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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF [REDACTED] DIVISION

[REDACTED],
Plaintiff,
vs.
[REDACTED]
COMPANY, INC.; [REDACTED]
[REDACTED]; and DOES 1 through 20,
inclusive,
Defendants.

Case No. [REDACTED]
**MEMORANDUM OF POINTS AND
AUTHORITIES SUBMITTED BY PLAINTIFF
IN OPPOSITION TO DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT
BASED UPON STATUTE OF LIMITATIONS**
Date: [REDACTED], 2006
Time: [REDACTED] o'clock A.M.
Dept: [REDACTED]
Discovery Cutoff: [REDACTED], 2006
Motion Cutoff: [REDACTED], 2006
Trial Date: [REDACTED], 2006

Plaintiff [REDACTED] [REDACTED] ("Plaintiff") hereby submits the following
Memorandum of Points and Authorities in opposition to the motion for summary judgment filed by
Defendant [REDACTED] COMPANY, INC. ("[REDACTED]") on the ground that Plaintiff's
complaint is barred by the applicable Statute of Limitations.

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I

SUMMARY OF DEFENDANT’S ARGUMENT

Defendant ██████ contends that “Based on her own testimony, by the summer of 2001, ██████. ██████ was complaining to management regarding conditions in the building. In her own words, these conditions caused plaintiff to have trouble breathing, sore throats and drippy eyes. By the summer of 2001 plaintiff had suffered an injury and, as demonstrated by her complaints, had a belief that the injuries were caused by conditions in the building. At that point, her cause of action for bodily injury accrued. Having failed to file suit until three years later, her complaint is time-barred.”

Defendant relies on C.C.P. Sec. 335.1 or, alternatively, C.C.P. Sec. 340.8. Both sections prescribe a statute of limitation of two years for causes of action falling within their parameters.

II

SUMMARY OF PLAINTIFF’S RESPONSE TO DEFENDANT’S ARGUMENT

There are two separate and independent reasons why the Statute of Limitations is not a bar to the complaint in this case.

First: In a typical case in which the Statute of Limitations is being asserted as a defense: (i) something actionable has happened -- a tort, a breach of contract, or some other type of cause of action; then (ii) the plaintiff has thereafter done nothing to pursue its rights, from which the expression “sitting on its rights” is derived; then (iii) after sitting on its rights for a period longer than specified in the applicable Statute of Limitations statute, the plaintiff finally files suit. In this scenario, the action would clearly be time-barred.

But there are several circumstances under which the defendant is estopped to rely on the Statute as a defense, and the action at bar demonstrates one of them: Where a cause of action has arisen in favor of a potential plaintiff, but the parties (or their surrogates) who stand to be named as defendants induce the plaintiff to refrain from filing the suit by saying -- as in the instant action -- “Don’t worry, we’re looking into the problem, and as soon as we’ve got it figured out, we’ll fix it” -- those same parties should be, and *are* under applicable California law, estopped from relying on the Statute as a defense.

1 The rule is founded not only on simple principles of equity and fairness, but also on society's interest in
2 allowing parties to resolve their differences amicably without resort to the courts whenever possible.

3 **Second:** Plaintiff is not a medical doctor, nor is she a professional engineer with the background
4 to evaluate if, just because she has a sore throat on a particular day, the symptom was caused by playing
5 too much in the snow with her kids the day before versus whether it was caused by one or more of the
6 indoor contaminants that collectively add up to the "Sick Building Syndrome" ("SBS").¹ Defendant
7 argues that since Plaintiff began to develop symptoms by 2001 that she suspected might be attributable
8 to conditions existing in the subject building, her cause of action arose then, and it was therefore then
9 that the Statute of Limitations began to run. But the early-onset symptoms of which Plaintiff originally
10 complained to her manager -- at first, that the air in the building seemed "stale" [Deposition of ██████████
11 ██████████ ("██████████ Depo."), at p. 22, lns. 13-25; p. 26, lns. 16-19; p. 28, lns. 12-15; p.
12 29, lns. 9-10; p. 40, lns. 15-16] -- could have been attributed to a number of factors and, more
13 importantly, *did not rise to the level of injury for which Plaintiff seeks recovery by way of her complaint*
14 (specifically, persistent pain above and below and to the left eye and ear). Nor did they afford Plaintiff
15 any indication of the existence of the underlying factors which are pleaded in the complaint and that
16 caused Plaintiff's injuries: Specifically, the presence of mold contamination in the building where she
17 worked. Plaintiff finally learned the true nature of her condition, as well as its causes, in 2003 following
18 consultation with several doctors, a date well within the applicable Statute of Limitations provisions
19 upon which Defendant is attempting to rely.

