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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

CENTRAL VALLEY CONCRETE, INC.,
Plaintiff,
v.
ROAD AND HIGHWAY BUILDERS,
LLC,
Defendant.

No. 1:16-cv-01374-DAD-MJS

TENTATIVE PRE-TRIAL ORDER

ROAD AND HIGHWAY BUILDERS,
LLC,
Counter-claimant,
v.
CENTRAL VALLEY CONCRETE, INC.,
Counter-defendant.

On January 8, 2018, the court conducted a final pretrial conference. Attorney Cory Chartrand appeared as counsel for plaintiff/counter-defendant Central Valley Concrete, Inc. (“CVC”); attorney Carl M. Hebert appeared as counsel for defendant/counter-claimant Road and Highway Builders, LLC (“RHB”). Having considered the parties’ joint pretrial statement and having heard from counsel at that conference, the court issues this tentative pretrial order.

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1 On August 16, 2016, plaintiff initiated this action in Merced County Superior Court
2 against defendant and Does 1–10, alleging that defendant failed to pay it an outstanding balance
3 of \$130,687.19 which was due and owing. (Doc. No. 1 at 5, ¶¶ 1–2.) In that action, plaintiff
4 asserted five causes of action under California state law: (i) breach of written contract; (ii) breach
5 of oral contract; (iii) account stated; (iv) common counts—work, labor, services; and (v) quantum
6 meruit. (*Id.* at 6–8.) On September 15, 2016, defendant removed the action from state court to
7 this federal court on the basis of diversity jurisdiction. (*Id.* at 2.) On the following day,
8 defendant filed an answer and counterclaim against plaintiff, alleging a single claim for breach of
9 contract. (Doc. Nos. 3–4.)

10 I. JURISDICTION/VENUE

11 Jurisdiction is predicated on 28 U.S.C. § 1332(a). Jurisdiction is not contested.

12 Venue is proper pursuant to 28 U.S.C. § 1391. Venue is not contested.

13 II. JURY

14 Plaintiff has requested a jury trial. The jury will consist of eight jurors.

15 III. UNDISPUTED FACTS

16 1. Defendant is a heavy engineering contractor based in Nevada that specializes in
17 highway design, construction, and maintenance.

18 2. Plaintiff is a trucking contractor based in California.

19 3. In 2014, defendant was the successful bidder on a Federal Highway
20 Administration (“FHA”) project to rehabilitate a portion of U.S. Highway 120 in
21 Yosemite National Park, located in Mariposa and Tuolumne Counties of
22 California.

23 4. The FHA name for the project was “Tioga Pass Road.”

24 5. As part of the construction, defendant required aggregate and paving materials to
25 be moved to a job site on Highway 120.

26 6. In March 2014, defendant solicited bids from trucking contractors for this portion
27 of the project.

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- 1 7. In response, in March, 2014, plaintiff submitted a quotation to defendant, which
2 was accepted and signed by both parties in March, 2015.
- 3 8. Defendant subsequently issued a purchase order in March 2015 that included the
4 quantities of aggregate and paving materials for the project and the terms and
5 conditions by which the parties would be bound.
- 6 9. The purchase order was signed by representatives from both plaintiff and
7 defendant.
- 8 10. The Tioga Pass Road project ultimately required 43,072.01 tons of material to be
9 transported to the job site.
- 10 11. Between March 12, 2015, and August 12, 2015, plaintiff hauled only 35,342.5 tons
11 of material to the site.
- 12 12. In mid-2015, defendant began contracting with other hauling companies to move
13 material that plaintiff had not yet transported.

14 **IV. DISPUTED FACTUAL ISSUES**

- 15 1. Whether plaintiff was to be the exclusive hauler on the project.
- 16 2. Whether plaintiff was ever provided a paving schedule.
- 17 3. Whether plaintiff was ever provided with definitions of “Method 1” and “Method
18 2” as those terms appear in defendant’s purchase order.
- 19 4. The daily quantity of trucks plaintiff was to provide.
- 20 5. How much advance notice defendant was to give plaintiff for trucks needed.
- 21 6. Whether non-bottom dump transport was to be paid by the hour or by the ton.
- 22 7. Whether plaintiff was ever provided a completion date for the “Tioga Pass
23 Project.”
- 24 8. Whether plaintiff was ever provided the “Summary of Quantities, Schedule B.”
- 25 9. Whether defendant ever complained, orally or in writing, concerning plaintiff’s
26 performance during the project.
- 27 10. The amount plaintiff is owed/was underpaid for plaintiff’s services.
- 28 11. The fair market value of plaintiff’s services.

