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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SACRAMENTO
GORDON D. SCHABER DOWNTOWN COURTHOUSE

ROQUE "ROCKY" DE LA FUENTE, an individual; DR. MARK SEIDENBERG, an individual; the AMERICAN INDEPENDENT PARTY OF CALIFORNIA; DR. ROBERT ORNELAS, an individual; DANIELLE DE LA FUENTE, an individual,

Plaintiffs,

v.

ALEX PADILLA, Secretary of State for the State of California; and DOE 1 through DOE 60 inclusive,

Defendants.

Case No. 34-2016-00204821

NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Date: January 14, 2019
Time: 2:00 p.m.
Dept: 53
Judge: Hon. David I. Brown
Trial Date: April 16, 2019
Action Filed: December 15, 2016

Confirmation No.: 2386407

1 TO PLAINTIFFS DR. MARK SEIDENBERG, DR. ROBERT ORNELAS, AND AMERICAN
2 INDEPENDENT PARTY OF CALIFORNIA:

3 PLEASE TAKE NOTICE that on January 14, 2019, at 2:00 p.m. or as soon thereafter as it
4 may be heard, in Department 53 of the above named court located at 813 6th Street, Sacramento,
5 CA 95814, Defendant Alex Padilla, California Secretary of State, will and hereby does move
6 under Code of Civil Procedure section 438 for judgment on the pleadings in this action in his
7 favor as to the entire complaint and each cause of action therein.

8 This motion is made on the ground that the plaintiffs' operative complaint does not state
9 facts sufficient to constitute a cause of action against Defendant Padilla. (Code Civ. Proc., § 438,
10 subd. (c)(1)(A)(ii).)


11 This motion is based upon the information provided herein, the accompanying
12 memorandum of points and authorities, the pleadings on file in this action, any matters of which
13 the Court may take judicial notice and such other matters as may be brought to the attention of the
14 Court before or during consideration of this motion.

15 This motion is made following the conference required by Code of Civil Procedure section
16 439, subdivision (a), which took place on November 9, 2018.

17 Dated: December 12, 2018.

Respectfully Submitted,

19 XAVIER BECERRA
20 Attorney General of California
21 MARK R. BECKINGTON
22 Supervising Deputy Attorney General

23 
24 AMIE L. MEDLEY
25 Deputy Attorney General
26 *Attorneys for Alex Padilla, California*
27 *Secretary of State*
28

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Defendant Alex Padilla, California Secretary of State (the "Secretary"), requests that this
4 Court grant judgment on the pleadings in his favor. The complaint in this action alleges
5 violations of various provisions of the California Elections Code that purportedly occurred in the
6 days leading up to the November 2016 general election. Among other things, plaintiffs claim that
7 there were problems with the certification of candidates, the abbreviations used on the ballot, and
8 the randomization drawing performed by Secretary of State to determine the placement of
9 candidates' names on the ballot. The Plaintiffs did not bring a pre-election challenge to seek
10 correction of these alleged errors, instead waiting until a month after the election to file this
11 action. It has now been approximately two years since the election occurred, an entire election
12 cycle having since come and gone, and there is no possible relief that this court can now grant the
13 plaintiffs. And the declaratory and injunctive relief Plaintiffs request in their complaint would
14 have no prospective effect and thus is not appropriate. For these reasons, the complaint should be
15 dismissed without leave to amend and judgment should be entered in favor of the Secretary.

