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11  
12 UNITED STATES DISTRICT COURT  
13 SOUTHERN DISTRICT OF CALIFORNIA

14 DR. SEUSS ENTERPRISES, L.P., a  
California limited partnership,

15 Plaintiff,

16 v.

17 COMICMIX LLC, a Connecticut  
18 limited liability company; MR.  
GLENN HAUMAN, an individual;  
19 MR. DAVID JERROLD  
FRIEDMAN A/K/A DAVID  
20 GERROLD, an individual; and MR.  
TY TEMPLETON, an individual,

21 Defendants.  
22

Case No.: 16-cv-02779-JLS-BGS

**PLAINTIFF DR. SEUSS  
ENTERPRISES, L.P.'S  
OPPOSITION TO DEFENDANT  
COMICMIX LLC'S REQUEST FOR  
JUDICIAL NOTICE PURSUANT TO  
FED. R. EVID. 201 IN SUPPORT OF  
MOTION TO DISMISS**

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1 **I. INTRODUCTION**

2 Plaintiff Dr. Seuss Enterprises, L.P. (“DSE”), by and through its undersigned  
3 counsel, respectfully submits this opposition to Defendant ComicMix LLC’s  
4 (“ComicMix” or “Defendant”) Request for Judicial Notice Pursuant to Fed. R.  
5 Evid. 201 (the “RJN”) (ECF No. 8-2) filed in support of its Motion to Dismiss  
6 Pursuant to Fed. R. Civ. P. 12(b)(6) (the “Motion”). (ECF No. 8.)

7 ComicMix submits to the Court extrinsic materials to support its Motion, and  
8 asks this Court to take judicial notice of Exhibits 1 through 6 to the RJN. In  
9 addition, although not properly attached as exhibits in compliance with Fed. R.  
10 Evid. 201, ComicMix also asks this Court to take judicial notice of (1) “the  
11 monologue from the opening credits of the original *Star Trek* series,” from The  
12 Smithsonian National Air and Space Museum website and YouTube.com, (RJN at  
13 5) and (2) eighteen individual episodes from the *Star Trek* television series,  
14 (Memorandum of Points and Authorities in Support of ComicMix LLC’s Motion to  
15 Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6) at 13-15, n.9-11) (“Br.”). This  
16 additional material is only cited in Defendant’s moving brief.

17 ComicMix’s RJN should be denied for several reasons, as it requests that the  
18 Court take judicial notice of: (1) documents that are not public records; (2)  
19 documents containing hearsay; (3) documents that are irrelevant; (4) documents  
20 that are not properly authenticated; (5) documents that lack foundation; (6)  
21 documents not subject to judicial notice; and (7) information that is deficient for  
22 failure to comply with Fed. R. Evid. 201. While DSE submits that the documents  
23 submitted by Defendant are largely irrelevant to the legal issues before the Court,  
24 DSE nevertheless submits that the documents attached to the RJN are not the  
25 proper subject of judicial notice and should not be considered by the Court. For the  
26 same reasons, the additional extrinsic material cited in Defendant’s brief but not  
27 contained in the RJN should likewise be rejected.

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1 **II. ARGUMENT**

2 In ruling on a Rule 12(b)(6) Motion to Dismiss, the Court generally may not  
 3 look beyond the four corners of the plaintiff’s complaint, “with the exception of  
 4 documents incorporated into the complaint by reference, and any relevant matters  
 5 subject to judicial notice.” *Fraley v. Facebook, Inc.*, 830 F. Supp. 2d 785, 794  
 6 (N.D. Cal. 2011); *Lee v. City of Los Angeles*, 250 F.3d 668, 688–89 (9th Cir. 2001).  
 7 Under the doctrine of incorporation by reference, the Court may consider  
 8 documents not attached to the complaint, provided that the complaint necessarily  
 9 relies on the documents or contents thereof, and both the document’s authenticity  
 10 and relevance are uncontested. *See Swartz v. KPMG LLP*, 476 F.3d 756, 763 (9th  
 11 Cir. 2007) (citing *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir. 1998)); *Coto*  
 12 *Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010). “[T]o merit  
 13 incorporation by reference, the complaint must refer to the content of the document  
 14 and not merely its existence.” *RB Rubber Products, Inc. v. ECORE Int’l, Inc.*, No.  
 15 3:11-CV-319-AC, 2012 WL 860416, at \*4 (D. Or. Mar. 13, 2012) (citing *Branch v.*  
 16 *Tunnell*, 14 F.3d 449, 453 (9th Cir. 1994) (overruled on other grounds)).

