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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

AMERICAN GENERAL LIFE)	Case No. CV 09-03198 DDP (RZx)
INSURANCE COMPANY,)	
)	ORDER DENYING PLAINTIFF'S MOTION
Plaintiff,)	FOR SUMMARY JUDGMENT AS TO THE
)	SECOND AMENDED COMPLAINT
v.)	
)	[Docket No. 176]
FAUSTO FERNANDEZ, an)	
individual; BENJAMIN YUNQUE)	
JR., an individual; et al.)	
)	
Defendants.)	
_____)	

Presently before the court is Defendant Bryan Manson's ("Defendant") Motion for Summary Judgment on Plaintiff/ Assignee National Financial Corp.'s ("Plaintiff") Second Amended Complaint ("SAC"). After reviewing the parties' moving papers, the court DENIES Defendant's Motion in its entirety.

I. Background

American General Life Insurance Company ("AGLIC") has assigned its claims against Defendant to Plaintiff. Defendant seeks summary judgment on Plaintiff's three claims against him: conspiracy to commit fraud, aiding and abetting fraud, and fraud. (Defendant's

1 Memorandum in Support of Defendant's Motion for Summary Judgment
2 ("Motion") at 1:12-22; SAC ¶¶ 130-44, 166-70.)¹ Defendant is a
3 licensed California attorney, who was the in-house counsel for
4 Prolinks. (Plaintiff/ Assignee National Financial Partners Corps
5 Statement of Genuine Issues ("SGI") ¶¶ 4-5.) Prolinks is a
6 corporation that submitted life insurance applications to AGLIC,
7 through an intermediary agency. (SGI ¶¶ 7-8.) The policies
8 resulting from several such applications are at issue in this case.
9 (SGI ¶¶ 8, 10.) AGLIC allegedly required the agent issuing a life
10 insurance policy to certify that the person paying for the policy
11 was the insured, the insured's family, or the insured's employer.
12 (See Klappa Decl.; Klappa Decl. Exs. A-D.) Such a certification
13 was allegedly made for the policies now at issue. Id. It is
14 alleged that Defendant wrote checks for premium payments on these
15 policies to make it look like the insured had paid Defendant's
16 company. (Opp'n at 14:11-28.) However, Deutsche Bank allegedly
17 financed these payments, and bought the beneficiary interest in the
18 policy soon after it was issued. (Plaintiff's Memorandum in
19 Opposition to Defendant's Motion for Summary Judgment ("Opp'n") at
20 10:18-25; Plaintiff/Assignee NFP's Separate Statement of Genuine
21 Issues and Material Fact ("SSGI") ¶¶ 6-10.) Key to this motion is
22 whether there is evidence that Defendant knew of and participated

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25 ¹This order has been issued for all three related cases between Plaintiff
26 and Defendant: AGLIC v. Fernandez, et al. (CV 09-03198 DDP (RZx)); AGLIC v.
27 Munshi, et al. (CV 08-06439 DDP (RZx)); AGLIC v. Khachatourians et al. (CV 08-
28 06408 DDP (RZx)). These cases involve the same issues, claims, and facts, and
were not consolidated because a motion to do so was filed after the same trial
date was set for each. (See Order Granting Defendant's Motion for Leave to File
a First Amended Answer and Vacated the Motion to Consolidate Three Related Cases
as Moot.) All citations to the record refer to the 09-03198 case number.

1 in the alleged misrepresentation regarding the source of payment
2 for these policies.

3 **II. Legal Standard**

4 Summary judgment shall be granted when a movant "shows that
5 there is no genuine dispute as to any material fact and the movant
6 is entitled to judgment as a matter of law." FED. R. CIV. P.
7 56(a). In other words, summary judgment should be entered "against
8 a party who fails to make a showing sufficient to establish the
9 existence of an element essential to that party's case, and on
10 which that party will bear the burden of proof at trial." Parth v.
11 Pomona Valley Hosp. Med. Ctr., 630 F.3d 794, 798-99 (9th Cir.
12 2010)(internal quotation marks omitted).

