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**Scharf-Norton Center for Constitutional Litigation at  
the GOLDWATER INSTITUTE**

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**IN THE SUPERIOR COURT OF  
ARIZONA IN AND FOR THE COUNTY  
OF MARICOPA**

MAISHA BYRD; J.M., by MAISHA BYRD  
as next friend; CHAUNCEY HALLFORD;  
L.M. and S.H., by CHAUNCEY  
HALLFORD as next friend; KAYLA  
SVEDIN; L.S., by KAYLA SVEDIN as next  
friend; PRISCA WALTON; and E.W. and  
P.W., by PRISCA WALTON as next friend,

Plaintiffs,

vs.

ARIZONA DEPARTMENT OF  
EDUCATION; KATHY HOFFMAN,  
Superintendent of Public Instruction, in her  
official capacity; KARLA ESCOBAR,  
Director of the Empowerment Scholarship  
Account, in her official capacity; MARK  
BRNOVICH, Attorney General of Arizona, in  
his official capacity.

Defendants.

Case No.

**CV2020-000148**

**COMPLAINT  
for Declaratory and Injunctive Relief**

1. This case challenges the unlawful adoption of policies and procedures by which the Arizona Department of Education (“ADE”) governs the Empowerment Scholarship Account (“ESA”) program. The plaintiffs—Arizona parents and their special-needs children—participate in this program.

2. The policies and procedures and rules promulgated by the ESA program have been adopted by the ADE without following the statutorily required notice and comment procedures. This robs those who are subjected to the rules and comments of their right to a voice in how they are governed in contravention of the Arizona Constitution. It also denies the court of a proper record that would allow for a substantive review of the rule maker’s decisions to ensure that the rules are not arbitrary, capricious, or an abuse of discretion pursuant to A.R.S. § 12-910(E).

3. The ESA program was established to enable parents of special-needs children to exercise greater freedom of choice in obtaining educational services for their children. Through that program, participating families are empowered to send their children to private schools, to obtain special tutoring services, or to home-school their children, with the funds that would otherwise have been spent on their children in a government-funded school.

4. However, ADE has adopted a series of rules, found primarily (but not exclusively) in its *ESA Handbook*, by which it governs the ESA program. These rules restrict the rights of parents and impose a series of limitations on participating parents that deprives them of choices, financially hinders both the parents and children, undermines the program, and violates Arizona law. Specifically, the *ESA Handbook* contains a set of rules that were not promulgated through the procedure required by the Administrative Procedure Act, and are therefore unlawful. This

lack of a substantive record robs the court of the ability to perform a substantive review even to find that these rules and regulations put forth by the Arizona Department of Education are valid because there is no properly created record.

5. These invalid rules and regulations cover a broad expanse of areas from conditioning payments to parents on ADE's approval of expense reports for past expenditures under the ESA, to limiting the amount of money parents are allowed to spend on certain categories of expenses, and even requiring parents to "repay" funds under certain circumstances as determined by ADE administrators. None of these rules are lawful, due to violations of the Administrative Procedure Act.

6. In addition, ADE is routinely late in making payments to parents pursuant to their ESA contracts. These late payments result in injuries to parents and their children, who are denied stability in their educational services because the ESA denies them the right to pay out of pocket when ADE is late in funding accounts without forfeiting the right to reimbursement. These parents are required to make late payments which can lead to late-payment fees that the program does not cover pursuant to the handbook. In addition parents suffer from lost credibility with service providers, and may lose their places in tutoring programs and lessons. Some are denied services all together or their children begin to experience delays in their academic and skill set advancement because ADE has failed to timely perform within the contractually obligated timeframe that it designated when it crafted the contracts.

7. Plaintiff parents seek remedies including an injunction and declaratory relief to forbid ADE from imposing these rules, restrictions, and costs on them; and equitable relief to require ADE to comply with the applicable statutes.

### **PARTIES, JURISDICTION, AND VENUE**

8. Plaintiff MAISHA BYRD is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. She is the parent and next friend of Plaintiff J.M.

9. Plaintiff J.M. is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. J.M. falls into an identified category of special needs and so he has an Individualized Education Plan (“IEP”). This plan expired on February 26, 2018, and has not been renewed. J.M. is diagnosed with autism and severe social and communication delays. Plaintiff J.M. participates in the ESA program and has done so since the 2017–2018 school year.

