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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

THERESE SWENSON,

Plaintiff,

v.

AMTRAK and DOES 1 to 100 inclusive,¹

Defendants.

No. 2:14-CV-02629-KJM-CMK

ORDER

Therese Swenson alleges contract and emotional distress claims against the National Railroad Passenger Corporation, commonly known as Amtrak. The matter is before the court on Amtrak's motion to dismiss her first amended complaint. The court held a hearing on

¹ The Ninth Circuit has held that if a defendant's identity is not known before the complaint is filed, a "plaintiff should be given an opportunity through discovery to identify the unknown defendants." *Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999) (quotation marks omitted) (quoting *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980)). Plaintiff is warned, however, that Doe defendants will be dismissed if "it is clear that discovery would not uncover the[ir] identities or that the complaint would be dismissed on other grounds." *Id.* (quotation marks omitted) (quoting *Gillespie*, 629 F.2d at 642). She is also warned that Federal Rule of Civil Procedure 4(m) is applicable to Doe defendants. That rule provides the court must dismiss defendants who have not been served within 120 days after the filing of the complaint unless good cause is shown. *See Glass v. Fields*, No. 09-00098, 2011 U.S. Dist. LEXIS 97604 (E.D. Cal. Aug. 31, 2011); *Hard Drive Prods. v. Does*, No. 11-01567, 2011 U.S. Dist. LEXIS 109837, at *2-4 (N.D. Cal. Sep. 27, 2011).

1 May 8, 2015. Case A. Colaw appeared for Amtrak and Barbara Norman appeared telephonically
2 for Ms. Swenson. The motion is granted in part with leave to amend.

3 I. BACKGROUND

4 The complaint alleges as follows: On November 13, 2012, Therese Swenson
5 purchased a round-trip ticket on the Coast Starlight train from Dunsmuir, California to Seattle,
6 Washington. First Am. Compl. 5–6, ECF No. 6.² Her ticket shows she is a senior and an Amtrak
7 Guest Rewards member. *Id.* at 6. She had traveled by train eight times in the preceding eleven or
8 twelve weeks without incident. *Id.* at 8. On November 15, 2012, Ms. Swenson departed for
9 Seattle. *Id.* at 11. On her way she asked the conductor three or four times if she could move to a
10 nearby vacant seat, but the conductor said no, that seat was reserved. *Id.* Despite discomfort in
11 her knees, she stayed in her seat throughout the fifteen-hour trip. *Id.* Her distress only increased
12 when another passenger, a man, twice placed his hand on her leg “and made a salacious
13 comment.” *Id.*

14 Ms. Swenson was scheduled to return to Dunsmuir on November 18, 2012. *Id.*
15 at 5. The day before, she called an Amtrak agent to express her anxiety about the return trip. *Id.*
16 at 11. She explained her knee surgeries and desire to switch seats or stretch out across two seats
17 if both were available. *Id.* She also told the agent about her experience with the “overly friendly
18 man” on the way to Seattle. *Id.* The agent assured her she could move to another vacant seat if
19 one was available because “a coach ticket is not assigned seating.” *Id.*

20 She boarded the return train as scheduled on November 18 and took a seat near the
21 front of the empty train. *Id.* She placed her sweater on the seat next to her. *Id.* She was sitting
22 quietly when a conductor named Rene arrived. *Id.* at 8, 11. Rene asked Ms. Swenson to remove
23 her sweater; another passenger had boarded the train in Olympia and would sit in that seat until
24 the train arrived in Kelso, Washington. *Id.* at 11. Ms. Swenson asked if she could move to a pair
25 of vacant seats behind her, but Rene said that if she wished to use two seats, she would have to
26

27 ² Unless otherwise noted, citations to the complaint are to the page numbers applied by the
28 CM/ECF system.

