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3 **ZUBER LAWLER & DEL DUCA LLP**
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Telephone: (213) 596-5620
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6 Attorneys for Plaintiffs **HALEY VIDECKIS** and **LAYANA WHITE**

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9 **UNITED STATES DISTRICT COURT**
10 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

11 **HALEY VIDECKIS** and **LAYANA**
12 **WHITE**, individuals,

13 Plaintiffs,

14 v.

15 **PEPPERDINE UNIVERSITY**, a
16 corporation doing business in
17 California,

18 Defendant.

CASE NO. 2:15-CV-00298-DDP (JCx)

[Assigned to the Hon. Dean D.
Pregerson – Courtroom 9C]

**PLANTIFFS’ MOTION IN LIMINE
NO. 1 TO EXCLUDE, OR IN THE
ALTERNATIVE LIMIT, THE
EXPERT TESTIMONY OF JODY
SHIPPER, AND REQUEST FOR
DAUBERT HEARING;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*[Filed Concurrently with Motions in
Limine Nos. 1 thru 7; [Proposed] Order
Nos. 1 thru 7; Declaration of Jayesh
Patel]*

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 9C

Trial Date: May 23, 2017
FSC: May 8, 2017

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24 **TO DEFENDANT AND ITS COUNSEL OF RECORD:**

25 **PLEASE TAKE NOTICE THAT** on May 15, 2017, at 10:00 a.m., or as soon
26 thereafter as counsel may be heard, in the courtroom of the Honorable Dean D.
27 Pregerson, located in Courtroom 9C of the United States Courthouse, 350 W. 1st
28 Street, Los Angeles, CA 90012, Plaintiffs **HALEY VIDECKIS** and **LAYANA**

1 **WHITE** (hereinafter collectively referred to as “Plaintiffs”) will and hereby do move
2 this Court to exclude, or in the alternative, limit the expert testimony of Jody Shipper
3 and request for *Daubert* hearing.

4 This Motion is made upon the following grounds:

- 5 1. Allowing Ms. Shipper to testify as an expert would be improperly taking
6 a central issue away from the jury
- 7 2. Ms. Shipper’s testimony on whether Pepperdine met the “standard of
8 care” in conducting its Title IX investigation is both irrelevant and would
9 not assist the jury.

10 This Motion is based on this Notice of Motion, the attached Memorandum of
11 Points and Authorities, the Declaration of Jayesh Patel filed concurrently herewith, all
12 of the pleadings, files, and records in this proceeding, all other matters of which the
13 Court may take judicial notice, and any argument or evidence that may be presented
14 to or considered by the Court prior to its ruling. This motion is made following the
15 conference of counsel pursuant to L.R. 7-3, which took place on April 17, 2017.

16 Dated: April 24, 2017

Respectfully submitted,

ZUBER LAWLER & DEL DUCA LLP
JAYESH PATEL
JEFFREY J. ZUBER
ROBERT W. DICKERSON

22 By: /s/ Jayesh Patel
23 Attorneys for Plaintiffs Haley Videckis and
24 Layana White

1 **MEMORANDUM OF POINTS AND AUTHORITIES**₁

2 A central issue in this case is about whether Pepperdine’s employees acted
3 reasonably, within the construct of the law governing equal treatment. As to the
4 Title IX investigation, Plaintiffs have not challenged the steps or procedure followed
5 by Pepperdine, but have offered that the treatment of the factual information by
6 Pepperdine is further evidence of the hostile environment that Plaintiffs faced at the
7 school.

8 Pepperdine has offered an expert witness on Title IX whose proposed opinion
9 impermissibly seeks to supplant the jury’s consideration of such issues. *The*
10 *assessment of whether treatment was equal does not require any special training or*
11 *technical knowledge.*

12 **Ms. Shipper’s Testimony Would Usurp The Role Of The Jury**

13 Pepperdine’s designation says that Jody Shipper would be testifying on the
14 Title IX investigation by the school as to “whether the conduct of the Pepperdine
15 employees... was reasonable.” Declaration of Jayesh Patel (“Patel Decl.”) at ¶ 2,
16 Ex. 1 at p. 1-2.

17 Experts are not permitted to testify to issues that would result in supplanting
18 the role of the jury. See *Ward v. Westland Plastics, Inc.*, 651 F.2d 1266 (9th Cir.
19 1980). In *Ward*, an employment discrimination case, the former employee plaintiff
20 attempted to introduce expert testimony as to whether gender was the basis of the
21 her differential treatment.