10. Plaintiff CHAUNCEY HALLFORD is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. She is the parent and next friend of Plaintiffs L.M. and S.H.

11. Plaintiff L.M. is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. L.M. falls into an identified category of special needs. He had an IEP, which has since lapsed. Plaintiff L.M. participates in the ESA program and has done so since the 2017–2018 school year.



12. Plaintiff S.H. is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. S.H. falls into an identified category of special needs and has a Multidisciplinary Evaluation Team Report (“MET”) that identifies her as having autism. Plaintiff S.H. participates in the ESA program and has done so since the beginning of the 2017–2018 school year.

13. Plaintiff KAYLA SVEDIN is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. She is the parent and next friend of Plaintiff L.S.

14. Plaintiff L.S. is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. L.S. falls into one of the identified categories of need and has a MET that identifies her as having a speech and language impairment. Plaintiff L.S. participates in the ESA program and has done so since the beginning at the 2019–2020 school year.

15. Plaintiff PRISCA WALTON is a citizen of the United States and a resident and domiciliary of Maricopa County in the State of Arizona. She is the parent and next friend of Plaintiffs E.W. and P.W.

16. Plaintiffs E.W. and P.W. are citizens of the United States and residents and domiciliaries of Maricopa County in the State of Arizona. E.W. falls into one of the categories of special needs and has an IEP that identifies him as having autism and an intellectual disability (historically referred to as retardation). Plaintiffs E.W. and P.W. participate in the ESA program and have done so off and on since the 2016–2017 school year.

17. Defendant ARIZONA DEPARTMENT OF EDUCATION is a state agency charged with overseeing, administering, and enforcing the ESA program.

18. Defendant KATHY HOFFMAN is the Superintendent of Public Instruction for the State of Arizona, and in that capacity is legally charged with overseeing, administering, and enforcing the ESA program and associated statutes. She is sued in her official capacity only.

19. Defendant KARLA ESCOBAR is the Director of the ESA program for the State of Arizona, and in that capacity is legally charged with ensuring the ESA program adheres to all relevant state and federal regulations, coordinating payments to the parents with the Treasurer's Office and accurately processing ESA applications in a timely manner. She is sued in her official capacity only.

20. Defendant MARK BRNOVICH is the Attorney General of Arizona, and in that capacity is legally charged with overseeing, administering, and enforcing the ESA program and associated statutes. He is sued in his official capacity only.

21. Jurisdiction over this action and its claims is provided by A.R.S. §§ 12-123, 12-1831, 12-1801.

22. Venue is proper pursuant to A.R.S. § 12-401.

#### **FACTS COMMON TO ALL CLAIMS**

23. The ESA program was created in 2011 to empower parents to make educational choices to better serve the needs of their "qualified students." The ESA program is governed by A.R.S. §§ 15-2401–15-2405. Qualified student is defined, *inter alia*, as a child suffering a disability, a child of a military family, a child who attends a poorly performing school, a child

who is a ward of the court, a child residing on an Indian reservation, or a child who has a sibling who qualifies for an ESA.

24. Plaintiffs BYRD, HALLFORD, SVEDIN, and WALTON are parents of qualified children who participate in the ESA program.

25. Plaintiffs J.M., L.M., S.H., L.S., E.W. and P.W. are qualified children who participate in the ESA program.

**Plaintiff BYRD**

26. Plaintiff BYRD has participated in the ESA program for two (2) years. Her son, Plaintiff J.M., suffers from autism, severe asthma, and cyclic vomiting. He has severe receptive, expressive, and pragmatic language impairments. He has processing delays and when questioned will not always respond to the appropriate subject matter. These language delays create a cascade of learning difficulties across the academic spectrum in key areas of competency. J.M. also has difficulty understanding verbal directions in the classroom and is easily distracted and overstimulated by noises and other children.

27. J.M. cannot maintain an erect sitting position and has a hard time with his balance, as well as an “eccentric” use of his muscles that puts him at risk of bodily harm. He cannot hold a pencil independently and even with support is unable to write with enough detail to respond to a writing prompt.

