BY FAX

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Attorneys for Plaintiffs

FILED/ENDORSED
OCT 12 2017
By: M. Rubalcaba
Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MIDLAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION,

Plaintiffs and Petitioners,

v.

XAVIER BECERRA, in His Official Capacity as Attorney General For the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, BETTY T. YEE, in Her Official Capacity as State Controller, and DOES 1 - 10,

Defendants and Respondents.

Case No. 34-2013-80001667

DECLARATION OF SCOTT M. FRANKLIN IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL ADDITIONAL RESPONSES TO REQUEST FOR ADMISSIONS (SET THREE) PROPOUNDED ON DEFENDANTS XAVIER BECERRA AND STEPHEN LINDLEY

Hearing Date: November 3, 2017
Hearing Time: 9:00 a.m.
Judge: Honorable Michael P. Kenny
Dept.: 31

Trial Date: March 16, 2018
Action Filed: October 16, 2013

DECLARATION OF SCOTT M. FRANKLIN

I, Scott M. Franklin, declare:

1. I am an attorney at law admitted to practice before all courts of the state of California. I have personal knowledge of each matter and the facts stated herein as a result of my employment with Michel & Associates, P.C., attorneys for Plaintiffs/Petitioners ("Plaintiffs"), and if called upon and sworn as a witness, I could and would testify competently thereto.

2. On August 31, 2016, I served Requests for Admissions (Set Three) and Special Interrogatories (Set Four) (collectively the "Written Discovery") on Defendants.

3. I granted Defendants a courtesy extension as to the deadline for responding to the Written Discovery, which was extended from October 28, 2016, to November 4, 2016.

4. Defendants' duty to respond to the Written Discovery was stayed as a part of the Court's November 4, 2016, bifurcation order.

5. During an informal status conference held September 8, 2017, the Court lifted the stay applicable to the Written Discovery.

6. On September 11, 2017, I sent opposing counsel a meet-and-confer letter explaining Plaintiffs' positions on the primary issues I expected to be disputed under my assumption that Defendants' general reluctance to provide substantive, straightforward discovery responses would continue. A true and correct copy of that letter is attached hereto as Exhibit1.

7. Pursuant to an agreement of the parties, Defendants served responses to the Written Discovery on October 4, 2017.

8. After having reviewed Defendants' responses to the Written Discovery, I determined they were evasive, and that Plaintiffs had ample grounds upon which to file motions to compel further responses to the Written Discovery.

9. On October 6, 2017, the parties held a telephonic meet-and-confer to discuss Defendants' responses to the Written Discovery; during the conference, counsel were able to tentatively resolve a few disputed issues, but it was clear that the larger issues, primarily concerning Defendants' refusal to comply with discovery requests seeking to confirm Defendants' legal positions and contentions, were not going to be resolved without a court order.

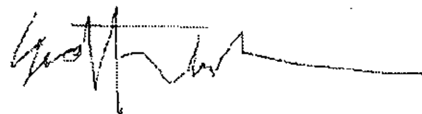
10. During the call of October 6, 2017, Defendants' counsel never indicated any change in Defendants' position that requests for admissions cannot be used to force admissions regarding a party's legal contentions. On a different topic, he did state that the California Department of Justice has no system for tracking the type of information sought by Special Interrogatory No. 33.

11. While drafting Plaintiffs' Motion to Compel Additional Responses to Requests for Admissions (Set Three), I determined that, although Plaintiffs could technically file a similar motion related to Defendants' failure to provide sufficient responses to the form interrogatory propounded with the relevant request for admissions, I determined it would be more simple for both the parties and the Court if Plaintiffs raise the form interrogatory issue as part of the abovementioned motion, inasmuch as the insufficiency identified in the relevant form interrogatory response was a direct result of the deficiencies identified in the responses challenged via the motion. When I raised this issue with opposing counsel he told me Defendants did not object to the form interrogatory issue being raised as part of Plaintiffs' Motion to Compel Additional Responses to Requests for Admissions (Set Three).