16 **BACKGROUND**

17 The original plaintiffs in the case included Roque "Rocky" De La Fuente, a presidential
18 candidate in the 2016 general election, and Danielle De La Fuente, who attempted to serve as one
19 of Roque De La Fuente's electors. Compl., at ¶¶ 2, 6. Roque De La Fuente's request to appear as
20 a write-in candidate on California's general election ballot was denied due to his failure to submit
21 the required slate of 55 pledged electors and to correctly complete and submit the required elector
22 forms. (Compl. at ¶ 2.) (Although the complaint includes allegations regarding Roque De La
23 Fuente's 2016 presidential run, the complaint does not tie any of the alleged Elections Code
24 violations to his candidacy.) Both of these plaintiffs dismissed their claims on June 1, 2017.
25 (Dkt. 28.) Their counsel then withdrew from representation of the remaining plaintiffs. (Dkt. 32,
26 49.) Three plaintiffs remain: the American Independent Party; Dr. Mark Seidenberg, the Vice
27 Chairman of the State Central Committee for the American Independent Party and one of its
28 electors during the November 2016 election; and Dr. Robert Ornelas, the Chairman of the

1 American Independent Party of California at the time the Complaint was filed (the remaining
2 plaintiffs will be referred to collectively as "Plaintiffs").¹ Compl. at ¶¶ 3-5.

3 This action was filed on December 15, 2016. (Dkt. 1.) The complaint consists of a single
4 cause of action for declaratory and injunctive relief based on alleged Election Code violations that
5 purportedly occurred in the lead up to the November 8, 2016 general election. First, Plaintiffs
6 allege that the Secretary violated Election Code section 13205, subdivision (b) by "willfully
7 permitt[ing] 57 of 58 California counties to omit advisory and informative language from the
8 ballot." (Compl. at ¶ 23.) The allegedly omitted language gives instructions on how to vote for a
9 slate of presidential and vice presidential electors. (Compl. at ¶ 14.) Plaintiffs next allege that the
10 Secretary violated Election Code sections 13105, subdivision (c) and 19301 subdivision (b) by
11 "permitt[ing] California counties to print the November 8, 2016 general election ballot with an
12 inaccurate, inappropriate, and non-representative abbreviation of the American Independent Party
13 of California ('AI') and "fail[ing] to properly separate "Rep", from "AI" with the prescribed
14 comma." (Compl. at ¶ 27.) Plaintiffs then allege that the Secretary violated Election Code
15 section 13112 by failing to conduct the required randomization lottery to determine the order in
16 which candidates' names are placed on the ballot. (Compl. at ¶ 28.) Finally, Plaintiffs allege that
17 the Secretary failed to enforce Election Code section 7300 by accepting the Republican Party's
18 slate of electors after the statutory deadline; by certifying that slate even though it did not include
19 specific party officers required by statute; and by certifying the slate even though it included an
20 individual who Plaintiffs allege holds an "office of trust under the United States" in violation of
21 Article II Section 1, Clause 2 of the United States Constitution. (Compl. ¶¶ 29, -31.)

22 The complaint seeks declaratory and injunctive relief as to each of these alleged violations.
23 Plaintiffs request a declaration that the Secretary violated the Election Code in "his preparation
24 and/or verification of the November 8, 2016 general election ballot." (Compl. at 9.) They also
25 seek a declaration that the Secretary violated the Election Code by certifying the Republican
26

27 ¹ After the withdrawal of their attorney, Drs. Seidenbaum and Ornleas represent
28 themselves in pro per. Although it remains a party, the American Independent Party has not
retained a new attorney.

1 Party's slate of electors. (*Ibid.*) Finally, Plaintiffs seek an injunction "ordering the Secretary of
2 State to comply with California law as it relates to his duties as Chief Elections Officer." (*Ibid.*)

3 Defendant Alex Padilla filed an answer to the complaint on March 8, 2017, generally
4 denying the allegations.

5 ARGUMENT

6 "A judgment on the pleadings in favor of the defendant is appropriate when the complaint
7 fails to allege facts sufficient to state a cause of action." (*Harris v. PAC Anchor Transp., Inc.*
8 (2014) 59 Cal.4th 772, 777.) "A motion for judgment on the pleadings performs the same
9 function as a general demurrer, and hence attacks only defects disclosed on the face of the
10 pleadings or by matters that can be judicially noticed." (*Burnett v. Chimney Sweep*, 123
11 Cal.App.4th 1057, 1064.)