22 The Ninth Circuit held that it was proper to prevent an expert in a
23 discrimination and affirmative action case to testify that to an on the ultimate issue--
24 that the employer had discriminated against the employee on account of her sex.
25 The trial court, “[e]vidently concerned that the testimony would invade the province
26 _____

27 ₁ Plaintiffs may need to supplement this motion after Ms. Shipper’s deposition and
28 respectfully reserve the right to do so.

1 of the jury... rejected it as ‘contrary to all rules of evidence’ and ‘not permissible.’”
 2 *Ward* at 1270. In affirming the district court’s decision, the Ninth Circuit relied in
 3 part on *Kline v. Ford Motor Co.*, 523 F.2d 1067, 1070 (9th Cir. 1975), to affirm that
 4 expert opinion on the ultimate issue was properly excluded. *Ward* at 1271.²

5 Whether or not Pepperdine’s overarching conduct was reasonable is one of
 6 the central factual issues of the case and therefore cannot be usurped by an expert
 7 opinion. The effort to parse out this issue into “subparts” as Defendant proposes, on
 8 matters irrelevant to the case (i.e. whether Pepperdine “complied” with common
 9 standards in conducting its Title IX investigation) would be misleading and
 10 prejudicial, given its purported cloak of authority. *See United States v. Arenal*, 768
 11 F.2d 263, 270 (8th Cir.1985) (finding prejudice because the erroneously admitted
 12 testimony enjoyed an expert's “aura of expertise”).

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 16 ² Federal circuit and district court cases in the employment context – for example
 17 Title VII cases – which are comparable to Plaintiffs’ case have also rejected
 18 testimony similar to the testimony rejected in *Ward*. *Kotla v. Regents of Univ. of*
 19 *California*, 115 Cal. App. 4th 283, 292 (2004). *See Curtis v. Oklahoma City Public*
 20 *Schools Bd.* (10th Cir.1998) 147 F.3d 1200, 1219 (jury could determine for itself
 21 whether recruitment plan was evidence of retaliation); *Barfield v. Orange County*
 22 (11th Cir.1990) 911 F.2d 644, 651, fn. 8 (opinion testimony about whether plaintiff
 23 was a victim of discrimination would not assist the trier of fact); *Brink v. Union*
 24 *Carbide Corp.* (S.D.N.Y.1997) 41 F.Supp.2d 402, 405 (age discrimination claim can
 25 be evaluated and understood by jury without assistance of a human resources
 26 expert); *Smith v. Colorado Interstate Gas Co.* (D.Colo.1992) 794 F.Supp. 1035,
 27 1044 (expert testimony that employer substantially motivated by discriminatory bias
 28 improperly circumvents fact finder's decision making process); *Lipsett v. University*
of Puerto Rico (D.P.R.1990) 740 F.Supp. 921, 925 (opinion testimony as to whether
 hostile work environment existed usurps the prerogative of the jury as the fact
 finder); cf. *Green v. Kinney Shoe Corp.* (D.D.C.1989) 715 F.Supp. 1122, 1123–1124
 (court should exercise special caution in admitting expert testimony on the issue of
 evaluating an employer's motivations in discrimination cases).

1 **Ms. Shipper’s Testimony Is Irrelevant, Wastes Time, And Will Not Assist The**
2 **Jury**

3 It is unclear what part of the jury’s necessary assessment of whether Plaintiffs
4 were treated “equally” would fall outside the knowledge of an ordinary person.
5 Efforts to shade conduct, or provide “expert” excuses would lack relevance and
6 result in a waste of time.

7 The trial judge has the task of ensuring that an expert’s testimony both rests
8 on a reliable foundation and is relevant to the task at hand. *Daubert v. Merrell Dow*
9 *Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993).³

10 In order to be admissible, an expert witnesses’ testimony must be of
11 assistance to the jury. Fed. R. Evid. 702. Issues arising from facts that are of
12 common knowledge to an average person would not assist the jury. See *Ward v.*
13 *Westland Plastics, Inc.*, 651 F.2d 1266, 1270–1271 (9th Cir.1980) (in employment
14 discrimination case, the Court held that “the question whether gender was the basis
15 of differential treatment is not so technical as to require the aid of an expert to
16 enlighten the jury or court”).

