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11 **UNITED STATES DISTRICT COURT**
12 **SOUTHERN DISTRICT OF CALIFORNIA**

13 **Citizens For Quality**
14 **Education San Diego, et al.,**

15 Plaintiffs;

16 v.

17 **San Diego Unified**
18 **School District, et al.,**

19 Defendants.

Case No. 3:17-cv-1054-BAS (JMA)

PLAINTIFFS' RESPONSE TO
BRIEF BY AMICUS CURIAE
CAIR-CA

Date: April 30, 2018
Judge: Hon. Cynthia Bashant
Magistrate: Hon. Jan Adler

INTRODUCTION

1
2 CAIR portrays this case in nearly fictional terms. Plaintiffs do not allege, as CAIR
3 wants this Court to believe, that learning about Islam represents radical
4 indoctrination. Nor do Plaintiffs allege that teaching about Muslim culture constitutes
5 militant proselytization. What Plaintiffs *do* allege, however, is that the San Diego Unified
6 School District is collaborating with a sectarian organization on an initiative that
7 discriminates in favor of one religion. Plaintiffs have firmly and deliberately made that clear
8 since the beginning of this case. Yet CAIR spends twenty-five pages mischaracterizing
9 Plaintiffs' claims, concocting new ones, and altogether spurning long-held Establishment
10 Clause jurisprudence as interpreted by the Supreme Court, the Ninth Circuit, and about
11 every other circuit.¹

12 As to the real issue before this Court—whether the Anti-Islamophobia Initiative, in
13 its ever-evolving-litigation-evading form, is neutral toward religion—CAIR offers little of
14 merit.² Nor can it. Indeed, CAIR does not dispute it is a religious organization. Nor does
15 it dispute that it actively promotes the religion of Islam. But it ignores a glaring problem of
16 law: a religious organization cannot under any circumstance advance its sectarian agenda
17 in a public school district. Instead, CAIR riddles its brief with amorphous reasons for the
18 Initiative, none compelling. What does CAIR believe is the fundamental issue in this case?
19 CAIR's brief sums (Br. 26) it up in the very last paragraph: it believes that this case is
20 nothing more than a “curriculum dispute” that is “cloaked” in “anti-Muslim rhetoric.”
21 That is pure fiction.

22 CAIR vigorously defends the Initiative's constitutionality, but other than a failed
23 attempt (Br. 14-21) at the *Lemon* Test and a misleading attack (Br. 22-25) on the merits of
24 Plaintiffs' No Aid Clause claim, CAIR only emphasizes its lack of case support for its
25

26 ¹ Brief of *Amicus Curiae* CAIR-CA (“Br.”), ECF No. 36.

27 ² This Court has noted that it will not consider CAIR's outside-the-record factual
28 information from its *amicus* brief (some 13 pages) (ECF No. 41.). Accordingly, Plaintiffs
took reasonable care not to dispute those facts as they are irrelevant.

1 discriminatory scheme by filling its brief with quotations from Donald Trump and
2 rehashing statistics from its own fundamentally flawed, self-contradicting surveys. Beyond
3 that, CAIR craftily tries to divert the Court’s attention from the Supreme Court’s First
4 Amendment jurisprudence by dangling (Br. 18-21, 25) the classic “alleged-indoctrination-
5 disguised-as-lessons” cases, *Eklund v. Byron Union Sch. Dist.*³ and *Brown v. Woodland Joint*
6 *Unified Sch. Dist.*,⁴ both of which have absolutely no bearing on Plaintiffs’ claims. Hoping
7 the Court will take the bait, CAIR presses misleading arguments and falsely complains (Br.
8 15) that Plaintiffs are up in arms about children being “forced to read the Qu’ran,
9 participate in prayer, or otherwise practice Islam.”

10 All wrong. This case is not a “curriculum dispute.” It is about the irreparable harm
11 Plaintiffs are suffering every day they send their children to school exposed to a religiously
12 discriminatory policy. It is about Plaintiffs’ feelings of marginalization and stigmatization
13 from a taxpayer-funded program that divides students along religious lines. Above all, it is
14 about the fundamental principles of equality and government neutrality as guaranteed by
15 the California and United States Constitutions.

