular, several NDE employees responsible for “designing” the ADVISOR Person ID System had direct access to the NDE’s licensed copy of the eScholar Uniq-ID© system. Upon information and belief, NDE software engineers (either in-house or independent contractors) were able to improperly reverse engineer or duplicate the eScholar Uniq-ID Trade Secret by viewing formal eScholar Uniq-ID© system demonstrations intended for system users; analyzing screen shot captures, reviewing training materials and accessing the system by improperly accessing the system and by utilizing log in credentials as if they were system users.

65. Critically, none of the improperly accessed proprietary information concerning the eScholar Uniq-ID Trade Secret is publicly available, and copyright notices are prominently displayed on all written materials relating to the Company’s eScholar Uniq-ID© system.

66. NDE violated section 2(b) of the Software License. Specifically, NDE agreed not to reverse engineer eScholar's software products “except with the prior written consent of the President and Chief Executive Officer of eScholar LLC” – such consent was never provided.

67. NDE also violated the “Confidentiality” provision contained in Section 10 of the Software License by disclosing to the public, as detailed below, highly confidential trade secrets and know-how of the Company.

**(v) Specific Copyright and Software License Violations**

68. NDE has committed the following copyright and Software License violations, among numerous others.

**(a) The ADVISOR Person ID “Compare” Web Page Improperly Copies and Uses the eScholar Uniq-ID© Compare Web Page**

69. The eScholar Uniq-ID© “Compare” web page is used to review two or more student records to determine if those particular records represent the same individual or not.

70. Prior versions of the eScholar Uniq-ID© system displayed information differently. However, after eScholar hired experts in user interface design, provided additional training and education to its development team, and obtained extensive input from system users, improvements were implemented resulting in the current “Compare” design.

71. The NDE ADVISOR Person ID system’s “Compare” web page impermissibly copies the literary work of the eScholar Uniq-ID© “Compare” web page.

72. The NDE ADVISOR Person ID system’s “Compare” web page impermissibly copies particular elements of the eScholar Uniq-ID© “Compare” web page, including the name “Compare” for the web page; and the unique inclusion (and corresponding exclusion) of critical data fields.

73. The NDE’s ADVISOR Person ID system’s “Compare” web page impermissibly copies the overall layout, look and feel of the data projected by the web page. Mimicking the look and feel is achieved by duplicating or imitating the precise manner in which data is displayed in columns; the selected highlights where data is being compared; the use of “white space” to allocate web screen “real estate” between certain fields; the choice of field names; and the location, function and purpose of the “action buttons” located on the top and bottom of the web page.

74. Only a few unique student identifier software systems used by education agencies offer the functions provided by the eScholar Uniq-ID© “Compare” page. The Florida Department of Education’s unique student identifier is closest in concept to the eScholar Uniq-ID© “Compare” web page. Comparison of the eScholar Uniq-ID©, NDE ADVISOR Person ID and the Florida version of this function, reveals that the NDE’s version is “strikingly similar” to the eScholar Uniq-ID© “Compare” web page (*see Exhibit I hereto*), whereas NDE version bears

little if any resemblance to Florida's.

75. The NDE ADVISOR Person ID system's "Compare" web page impermissibly infringes the eScholar Uniq-ID© system's "Compare" web page.

**(b) The ADVISOR Person ID "Student Information"  
Web Page Improperly Copies and Uses the eScholar Uniq-ID©  
"Individual Person Information" Web Page**

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76. The eScholar Uniq-ID© system's "Individual Person Information" web page uniquely presents information on an individual.

77. As with its "Compare" web page, the NDE ADVISOR Person ID system's "Student Information" web page copies not only the inclusion of certain data elements and fields (and the corresponding exclusion of other data elements and fields) and the precise location of the data on the web page, but also the eScholar Uniq-ID© system's approach to presenting the data with significant "white space" to make it simple and intuitive for an individual to interact with it. (See **Exhibit J** hereto.)

78. The NDE ADVISOR Person ID system's "Student Information" web page includes the state identifier (ID) and the date and time the record was created, just like eScholar's Uniq-ID© "Individual Person Information" web page.