17 In addition, under Fed. R. Evid. 201, a court may take judicial notice of “a  
 18 fact that is not subject to reasonable dispute because it: (1) is generally known  
 19 within the trial court’s territorial jurisdiction; or (2) can be accurately and readily  
 20 determined from sources whose accuracy cannot reasonably be questioned.” Fed.  
 21 R. Evid. 201(b). “Because the effect of judicial notice is to deprive a party of an  
 22 opportunity to use rebuttal evidence, cross-examination, and argument to attack  
 23 contrary evidence, caution must be used in determining that a fact is beyond  
 24 controversy under Rule 201(b).” *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151  
 25 (9th Cir. 2005) (citation omitted). “[T]he Ninth Circuit tends to be strict with its  
 26 application of Rule 201(b).” *Von Grabe v. Sprint PCS*, 312 F. Supp. 2d 1285, 1311  
 27 (S.D. Cal. 2003). Further, judicial notice is “not a proper basis for rejecting factual

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1 allegations appearing in the plaintiff's complaint." *CPI Advanced, Inc. v. Kong*  
2 *Byung Woo Comm. Ind, Co., Ltd.*, 135 F. App'x 81, 83 (9th Cir. 2005).

3 The documents for which ComicMix requests judicial notice do not meet the  
4 requirements of Fed. R. Evid. 201, nor the requirements of the doctrine of  
5 incorporation by reference, and are thus unsuitable for judicial notice and cannot  
6 support ComicMix's Motion.

7 **A. Exhibits 1-3: Kickstarter.com Webpages (collectively, the**  
8 **"Webpages")**

9 Exhibits 1 through 3 are screenshots of webpages on the Kickstarter.com  
10 website, and ComicMix presents them to the Court with a bare assertion that the  
11 Webpages reflect the content of: (1) Defendants' Kickstarter campaign as it  
12 appeared on or shortly after September 30, 2016, but before October 7, 2016; (2) a  
13 page on Kickstarter's website reflecting the DMCA Takedown Notice that DSE  
14 sent to Kickstarter as it appeared on the website on December 16, 2016; and (3) a  
15 page on Kickstarter's website where Defendant's Kickstarter campaign webpage  
16 address redirected as of December 16, 2016, respectively. (RJN at 3.) DSE objects  
17 to ComicMix's request for judicial notice of the Webpages because they are  
18 irrelevant, inappropriate topics, and have not been properly authenticated.  
19 Additionally, DSE further objects to judicial notice of Exhibits 2 and 3 because  
20 they are not necessarily relied on by DSE in its complaint (ECF No. 1 (the  
21 "Complaint" or "Compl.")).

22 As a threshold matter, judicial notice of a document that is merely referenced  
23 in the complaint for use in a Motion to Dismiss is proper only when the complaint  
24 necessarily relies on that document. *See Swartz, supra*, at 763. Although  
25 Paragraphs 34 and 35 of the Complaint make reference to Defendants' Kickstarter  
26 campaign, and Paragraphs 40 and 41 make reference to DSE's DMCA Takedown  
27 Notice, the Complaint in no way makes any substantive reliance on Exhibits 2 or 3.  
28 But even assuming DSE's Complaint necessarily relies on the Webpages,