1 pay for both. *Id.* Confused, Ms. Swenson asked if coach seats were actually assigned seating,
2 contrary to what the agent had assured her the day before. *Id.*

3 Rene left, warning Ms. Swenson she would return with a colleague. *Id.* Another
4 conductor, Don, soon arrived and told Ms. Swenson he had called the police to escort her off the
5 train. *Id.* Ms. Swenson called an Amtrak agent and reported an emergency. *Id.* The agent asked
6 to speak with the conductor, and Ms. Swenson passed Don the phone, who argued with the agent,
7 then returned her phone. *Id.* Ms. Swenson called the agent again and reiterated her distress, and
8 the agent told her to stay in her seat. *Id.* She was still on the phone when a police officer arrived
9 and told her to turn off the phone and come with him. *Id.* Ms. Swenson protested that the
10 Amtrak agent on the phone had told her to stay in her seat. *Id.* She was arrested, placed in
11 handcuffs, and escorted to the courthouse, where she was charged with trespassing, *id.* at 4, 8,
12 then placed in jail in Kelso, *id.* at 9. Her travel bag was impounded. *Id.* In it were her house
13 keys, car keys, prescription pain medication, clothes, makeup, and cell phone. *Id.* This left her
14 with open-toed shoes, no sweater, and a light overcoat, and she had no choice but to walk two
15 miles in the rain to find food and catch a bus home. *Id.* She has returned to Kelso four times to
16 resolve the arrest and related charges. *Id.* at 8.

17 On November 10, 2014, Ms. Swenson filed a complaint in this court, appearing
18 originally without counsel. ECF No. 1. She amended her complaint on February 6, 2015. First
19 Am. Compl., ECF No. 6. She seeks compensatory and punitive damages under claims for breach
20 of contract, personal injury, intentional infliction of emotional distress, and the Americans with
21 Disabilities Act. *Id.* at 3, 12. Amtrak moved to dismiss on March 9, 2015. Mot. Dismiss, ECF
22 No. 7. Ms. Norman appeared as plaintiff's counsel on April 8, 2015. ECF No. 10.

23 Amtrak's motion rests on three arguments. First, it argues the complaint does not
24 state a claim for breach of contract because (a) Ms. Swenson disregarded the terms and conditions
25 of her ticket and (b) does not allege Amtrak proximately caused her any damages. Mot. 6–9.
26 Second, Amtrak argues the complaint's factual allegations cannot support her claim for
27 intentional infliction of emotional distress. *Id.* at 10–12. Third, it argues the complaint's factual
28 allegations fall short of showing Amtrak's employees acted with "conscious, flagrant indifference

1 to the right or safety of others,” and therefore all requests for punitive damages must be
2 dismissed. *Id.* at 12–15. In opposition, Ms. Swenson disagreed on each point. Opp’n, ECF
3 No. 9. Amtrak replied. Reply, ECF No. 15.

4 Amtrak does not address Ms. Swenson’s general claim for personal injury under
5 the ADA, but at the hearing Ms. Swenson’s counsel confirmed she asserts no claim for personal
6 injury independent of her claim for emotional distress and no claim under the ADA. These
7 claims are therefore both dismissed with prejudice.

8 II. LEGAL STANDARD

9 A defendant may move to dismiss for “failure to state a claim upon which relief
10 can be granted.” Fed. R. Civ. P. 12(b)(6). The motion may be granted only if the complaint lacks
11 a “cognizable legal theory” or if its factual allegations do not support a cognizable legal theory.
12 *Hartmann v. Cal. Dep’t of Corr. & Rehab.*, 707 F.3d 1114, 1122 (9th Cir. 2013). The court
13 assumes these factual allegations are true and draws reasonable inferences from them. *See*
14 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

15 A complaint need contain only a “short and plain statement of the claim showing
16 that the pleader is entitled to relief,” Fed. R. Civ. P. 8(a)(2), not “detailed factual allegations,”
17 *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). But this rule demands more than
18 unadorned accusations; “sufficient factual matter” must make the claim at least plausible. *Iqbal*,
19 556 U.S. at 678. In the same vein, conclusory or formulaic recitations of elements do not alone
20 suffice. *Id.* (quoting *Twombly*, 550 U.S. at 555). Evaluation under Rule 12(b)(6) is a context-
21 specific task drawing on “judicial experience and common sense.” *Id.* at 679. And aside from
22 the complaint, district courts have discretion to examine documents incorporated by reference,
23 *Davis v. HSBC Bank Nevada, N.A.*, 691 F.3d 1152, 1159–60 (9th Cir. 2012); affirmative defenses
24 based on the complaint’s allegations, *Sams v. Yahoo! Inc.*, 713 F.3d 1175, 1179 (9th Cir. 2013);
25 and proper subjects of judicial notice, *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 976 (9th
26 Cir. 2012).