28. J.M. is identified as suffering from severe social delays. He is unable to establish appropriate relationships with peers. He has poor impulse control and has aggressive behavioral tendencies. These aggressive behaviors include displays of defiance and threatening others. He

has a history of screaming, throwing things, and falling to the ground when he is in the classroom. These delays affect his educational performance, which is why he is eligible for an IEP.

**Plaintiff HALLFORD**

29. Plaintiff HALLFORD has participated in the ESA program for three (3) years. Her son, Plaintiff L.M., suffers from autism, an intellectual delay (historically referred to as retardation), and a speech and language impairment. L.M. has Attention Deficit/Hyperactivity Disorder and Obsessive Compulsive Disorder. He has learning disabilities, including Dyslexia and other health impairments that prevent him from being able to regularly attend school.

30. L.M. exhibits social delays. He has difficulty establishing appropriate relationships with peers. He is physically and verbally aggressive, practices self-mutilation, and destroys the personal property of others. His developmental and intellectual delays along with his concomitant behavioral concerns affect his educational performance, which is why he is eligible for an IEP.

31. Plaintiff HALLFORD's daughter, Plaintiff S.H. is a qualified student who is covered by an ESA. She has participated in the program for one year. S.H. has autism, Attention Deficit Hyperactivity Disorder, depression, and anxiety. She also has a heart condition.

32. S.H. has a series of inappropriate social responses. She has difficulty establishing appropriate relationships with peers. She is physically aggressive, kicks, screams, and destroys property. She likes "terrifying things" and hurting animals. She also engages in self-injurious

behaviors. S.H.'s autism and concomitant inappropriate behavioral response patterns affect her educational performance, which is why she is eligible for an IEP.

**Plaintiff SVEDIN**

33. Plaintiff SVEDIN has participated in the ESA program since the first quarter of the 2019–2020 school year. Her daughter, Plaintiff L.S., suffers from a speech and language impairment. She has an articulation delay that causes her to have difficulty expressing her wants and needs in the classroom. Her teachers have difficulty understanding her, and she has “meltdowns” because of her nascent awareness of the difficulty others have in understanding her.

34. L.S. has cyclic vomiting as well as convulsive and absence seizures. She is currently under evaluation by a neurologist to determine the cause of these health impairments. Her speech and language delays coupled with her seizures affect her educational performance, which is why she is eligible for an IEP.

**Plaintiff WALTON**

35. Plaintiff WALTON has participated in the ESA program on and off for three (3) years. Her son, Plaintiff E.W., suffers from autism and has an intellectual disability. He has a severe communication delay and has limited expressive language and therefore cannot effectively express his needs to school staff. He has difficulty in understanding the social and directive environment within the classroom. E.W. suffers from anxiety when he is separated from his mother and needs ongoing reassurance from adults that she will come back for him at the end of the day.

36. Plaintiff is informed and believes, and on that basis alleges, that she resides in a district where the nearest schools regularly perform poorly and have received D or F grades pursuant to A.R.S. § 15-241. The schools in her neighborhood are, in her judgment, incapable of providing E.W. and P.W. with the services they needs for their growth and education.

37. E.W.'s autism, and intellectual disabilities along with his communication and social delays affect his educational performance, which is why he is eligible for an IEP.

**ADE's administration of the ESA program**

38. ADE administers the program pursuant to the *ESA Handbook* ("*Handbook*") that it publishes on its website and which it updates annually. The current version is attached as Exhibit 1.

39. ADE regularly informs ESA participants that they must follow the rules laid out in the *Handbook*. Plaintiffs are informed and believe, and on that basis allege, that ADE's employees regularly consult and abide by the *Handbook* when administering the ESA program.

40. ADE offers a telephone line for ESA participants to call to obtain assistance or to answer questions regarding the ESA program. Wait times on this help line routinely exceed three hours.

41. ADE requires parents to submit "quarterly expense reports" regarding their expenditures of ESA funds. These reports are due on September 30, December 31, March 31, and June 30 of each year. The *Handbook* states that "if an expense report is submitted by the deadline[s] listed above, funding will be dispersed [*sic*] any time between the 15<sup>th</sup> through the

30<sup>th</sup> of each funding month. Failure to submit an expense report within 30 days of the deadline may result in termination from the program.” *Handbook* at 34.

