

C.D. Michel – SBN 144258  
Email: cmichel@michellawyers.com  
Joshua R. Dale – SBN 209942  
Sean A. Brady – SBN 262007  
Anna M. Barvir – SBN 268728  
MICHEL & ASSOCIATES, P.C.  
180 E. Ocean Blvd., Suite 200  
Long Beach, CA 90802  
Telephone: (562) 216-4444  
Facsimile: (562) 216-4445

Attorneys for Plaintiffs

**IN THE UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA  
WESTERN DIVISION**

MICHELLE FLANAGAN, et al.,

Plaintiffs,

v.

CALIFORNIA ATTORNEY  
GENERAL XAVIER BECERRA, in  
his official capacity as Attorney  
General of the State of California, et  
al.,

Defendants.

Case No.: 2:16-cv-06164-JAK-AS

**PLAINTIFFS' OBJECTIONS TO  
THE DECLARATION OF P. PATTY  
LI AND EVIDENCE SUBMITTED IN  
SUPPORT OF DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT**

Judge: John A. Kronstadt  
Hearing Date: November 6, 2017  
Hearing Time: 8:30 AM  
Courtroom: 10B

Action Filed: August 17, 2016  
Trial Date: February 6, 2018

Plaintiffs, Michelle Flanagan, Samuel Golden, Dominic Nardone, Jacob Perkio, And The California Rifle & Pistol Association (collectively, the "Plaintiffs") make the following objections to the Declaration of Patty Li on Professor Donohue's deposition and evidence in support of defendants' Motion for Summary Judgment.

Plaintiffs respectfully request that the Court rule on each of the following objections prior to ruling on Defendants' motion.

**OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 8.**

<b>EVIDENCE OBJECTED TO</b>	<b>GROUND FOR OBJECTION</b>	<b>COURT'S RULING</b>
<b>1. Exhibit 2 Professor John J. Donohue's Expert Witness Report ("Ex. 2") at ¶32:</b> While the empirical literature discussed above has largely focused on the impact of laws allowing citizens to carry concealed guns, this literature can be used to make informed predictions about the likely impact of allowing citizens to carry arms openly.	<b>Lacks foundation, confuses the issues, wastes time and presents cumulative evidence:</b> There is no foundation for the assumption that the literature about concealed carry can be used to make predictions about open carry. FRE 403, 702, 703. Scientific opinion is not admissible when a court concludes "that there is simply too great an analytical gap between the data and the opinion proffered." <i>See Gen. Elec. Co. v. Joiner</i> , 522 U.S. 136, 146 (1997) ("Trained experts commonly extrapolate from existing data. But nothing in either <i>Daubert</i> or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the <i>ipse dixit</i> of the expert.") In fact, declarant admits that there is a	<input type="checkbox"/> Sustained  <input type="checkbox"/> Overruled

	<p>distinction between open and concealed carry. Exhibit 3 Deposition Transcript of John J. Donohue, Volume I (“Ex. 3”) at 197: 14-16. He further testified, “any time I’m making a prediction or estimate, I could be wrong” Ex. 3 at 220:12-18. The declarant has not proffered any preliminary evidence to lay the foundations that he attempted to research what open carry might be, as his research is solely based on concealed carry. FRE 702, 703.</p>	
<p><b>2. Ex. 2 at ¶33:</b> These facts suggest that open carry of guns would be less socially desirable than concealed carry since the latter at least has the prospect of deterrence since criminals cannot know who is carrying weapons.</p>	<p><b>Conclusory:</b> Declaration which sets forth only conclusions opinions, or ultimate facts is insufficient. (<i>Kramer v Barnes</i> 91963) 212 Cal. App.2d 440, 446; see also <i>Powell v Kleinman</i> (2007) 151 Cal. App. 4<sup>th</sup> 112, 123 [“an expert’s opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>

1 than the reasons and facts on  
2 which it is based “[.]” FRE 602,  
3 702.

4 **Not Proper Scientific**

5 **Testimony:** What is, or is not  
6 “socially desirable” is a question  
7 that does not require “scientific,  
8 technical, or other specialized  
9 knowledge[.]” meaning the issue  
10 is not the proper subject of expert  
11 testimony under FRE 702. *See*  
12 *Range Rd. Music, Inc. v. E. Coast*  
13 *Foods, Inc.*, 668 F.3d 1148, 1153  
14 (9th Cir. 2012) (citing FRE 702  
15 and quoting the advisory  
16 committee notes to FRE 701:  
17 “[T]he distinction between lay and  
18 expert witness testimony is that  
19 lay testimony results from a  
20 process of reasoning familiar in  
21 everyday life, while expert  
22 testimony results from a process  
23 of reasoning which can be  
24 mastered only by specialists in the  
25 field.”)