16 But CAIR rejects all that while even overlooking the consequences of its position as
17 applied to other potential circumstances—such as what if a Zionist advocacy organization
18 or a Christian civil rights group were in its exact place. For CAIR, there is simply too much
19 on the line—from its fundraising efforts to its publicly touted plan of using this Initiative
20 as a pilot program for a nationwide rollout—to accept that the Constitution applies to it
21 like all other religious advocacy organizations. The law, however, is clear: “In no activity
22 of the State is it more vital to keep out divisive forces than in its schools.” *Edwards v.*
23 *Aguillard*, 482 U.S. 578, 584 (1987). The Court should see past CAIR’s legal irrelevancies
24 and factual distortions and in turn grant Plaintiffs’ motion for preliminary injunction.

27 ³ 154 F. App’x 648 (9th Cir. 2005).

28 ⁴ 27 F.3d 1373 (9th Cir. 1994).

DISCUSSION

CAIR’s entire brief collapses under the weight of its giant straw man argument: that Plaintiffs oppose the teaching of Islam and learning about Muslim culture. Nowhere have Plaintiffs made that claim. For good reason—it is utterly false. Learning about Islam and Muslim culture is critical to a child’s understanding of world religions and diverse traditions. But CAIR deliberately fabricates (*e.g.*, Br. 3-4) its assertion because the Initiative itself cannot withstand constitutional scrutiny. CAIR also deliberately ignores (Br. 7) another reality, fatal to its anti-Islamophobia crusade, of what is happening in District schools. Here are a sample of official bullying reports made by District staff:⁵

- “Student was drawing swastikas on his journal in front of a Jewish student, who has complained about anti-semitic comments made by this student.”
- “Student said to another ‘Jews suck.’ Student said this a few times. Told a female student he didn’t want to sit next to her because she is a Christian.”
- “Student said racial slurs to Jewish student. He also posted the word ‘Cancer’ to her Instagram online.”
- “Student said racial slurs to a Jewish student. Motioning ‘Hail Hitler.’”
- “For no apparent reason, student burst into a classroom loudly asking ‘Is this the Jewish room’. Student was dared by peers to do this.”

Blinded by its own agenda, CAIR fails to see that the Initiative simply “does not square with the First Amendment’s promise” of religious and educational equality. *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1842 (2014) (Kagan, J., dissenting).

1. CAIR Deliberately Flouts Longstanding Establishment Clause Principles.

1.1. The Initiative fails strict scrutiny because it lacks a compelling interest to justify religious discrimination.

The Initiative violates Plaintiffs’ First Amendment rights by discriminating on the basis of religion. “The Establishment Clause requires that ‘one religious denomination

⁵ Pls.’ Mot., LiMandri Decl. Ex. 4 (incidents of anti-Semitic bullying recorded in the District’s state-mandated reports in 2015 and 2016) (typographical errors in original).

1 cannot be officially preferred over another.’’ *Bacus v. Palo Verde Unified Sch. Dist. Bd. of*
 2 *Educ.*, 52 F. App’x 355, 357 (9th Cir. 2002) (quoting *Larson v. Valente*, 456 U.S. 228, 244
 3 (1982)). Thus, it is well established that when a government policy discriminates in favor
 4 of one religion, that policy is reviewed under strict scrutiny. *See Larson*, 456 U.S. at 244;
 5 *see also Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 886 n. 3
 6 (1990) (noting that the Court strictly scrutinizes “governmental classifications based on
 7 religion” just as it scrutinizes “classifications based on race.”); *cf. Bd. of Educ. of Kiryas*
 8 *Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687, 728 (1994) (“The danger of stigma and stirred
 9 animosities is no less acute for religious line drawing than for racial.”) (Kennedy, J.,
 10 concurring). CAIR does not even address how the Initiative could survive strict scrutiny,
 11 much less assert any compelling interest. Nor could it.