12. Exhibit 2 is a true and correct copy of excerpts of a discovery response provided by Plaintiffs, dated May 26, 2015.

13. Exhibit 3 is a true and correct copy of excerpts of a discovery response provided by Plaintiffs, dated January 22, 2015.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct, and that this Declaration was executed on October 12, 2017, in Glendale, California.



Scott M. Franklin
Declarant

EXHIBIT 1

SENIOR PARTNER
C. D. MICHEL*

MANAGING PARTNER
JOSHUA ROBERT DALE

SPECIAL COUNSEL
ERIC M. NAKASU
W. LEE SMITH

ASSOCIATES
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SEAN A. BRADY
MATTHEW D. CUBEIRO
JOSEPH A. SILVOSO, III
NICHOLAS W. STADMILLER
LOS ANGELES, CA

* ALSO ADMITTED IN TEXAS AND THE DISTRICT OF COLUMBIA

OF COUNSEL
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LOS ANGELES, CA

WRITER'S DIRECT CONTACT:
562-216-4474
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September 11, 2017

VIA EMAIL & U.S. MAIL

Mr. Anthony R. Hakl
Deputy Attorney General
Office of the Attorney General
1300 "I" Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244
Anthony.Hakl@doj.ca.gov

Re: Status of Pending Discovery and Litigation Issues (*Gentry v. Harris*, Case No. 34-2013-80001667)

Dear Mr. Hakl:

I write regarding the discovery motions I plan to file on September 20, 2017. The discovery at issue is Plaintiffs': Requests for Admissions (Set Three); Form Interrogatory (Set Four) No. 17.1(b), as it relates to the requests for admissions previously mentioned; Special Interrogatories (Set Four); and Request for Production of Documents (Set Four).

As you likely recall, Defendants have not yet responded to the relevant discovery. It was served on August 31, 2016, and per a courtesy extension, the deadline was extended from October 28, 2016, to November 4, 2016. As you also likely recall, the discovery was stayed as a part of the Court's November 4, 2016, bifurcation order. Based on the Court's comments during our recent informal status conference, however, it is clear the stay has effectively been lifted, as Judge Kenny confirmed the resolution of the disputed issue would be handled via motion(s) to compel.

Neither the parties nor the Court attempted to finalize a specific due date for the relevant discovery (as limited per my previous email) during the informal status conference, so it is an issue that needs to be addressed without delay. Prior to the informal status conference, I suggested a deadline of September 11, 2017, but Defendants did not respond as to that proposal. Based on the September 20, 2017, motion filing deadline for the agreed-upon October 13 hearing date, if I put all my other work aside, I could probably comply with that deadline if the responses are provided, by email, on the morning of September 18, 2017. If that occurs, however, I think we will have to meet-and-confer later that same day. Alternatively, if you want to push the motion and opposition dates back two days so

Defendants can provide responses on the twentieth, we could also do that (assuming that is not something the Court would not object to). Please let me know as soon as possible if Defendants are unwilling to comply with one of the two options above.

Inasmuch as responses have not yet been served, this meet-and-confer letter is probably not going to cover all objections raised by Defendants. Nonetheless, I want to discuss a few issues now, in the hope that Defendants will forgo making objections that are shown below to be without merit.

Requests for Admissions Concerning Legal Issues Are Indisputably Authorized under Statutory Law and California Supreme Court Precedent.

This issue was fully briefed by the parties during the litigation of Plaintiffs' Motion to Compel Further Responses to Request for Admissions, Set One. In Plaintiffs' Separate Statement in Support of that motion, Plaintiffs deconstructed Defendants' initial and amended responses, showing that Defendants' attempt to mischaracterize the scope of request for admissions was patently wrong (see, e.g., the discussion concerning Defendants' responses to Request for Admission No. 83 in the Separate Statement). Defendants' claim that they were *"unable to admit or deny"* the relevant inquiries was plainly untrue, seeing as Defendants' responses also claimed that if the relevant legal issue came up at trial, Defendants would then "contest the issue[.]"