<p>1 <b>3. Ex. 2 at ¶34:</b> Spending</p> <p>2 resources that shift</p> <p>3 burdens of crime from</p> <p>4 one ground to another</p> <p>5 without reducing the</p> <p>6 overall burden is a net</p> <p>7 waste of resources.</p> <p>8 Indeed, the billions of</p> <p>9 dollars that are spent</p> <p>10 each year buying guns</p> <p>11 for self-protection</p> <p>12 without any statistical</p> <p>13 support for the claim that</p> <p>14 they diminish crime</p> <p>15 could easily confer</p> <p>16 substantial crime</p> <p>17 reducing benefits if the</p> <p>18 money were directed to</p> <p>19 known crime-reducing</p> <p>20 expenditures.</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p>	<p><b>Lacks Foundation:</b> The statement</p> <p>fails to identify any factual</p> <p>evidence to show what his opinion</p> <p>is based on. (<i>Taliaferro v</i></p> <p><i>Taliaferro</i> (1962)203 Cal. App.</p> <p>2d 649, 651; FRE 702, 703</p> <p>[failure to state facts upon which</p> <p>opinion is based may warrant</p> <p>disregard of opinion, especially</p> <p>where it is self-serving]; <i>Powell v.</i></p> <p><i>Kleinman</i> (2007) 151 Cal. App. 4<sup>th</sup></p> <p>112, 123 [“an expert’s opinion</p> <p>rendered without a reasoned</p> <p>explanation of why the underlying</p> <p>facts lead to the ultimate</p> <p>conclusion has no evidentiary</p> <p>value because an expert opinion is</p> <p>worth no more than the reasons</p> <p>and facts on which it is based”].)</p> <p><b>Speculative:</b> The declarant does</p> <p>not present any evidence to show</p> <p>that open carry produces a net</p> <p>waste of resources. Because there</p> <p>is no evidence, the statement is</p> <p>speculative. FRE 702, 703. In</p> <p>fact, the declarant testified that he</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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	<p>didn't rely upon any data to measure the resource burdens that open carry imposes. And these are just his inferences. (Ex. 3 at 185:3-8)</p>	
<p><b>4. Ex. 2 at ¶36:</b> Open carry of guns can spread fear and alarm in the community. An openly displayed gun in public also gives a muddy signal about the gun toter and could draw undue attention from police officers, directing law-enforcement resources inefficiently, which again makes law enforcement less effective, thereby further promoting crime.</p>	<p><b>Lacks Foundation:</b> The declarant lacks foundation to testify regarding open carry. FRE 602, 702-704. The declarant has not proffered any preliminary evidence to lay the foundations that he attempted to research what open carry might be, as his research is solely based on concealed carry. FRE 602, 702-704.</p> <p><b>Speculative:</b> The declarant does not present any evidence to show that displaying guns in public can spread fear and alarm. Because there is no evidence, the statement is speculative. FRE 702, 703.</p> <p><b>Conclusory:</b> Declaration which sets forth only conclusions opinions, or ultimate facts is</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>

insufficient (*Kramer v Barnes* 91963) 212 Cal. App.2d 440, 446; see also *Powell v Kleinman* (2007) 151 Cal. App. 4<sup>th</sup> 112, 123 [“an expert’s opinion rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion has no evidentiary value because an expert opinion is worth no more than the reasons and facts on which it is based “].) FRE 702, 703.

**Not Proper Scientific**

**Testimony:** Whatever “signal” an “openly displayed gun” provides to the public is, by definition, a question that does not require “scientific, technical, or other specialized knowledge[.]” meaning the issue is not the proper subject of expert testimony under FRE 702. *See Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the