13 To satisfy its burden at summary judgment, a moving party must
14 produce facts for each element which it has the burden of proof at
15 trial "sufficient for the court to hold that no reasonable trier of
16 fact could find other than for the moving party." Calderone v.
17 United States, 799 F.2d 254, 259 (6th Cir. 1986) (emphasis
18 omitted). A moving party without the burden of persuasion "must
19 either produce evidence negating an essential element of the
20 nonmoving party's claim or defense or show that the nonmoving party
21 does not have enough evidence of an essential element to carry its
22 ultimate burden of persuasion at trial." Nissan Fire & Marine Ins.
23 Co., Ltd. v. Fritz Cos., Inc., 210 F.3d 1099, 1102 (9th Cir. 2000);
24 see also Devereaux v. Abbey, 263 F.3d 1070, 1076 (9th Cir. 2001)
25 (*en banc*) ("When the nonmoving party has the burden of proof at
26 trial, the moving party need only point out 'that there is an
27 absence of evidence to support the nonmoving party's case.'")
28 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986), and

1 citing Fairbank v. Wunderman Cato Johnson, 212 F.3d 528, 532 (9th
2 Cir. 2000) (holding that the *Celotex* "showing" can be made by
3 "pointing out through argument- the absence of evidence to support
4 plaintiff's claim").

5 If the party moving for summary judgment meets its initial
6 burden of identifying for the court the portions of the
7 materials on file that it believes demonstrate the absence
8 of any genuine issue of material fact, the nonmoving party
9 may not rely on the mere allegations in the pleadings in
order to preclude summary judgment[, but instead] must set
forth, by affidavit or as otherwise provided in Rule 56,
specific facts showing that there is a genuine issue for
trial.

10 T.W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n, 809 F.2d
11 626, 630 (9th Cir. 1987) (internal citations, quotation marks, and
12 emphasis omitted).

13 At the summary judgment stage, the Court does not make
14 credibility determinations or weigh conflicting evidence, and views
15 all evidence and draws all inferences in the light most favorable
16 to the non-moving party. See id. at 630-31 (citing Matsushita
17 Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587
18 (1986)); see also Hrdlicka v. Reniff, 631 F.3d 1044 (9th Cir.
19 2011); Miranda v. City of Cornelius, 429 F.3d 858, 860 n.1 (9th
20 Cir. 2005). Speculative testimony in affidavits and motion papers
21 is insufficient to raise genuine issues of fact and defeat summary
22 judgment. Thornhill Publ'g Co., Inc. v. GTE Corp., 594 F.2d 730,
23 738 (9th Cir. 1979). As the Supreme Court has stated, "[t]he mere
24 existence of a scintilla of evidence . . . will be insufficient;
25 there must be evidence on which the jury could reasonably find for
26 the [non-moving party]." Anderson v. Liberty Lobby, Inc., 477 U.S.
27 242, 252 (1986).

1 It is not the Court's task "to scour the record in search of a
2 genuine issue of triable fact." Keenan v. Allan, 91 F.3d 1275,
3 1279 (9th Cir. 1996). Counsel has an obligation to lay out their
4 support clearly. Carmen v. San Francisco Unified Sch. Dist., 237
5 F.3d 1026, 1031 (9th Cir. 2001). The Court "need not examine the
6 entire file for evidence establishing a genuine issue of fact,
7 where the evidence is not set forth in the opposing papers with
8 adequate references so that it could conveniently be found." Id.

9 **III. Analysis**

10 **A. Fraud**

11 Defendant argues that Plaintiff cannot prove one or more of
12 the essential elements of its fraud claim. (See Motion at 15-20.)
13 The elements of fraud are: "a) misrepresentation (false
14 representation, concealment, or nondisclosure); (b) knowledge of
15 falsity (or "scienter"); (c) intent to defraud, i.e., to induce
16 reliance; (d) justifiable reliance; and (e) resulting damage."
17 Engalla v. Permanente Med. Grp. Inc., 15 Cal. 4th 951, 974, 938
18 P.2d 903 (1997).

19 Defendant first argues that there is no triable issue of fact
20 as to whether he made a misrepresentation. To be actionable, a
21 misrepresentation must be false when made. See Edmunds v. Valley
22 Circle Estates, 16 Cal. App. 4th 1290, 1301 (1993). However, "[a]
23 misrepresentation need not be oral; it may be implied by conduct."
24 Thrifty-Tel, Inc. v. Bezenek, 46 Cal. App. 4th 1559, 1567, 473-74
25 (1996).

