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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

CALIFORNIA PARENTS FOR THE EQUALIZATION OF EDUCATIONAL MATERIALS,

Plaintiff,

v.

KENNETH NOONAN, RUTH BLOOM, ALAN BERSIN, YVONNE CHAN, DONALD G. FISHER, RUTH E. GREEN, JOE NUNEZ, JOHNATHAN WILLIAMS, and DAVID LOPEZ, all in their official capacities as Members of the California State Board of Education; and TOM ADAMS, in his official capacity as Director of the Curriculum Frameworks and Instructional Resources Division and Executive Director of the Curriculum Commission (of the California State Department of Education),

Defendants.

2:06-CV-00532-FCD-KJM

DEFENDANTS' REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR PARTIAL SUMMARY JUDGMENT

Date: March 7, 2008
Time: 10:00 a.m.
Dept: Courtroom 2

The Honorable Frank C. Damrell

Trial Date: November 4, 2008

Action Filed: March 14, 2006

INTRODUCTION

The undisputed facts in this case compel the conclusion that res judicata and collateral estoppel bar this action because a party in privity with Plaintiff California Parents for the Equalization of Educational Materials (CAPEEM) already litigated the claims and issues that CAPEEM pursues. The prior state court proceeding (*HAF* case) was brought by the Hindu American Foundation (HAF) and parents of California public school children who participated in the textbook adoption process (*HAF* plaintiffs). The prior action arises from the same factual allegations, presents the same legal principles, and seeks to vindicate the same primary right. Both actions challenge the allegedly unequal treatment of Hindus during the adoption process and the manner in which the adopted textbooks portray Hinduism. CAPEEM's purported reliance on new evidence or legal theories is insufficient to avoid the prior action's preclusive effect. Thus, CAPEEM's untimely opposition fails to present evidence that a genuine issue of material fact exists, and summary judgment is warranted.

ARGUMENT

I. THE COURT SHOULD STRIKE CAPEEM'S UNTIMELY OPPOSITION AND PRECLUDE CAPEEM FROM MAKING ORAL ARGUMENT.

The Court should strike CAPEEM's opposition and deny CAPEEM the opportunity for oral argument because its brief is untimely and exceeded the Court's 20-page limit. The attorneys in this action consented to serve documents electronically, and waived the right to serve documents via personal service or first class mail. L.R. 5-135(g)(1)(2). Pursuant to Local Rule 78-230, CAPEEM was required to file and serve Defendants [1/] with its opposition on Tuesday, February 19, 2008 (17 days before the hearing on March 7, 2008). It failed to meet this deadline. Instead, CAPEEM filed and electronically and personally served its 23-page opposition on Friday, February 22, 2008.

The Court in its discretion may refuse to consider matters that are not timely filed as a result of inexcusable neglect. *Cusano v. Klein*, 264 F.3d 936, 950-51 (9th Cir. 2001). In addition, "No

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1. The term "Defendants" refers collectively to: Kenneth Noonan, Ruth Bloom, Alan Bersin, Yvonne Chan, Donald G. Fisher, Ruth E. Green, Joe Nunez, Johnathan Williams, and David Lopez, all in their official capacities as Members of the California State Board of Education (SBE); and Tom Adams, in his official capacity as Director of the Curriculum Frameworks and Instructional Resources Division and Executive Director of the Curriculum Commission.

party will be entitled to be heard in opposition to a motion at oral arguments if opposition to the motion has not been timely filed by that party." L.R. 78-230(c). Accordingly, the Court need not consider the opposition, and CAPEEM has forfeited oral argument by its untimely filing.

II. THE UNDISPUTED MATERIAL FACTS COMPEL THE CONCLUSION THAT CLAIM AND ISSUE PRECLUSION BAR CAPEEM'S ACTION.

CAPEEM does not dispute the material facts in support of Defendants' motion for summary judgment and does not identify additional disputed facts.[2/] CAPEEM's nonmaterial, conclusory allegations in its opposition have no bearing on this motion for summary judgment. Fed. R. Civ. P. 56(e)(2) (opposing party "may not rely merely on allegations and denials"); *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir.1993) (conclusory allegations as to ultimate facts are insufficient to defeat summary judgment motion). To defeat a motion for summary judgment, the non-moving party must show (1) that a genuine factual issue exists, and (2) that this factual issue is material. *Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). The allegations in CAPEEM's opposition are not material to the issues of res judicata and collateral estoppel. Thus, the material facts pertinent to this motion are those in Defendants' Statement of Undisputed Facts.