1		advisory committee notes to FRE	
2		701: “[T]he distinction between	
3		lay and expert witness testimony	
4		is that lay testimony results from a	
5		process of reasoning familiar in	
6		everyday life, while expert	
7		testimony results from a process	
8		of reasoning which can be	
9		mastered only by specialists in the	
10		field.”) Additionally, even	
11		assuming <i>arguendo</i> the claim	
12		about “undue attention” by police	
13		is potentially a proper source of	
14		expert opinion, the Declarant is	
15		not a police officer. Indeed, he	
16		states “I don't really have a strong	
17		feeling on -- or a strong sense of	
18		what police are estimating.” Ex. 3	
19		at 114:22-23.	
20			
21	<b>5. Ex. 2 at ¶¶1-36</b>	<b>Immaterial and Irrelevant:</b> The	<input type="checkbox"/> Sustained
22		study on concealed carry is not	
23		relevant to any material fact at	<input type="checkbox"/> Overruled
24		issue in the case. FRE 402. Prof.	
25		Donohue’s study is wholly	
26		irrelevant because his study is	
27		exclusively focused on <i>concealed</i>	
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	<p>carry. The declarant admits that he did no research about open carry, nor did he examine data from any state that allows open carry. Ex. 3 at 178:3-12. The declarant further testifies that everything he states about open carry is inferred from his work on concealed carry study. (Ex. 3 at 185:17-20). And about his study, he says “I didn’t focus on open carry in this paper.” (Ex. 3 at 179:5). Further, he is not aware of any research of open carry’s potential impacts on criminality [Ex. 3 at 179:20-181:7]. Because this case is about open carry, Professor Donohue’s testimony and report will not assist the court in deciding Plaintiff’s Motion for Summary Judgment.</p>	
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**OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 5.**

<p><b>6. Exhibit 3 Deposition Transcript of John J. Donohue, Volume I</b></p>	<p><b>Lacks Foundation.</b> Declarant’s testimony is not based on an adequate foundation of reliable</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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<p><b>(“Ex. 3”) at 114:22-114:23:</b> [the research on disaggregated data for each category of violent crime] pretty much conforms of what we saw here [in the study].</p>	<p>data, and is not based on an adequate methodology to support his conclusion. FRE 702. The research is not particularly clear on the impact of right to carry laws on violent crime rates. Declarant had his staff run regressions for the disaggregated crimes in preparing the attached report, but he did not include them in the report. Scientific opinion is not admissible when a court concludes “that there is simply too great an analytical gap between the data and the opinion proffered.” <i>See Gen. Elec. Co. v. Joiner</i>, 522 U.S. 136, 146 (1997) (“Trained experts commonly extrapolate from existing data. But nothing in either <i>Daubert</i> or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the <i>ipse dixit</i> of the expert.”)</p> <p>In fact, declarant admits that some</p>	
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1		regressions are not consistent with	
2		his conclusions in his study, and	
3		that these regressions are very	
4		misleading, by saying “if you run	
5		enough regressions, [you can] pick	
6		out one that you like, you can	
7		really, really engineer results that	
8		are very misleading” Ex. 3 at	
9		35:20-24, 36: 6-8.	
10			
11		<b>Lacks proper authentication:</b>	
12		The predictions relied upon lacks	
13		proper authentication. FRE 403,	
14		901, 902. The declarant has not	
15		produced evidence sufficient to	
16		support his finding that separate	
17		disaggregated data for each	
18		category of violent crime	
19		conforms with aggregated data in	
20		the study reported.	
21	<b>7. Ex. 3 at 147: 7-16: I</b>	<b>Lacks proper authentication:</b>	<input type="checkbox"/> Sustained
22	think there were actually	The predictions relied upon lacks	
23	some problems with	proper authentication. FRE 403,	<input type="checkbox"/> Overruled
24	[Concealed Carry	901, 902. The declarant has not	
25	Killers] when they first	produced evidence sufficient to	
26	released that information	support his finding that Concealed	
27	and it was criticized, but	Carry Killers is a reliable website.	
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1	they have cleaned up the	<b>Not Proper Scientific</b>	
2	website quite a bit since	<b>Testimony:</b> The proffered	
3	then... and it is a useful	testimony here says a particular	
4	resource of highlighting	website, but not any particular	
5	certain behaviors on the	data thereon, is “a useful resource	
6	part of permit holders,	in highlighting certain behaviors	
7	that show that they	on the part of permit holders.”	
8	engage in behavior that	Inasmuch as the declarant is not	
9	would either be criminal,	offering testimony based on a	
10	reckless, or suggestive of	<i>scientific</i> analysis of data—and	
11	not being the sort of	because any layperson can see	
12	person you want	what is “highlighted” on the	
13	carrying guns around.	website—the issue is not the	
14		proper subject of expert testimony	
15		under FRE 702. <i>See Range Rd.</i>	
16		<i>Music, Inc. v. E. Coast Foods,</i>	
17		<i>Inc.</i> , 668 F.3d 1148, 1153 (9th Cir.	
18		2012) (citing FRE 702 and	
19		quoting the advisory committee	
20		notes to FRE 701: “[T]he	
21		distinction between lay and expert	
22		witness testimony is that lay	
23		testimony results from a process	
24		of reasoning familiar in everyday	
25		life, while expert testimony results	
26		from a process of reasoning which	
27		can be mastered only by	
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1		specialists in the field.”)	
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3	<b>8. Ex. 3 at 101: 6-25:</b>	<b>Speculative:</b> The expert witness’s	<input type="checkbox"/> Sustained
4	California, New York,	“knowledge” must be based upon	
5	and Washington, D.C.,	“more than subjective belief or	<input type="checkbox"/> Overruled
6	were areas with the	unsupported speculation.”	
7	worst crack problems.	<i>Daubert</i> 509 U.S. at 590, 113 S.	
8		Ct. at 2795, 125 L. Ed. 2d at 481).	
9		FRE 702. The declarant does not	
10		present any evidence to show that	
11		states that do not have right to	
12		carry laws are worse on crack than	
13		adopters of right to carry states.	
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15	<b>9. Ex. 3 at 123:16-20</b> We	<b>Lacks Foundation:</b> The	<input type="checkbox"/> Sustained
16	discussed sort of the	declarant has not produced	
17	ambiguities about what	evidence sufficient to support his	<input type="checkbox"/> Overruled
18	the net effect is on	finding that right to carry laws	
19	property crime, but we	result in increased property	
20	said for just looking at	crimes, including gun theft. FRE	
21	gun thefts, right to carry	702, 703. Indeed, the declarant	
22	laws theoretically	necessarily, albeit impliedly,	
23	increase gun theft.	admits as much (“right to carry	
24		laws <i>theoretically</i> increases gun	
25		theft.”).	
26			
27	<b>10. Ex. 3 at 203 4-23:</b>	<b>Lacks Authentication:</b> The	<input type="checkbox"/> Sustained
28	Carrying gun openly	predictions relied upon lacks	