17 Similar to *Ward*, in Plaintiffs’ discrimination case, the jury could easily
18 understand the equal protections offered under Title IX without the assistance of an
19 expert. Again, the manner of Pepperdine’s Title IX investigation is not at issue, but
20 the conclusions, based on the facts developed by Pepperdine, are evidence of the
21 environment within which Plaintiffs experienced discrimination. Ms. Shipper’s
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25 ³ In evaluating the reliability of expert opinion testimony, courts look at the
26 following factors: whether the methodology used can be (and has been)tested;
27 whether the methodology has been subjected to peer review; whether there is a
28 known potential rate of error; whether there are standards controlling the technique
used; whether a known technique is generally accepted in relevant scientific or
technical community. *Daubert*, 509 U.S. at 594.

1 proposed areas of expertise would not address this core contention and therefore
2 would not help the trier of fact.

3 Dated: April 24, 2017

Respectfully submitted,

4 **ZUBER LAWLER & DEL DUCA LLP**
5 JAYESH PATEL
6 ROBERT W. DICKERSON

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8 By: /s/ Jayesh Patel
9 Attorneys for Plaintiffs Haley Videckis and
10 Layana White

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6 Attorneys for Plaintiffs **HALEY VIDECKIS** and **LAYANA WHITE**

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION

HALEY VIDECKIS and LAYANA
 WHITE, individuals,
 Plaintiffs,
 v.
 PEPPERDINE UNIVERSITY, a
 corporation doing business in
 California,
 Defendant.

CASE NO. 2:15-CV-00298-DDP (JCx)

[Assigned to the Hon. Dean D.
 Pregerson – Courtroom 9C]

**DECLARATION OF JAYESH
 PATEL IN SUPPORT OF
 PLAINTIFFS’ MOTION IN LIMINE
 NO. 1 TO EXCLUDE, OR IN THE
 ALTERNATIVE LIMIT, THE
 EXPERT TESTIMONY OF JODY
 SHIPPER, AND REQUEST FOR
 DAUBERT HEARING**

*[Filed Concurrently with Motions in
 Limine Nos. 1 thru 7; [Proposed] Order
 Nos. 1 thru 7]*

Date: May 15, 2017
 Time: 10:00 a.m.
 Courtroom: 9C

Trial Date: May 23, 2017
 FSC: May 8, 2017

EXHIBIT 1

1 JEREMY J. GRAY (SBN 150075)
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2 JEFFREY J. ZUBER (SBN 220830)
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3 **ZUBER LAWLER & DEL DUCA LLP**
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4 Los Angeles, California 90017 USA
Telephone: (213) 596-5620
5 Facsimile: (213) 596-5621

6 Attorneys for Plaintiffs
Haley Videckis and Layana White
7

8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

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11 **HALEY VIDECKIS and LAYANA**
WHITE, individuals,
12 **Plaintiffs,**
13 **v.**
14 **PEPPERDINE UNIVERSITY, a**
15 **corporation doing business in**
16 **California,**
Defendant.

CASE NO. 2:15-CV-00298-DDP (JCx)

NOTICE OF DEPOSITION OF
ANDREW K. BENTON AND
DEMAND FOR PRODUCTION OF
DOCUMENTS

Date: January 24, 2017
Time: 10:00 a.m.
Location: Zuber Lawler & Del Duca LLP
777 S. Figueroa St., 37th Fl.
Los Angeles, CA 90017

Trial Date: May 23, 2017

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20 **TO ALL INTERESTED PARTIES AND THEIR COUNSEL OF RECORD**
21 **HEREIN:**

22 **PLEASE TAKE NOTICE** that, pursuant to Rule 30 of the Federal Rules of
23 Civil Procedure, **HALEY VIDECKIS and LAYANA WHITE**, by and through their
24 attorneys of record, will take the deposition upon oral examination of **ANDREW K.**
25 **BENTON**, commencing at 10:00 a.m. on January 24, 2017, at Zuber Lawler & Del
26 Duca LLP, 777 South Figueroa Street, 37th Floor, Los Angeles, CA 90017;
27 telephone (213) 596-5620, and continuing from day to day, Saturdays, Sundays and
28 legal holidays excluded, until concluded. The deposition shall be taken

1 stenographically (including through computer assisted transcription) and by
2 videotape before a certified court reporter authorized to administer oaths in the State
3 of California. In addition, the deposition shall be recorded by videotape, and the
4 deposing party specifically reserves the right to use the videotape at the time of trial.
5 Finally, the deposition may be conducted using instant visual display (Livenote).

