

United States District Court  
For the Northern District of California

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

DEAN REECE,	)	Case No.: 5:11-CV-03960 EJD
	)	
Plaintiff,	)	<b>ORDER GRANTING DEFENDANT’S</b>
	)	<b>MOTION FOR SUMMARY</b>
v.	)	<b>JUDGMENT</b>
	)	
UNITRIN AUTO AND HOME INSURANCE	)	
COMPANY,	)	
Defendant.	)	<b>[Re: Docket No. 25]</b>
	)	

In this employment-related action brought by Plaintiff Dean Reece (“Plaintiff” or “Reece”), presently before the Court is Defendant Merastar Insurance Company’s (“Defendant” or “Merastar”)<sup>1</sup> Motion for Summary Judgment. See Docket Item No. 25. The Court found these matters appropriate for decision without oral argument pursuant to Local Civil Rule 7–1(b), and previously vacated the corresponding hearing date. Having fully reviewed the parties’ papers the Court will grant Defendant’s Motion for Summary Judgment.

**I. Background**

**A. Factual Summary**

On or around March 5, 2007, Defendant, a nationwide home and auto insurance company, began to employ Plaintiff as a material damage appraiser. Notice of Removal Ex. A, Pl.’s First Am.

<sup>1</sup> Plaintiff had erroneously sued Unitrin Auto and Home Insurance Company instead of Merastar.

1 Compl. ¶ 5 (hereinafter “First Am. Compl.”), Docket Item No. 1. Plaintiff’s direct supervisor was  
2 Ronald Stanley (“Stanley”). Decl. of Todd K. Boyer in Supp. of Def.’s Mot. for Summ. J. Ex. A.  
3 Plaintiff’s job duties were to appraise and write repair estimates for damage to insured’s and  
4 claimant’s vehicles. Id.; id. ex. LL, Dep. of Dean Reece Vol. I, at 83–87. Plaintiff was an outside  
5 appraiser, which meant that he worked in the field and from his home and did not report to an  
6 office. Reece Dep. Vol. I at 97–98. Plaintiff was scheduled to work from 8:00 a.m. to 4:30 p.m.  
7 Monday through Friday. Id. at 116. As a remote and non–overtime exempt employee, Plaintiff was  
8 required to accurately record what hours he worked on an electronic time sheet, including overtime  
9 hours. Id. at 47–48; 114. Plaintiff has admitted that he never kept a record of his time worked  
10 outside of the records entered in Defendant’s computer system. Id. at 44.

11       Upon his hiring, in a statement he signed and dated March 7, 2007, Plaintiff acknowledged  
12 reading, understanding, and agreeing to abide by Defendant’s Employee Handbook which  
13 explicated various company policies such as overtime pay, meal and rest period breaks, and dress  
14 code. See Boyer Decl. Ex. B. Defendant’s overtime policy required non-exempt employees like  
15 Plaintiff to obtain pre-approval from their supervisors for overtime work. Id. Ex. C, at 16; id. Ex.  
16 MM, Dep. of Dean Reece Vol. II, at 239. Even if an employee worked non-approved overtime,  
17 Defendant would generally still pay for the overtime hours worked. Id.; id. Ex. NN, Dep. of Ronald  
18 J. Stanley, at 84–85, 99–100. Defendant compensated Plaintiff for all his reported overtime,  
19 whether preapproved or not. Id. Stanley never denied Plaintiff’s request to work overtime or  
20 complained that Plaintiff was reporting too many overtime hours. Reece Dep. Vol. II, at 239, 247.

21       Defendant’s meal period policy required non-exempt employees like Plaintiff to take  
22 required unpaid meal and rest breaks during the workday. Id. Ex. C, at 43. This policy, and that of  
23 the overtime hours reporting requirement, was outlined and explained in Defendant’s Employee  
24 Handbook. Id.