1	where open carry is	proper authentication. FRE 403,	<input type="checkbox"/> Overruled
2	allowed suddenly	901, 902. The declarant has not	
3	triggers police	produced evidence sufficient to	
4	intervention.... We do	support his finding that carrying	
5	have the discussions of	gun openly triggers police	
6	police chiefs talking	intervention. His testimony simply	
7	about the amount of	relies on anecdotal information.	
8	attention that gun	<b>Hearsay:</b> The statement	
9	carriers can encourage	summarizes a discussion but does	
10	from the public.	not verify or properly authenticate	
11		the conversation. FRE 801.	
12		<b>Not Proper Scientific</b>	
13		<b>Testimony:</b> The proffered	
14		testimony here says open carry	
15		triggers police intervention.	
16		Inasmuch as the declarant is not	
17		offering testimony based on a	
18		<i>scientific</i> analysis of data—and	
19		because the claim about “police	
20		intervention” is potentially a	
21		proper source of expert opinion,	
22		the Declarant is not a police	
23		officer--the issue is not the proper	
24		subject of expert testimony under	
25		FRE 702. <i>See Range Rd. Music,</i>	
26		<i>Inc. v. E. Coast Foods, Inc.</i> , 668	
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	<p>F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the advisory committee notes to FRE 701: “[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.”)</p>	
<p><b>11. Ex. 3 at 196:23-197:13:</b> I think there are strong reasons supported by police chief discussions that open carry would have yet more burdens and less benefits.</p>	<p><b>Lacks Foundation:</b> The declarant has not produced evidence sufficient to support his finding that open carry would have more burdens and less benefits. FRE 702, 703.</p> <p><b>Hearsay:</b> The statement summarizes a discussion but does not verify or properly authenticate the discussions by the chief of police. FRE 801.</p> <p><b>Not Proper Scientific Testimony:</b> The proffered</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>

testimony here says open carry would have more burdens and less benefits. Inasmuch as the declarant is not offering testimony based on a *scientific* analysis of data—and because the claim about “burdens of open carry” is potentially a proper source of expert opinion, the Declarant is not a police officer--the issue is not the proper subject of expert testimony under FRE 702. *See Range Rd. Music, Inc. v. E. Coast Foods, Inc.*, 668 F.3d 1148, 1153 (9th Cir. 2012) (citing FRE 702 and quoting the advisory committee notes to FRE 701: “[T]he distinction between lay and expert witness testimony is that lay testimony results from a process of reasoning familiar in everyday life, while expert testimony results from a process of reasoning which can be mastered only by specialists in the field.”)