42. Participants must submit an expense report online. An expense report must include, *inter alia*, receipts, processing fees, rate amounts, etc. The *Handbook* states that “incomplete expense reports will be rejected” and that if a report is rejected, the parent will have five (5) days to resubmit with proper documentation. If the parent fails to do this, the *Handbook* states that the parent will be “terminated from the program.” *Handbook* at 35.

43. ADE does not disburse ESA funds until after it has reviewed and approved the previous quarter’s expense reports.

44. On July 17, 2019, Defendant ESCOBAR spoke at a meeting with ESA participants. She stated “Quarter 2 will not be funded if [the] Quarter 1 expense report is not submitted and approved.”

45. ADE’s review and approval process is slow and cumbersome. As a consequence, ADE routinely disburses funds late.

46. Among other rules that ADE imposes (either pursuant to the *Handbook* or otherwise) is a requirement that parents must “repay” to ADE funds that the Department deems to have been misspent. ADE imposes this requirement by sending parents that it deems to be out of compliance a letter informing them of ADE’s contention that they have misspent ESA funds, and commanding them to “repay” the allegedly misspent funds within a specified period of time or have their ESA accounts closed.

47. For example, Plaintiff WALTON received such a letter on January 1, 2017, which stated that any funds in her ESA account would be recovered by the Department of Education and no longer available for use.

48. Plaintiffs are informed and believe, and on that basis allege, that when ESA participants “repay” funds to ADE pursuant to ADE’s “repayment” demands, those “repaid” funds are *not* returned to that participant’s ESA account, but are instead placed in the ADE’s general funds.

49. Plaintiffs are informed and believe, and on that basis allege, that ADE routinely suspends, terminates, and/or refuses to reinstate ESA accounts for entire families when it asserts that an irregularity has occurred with regard to one child even if no irregularities have occurred with regard to that child’s siblings. To cite one example, Plaintiff WALTON was informed that P.W.’s ESA account could not be reinstated while Walton’s appeal regarding termination of E.W.’s account was pending. As a result, WALTON was forced, for months, to keep P.W. enrolled at a school that did not adequately meet P.W.’s needs until ADE restored E.W.’s ESA.

### **COUNT ONE**

#### **Administrative Procedure Act**

50. Plaintiffs incorporate by reference and reassert the preceding paragraphs as though fully set forth herein.

51. A.R.S. § 41-1022 requires that before an agency makes, amends, renumbers, or repeals a rule the agency must first file a notice with the Secretary of State and allow for and accept public comment and notice on the rulemaking.



52. The *ESA Handbook* consists of a set of “rules” as defined in A.R.S. § 41-1001(19) because it contains statements of “general applicability that implement,[ ] interpret[ ], or prescribe[ ] law[s] or polic[ies]” and “describe[ ] the procedure [and] practice requirements” of the ADE when administering the ESA program.

53. Pursuant to A.R.S. § 41-1001(20), “[r]ulemaking” is a process in which a new rule is “amend[ed], repeal[ed] or renumber[ed].”

54. Pursuant to A.R.S. § 41-1005(F), the State Board of Education must adopt policies and rules for the board and institutions under its jurisdiction that provide notice of and opportunity to comment on policies or rules proposed for adoption. Before ADE may implement or change any rules, it must provide at least two opportunities for public comment.

55. Among other rules included in the *ESA Handbook* are rules that limit the percentage of ESA funds that may be spent on certain categories of expenditure, as well as guidelines requiring certain percentages of funding be spent in traditional academic categories. In addition, Plaintiffs are informed and believe, and on that basis allege, that ADE interprets the *Handbook* and the ESA statutes as requiring parents to dis-enroll their children from district or charter schools prior to *applying* for an ESA rather than dis-enrolling their children prior to *signing* an ESA contract. This harms parents who must first receive assurance that their children have an ESA before they can dis-enroll their children from the only education currently available to them (district or charter schools).

56. Plaintiffs are informed and believe, and on that basis allege, that the *ESA Handbook* was not promulgated pursuant to the procedures set out in the Arizona Administrative

Procedure Act (A.R.S. § 41-1001 et seq.). Plaintiffs are informed and believe, and on that basis allege, that no waiver or exception to that requirement applies.