12 There is no “plague of anti-Muslim bullying.”⁶ For an interest to be compelling
 13 enough to justify a discriminatory law, “[t]he State must specifically identify an *actual*
 14 *problem* in need of solving.” *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (emphasis added).
 15 When the Board adopted the Initiative, it relied on CAIR’s self-administered bullying
 16 surveys, which declared there was a “growing epidemic” of Islamophobia in California
 17 schools.⁷ But the District’s state-mandated bullying reports listed only two incidents
 18 involving Muslim students in the 2015 and 2016 school years. On the other hand, it
 19 reported *eleven* incidents of anti-Semitic bullying.⁸ To be sure, protecting students from
 20 bullying a valid concern, but CAIR’s asserted (Br. 2) “plague of anti-Muslim bullying” is
 21 spurious at best.⁹ “To sacrifice First Amendment protections for so speculative a gain is
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23 ⁶ Br. 2.

24 ⁷ Pls.’ Mot., LiMandri Decl. Ex. 5.

25 ⁸ Pls.’ Mot., LiMandri Decl. Ex. 4.

26 ⁹ Not only did CAIR distort the findings of its own surveys, its broad definition of
 27 bullying is utterly distinct from the definitions the District adopted pursuant to the
 28 California Education Code and the United States Department of Health and Human
 Services (HHS). *See* Pls.’ Amend. Compl. ¶¶ 24-25, 40-44, ECF No. 3. For example, if a
 student makes a critical comment on women’s rights in Muslim-majority countries during

1 not warranted.” *Columbia Broad. Sys., Inc. v. Democratic Nat’l Co.*, 412 U.S. 94, 127 (1973).

2 CAIR tries to neutralize the Initiative by asserting (Br. 17, 23) abstract principles like
 3 “promoting diversity” and “fostering tolerance.” Under Supreme Court precedent,
 4 however, none of those interests is considered compelling. *See Parents Involved in Cmty.*
 5 *Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 720-722 (2007); *cf. Shaw v. Hunt*, 517 U.S. 899,
 6 909–910 (1996) (“[A]n effort to alleviate the effects of societal discrimination is not a
 7 compelling interest”). The reason is simple—interests such as “diversity” and
 8 “tolerance” could justify religious preferences “essentially limitless in scope and
 9 duration.” *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989). In fact, CAIR
 10 does not even define what those words mean. Justifying the Initiative according to such
 11 amorphous interests simply would have “no logical stopping point.” *Wygant v. Jackson*
 12 *Bd. of Educ.*, 476 U.S. 267, 275 (1986).

13 Even if CAIR’s abstractions were compelling interests, the Initiative is obviously not
 14 narrowly tailored to achieve them.¹⁰ Under strict scrutiny, narrow tailoring demands “the
 15 most exact connection between justification and classification.” *Adarand Constructors, Inc.*
 16 *v. Peña*, 515 U.S. 200, 229 (1995) (internal quotation marks omitted). CAIR claims (Br. 12)
 17 its “anticipated role” was to (1) work with District officials “to increase their
 18 understanding of Muslim culture” and (2) supply the District with “resources ... to

19
 20 a high school social studies class discussion, CAIR could and would consider this an
 21 example of “bullying” and “discrimination.” *But see Lee v. Weisman*, 505 U.S. 577, 590
 22 (1992) (“To endure the speech of false ideas or offensive content and then to counter it is
 23 part of learning how to live in a pluralistic society, a society which insists upon open
 24 discourse towards the end of a tolerant citizenry.”); *cf. W. Virginia State Bd. of Educ. v.*
 25 *Barnette*, 319 U.S. 624, 640–42 (1943) (“Those who begin coercive elimination of dissent
 soon find themselves exterminating dissenters. . . . The First Amendment to our
 Constitution was designed to avoid these ends by avoiding these beginnings.”).

26 ¹⁰ CAIR asserts (Br. 3) that the “actual services” for the District were “quite narrow.”
 27 But that statement is directly contradicted by the “Proposed Outline of Services” that
 28 Hanif Mohebi, the executive director of CAIR’s San Diego chapter, submitted to the
 District just before the April 4, 2017, board meeting. *See Pls.’ Mot.*, LiMandri Decl. Ex. 7.