26 The checks Defendant wrote for the initial premium payments of
27 the policies at issue in this case constitute the alleged
28 misrepresentation. (Opp'n at 14:11-28.) Plaintiff claims that

1 since Defendant knew AGLIC forbade issuing life insurance policies
2 that were not funded by the insured, the insured's employer, or the
3 insured's family, his checks implicitly asserted that the policies
4 were funded in accordance with AGLIC's rules. Id. Thus, whether
5 Defendant's checks are actionable misrepresentations depends on
6 whether Defendant knew of AGLIC's policy and the alleged fraudulent
7 scheme. Plaintiff has provided evidence of both.

8 Defendant admits in his deposition that he was "99 percent"
9 sure that he had reviewed a blank AGLIC life insurance application.
10 (Fredericks Decl. Ex. 2 at 195-196.) Tigran Khrlonian, a principal
11 at Prolinks, said he retrieved "copies of every [insurance]
12 company's paperwork" that Prolinks did business with, and had
13 Defendant "go through [it]" so that he could answer agents'
14 questions. Id. at 117-118. AGLIC's applications allegedly
15 contained an "Agent Certification Form," which required agents to
16 certify that the insured, the insured's employer, or the insured's
17 family was paying for the premiums. (See Klappa Decl. Ex. A-D.)

18 Tigran Khrlonian, a supervisor at Prolinks, testified that on
19 behalf of Prolinks Defendant participated in negotiations with
20 Deutsche Bank that led to the creation of the alleged fraudulent
21 scheme. (Fredericks Decl. Ex. 1 at 31:21-33:7.) Testimony alleges
22 that the scheme involved Deutsche Bank both paying individuals, who
23 Prolinks identified, to take out life insurance policies and
24 funding the premiums on these policies. (Fredericks Decl. Ex. 1 at
25 47:4-49:5; Fredericks Decl. Ex. 1 at 31:21-33:7; Fredericks Decl.
26 Ex. 2 119:25-121:7.) Defendant admits that he opened the bank
27 accounts that funded the initial policy premium payments. (SSGI ¶
28 22.) Plaintiff argues that Defendant opened these accounts to mask

1 the funds' source, Deutsche Bank. Since the only names that appear
2 on these checks are the Defendant's and a trust in the name of the
3 insured, a reasonable jury could believe Plaintiff's
4 interpretation. One check's header reads:

5 Ricarda Magbual 2007 Insurance Trust
6 Brian A Manson Trustee
(Fredericks Decl. Ex. 7.) A misrepresentation "may be implied by
7 conduct," so a reasonable jury could find that Defendant, Prolinks'
8 in-house counsel, implicitly represented that the funds were not
9 coming from a third party. Thrifty-Tel, 46 Cal. App. 4th at 473-
10 74.

11 Next, Defendant argues there is insufficient evidence that he
12 intended to defraud AGLIC. In a fraud claim, a plaintiff need only
13 show that the defendant had "the intent to *induce reliance*."
14 Gutierrez v. Wells Fargo & Co., 622 F. Supp. 2d 946, 958 (N.D. Cal.
15 2009) (emphasis in original). Intent may "be inferred from the
16 fact that he made the representation with knowledge that plaintiffs
17 would act in reliance thereon." Gagne v. Bertran, 43 Cal. 2d 481,
18 488, 275 P.2d 15 (1954). Summary judgment, though, "is rarely
19 proper" on issues concerning "a party's motive or intent." Atkins
20 v. Union Pac. R. Co., 685 F.2d 1146, 1149 (9th Cir. 1982). For
21 reasons discussed *supra*, there is a triable issue of fact as to
22 whether Defendant knew of and participated in a scheme to defraud
23 AGLIC. Defendant seems to argue that even if the life insurance
24 applications at issue in this case conformed to the alleged
25 fraudulent scheme, there is no evidence that he was aware that
26 they were part of the scheme. (Motion at 17:4-24.) Therefore, he
27 could not have intended to defraud, because he lacked knowledge
28 that these particular applications were fraudulent. Id. However,

1 acting in conformance with a fraudulent scheme is sufficient to
2 create a triable issue of fact as to whether Defendant knew he was
3 committing fraud on particular occasions. Biren v. Equal.
4 Emergency Med. Grp. Inc., 102 Cal. App. 4th 125, 141(2002)(finding
5 that it is reasonable to infer intent when actions conform to
6 general practice).

