

United States District Court  
Northern District of California

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

**SENTIUS INTERNATIONAL, LLC,**  
Plaintiff,  
vs.  
**APPLE INC.,**  
Defendant.

CASE NO. 4:20-cv-00477-YGR

**ORDER GRANTING IN PART AND DENYING  
IN PART APPLE INC.’S PARTIAL MOTION  
TO DISMISS THIRD AMENDED COMPLAINT  
FOR PATENT INFRINGEMENT**

Re: Dkt. No. 61

Plaintiff Sentius International, LLC (“Sentius”) brings this patent infringement action against defendant Apple Inc. for alleged infringement of two of its patents, U.S. Patent No. RE43,633 (the “’633 Patent”) and 7,672,985 (the “’985 Patent”). On June 2, 2020, the Court granted Apple’s partial motion to dismiss on the grounds that Sentius failed to state a claim for direct infringement of the ’633 Patent method claims and joint infringement of the ’633 and ’985 Patent method claims, with leave to amend. (Dkt. No. 55 (“Order”).) On June 23, 2020, Sentius filed an amended complaint, continuing to assert direct and joint infringement of the asserted method claims. (Dkt. No. 58 (“TAC”).)

Now before the Court is Apple’s partial motion to dismiss the third amended complaint. (Dkt. No. 61 (“MTD”).) Having carefully reviewed the pleadings and submitted papers, and for the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** defendant’s partial motion to dismiss.<sup>1</sup>

**I. BACKGROUND**

The background giving rise to this action is well-known, and the Court does not repeat it here. (*See* Order at 1:21-3:27.) In brief, Sentius asserts infringement of the ’633 Patent method

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<sup>1</sup> Pursuant to Federal Rule of Civil Procedure 78(b) and Civil Local Rule 7-1(b), the Court finds the motion appropriate for resolution without oral argument.

1 claims. (TAC ¶ 20.) Sentius accuses certain Apple products (such as iPhones and MacBooks) as  
2 well as Apple online applications (Pages and Keynote) through their spellcheck functionality. (*Id.*  
3 ¶¶ 11-17.) Specifically, Sentius alleges that these products and applications practice the claimed  
4 methods when a user selects a misspelled word to see spelling suggestions. (*Id.* ¶ 12.)

5 Previously, Sentius alleged that Apple uses the '633 Patent methods through software that  
6 automatically executes the claimed steps in response to user selection. (*See* Dkt. No. 37 (“SAC”)  
7 ¶¶ 35-46.) The Court dismissed these allegations because Federal Circuit precedent considers  
8 software to be instructions, such that party that operates the device to execute the software (the  
9 user) infringes a method claim, as opposed to the party that sells the device together with the  
10 software (Apple). (Order at 4:21-8:2.) In the third amended complaint, Sentius continues to assert  
11 infringement through software, but also alleges that “Apple and other users . . . have each  
12 respectively operated devices” to execute software that performs the claimed methods. (TAC ¶¶  
13 22-33.) Sentius also alleges that Apple operated these devices to execute the methods “on servers,  
14 computers and devices controlled by Apple.” (*Id.* ¶ 20.)

15 Separately, Sentius asserts a “joint infringement” theory by alleging that Apple “is directly  
16 responsible for any infringing acts of its users” because it conditions a benefit of the spell check  
17 functionality on user performance of claimed steps. (*Id.* ¶¶ 34, 42.) The joint infringement theory  
18 is relevant to both the '633 Patent—the claims of which require “selecting a discrete portion of an  
19 image of the textual source material” (i.e., the misspelled word)—and the '985 Patent, the claims  
20 of which require linked content to be displayed “based upon user interaction with at least a portion  
21 of the one or more source documents.” (*Id.* ¶¶ 28, 59, 61.) Although the Court has previously  
22 dismissed these claims, it did so on the grounds that Sentius’ allegations did not reflect its theory  
23 of infringement and did not consider the merits. (Order at 9:7-20.)

24 In response to Apple’s current motion, Sentius agrees not to pursue joint infringement for  
25 the '633 Patent, but asserts, in its place, that Apple is vicariously liable for its users’ operation of  
26 the accused products. (Dkt. No. 63 (“Opp.”) at 1:19-25.) Although the third amended complaint  
27 does not allege vicarious infringement, the Court considers the issue to determine whether  
28 amendment would be futile.