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25 ¹ Whether or not SBS really existed was for some time a matter of controversy, but no longer. As a
26 Florida federal district court noted in *West American Ins. Co. v. Band & Desenberg* (1996) 925 F.Supp.
27 758: "It is generally recognized that 'sick building syndrome' is caused by a variety of contaminants in
28 the indoor air that give rise to indoor air pollution. See Andrew Kopon, Jr. & Joseph C. Gergits, *Indoor
Environment: Regulatory Developments and Emerging Standards of Care*, 62 Def.Cons.J. 47 (January
1995), and sources cited therein. See also, *Mackey v. TKCC, Inc.*, 134 Or.App. 121, 894 P.2d 1200
(1995) (discussing sick building syndrome as caused by indoor air pollution)."

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III
DEFENDANT IS ESTOPPED FROM ASSERTING THAT PLAINTIFF'S
COMPLAINT IS BARRED BY THE STATUTE OF LIMITATIONS

A. The Statute of Limitations is “Tolled” by the Doctrine of Equitable Estoppel in Situations Wherein the Plaintiff has Delayed Filing Suit in Reliance Upon Actions Represented by the Defendant (or its Surrogates) as Being Attempts to Remedy the Situation by Which Plaintiff is Aggrieved.

The law in California in this area is clear and was recently described in *Airlines, Inc. v. Ontario Aircraft Services, Inc.* (2002) 104 Cal.App.4th 1053, 1060-1061:

“To create an equitable estoppel, ‘it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss.’ * * * ‘Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.’ (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152-1153, quoting *Benner v. Industrial Acc. Com.* (1945) 26 Cal.2d 346, 349-350, italics omitted; see also *Ginns v. Savage* (1964) 61 Cal.2d 520, 524-525.)”

The notion that the Statute of Limitations is tolled when a plaintiff does not hasten to bring suit within the ordinary statutory period because it believes that good-faith efforts are underway by the other side to resolve the problem that would be the subject of the putative litigation goes back in California jurisprudence well over fifty years. In *Carruth v. Fritch* (1950) 36 Cal.2d 416, 433, the Supreme Court, quoting *Howard v. West Jersey & S. S. R. Co.* (N.J. Ch. 1928) 141 A. 755, 757-758, opined that:

“‘[O]ne cannot justly or equitably lull his adversary into a false sense of security, and thereby cause his adversary to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his course of conduct as a defense to the action when brought.’”

1 **B. In the Action at Bar, It Was Specifically Represented Unto Plaintiff That Remedial**
2 **Measures to Alleviate the “Sick Building Syndrome” by Which Her Workplace Was**
3 **Affected Were Being Undertaken.**

4 It is true that Plaintiff and several of her co-workers had commented, as early as 2001 when their
5 DMV branch first moved into the subject building, that they were experiencing symptoms such as -- at
6 first -- the feeling that the air inside the building was “stale” [REDACTED] Depo., at p. 22, Ins. 13-25; p.
7 26, Ins. 16-19; p. 28, Ins. 12-15; p. 29, Ins. 9-10; p. 40, Ins. 15-16]. These comments, according to
8 Plaintiff’s deposition testimony, elicited an almost immediate response -- one that continued all the way
9 through 2003²:

10 “Q. What was your purpose in making a statement about the conditions
11 um...that you were working in at that time?