- 1 12. Whether the Purchase Order of March 12, 2015 is an enforceable contract.
- 2 13. Whether plaintiff breached a trucking contract with defendant by failing to timely
- 3 transport all of the paving materials required on the project.
- 4 14. The amount due to defendant under its counterclaim for breach of the trucking
- 5 contract.

6 V. DISPUTED EVIDENTIARY ISSUES/MOTIONS IN LIMINE

7 The parties have not yet filed motions *in limine*. The court does not encourage the filing
8 of motions *in limine* unless they are addressed to issues that can realistically be resolved by the
9 court prior to trial and without reference to the other evidence which will be introduced by the
10 parties at trial. Any motions *in limine* counsel elects to file shall be filed no later than **21 days**
11 **before trial**. Opposition shall be filed no later than **14 days before trial**, and any replies shall be
12 filed no later than **10 days before trial**. Upon receipt of any opposition briefs, the court will
13 notify the parties if it will hear argument on any motions *in limine* prior to the first day of trial.

14 Plaintiff's Anticipated Motions in Limine

- 15 1. Relevance of the opinion of defendant's expert, Brian Ady, concerning the
- 16 capacity of the paver used by defendant.
- 17 2. Admissibility of the legal conclusion/opinion of defendant's expert, Michael Pack,
- 18 that the defendant's purchase order "supersedes" the plaintiff's signed quotation.
- 19 3. Plaintiff will move to exclude from evidence and consideration all extrinsic
- 20 contractual documents such as paving schedules and the Summary of Quantities,
- 21 Schedule B, which were never provided to plaintiff during the course of
- 22 construction, were not a part of the contract documents, and were not incorporated
- 23 by reference into the contract documents.

24 Defendant's Anticipated Motions in Limine

- 25 1. The admissibility of any parol evidence used to dispute the clear terms of the
- 26 Purchase Order of March 12, 2015.

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1 VI. SPECIAL FACTUAL INFORMATION

2 Pursuant to Local Rule 281(b)(6), the following special factual information pertains to this
3 action:

4 (A) Plaintiff's Version of the Terms of the Contract: Plaintiff believes the terms of the
5 contract were as stated on its quotation, which was signed by the defendant:
6 payment of \$18.50 per ton, plus 8% for all material transferred by bottom dump
7 trucks and payment of \$120.00 per hour, plus 8% for all material hauled by other
8 trucks (transfers, 10 wheelers, side drop and seed bed). By the time the contract
9 was entered (a year after the project commenced), plaintiff no longer had the
10 understanding that it would be the exclusive hauler on the job, since other haulers
11 had already worked on the project and completed portions of the project. Plaintiff
12 believed that the terms of its quotation were the same as defendant's purchase
13 order. There were many terms of the defendant's purchase order which were not
14 defined. Plaintiff now understands that defendant claims there were many terms to
15 the parties' contract which are not set forth in any of the contract documents. If
16 the court determines that there was no "meeting of the minds" and no contract,
17 plaintiff seeks recovery under quantum meruit for the fair value of its services
18 which defendant has refused to pay.

19 Defendant's Version of the Terms of the Contract: The contract was the Purchase
20 Order of March 12, 2015 by which plaintiff agreed to timely haul all of the asphalt
21 contract and aggregate base to the work site. Payment was by the ton (unit price),
22 with no standby charges.

23 (B) Modifications and Collateral Agreements: Plaintiff does not claim any oral or
24 written modifications or that there were any applicable collateral agreements. It is,
25 however, now clear that the terms of the two written agreements are not the same,
26 the parties' intentions were not the same, and if it is determined that the terms of
27 plaintiff's quotation do not apply, there was no "meeting of the minds." Defendant

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1 does not claim any oral or written modifications or collateral agreements. The
2 contract was the Purchase Order only.