1                   **II.           LEGAL STANDARD**

2           Pursuant to Rule 12(b)(6), a complaint may be dismissed for failure to state a claim upon  
3 which relief may be granted. Dismissal for failure to state a claim under Federal Rule of Civil  
4 Procedure 12(b)(6) is proper if there is a “lack of a cognizable legal theory or the absence of  
5 sufficient facts alleged under a cognizable legal theory.” *Conservation Force v. Salazar*, 646 F.3d  
6 1240, 1242 (9th Cir. 2011) (citing *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
7 1988)). The complaint must plead “enough facts to state a claim [for] relief that is plausible on its  
8 face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible on its face  
9 “when the plaintiff pleads factual content that allows the court to draw the reasonable inference  
10 that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678  
11 (2009). If the facts alleged do not support a reasonable inference of liability, stronger than a mere  
12 possibility, the claim must be dismissed. *Id.* at 678–79. Mere “conclusory allegations of law and  
13 unwarranted inferences are insufficient to defeat a motion to dismiss.” *Adams v. Johnson*, 355  
14 F.3d 1179, 1183 (9th Cir. 2004).

15                   **III.       DISCUSSION**

16           Apple moves to dismiss Sentius direct and joint infringement claims for the ’633 Patent  
17 and joint infringement claims for the ’633 and ’985 Patents. In light of Sentius’ representations  
18 that it will no longer pursue joint infringement claims for the ’633 Patent, the Court considers the  
19 three remaining issues: (1) direct infringement of the ’633 Patent, (2) vicarious infringement of  
20 the ’633 Patent, and (3) joint infringement of the ’985 Patent.<sup>2</sup>

21                   **A.       Direct Infringement (’633 Patent)**

22           Direct infringement of a method claim occurs “where all steps of a claimed method are  
23 performed by or attributable to a single entity.” *Akamai Techs., Inc. v. Limelight Networks, Inc.*,  
24 797 F.3d 1020, 1022 (Fed. Cir. 2015). As stated in the Court’s Order, direct infringement of a  
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26                   <sup>2</sup> For ease of reference, the Court adopts the parties’ categories and refers to divided  
27 infringement as “joint” infringement. Nevertheless, the Court notes that divided infringement is a  
28 species of direct infringement and that “joint” infringement is, at least in theory, broader than  
divided infringement. *See Akamai*, 797 F.3d at 1022; *Shockley v. Arcan, Inc.*, 248 F.3d 1349,  
1364 (Fed. Cir. 2001); *cf.* Restatement (Second) Torts § 875 (indivisible harm).

1 method claim requires that “(1) Apple actually operates the device to perform the method, (2) at  
2 least one step of the method is performed on equipment controlled by Apple (per *SiRF*), or (3)  
3 Apple exercises direction or control over the users.” (Order at 7:11-14.) For example, in  
4 *Ericsson, Inc. v. D-Link Systems, Inc.*, the court held that device makers whose products  
5 automatically performed a claimed method were not directly liable because all of the steps were  
6 performed on user-controlled devices and defendants neither performed the steps nor exercised  
7 direction or control over the users. 773 F.3d 1201, 1221-22 (Fed. Cir. 2014).

8 Here, Sentius alleges that each step of the claimed methods was performed when “Apple  
9 and other users of the accused functionality . . . each respectively operated devices, such as the  
10 Accused Products, executing the software that performed [the step].” (TAC ¶¶ 23-33.) Sentius  
11 also alleges that the claimed methods were executed on “servers, computers and devices controlled  
12 by Apple,” but clarifies that this refers to Apple’s own use of the devices. (*Id.* ¶ 20; Opp. at 6:6-  
13 13.) Sentius thus alleges two theories of direct infringement: (1) direct infringement through  
14 Apple’s own operation of the devices, and (2) direct infringement through direction and control  
15 over users who operate the devices.