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1 ComicMix’s request as to Exhibits 1 through 3 should still be denied. First, while  
2 websites may be proper subjects for judicial notice, “courts are hesitant to take  
3 notice of information found on third party websites and routinely deny requests for  
4 judicial notice.” *Gerritsen v. Warner Bros. Entm’t Inc.*, 112 F. Supp. 3d 1011,  
5 1028 (C.D. Cal. 2015). This is especially true where, as here as to Exhibit 1, the  
6 user-submitted content appearing on the Defendants’ Kickstarter webpage was  
7 created and maintained by a party to the litigation. *See id.* at 1030-31 (citing  
8 *Koenig v. USA Hockey, Inc.*, No. 2:09–cv–1097, 2010 WL 4783042, at \*3 (S.D.  
9 Ohio June 14, 2010) (“[F]ederal courts should be very reluctant to take judicial  
10 notice of information or documents that appear exclusively on websites which have  
11 been created and are maintained by one of the parties to a case unless that party is a  
12 governmental body and the website is maintained not to further the business  
13 interests of the party but to provide a source of public information.”)). On  
14 September 28, 2016, DSE sent a letter to Defendants concerning their unauthorized  
15 use of the DSE works. (Compl. at ¶ 36.) ComicMix purportedly collected Exhibit  
16 1 sometime after September 30, 2016 but before October 7, 2016, (Affidavit of Dan  
17 Booth in Support of ComicMix LLC’s Request for Judicial Notice Pursuant to Fed.  
18 R. Evid. 201 (“Booth Aff.”) at ¶ 2) (ECF No. 8-3), when DSE submitted its DMCA  
19 Takedown Notice to Kickstarter. (Compl. at ¶ 40.) ComicMix, however, does not  
20 establish whether Exhibit 1 accurately reflects the content of the Defendants’  
21 Kickstarter webpage prior to receiving notice of DSE’s claims. *See Fraley*, 830 F.  
22 Supp. 2d at 795 (denying Facebook’s request for judicial notice of documents  
23 whose relevance and authenticity were contested since it was “unclear whether the  
24 particular web pages . . . were even in existence at the time Facebook first launched  
25 the Sponsored Stories feature or at the time Plaintiffs took the actions that rendered  
26 them subject to Sponsored Stories.”); *Cohen v. Facebook, Inc.*, 798 F. Supp. 2d  
27 1090, 1094–95 (N.D. Cal. 2011) (rejecting Facebook’s request to take judicial  
28 notice of various Terms of Use documents because “substantial questions . . .



1 remain in this instance as to when various versions of the documents may have  
2 appeared on the website . . .”). Nor does ComicMix establish that the content of  
3 the Defendants’ Kickstarter webpage was not otherwise altered prior to the  
4 collection of Exhibit 1. *See id.* Second, ComicMix improperly uses a request for  
5 judicial notice of the existence of Exhibit 1 to support its argument that the contents  
6 of that webpage are true, and should be considered by the court for their truth—  
7 namely, that Defendants’ Infringing Work, *Oh, The Places You’ll Boldly Go!*, is a  
8 parody. *See Lee v. Corinthian Colleges*, 655 F.3d 984, 999 (9th Cir. 2011) (the  
9 Court may take notice of the existence of certain documents, but may not “draw  
10 inferences” based on those documents “or take notice of facts that might reasonably  
11 be disputed”). DSE, of course, vigorously disputes Defendants’ conclusory  
12 assertion that the Infringing Work is a parody. (*See* Plaintiff Dr. Seuss Enterprises,  
13 L.P.’s Memorandum of Points and Authorities In Opposition To Defendant  
14 ComicMix LLC’s Motion To Dismiss Pursuant To Fed. R. Civ. P. 12(b)(6) (“Opp.  
15 Br.”) at 9-12.) Third, the Webpages are irrelevant to the issue presently before the  
16 Court on ComicMix’s Motion since they have no bearing on whether DSE has  
17 adequately stated claims against Defendant for copyright and/or trademark  
18 infringement.