When "the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard." *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S. Ct. 807, 818 (1991). Summary judgment is mandated where the facts and law will reasonably support only one conclusion. *Id.* Here, the undisputed material facts compel the conclusion that res judicata and collateral estoppel bar CAPEEM from bringing this action because it seeks to relitigate the same claims and issues already litigated by its virtual representative the *HAF* plaintiffs. As such, Defendants have met their burden of establishing the absence of a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2554 (1986).

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2. Although CAPEEM states that it disputes facts 3, 8, 10, 11, and 14, it provides no basis for such dispute other than requesting relief under Federal Rule of Civil Procedure 56(f). Mere references in memoranda or declarations to a need for discovery do not qualify as motions under Rule 56(f). *Brae Transp., Inc. v. Coopers & Lybrand*, 790 F.2d 1439, 1443 (9th Cir. 1986). "Rather, Rule 56(f) requires litigants to submit affidavits setting forth the particular facts expected from further discovery." *Cal. v. Campbell*, 138 F.3d 772, 779 (9th Cir. 1998). Similarly, its general citation to Kumar's declaration is insufficient to rebut fact 14. (CAPEEM SUF 2-3.)

III. COLLATERAL ESTOPPEL BARS THIS ACTION BECAUSE CAPEEM SEEKS TO ADJUDICATE THE SAME ISSUES THAT WERE ACTUALLY LITIGATED AND NECESSARILY DECIDED IN THE PRIOR ACTION.

A. The Issues in this Case Are Identical to Those in the Prior Proceeding.

Both the CAPEEM and *HAF* cases address the same issues of whether 1) the textbook adoption process was procedurally deficient and 2) the adopted textbook content is substantively deficient. CAPEEM argues that collateral estoppel cannot apply because the issues in the current case and the *HAF* case are purportedly not identical. (Opp'n 13-15.) However, the California Supreme Court has explained, "The 'identical issue' requirement addresses whether 'identical factual allegations' are at stake in the two proceedings, not whether the ultimate issues or dispositions are the same." *Lucido v. Superior Ct.*, 51 Cal.3d 335, 342 (1990). By comparing specific portions of the *HAF* papers (petition and briefs) and CAPEEM's Second Amended Complaint (SAC), Defendants established that the two actions are based on identical factual allegations and legal principles. (Defs. Br. 6-9.) CAPEEM does not dispute that both cases are premised on the same content-based issues, procedural challenges, and same issues of law. *Id*. Rather, CAPEEM argues that its case is distinct because it also challenges the portrayal of other religions, the seventh grade textbooks, and the Content Standards the State uses to determine textbook content.[3/] (Opp'n 13, 14:18-26.)

Simply alleging different evidence or legal theories cannot save CAPEEM's action. Presentation of new or different evidence in support of its claim is not a valid basis for dismissing the preclusive effect of the state court's prior judgment. 18A Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4408, at 183 (2nd ed. 2002); *Evans v. Celotex*, 194 Cal. App. 3d 741, 748 (Cal. Ct. App. 1987) ("An exception to collateral estoppel cannot be grounded on the alleged discovery of more persuasive evidence. Otherwise, there would be no end to litigation."). A major function of claim preclusion is to force a plaintiff to explore all the facts, develop all the theories, and demand all the remedies in the first suit. 18A Wright, Miller & Cooper, *Federal*

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3. The latter two allegations are not in the SAC, and CAPEEM cannot now assert them as a means to save its action. *Wasco Products Inc. v. Southwall Techs. Inc.*, 435 F.3d 989, 992 (9th Cir. 2006) ("Simply put, summary judgment is not a procedural second chance to flesh out inadequate pleadings."); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-93 (9th Cir. 2000) (plaintiff could not proceed at summary judgment stage on new theory of liability that was not raised in complaint or during discovery because it would prejudice the defendant).