<p><b>12. Ex. 3 at 212: 18-25;</b></p> <p><b>213: 1-15:</b> I suspect, if anything, the open carriers would be much less law-abiding than the concealed carriers.</p>	<p><b>Speculative:</b> The expert witness's "knowledge" must be based upon "more than subjective belief or unsupported speculation." <i>Daubert 509 U.S. at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481).</i> FRE 702. The declarant does not present any evidence to show that open carriers are less law-abiding than concealed carriers.</p> <p><b>Conclusory:</b> Declaration which sets forth only conclusions, opinions or ultimate facts is insufficient. (<i>Kramper v Barnes</i> (1963) 212 Cal. App. 2d 440,446.) FRE 702, 703.</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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**OBJECTIONS TO DECLARATION OF P. PATTY LEE, See Exhibit 1 ¶ 6.**

<p><b>13. Exhibit 4 Deposition Transcript of John J. Donohue, Volume II ("Ex. 4") at 353: 16-353:20:</b> The synthetic controls estimates, regardless of the particular set of</p>	<p><b>Speculative:</b> The expert witness's "knowledge" must be based upon "more than subjective belief or unsupported speculation." <i>Daubert 509 U.S. at 590, 113 S. Ct. at 2795, 125 L. Ed. 2d at 481).</i> FRE 702. In this case, there has been no showing that the facts or</p>	<p><input type="checkbox"/> Sustained</p> <p><input type="checkbox"/> Overruled</p>
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1	explanatory variables	data relied upon by Prof. Donohue	
2	that was used, showed	are of a type reasonably relied	
3	a highly statistically	upon by experts in the field.	
4	significant impact on	Accordingly, his opinion	
5	aggravated assault	regarding open carry does not	
6	rising when right to	meet the <i>Daubert</i> standard.	
7	carry laws were		
8	[adopted].		
9			
10	<b>14. Ex. 4 at 5-25; 328 1-4:</b>	<b>Speculative:</b> There is no evidence	<input type="checkbox"/> Sustained
11	One huge way is guns	presented to validate declarant's	
12	are much more likely to	belief that guns are more likely to	<input type="checkbox"/> Overruled
13	be stolen when you're	be stolen when one is outside their	
14	taking them around	home, as he cannot recollect any	
15	town and walking	reports. FRE 702, 703.	
16	around.	<b>Conclusory:</b> Declaration which	
17		sets forth only conclusions,	
18		opinions or ultimate facts is	
19		insufficient. ( <i>Kramper v Barnes</i>	
20		(1963) 212 Cal. App. 2d 440,446.)	
21		FRE 702, 703.	
22			
23	<b>15. Ex. 4 at 331:13-14,</b>	<b>Speculative:</b> The expert witness's	<input type="checkbox"/> Sustained
24	<b>332:13-16:</b> NRA was	"knowledge" must be based upon	
25	looking around for	"more than subjective belief or	<input type="checkbox"/> Overruled
26	other ways to stimulate	unsupported speculation."	
27	gun sales... the one	<i>Daubert</i> 509 U.S. at 590, 113 S.	
28			

unifying theme in NRA  
conduct is, as far as I  
can tell, that they favor  
anything that stimulate  
gun sales and oppose  
anything that might  
reduce gun sales.

Ct. at 2795, 125 L. Ed. 2d at 481).  
FRE 702. The declarant does not  
present any evidence to show that  
NRA was looking to stimulate gun  
sales.

**Conclusory:** Declaration which  
sets forth only conclusions,  
opinions or ultimate facts is  
insufficient. (*Kramper v Barnes*  
(1963) 212 Cal. App. 2d 440,446.)  
FRE 702, 703.

Dated: October 2, 2017

**MICHEL & ASSOCIATES, P.C.**

/s/ Sean A. Brady

Sean A. Brady  
Attorneys for Plaintiffs

**CERTIFICATE OF SERVICE**

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

Case Name: *Flanagan, et al. v. California Attorney General Xavier Becerra, et al.*  
Case No.: 2:16-cv-06164-JAK-AS

IT IS HEREBY CERTIFIED THAT:

I, the undersigned, am a citizen of the United States and am at least eighteen years of age. My business address is 180 East Ocean Boulevard, Suite 200, Long Beach, California 90802.

I am not a party to the above-entitled action. I have caused service of:

**PLAINTIFFS' OBJECTIONS TO THE DECLARATION OF P. PATTY LI AND EVIDENCE SUBMITTED IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

Xavier Becerra, Attorney General of California	<i>Attorneys for Attorney</i>
P. Patty Li, Deputy Attorney General	<i>General of the State of</i>
E-mail: Patty.Li@doj.ca.gov	<i>California</i>
Jonathan M. Eisenberg, Deputy Attorney General	
E-mail: Jonathan.Eisenberg@doj.ca.gov	
300 South Spring Street, Suite 1702	
Los Angeles, CA 90013	

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

Executed October 2, 2017

/s/ Laura Palmerin

Laura Palmerin