6 The documents requested for production are attached hereto as Attachment 1.

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Dated: December 23, 2016

Sincerely,

ZUBER LAWLER & DEL DUCA LLP
JEREMY J. GRAY
JEFFREY J. ZUBER

By: 
Attorneys for Plaintiffs Haley Videckis and
Layana White

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ATTACHMENT 1

ATTACHMENT 1
TO
DEPOSITION NOTICE OF ANDREW K. BENTON

Pursuant to Rule 34, Federal Rules of Civil Procedure, Andrew K. Benton shall produce at such deposition the documents in his custody, control or possession. For purposes of this request, the term “documents” shall be construed in the broadest sense to include any writing and any electronically stored data, including, but not limited to, data filed (whether in the form of text, audio or video, and whether embedded or in a form that can be printed) from which information can be obtained, translated, transferred or copied, if necessary, into a reasonable useable form and which data and/or compilations have been created by any software application program. The documents to be produced are identified as follows:

DEFINITIONS

- A. “PLAINTIFFS” shall mean Haley Videckis and Layana White.
- B. “YOU” and “YOUR” shall mean Andrew K. Benton.
- C. “PERSON(S)” includes any natural Person, firm, association, organization, partnership, business, trust, corporation, governmental or public entity or any other form of legal entity.
- D. “DOCUMENT” is defined to be no less broad in scope than the usage of this term under California Rules of Civil Procedure and, as used herein, includes, without limitation, any written, printed, recorded, electronic or graphic material, including, but not limited to writings, drawings, graphs, charts, phone records, memoranda, reports, letters, electronic correspondence, e-mail, notes, minutes, records, photographs, tapes, diskettes, and computer printouts, however stored, printed, reproduced, or coded and any and all other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form.

E. “COMMUNICATION(S)” means any oral, written or electronic transmission of information, including but not limited to meetings, discussions, conversations, telephone calls, telegrams, memoranda, letters, facsimile transmissions, telexes, conferences, messages, notes or seminars.

F. “ANY” includes the word “ALL,” and vice versa; the singular includes the plural, and vice versa; and the past includes the present, and vice versa.

G. “AND” or “OR” shall be construed conjunctively and disjunctively so as to acquire the broadest possible meaning.

H. “LGBT” shall mean lesbian, gay, bisexual, OR transsexual.

I. “RELATING TO” or “RELATE(S) TO” means constituting, containing, concerning, embodying, reflecting, identifying, stating, mentioning, discussing, describing, evidencing, or in any other way being relevant to that given subject matter.

DOCUMENTS TO BE PRODUCED

1. All DOCUMENTS CONCERNING ANY LGBT clubs or groups at Pepperdine, including but not limited to the inception of any such groups.

2. All DOCUMENTS CONCERNING or relating to the impact of LGBT clubs or groups at Pepperdine on fundraising or donations to Pepperdine.

3. All DOCUMENTS CONCERNING or relating to YOUR communications with any students at Pepperdine regarding the impact of LGBT clubs or groups at Pepperdine on donations to Pepperdine.

4. All DOCUMENTS CONCERNING ANY COMMUNICATIONS between YOU and anyone at Pepperdine regarding the impact of LGBT clubs or groups at Pepperdine on donations to Pepperdine.

5. All COMMUNICATIONS between YOU and any Pepperdine donor or potential donor regarding LGBT clubs at Pepperdine.

6. All COMMUNICATIONS between YOU and anyone at Pepperdine

regarding the recognition of the student organization “Crossroads” at Seaver College.

7. All COMMUNICATIONS between YOU and any Pepperdine students regarding the recognition of the student organization “Crossroads” at Seaver College.

8. All COMMUNICATIONS between YOU and Grant Turck regarding any LGBT student groups or clubs on campus at Seaver College.

9. All COMMUNICATIONS between YOU and anyone at Pepperdine University.

10. All DOCUMENTS CONCERNING any interactions or communications between YOU and any administrator at Pepperdine’s regarding PLAINTIFFS.

11. All DOCUMENTS CONCERNING any interactions or COMMUNICATIONS between YOU and any member of Pepperdine’s women’s basketball team coaching staff regarding PLAINTIFFS.

12. All DOCUMENTS CONCERNING either PLAINTIFF’S membership on the Leadership Committee of Pepperdine’s women’s basketball team.