16 As to the first theory, Sentius states a viable claim. While Apple undoubtedly designs its  
17 products for other users, the Court finds it plausible that Apple may have tested its products or  
18 otherwise executed the relevant methods in the course of product development and support. *See*,  
19 *e.g.*, *Carnegie Mellon U. v. Marvell Tech. Grp., Ltd.*, 807 F.3d 1283, 1296-97 (Fed. Cir. 2015)  
20 (upholding jury verdict of direct infringement based on infringer’s simulation of accused feature  
21 operation during development); *Finjan, Inc. v. Sophos, Inc.*, 244 F. Supp. 3d 1016, 1046 (N.D.  
22 Cal. 2017) (affirming jury verdict of direct infringement based on substantial evidence that  
23 defendant tested its products in the United States). *But see Packet Intelligence LLC v. NetScout*  
24 *Sys., Inc.*, 965 F.3d 1299, 1314-15 (Fed. Cir. 2020) (reversing damages award based on device  
25 sales which was not tied to the internal use of the claimed methods).

26 With regard to the second theory, Sentius argues that Apple directs and controls users’  
27 actions because Apple conditions the benefits of spell check on user performance of the claimed  
28 methods and establishes the manner and timing of that performance. (TAC ¶ 34.) This is the

1 standard for joint infringement. *See Akamai*, 797 F.3d at 1023 (expanding attribution principles  
2 for joint liability to include “condition[ing] participation in an activity or receipt of a benefit upon  
3 performance of a step or steps of a patented method and establish[ing] the manner or timing of that  
4 performance’). Apple thus argues that because Sentius abandoned its joint infringement claim, the  
5 “conditioned benefit” test is no longer applicable. Sentius disagrees and contends that the Federal  
6 Circuit intended to expand principles of attribution in *Akamai* to allow for direct liability where a  
7 third party performs all steps of a claimed method based on the defendant’s conditioned benefit  
8 and control.

9 Sentius is correct. In *Nalco Company v. Chem-Mod, LLC*, an accused infringer allegedly  
10 practiced a method to remove mercury pollutant from power plant gas. 883 F.3d 1337, 1342-43  
11 (Fed. Cir. 2018). The patentee alleged “three ways” in which all steps of the method could be  
12 attributable to defendants, namely they (i) operated the process at a power plant, (ii) directed and  
13 controlled operation of a test facility that carried out all steps, and (iii) carried out all steps during  
14 testing. *Id.* at 1350. The district court dismissed the claims because the patentee “failed to allege  
15 that any Defendant is directly responsible for performing all method steps,” but the Federal Circuit  
16 reversed. *Id.* at 1351. The court noted that the testing facility was alleged to “obtain[] monetary  
17 benefits for performing the test requisitioned by Defendants” and that defendants “controlled all  
18 aspects of the power plant operations during the test.” *Id.* at 1352-53. In these circumstances, it  
19 “d[id] not matter” whether the party conducting the test was the defendant, a non-defendant power  
20 plant, or a facility performing pilot tests—all three were directed to perform all steps of the  
21 method by the defendants. *Id.* at 1353.

22 Accordingly, a defendant may be directly liable for infringing a claimed method where a  
23 third party carries out all steps of the method to obtain a benefit conditioned by the defendant and  
24 the defendant controls the manner or timing of that performance. *Id.* at 1350; *Akamai*, 797 F.3d at  
25 1023. Apple’s cases to the contrary, *Finjan*, 244 F. Supp. 3d at 1044, and *Rearden LLC v. Walt*  
26 *Disney Co.*, 293 F. Supp. 3d 963, 972-73 (N.D. Cal. 2018), were decided before *Nalco* and do not  
27 control. *See Sound View Innovations, LLC v. Hulu, LLC*, No. LA CV17-04146 JAK (PLAx),  
28 2019 WL 2619639, at \*\*9-10 (C.D. Cal. Apr. 30, 2019).