Practice and Procedure: Jurisdiction 2d § 4408, at 185. Neither new evidence nor a change in legal theory is sufficient to bar the preclusive effect of a prior judgment. *Id* at 179, 183. Were collateral estoppel to require identical legal theories or causes of action, "there would be no end to litigation for injuries arising out of the same facts, as long as a party could offer another legal theory by which the same issue might be differently decided." *Evans*, 194 Cal. App. 3d at 746-47. Here, CAPEEM simply offers new legal theories and evidence on the same previously adjudicated issues, neither of which can bar the preclusive effect of the prior adjudication.

Moreover, contrary to CAPEEM's contentions, the *HAF* action also challenged the textbooks' portrayal of other religions, including the portrayal of Judaism, Christianity, Islam, and Buddhism as compared to Hinduism.[4/] (*See* SUF ¶¶ 22, 39, 63, 67, 77, 86.) CAPEEM's allegedly "new" challenges to the textbooks (Kumar Dec., Exh. A) are all textbook citations that cover the same subject matter as the cites presented in the *HAF* case, challenge material in the same chapters, or, in many cases, are identical to the citations challenged in the *HAF* case. (Supp. Rekers Dec., Exh. A.) CAPEEM's assertion that it is challenging different textbook contents is inaccurate and a specious attempt to present new evidence on the same issue of whether the adopted textbooks' contents are substantively deficient, which the state court already adjudicated.

B. The Issues in this Case Were Actually Litigated and Necessarily Decided in the State Court Proceeding.

Contrary to CAPEEM's contentions, the adoption process and textbook content issues (including the treatment of other religions) were actually litigated and necessarily decided in the

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4. CAPEEM states throughout its opposition that it challenges the "indoctrination" and teaching of other religions. (Opp'n 7-8, 13:26-14:3, 15:1-12; 16:12, 17:13-15; 18:22-19:1; 19:13-20). In the SAC, CAPEEM challenges the textbooks' portrayal of different religions in the context of Hinduism (i.e., the more favorable portrayal of other religions denigrates Hinduism). (*See* SAC ¶¶ 6.3-6.10.) The opposition's allegations regarding indoctrination are inconsistent with and beyond the scope of the SAC to the extent that they focus solely on the teaching of religion without regard to Hinduism. Moreover, CAPEEM lacks standing to bring such allegations because they are not germane to CAPEEM's stated purpose. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343, 97 S. Ct. 2434, 2441 (1977). Therefore, Defendants interpret these allegations as challenging the portrayal of other religions as compared to Hinduism, as set forth in the SAC. Additionally, the Arvind Kumar declaration in support of the "indoctrination" claims is argument, and the exhibit attached thereto lacks proper authentication or foundation. (Opp'n 7-8; Defs. Evid. Obj. 3.)

HAF case, as state law requires. (Opp'n 14-15; Defs. Br. 9-12 citing *Lucido*, 51 Cal.3d at 342.) An issue is "necessarily decided" if the resolution of the issue cannot have been "entirely unnecessary" to the judgment in the prior proceeding. *Lucido*, 51 Cal.3d at 342. In considering the content claims, the state court considered whether the textbooks encourage a religious belief and "indoctrinate the student in any particular religious belief." (Defs. Br. 10; SUF ¶ 96.) The court found the textbooks to be neutral and not to favor other religions over Hinduism. (Defs. Br. 11; SUF ¶¶ 99, 100.)

The consideration of "whether use of the textbook materials would result in indoctrination, or whether Christianity was presented in a factual manner in comparison to other religions" was clearly necessary in the court's judgment, despite CAPEEM's contention to the contrary. (Opp'n 15:1-3.) Similarly, the issue of whether the adoption process was structured in such a way so that the resulting textbooks advanced "the perspective of Abrahamic religions while having the opposite effect on Hinduism" could not have been entirely unnecessary in the court's judgment. (Opp'n 15:6-8); *Lucido*, 51 Cal.3d at 342. If the process had resulted in textbooks that endorse Abrahamic religions, the court could not have determined that the adopted textbooks are neutral and do not tend to favor other religions over Hinduism. (SUF ¶¶ 99, 100.) Accordingly, the issues CAPEEM raises in its opposition were actually litigated and necessarily decided and collateral estoppel bars the current action.