57. On April 11, 2017, the Attorney General's office stated that the *ESA Handbook* does not consist of rules, and therefore does not fall within the requirements of the Administrative Procedure Act. ADE through the ESA program requires those with an ESA account to treat the *Handbook* requirements as rules they must comply with or risk losing access to their accounts. Thus, ADE is applying the *Handbook* as if its contents constituted rules, policies, and procedures, as specified in the *Handbook*.

58. Plaintiffs are informed and believe, and on that basis allege, that Defendants contend that their actions in respect to Count One are lawful in all respects.

## **COUNT TWO**

### **Unlawful Demands for "Repayment"**

59. Plaintiffs incorporate by reference and reassert the preceding paragraphs as though fully set forth herein.

60. ADE has no lawful authority to demand "repayment" of ESA funds. The only statutes establishing any such authority are A.R.S. § 15-2403(C) and (E). Section (E) provides that ADE may report "substantial misuse of monies" to the Attorney General, who may engage in "collection" or a criminal investigation if the facts so warrant. Section (C) permits ADE to suspend an account only where the parent "knowingly misuses monies or knowingly fails to comply with the terms of the contract with intent to defraud." In such cases, ADE must notify the state treasurer of its allegations. Neither of these statutory sections provides ADE with any

authority to demand “repayment,” to engage in “collection,” or to otherwise penalize a parent or student in any manner except for fraud or knowing misuse of funds.

61. Plaintiffs are informed and believe, and on that basis allege, that ADE routinely suspends ESA accounts without evidence of knowing misuse or fraud, unlawfully demands “repayment,” engages in “collection,” and otherwise exceeds its statutory authority in this regard.

62. Plaintiffs contend that attempts to recoup benefits under the ESA program are not only outside ADE’s statutory authority but also violate the common law prohibition on recoupment of public benefits. *Cf. Lucido v. Rippeto*, 73 Cal. App. 3d 1, 3 (1977).

63. Plaintiffs are informed and believe, and on that basis allege, that Defendants contend that their actions in respect to Count Two are lawful in all respects.

### **COUNT THREE**

#### **Unlawful Disbursement to the General Fund of “Repaid” Funds**

64. Plaintiffs incorporate by reference and reassert the preceding paragraphs as though fully set forth herein.

65. Plaintiffs contend that pursuant to A.R.S. § 15-2402 the state is required to place any monies returned to ADE for misspent funds in the student’s ESA account to be applied to that student’s education.

66. Plaintiffs contend that ADE is acting as an adjudicator, without observing the appropriate protocol when it “punishes” parents by requiring repayment of what the ESA program determines are misspent funds, and then does not return that balance remitted by the parent to the student’s account to be properly spent.

67. Plaintiffs contend that if the ESA program coordinators are engaging in adjudications they must comply with requirements found in A.R.S. § 15-2403(C) and apply only applicable law, contractual agreements, and those rules which are validly made pursuant to A.R.S. § 41-1001 et seq.

68. Plaintiffs are informed and believe, and on that basis allege, that when participating parents “repay” ESA funds to ADE pursuant to ADE’s claim that the parent has misspent the funds, those “repaid” funds are *not* returned to that student’s ESA account, but are instead placed in ADE’s general funds. Plaintiffs are informed and believe, and on that basis allege, that ADE has no lawful authority to place “repaid” funds anywhere other than back in the ESA participant’s own ESA account.

69. Plaintiffs are informed and believe, and on that basis allege, that Defendants contend that their actions in respect to Count Three are lawful in all respects.

**COUNT FOUR**  
**Unlawful Condition of Payments on Approval of Expense Reports**

70. Plaintiffs incorporate by reference and reassert the preceding paragraphs as though fully set forth herein.

71. As described above, Paragraphs 37–47, ADE requires participating parents to file quarterly “expense reports” listing how they have spent ESA funds. ADE then evaluates these reports and determines whether it believes any improper expenditures have been made. ADE expressly conditions future payments to parents on approval of previous quarterly expenditure reports. ADE also makes clear that approval of a quarterly expenditure report is subject to

revision and reversal—and that such reports are subject to disapproval—at any time in the future.