In response to the motion mentioned in the preceding paragraph, Defendants' opposition included the argument discussed above (i.e., Defendants' unsupported claim that request for admissions cannot be used to obtain binding responses as to relevant legal issues), and an argument that the relevant requests would become irrelevant should the Court grant Defendants' motion for judgment on the pleadings (which concerned the single tax-law based claim that was in the original complaint). Defendants' Opposition to the discovery motion included *no* response to Plaintiffs' citations of the determinative law at issue;[1] rather, Defendants speciously claimed, without any analysis, that "the legal principles articulated in the [cases stated in Defendants' responses] still apply[.]"

When the Court denied Plaintiffs' prior motion, it apparently did so based on Defendants' mootness argument and the Court having granted Defendants' Motion for Judgment on the Pleadings regarding the illegal tax claim in the original complaint. Accordingly, the substantive dispute about the proper scope of requests for admissions was never ruled upon. If, however, Defendants attempt to re-raise this objection as to the pending discovery related to Plaintiffs' current tax claims, it is an issue that will be resolved by the Court in Plaintiffs' favor.

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[1] *E.g.*, Code of Civil Procedure section 2033.010 (expressly stating a request for admission may seek a response regarding the application of law to fact); *Burke v. Super. Ct.*, 71 Cal. 2d 276, 282 (1969) ("When a party is served with a request for admission concerning a legal question properly raised in the pleadings he cannot object simply by asserting that the request calls for a conclusion of law. He should make the admission if he is able to do so and does not in good faith intend to contest the issue at trial, thereby 'setting at rest a triable issue.") (citing (*Cembrook v. Super. Ct.*, 56 Cal. 2d 423, 429 (1961)). It is worth noting, again, that Defendants' responses offered *Cembrook* in support of their position, even though *Cembrook* ***expressly*** states a contrary position.

Recent case law confirms that Plaintiffs' position on this issue is correct, and that Defendants do not have a meritorious objection.

- *City of Glendale v. Marcus Cable Assocs., LLC*, 235 Cal. App. 4th 344, 353–54 (2015).

  Requests for admission are not restricted to facts or documents, but apply to conclusions, opinions, and even legal questions. (See 2 Witkin, *supra,* § 174 at p. 1164; *Burke v. Superior Court of Sacramento County* (1969) 71 Cal.2d 276, 282, 78 Cal.Rptr. 481, 455 P.2d 409.) Thus, requests for admission serve to narrow discovery, eliminate undisputed issues, and shift the cost of proving certain matters. As such, the requests for admission mechanism is not a means by *354 which a party obtains additional information, but rather a dispute-resolution device that eliminates **338 the time and expense of formal proof at trial. (See *Hansen v. Superior Court* (1983) 149 Cal.App.3d 823, 829, 197 Cal.Rptr. 175 ["Such requests are a useful and important part of the dispute-resolution mechanism...."])[.]

- *Joyce v. Ford Motor Co.*, 198 Cal. App. 4th 1478, 1488–89 (2011)

  "when a party is served with a request for admission concerning a legal question properly raised in the pleadings he cannot object simply by asserting that the request calls for a conclusion of law. He should make the admission if he is able to do so and does not in good faith intend to contest the issue at trial, thereby 'setting at rest a triable issue.' [Citation.] Otherwise he should set forth in detail the reasons why he cannot truthfully admit or deny the request." [Citing *Burke* and *Cembrook.*]

It is clear that Defendants do not want to answer the relevant requests, presumably because providing honest binding answers would be detrimental to Defendants' case. Obviously, Defendants are not stating an objection on that ground because it would be an affront to the purpose of the discovery process, and to the purposes behind requests for admissions in specific. The objection actually made, however, is just as troubling; it is clearly contrary to controlling law. Should Defendants make this same argument in response to the pending request for admissions, Plaintiffs' position is that doing so will constitute a flagrant abuse of the discovery process that would justify sanctions. Code Civ. Proc. § 128.7(b)(2).