1           Nevertheless, the Court finds that Sentius fails to state a claim under the “conditioned  
2 benefit” test for direction and control. Each Federal Circuit case under this standard involves  
3 some version of offline control and conditioned benefit over users. In *Akamai*, the defendant  
4 imposed contractual requirements for users to perform certain steps to use its service. 797 F.3d at  
5 1024. In *Eli Lilly & Co. v. Teva Parenteral Medicines, Inc.*, doctors conditioned patient treatment  
6 on their taking of folic acid. 845 F.3d 1357, 1366 (Fed. Cir. 2017). In *Travel Sentry, Inc. v.*  
7 *Tropp*, the defendant had a “memorandum of understanding” with the TSA to perform certain  
8 steps. 877 F.3d 1370, 1383-84 (Fed. Cir. 2017). And in *Nalco*, the defendant apparently paid a  
9 test facility to perform the method. 883 F.3d at 1353. Each of these cases involved offline or  
10 “real world” control and conditioning—not control through a device.

11           By contrast, the Court is aware of no case where software functionality alone satisfied the  
12 “conditioned benefit” test. Although the Federal Circuit warned against limiting the standard to  
13 legal obligations and technological prerequisites, it has repeatedly stated that “mere guidance or  
14 instruction is insufficient” to show conditioned benefit. *Eli Lilly*, 845 F.3d at 1367; *Travel Sentry*,  
15 877 F.3d at 1379. Under governing precedent, software is exactly that: instructions. *See Ricoh*  
16 *Co., Ltd. v. Quanta Comp. Inc* 550 F.3d 1325, 1335 (Fed. Cir. 2008) (“[S]oftware is not itself a  
17 sequence of actions, but rather it is a set of instructions that directs hardware to perform a  
18 sequence of actions.”); *Fantasy Sports Props., Inc. v. SportsLine.com, Inc.*, 287 F.3d 1108, 1118  
19 (Fed. Cir. 2002) (“Software is a set of instructions, known as code, that directs a computer to  
20 perform specified functions or operations.”); *see also Microsoft Corp. v. AT & T Corp.*, 550 U.S.  
21 437, 447 (2007) (relying on *Fantasy Sports* to equate software with instructions).

22           Moreover, the Patent Act provides different provisions for infringement through supply of  
23 a device for infringement. *See* 35 U.S.C. § 271. Section 271(c) states that “[w]hoever offers to  
24 sell or sells . . . a material or apparatus for use in practicing a patented process . . . shall be liable  
25 as a contributory infringer.” Section 271(b) provides liability for “active inducement,” which  
26 includes providing instructions for infringement. *See Barry v. Medtronic, Inc.*, 914 F.3d 1310,  
27 1336 (Fed. Cir. 2019). The Federal Circuit has consistently analyzed provision of infringing  
28 devices under these standards, not the direct infringement of section 271(a). *See, e.g., Mirror*

1 *Worlds, LLC v. Apple Inc.*, 692 F.3d 1352, 1360 (Fed. Cir. 2012); *Fujitsu Ltd. v. Netgear Inc.*, 620  
2 F.3d 1321, 1326-32 (Fed. Cir. 2010); *Ricoh*, 550 F.3d at 1341; *see also Commil USA, LLC v.*  
3 *Cisco Sys., Inc.*, 575 U.S. 632 (2015); *cf. Hilgraeve Corp. v. Symatec Corp.*, 265 F.3d 1336, 1342  
4 n.2 (Fed. Cir. 2001) (“While the parties, and the district court’s decision, speak of the accused  
5 devices as infringing, more properly the allegation is that the operation of the devices directly  
6 infringes the method claims at issue, or that that the sale of the devices induces customers to  
7 infringe the method claims.”).

8 Thus, “in the context of the facts presented,” the Court concludes that Sentius fails to state  
9 a claim for direct infringement based on allegations of direction and control through the provision  
10 of infringing software to end-user devices. Sentius never alleges that users could only obtain the  
11 benefit of the sold devices by performing the claimed method. On the contrary, Sentius expressly  
12 alleges that users may obtain spell check benefits through other means. (TAC ¶ 12.) Sentius also  
13 does not allege that Apple has the right and ability to control users’ infringement after the devices  
14 are sold. *See Travel Sentry*, 877 F.3d at 1385 (citing *Metro-Goldwyn-Mayer Studios Inc. v.*  
15 *Grokster, Ltd.*, 545 U.S. 913, 930 (2005)). Ultimately, Sentius may convince the Federal Circuit  
16 that software functionality should satisfy the “conditioned benefit” test. But absent explicit  
17 guidance, the Court declines to expand direct liability to hold parties that provide software for  
18 performing a method to end-user devices strictly liable.