13. All DOCUMENTS CONCERNING Pepperdine’s policies, and practices regarding homosexuality.

14. All DOCUMENTS CONCERNING any and all meetings between either PLAINTIFF and YOU.

15. All COMMUNICATIONS between either PLAINTIFF and YOU.

16. All COMMUNICATIONS CONCERNING either PLAINTIFF between and YOU and members of Pepperdine’s athletic department.

17. All DOCUMENTS CONCERNING the status of any scholarships

awarded to either PLAINTIFF during their respective periods of time at Pepperdine.

18. All COMMUNICATIONS between YOU and the parents of Layana White.

19. All COMMUNICATIONS between YOU and the parents of Haley Videckis.

20. All DOCUMENTS CONCERNING PLAINTIFFS' claims asserted in this ACTION.

21. All DOCUMENTS CONCERNING Pepperdine's defenses asserted in this ACTION.

22. All DOCUMENTS CONCERNING any allegations of discrimination on the basis of sexual orientation made against Pepperdine.

23. All COMMUNICATIONS between YOU and Adi Conlogue RELATING TO Plaintiffs.

24. All COMMUNICATIONS between YOU and the any athletic trainers RELATING TO Plaintiffs.

25. All COMMUNICATIONS between YOU and Dr. Steve Potts RELATING TO Plaintiffs.

26. All COMMUNICATIONS between YOU and Tabatha Jones Jolivet RELATING TO Plaintiffs.

27. All COMMUNICATIONS between YOU and anyone at Pepperdine regarding the Title IX investigation conducted by Pepperdine regarding PLAINTIFFS or in connection with PLAINTIFFS.

28. All DOCUMENTS AND COMMUNICATIONS CONCERNING YOUR January 27, 2016 letter to the Department of Education regarding Pepperdine's withdrawal of its 1976 request for an exemption from certain

provisions of Title IX.

29. All DOCUMENTS CONCERNING the reason or reasons for Pepperdine's request to withdraw its 1976 request for an exemption from certain provisions of Title IX.

30. All COMMUNICATIONS between YOU and Ryan Weisenberg RELATING TO Plaintiffs.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 777 S. Figueroa Street, 37th Floor, Los Angeles, CA 90017.

On December 23, 2016, I served true copies of the following document(s) **NOTICE OF DEPOSITION OF ANDREW K. BENTON AND DEMAND FOR PRODUCTION OF DOCUMENTS** on the interested parties in this action as follows:


Paula Tripp Victor
ptv@amclaw.com
Peter B. Rustin
pbr@amclaw.com
ANDERSON, McPHARLIN &
CONNERS LLP
707 Wilshire Boulevard, Suite 4000
Los Angeles, California 90071-2901
Telephone: (213) 688-0080
Facsimile: (213) 622-7594
Attorneys for Defendant Pepperdine
University

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the practice of Zuber Lawler & Del Duca LLP for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid. I am a resident or employed in the county where the mailing occurred. The envelope was placed in the mail at Los Angeles, California.

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address lwan@zuberlaw.com to the persons at the e-mail addresses listed in the Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.

Executed on December 23, 2016, at Los Angeles, California.



Lorraine M. Wan

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA, WESTERN DIVISION**

HALEY VIDECKIS and LAYANA
WHITE, individuals,

Plaintiffs,

v.

PEPPERDINE UNIVERSITY, a
corporation doing business in
California,

Defendant.

CASE NO. 2:15-CV-00298-DDP (JCx)

[Assigned to the Hon. Dean D.
Pregerson – Courtroom 9C]

**[PROPOSED] ORDER RE
PLANTIFFS’ MOTION IN LIMINE
NO. 1 TO EXCLUDE, OR IN THE
ALTERNATIVE LIMIT, THE
EXPERT TESTIMONY OF JODY
SHIPPER, AND REQUEST FOR
DAUBERT HEARING;
MEMORANDUM OF POINTS AND
AUTHORITIES**

*[Filed concurrently with Motions in
Limine Nos. 1 thru 7; [Proposed]
Orders Nos. 1 thru 7; Declaration of
Jayesh Patel]*

Date: May 15, 2017
Time: 10:00 a.m.
Courtroom: 9C

Trial Date: May 23, 2017
FSC: May 8, 2017

1 This matter having come before the Court upon Plaintiff Haley Videckis and
2 Layana White's motion in limine, the Court having reviewed the motion and related
3 papers and after sufficient cause appearing, the Court finds that Plaintiffs' motion in
4 limine No. 1 to exclude the expert testimony of Jody Shipper is granted.

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IT IS SO ORDERED.

DATED: May ____, 2017

Judge Dean D. Pregerson