7 Defendant next claims that AGLIC did not justifiably rely on
8 his misrepresentation. (Motion at 18-20.) Justified reliance is
9 the causation element of fraud. Alliance Mortg. Co. v. Rothwell,
10 10 Cal.4th 1226, 1239(1995). "It is not ... necessary that [a
11 plaintiff's] reliance upon the truth of the fraudulent
12 misrepresentation be the sole or even the predominant or decisive
13 factor in influencing his conduct.... It is enough that the
14 representation has played a substantial part, and so has been a
15 substantial factor, in influencing his decision." Engalla, 15
16 Cal.4th at 976-77 (alterations in original). Causation is almost
17 inappropriate for summary adjudication: "Because of the highly
18 subjective nature of a causation analysis, the Supreme Court of
19 California has instructed that the question whether a party
20 detrimentally relied on the misrepresentation of another party is
21 properly left to a jury." City Solutions, Inc. v. Clear Channel
22 Commc'ns, 365 F.3d 835, 840 (9th Cir. 2004).

23 Defendant claims that Wells Fargo was listed as the trustee of
24 each policy at issue, and accordingly AGLIC could not have
25 justifiably relied on Defendant's initial premium checks, which
26 allegedly indicate that he was the trustee of the insurance
27 policies. (Motion at 18-20.) However, Plaintiff's claim is
28 broader than Defendant's characterization. As discussed *supra*,

1 Plaintiff claims that Defendant's checks implicitly misrepresented
2 that the policies were issued in accordance with AGLIC's rules
3 regarding third party financing. Since Plaintiff has provided
4 evidence that AGLIC would not have issued the policies had it known
5 about their true source of funding, there is a triable issue of
6 fact as to whether there was justified reliance. (See Plotkin
7 Decl. ¶ 5); see Engalla, 15 Cal.4th at 976-77.

8 **B. Conspiracy and Aiding and Abetting**

9 Defendant claims that Plaintiff cannot meet the essential
10 elements of both conspiracy and aiding and abetting. (Motion at
11 11-13.) "The elements of an action for civil conspiracy are the
12 formation and operation of the conspiracy and damage resulting to
13 plaintiff from an act or acts done in furtherance of the common
14 design." Applied Equip. Corp. v. Litton Saudi Arabia Ltd., 7 Cal.
15 4th 503, 511 (1994) (citations omitted). A defendant is liable for
16 aiding and abetting if he "(a) knows the other's conduct
17 constitutes a breach of duty and gives substantial assistance or
18 encouragement to the other to so act or (b) gives substantial
19 assistance to the other in accomplishing a tortious result and the
20 person's own conduct, separately considered, constitutes a breach
21 of duty to the third person." Casey v. U.S. Bank Nat'l Ass'n, 127
22 Cal. App. 4th 1138, 1144 (2005). For the reasons the court
23 announced supra in its fraud analysis, there is a triable issue of
24 fact as to whether Defendant knew of and actively participated in a
25 scheme to defraud AGLIC.

26 Regarding civil conspiracy specifically, Defendant argues that
27 he is not liable for this claim, because the alleged fraud did not
28 violate California insurable interests laws. (Motion at 11-12.)

1 Civil conspiracy does not require a "criminal act" or "statutory
2 violation." Rogers v. Grua, 215 Cal. App. 2d 1, 7 (1963). The
3 California Supreme Court has held that "commission of an actual
4 tort" can "activate" civil conspiracy liability. Applied Equip., 7
5 Cal. 4th at 511. Thus, Defendant's argument fails.