12 I. PLAINTIFFS FAILED TO PROPERLY AND TIMELY CHALLENGE THE ALLEGED 13 ELECTIONS CODE VIOLATIONS

14 Plaintiffs make allegations regarding several violations of the Election Code that they
15 believe occurred in the days leading up to the November 2016 general election. However,
16 Plaintiffs have failed to present their challenge in such a way that they could obtain effective
17 relief. Plaintiffs do not purport to be contesting the election under Election Code section 16100,
18 nor did they seek a preelection remedy under Election Code section 13314, subdivision (a)(1).

19 Elections Code section 16100 sets out the procedure to contest an election and enumerates
20 the specific grounds on which an election may be contested. These grounds include egregious
21 problems that might occur in an election, such as misconduct by elections officials or the
22 occurrence of voter fraud. (Elec. Code, § 16100.) The grounds listed in that section are the
23 exclusive grounds for an election contest. (*Friends of Sierra Madre v. City of Sierra Madre*
24 (2001) 25 Cal.4th 165, 171.) Even if Plaintiffs had asserted one of the seven enumerated grounds
25 for an election contest, they did not do so in a timely manner. Any election contest must be filed
26 within thirty days of the election (and in specific circumstances the deadline to file is even
27 shorter). (Elec. Code, § 16401.) Plaintiffs filed their complaint on December 15, 2016—39 days
28 after the election.

1 Plaintiffs also failed to seek relief that could have corrected the alleged errors before the
2 November 8, 2016 election actually occurred. The usual procedure for raising the type of
3 statutory violations asserted in Plaintiffs' complaint is a preelection writ of mandate, not a post-
4 election complaint for injunctive and declaratory relief: "Any elector may seek a writ of mandate
5 alleging that an error or omission has occurred, or is about to occur, in the placing of any name
6 on, or in the printing of, a ballot, sample ballot, voter pamphlet, or other official matter, or that
7 any neglect of duty has occurred, or is about to occur." (Elec. Code, § 13314, subd. (a)(1).) That
8 section provides that a writ of mandate shall issue only if the "issuance of the writ will not
9 substantially interfere with the conduct of the election" and gives challenges under that section
10 priority over all other civil matters. (Elec. Code, § 13314, subd. (a)(2)(B).) Occasionally claims
11 brought under this section may continue after an election has occurred, but only if they fit into the
12 exception to mootness for questions of public policy that are likely to be repeated in the future.
13 (*See infra* pp. 8-9.)

14 Each of the errors Plaintiffs allege took place would have occurred far enough in advance
15 of the election that Plaintiffs could have sought a remedy under Election Code section 13314.
16 The omission of language from a county ballot or the use of an incorrect party abbreviation could
17 have been raised at least as early as the few days following the availability of sample ballots. The
18 allegation that the Republican slate of electors was submitted after the statutory deadline (usually
19 October 1, though in 2016, the deadline moved to October 3 because October 1 was a Saturday)
20 could have been raised shortly after that deadline. The allegation that the required randomization
21 lottery, which must take place on the 82nd day before the election (*see* Elec. Code, § 13112), did
22 not occur could have been raised in the days following that deadline. Plaintiffs presumably
23 would have had knowledge of these events as they were occurring. Had they sought a writ of
24 mandate before the election occurred, the Court might have been able to provide any relief it
25 found to be merited in the form of ballot corrections or additional procedures. But because
26 Plaintiffs did not raise the alleged errors until after the election, that relief was lost to them.