Discovery Related to the Use of a Particular Levy, and the Government's Legal Characterizations Related thereto, Are Allowed if the Levy Is Alleged to Be an Unconstitutional Tax

In light of Defendants' previous claims that they were unable to admit or deny regarding "ancillary legal questions like whether those who participate in the DROS process 'place an unusual burden' on the general public as to the illegal possession of firearms[,]" it is worthwhile to discuss relevancy at this juncture. Code of Civil Procedure section 2017.010 outlines the boundaries of relevance vis-à-vis the discovery process:

> any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action or to the determination of any motion made in that action, if the matter either is itself admissible in evidence or appears reasonably calculated to lead to the discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action.

"For discovery purposes, information should be regarded as 'relevant' to the subject matter if it might reasonably assist a party in *evaluating* the case, *preparing* for trial, or facilitating *settlement* [Citations]." Cal. Prac. Guide Civ. Pro. Before Trial § 8:66 (Rutter 2017).

Plaintiffs' counsel has not completed its research on exactly what it will need to prove regarding its illegal tax claims (i.e., Plaintiffs Sixth, Seventh, and Eighth Causes of Action), but it seems likely *Sinclair Paint* will be a major guidepost. *Cf. Cal. Chamber of Commerce v. State Air Res. Bd.*, 10 Cal. App. 5th 604, 614 (2017), *review denied* (June 28, 2017) ("The bulk of the briefing in the trial court and on appeal discusses the test to determine whether a purported regulatory fee is instead a tax subject to Proposition 13. The key authority is *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, . . . and its progeny.");[2] *accord Nw. Energetic Servs., LLC v. Cal. Franchise Tax Bd.*, 159 Cal. App. 4th 841, 854 (2008), *as modified on denial of reh'g* (Mar. 3, 2008); *Bay Area Cellular Tel. Co. v. City of Union City*, 162 Cal. App. 4th 686, 693 (2008).

Defendants claim that discovery on any "benefits" or "burdens" related to the DROS Fee and the use thereof is inappropriate because distinguishing a tax from a regulatory fee is a question of law. Defendants' contention is based on the supposition that the relevant question of law can be resolved without any discovery. This supposition is wrong. *Sinclair Paint* provides the "general guideline" "that whether impositions are 'taxes' or 'fees' is a question of law for the appellate courts to decide *on independent review of the facts*." *Sinclair*, 15 Cal. 4th at 1353 (emphasis added). *Sinclair* conclusively shows that facts and legal contentions related to "benefits" and "burdens" are plainly at issue (and thus subject to discovery per Code of Civil Procedure Section 2017.010) in an illegal tax case. For example, *Sinclair* states "that 'to show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity.'" *Id.* at 879, 881;[3] *accord Cal. Ass'n of Prof. Scientists v. Dep't of Fish & Game*, 79 Cal. App. 935, 945 (2000).

Defendants try to paint the tax vs. fee question as a "pure question of law[,]" but that characterization would only apply if the relevant facts were not in dispute, and such facts are most certainly in dispute here. *Cf. Neecke v. City of Mill Valley*, 39 Cal. App. 4th 946, 953 (1995) ("The application of a tax statute to essentially undisputed facts confronts the court with a pure question of law."). And even assuming arguendo the issue before the court was a "pure question of law" where no

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[2] Though Proposition 26 was extant when *Cal. Chamber* was filed, it was held to be inapplicable. *Id.* at 715.