79. The inclusion, placement and ability to click through on "Add Note" appearing on the NDE ADVISOR Person ID system's "Student Information" web page replicates inclusion, placement and ability to click through on "Add Note" appearing on the eScholar Uniq-ID© "Individual Person Information" web page.

80. The headers "General Information, Batch Information and Enrollment" information appearing on the NDE ADVISOR Person ID system's "Student Information" are

identical to those appearing on eScholar Uniq-ID© “Individual Person Information” web page.

81. The “Back to Result” action button on NDE ADVISOR Person ID system’s “Student Information” is located in position identical to that in which the “Back to Search Result” action button appears on the eScholar Uniq-ID© “Individual Person Information” web page.

82. The NDE ADVISOR Person ID system’s “Student Information” web page is “strikingly similar” to the eScholar Uniq-ID© “Individual Person Information” web page.

83. The NDE ADVISOR Person ID system’s “Student Information” web page impermissibly infringes the eScholar Uniq-ID© “Individual Person Information” web page. (*See Ex. J hereto.*)

**(vi) eScholar’s Investment in the eScholar Uniq-ID Trade Secret**

84. eScholar has, over the past 15 years, invested approximately \$15,000,000 in the development, commercialization, promotion and marketing of the eScholar Uniq-ID© system. The creation of, and enhancements to the eScholar Uniq-ID© system that have resulted from this substantial investment of capital, labor and other resources include, among other proprietary methods, innovative and unique means of capturing, storing and presenting data.

**(vii) Trade Secret and Software License Violations**

85. NDE violated Section 2(b) of the Software License in which it specifically agreed that it would not reverse engineer eScholar’s software products “except with the prior written consent” of eScholar. eScholar has never consented to the NDE’s reverse engineering of any eScholar’s software products, nor has NDE ever requested such consent.

86. NDE also violated the ownership rights assigned to eScholar in section 8 of the Software License, as well as the confidentiality provision in section 10, by publishing web pages

that impermissibly copied eScholar's literary property, without disclosing the illegally derivative nature of those pages or properly crediting eScholar's copyright.

87. NDE also violated the ownership rights assigned to eScholar in section 5 by failing to either return to or destroy all intellectual property that could be impermissibly copied by its employees.

88. NDE also violated the strict "Confidentiality" provision contained in Section 10 of the Agreement, for which Plaintiff is seeking injunctive relief against NDE's current and future misappropriations of the eScholar Uniq-ID Trade Secret. NDE has also wrongfully disseminated protected aspects of the eScholar Uniq-ID Trade Secret through its public website.

**(viii) Folkers' and Hastings' Ongoing Violations of eScholar's Copyrights**

89. Folkers and Hastings possess actual authority to cause the infringement of the eScholar Uniq-ID© copyright as alleged herein.

90. Despite eScholar's demands, Folkers and Hastings have refused to cease and desist from their infringing conduct and, instead, have continued to use and exploit, and cause the use and exploitation of the eScholar Uniq-ID© copyright.

91. Folkers and Hastings, in their individual capacities, continue to, and, unless enjoined, will continue in the foreseeable future to, wrongfully and directly infringe eScholar's eScholar Uniq-ID© copyright.

92. eScholar will suffer irreparably unless Folkers' and Hastings' ongoing and future infringement of the eScholar Uniq-ID© copyright is permanently enjoined.



**E. CLAIMS FOR RELIEF**

**First Claim for Relief:**

**Rescission and Damages for Breach of the Software Licensing Agreement**  
**(against NDE)**

93. Paragraphs 1 - 92 are repeated and realleged as if set forth fully herein.

94. A material breach of a licensing agreement gives rise to a right of rescission which allows the non-breaching party to terminate the agreement.

95. A material breach is one that is either willful or so substantial as to defeat the object of the parties in forming the contract.

96. As alleged herein, NDE materially violated section 10 of the Software License (“Confidential Information”) which provides: “Each party will employ the same efforts to protect the other party’s confidential and proprietary information that it applies to protect its own confidential and proprietary information.” NDE also violated section 5 of the Software License which provides that, upon termination of the agreement, NDE shall “discontinue all use of the Licensed Products.” NDE also violated section 2(b) of the Software License (Restrictions on Use) which prohibit NDE “from causing or permitting the reverse engineering, disassembly or decompilation, alterations or modifications to the Licensed Products.”