27 In any event, "[o]ne cannot pass up a preelection remedy in favor of a post-election
28 challenge." (*McKinney v. Sup. Court* (2004) 124 Cal.App.4th 951, 957.) In *McKinney*, a voter

1 brought a post-election challenge, arguing that the presence on the ballot of a write-in candidate
2 who was not actually qualified had affected the election's outcome. (*Id.* at p. 775.) The court
3 held that the challenge should have been brought before the election and could not be brought
4 after the fact. (*Id.* at p. 777.) The court explained that post-election contests could only be
5 brought on the grounds enumerated in Election Code section 16100 or based on a constitutional
6 violation. (*Id.* at pp. 776-778.) Also instructive on this point is *Kilbourne v. City of Carpinteria*
7 (1976) 56 Cal.App.3d 11, in which a city council member facing a special recall election failed to
8 seek a writ of mandate to correct the spelling of his name on the ballot. Instead, he waited until
9 after the election and sought to invalidate the election results based on the error. (*Id.* at p. 16.)
10 The court held that his claims were moot and dismissed the case. (*Id.* at p. 17.) Although
11 Plaintiffs in this action do not seek the drastic remedy of invalidating the November 2016 election
12 based on the alleged violations of the Election Code, by not raising these errors before the
13 election was held, they missed their opportunity to obtain an effective remedy. Declaratory relief
14 regarding whether or not Election Code violations did occur would have no prospective effect,
15 and the only injunctive relief requested is a general command for the Secretary of State to comply
16 with the Election Laws in the future—something he is already presumed to do. (*Connerly v.*
17 *Schwarzenegger* (2007) 146 Cal.App.4th 739, 751.)

18 **II. ALL OF THE CLAIMS ALLEGED IN THE COMPLAINT ARE MOOT**

19 Even if Plaintiffs had timely filed an action to raise the allegations in the Complaint, those
20 claims are all now moot. It has now been two full years since the November 2016 general
21 election occurred. The ballots were printed, cast, counted, and the candidates elected have now
22 served nearly two years of their terms of office. No relief is available for Plaintiffs' alleged
23 violations of the Elections Code, which relate to the preparation and printing of ballots and the
24 qualification of candidates for the November 2016 election.

25 The occurrence of an election renders claims of error in the conducting of that election
26 moot. (*See, e.g., Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1549-50 ["there is no actual
27 controversy in this case because the election has been held and the results have been certified."];
28 *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 11 [appeal dismissed as moot where trial

1 court denied preliminary injunction to stop a special election and the election occurred].) In
2 *Vargas v. Balz* (2014) 223 Cal.App.4th 1544, for example, the plaintiff petitioned for a writ of
3 mandate to compel the city clerk and the registrar of the City of Brea to print ballot arguments as
4 submitted by the authors rather than the version provided by the city clerk, which omitted a
5 portion of the arguments. The Court of Appeal held that the claim was moot, noting that “there is
6 no actual controversy in this case because the election has been held and the results have been
7 certified.” (*Id.* at pp. 1549-50.) Another case, *Finnie v. Town of Tiburon, supra*, 199 Cal.App.3d
8 1, involved allegations regarding violations of the Elections Code in the calling of and
9 preparations for a special election at which voters would consider a ballot initiative. The
10 requested injunction was denied, the case was dismissed, and the election went forward. The
11 Plaintiffs appealed, but the appeal was dismissed because “in this post-election period any ruling
12 on that injunction would be purely academic.” (*Id.* at p. 11.)

13 The California Supreme Court, in an older and often-cited case, upheld the dismissal of a
14 case alleging problems with the verification of signatures on the petition to hold a special recall
15 election. (*Lanahan v. City of Los Angeles* (1939) 14 Cal.2d 128.) The Court explained:

16 The election has been held and it is not even intimated that any of the alleged
17 deficiencies or irregularities in the presentation and certification of the recall petition
18 prevented a full and fair vote at the recall election. The result of the election was
19 duly canvassed and declared. The elected mayor assumed his office and has since
20 been functioning as such. A reversal of the order would vest the trial court with no
justiciable controversy in this action for the reason that what was sought to be
enjoined has already been done.

21 (*Id.* at 132.)