12 A. The purpose was to hopefully fix the things that were -- seemed to be
13 bothering everyone.

14 Q. And did you notice any response from management in regard to these
15 complaints?

16 A. Always.

17 Q. And what were the first things that you saw happen because of these
18 complaints?

19 A. I think the first things that were seen um...was a representative of the
20 company that was supposed to clean the building, clean the floors and
21 stuff.” [Bettencourt Depo.” at p. 43, Ins. 10-22]

22 * * * * *

23 “Q. Other than the manager at the [REDACTED] and your attorneys, have you
24 ever spoken to anyone else about conditions at that building?

25 A. Yes.

26 Q. And who else have you talked to?

27 ² That Plaintiff was continually being reassured that something was being done to resolve the issues
28 that were by that time well known to exist up until sometime in 2003 is clear from two facts. First, her
29 testimony that she met sometime during that year with the “team” that had been dispatched from
30 [REDACTED] to investigate the complaints concerning the building [REDACTED] Depo. at pp. 44-47, Ins.
31 23-12]. Second, that she received copies of one or more “reports” generated as a result of that team’s
32 inspection. As Defendant’s own motion for summary judgment makes clear, there were in total only
33 four separate reports prepared by *anyone* regarding the subject building, and they were *all* prepared in
34 mid-or-late 2003.

1 * * * * *

2 A. There was a team that came down to visit that [REDACTED], and I don't
3 remember their names. They were from [REDACTED] headquarters, [REDACTED]
4 headquarters office.

5 Q. And did you have any understanding as to what their purpose was in
6 visiting the location?

7 A. Fact finding.

8 Q. And do you recall when that took place?

9 A. I'm sorry, no.

10 Q. Do you know what they did in terms of their fact finding

11 A. Could you be more specific?

12 Q. I asked you if you knew what the team from [REDACTED] was doing
13 there, and you said fact finding.

14 A. Right.

15 Q. So I'm just trying to find out what they did.

16 A. What they did about the problem?

17 Q. Well, did they interview people, did they take samples, did they run
18 tests --

19 A. Oh. Okay.

20 Q. -- did they take photographs? How did they do their investigation?

21 A. Thank you.

22 Q. Sure.

23 A. They were just present at one of our morning meetings. But I think I
24 said to you one meeting a month. Actually, every Wednesday. There's a
25 meeting every Wednesday, first hour of the day before the building opens.
26 So...and they just sat down, and it was more of a...like this forum, and
27 everybody talking.

28 Q. And you don't recall when that took place?

A. I believe it was in mid to late 2003.

Q. And did these individuals indicate what their position with the [REDACTED]
was?

A. Yes.

Q. And what was it?

A. I don't know. I don't remember.

Q. All right. And so they were made available to answer questions, is that
correct?

A. No. I don't think so.

Q. So what did they do there?

A. They sat and listened to our concerns, and they took a tour of the
office.

Q. Were you ever provided with the results of any investigation as to
whether any contaminants, toxins, anything existed in the building which
should not --

A. Yes.

Q. And who provided those results to you?

1 A. The manager.

2 Q. And when was this?

3 A. It would have also been mid to late -- I don't remember. I want to say
4 2003 also. As close as I can come." [REDACTED] Depo. at pp.44- 47, Ins.
5 23-12]

6 * * * * *

7 "Q. When you first complained to your manager about the conditions in
8 the building, what was her response?

9 A. Her -- it was a pretty informal meeting, and her response was that she
10 was checking into filters or things that maybe needed to be changed.

11 Q. Did you personally indicate to her at that time -- and we're talking
12 about 2001 -- that you were concerned about the possible impact on your
13 health because of the conditions in the building?

14 A. No. I don't think so.

15 Q. What was the reason that you were complaining then?

16 A. I was uncomfortable." [REDACTED] Depo. at p. 24, Ins. 4-16]

17 * * * * *

18 "Q. Did the [REDACTED] management take any action, that you can recall, in
19 response to the complaints about conditions at the [REDACTED] Street building other
20 than what you've told me so far?