3 (C) Misrepresentations of Fact, Mistake, or Other Matters Affecting Validity: Plaintiff
4 does not claim any misrepresentations of fact, unless one considers defendant's
5 signing of plaintiff's quotation, indicating an intent to be bound to that quotation
6 and then sending over a completely different purchase order with the intent that it
7 change or supersede the terms already agreed upon, to be a misrepresentation.
8 Defendant's reliance on terms which are not in the written agreements and terms
9 which are ambiguous and not defined in the written agreements certainly affects
10 the validity of defendant's version of the agreement. Defendant does not claim
11 any misrepresentations of fact, mistake, or other matters affecting the validity of
12 the Purchase Order contract.

13 (D) Any Breach of Contract: Both sides claim breaches. Plaintiff contends that
14 defendant breached the obligation to pay plaintiff pursuant to the terms contained
15 in the plaintiff's quotation for hourly use of transport trucks other than bottom-
16 dump dump trucks and short-paid or underpaid plaintiff on the contract.
17 Defendant claims that plaintiff breached obligations to be the exclusive hauler and
18 to provide forty to sixty trucks per day. Plaintiff disputes that either of these terms
19 were part of a contract between the parties. Defendant asserts that the Purchase
20 Order contained all of the quantities specified by the Federal Highway
21 Administration for asphalt concrete and aggregate base and that the plaintiff knew
22 that it was the exclusive hauler and breached its obligation.

23 (E) Waiver or Estoppel: Neither plaintiff or defendant claims any waiver or estoppel.

24 (F) Relief Sought: Plaintiff seeks contract damages for the amounts it was underpaid
25 pursuant to plaintiff's quotation, together with late finance charges, prejudgment
26 interest, and attorney's fees. Alternatively, plaintiff seeks the fair value of the
27 services it provided and for which it did not receive payment under common
28 counts/quantum meruit causes of action. Defendant seeks damages under its

1 counterclaim for additional expenses on the project, including work crew
2 downtime, additional materials costs, increased hauling/trucking expenses,
3 increased administrative time, increased supervisory time, and other delay
4 expenses. Defendant also seeks attorney's fees under § 11 of the Purchase Order
5 contract.

6 (G) The Measure of Restitution or Damages and an Itemized Statement of the
7 Elements Thereof.

8 Plaintiff:

9	i.	Total principal unpaid invoices/contract damages:	\$110,802.24
10	ii.	Total finance charges:	\$46,020.72
11	iii.	Prejudgment interest to date:	\$25,069.10
12	iv.	Total damages exclusive of attorney's fees and costs:	\$181,892.06

13 Defendant:

14	i.	Paving crew costs (15 days)	\$366,010.37
15	ii.	Additional traffic control	\$30,379.28
16	iii.	Additional quality control	\$82,231.89
17	iv.	Additional trucking charges (Dan Palmer Trucking)	\$45,906.40
18	v.	Additional trucking charges (GCU Trucking)	\$16,230.49
19	vi.	Incorrect billings by plaintiff	\$79,903.82
20	vii.	Lost asphalt due to plaintiff truck breakdowns	\$6,776.00
21	viii.	General charges for extra office staff and equipment	\$46,011.35
22	ix.	Home office overhead as a % of total cost	\$67,344.96
23	x.	Total damages exclusive of attorney's fees and costs	\$740,794.56

24 VII. RELIEF SOUGHT

25 See Section VI(F) and (G), above.

26 VIII. POINTS OF LAW

27 All claims and defenses arise under state law. All of plaintiff's claims are brought against
28 the defendant, and defendant's counterclaim is brought against plaintiff.

- 1 1. The elements of, standards for, and burden of proof in an action for breach of a written
2 contract.
- 3 2. The elements of, standards for, and burden of proof in an action for breach of an oral
4 contract.
- 5 3. The elements of, standards for, and burden of proof in an action for account stated.
- 6 4. The elements of, standards for, and burden of proof in an action for common count.
- 7 5. The elements of, standards for, and burden of proof in an action for quantum meruit.