22 Although these examples of mootness occurred in the appellate courts rather than the trial
23 courts, they are applicable here. The duty of this Court, as of any court, “is to decide actual
24 controversies by a judgment which can be carried into effect, and not to give opinions upon moot
25 questions or abstract propositions, or to declare principles or rules of law which cannot affect the
26 matter in issue in the case before it.” (*Consol. Vultee Aircraft Corp. v. United Automobile
27 Aircraft and Agricultural Implement Workers of America* (1946) 27 Cal.2d 859, 863.) And “the
28

1 pivotal question in determining if a case is moot is therefore whether the court can grant the
2 plaintiff any effectual relief.” (*Wilson & Wilson v. City Council of Redwood City* (2011) 191
3 Cal.App.4th 1559, 1574.) With the 2016 general election long past, this Court can offer no relief
4 to the Plaintiffs in this case. Thus, the claims are moot and should be dismissed.

5 Although “an exception to the doctrine of mootness exists where the issues presented ‘are
6 of general public interest and likely to recur,’” that exception does not apply here. (*Kunde v.*
7 *Seiler* (2011) 197 Cal. App. 4th 518, 527.) Here, the allegations in the Complaint are limited to
8 very specific factual scenarios that are unlikely to recur in future elections. The Complaint does
9 not raise broad questions regarding the correct application or interpretation of the cited Elections
10 Code sections, but whether specific actions or errors alleged to have occurred in 2016 violated
11 those laws. And Plaintiffs do not allege that there is a likelihood that the alleged statutory
12 violations will be repeated in the future. Thus, Plaintiffs’ claims do not fit into the exception for
13 mootness.

14 **III. PLAINTIFFS ARE NOT ENTITLED TO DECLARATORY OR INJUNCTIVE RELIEF**

15 The Complaint includes three requests for relief: 1) a judgment “[d]eclaring the Defendants
16 violated California Election Code in his preparation and/or verification of the November 8, 2016
17 general election ballot;” 2) a judgment “[d]eclaring that Defendants violated California Election
18 Code in his certification of the Republican slate of electors because it was not submitted before
19 the deadline and because the slate included/excluded electors adverse to controlling statute;” and
20 3) “an injunction ordering the Secretary of State to comply with California law as it relates to his
21 duties as Chief Elections Officer.” (Compl. at 9.) None of these requested remedies is
22 appropriate in this case.

23 **A. Declaratory Relief Is Not Appropriate**

24 As mentioned, Plaintiffs’ claims in this case are very specific to certain factual scenarios
25 that they allege to have occurred in the days leading up to the November 2016 election. They
26 seek a declaration from this Court that the Secretary violated the law, even though it is too late for
27 any violations that did occur to be corrected and the alleged violations are unlikely to be repeated
28 in future elections. It is well-established that declaratory relief “operates prospectively, and not

1 merely for the redress of past wrongs.” (*Travers v. Loudon* (1967) 254 Cal.App.2d 926, 931-32.)
2 The remedy of declaratory relief “is to be used in the interests of preventative justice, to declare
3 rights rather than execute them.” (*Ibid.*) Plaintiffs do not request a declaration of the
4 constitutionality or correct interpretation of statute, which could potentially be provided through
5 declaratory relief. Instead they only seek confirmation of their belief that errors occurred in the
6 November 2016 election, which would offer no value or guidance moving forward. As such,
7 declaratory relief is not appropriate.

8 **B. Injunctive Relief Is Not Appropriate**

9 Plaintiffs also request an injunction requiring the Secretary to comply with California law
10 in the future. This type of general instruction to a state official to follow the law is not
11 appropriate for an injunction. “There is a presumption that state officers will obey and follow the
12 law” and “without a threat of present or future injury, no injunction can lie.” (*Connerly v.*
13 *Schwarzenegger* (2007) 146 Cal.App.4th 739, 751.) Plaintiffs do not allege that the statutory
14 violations they contend occurred in the November 2016 elections are likely to occur again, or that
15 there is any reason to believe the Secretary will do anything other than follow applicable law in
16 connection with preparation for future elections. Thus, the requested injunction is not
17 appropriate.