19 Accordingly, Sentius states a claim for direct infringement based on Apple’s own  
20 operation of the accused devices, but not for direction or control over users who operate the  
21 devices.

22 **B. Vicarious Infringement (’633 Patent)**

23 Patent infringement is a tort action. *Wordtech Sys., Inc. v. Integrated Network Sol., Inc.*,  
24 609 F.3d 1308, 1313 (Fed. Cir. 2010). Patent law thus presumptively incorporates vicarious  
25 liability principles. *See Meyer v. Holley*, 537 U.S. 280, 285 (2003) (“[W]hen Congress creates a  
26 tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules  
27 and consequently intends its legislation to incorporate those rules.”); *see also Sony Corp. of Am. v.*  
28 *Universal City Studios, Inc.*, 464 U.S. 417, 435 (1984) (reading vicarious liability into the

1 Copyright Act because “vicarious liability is imposed in virtually all areas of the law”).<sup>3</sup>

2 Under traditional vicarious liability principles, a principal or employer is liable for its  
3 agent’s or employee’s torts. *Meyer*, 537 U.S. at 285. In copyright law, vicarious liability has also  
4 been imposed on a party that “profit[s] from direct infringement while declining to exercise a right  
5 to stop or limit it.” *Grokster*, 545 U.S. at 930. This principle is “an outgrowth” of *respondeat*  
6 *superior* based on an analogy to “dance hall” cases that found operators of entertainment venues  
7 vicariously liable for infringing performances in their venues. *Fonivisa, Inc. v. Cherry Auction,*  
8 *Inc.*, 76 F.3d 259, 261-62 (9th Cir. 1996). Imposing liability in these circumstances encourages a  
9 party that has the right and ability to police infringement to do so, and thus “place[s] responsibility  
10 where it can and should be effectively exercised.” *Shapiro, Bernstein & Co. v. H.L. Green Co.*,  
11 316 F.2d 304, 308 (2d Cir. 1963).

12 Sentius now argues that the Federal Circuit expanded vicarious liability further in *Akamai*  
13 to find a party liable whenever it conditions a benefit and controls another party’s infringement.  
14 797 F.3d at 1023. However, as *Akamai* expressly noted, vicarious liability “is a misnomer” in that  
15 context. *Id.* at 1022 n.2. *Akamai* had expanded principles of attribution for purposes of *direct*  
16 infringement of a method claim. *See id.* at 1022. Although it did so using “general principles of  
17 vicarious liability,” the doctrines remain distinct. *Id.* Vicarious infringement is a secondary  
18 liability doctrine based on “an alleged infringer[’s] [liability] for a third party’s commission of  
19 infringement.” *Id.* at 1022 n. 2. Joint infringement is a direct liability doctrine based on “an  
20 alleged infringer [being] responsible for method steps performed by a third party.” *Id.* The  
21 distinction is slim to nonexistent where vicarious liability is a viable theory, but has an impact  
22 where vicarious liability is not available—most obviously, where there is no direct infringement  
23 because no party performs all of the steps of a method claim.

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25 \_\_\_\_\_  
26 <sup>3</sup> The lines between direct, contributory, and vicarious infringement have not always been  
27 “clearly drawn.” *Sony*, 464 U.S. at 435 n.17. Both the Supreme Court and the Federal Circuit  
28 have occasionally referred to contributory infringement as “vicarious” infringement. *See id.* at  
439-40; *Dynacore Holdings Corp. v. U.S. Philips Corp.*, 363 F.3d 1263, 1273 (Fed. Cir. 2004).  
However, at least in the patent context, that is a misnomer. Contributory infringement is expressly  
defined in 35 U.S.C. § 271(c) and requires knowledge of the patent; vicarious infringement stems  
from common law principles and does not. *See Grokster*, 545 U.S. at 930 n.9; *Shapiro*, 316 F.2d  
at 307; *see also A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1022-23 (9th Cir. 2001).