19 Accordingly, the Court should deny ComicMix’s RJN as to Exhibits 1  
20 through 3.

21 **B. Exhibit 4: October 28, 2016 Letter (the “Oct. 28 Letter”)**

22 Defendant also requests this Court take judicial notice of the content of a  
23 October 28, 2016 letter sent to DSE’s counsel by Defendant’s counsel, which  
24 characterizes and responds to DSE’s DMCA Takedown Notice, sets forth  
25 Defendants’ position on the fair use defense, and threatens litigation. DSE objects  
26 to judicial notice of the Oct. 28 Letter because it is irrelevant, asserts legal  
27 conclusions, and represents a one-sided characterization of facts subject to dispute.  
28 ComicMix asks the Court to take judicial notice of the truth of the disputed facts

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1 and legal conclusions asserted in the Oct. 28 Letter. However, the Court may not  
2 take judicial notice of disputed facts contained in a document, or a party's  
3 interpretation of such disputed facts. *See Corinthian Colleges*, 655 F.3d at 999  
4 (“[W]e may not, on the basis of evidence outside of the Complaint, take judicial  
5 notice of facts favorable to Defendants that could reasonably be disputed.”); *Garber*  
6 *v. Heilman*, No. CV 08–3585 DDP (RNB), 2009 WL 409957, at \*1 (C.D. Cal. Feb.  
7 18, 2009) (“Plaintiff’s request that the Court take judicial notice of his own list of  
8 encounters with the police ... is denied because plaintiff’s own characterization of  
9 the matters reflected in his chart does not qualify as a matter that is ‘not subject to  
10 reasonable dispute.’”) (citing Fed. R. Evid. 201(b)); *Balanced Body Univ.y, LLC v.*  
11 *Zahourek Sys., Inc.*, No. CIV S–13–1606 LKK/EFB, 2014 WL 66722, at \*2 (E.D.  
12 Cal. Jan. 7, 2014) (“The court cannot take judicial notice of statements which  
13 paraphrase or summarize allegations, as such statements are arguably inaccurate,  
14 and therefore, ‘subject to reasonable dispute.’”) (citing Fed. R. Evid. 201(b)).  
15 ComicMix’s request to have this Court draw factual conclusions based on disputed  
16 allegations should be rejected. ComicMix contends that “[t]he Court may take  
17 ‘judicial notice of the fact that counsel made particular statements’ in  
18 correspondence between the parties’ counsel referenced in the complaint.” (RJN at  
19 3) (quoting *Theta Chi Fraternity, Inc. v. Leland Stanford Junior Univ.*, No. 16-cv-  
20 01336-RMW, 2016 WL 4524305, at \*4 (N.D. Cal. Aug. 30, 2016). However,  
21 ComicMix grossly mischaracterizes the *Theta* case by omitting the *Theta* court’s  
22 complete holding, which actually held that: “While the court takes judicial notice of  
23 the fact that counsel made particular statements in these emails, the court does not  
24 take judicial notice of the truth of counsel’s factual assertions in the emails to the  
25 extent that the emails are inconsistent with the allegations in the complaint.” *Id.* In  
26 any event, ComicMix is wrong because “[c]ommunications between counsel  
27 generally do not fall under Federal Rule of Evidence 201.” *Trenches, Inc v.*

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1 *Hanover Ins. Co.*, No. SACV 12-627 AG (RNBx), 2012 WL 12507967, at \*4 (C.D.  
2 Cal. Aug. 10, 2012).

3 Accordingly, the Court should deny ComicMix's RJN as to Exhibit 4.

4 **C. Exhibits 5 and 6: The Infringing Work and *Oh, The Places You'll***  
5 ***Go!*, respectively**

6 ComicMix requests that the Court take judicial of the contents of the  
7 Infringing Work (Exhibit 5) and DSE's *Oh, The Places You'll Go!* (Exhibit 6).  
8 Because ComicMix's request, however, suffers from two fatal flaws, it should be  
9 rejected.