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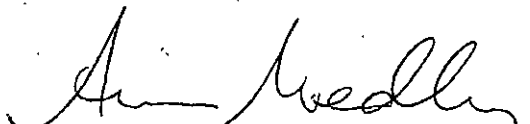
CONCLUSION

For the foregoing reasons; the Secretary respectfully requests that Plaintiffs' claims be dismissed and judgment be entered in his favor.

Dated: December 12, 2018

Respectfully Submitted,

XAVIER BECERRA
Attorney General of California
MARK R. BECKINGTON
Supervising Deputy Attorney General



AMIE L. MEDLEY
Deputy Attorney General
*Attorneys for Defendant Alex Padilla,
Secretary of State*

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **De La Fuente v. Padilla (De La Fuente IV)**

Case No.: **34-2016-00204821**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 12, 2018, I served the attached **NOTICE OF MOTION AND MOTION FOR JUDGMENT ON THE PLEADINGS; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Dr. Mark Seidenberg
476 Deodora St.
Vacaville, CA 95688
E-Mail: hakohen3@yahoo.com

Dr. Robert Ornelas
1691 S. Heritage Circle
Anaheim, CA 92804
E-Mail: rbrtornelas@aol.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 12, 2018, at Los Angeles, California.

Beth Capulong
Declarant


Signature

1 XAVIER BECERRA
 Attorney General of California
 2 MARK R. BECKINGTON
 Supervising Deputy Attorney General
 3 AMIE L. MEDLEY
 Deputy Attorney General
 4 State Bar No. 266586
 300 South Spring Street, Suite 1702
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 7 Attorneys for Defendant Alex Padilla,
 California of Secretary of State

8
 9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 COUNTY OF SACRAMENTO
 10 GORDON D. SCHABER DOWNTOWN COURTHOUSE
 11

12
 13 **ROQUE "ROCKY" DE LA FUENTE, an**
individual; DR. MARK SEIDENBERG, an
 14 **individual; the AMERICAN**
INDEPENDENT PARTY OF
 15 **CALIFORNIA; DR. ROBERT ORNELAS,**
 16 **an individual; DANIELLE DE LA**
FUENTE, an individual,

34-2016-00204821

**[PROPOSED] ORDER GRANTING
MOTION FOR JUDGMENT ON THE
PLEADINGS**

C.C.P. § 438

17 Plaintiffs,

18 v.

19 **ALEX PADILLA, Secretary of State for the**
 20 **State of California; and DOE 1 through**
 21 **DOE 60 inclusive,**

22 Defendants.

23 The Motion for Judgment on the Pleadings filed by Defendant Alex Padilla, California
 24 Secretary of State, came on regularly for hearing upon notice on January 14, 2019 in Department
 25 53 of the above-entitled court.
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The Court, having reviewed and considered all papers in support of and in opposition to Defendant's Motion for Judgment on the Pleadings, the Court finds, adjudges and orders as follows:

That the Court GRANTS Defendant's Motion for Judgment on the Pleadings with regard to the complaint filed on December 15, 2016.

The complaint in its entirety is hereby dismissed with prejudice. Judgment shall be entered in favor of Defendant.

IT IS SO ORDERED

Dated: _____ The Honorable David I. Brown

DECLARATION OF SERVICE BY E-MAIL and U.S. Mail

Case Name: **De La Fuente v. Padilla (De La Fuente IV)**
Case No.: **34-2016-00204821**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On December 12, 2018, I served the attached **[PROPOSED] ORDER GRANTING MOTION FOR JUDGMENT ON THE PLEADINGS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, addressed as follows:

Dr. Mark Seidenberg
476 Deodora St.
Vacaville, CA 95688
E-Mail: hakohen3@yahoo.com

Dr. Robert Ornelas
1691 S. Heritage Circle
Anaheim, CA 92804
E-Mail: rbrtornelas@aol.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 12, 2018, at Los Angeles, California.

Beth Capulong
Declarant


Signature