21 A. Yes.

22 Q. What did they do that you can recall?

23 A. Um...she conveyed to us that she had talked to um...people in
24 [REDACTED] at [REDACTED] headquarters explaining to them the problems we
25 were having. She also conveyed that she spoke to um...the leasing
26 company that I -- as best I can remember, was told that they were
27 responsible for the cleaning of the building.

28 Q. And do you recall that -- whether any repairs or any other action was
actually taken um...that you observed?

A. While I was there? I'm going to ask you to rephrase -- restate that for
me.

Q. Sure. You told me that your manager relayed some conversations that
she had after she received the complaints about conditions in the building.
Did you see any action taken by the [REDACTED] management in response to
those complaints?

A. Yes.

Q. What did you see happen?

A. Um...they..they ordered fans um...to be put on during our off time, so
during the weekends or holidays the fans were supposed to run to dry out
the building. They also -- and I'm going to say they, because I honestly
don't know whether that was the leasing company or [REDACTED] headquarters,

1 but I know that the manager was asked to remove the mats that the chairs
2 sat on during the weekends also.

3 Q. Did that seem to alleviate the problem?

4 A. No.” [REDACTED] Depo. at pp. 63-65, lns. 23-7]

5 * * * * *

6 “Q. Did you ever ask that those areas be cleaned?

7 A. Yes.

8 Q. Well --

9 A. Excuse me. Me personally?

10 Q. I’m asking at this point, yes. You personally.

11 A. No.

12 Q. Was it discussed at these meetings?

13 A. Yes.

14 Q. And do you recall whether or not, for instance, the carpets were
15 cleaned as a result of these requests?

16 A. I believe so at one point.

17 Q. Do you recall when that occurred?

18 A. I really don’t.

19 Q. Do you recall whether or not that alleviated the problem?

20 A. No. It didn’t get -- it didn’t do anything. I just don’t remember when
21 you said cleaning if that meant shampooing or vacuuming.” [REDACTED]
22 Depo. at p. 68, lns. 3-20]

23 The first of Plaintiff’s two primary reasons for not filing suit earlier than she did was that she
24 was continually being reassured that the matter of the “sick building” in which she worked was actively
25 being worked on with a view toward arriving at a solution. Under these circumstances, Defendant is
26 estopped from pleading the Statute of Limitations as a defense against a lawsuit which, had Plaintiff not
27 been led to believe that it involved a problem that was being worked on diligently in an effort to achieve
28 a fix, would undoubtedly been filed much earlier. *Airlines, Inc., supra; Vu v, supra; Prudential
Property & Casualty Ins. Co., supra; Benner v. Industrial Acc. Coms., supra; and Ginns, supra.*

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**IV
PLAINTIFF DID NOT KNOW, AND COULD NOT REASONABLY
HAVE KNOWN, OF THE EXISTENCE OF HER CAUSE OF ACTION
UNTIL WELL WITHIN ONE YEAR PRIOR TO HER FILING OF
THE ACTION AT BAR**

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A. While It is True That Plaintiff Suffered From Sinus Infections and Other Related Complaints After Relocating to the Subject Premises, These Are Commonplace Within the General Population, and Were Insufficient to Commence the Running of the Statute of Limitations.

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The various symptoms of which Plaintiff and several of her co-workers located in the same building eventually reported included sore throats, some respiratory distress, and drippy eyes. These, and *only* these, are enumerated in Defendant’s Notice of Motion and Motion for Summary Judgment (see pp. 2-3, lns. 1-9 thereof). Defendant claims that this alone was sufficient to place Plaintiff on notice that she had a claim for what would ultimately turn out to be a classic instance of “Sick Building Syndrome” (“SBS”).³

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The court may certainly take judicial notice of the fact that sore throats, respiratory distress, and drippy eyes -- the three factors relied upon by Defendant in support of its motion for summary judgment -- are quite commonplace in the general population, specifically in the form of the “common cold.” In the United States, on average, preschool children have 9 colds per year; those in kindergarten, 12 colds per year; and adults, 7 colds per year.⁴ In light of these statistics, it would have been unreasonable for Plaintiff to have assumed it to be a known fact that rather than having the common cold or some variant thereof, she was in fact suffering from the much-less-well-known effects of SBS.