10 First, ComicMix's Motion does not ask the Court to conduct a "substantial  
11 similarity" analysis between the DSE works and the Infringing Work, or to dismiss  
12 DSE's copyright claim for lack of substantial similarity, and therefore infringement,  
13 as a matter of law.<sup>1</sup> Rather, ComicMix asks the Court to determine whether  
14 ComicMix's unauthorized use of the "protectable" elements thereof is a "fair use"  
15 as a matter of law. (Br. at 9-19.) As this exercise is not proper for any copyright  
16 defense advanced by ComicMix, the Court's review of the content of these works  
17 has only minimal relevance to the issue presently before the Court on ComicMix's  
18 Motion: whether Defendants' unauthorized use of DSE's copyrighted material  
19 constitutes "fair use" as a matter of law. (*See id.*)

20 As discussed in DSE's opposition brief (*see* Opp. Br. at 8-9), Rule 12(b)(6)  
21 motions are particularly unsuitable for adjudicating a fair use defense to copyright  
22 infringement as a matter of law. *See e.g., Browne v. McCain*, 611 F. Supp. 2d  
23

24 <sup>1</sup> ComicMix also fails to address the Ninth Circuit's two-part analysis—the  
25 extrinsic and intrinsic tests—to determine whether two works are substantially  
26 similar. *See Cavalier v. Random House, Inc.*, 297 F.3d 815, 822 (9th Cir. 2002).  
27 Likewise, ComicMix does not address the "inverse ratio rule," which applies here,  
28 given Defendants' undisputed access to the DSE Works, "justify[ing] a lower  
standard of proof [for DSE] to show substantial similarity." *Shaw v. Lindheim*, 919  
F.2d 1353, 1361 (9th Cir. 1990). DSE's allegations concerning infringement of the  
DSE Works satisfy the extrinsic test prong of substantial similarity and, thus,  
survive the Motion. (*See* Compl. at ¶¶ 18-31.)  
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1 1073, 1078 (C.D. Cal. 2009) (“Generally, when analyzing a Rule 12(b)(6) motion, a  
2 court’s analysis of the plaintiff’s claims is limited to its allegations in the complaint.  
3 At this stage, a court does not make factual findings, nor deem material facts  
4 undisputed or admitted. Thus, in light of a court’s narrow inquiry at this stage and  
5 limited access to all potentially relevant and material facts needed to undertake the  
6 analysis, courts rarely analyze fair use on a 12(b)(6) motion.”). This is because the  
7 fair use defense involves highly fact-specific inquiries. *Id.* As such, courts  
8 routinely reject fair use as a basis to dismiss copyright claims. *Id.* Accordingly,  
9 because the Court’s review of the content of these two works bears only minimal  
10 relevance to fact-specific fair use factors at the pleading stage, ComicMix’s request  
11 should be denied.

12 Second, even if ComicMix were asking the Court to conduct a proper  
13 substantial similarity analysis, ComicMix asks this Court to review only some of  
14 the underlying works at issue: the Infringing Work also misappropriates key  
15 protected elements of *Horton Hears a Who*, *How the Grinch Stole Christmas!*, *The*  
16 *Lorax*, and *The Sneetches and Other Stories*. (Compl. at ¶ 27.) These works are  
17 not yet before the Court, and thus the Court cannot make a finding on the highly  
18 fact-specific fair use factors based on an incomplete record. *See Browne*, 611 F.  
19 Supp. 2d at 1078.

20 Accordingly, the Court should deny ComicMix’s RJN as to Exhibits 5 and 6.

21 **D. Star Trek Opening Monologue (the “Monologue”)**

22 ComicMix requests that the Court take judicial notice of the Monologue,  
23 which is not referenced in or relied upon by DSE’s Complaint. Even if the  
24 Monologue were referenced in the Complaint, as stated above, judicial notice of a  
25 document that is merely referenced in the complaint for use in a Motion to Dismiss  
26 is proper only when the complaint relies on that document. *See Swartz*, *supra*, at  
27 763. Further, the Monologue is not the proper subject of judicial notice because  
28 any purported “facts” it contains are not the type of facts which are “generally

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1 known within the trial court’s territorial jurisdiction,” Fed. R. Evid. 201(b). Nor  
2 are those facts capable of being “accurately and readily determined from sources  
3 whose accuracy cannot reasonably be questioned,” Fed. R. Evid. 201(b), since the  
4 authors of the Monologue are unknown and not stated by Defendants, and they  
5 have not offered any documents for authentication. The Monologue’s proffered  
6 extrinsic “facts” thus lack foundation and are hearsay.