1 instruct students about Muslims.” But CAIR has offered no plausible way to evaluate
 2 whether these means would actually ameliorate any perceived anti-Muslim bullying.
 3 Indeed, the plans are both so overinclusive and underinclusive there are can be no doubt
 4 that CAIR’s motive was to carve out a religious gerrymander in the District. *See, e.g.,*
 5 *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). Because
 6 the Initiative is not narrowly tailored to further any compelling governmental interest, it
 7 fails strict scrutiny.

8 **1.2. The Initiative fails the *Lemon* Test because it has the purpose and effect**
 9 **of government preference for one religion.**

10 Deploying conclusory assertions and ignoring the real issues in this case, CAIR
 11 attempts to justify (*e.g.*, Br. 15-16) the Initiative under the disjunctive *Lemon* Test. *See*
 12 *Lemon v. Kurtzman*, 403 U.S. 602 (1971). To begin, *Lemon* “is not necessary to the
 13 disposition” of this case because the Initiative expressly classifies based on religion.
 14 *Larson, supra*, at 252 (*Lemon* applies to “laws affording uniform benefit to all religions, and
 15 not to provisions ... that discriminate *among* religions”); *Hernandez v. Comm’r of Internal*
 16 *Revenue*, 490 U.S. 680, 695 (1989) (same).¹¹ Even so, the District fails to satisfy any of the
 17 *Lemon* prongs.

18 **Secular Purpose.** Predictably, CAIR contends (Br. 16) that the Initiative is
 19 “patently secular”; yet in the same stroke, it declares that the Initiative’s “stated
 20 purpose” is to “address Islamophobia and bullying.” Indeed, the illogic of CAIR’s
 21 reasoning can be based on a simplistic syllogism:

22 The Initiative’s purpose is to address Islamophobia.

23 Islamophobia is bias against Islam.

24 Islam is a religion.

25 Therefore, the Initiative’s purpose is to address bias against a religion.

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 27
 28 ¹¹ *See supra*, at 3; *see also* Pls.’ Mot. 13; *id.*, LiMandri Decl. Exs. 2, 5.

1 This cannot be any clearer. The Establishment Clause “prohibits government from
 2 abandoning secular purposes in order to put an imprimatur on one religion, or on religion
 3 as such, or to *favor the adherents of any sect or religious organization.*” *Texas Monthly, Inc. v.*
 4 *Bullock*, 489 U.S. 1, 8–9 (1989). The Initiative is patently sectarian.

5 **Primary Effect.** CAIR contends (Br. 17) that “the primary effect” of the Initiative
 6 is “to educate and promote diversity.” That argument is meritless. The effects prong asks
 7 whether the policy conveys a message that one religion is preferred, regardless of the
 8 government’s actual purpose. *See Access Fund v. U.S. Dep’t of Agric.*, 499 F.3d 1036, 1045
 9 (9th Cir. 2007); *see also Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J.,
 10 concurring). Here, Defendants designed and implemented an educational program
 11 associated with a single religion to the exclusion of all others. *See Town of Greece, supra*, at
 12 1844. In doing so, Defendants “advanced one faith, [Islam], providing it with a special
 13 endorsed and privileged status in the school board.” *Bacus, supra*, at 357. This exclusionary
 14 criterion leaves a reasonable person with little doubt that the Initiative conveys a message
 15 of favoritism towards Muslim students.

16 **Entanglement.** CAIR asserts (Br. 21) that it is not “excessively entangled” with the
 17 District. But CAIR does not even dispute (Br. 1) that it is an Islamic civil rights
 18 organization, nor does it dispute that its mission is to “create a religious educational
 19 environment” in public schools.¹² In fact, entanglement can be excessive merely when the
 20 government’s entanglement has the *effect* of advancing religion. *See Agostini v. Felton*, 521
 21 U.S. 203, 232–33 (1997) (holding that the factors assessing “excessive” entanglement are
 22 similar to those assessing a policy’s primary “effect”). To this, CAIR has no answer.
 23 Moreover, the decisions that CAIR relies on are inapposite. In *Nurre v. Whitehead*, the
 24 Ninth Circuit “confine[d] [its] analysis to the narrow conclusion” that a school official
 25 prohibiting “the performance of an obviously religious piece” of music did not violate the
 26

27 ¹² Pls.’ Mot. 5 (citing *CAIR-Foundation, Inc. d/b/a Council on American-Islamic Relations*,
 28 Case 05-RC186732 (N.L.R.B. Apr. 7, 2017) (decision and direction of election)).