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³ It is difficult to see how these three symptoms alone could have been sufficient to put Plaintiff on notice of what would ultimately turn out to be her real claim. According to the Office of Air and Radiation, Office of Research and Development, Office of Radiation and Indoor Air of the United States Environmental Protection Agency (“EPA”), in its definitive circular released in April, 1991, the indicators of SBS include: “Building occupants complain of symptoms associated with acute discomfort, e.g., headache; eye, nose, or throat irritation; dry cough; dry or itchy skin; dizziness and nausea; difficult in concentrating; fatigue; and sensitivity to odors.” A true and correct copy of the EPA circular is attached to these Points and Authorities as Exhibit “A”.

⁴ *Webster's New World™ Medical Dictionary* First and Second Editions (January, 2003) John Wiley & Sons, Inc.; ISBN: 0-7645-2461-5.

1 Under Defendant's analysis, by analogy, *any* type of medical condition or problem -- a hangnail,
2 for example -- would be sufficient to commence the running of the Statute of Limitations even if the
3 hangnail festered for three years, then turned into something more acute. That is in a sense what
4 happened here -- Plaintiff at first suffered no symptoms at all; then later during her work inside the
5 subject building, began to experience the feeling that she was breathing stale air; then later still
6 developed some symptoms that could easily have been ascribed to the common cold or certainly to some
7 malady much less exotic than SBS; then finally, in 2003, within less than a year of filing the instant
8 action, finally learned the full nature, cause, and extent of her condition.

9 Note that in her complaint, Plaintiff seeks recovery of damages in two different areas:

10 First are the damages comprised of persistent pain above and below and to the left eye and ear,
11 coupled with her inability to wear eyeglasses as a result of this pain. These problems did not manifest
12 themselves until they culminated in her being declared unfit to work by a physician and had to leave her
13 job at ██████ in August, 2005 [██████████ Depo. at pp. 80-82, Ins. 3-22].

14 Second are the damages resulting from Plaintiff's exposure to mold, an often-present
15 contaminant in SBS cases. Plaintiff's doctor has confirmed to her that this mold exposure is a
16 component of her overall medical problems at the present time [██████████ Depo. at p. 62, Ins. 12-24].
17 Not being a doctor, epidemiologist, or trained building engineer, Plaintiff can hardly be held to the
18 standard of scientific expertise that would imply that she should have been able to recognize mold
19 immediately on sight; identify which of the hundreds of species of mold she might be looking at; and
20 weigh what the pathological implications of that mold could potentially be. Defendant seeks in its
21 motion for summary judgment to, in effect, label a ██████ clerk as a proverbial rocket scientist.

22
23 **B. Plaintiff Did Not Discover the True Nature of Her Condition, or the Fact That Such**
24 **Condition Was Related to Her Place of Work, Until 2003, Less Than One Year**
25 **Prior to the Filing of Her Complaint in the Within Action.**

26 Recall Footnote #2, *supra*, in which it was observed that that Plaintiff was continually being
27 reassured that something was being done to resolve the issues that were by that time well known to exist
28 up until sometime in 2003 is clear from two facts. First, her testimony that she met sometime during
that year with the "team" that had been dispatched from ██████ to investigate the complaints

1 concerning the building [REDACTED] Depo. at pp. 44-47, lns. 23-12]. Second, that she received copies
2 of one or more “reports” generated as a result of that team’s inspection. As Defendant’s own motion for
3 summary judgment makes clear, there were in total only four separate reports prepared by *anyone*
4 regarding the subject building, and they were *all* prepared in mid-or-late 2003.