[3] The case cited in this portion of *Sinclair* was discussing "special taxes" as that term is used in the context of article XIII A, section 3, of the California Constitution (applicable to local agency levies), but the Court nonetheless found such cases could be "helpful, though not conclusive," in determining whether levies by the state are taxes under article XIII A, section 4. *Id.* at 873.

fact discovery was necessary, that circumstance would not prevent Plaintiff from using, inter alia, request for admissions to prepare for trial on a legal issue (see footnote 1). Put simply, Defendants' desire to limit discovery is contrary to well-established law.

Determining whether the DROS Fee, or a portion thereof, constitutes a tax is a question of law that can only be established by looking at who pays the fee, what they purportedly are paying for, and what they are actually funding. Without the foundational facts, there is no context within which the legal question can be answered. Thus, to the extent the pending discovery concerns these factual issues, or the Defendants' legal positions as to these issues, these are proper topics for discovery in an illegal tax case, and any objections to the contrary will be challenged by a motion to compel.

Please do not hesitate to contact me if you have any questions regarding the foregoing, and please respond as soon as possible as to whether Defendants are going to agree to one of the discovery service deadlines mentioned above.

Sincerely,
Michel & Associates, P.C.

S/
Scott M. Franklin

EXHIBIT 2

29 MAY '15 PM 1:54

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MID LAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION,

Plaintiffs and Petitioners,

v.

KAMALA HARRIS, in Her Official Capacity as Attorney General For the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, JOHN CHIANG, in his official capacity as State Controller, and DOES 1-10.,

Defendants and Respondents.

Case No. 34-2013-80001667

DEFENDANTS' KAMALA HARRIS AND STEPHEN LINDLEY'S RESPONSES TO FORM INTERROGATORIES, SET TWO PROPOUNDED BY PLAINTIFF

PROPOUNDING PARTY: Plaintiff David Gentry

RESPONDING PARTY: Defendants Kamala Harris and Stephen Lindley

SET NO.: TWO

Denial of paragraph 108.

(a) Defendants lacked sufficient information and belief to admit or deny the allegations and therefore denied them.

(b) Not applicable.

(c) Not applicable.

First Affirmative Defense – Standing

(a) Defendants have alleged this affirmative defense out of an abundance of caution. The petition and complaint do not clearly allege a cognizable injury by plaintiffs, although defendants' note that discovery is ongoing.

(b) Stephen Lindley. Mr. Lindley can be contact through counsel, whose contact information is above.

(c) Defendants have no additional documents to identify other than the documents identified in connection with this case and the related federal case, *Bauer v. Harris*, Case No. 1:11-cv-1440-LJO-MJS (E.D. Cal.) Any request for documents can be directed to counsel, whose contact information is above.

Second Affirmative Defense – Laches

(a) Defendants have alleged this affirmative defense to the extent plaintiffs are challenging the setting of the DROS fee at $19.00 as a result of the 2004 rulemaking process, which occurred more than ten years ago. Any challenge to the amount of $19.00 and related regulation was due at that time, and any challenge at this late stage is unfair and untimely.

Any challenge to defendants' decision not to proceed with the 2010 rulemaking process, which was approximately five years ago, is similarly barred.

(b) Stephen Lindley. Mr. Lindley can be contact through counsel, whose contact information is above.

(c) Defendants have no additional documents to identify other than the documents identified in connection with this case and the related federal case, *Bauer v. Harris*, Case No. 1:11-cv-1440-LJO-MJS (E.D. Cal.) Any request for documents can be directed to counsel, whose contact information is above.

EXHIBIT 3

KAMALA D. HARRIS
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Supervising Deputy Attorney General
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Attorneys for Defendants and Respondents

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

DAVID GENTRY, JAMES PARKER, MARK MID LAM, JAMES BASS, and CALGUNS SHOOTING SPORTS ASSOCIATION,

Plaintiffs and Petitioners,

v.

KAMALA HARRIS, in Her Official Capacity as Attorney General for the State of California; STEPHEN LINDLEY, in His Official Capacity as Acting Chief for the California Department of Justice, JOHN CHIANG, in his official capacity as State Controller, and DOES 1-10,

Defendants and Respondents.