CAPEEM's argument that it cannot be precluded from relitigating issues that were previously decided against Defendants lacks merit. (Opp'n 14.) Collateral estoppel bars the relitigation of an issue actually decided. *Lucido,* 51 Cal.3d at 341. The success of the litigation is not one of the factors determining the applicability of the doctrine. *Id.* The authority cited by CAPEEM does not state otherwise, and the argument is specious.[5/]

CAPEEM has failed to present evidence to contradict that this action is based on the identical

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5. The full quotation to the *Zevnik* opinion cited by CAPEEM is: "The rule was then, and is now, that a prior judgment in favor of the defendant in another action is a bar to a subsequent action by the same plaintiff against the same defendant based on the same cause of action only if the judgment was on the merits." *Zevnik v. Superior Ct.*, 159 Cal. App. 4th 76, 87 (Cal. Ct. App. 2008). The paragraph is addressing whether a prior judgment was on the merits, not whether it was successful. (*See* Opp'n 14:12-14.)

issues as the prior proceeding, and those issues were actually litigated and necessarily decided. As such, the current action is barred by collateral estoppel and summary judgment is appropriate.

IV. RES JUDICATA BARS CAPEEM'S CLAIMS BECAUSE A PRIMARY RIGHT GIVES RISE TO ONLY ONE CAUSE OF ACTION, REGARDLESS OF THE AVAILABILITY OF DIFFERENT LEGAL THEORIES.

CAPEEM's argument that the *HAF* case does not involve the same primary right because *HAF* pursues different legal theories is without merit. (Opp'n 16-19.) The most salient characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action regardless of the availability of different legal theories or remedies. *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 904 (2002). A "primary right" is the right to be free from a particular injury, which is defined in part by the set of facts from which the injury arose. *Id.*; *Fed'n of Hillside & Canyon Ass'ns v. City of L.A.*,126 Cal. App. 4th 1180, 1203 (Cal. Ct. App. 2004). CAPEEM does not dispute that the injury to both sets of plaintiffs arises from the same set of facts. Moreover, CAPEEM cannot deny that the two actions seek to vindicate the same injury, i.e., the right of Hindus to be equitably treated in the 2005-2006 history-social science textbook adoption process and to have their religion neutrally portrayed in the resulting textbooks.

The fact that the *HAF* plaintiffs sought to vindicate the injury under state law theories (the APA, Bagley-Keene Open Meeting Act, and the content standards/Education Code) does not alter the right at issue.[6/] CAPEEM's argument that the Constitutional protections are greater than state law protections and stem from different policies misses the premise of res judicata. (Opp'n 15-19.) Under the primary rights theory, the focus is on the injury that the party seeks to vindicate. *Mycogen*, 28 Cal. 4th at 904 ("primary right" is right to be free from a particular injury). Here, the injury is the same. CAPEEM's focus on the differences in the legal theories pursued in the two cases is futile; though there may be multiple theories upon which recovery might be predicated, or

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6. Contrary to CAPEEM's argument, the California Education Code does prevent indoctrination and entanglement with religion. (*See, e.g.*, California Education Code § 60044 prohibits instructional materials 1) which reflect adversely on someone because of his or her "race, color, creed, national origin, ancestry, sex, handicap, or occupation" and 2) from containing "[a]ny sectarian or denominational doctrine or propaganda contrary to law.")

many different forms of relief, one injury gives rise to only one cause of action. *Id.*

CAPEEM's reliance on *Agarwal* to support its contention that the *HAF* case does not involve the same primary right because it pursues different legal theories is misplaced. (Opp'n 15-16.) In *Agarwal*, the court concluded that different primary rights were at issue because the plaintiff had suffered multiple harms, as illustrated in part by the different remedies available to her. *Agarwal v. Johnson*, 25 Cal. 3d 932, 954 (1979). Here, in contrast, both cases allege the same injury to the Hindu community, and both cases seek injunctive and declaratory relief. Courts have long recognized that Constitutional claims arising from the same injury are barred in subsequent actions, regardless of whether they were raised in the prior state court proceeding. *See, e.g., Clark v. Yosemite Cmty. Coll. Dist.*, 785 F.2d 781, 786-87 (9th Cir. 1986) (noting that federal Constitutional claims could have been brought in state mandamus proceeding); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir.1975), *cert. denied*, 423 U.S. 1066, 96 S. Ct. 807 (1976) ("[W]here the federal constitutional claim is based on the same asserted wrong as was the subject of a state action, and where the parties are the same, [r]es judicata will bar the federal constitutional claim whether it was asserted in state court or not").