7 Significant questions regarding the authenticity of the Monologue are also  
8 raised because Defendant has not attached any copies of the Monologue it seeks to  
9 have judicially noticed. As stated above, while websites may be proper subjects for  
10 judicial notice, “courts are hesitant to take notice of information found on third  
11 party websites and routinely deny requests for judicial notice.” *Warner Bros.*  
12 *Entm’t Inc.*, 112 F. Supp. 3d at 1028. That is especially true where, as here, the  
13 defendant has not attached a hard copy of the webpages referenced in their  
14 request—a webpage on a museum’s website and a webpage on YouTube. “Federal  
15 Rule of Evidence 201(d) generally contemplates that a party will provide the copy  
16 of the document it seeks to have judicially noticed.” *Caldwell v. Caldwell*, No. C  
17 05-4166 PJH, 2006 WL 618511, at \*4 (N.D. Cal. Mar. 13, 2006) (denying the  
18 defendant’s request for judicial notice of a museum’s website as deficient for  
19 failure to comply with Fed. R. Evid. 201). “[W]ithout the actual web pages before  
20 it, the court is unable to pass on the nature of facts contained within the entire  
21 website, whose accuracy cannot be determined with reference to anything concrete.  
22 This is especially significant, given the changing and changeable nature of internet  
23 websites.” *Id.*

24 Finally, the Monologue, which constitutes intellectual property owned by a  
25 third-party, is irrelevant to this Motion. Neither the existence of the Monologue nor  
26 Defendant’s use of it in The Infringing Work have any bearing on whether DSE has  
27 stated a claim for trademark and copyright infringement.

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1 Accordingly, the Court should deny ComicMix’s RJN as to the Monologue.

2 **E. Star Trek Episodes (the “Episodes”)**

3 Although not properly requested in its RJN, Defendant cites to eighteen Star  
4 Trek episodes in its brief (Br. at 13-15, n.9-11), apparently asking the Court to  
5 consider the Episodes’ content in its “fair use” analysis. Putting aside that  
6 Defendant did not properly request that the Court take judicial notice of these  
7 extrinsic “facts,” the Court should disregard them, too, because they are not the  
8 proper subject of judicial notice. First, the Episodes may not be noticed under the  
9 doctrine of incorporation by reference since none of the Episodes are referenced,  
10 much less necessarily relied upon, by DSE in its Complaint. *See Swartz, supra*, at  
11 763. Second, the Episodes are not appropriate for judicial notice because the  
12 alleged facts they contain—the content of various *Star Trek* television series  
13 episodes—are not “generally known within the trial court’s territorial jurisdiction,”  
14 Fed. R. Evid. 201(b). Nor are these facts capable of “being accurately and readily  
15 determined from sources whose accuracy cannot reasonably be questioned,” Fed. R.  
16 Evid. 201(b), since the source of the Episodes are unknown and not stated by  
17 Defendants. For these reasons, the Episodes also lack foundation. Finally,  
18 Defendant has not submitted to the Court copies of any of the Episodes. Again,  
19 “Federal Rule of Evidence 201(d) generally contemplates that a party will provide  
20 the copy of the document it seeks to have judicially noticed.” *Caldwell*, 2006 WL  
21 618511 at \*4.

22 As with Defendant’s other proffered evidence, the information contained in  
23 the Episodes, regardless of their authenticity, have nothing to do with the issue  
24 before the court—which is whether DSE has sufficiently stated claims for  
25 trademark and copyright infringement of DSE’s own trademarks and copyrighted  
26 material against Defendant. Judicial notice of the Episodes for consideration in  
27 deciding the instant Motion is improper.

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1 Accordingly, the Court should deny ComicMix’s RJN as to the Episodes.

2 **III. CONCLUSION**

3 For the foregoing reasons, DSE respectfully submits that ComicMix’s  
4 Request for Judicial Notice be denied in its entirety.

5 Dated: January 19, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 19, 2017 I electronically filed the foregoing document by using the Court’s ECF system, thereby causing a true copy thereof to be served upon counsel of record for each party to have appeared to date, as identified on the Notice of Electronic Filing.

/s/ Gina Durham  
Gina Durham