6 Defendant also argues that Plaintiff's claims for conspiracy
7 to commit fraud and aiding and abetting fraud must be summarily
8 adjudicated, because Plaintiff's complaint does not seek damages
9 against Defendant for these torts. (Motion at 14-15.) As a
10 preliminary matter, Defendant seems to confuse the standard for
11 summary judgment, which asks whether there is a triable issue of
12 fact, with a motion to dismiss for failure to state a claim, which
13 asks whether a complaint has sufficiently alleged the elements of a
14 claim. Compare Celotex Corp. v. Catrett, 477 U.S. 317, at 327
15 (1986), with Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). In
16 California, each member of a civil conspiracy is jointly liable for
17 all harm done in furtherance of the conspiracy." 5 Witkin, Summary
18 of California Law, Torts § 45, (10th ed. 2005). Similarly,
19 "California law allows for joint liability of aiders and abettors
20 to an intentional tort." Newman v. San Joaquin Delta Cmty. Coll.
21 Dist., 2010 WL 3633737 (E.D. Cal. Sept. 14, 2010). As analyzed in
22 the fraud section supra, Plaintiff seeks damages for, among others,
23 the commissions it paid as a result of issuing the policies that
24 fraudulently violated its rules against third party financing.
25 Since these damages stem from the alleged fraud, conspiracy, and
26 aiding and abetting, there is a triable issue of fact as to
27 damages. Moreover, Defendant had sufficient notice of damages
28 related to the aiding and abetting and conspiracy claims, because

1 the SAC explicitly sought damages from Defendant's alleged joint
2 tortfeasors. (SAC at 38:23-27, 41:6-9.)

3 **C. Agent's Immunity Rule and Sole Actor Rule**

4 Defendant claims that the agent's immunity rule and the single
5 actor rule bar Plaintiff's claims for aiding and abetting fraud and
6 conspiracy to commit fraud. (See Motion at 7-11.) The agent's
7 immunity rule states: "When a corporate employee acts in the course
8 of his or her employment, on behalf of the corporation, there is no
9 entity apart from the employee with whom the employee can
10 conspire." Black v. Bank of Am., 30 Cal. App. 4th 1, 6 (1994); see
11 also Sanchez v. Aviva Life & Annuity Co., 2010 WL 2606670, at *7
12 (E.D. Cal. June 28, 2010) (applying the agent's immunity rule to
13 aiding and abetting claims). This rule is equivalent to what
14 Defendant calls the single actor rule. See Fiol v. Doellstedt, 50
15 Cal. App. 4th 1318, 1326 (1996) (describing the agent's immunity
16 rule as similar to the principle that, "an employee acting on
17 behalf of the employer cannot be acting in concert with the
18 employer, as there is in law only a single actor). The agent's
19 immunity rule is an affirmative defense, so the defendant bears the
20 burden of proving its application. See CACI 3602. "[T]he
21 determination of whether an employee has acted within the scope of
22 employment presents a question of fact." 6 Witkin, Summary of
23 California Law, Agency § 176, (10th ed. 2005). Other jurisdictions
24 have persuasively argued that deciding a scope-of-employment issue
25 is "rarely appropriate" for summary adjudication. Webb v. United
26 States, 24 F. Supp. 2d 608, 614 (W.D. Va. 1998).

27 As the court found supra in its fraud analysis, there is
28 sufficient evidence to show that Defendant and his supervisor at

1 Prolinks, Tigran Khrlobian, conceptualized and executed a plan to
2 defraud AGLIC. If Defendant and Khrlobian were acting within the
3 scope of their employment at Prolinks, then there can be no
4 conspiracy between them. See Black, 30 Cal. App. 4th at 6.
5 Khrlobian, however, was also an appointed agent with AGLIC. SGI ¶
6 6. Khrlobian allegedly signed the Agent's Certification Forms at
7 issue in this case, and they neither indicate nor does his
8 signature suggest that he was signing on Prolinks' behalf. There
9 is no mention either on the form or in his alleged signature that
10 he was signing on behalf of Prolinks. (See Klappa Decl. Exs. A-D.)
11 The only companies mentioned anywhere on the form is AIG and AGLIC-
12 the name "Prolinks" is completely absent. (See id.) Generally,
13 individuals signing on behalf of their corporation are supposed to
14 explicitly indicate as much. 3 Witkin, Summary of California Law,
15 Agency § 198, (10th ed. 2005)(citing numerous California cases).
16 Since no such indication exists on the form, there is a triable
17 issue of fact whether Khrlobian was acting within the scope of his
18 employment while participating in the allegedly fraudulently
19 scheme. The agent's immunity rule only shields a corporate
20 employees because a corporation cannot conspire with itself. See
21 Black, 30 Cal. App. 4th at 6. If Khrlobian was acting outside the
22 scope of his employment (perhaps acting as an individual or as an
23 AGLIC agent) the agent's immunity rule is irrelevant to Defendant's
24 case. See id. A jury will, thus, have to decide the capacity in
25 which Khrlobian signed the Agent's Certification Forms.