1 III. DISCUSSION

2 As noted above, Amtrak argues the complaint’s factual allegations do not support
3 a claim for relief for breach of contract, intentional infliction of emotional distress, or for punitive
4 damages. The court considers each point in turn.

5 A. Contract

6 California law supplies the rule of decision here. *See Klaxon Co. v. Stentor Elec.*
7 *Mfg. Co.*, 313 U.S. 487, 496 (1941) (federal district courts apply the choice of law rules of the
8 state in which they sit); Cal. Civ. Code § 1646 (“A contract is to be interpreted according to the
9 law and usage of the place where it is to be performed; or, if it does not indicate a place of
10 performance, according to the law and usage of the place where it is made.”). The elements of a
11 contract claim are well known: “(1) the existence of the contract, (2) plaintiff’s performance or
12 excuse for nonperformance, (3) defendant’s breach, and (4) the resulting damages to the
13 plaintiff.” *Oasis W. Realty, LLC v. Goldman*, 51 Cal. 4th 811, 821 (2011). Amtrak agrees a
14 contract exists, but argues the ticket attached to Ms. Swenson’s complaint is only one part of their
15 agreement. It also contests the complaint’s adequacy on each of the final three elements of a
16 contract claim.

17 1. The Contract

18 Ms. Swenson has attached to her current complaint the first printed page of an
19 emailed sales receipt. *See* First Am. Compl. 7. It shows she purchased a round-trip ticket for
20 November 15 and 18, 2012, and several bullet points fill the receipt’s bottom quarter. *Id.* The list
21 includes, for example, Amtrak’s recommendation “you arrive at the station at least 30 minutes
22 prior to your scheduled departure”; notice that “[r]efund restriction or penalties may apply”; and,
23 relevant here, a “Summary of Conditions of Contract.” *Id.* This summary alerts the reader,
24 among other things, that the “[t]icket is contract of carriage between Amtrak and the ticket holder
25 which is subject to specific terms and conditions. These terms and conditions are available for
26 inspection at Amtrak ticket counters or on the Amtrak website . . . or may be requested by”—and
27 there the email reaches the page’s end; any remaining text is cut off. *Id.*

1 To its motion Amtrak attaches the declaration of Robert Pee, Amtrak's Director of
2 Pricing Strategy. Pee Decl. ¶ 3, ECF No. 7-1. Mr. Pee was employed in the same capacity at the
3 time Ms. Swenson purchased her ticket. *See id.* ¶ 3. He professes by personal knowledge that
4 Amtrak's passenger ticket terms and conditions were available at the address reproduced on Ms.
5 Swenson's email and at Amtrak ticket offices. *Id.* ¶ 4. The terms and conditions in force as of
6 November 2012 are attached to his declaration. *Id.* Ex. 1. The attached document is seven pages
7 long and includes sections describing, for example, its applicability, disclaimers, limitations on
8 liability, and conditions of carriage. *See generally id.* On the fourth and fifth pages, it provides
9 in part as follows:

10 **Carriage of Passengers**

11 ... In order to ensure the quality of travel and the safety and
12 security of its passengers, Amtrak may refuse to carry passengers:

- 13 • Who have not paid the applicable fare;
- 14 • Whose conduct is objectionable (such as but not limited to
15 being under the influence of alcohol or narcotics); [or]
- 16 • Who refuse to comply with safety or security rules or
17 instructions of Amtrak personnel;

18 ...

19 Amtrak employees or other authorized carrier representatives may
20 remove such a passenger from the train at any inhabited place, as
21 necessary under the circumstances, for any of the above reasons.

21 **Seating**

- 22 • On unreserved trains there are no guaranteed seats. Seating
23 is on a first-come first served basis.
- 24 • To the extent coach seats are available; each passenger
25 paying a fare will be entitled to a seat;
- 26 • No passenger may occupy more than one seat to the
27 exclusion of other passengers.

26 **Rights reserved by Amtrak**

- 27 • Amtrak reserves to itself full control and discretion as to
28 seating of passengers, and

- Amtrak reserves the right to change such seating at any time during a trip.

...

Id. at 4–5 (emphasis added). In opposition to Amtrak’s motion, Ms. Swenson does not contest the authenticity of this document; however, she argues its legal effect cannot be ascertained here thanks to unresolved legal and factual questions. *See* Opp’n 4. She implies the terms and conditions were not “an applicable portion of the written contract”; she was not aware of its terms and did not consent to them; and they are “over-broad in scope or application under the circumstances of this case.” *Id.*

Ordinarily on a motion to dismiss, a district court limits its analysis to the complaint’s allegations, exhibits, and attachments. *See, e.g., Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005). Nevertheless, the court may consider extrinsic information incorporated into the complaint by reference. *Id.* More specifically, the court may consider documents “whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the [plaintiff’s] pleading.” *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999) (citation and quotation marks omitted) (alteration in original), *abrogated on other grounds by Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007). This doctrine extends “to situations in which the plaintiff’s claim depends on the contents of a document, the defendant attaches the document to its motion to dismiss, and the parties do not dispute the authenticity of the document, even though the plaintiff does not explicitly allege the contents of that document in the complaint.” *Knievel*, 393 F.3d at 1076. Here, although the legal implications of the terms and conditions attached to Amtrak’s complaint are disputed, that document’s authenticity is not. Moreover, the portion of the sales receipt attached to the complaint refers directly to terms and conditions, and Ms. Swenson’s contract claims depend on them. They are therefore incorporated into the complaint by reference.

Contract law employs a second and distinct doctrine of incorporation by reference. Under California law, a document extrinsic to a contract may be incorporated into that contract by reference if “(1) the reference is clear and unequivocal, (2) the reference is called to the attention

1 of the other party and he consents thereto, and (3) the terms of the incorporated document are
2 known or easily available to the contracting parties.” *DVD Copy Control Ass’n, Inc. v.*
3 *Kaleidescape, Inc.*, 176 Cal. App. 4th 697, 713 (2009); *see also Amtower v. Photon Dynamics,*
4 *Inc.*, 158 Cal. App. 4th 1582, 1608 (2008) (“The contract need not recite that it incorporates
5 another document, so long as it guides the reader to the incorporated document.” (citation,
6 quotation marks, and alterations omitted)). The question of incorporation is factually specific.
7 *See Shaw v. Regents of Univ. of California*, 58 Cal. App. 4th 44, 54 (1997) (“[E]ach case must
8 turn on its facts.” (citation and quotation marks omitted)).

9 Here, drawing all inferences in Ms. Swenson’s favor, the court lacks sufficient
10 information to perform the analysis required by California law. The e-ticket attached to her
11 complaint does not refer to any additional terms and conditions; only the emailed sales receipt
12 includes that reference. The court cannot conclude the sales receipt was part of the parties’
13 agreement. It cannot conclude Amtrak called Ms. Swenson’s attention to additional terms and
14 conditions at the time they entered an agreement. It cannot conclude the reference was clear and
15 unequivocal or that she consented. Factual questions such as these are ill-suited to a motion to
16 dismiss, in contrast to the circumstances before the court in *Fadal Machining Centers, LLC v.*
17 *Compumachine, Inc.*, 461 F. App’x 630 (9th Cir. 2011) (unpublished). In that case, the plaintiff
18 had attached both the substantive agreement in question and a number of invoices to his
19 complaint. *Id.* at 631. Both the written agreement and each of the invoices unequivocally
20 referred to terms and conditions on the plaintiffs’ website. *Id.* Those terms and conditions
21 required arbitration, so the district court dismissed the case and the Ninth Circuit affirmed. *Id.* at
22 631–32. What is missing from this case—and what was present in *Fadal*—is sufficient evidence
23 of the parties’ “clearly expressed . . . intent that [Swenson] would be bound by the terms and
24 conditions [Amtrak] set.” *Id.* at 632 (citing *DVD Copy*, 176 Cal. App. 4th at 713–14, for the
25 proposition that the parties’ “unambiguous intent” allows later incorporation by reference).

26 2. Performance and Breach

27 Without more specific descriptions of the parties’ agreement and for the reasons
28 described above, the court must accept Ms. Swenson’s allegations of her performance and

1 Amtrak’s breach. Amtrak also argues, however, that Ms. Swenson has breached obligations
2 imposed on her by California statutory law. Mot. 8:15–26 (citing *Dayton v. Yellow Cab Co. of*
3 *S.F.*, 85 Cal. App. 2d 740, 744 (1948)). In *Dayton*, the plaintiff’s wife had vomited in the
4 defendant’s taxi, the defendant demanded payment for the cleanup, and in the resulting
5 “[p]hysical encounter,” the plaintiff sustained a broken leg. 85 Cal. App. 2d at 741. The
6 appellate court affirmed: “even accepting the rule of ‘highest degree of care’ if the cab driver
7 were attacked he would be in no different position than anyone else in the exercise of his right to
8 protect himself.” *Id.* at 746. The court’s reference to a passenger’s “reciprocal obligation . . . to
9 use all reasonable care” arose only when the court concluded a common carrier has “the same
10 right to self protection as would anyone else.” *Id.* at 744 (citing Cal. Civ. Code § 50 (“Any
11 necessary force may be used to protect from wrongful injury the person or property of oneself . . .
12 or guest.”)). No allegations suggest Amtrak’s employees were protecting themselves or other
13 passengers from injury or that the rule of *Dayton* and the statutes it cites are applicable here.

14 3. Damages

15 Contract damages are limited to amounts “which will compensate the party
16 aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of
17 things, would be likely to result therefrom.” Cal. Civ. Code § 3300. Contract damages must be
18 “clearly ascertainable in both their nature and origin.” *Id.* § 3301. The parties’ expectations at
19 the time of contracting circumscribe any award. *See Applied Equip. Corp. v. Litton Saudi Arabia*
20 *Ltd.*, 7 Cal. 4th 503, 515 (1994) (“Contract damages are generally limited to those within the
21 contemplation of the parties when the contract was entered into or at least reasonably foreseeable
22 by them at that time . . .”).

23 Here, Ms. Swenson seeks damages for the price of her ticket, her out-of-pocket
24 expenses for finding alternative transportation from Kelso, Washington, and legal expenses
25 associated with her detention in Kelso. *See, e.g.*, First Am. Compl. 3. The value of her ticket and
26 the increased cost of alternative transportation are within the reasonable expectation of a person
27 who buys a train ticket and does not arrive at her chosen destination. The motion is denied as to
28 her contract claims.

1 B. Intentional Infliction of Emotional Distress

2 A complaint states a claim for intentional infliction of emotional distress when it
3 alleges (1) the defendant’s conduct was outrageous; (2) the defendant either intended to cause
4 emotional distress or acted with reckless disregard to the probability of causing emotional
5 distress; (3) the plaintiff suffered severe emotional distress; and (4) the defendant’s conduct
6 actually and proximately caused that emotional distress. *Nally v. Grace Cmty. Church*, 47 Cal. 3d
7 278, 300 (1988). The defendant’s conduct is sufficiently “outrageous” when it is “so extreme as
8 to exceed all bounds of that usually tolerated in a civilized community.” *Davidson v. City of*
9 *Westminster*, 32 Cal. 3d 197, 209 (1982).

10 Here, the complaint alleges Amtrak or its agents acted outrageously and extremely,
11 arbitrarily, vindictively, and with “harmful intent” and reckless disregard to the potential that Ms.
12 Swenson would suffer emotional distress. *See* First Am. Compl. at 4, 10. As alleged, the
13 conductors on the train could probably have addressed the situation with more restraint, *see id.*
14 at 11 (conductor argued on phone with agent, who had told Ms. Swenson to stay in her seat), but
15 the complaint includes no factual allegations to plausibly support these claims or from which the
16 court can plausibly infer Amtrak’s liability.