CAPEEM is barred by the doctrine of res judicata from litigating the Constitutional claims it raises in this action. The claims arise from the same injury as that adjudicated in the *HAF* case and could have been raised in the prior proceeding. As such, summary judgment is appropriate as to all of CAPEEM's claims.

V. PRIVITY EXITS BECAUSE THE *HAF* PLAINTIFFS ADEQUATELY REPRESENTED CAPEEM; THEY HAD THE SAME INTERESTS AND A STRONG MOTIVE TO ASSERT THOSE INTERESTS.

Although not a party to the *HAF* final settlement agreement, CAPEEM is bound by it because it is in privity with the *HAF* plaintiffs. *See Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Assoc.*, 60 Cal. App. 4th 1053, 1069 (Cal. Ct. App. 1998) (party bound by prior settlement agreement). Identity of interests and adequate representation are due process prerequisites to a finding of privity that binds a party with the results obtained in an earlier proceeding in which it did not participate. *Seadrift*, 60 Cal. App. 4th at 1070. A party is adequately represented for purposes of privity if the first party had the same interests as the party to be precluded, and a motive

to assert those interests. *Id.* at 1071. Defendants have established that the *HAF* plaintiffs had the same interests as CAPEEM, and that the *HAF* plaintiffs adequately represented those interests in the prior state court proceeding. (Defs. Br. 13-17.) Thus, privity exists between the parties.

Indeed, CAPEEM does not dispute that the *HAF* plaintiffs have the same interests and a motive to assert those interests.[7/] Rather, CAPEEM contends that privity does not exist because it was allegedly not provided notice of, or an opportunity to participate in, the *HAF* settlement and because no fairness hearing was held to determine the settlement's effect on third parties. (Opp'n 20:9-10, 21-23.) This contention must be rejected because these are not prerequisites for adequate representation. To the contrary, a party may be adequately represented despite a lack of notice of the prior proceeding. *Alvarez v. May Dep't Stores*, 143 Cal. App. 4th 1223, 1239 (Cal. Ct. App. 2006) (putative class members bound by prior litigation despite lack of notice of prior unsuccessful attempt to certify a class). Furthermore, a party need not have an opportunity to participate in or control the prior proceeding in order to be bound by it. *Seadrift*, 60 Cal. App. 4th at 1072-73 (party was adequately represented in case that ended in a settlement, despite denial of motion to intervene and failure to control or directly participate). The only requirement is that the prior party adequately represented the interests of the subsequent party. *Id.* Here, CAPEEM does not dispute that the *HAF* plaintiffs adequately represented it (i.e., the *HAF* plaintiffs have the same interests and a motive to assert those interests). Thus, CAPEEM's due process rights were sufficiently protected by the *HAF* plaintiffs' adequate representation in the state court proceeding for the purposes of res judicata and collateral estoppel. *Seadrift*, 60 Cal. App. 4th at 1071.

CAPEEM contends that the Court should apply federal (*Headwaters, Inc. v. United States Forest Service*, 399 F.3d 1047 (9th Cir. 2005)) and not state law in deciding whether it should be