1 Establishment Clause. 580 F.3d 1087, 1095 (9th Cir. 2009). In *Cholla Ready Mix, Inc. v.*
2 *Civish*, F.3d 969, 977 (9th Cir. 2004), the alleged “religious community” was, in fact,
3 Native Americans; and in *Williams v. California*, 764 F.3d 1002, 1016 (9th Cir. 2014), the
4 challenged “aid” was furnished to a nonreligious vendor. In any event, each of the cases
5 CAIR cites stands for the same proposition— the government cannot entangle itself with
6 a pervasively sectarian organization. *Never once in history* has the Supreme Court upheld
7 such blatant government entanglement with religion such as here.

8

9 **2. CAIR’s Purposefully Misconstrues Plaintiffs’ No Aid Clause Claims.**

10 CAIR’s nearly four-page attack on Plaintiffs’ No Aid Clause claim begins with spin.
11 Right away, CAIR seeks to create confusion by characterizing (Br. 22) Plaintiffs’ claims as
12 being concerned simply with “educating students about a world religion.” But CAIR’s
13 conjuring does not insulate itself from “the d[e]finitive statement of the principle of
14 government impartiality in the field of religion.” *Cal. Educ. Facilities Auth. v. Priest*, 526
15 P.2d 513, 520 (1974). CAIR evidently recognizes this because it does not respond to any of
16 Plaintiffs’ arguments; instead, it opts to deflate the No Aid Clause’s enormous breadth by
17 boldly declaring that the provision “*only*” prohibits the District—and here CAIR cites the
18 provision—from “granting *anything* to or in aid of *any* religious sect ... or sectarian
19 purpose.” (emphasis added). CAIR’s attempt at misdirection, which fails on its own
20 terms, should be rejected.

21 First, CAIR contends (Br. 23) that the Initiative does not benefit a sectarian purpose.
22 Sticking to its false “curriculum dispute” narrative, CAIR tries to reshape (Br. 23) the No
23 Aid Clause to pertain only to monetary grants to religious organizations. That is a straw
24 man. The Ninth Circuit rejects the very same argument that CAIR makes, holding that the
25 No Aid Clause “is so broad” that a financial benefit is irrelevant, and a government may
26 violate the provision “by doing no more than lending their prestige and power to a
27 sectarian purpose.” *Paulson v. City of San Diego*, 294 F.3d 1124, 1130 (9th Cir. 2002) (en
28 banc) (internal quotation marks omitted). CAIR’s avoidance of all this speaks volumes.

1 CAIR also makes the claim (Br. 24) that “teaching cultural awareness is not a
2 sectarian purpose.” That is hardly an answer to Plaintiffs’ *actual* argument—that CAIR is
3 advancing its religious agenda in a public school district through a taxpayer-funded
4 educational program. *See Paulson*, 294 F.3d 1124 at 1130 (observing that “sectarian purpose
5 ... simply means aid to a sectarian use”) (internal quotation marks and alterations omitted).

6 CAIR further tries to distract this Court by citing (Br. 25) the Ninth Circuit’s
7 decision in *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373 (9th Cir. 1994). But
8 comparing a handful of stories about witches and sorcerers to a government program that
9 *directly* and *substantially* singles out one religious sect for preferential benefits is meritless.
10 In both design and operation, the Initiative directly benefits Muslim students and advances
11 CAIR’s sectarian agenda, thus violating the No Aid Clause.