8 Trial briefs addressing the points of law implicated by these remaining claims shall be
9 filed with this court no later than **7 days before trial** in accordance with Local Rule 285.

10 ANY CAUSES OF ACTION OR AFFIRMATIVE DEFENSES NOT EXPLICITLY
11 ASSERTED IN THE PRETRIAL ORDER UNDER POINTS OF LAW AT THE TIME IT
12 BECOMES FINAL ARE DISMISSED, AND DEEMED WAIVED.

13 IX. ABANDONED ISSUES

14 None.

15 X. WITNESSES

16 The parties have submitted the following as witnesses:

- 17 1. Brandon Williams
- 18 2. Custodian of Records/Person Most Knowledgeable at George Reed, Inc.
- 19 3. Barry Vazquez
- 20 4. Dean Conard
- 21 5. Richard Wilson
- 22 6. Steve Blakely
- 23 7. Terry Smith
- 24 8. Layman Light
- 25 9. Darla Lunsford
- 26 10. Bryan Ady
- 27 11. Michael Pack
- 28 12. Richard Buenting

1 13. Plaintiff disclosed the names of forty-five truck drivers who hauled on this
2 project/contract in its initial disclosures, and reserves the right to call at least three
3 of any of the forty-five truck drivers previously listed.¹

4 Each party may call any witnesses listed above.

5 A. **The court does not allow undisclosed witnesses to be called for any purpose,**
6 **including impeachment or rebuttal, unless they meet the following criteria:**

7 (1) The party offering the witness demonstrates that the witness is for the
8 purpose of rebutting evidence that could not be reasonably anticipated at
9 the pretrial conference, or

10 (2) The witness was discovered after the pretrial conference and the proffering
11 party makes the showing required in paragraph B, below.

12 B. Upon the post pretrial discovery of any witness a party wishes to present at trial,
13 the party shall promptly inform the court and opposing parties of the existence of
14 the unlisted witnesses so the court may consider whether the witnesses shall be
15 permitted to testify at trial. The witnesses will not be permitted unless:

16 (1) The witness could not reasonably have been discovered prior to the
17 discovery cutoff;

18 (2) The court and opposing parties were promptly notified upon discovery of
19 the witness;

20 (3) If time permitted, the party proffered the witness for deposition; and

21 (4) If time did not permit, a reasonable summary of the witness's testimony
22 was provided to opposing parties.

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27 ¹ Although not discussed at the final pretrial conference, the court now notes that this
28 identification of trial witnesses is insufficiently specific. In its objections plaintiff is directed to specifically identify by name the individual drivers that it may elect to call as witnesses at trial.

1 XI. EXHIBITS, SCHEDULES, AND SUMMARIES

2 Plaintiff's Exhibits

- 3 1. Central Valley Concrete signed quotation
- 4 2. Road and Highway Builders' signed Purchase Order
- 5 3. Central Valley Concrete's December 22, 2015 final invoice
- 6 4. Spreadsheet of Road and Highway Builders' deductions
- 7 5. Central Valley Concrete job order sheets and dispatch sheets for days when trucks
- 8 were ordered on the Tioga Pass Project
- 9 6. History ticket inquiry subpoenaed from George Reed, Inc. showing all trucking
- 10 companies who hauled material on the Tioga Pass Project
- 11 7. History ticket inquiry subpoenaed from George Reed, Inc. showing the dates
- 12 material was hauled for the Tioga Pass Project
- 13 8. Invoices to Road and Highway Builders subpoenaed from George Reed, Inc. for
- 14 the Tioga Pass Project
- 15 9. Spreadsheet of work/scheduled dates attached as Exhibit A to Plaintiff's Responses
- 16 to Special Interrogatories
- 17 10. Spreadsheet of subhaulers and dates worked attached as Exhibit B to Plaintiff's
- 18 Responses to Special Interrogatories
- 19 11. Nine page email string between Brandon Williams, Richard Bunting, Darla
- 20 Lundsford and Barry Vasquez from August 25, 2015 through December 22, 2015
- 21 12. Two page email string between Darla Lundsford and Kim Krauser and attachment
- 22 between April 8, 2015 and July 9, 2015
- 23 13. July 23, 2015 email from Darla Lundsford to Kim Krauser
- 24 14. Eight page email string between Darla Lundsford, Richard Bunting, Barry
- 25 Vasquez and Barry Williams from August 25, 2015 through December 21, 2015
- 26 15. Seven page email string between Darla Lundsford, Richard Bunting, Barry
- 27 Vasquez and Barry Williams from August 25, 2015 through December 21, 2015