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7. Although not in its argument, CAPEEM states in other parts of the brief that HAF is not a member organization, and that none of CAPEEM's members participated in or were represented in the *HAF* case. (*See, e.g.*, Opp'n 10:13-15; Kumar Dec. ¶ 2.) According to its website, HAF does have members, and a person can even register for membership on the website. Hindu American Foundation, http://www.hinduamericanfoundation.org/membership.php, last visited, Feb. 27, 2008. However, so long as the *HAF* plaintiffs are CAPEEM's virtual representatives, it does not matter whether the persons are identical. *See L.A. Unified Sch. Dist. v. L.A. Branch NAACP*, 714 F.2d 935, 943 (9th Cir. 1983) *aff'd en banc*, 750 F.2d 731 (1984)

subject to the preclusive effect of the judgment rendered in the *HAF* case. (Opp'n 20:9-10, 21-23.) CAPEEM's contention is misplaced because a federal court must look to state law in determining whether a state court action bars a subsequent federal action. *Mfrd. Home Cmtys., Inc. v. City of San Jose,* 420 F.3d 1022, 1031 (9th Cir. 2005). *Headwaters* involved three separate federal court actions and did not address the issue of the preclusive effect of a prior state court judgment on a subsequent federal action. *Headwaters, Inc v. U.S. Forest Serv.*, 399 F.3d 1047. Accordingly, *Headwaters* is not the rule of law that guides resolution of the matters at issue in this proceeding.

However, even under federal law, the Ninth Circuit has recognized that adequate representation by a named party to the prior action is a prerequisite to a finding of virtual representation for the purposes of preclusion. *Irwin v. Mascott*, 370 F.3d 924 (9th Cir. 2004); *Pedrina v. Chun*, 97 F.3d 1296, 1301-1302 (9th Cir. 1996). As in California, the two necessary factors to establish virtual representation for preclusion are the identity of interests between the parties and adequate representation of the absent party's interests in the prior action, although other factors may also be considered. *Irwin*, 370 F.3d at 930. Where adequate representation is established, due process has been satisfied. *Headwaters*, 399 F.3d at 1054. Thus, both state and federal law require adequate representation and an identity of interests in order for one party to be deemed the virtual representative of another. Moreover, adequate representation under both federal and state law constitutes sufficient due process for the purposes of preclusion. Because CAPEEM does not dispute that *HAF* adequately represented its interests in the prior proceeding, this action is barred by the preclusive effect of the prior state court judgment issued in *HAF*.

VI. STRONG POLICY REASONS SUPPORT THE APPLICATION OF RES JUDICATA AND COLLATERAL ESTOPPEL.

Res judicata and collateral estoppel promote the public policies of curtailing vexatious litigation, promoting judicial economy, and avoiding the issuance of inconsistent judgments that undermine the integrity of the judicial system. *Lucido*, 51 Cal.3d at 343. Contrary to CAPEEM's argument, this case could result in inconsistent judgments even though CAPEEM asserts Constitutional, rather than state, legal theories. (Opp'n 20-21.) Because the issues in the two cases are identical, this Court would have to revisit the same evidence and legal principles. For example,

if the Court found that the textbooks indoctrinate students or promote religious beliefs in violation of the Establishment Clause, its ruling would be inconsistent with the state court's finding that the textbooks are neutral and do not compare the Hindu religion unfavorably to other religions. (SUF ¶ 100.) Dismissal of this litigation will also promote judicial economy. In addition, public policy supports that the State should not be subject to an endless stream of litigation based on the same claims and issues arising out of the same factual circumstances. *Alvarez*, 143 Cal. App. 4th at 1240.

CONCLUSION

Defendants have established that no genuine issue of material fact exists for trial because the undisputed facts and law reasonably support only one conclusion: CAPEEM's action is barred by res judicata and collateral estoppel. CAPEEM seeks to relitigate the same claims and issues as were previously litigated by the *HAF* plaintiffs. The *HAF* plaintiffs and CAPEEM have the same interests, and the *HAF* plaintiffs adequately represented CAPEEM in the prior state court proceeding. As such, privity exists. CAPEEM cannot avoid the preclusive effect of the prior state court judgment by simply alleging new legal theories or new evidence. All of the allegations in the current complaint could have been brought in state court proceeding, which sought to vindicate the same primary right. Accordingly, CAPEEM's action is barred by res judicata and claim preclusion, and strong policy reasons support its dismissal. CAPEEM has failed to provide evidence of specific material facts to establish that a genuine issue of material fact exists. Thus, Defendants respectfully request that the Court grant the motion for summary judgment and dismiss this action in its entirety.

Dated: February 29, 2008

Respectfully submitted,

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