26 **D. Election of Remedies**

27 Defendant claims that Plaintiff's tort claims must be
28 summarily adjudicated, because Plaintiff has elected the contract

1 remedy of rescission. (Motion at 20.) The election of remedies
2 doctrine is an affirmative defense on which Defendant carries the
3 burden. See id. The election of remedies doctrine will prevent a
4 plaintiff from collecting both contract damages and tort damages
5 from a defendant for the same harm. See 5 Witkin, Summary of
6 California Law, Torts § 829, (10th ed. 2005). A federal court in
7 Arkansas has persuasively clarified that, "the election-of-remedies
8 doctrine is designed to prevent double recovery for a single
9 injury, but it does not prevent a party from pursuing multiple
10 claims against multiple parties until full satisfaction is had."
11 GeoVera Specialty Ins. Co. v. Rogers, 2012 WL 931983, at *1 (E.D.
12 Ark. Mar. 20, 2012).

13 Defendant argues that since each life insurance policy at
14 issue has been rescinded, Plaintiff may not now seek to collect in
15 tort against Defendant. (SGI ¶¶ 35-38; Motion at 20-22.)
16 Defendant, however, did not take out a life insurance policy with
17 AGLIC, and Plaintiff does not seek to rescind any contract that
18 Defendant was a party to. (See Opp'n at 18-19.) The harm
19 Defendant seeks recompense for is the amount it paid in commissions
20 for the policies that violated AGLIC's standards. Id. Defendant
21 cannot escape liability for the harm he allegedly caused simply
22 because Plaintiff has received compensation from different
23 defendants for different harms. See GeoVera Specialty Ins.
24 Co., 2012 WL 931983, at *1.

25 **IV. Defendant's Objections**

26 Defendant makes various objections. Almost all of which are
27 moot as they were not material to the court's analysis. Two
28 deserve some discussion, though. First, Defendant objects to the

1 Agent's Certification Forms, which were originally part of the
2 Frederick's declaration, as having an insufficient foundation.
3 This defect was cured, though, when they were resubmitted with the
4 Klappa declaration. (See Klappa Decl.; Klappa Decl. Exs. A-D.) At
5 the October 15, 2012, hearing on Defendant's Motion for Summary
6 Judgment, Defendant made a general objection to the Klappa
7 declaration (and presumably also to the Agent's Certification Forms
8 attached to it), broadly claiming the declaration was inadmissible.
9 However, objections must be "sufficiently specific" to make a judge
10 understand exactly what is objected to and the grounds for that
11 objection. Cont'l Oil Co. v. United States, 184 F.2d 802, 814 (9th
12 Cir. 1950) (ruling that, "[i]t is elementary that objections to
13 offered evidence must be sufficiently specific to bring their point
14 home to the trial judge.") Defendant's objection plainly fails
15 this standard.

16 Defendant has also objected to the checks that he allegedly
17 wrote for the initial policy premium. Defendant claims that they
18 are inadmissible hearsay to the extent they identify Defendant as a
19 trustee. However, the checks are admissible under the party
20 opponent hearsay exemption. They are also admissible to prove the
21 effect on the listener- namely that AGLIC believed Defendant was a
22 trustee and relied upon that. Defendant also objects that there
23 was insufficient foundation for admitting the checks. However,
24 Defendant testified that the signatures on these checks appear to
25 be his. (Fredericks Decl. Ex. 2 187:13-193:4.)

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1 **V. Conclusion**

2 Based on the preceding analysis, the court DENIES Defendant's
3 Motion for Summary Judgment in its entirety.

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6 IT IS SO ORDERED.

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9 Dated: October 24, 2012

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DEAN D. PREGERSON
United States District Judge