Case No. 34-2013-80001667

DEFENDANTS ATTORNEY GENERAL KAMALA HARRIS AND BUREAU OF FIREARMS CHIEF STEPHEN LINDLEY'S AMENDED RESPONSES TO FORM INTERROGATORIES (SET ONE)

PROPOUNDING PARTY: **PLAINTIFFS**

RESPONDING PARTY: **DEFENDANTS ATTORNEY GENERAL KAMALA HARRIS AND BUREAU OF FIREARMS CHIEF STEPHEN LINDLEY**

SET NUMBER: **ONE**

1 **RESPONSES TO FORM INTERROGATORIES**

2 **INTERROGATORY NO. 1.1**:

3 State the name, ADDRESS, telephone number, and relationship to you of each PERSON
4 who prepared or assisted in the preparation of the responses to these interrogatories. (Do not
5 identify anyone who simply typed or reproduced the responses.)

6 **RESPONSE TO INTERROGATORY NO. 1.1**:

7 1. Anthony Hakl, Deputy Attorney General.
8 2. Kimberly Granger, Deputy Attorney General.
9 3. David Harper, Deputy Director, Division of Administrative Support.
10 4. Stephen Lindley, Chief of the Bureau of Firearms.

11 Each of these employees of the California Department of Justice may be contacted through
12 counsel.

13 **INTERROGATORY NO. 15.1**:

14 Identify each denial of a material allegation and each special or affirmative defense in
15 your pleadings and for each:

16 (a) state all facts upon which you base the denial or special or affirmative defense;
17 (b) state the names, ADDRESSES, and telephone numbers of all PERSONS who have
18 knowledge of those facts, and
19 (c) identify all DOCUMENTS and other tangible things that support your denial or
20 special or affirmative defense, and state the name, ADDRESS, and telephone number of the
21 PERSON who has each document.

22 **RESPONSE TO INTERROGATORY NO. 15.1**:

23 Defendants object to this interrogatory. It is not full and complete in and of itself,
24 contains subparts, and is compound. The interrogatory also requires referring to other documents
25 in order to respond, namely the complaint and answer. The interrogatory also seeks information
26 protected by the attorney-client privilege and work product doctrine. It also seeks confidential
27 law enforcement information protected by the official information, law enforcement and
28

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

I, Laura Palmerin, am employed in the City of Long Beach, Los Angeles County, California. I am over the age of eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, CA 90802.

On October 12, 2017, the foregoing document described as

DECLARATION OF SCOTT M. FRANKLIN IN SUPPORT OF PLAINTIFFS' MOTION TO COMPEL ADDITIONAL RESPONSES TO REQUEST FOR ADMISSIONS (SET THREE) PROPOUNDED ON DEFENDANTS XAVIER BECERRA AND STEPHEN LINDLEY

on the interested parties in this action by placing
☐the original
☒a true and correct copy
thereof enclosed in sealed envelope(s) addressed as follows:

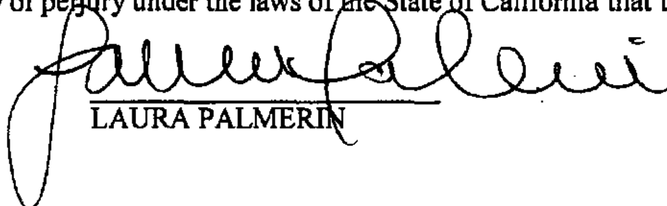
Anthony R. Hakl
Deputy Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550

Attorney for Defendants

☒ (BY ELECTRONIC MAIL) As follows: I served a true and correct copy by electronic transmission. Said transmission was reported and completed without error.
Executed on October 12, 2017, at Long Beach, California.

☒ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.
Executed on October 12, 2017, at Long Beach, California.

☒ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



LAURA PALMERIN

RECEIVED
IN DROP BOX

2017 OCT 12 PM 4:40

DOWNTOWN COURTHOUSE
SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO