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4 IN THE UNITED STATES DISTRICT COURT
5 FOR THE NORTHERN DISTRICT OF CALIFORNIA
6

7 HEINZ HOFMANN and THOMAS BUCKLEY,

No. C 11-4016 CW

8 Plaintiffs,

ORDER DENYING
DEFENDANTS' MOTION
TO DISMISS
PLAINTIFFS' FIRST
AMENDED COMPLAINT
(Docket No. 39)

9 v.

10 THE CITY AND COUNTY OF SAN
11 FRANCISCO; GEORGE GASCON, in his
12 individual capacity; and JEFFREY
13 GODOWN, in his individual
14 capacity,

15 Defendants.
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In this disparate treatment action, Plaintiffs Heinz Hofmann and Thomas Buckley, both of whom are white, male police lieutenants, challenge the promotion practices employed by the San Francisco Police Department (SFPD), which they claim discriminate on the basis of race. Plaintiffs have filed suit against the City and County of San Francisco and former SFPD Chiefs of Police George Gascón and Jeffery Godown. In their First Amended Complaint (1AC) Plaintiffs allege five causes of action: (1) a claim under 42 U.S.C. § 1981 against all Defendants; (2) a claim under 42 U.S.C. § 1983 against all Defendants; (3) a claim under the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq., against the City; (4) a claim under California's Fair Employment and Housing Act, California Government Code section 12940, against the

1 City; and (5) a claim under the California Constitution, Article
2 I, section 31, against the City. Defendants move to dismiss
3 Plaintiffs' § 1983 and § 1981 claims against the City for failure
4 adequately to allege violations under Monell v. Department of
5 Social Services, 436 U.S. 658, 690-91 (1978), and for failure to
6 allege their claims within the limitations period. In addition,
7 Defendants argue that Plaintiffs did not adequately allege their
8 claim against the City under Title VII and that their claims
9 against the City under Title VII, the FEHA and the California
10 constitution are untimely.

11 Having considered all of the parties' submissions and oral
12 argument, the Court denies Defendants' motion to dismiss the 1AC.

13 BACKGROUND

14 Plaintiffs' 1AC largely mirrors the allegations in the
15 original complaint. The allegations were described in detail in
16 the Court's April 30, 2012 order addressing Defendants' motion to
17 dismiss the original complaint. This order addresses the new
18 allegations as pertinent to Defendants' second motion to dismiss.

19 LEGAL STANDARD

20 A complaint must contain a "short and plain statement of the
21 claim showing that the pleader is entitled to relief." Fed. R.
22 Civ. P. 8(a). On a motion under Rule 12(b)(6) for failure to
23 state a claim, dismissal is appropriate only when the complaint
24 does not give the defendant fair notice of a legally cognizable
25 claim and the grounds on which it rests. Bell Atl. Corp. v.
26 Twombly, 550 U.S. 544, 555 (2007). In considering whether the
27 complaint is sufficient to state a claim, the court will take all
28 material allegations as true and construe them in the light most

1 favorable to the plaintiff. NL Indus., Inc. v. Kaplan, 792 F.2d
2 896, 898 (9th Cir. 1986). However, this principle is inapplicable
3 to legal conclusions; "threadbare recitals of the elements of a
4 cause of action, supported by mere conclusory statements," are not
5 taken as true. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)
6 (citing Twombly, 550 U.S. at 555).

7 ANALYSIS

8 I. Section 1983 Claim

9 A. Sufficiency of Allegations

10 Under Monell, 436 U.S. at 690-91, Plaintiffs may state a
11 § 1983 claim against the City where "action pursuant to official
12 municipal policy of some nature cause[s] a constitutional tort."
13 The Ninth Circuit has held that municipal liability under Monell
14 may be established in one of three ways: (1) "the plaintiff may
15 prove that a city employee committed the alleged constitutional
16 violation pursuant to a formal governmental policy or a
17 longstanding practice or custom which constitutes the standard
18 operating procedure of the local governmental entity;" (2) "the
19 plaintiff may establish that the individual who committed the
20 constitutional tort was an official with final policy-making
21 authority and that the challenged action itself thus constituted
22 an act of official governmental policy;" or (3) "the plaintiff may
23 prove that an official with final policy-making authority ratified
24 a subordinate's unconstitutional decision or action and the basis
25 for it." Gillette v. Delmore, 979 F.2d 1342, 1346-47 (9th Cir.
26 1992).

27 Plaintiffs previously alleged that Chiefs Gascón and Godown
28 had final policy-making authority for the City with respect to

1 promotions in the SFPD under the City Charter, Administrative
2 Code, and Civil Service Commission regulations and policies.
3 However, the Court determined that Plaintiffs had not alleged that
4 the Chiefs had the final policy-making authority necessary to
5 pursue their § 1983 claim because they conceded that the Civil
6 Service Commission establishes the rules to certify candidates for
7 promotion and the Chiefs' individual promotion decisions could be
8 appealed to the Commission. That the Chiefs had authority over
9 the specific promotions did not establish that they had final
10 promotion policy-making power. In the 1AC, Plaintiffs allege that
11 the City Charter, in sections 2A.30 and A8.329, "expressly
12 delegates the policymaking function of appointing individuals for
13 promotion from the certification lists established by the City's
14 Civil Service Commission." 1AC at ¶ 38. Plaintiffs' citation to
15 sections 2A.30 and A8.329 does not persuade the Court to
16 reconsider its earlier determination that the Chiefs are not
17 promotion policy-makers.

18 The Court previously held that the City's continued use of a
19 banding method is an official policy, but that Plaintiffs had not
20 alleged that banding under the City's current plan is
21 unconstitutional or amounts to discrimination against white
22 candidates. Accordingly, the Court found that Plaintiffs had not
23 alleged that the Chiefs had acted pursuant to an unconstitutional
24 policy.

25 Plaintiffs now allege that the City has a long-standing
26 practice and custom in which it "resorts to banding when
27 sufficient numbers of minorities fail to do well enough on the
28 promotional examinations to be promoted under an alternate

1 certification rule (e.g. Rank Order, Rule of 3, Rule of 5, etc.)."
2 1AC at ¶ 28. Plaintiffs claim that the "purposes behind the
3 City's use of the banding procedure in SFPD promotions is to
4 artificially increase the number of minorities promotable on
5 eligibility lists than otherwise would be under some certification
6 rule." 1AC at ¶ 28. Plaintiffs allege that, since 1998, when the
7 consent decree arising from a 1973 class action, Officers for
8 Justice v. Civil Service Commission of the City and County of San
9 Francisco, C 73-0657, was terminated, the City has used banding to
10 select candidates for promotion from the 2000 and 2005
11 Lieutenant's Lists, and the 2001, 2004 and 2007 Captain's List.
12 According to Plaintiffs' 1AC, the City abandoned banding as a
13 method to select candidates from the 2011 Captain's List because
14 all black applicants are reachable under the Rule of 10 used for
15 the list. 1AC at ¶ 24.

16 Defendants argue that Plaintiffs cannot allege a Monell claim
17 based on the City's use of banding because the method is legal as
18 a matter of law. As the Court described in its previous order,
19 the Ninth Circuit in Officers for Justice v. Civil Service
20 Commission of the City and County of San Francisco, 979 F.2d 721,
21 724 (9th Cir. 1992), held that the banding described in that case
22 was constitutional. The Ninth Circuit described a band as a
23 "statistically derived confidence range that is applied to the
24 examination results." Id. at 722. However, Plaintiffs' amended
25 Monell claim does not allege that the banding method itself
26 discriminates on the basis of race. Rather, Plaintiffs claim that
27 the City has a custom and practice of discriminating against white
28 applicants by opting to use the banding method, rather than a

1 different selection rule, only when few African Americans and
2 Asian Americans are eligible for promotion under those other
3 selection rules. Thus, the Ninth Circuit's ruling does not
4 preclude Plaintiffs' claim.

5 Defendants further argue that Plaintiffs' claim fails because
6 they remained eligible for promotion when the City applied banding
7 to the 2007 Captain's List. Plaintiffs were within the forty-five
8 point band, but they were not selected based on "secondary
9 criteria," such as education, training, assignments, disciplinary
10 history and commendations or awards. Accordingly, Defendants
11 contend that Plaintiffs were not injured by the City's alleged
12 custom of selectively using banding.

13 Defendants' argument is not persuasive. Plaintiffs' amended
14 allegations assert a municipal custom and practice in which the
15 City resorted to the banding method to boost the number of African
16 American and Asian American candidates eligible for promotion and
17 to facilitate discrimination against white candidates; and the
18 Chiefs, in turn, engaged in a custom and practice of selecting
19 minority candidates for promotion over objectively more qualified
20 white applicants. 1AC at ¶ 30. Although Plaintiffs were eligible
21 for promotion because they were within the forty-five point band,
22 they were allegedly injured when the Chiefs declined to promote
23 them.

24 Finally, Defendants challenge the sufficiency of Plaintiffs'
25 factual allegations that the Chiefs made promotions pursuant to
26 the City's longstanding custom and practice of discrimination.
27 Defendants contend that Plaintiffs have repeated the spare
28 allegations in their original complaint that the Chiefs made

1 promotions "under the City's policy of banding," and that these
2 allegations do not include sufficient facts to infer a plausible
3 claim as required by Twombly, 550 U.S. at 555.

4 Defendants neglect several new allegations. In paragraphs
5 twenty-four and thirty of the 1AC, as noted above, Plaintiffs
6 allege that the City used banding to select candidates for
7 promotion from the 2000 and 2005 Lieutenant's Lists, and the 2001,
8 2004 and 2007 Captain's Lists, but not the 2011 Captain's List.
9 In addition, Plaintiffs add, "When any blacks were within the band
10 on any of these SFPD promotional lists, they were virtually always
11 hired (with 2 notable exceptions that constituted extraordinary
12 circumstances)." 1AC at ¶ 30. Plaintiffs also allege that the
13 City promoted all five African American candidates from the band
14 applied to the 2000 Lieutenant's list. 1AC at ¶ 18. Because
15 Plaintiffs contend that African Americans were "virtually always"
16 hired over white candidates from within the band and that this
17 practice occurred for several years, during the tenure of more
18 than one Chief, the allegations could support an inference that
19 the Chiefs were making promotion decisions pursuant to a
20 discriminatory policy, custom and practice attributable to the
21 City.

22 In sum, Plaintiffs have alleged a Monell claim because they
23 claim that the City selectively applied banding to boost the
24 number of African American and Asian American candidates eligible
25 for promotion, and SFPD Chiefs, pursuant to the City's policy of
26 discrimination, engaged in a longstanding custom and practice of
27 selecting virtually all of such candidates for promotion over
28 objectively more qualified white candidates within the band. To

1 prevail on their Monell claim alleging disparate treatment,
2 Plaintiffs must prove that both the City and the individual Chiefs
3 acted with discriminatory intent and that the Chiefs did so
4 because of the City's intentionally discriminatory policy, not
5 merely their own desire to discriminate against white candidates.
6 Plaintiffs must also prove that, but for such discrimination, each
7 Plaintiff would have been selected as the most qualified applicant
8 for a particular promotion.

9 B. Timeliness of Claim

10 The parties do not dispute that a two-year limitations period
11 applies to Plaintiffs' § 1983 claim. Instead, their dispute
12 centers on the date that the claim accrued.

13 In their first motion to dismiss Defendants argued that
14 Plaintiffs' claim accrued in January 2008, when the City announced
15 that the banding method would be used to select candidates from
16 the 2007 list for promotion. Plaintiffs argued that their claim
17 accrued on the date the 2007 list expired, January 14, 2011, when
18 the possibility that they would be promoted from the list ended.
19 Relying on Lukovsky v. City and County of San Francisco, 535 F.3d
20 1044, 1049-51 (9th Cir. 2008), the Court held that Plaintiffs'
21 § 1983 claim accrued when they were notified that they were not
22 selected for promotion to the position of Captain or when they
23 should have known that they were not selected. In Lukovsky, the
24 plaintiffs argued that their claims did not accrue until they knew
25 that they were not hired and they learned of the defendants'
26 alleged discriminatory intent. The plaintiffs claimed that they
27 had no reason to know of the defendants' discriminatory conduct
28 until they were informed of it years after they were denied the

1 positions. The Ninth Circuit held that claims under § 1983 accrue
2 when applicants are informed or should know that they have not
3 been hired. That is, claims accrue when the applicants learn of
4 the "actual injury," not when they suspect a "legal wrong," such
5 as that the employer's action was based on discriminatory intent.
6 Id. In the original complaint, Plaintiffs had not alleged the
7 dates when they were passed over for promotion. The Court held
8 that, given that they filed their complaint on August 16, 2011,
9 provided that they learned they were denied one or more promotions
10 on or after August 16, 2009, their claim under § 1983 is timely.

11 There is no reason to change this decision because no new
12 allegations indicate that Plaintiffs' claim is untimely.
13 Plaintiffs' claims here did not accrue in January 2008 when the
14 City announced its decision to use banding, but only later when it
15 acted on its decision by denying promotions to Plaintiffs. When
16 the City announced the decision to use banding, Plaintiffs only
17 had notice of the possibility of an adverse employment action
18 against them, but the adverse action did not occur until they were
19 actually denied a promotion. The denial of Plaintiffs'
20 applications for promotion did not automatically flow from the
21 announcement that the City intended to use banding.

22 Defendants argue that the Court's ruling improperly conflated
23 two adverse employment decisions--the City's decision to use
24 banding and the Chiefs' promotion decisions--and that determining
25 the accrual date of Plaintiffs' banding claim requires that the
26 Court distinguish between the two decisions. Lukovsky does not
27 support Defendants' position, nor does Delaware State College v.
28 Ricks, 449 U.S. 250, 258-59 (1980), a case upon which Lukovsky

1 relies. In Ricks, the Supreme Court held that the plaintiff's
2 § 1981 and Title VII claims accrued when the plaintiff was denied
3 tenure, not on the date, one year later, when the plaintiff's
4 employment actually ended. Although the college had a policy of
5 not immediately terminating the employment of a professor who was
6 denied tenure, but instead allowing one additional year of
7 employment under a "terminal" contract, the Court rejected the
8 plaintiff's argument that his claim did not accrue until his
9 employment actually ended. The Court reasoned that the plaintiff
10 had only alleged discrimination in the denial of tenure, after
11 which the termination of his employment was "inevitable." Id. at
12 257-58. Unlike the situation in Ricks, the denial of Plaintiffs'
13 applications for promotion was not inevitable once the City chose
14 to apply banding. Thus, Ricks does not support finding that the
15 adverse employment action occurred when the City decided to use
16 the banding method.

17 Plaintiffs argue that the Supreme Court's more recent
18 decision in Lewis v. City of Chicago, 130 S. Ct. 2191 (2010),
19 supports their position that actionable discrimination occurred
20 each time the City selected a candidate for promotion from the
21 list of eligible candidates and, therefore, their § 1983 disparate
22 treatment claim is timely. Defendants counter that Lewis
23 undermines Plaintiffs' position. Lewis concerned disparate impact
24 claims under Title VII,¹ which do not require a showing of
25 discriminatory intent. Id. at 2199. There, the Court rejected

26
27 ¹ The Ninth Circuit has stated that cases arising under Title
28 Lukovsky, 535 F.3d at 1049 n.3.

1 the City of Chicago's argument that the only actionable
2 discrimination occurred when it used examination results to adopt
3 a cutoff score and create its hiring eligibility list. Lewis held
4 that an "employment practice," for purposes of a Title VII
5 disparate impact claim, encompassed the City's decision to adopt a
6 cutoff score and create a list of candidates eligible for hire, as
7 well as the City's later decision to hire as firefighters certain
8 candidates on the eligibility list. Lewis does not compel a
9 finding that Plaintiffs alleged discriminatory intent within the
10 limitations period, but does not indicate that they will be unable
11 to establish a timely disparate treatment claim under § 1983.
12 Lewis is inapposite as to both Plaintiffs' and Defendants'
13 arguments on this point.

14 Defendants' motion to dismiss Plaintiffs' § 1983 claim as
15 untimely is denied without prejudice to revisiting the issue on
16 summary judgment.² As noted earlier, to succeed on their Monell
17 claim, Plaintiffs must prove that the City adopted the banding
18 policy and the individual Chiefs made their promotion decisions--
19 all with discriminatory intent in accordance with City policy,
20 custom and practice. To ensure that their claim is timely,
21 Plaintiffs will be required to prove that a failure to promote
22 each of them, motivated by discriminatory intent, occurred within
23 the limitations period.

24 ² At the hearing, the Court asked the parties when the
25 disputed promotion decisions were made but they declined to
26 clarify this point. Thus far, they have not submitted a joint or
27 separate letters indicating the promotion decision dates, as
28 required by this Court's July 5, 2012 order. Nor have they
complied with the Court's order that they explain how the Rule of
5 was applied in the circumstances of tied scores.

1 II. Section 1981 Claim

2 Defendants argue that Plaintiffs have failed to allege facts
3 sufficient to state a claim under § 1981. The Court previously
4 dismissed Plaintiffs § 1981 claim for failure to allege a
5 cognizable municipal custom or policy. The Court found that Ninth
6 Circuit precedent, specifically Federation of African American
7 Contractors v. City of Oakland, 96 F.3d 1204, 1215 (9th Cir.
8 1996), required a plaintiff pursuing a § 1981 claim against a
9 municipality to allege that his or her injury was caused by an
10 official "policy or custom" under Monell.

11 As explained above, Plaintiffs have sufficiently alleged a
12 long-standing policy, custom and practice of selectively adopting
13 banding to increase the number of African American and Asian
14 American candidates eligible for promotion and then uniformly
15 promoting such individuals over objectively better qualified white
16 candidates. Defendants' motion to dismiss Plaintiffs' § 1981
17 claim is denied.

18 III. Title VII Claim

19 A. Sufficiency of Allegations

20 Defendants contend that Plaintiffs' Title VII claim is
21 precluded by the Ninth Circuit's approval of banding as a neutral
22 selection method in the Officers for Justice decision discussed
23 earlier. Defendants also rely on Hazen Paper Co. v. Biggins, 507
24 U.S. 604 (1993). There, addressing ADEA claims, the Supreme Court
25 stated, "Whatever the employer's decisionmaking process, a
26 disparate treatment claim cannot succeed unless the employee's
27 protected trait actually played a role in that process and had a
28 determinative influence on the outcome." Id. Plaintiffs now

1 claim that since 1998 the City has selectively resorted to the
2 banding method to boost the number of African American and Asian
3 American candidates eligible for promotion, and has chosen to
4 promote African American and Asian American candidates who were
5 less qualified than their white counterparts and this constitutes
6 the City's policy, custom and practice of intentionally
7 discriminating against white applicants. For this reason,
8 Defendants' motion to dismiss Plaintiffs' Title VII claim is
9 denied.

10 B. Failure to Exhaust Timely

11 Defendants also contend that Plaintiffs' Title VII claim is
12 time-barred because Plaintiffs filed untimely administrative
13 complaints and the administrative complaints do not allege the
14 type of harm Plaintiffs purport to claim in the 1AC.
15 Specifically, Defendants contend that the administrative
16 complaints allege only discriminatory individual promotion
17 decisions, not the unlawful use of banding.

18 With respect to administrative exhaustion, the Ninth Circuit
19 has stated, "Since laypersons initiate the administrative process
20 for resolving employment discrimination complaints, the procedural
21 requirements for Title VII actions are neither interpreted too
22 technically nor applied too mechanically." Greenlaw v. Garrett,
23 59 F.3d 994, 999 (9th Cir. 1995) (internal quotation marks
24 omitted). "Incidents of discrimination not included in an EEOC
25 charge may not be considered by a federal court unless the new
26 claims are like or reasonably related to the allegations contained
27 in the EEOC charge." Green v. Los Angeles Cnty. Superintendent of
28 Schs., 883 F.2d 1472, 1476 (9th Cir. 1989) (internal quotation

1 marks omitted). In determining whether a new claim is like or
2 reasonably related to allegations contained in the previous
3 charge, the court inquires into "whether the original EEOC
4 investigation would have encompassed the additional charges." Id.

5 Hofmann stated in his EEOC charge that in or about 2007 he
6 applied for a promotion to the position of Captain and he was
7 ranked twenty on the list. He further claimed that he was passed
8 over for promotion, while the City promoted applicants who were
9 ranked lower than he. Likewise, Buckley alleged in his
10 administrative charge that in 2007 he applied for promotion to the
11 position of Captain, but officers ranked lower than he were
12 selected.

13 Although Plaintiffs did not specifically mention the City's
14 use of banding, their administrative claims were sufficient to
15 encompass the rules and decision-making process that the City used
16 to select candidates for promotion. Defendants' motion to dismiss
17 Plaintiffs' Title VII claim for failure to exhaust their
18 administrative remedies is not well-taken.

19 Defendants also argue that Plaintiffs' administrative charges
20 were untimely given that the City announced its banding rule in
21 December 2007, but Plaintiffs filed their charges of
22 discrimination with the EEOC in 2011. Plaintiffs respond that the
23 300 day period for them to file an administrative complaint began
24 to run from the day they were informed that they would not be
25 hired, not from when they learned the City would employ banding as
26 a certification rule. Like the original complaint, Plaintiffs'
27 1AC does not allege the dates when they were passed over for
28 specific promotions. Provided that Plaintiffs were notified that

1 they were denied a promotion within the 300 days before the Equal
2 Employment Commission received their administrative charges, their
3 charges were timely. At this stage in the litigation, Defendants'
4 request to dismiss Plaintiffs' Title VII claim as untimely lacks
5 merit.

6 IV. FEHA Claim

7 As with the Title VII claim, Defendants argue that
8 Plaintiffs' FEHA allegations are deficient because the banding
9 method has been held constitutional by the Ninth Circuit and
10 Plaintiffs have failed to allege that they were harmed by the
11 City's use of it. For the reasons stated above, Plaintiffs' FEHA
12 claim is not foreclosed by the Ninth Circuit's decision in
13 Officers for Justice, 979 F.2d at 724, 728. Defendants are also
14 incorrect that the 1AC fails to allege that the City discriminated
15 against them with respect to subsequent promotion decisions. As
16 discussed earlier, Plaintiffs' new allegations are sufficient to
17 allow an inference that the Chiefs made discriminatory promotion
18 decisions pursuant to a City policy. Accordingly, Defendants'
19 motion to dismiss Plaintiffs' FEHA claim based on insufficient
20 allegations is denied.

21 Like Title VII, under the FEHA, an "employee must exhaust the
22 administrative remedy provided by the statute by filing a
23 complaint with the Department of Fair Employment and Housing
24 . . . to be entitled to file a civil action in court based on
25 violations of the FEHA." Romano v. Rockwell Int'l, Inc., 14 Cal.
26 4th 479, 492 (1996) (citing Cal. Gov. Code §§ 12960 and 12965(b)).
27 The FEHA states that plaintiffs may file a complaint with the DFEH
28 within one year from the date upon which the alleged unlawful

1 practice occurred. Cal. Govt. Code § 12960(d). Plaintiffs' FEHA
2 claim need not be dismissed as untimely, because the allegations
3 do not indicate that they filed their administrative complaints
4 more than one year after they received notice of a denial of their
5 application for promotion.

6 V. California Constitutional Claim

7 Defendants argue that Plaintiffs' claim under Article I,
8 section 31 of the California Constitution should be dismissed
9 because the banding method is lawful and Plaintiffs have failed to
10 allege that discrimination by the City led to the denial of their
11 promotion. As explained above, the IAC alleges that the City used
12 banding on select occasions to boost the number of Asian American
13 and African American applicants eligible for promotion, and then
14 took advantage of banding to select unqualified candidates. The
15 allegations do not challenge the constitutionality of the banding
16 method alone. Plaintiffs' allegations are sufficient to support
17 an inference that the promotion decisions were the result of the
18 City's policy, custom and practice of discrimination. Defendants'
19 motion to dismiss Plaintiffs' state constitutional claim is
20 denied.

21 CONCLUSION

22 Defendants' motion to dismiss Plaintiffs' § 1983, Title VII
23 and FEHA claims as untimely is denied. Defendants' motion to
24 dismiss Plaintiffs' § 1983, § 1981, Title VII, FEHA and state
25 constitutional claims based on insufficient allegations is also
26 denied.

27 The parties shall appear for a case management conference on
28 June 29, 2013 at 2:00 p.m., whether or not any dispositive motion

1 is heard on that date, pursuant to this Court's July 5, 2012 case
2 management order.

3 IT IS SO ORDERED.

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5 Dated: 8/2/2012


6 CLAUDIA WILKEN
7 United States District Judge
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