12 **3. The Initiative Cannot Be Redeemed Under Any Deferential Standard Because**
13 **It Violates the First Amendment.**

14 CAIR contends (Br. 15) that the Court should defer to the District’s judgment and
15 pass on reviewing Plaintiffs’ constitutional claims because the Initiative was “designed to
16 educate students about an often unfamiliar religion in order to combat a surge in
17 discrimination. CAIR, however, is effectively urging for a “blind judicial deference” that
18 is fundamentally at odds with constitutional jurisprudence. *Croson, supra*, at 501. Citing
19 *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, CAIR correctly notes (Br. 15)
20 that the Supreme Court has long recognized that school boards have broad discretion in
21 managing school affairs. 457 U.S. 853, 870. But the Court also has consistently recognized
22 that a school board’s discretion “must be exercised in a manner that comports with the
23 transcendent imperatives of the First Amendment.” *Id.* at 864. Simply because the Board
24 may pursue a well-meaning goal does not mean it is free to discriminate on the basis of
25 religion to achieve it.

26 CAIR relatedly claims (Br. 16) that the District merely “followed the legislature’s
27
28

1 directive” under the Safe Place to Learn Act.¹³ But as the Supreme Court made clear, “[a]n
 2 asserted motivation of religious accommodation, even if justified by reference to a state
 3 statute, cannot shield governmental actions that otherwise violate the principle of
 4 neutrality embedded in the establishment clause.” *Kiryas Joel, supra*, at 705; *Larkin v.*
 5 *Grendel’s Den, Inc.*, 459 U.S. 116, 123 (1982) (“[T]he statute, by delegating a governmental
 6 power to religious institutions, inescapably implicates the Establishment Clause.”).¹⁴ And
 7 Plaintiffs do not suggest that the District turn a blind eye to any instance where a Muslim
 8 student is being bullied; rather, Plaintiffs are asking this Court to determine, in light of
 9 Supreme Court precedent and the strictest form of judicial scrutiny known to American
 10 law, whether the District has a compelling interest to expressly discriminate in favor of one
 11 religion. The answer is that it does not, and it cannot.

12 13 CONCLUSION

14 CAIR asks this Court to place the mores of “cultural awareness” and “promoting
 15 tolerance” above the First Amendment and turn a blind eye to its sectarian agenda. But
 16 “Establishment Clause jurisprudence has distilled one clear understanding: Government
 17 may neither promote nor affiliate itself with any religious doctrine or organization, nor may
 18 it obtrude itself in the internal affairs of any religious institution.” *Lee v. Weisman*, 505 U.S.
 19 577, 599 (1992) (Blackmun, J., concurring). CAIR may freely advance its religious mission
 20 in the public square, but it may not do so in the public school—the Constitution forbids it.
 21 An injunction is warranted.

22 ///

24 ¹³ CAIR fails to note it was a co-sponsor of AB 2845, and it lobbied for the law using the
 25 same spurious bullying surveys it used with the District. *See* A.B. 2845, 2016 Leg. (Cal.
 2016).

26 ¹⁴ CAIR also ignores the statutory provision that expressly states “[n]othing in this
 27 section shall be construed to require school employees to engage with religious institutions
 28 in the course of identifying community support resources pursuant to this section.” Cal.
 Educ. Code § 234.1 (West).

1 Respectfully submitted,
2 FREEDOM OF CONSCIENCE DEFENSE FUND

3 Dated: April 30, 2018

By: /s/ Charles S. LiMandri

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CERTIFICATE OF SERVICE

Citizens for Quality Educ. San Diego, et al. v. San Diego Unified School District, et al.
Case No.: 3:17-cv-1054-BAS-JMA

I, the undersigned, declare under penalty of perjury that I am over the age of eighteen years and not a party to this action; my business address is P.O. Box 9520, Rancho Santa Fe, California 92067, and that I served the following document(s):

• PLAINTIFFS' RESPONSE TO BRIEF BY AMICUS CURIAE CAIR-CA.

on the interested parties in this action by placing a true copy in a sealed envelope, addressed as follows:

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 X **(BY ELECTRONIC FILING/SERVICE)** I caused such document(s) to be Electronically Filed and/or Service using the ECF/CM System for filing and transmittal of the above documents to the above-referenced ECF/CM registrants. recipients via electronic transmission of said documents.

I declare under penalty of perjury, under the laws of the State of California, that the above is true and correct. Executed on April 30, 2018, at Rancho Santa Fe, California.


Kathy Denworth