17 In the face of an “obvious alternative explanation” for the defendant’s conduct, a
18 complaint must be dismissed. *Iqbal*, 556 U.S. at 682; *Twombly*, 550 U.S. at 567. The
19 conductors’ desire to orderly remove Ms. Swenson from a seat she did not pay for, one allocated
20 to another passenger, explains their conduct at this point better than the theory of her complaint.
21 By her own allegation she refused to occupy only one seat and refused to pay for two. After she
22 ignored the conductors’ instructions, they called the police to escort her from the train, not to
23 arrest and cuff her. Even if the complaint could be read to infer Amtrak’s intent or reckless
24 disregard, its allegations do not show Amtrak’s actions exceeded all bounds of conduct usually
25 tolerated in civil society. The motion is granted with leave to amend.

26 C. Punitive Damages

27 The complaint seeks punitive damages. Under California law, “[i]n an action for
28 the breach of an obligation not arising from contract,” a plaintiff may recover punitive damages if

1 she proves “by clear and convincing evidence that the defendant has been guilty of oppression,
2 fraud, or malice.” Cal. Civ. Code § 3294(a). Congress has partially preempted state law on this
3 point, however. *See Dewese v. Nat’l R.R. Passenger Corp. (Amtrak)*, 590 F.3d 239, 249 (3d Cir.
4 2009); *Miller v. Illinois Cent. R. Co.*, 474 F.3d 951, 952 (7th Cir. 2007); *Haynes v. Nat’l R.R.*
5 *Passenger Corp.*, 423 F. Supp. 2d 1073, 1086 (C.D. Cal. 2006). A court may award punitive
6 damages against Amtrak “only if the plaintiff establishes by clear and convincing evidence that
7 the harm that is the subject of the action was the result of conduct carried out by the defendant
8 with a conscious, flagrant indifference to the rights or safety of others.” 49 U.S.C. § 28103(a)(1).

9 Nonetheless, the federal statute limits punitive damages awards to those “permitted
10 by applicable state law.” *Id.* Because California law prohibits the award of punitive damages for
11 a contract claim, and because the court has granted Amtrak’s motion to dismiss the claim for
12 intentional infliction of emotional distress, the request for punitive damages is dismissed with
13 leave to amend.

14 IV. CONCLUSION

15 This order disposes of ECF No. 7. The motion is GRANTED IN PART and
16 DENIED IN PART. In particular, the court orders as follows:

- 17 (1) The claim for intentional infliction of emotional distress is dismissed with leave to
18 amend.
- 19 (2) The request for punitive damages is dismissed with leave to amend.
- 20 (3) The claims under the ADA and for personal injury independent of emotional
21 distress are dismissed with prejudice.
- 22 (4) In all other respects the motion is denied.
- 23 (5) An amended complaint shall be filed within twenty-one days. In the interest of an
24 efficient resolution of this matter, it must be printed in typeface no smaller than
25 twelve-point Times New Roman with a spacing twenty-four points or greater, *i.e.*,
26 double spacing. Each paragraph must be sequentially numbered. Exhibits or
27 attachments must be appended together at the conclusion of the amended
28 complaint and must be labeled by letter, *i.e.* A, B, C, etc.

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(6) After an amended complaint is filed, this case is referred to a mandatory settlement conference before another judge of this court.

(7) Magistrate Judge Edmund F. Brennan has been randomly selected as the settlement judge. A settlement conference is scheduled before Judge Brennan for January 7, 2016 at 10:00 a.m. in Courtroom No. 8, 13th Floor.

The parties are directed to submit their confidential settlement conference statements to the Court using the following email address: efborders@caed.uscourts.gov. If a party desires to share additional confidential information with the Court, they may do so pursuant to the provisions of Local Rule 270(d) and (e). Statements are due at least 7 days prior to the Settlement Conference. Each party is reminded of the requirement that it be represented in person at the settlement conference by a person able to dispose of the case or fully authorized to settle the matter at the settlement conference on any terms. *See* Local Rule 270.

IT IS SO ORDERED.

DATED: October 22, 2015.


UNITED STATES DISTRICT JUDGE