97. NDE’s breaches of the Software License were intentional, willful, material and substantial and defeated the parties’ purpose in entering into the Software License.

98. As a result of NDE’s breaches of the Software License, eScholar is entitled to both a judgment declaring that the Software License has been rescinded, as well as damages for the prior breach of the Software License in an amount to be determined at trial.

**Second Claim for Relief:**

**Damages for Copyright Infringement**  
**(against NDE)**

99. Paragraphs 1 - 98 are repeated and realleged as if set forth fully herein.

100. As eScholar asserts in the First Claim for Relief, *supra*, NDE materially breached the Software License, thereby conferring upon eScholar the right of rescission.

101. eScholar Uniq-ID© system is the subject of eight valid copyright registrations including a valid copyright filed under registration number TX 6-347-172.

102. As a matter of law, a cause of action for copyright infringement arises when a willful or material breach of a licensing agreement occurs, and the non-breaching party obtains the right to terminate the licensing agreement.

103. A licensor can recover for copyright infringement based on breach of a license agreement when the copying exceeds the scope of the defendant's license or defeats the parties' purpose in entering into the license.

104. A licensor can recover for copyright infringement based on breach of a license agreement, where the claim is grounded in the exclusive right of copyright, such as unlawful reproduction or distribution.

105. A licensor can recover for copyright infringement based on breach of a license agreement, where the licensee uses a work after the contract has already been terminated for breach of a material condition.

106. Where a licensee breaches the license and has thereby caused the license to terminate, all rights under copyright law immediately revert to the licensor.

107. Use by the licensee without authority from the licensor results in a copyright infringement by the licensee.

108. Following a material breach by the licensee which terminates the license, the licensee's continued use of the copyrighted work that had been the subject of the license gives rise to a claim for copyright infringement.

109. A claim based on a breach of a restriction that the license imposes on the manner in which the copyrighted work may be used to claim a copyright infringement under the Copyright Act.

110. eScholar owns all right, title and interest in the eScholar Uniq-ID© copyright, as well as all claims for infringement thereof.

111. An express condition precedent to any rights accruing to NDE under the Software License is that NDE was required to pay for all support rendered under the Software License. NDE has not satisfied that express condition precedent, since it did not pay for support subsequent to October 31, 2019. Accordingly, NDE no longer has any license and is not authorized to reproduce, prepare derivative works of, distribute, or publicly display those works, or to authorize others to do so.

112. By continuing to operate the NDE ADVISOR Person ID system's website, and by publishing the ADVISOR Person ID Instructions document for public access, which, at a minimum, includes images exploiting the eScholar Uniq-ID© copyright, NDE is infringing upon eScholar's exclusive right to exploit the eScholar Uniq-ID© copyright.

113. eScholar has been actually and irreparably harmed by the actions of NDE in using, reproducing, and distributing the eScholar Uniq-ID© copyright. eScholar has been actually and irreparably harmed by the actions of NDE in its preparation of works derivative of

the eScholar Uniq-ID© copyright.

114. NDE has benefitted from intellectual property which it is not entitled to exploit.

115. By continuing to infringe on eScholar's copyrights, and continuing to claim the copyright assets are inadequate or defective, NDE is continuing to injure eScholar in a manner that cannot fully be remedied at law.

116. NDE's infringement of the eScholar Uniq-ID© copyright, entitles eScholar to damages and lost profits (17 U.S.C. §504), and costs and attorneys' fees ((17 U.S.C. §505).

117. Accordingly, as a direct and proximate result of NDE's copyright infringement, eScholar has been damaged both economically and in terms of its reputation, and is entitled to damages, including statutory damages, in an amount to be proven at trial, and such equitable relief as may be appropriate.

### **Third Claim for Relief:**

#### **Permanent Injunction against Copyright Infringement** **(against NDE)**

118. Paragraphs 1 - 117 are repeated and realleged as if set forth fully herein.

119. The federal Copyright Act, 17 U.S.C. §502, provides that: "Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

120. As a direct and proximate result of the acts and conduct alleged herein, eScholar has sustained and will continue to sustain substantial, immediate and irreparable injury, for which there is no adequate remedy at law.

121. The balance of the hardships equities and the public interest favor granting an

injunction. The federal Copyright Act recognizes the important public policy interest in protecting intellectual property and encouraging innovation. Permitting NDE to continue to ignore the rights in the eScholar Uniq-ID© copyright would inflict a substantial hardship upon eScholar and outweigh any burden imposed upon NDE.

122. Unless permanently enjoined and restrained by this Court, NDE will continue to infringe on eScholar's rights in the eScholar Uniq-ID© copyright.

123. For the foregoing reasons, eScholar is entitled to a permanent injunction under 17 U.S.C. §502 sufficient in scope and effect to prohibit NDE from further infringement of the eScholar Uniq-ID© copyright.

**Fourth Claim for Relief:**

**Damages for Violation of the Nebraska Trade Secrets Act**  
**(against NDE)**

124. Paragraphs 1 - 123 are repeated and realleged as if set forth fully herein.

125. The eScholar Uniq-ID Trade Secret, as defined above, falls within Nebraska's statutory definition of a trade secret. The Nebraska Trade Secrets Act, Neb. Rev. St. § 87-502(4), defines "trade secret" to mean

. . . information, including, but not limited to, a drawing, formula, pattern, compilation, program, device, method, technique, code, or process that:  
(a) Derives independent economic value, actual or potential, from not being known to, and not being ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and  
(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

126. The ideas embodied in the eScholar Uniq-ID© system, referred to herein as the "eScholar Uniq-ID Trade Secret," meet the foregoing statutory definition.

127. NDE is a “person” within the statutory definition used in the Nebraska Trade Secrets Act, Neb. Rev. St. §87-502(4), which includes “government, governmental subdivision or agency.”

128. NDE acquired the eScholar Uniq-ID Trade Secret by “improper means,” as defined within the Nebraska Trade Secrets Act, §87-502(1), which includes “breach of a duty to maintain secrecy.” In particular, NDE violated section 10 of the Software License (“Confidential Information”) which provides: “Each party will employ the same efforts to protect the other party’s confidential and proprietary information that it applies to protect its own confidential and proprietary information.” NDE also violated section 5 of the Software License which provides that, upon termination of the agreement, NDE shall “discontinue all use of the Licensed Products.” NDE also violated section 2(b) of the Software License (Restrictions on Use) which prohibit NDE “from causing or permitting the reverse engineering, disassembly or decompilation, alterations or modifications to the Licensed Products.”

129. As a direct and proximate result of NDE’s violation of the Nebraska Trade Secret Act, eScholar has been economically damaged.

130. NDE has been unjustly enriched by reason of its violation of the Nebraska Trade Secret Act, §87-504.

131. eScholar is entitled to damages in accordance with the Nebraska Trade Secret Act, §87-504, including both the actual loss caused and the unjust enrichment caused by misappropriation.

**Fifth Claim for Relief:**

**Permanent Injunction against Future Breaches  
of the Software License, and Future  
Violations of the Nebraska Trade Secrets Act  
(against NDE)**

132. Paragraphs 1 - 131 are repeated and realleged as if set forth fully herein.

133. Section 5 of the Software License provides that any uncured material breaches of its terms:

. . . shall entitle eScholar to injunctive relief, without the necessity of proving the inadequacy of monetary damages or the posting of any bond or security, enjoining or restraining Licensee from any such violation or threatened violation.

134. Nebraska's Trade Secrets Act, Neb. Rev. St. §87-503(1) provides that: "Actual or threatened misappropriation may be enjoined."

135. Without the requested permanent injunction, eScholar will be irreparably harmed. If NDE is permitted to continue to use its ADVISOR Person ID system, eScholar will lose the ability to control access to its intellectual property. NDE could use and disclose eScholar's proprietary intellectual property and trade secrets, causing harm to eScholar's reputation and goodwill.