72. ADE has no statutory authority to require parents to obtain approval of past expense reports before disbursing ESA funds. The sole statutory authority ADE has in this regard is A.R.S. § 15-2403(B), which provides that ADE may annually “audit” ESA accounts to ensure compliance, and to conduct random quarterly and annual audits. A requirement that all participating ESA parents file quarterly expense reports and obtain ADE’s approval of all expenditures in those reports before receiving ESA funds going forward exceeds ADE’s statutory authority.

73. ADE’s evaluation and approval process for quarterly expense reports is extremely slow, cumbersome, and time-consuming, and as a consequence, ADE’s payments to ESA participants is often late, resulting in breaches of contract. Plaintiffs are informed and believe, and on that basis allege, that there are numerous ESA participants who have been paid late by ADE as a consequence of its requirement that prior quarterly expense reports be preapproved prior to disbursements of ESA account monies.

74. Plaintiffs are informed and believe, and on that basis allege, that Defendants contend that their actions in respect to Count Four are lawful in all respects.

#### **Declaratory Relief Allegations**

75. Plaintiffs incorporate by reference and reassert the preceding paragraphs as though fully set forth herein.

76. An actual and substantial controversy exists between Plaintiffs and Defendants as to their respective legal rights and duties. Plaintiffs contend that the challenged rules, policies, and actions of ADE and the Arizona Attorney General as described above are unlawful. Plaintiffs are informed and believe, and on that basis allege, that Defendants contend otherwise on all counts. Plaintiffs contend that ADE through the ESA program has failed to accept public notice and comment requirements that are specifically identified as required of the agency. Therefore there is no substantial evidence to show that the agency decision making was not arbitrary, capricious, or an abuse of discretion, and so the rules are unlawful.

77. Accordingly, declaratory relief is appropriate.

#### **Injunctive Relief Allegations**

78. Plaintiffs incorporate by reference and reassert the preceding paragraphs as though fully set forth herein.

79. Due to Defendants' enforcement of the challenged rules and policies, and other actions as alleged above, Plaintiffs and others similarly situated, are now and will continue to be, deprived of their rights as guaranteed by A.R.S. § 15-2401 et seq.

80. If not permanently enjoined by this Court, Defendants and their agents, representatives, and employees, will continue to implement the challenged rules and policies, and pursue actions as specified herein, which deprive Plaintiffs of their legal rights and cause them to face great uncertainty with respect to future financial plans, the stability and enforcement of their ESA contracts, and the future education of their special-needs children. Plaintiffs have no plain, speedy, and adequate remedy at law for such an injury.

81. Accordingly, injunctive relief is appropriate.

### **PRAYER FOR RELIEF**

Wherefore, Plaintiffs request that this Court take the following actions:

A. Declare that ADE's *ESA Handbook* is a rule promulgated without compliance with the Arizona Administrative Procedure Act and is therefore unlawful, and to enjoin ADE and/or the Attorney General from either giving effect to the rules stated therein or from informing parents that they must comply with it;

B. Declare that ADE has no lawful authority to demand "repayment" of ESA funds that it deems to have been misspent, and to enjoin ADE and/or the Attorney General from making such demands in the future;

C. Declare that ADE has no lawful authority to place "repaid" ESA funds anywhere other than into the specific participant's own ESA account, and to enjoin ADE from placing such funds anywhere other than back into the participant's own ESA account;

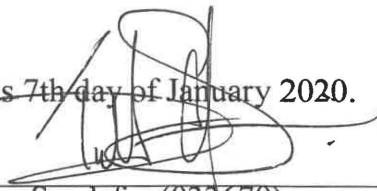
D. Declare that ADE has no lawful authority to require the filing and approval of quarterly expense reports as a condition of future disbursements of ESA funds, and to enjoin ADE and/or the Attorney General from imposing any such requirement;

E. Award Plaintiffs reasonable attorney fees pursuant to the private attorney general doctrine;

F. Award Plaintiffs costs as prevailing parties; and

G. Award such other and further relief as may be just, equitable, and proper.

**RESPECTFULLY SUBMITTED** this 7th day of January 2020.



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