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- 1 16. Four page email string between Darla Lundsford, Brandon Williams and Barry
- 2 Vasquez from August 25, 2015 through November 19, 2015
- 3 17. All invoices from Central Valley Concrete, Inc. to Road and Highway Builders
- 4 18. All weight tags and delivery tickets for the project
- 5 19. Summary/schedule of payments received from Road and Highway Builders
- 6 20. Credit application of Road and Highway Builders
- 7 21. Collection of plaintiff's subhauler agreements
- 8 22. Plaintiff's damages spreadsheets.

9 Defendant's Exhibits

- 10 1. Any or all of the exhibits listed by the plaintiff above.
- 11 2. Defendant's damages calculations, spreadsheets, and supporting documents.

12 At trial, joint exhibits shall be identified as JX and listed numerically, e.g., JX-1, JX-2.

13 No exhibit shall be marked with or entered into evidence under multiple exhibit numbers, and the
14 parties are hereby directed to meet and confer for the purpose of designating joint exhibits.

15 Plaintiff's exhibits shall be listed numerically and defendant's exhibits shall be listed
16 alphabetically. All exhibits must be pre-marked. The parties must prepare three (3) separate
17 exhibit binders for use by the court at trial, with a side tab identifying each exhibit in accordance
18 with the specifications above. Each binder shall have an identification label on the front and
19 spine.

20 The parties must exchange exhibits no later than **28 days before trial**. Any objections to
21 exhibits are due no later than **14 days before trial**. The final exhibits are due **March 1, 2018**. In
22 making any objection, the party is to set forth the grounds for the objection. As to each exhibit
23 which is not objected to, it shall be marked and received into evidence when offered at trial and
24 will require no further foundation.

25 **The court does not allow the use of undisclosed exhibits for any purpose, including**
26 **impeachment or rebuttal, unless they meet the following criteria**

- 27 A. The court will not admit exhibits other than those identified on the exhibit lists
- 28 referenced above unless:

1 (1) The party proffering the exhibit demonstrates that the exhibit is for the
2 purpose of rebutting evidence that could not have been reasonably
3 anticipated, or

4 (2) The exhibit was discovered after the issuance of this order and the
5 proffering party makes the showing required in paragraph B, below.

6 B. Upon the discovery of exhibits after the discovery cutoff, a party shall promptly
7 inform the court and opposing parties of the existence of such exhibits so that the
8 court may consider their admissibility at trial. The exhibits will not be received
9 unless the proffering party demonstrates:

10 (1) The exhibits could not reasonably have been discovered earlier;

11 (2) The court and the opposing parties were promptly informed of their
12 existence;

13 (3) The proffering party forwarded a copy of the exhibits (if physically
14 possible) to the opposing party. If the exhibits may not be copied the
15 proffering party must show that it has made the exhibits reasonably
16 available for inspection by the opposing parties

17 XII. DISCOVERY DOCUMENTS

18 Counsel must lodge the sealed original copy of any deposition transcript to be used at trial
19 with the Clerk of the Court no later than **14 days before trial**.

20 Plaintiff may use the following discovery document at trial:

21 1. Documents subpoenaed from George Reed, Inc.

22 Defendant may use the following discovery document at trial:

23 1. Plaintiff's answers to interrogatories, set one, and the plaintiff's responses to
24 requests for production.

25 XIII. FURTHER DISCOVERY OR MOTIONS

26 Plaintiff does not intend any further discovery or motions, other than motions *in limine* as
27 discussed in Section V. Defendant does not intend any further discovery or motions.