136. The balance of the hardships and the public interest favor granting a preliminary injunction. The Nebraska Trade Secrets Act recognizes the important public policy interest in protecting intellectual property and encouraging innovation. Permitting NDE to ignore eScholar's intellectual property rights and the protections intended by the Nebraska Trade Secrets Act would cause a substantial hardship and outweigh any burden imposed on NDE.

137. For the foregoing reasons, eScholar is entitled to a permanent injunction sufficient in scope and effect to prohibit NDE from utilizing the ADVISOR Person ID system or any other



system that infringes eScholar's intellectual property or wrongfully exploits eScholar's trade secrets.

**Sixth Claim for Relief:**

**Permanent Injunction Prohibiting Folkers and Hastings  
from Future Violations of the eScholar's Copyright  
(against Folkers and Hastings)**

138. Paragraphs 1 - 137 are repeated and realleged as if set forth fully herein.

139. The federal Copyright Act, 17 U.S.C. §502, provides that: "Any court having jurisdiction of a civil action arising under this title may, subject to the provisions of section 1498 of title 28, grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright."

140. Folkers and Hastings took action pursuant to an unlawful policy, and/or possessed final authority regarding the infringement of the eScholar Uniq-ID© copyright, as alleged herein.

141. Despite eScholar's demands, Folkers and Hastings have refused to cease and desist from their infringing conduct and, instead, have continued to use and exploit, and cause the use and exploitation of, the eScholar Uniq-ID© copyright.

142. Folkers and Hastings, in their individual capacities, continue to, and, unless enjoined, will continue in the foreseeable future to, wrongfully and directly infringe eScholar's Uniq-ID© copyright.

143. Under *ex Parte Young, supra*, Eleventh Amendment sovereign immunity does not protect Folkers and Hastings from suit for prospective injunctive relief.

144. Folkers and Hastings are engaged in ongoing violations of federal law, specifically, the Copyright Act.

145. Folkers and Hastings are the officials responsible for the use of the ADVISOR Person ID system in violation of eScholar's intellectual property rights.

146. eScholar will be irreparably harmed unless Folkers' and Hastings' ongoing and future infringement of the eScholar Uniq-ID© copyright is permanently enjoined.

147. Without the requested permanent injunction, eScholar will be irreparably harmed. If Folkers and Hastings are permitted to continue to use ADVISOR Person ID system, eScholar will lose the ability to control access to its intellectual property. Folkers and Hastings could use and disclose eScholar's proprietary intellectual property and trade secret, causing harm to eScholar's reputation and goodwill.

148. The balance of the hardships equities and the public interest favor granting an injunction. The federal Copyright Act recognizes the important public policy interest in protecting intellectual property and encouraging innovation. Permitting Folkers and Hastings to ignore the rights in the eScholar Uniq-ID© copyright would inflict a substantial hardship upon eScholar and outweigh any burden imposed upon Folkers and Hastings.

149. For the foregoing reasons, eScholar is entitled to an injunction against Folkers and Hastings preventing and restraining the ongoing and future infringement of the eScholar Uniq-ID© copyright pursuant to 17 U.S.C. §502.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that this Court enter a judgment against Defendants as follows:

**(A) On the FIRST CLAIM FOR RELIEF,**

(1) an order rescinding and terminating the Software License; and

(2) an award of money damages in an amount to be determined at trial but in any event no less than \$15 million.

**(B) On the SECOND and FOURTH CLAIMS FOR RELIEF**, an award of money damages in an amount to be determined at trial but in any event no less than \$15 million.

**(C) On the THIRD CLAIM FOR RELIEF**, an injunction under 17 U.S.C. §502 prohibiting NDE, its officers, agents, servants and employees, and those persons in active concert or participation with them:

(1) from publicly using, reproducing, distributing or otherwise infringing in any manner (including without limitation by materially contributing to or intentionally inducing the infringement of) any right under copyright of the eScholar Uniq-ID© copyright, including without limitation of using, reproducing or distributing any software or work protected under the eScholar Uniq-ID© copyright, providing any service or device that does or facilitates any of the foregoing acts; and (b) impounding all software in NDE's possession, custody, or control, and any and all documents or other records in NDE's possession, custody, or control relating to NDE's infringement of the eScholar Uniq-ID© copyright.