1           Accordingly, Sentius cannot state a claim for vicarious infringement based on the  
2 “conditioned benefit” test of *Akamai*. Nor do the rest of the allegations state a claim for vicarious  
3 infringement because Sentius fails to allege an agency relationship between Apple and its users or  
4 that Apple has the right and ability to police users’ direct infringement. *See Centillion Data Sys.,*  
5 *LLC v. Qwest Comm’n’s Int’l, Inc.*, 631 F.3d 1279, 1287 (Fed. Cir. 2011) (no vicarious liability  
6 where “it is entirely the decision of the customer whether to install and operate . . . software”);  
7 *Cross Medical Prods., Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1311 (Fed. Cir.  
8 2005) (no vicarious liability without an agency relationship); *Acceleration Bay LLC v. Activision*  
9 *Blizzard, Inc.*, 324 F. Supp. 3d 470, 482 (D. Del. 2018) (rejecting vicarious liability where  
10 customers chose whether to install software); *Joao Control & Monitoring Sys. Of Cal., LLC v.*  
11 *Sling Media, Inc.*, No. C-11-6277 EMC, 2012 WL 3249510, at \*7-8 (N.D. Cal. Aug. 7, 2012) (no  
12 vicarious liability based on customer relationship where defendant was not the “mastermind” who  
13 controls the infringement).

14           Accordingly, the Court finds that amendment to the complaint to add vicarious  
15 infringement claims based on Sentius’ factual allegations would be futile.

16           **C.     Joint Infringement (’985 Patent)**

17           Joint infringement stems from the principle that “a method patent is not directly infringed .  
18 . . . unless a single actor can be held responsible for the performance of all steps of the patent.”  
19 *Limelight Networks, Inc. v. Akamai Techs., Inc.*, 572 U.S. 915, 924 (2014). Where multiple  
20 parties are involved in performing the method steps, all steps must be ultimately attributable to the  
21 direct infringer. *Akamai*, 797 F.3d at 1022. A third-party’s performance of a step is attributable to  
22 the alleged infringer if (1) the third-party acts as the infringer’s agent, (2) the parties form a joint  
23 enterprise, (3) the alleged infringer contracts with the third-party to perform the steps, or (4) the  
24 alleged infringer “conditions participation in an activity or receipt of a benefit upon performance  
25 of a step or steps . . . and establishes the manner or timing of that performance.” *Id.* at 1023.

26           Here, Sentius alleges that Apple performs the step of “syndicating one or more data objects  
27 . . . to one or more remote computers” from its own servers and conditions users’ performance of  
28 the remaining steps on their end-user devices. (TAC ¶¶ 43-48, 51-59.) These allegations state a

1 claim for direct infringement under *SiRF Technology, Inc. v. International Trade Commission*,  
2 601 F.3d 1319, 1331 (Fed. Cir. 2010). (See Order at 5 n.1, 7:11-14.) Although *SiRF* rejected the  
3 district court finding of joint infringement, the Court cannot conclude that Sentius fails as a matter  
4 of law in alleging joint infringement, in addition to or in the alternative to direct infringement. See  
5 *SiRF*, 601 F.3d at 1229. In particular, while the claims in *SiRF* were drawn to a single actor, and  
6 did not require a third-party to perform any step, claim 21 of the '985 Patent requires user  
7 interaction. *Id.*; (TAC ¶ 59). Accordingly, Sentius states a claim for joint infringement.


8 **IV. CONCLUSION**

9 For the foregoing reasons, the Court **GRANTS** Apple's partial motion to dismiss with  
10 respect to allegations of direct infringement based on direction and control over users, but **DENIES**  
11 the motion with respect to allegations of Apple's own operation of the accused devices, as well as  
12 joint infringement of the '985 Patent. Apple shall answer the complaint within twenty-one (21)  
13 days. The Court further **SETS** a case management conference for November 23, 2020, at 2:00 p.m.  
14 Instructions for a Zoom link will be docketed a few days before the hearing.

15 This Order terminates docket number 61.

16 **IT IS SO ORDERED.**

17  
18 Dated: October 15, 2020

19   
20 **YVONNE GONZALEZ ROGERS**  
21 **UNITED STATES DISTRICT COURT JUDGE**