5 By definition, Plaintiff could not have known of the true nature of her claim until sometime
6 during mid-to-late 2003. Defendant will no doubt argue that if she did not know, at least she *should*
7 *reasonably have known*. The distinction between these two separate conditions is often overlooked.
8 The Oregon Supreme Court put the matter succinctly and well, when it said in *Moore v. Willis* (1988)
9 307 Or. 254, 259:

10 “An allegation that someone knew something is different from an
11 allegation that the person should have known something. That a defendant
12 knew of a dangerous condition is an ultimate fact -- the fact that the
13 defendant was aware of a particular risk. Yet an allegation that a
14 defendant should have known of a dangerous condition is not an allegation
15 of a fact. Whether a defendant should have known something is a
16 judgment about a particular set of circumstances rather than a fact from
17 which conclusions are drawn. An allegation that a defendant knew
18 something may be an allegation of fact, but an allegation that he should
19 have known something is merely a conclusion drawn from other facts.
20 When a plaintiff claims that a risk was foreseeable, through not
21 necessarily foreseen, the plaintiff must allege facts that would allow the
22 factfinder to conclude that the defendant should have known of the risk.”

23 True, *Moore, supra* is not a binding California precedent. But its reasoning is worth noting
24 because it represents both sound logic as well as well-reasoned common sense.

25 In the action at bar, for Defendant to argue that Plaintiff “should have known,” back in 2001
26 when she first commenced working in the subject building, of all of the circumstances that would
27 eventually give rise to the causes of action she is presently asserting lacks any foundational showing of
28 what “facts” are in existence that gave rise to the reason she “should have known.” These facts just

1 simply do not exist. In 2001 up until a year later sometime in 2002, Plaintiff had no facts to work with
2 other than the feeling that she was breathing “stale air.” Sometime thereafter the condition morphed into
3 what, in Defendant’s own moving papers, consisted of “sore throats, some respiratory distress, and
4 drippy eyes.” These symptoms fall far short of what the EPA -- the reigning “pro from Dover” in this
5 area -- has characterized as the conditions that an SBS sufferer would typically manifest (see Footnote
6 #3, *supra*). Finally, the damages for which Plaintiff now seeks recovery -- persistent pain above and
7 below and to the left eye and ear, coupled with her inability to wear eyeglasses as a result of this pain --
8 did not manifest themselves until they culminated in her being declared unfit to work by a physician and
9 had to leave her job at ██████ in August, 2005 [██████████ Depo. at pp. 80-82, lns. 3-22].

10 Put another way, to argue that Plaintiff should have realized -- or even remotely suspected --
11 back in 2001 that she was working in a building that was contaminated with SBS is also to argue that
12 she was intimately familiar with SBS and the array of symptoms its affected victims typically display.
13 Fifteen years ago, the debate was still on about whether SBS really even *existed*; the notion that a whole
14 building could somehow be “sick” was regarded with suspicion by many experts as well as by many
15 courts. But as science has progressed, so has its understanding of SBS and its characteristics.

16 Plaintiff is not one of these scientists, unfortunately, and insofar as is known, the training
17 regimen presently offered for ██████ clerks does not include a course in epidemiology.

18
19 **V**
20 **CONCLUSION**

21 Defendant is estopped from asserting the Statute of Limitations as a defense because Plaintiff’s
22 delay in filing suit was attributable to the ongoing assurances she was continuously receiving -- all the
23 way up to the latter half of 2003 -- that remedial measures were actively underway, and that the
24 symptoms manifested by what was clearly (in light of the EPA guidelines; see Exhibit “A” attached
25 hereto) a building afflicted with SBS. Had she not received these assurances, she presumably would
26 have filed the within action sooner.

27 In addition, as previously noted, Plaintiff is neither a doctor, an engineer, or anyone else who
28 could reasonably have been expected to have that degree of specialized knowledge that would have been

1 required to differentiate the symptoms of the common cold suffered by millions of Americans each year
2 versus the much more complex symptomology manifested among the inhabitants of a building afflicted
3 with SBS. When she finally did learn of the true nature of her condition, Plaintiff acted promptly, and
4 filed the action at bar less than one year after the time that she gained such knowledge.

5 Defendant's motion for summary judgment on the ground that Plaintiff's causes of action are
6 barred by the Statutes of Limitations must be denied.

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8 Dated: [REDACTED], 2006
9

10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

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14 By _____
15 [REDACTED], Attorneys
16 for Plaintiff [REDACTED]
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