(2) from continuing to use the ADVISOR Person ID; and

(3) from committing or engaging in continued acts of infringement of eScholar Uniq-ID© copyright.

**(D) On the FIFTH CLAIM FOR RELIEF**, an injunction under Nebraska's Trade Secrets Act, Neb. Rev. St. §87-503(1) and section 5 of the Software License, prohibiting NDE, its officers, agents, servants and employees, and those persons in active concert or participation with them:

(1) from publicly using, reproducing, distributing or otherwise misappropriating

in any manner (including without limitation by materially contributing to or intentionally inducing the misappropriation of) the eScholar Uniq-ID Trade Secret or related intellectual property (as defined in the Software License), including without limitation by using, reproducing or distributing the eScholar Uniq-ID Trade Secret or the related intellectual property, or providing any service or device that does or facilitates any of the foregoing acts; and (b) impounding any software in NDE's possession, custody, or control, and any and all documents or other records in NDE's possession, custody, or control relating to NDE's misappropriation of the eScholar Uniq-ID© Trade Secret or the related intellectual property.

(2) from continuing to use the ADVISOR Person ID; and

(3) from continued acts of misappropriation of the eScholar Uniq-ID Trade Secret and related intellectual property as defined in the Software License.

**(E) On the SIXTH CLAIM FOR RELIEF**, an injunction under 17 U.S.C. §502 prohibiting Folkers and Hastings:

(1) from publicly using, reproducing, distributing or otherwise infringing in any manner (including without limitation by materially contributing to or intentionally inducing the infringement of) any right under copyright of the eScholar Uniq-ID© copyright, including without limitation by using, reproducing or distributing any software or work protected under the eScholar Uniq-ID© copyright, providing any service or device that does or facilitates any of the foregoing acts; and (b) impounding all software in Folkers' or Hastings' possession, custody, or control, and any and all documents or other records in Folkers' or Hastings' possession, custody, or control relating to the infringement of the eScholar Uniq-ID© copyright.

(2) from continuing to use the ADVISOR Person ID; and

(3) from continued acts of infringement of eScholar Uniq-ID© copyright.

(F) **TOGETHER WITH** an award of costs, interest and attorneys' fees to the extent permitted by law.

- and -

(G) **SUCH OTHER RELIEF** as the Court deems just and proper.

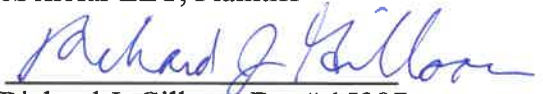
**DEMAND FOR TRIAL BY JURY**

eScholar demands a trial by jury on all issues that are so triable.

Dated: April 21, 2020

Respectfully submitted,  
eScholar LLC, Plaintiff

By:

  
Richard J. Gilloon, Bar # 15397  
Erickson | Sederstrom P.C.  
10330 Regency Parkway Drive, Suite 100  
Omaha, NE 68114  
(402) 397-2200  
rgill@eslaw.com

- and -

Paul R. McMenamin,  
Mcmenamin Law Group  
1140 Avenue of the Americas, 9th Floor  
New York, New York 10036  
paul@mcmenaminlawgroup.com  
(917) 312-8334

*Attorneys for Plaintiff eScholar LLC*

**VERIFICATION**

Wolf Boehme, pursuant to 28 U.S.C. §1746, declares under penalty of perjury that:

1. I am the president of eScholar LLC, the plaintiff in this action.
2. The allegations in the foregoing Amended Complaint are true and correct.

Dated: White Plains, New York  
April 21, 2020

  
\_\_\_\_\_  
Wolf Boehme

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing Verified Amended Complaint and Jury Demand was served on this 21st day of April, 2020 to:

Mr. Doug Peterson  
Nebraska Attorney General  
2115 State Capitol  
Lincoln, NE 68509

by: ☒ U.S. Mail, postage prepaid  
☐ Electronic filing using the JUSTICE system  
☐ e-mail  
☐ Hand Delivery  
☐ Overnight Courier

  
Richard J. Gallo