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1 XIV. STIPULATIONS

2 None.

3 XV. AMENDMENTS/DISMISSALS

4 Plaintiff will dismiss all DOE defendants prior to trial.

5 XVI. SETTLEMENT

6 The parties have met and conferred concerning mediation and have agreed to participate
7 in mediation and/or a settlement conference before a magistrate. The parties are directed to
8 contact the chambers of the assigned magistrate judge to schedule a mandatory settlement
9 conference before a magistrate judge of this court as soon as possible.

10 XVII. JOINT STATEMENT OF THE CASE

11 Because there are numerous disputed factual issues, the parties agree that a joint statement
12 of the case is neither feasible nor advisable. Nonetheless, the parties are directed to meet and
13 confer and arrive at an agreed upon neutral statement describing the case to be read to jury by the
14 court panel during voir dire.

15 XVIII. SEPARATE TRIAL OF ISSUES

16 None.

17 XIX. IMPARTIAL EXPERTS/LIMITATION OF EXPERTS

18 None.

19 XX. ATTORNEYS' FEES

20 Both sides seek attorney's fees pursuant to contractual provisions.

21 XXI. TRIAL PROTECTIVE ORDER AND REDACTION OF TRIAL EXHIBITS

22 A protective order will only be sought if a party's private, proprietary, or trade secret
23 information is introduced into evidence. If unredacted versions of private, proprietary, or trade
24 secret information are introduced, a protective order protecting the confidential nature of such
25 information will be sought.

26 XXII. MISCELLANEOUS

27 N/A

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1 **XXIII. ESTIMATED TIME OF TRIAL/TRIAL DATE**

2 Jury trial is set for **June 5, 2018**, at 1:00 p.m. in Courtroom 5 before the Honorable Dale
3 A. Drozd. Trial is expected to last 5–7 days. The parties are directed to Judge Drozd’s standard
4 procedures available on his webpage on the court’s website.

5 Counsel are to call Renee Gaumnitz, courtroom deputy, at (559) 499-5652, one week prior
6 to trial to ascertain the status of the trial date.

7 **XXIV. PROPOSED JURY VOIR DIRE AND PROPOSED JURY INSTRUCTIONS**

8 The parties shall file any proposed jury *voir dire* **7 days before trial**. Counsel for each
9 party will be limited to fifteen minutes of supplemental jury *voir dire* in addition to that
10 conducted by the court.

11 The court directs counsel to meet and confer in an attempt to generate a joint set of jury
12 instructions and verdicts. The parties shall file any such joint set of instructions **14 days before**
13 **trial**, identified as “Joint Jury Instructions and Verdicts.” To the extent the parties are unable to
14 agree on all or some instructions and verdicts, their respective proposed instructions are due **14**
15 **days before trial**.

16 Counsel shall e-mail a copy of all proposed jury instructions and verdicts, whether agreed
17 or disputed, as a Word document to dadorders@caed.uscourts.gov no later than **14 days before**
18 **trial**; all blanks in form instructions should be completed and all brackets removed.

19 Objections to proposed jury instructions must be filed **7 days before trial**; each objection
20 shall identify the challenged instruction and shall provide a concise explanation of the basis for
21 the objection along with citation of authority. When applicable, the objecting party shall submit
22 an alternative proposed instruction on the issue or identify which of his or her own proposed
23 instructions covers the subject.

24 **XXV. TRIAL BRIEFS**

25 As noted above, trial briefs are due **7 days before trial**.

26 **XXVI. OBJECTIONS TO PRETRIAL ORDER**

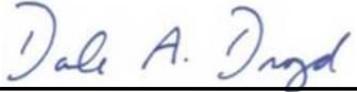
27 Each party is granted **14 days from the date of this order** to file objections to the same.
28 Each party is also granted **7 days thereafter** to respond to the other party’s objections. If no

1 objections are filed, the order will become final without further order of this court.

2 The parties are reminded that pursuant to Rule 16(e) of the Federal Rules of Civil
3 Procedure and Local Rule 283 of this court, this order shall control the subsequent course of this
4 action and shall be modified only to prevent manifest injustice.

5 IT IS SO ORDERED.

6 Dated: January 12, 2018

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9 UNITED STATES DISTRICT JUDGE

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