25       Prior to his termination, Defendant received several written reprimands for violations of  
26 various company policies. First, on January 9, 2009 Plaintiff was issued a written reprimand for  
27 inappropriately using Defendant’s email system in violation of Defendant’s electronic use policy.  
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1 Id. Ex. N; see also Def.’s Mot. for Summ. J. 6. This reprimand stemmed from Plaintiff’s  
2 forwarding a sexually provocative email to his personal email account in violation of company  
3 policy. Boyer Decl. Ex. N. Plaintiff contends that he forwarded the unsolicited pornographic email  
4 to his personal account with the intentions of deleting it immediately. Decl. of Dean Reece in Supp.  
5 of Pl.’s Opp’n to Def.’s Mot. for Summ. J. ¶ 16. In August 2009, Plaintiff was issued a second  
6 written reprimand, which stemmed from Defendant’s determination that Plaintiff had been  
7 “steering” customers to particular auto shops in violation of California law.<sup>2</sup> See Def.’s Mot. for  
8 Summ. J. 6–7 (summarizing this violation); Boyer Decl. Ex. C. Plaintiff submits that the “steering  
9 memo was not warranted.” Reece Decl. ¶ 16. On April 8, 2010, Plaintiff received a third written  
10 reprimand for violating Defendant’s electronic use policy by sending inappropriate company-wide  
11 emails openly criticizing others within the company. Boyer Decl. Ex. P; see also Def.’s Mot. for  
12 Summ. J. 8. Plaintiff contends that this action was inadvertent. Reece Decl. ¶ 16.

13 In or around late November 2010, Plaintiff conducted an appraisal of an insured’s vehicle  
14 while dressed in shorts—a violation of Defendant’s dress code policy. Boyer Decl. Exs. R, S; id.  
15 Ex. C, at 17, 24–25. This violation was discovered by Defendant’s Claims Supervisor Lisa Morgan  
16 (“Morgan”) while she was reviewing one of Plaintiff’s repair estimate files, which contained a  
17 photograph showing Plaintiff wearing shorts while conducting the damage appraisal. Lyons Dep.,  
18 at 87–88. Morgan referred the incident to Stanley, who, in an email dated April 1, 2011, requested  
19 to meet with Plaintiff to discuss the situation. Boyer Decl. Ex. R. Plaintiff at first responded to this  
20 email with a joke and sexual innuendo—a response which Plaintiff has admitted was inappropriate.  
21 Id. Exs. R, T; see also Def.’s Mot. for Summ. J. 8. Plaintiff also sent an email to a coworker  
22 making light of the situation and containing disparaging remarks about Stanley. Id. Ex. U.  
23 Plaintiff’s second email response to Stanley contained an explanation of why he was wearing  
24 shorts during the work day, suggesting that he was working off-the-clock and through his meal  
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26 \_\_\_\_\_  
27 <sup>2</sup> California law prohibits insurance companies from suggesting or recommending that an automobile be repaired at a  
28 specific automotive repair dealer unless a referral is requested by claimants or claimants are informed in writing of  
their right to select their own shop. See Cal. Ins. Code § 758.5.

1 periods. Id. Ex. V. Stanley referred the matter to Defendant’s Human Resources Business Partner  
2 Glen Lyons (“Lyons”). Stanley Dep., at 141–42.

3 Lyons met with Regional Claims Manager Coy Jacobs (“Jacobs”) and Stanley’s supervisor  
4 Stephanie Woodcock (“Woodcock”) to discuss the matter. Boyer Decl. Ex. KK, Dep. of Glen  
5 Lyons, at 79–80. The three concluded that Plaintiff’s email responses to Stanley were a cause for  
6 concern not only because of their inappropriate nature, but also because they suggested that  
7 Plaintiff was working unreported overtime hours, in violation of company policy. Id. at 80–88; see  
8 also Def.’s Mot. for Summ. J. 9. Based on this situation, the emails, and Plaintiff’s prior  
9 disciplinary issues, Lyons, Jacobs, Woodcock, and Stanley concluded that Plaintiff was unwilling  
10 or unable to comply with company policies. Lyons Dep. at 95, 10–01; see also Def.’s Mot. for  
11 Summ. J. 10. As a result of these discussions and conclusions, the decision was made to terminate  
12 Plaintiff’s employment. Boyer Decl. Ex. JJ, Dep. of Coy Jacobs, at 31–32; see also Def.’s Mot. for  
13 Summ. J. 10. Jacobs and Lyons notified Plaintiff that his employment was being terminated,  
14 effective April 8, 2011, for violations of Defendant’s policies regarding dress code, meal and rest  
15 break, overtime, and electronic communications. Id.

16 Immediately following the termination of Plaintiff’s employment, pursuant to company  
17 policy, Stanley and Lyon collected and reviewed the contents of Plaintiff’s company laptop. Lyons  
18 Dep. 85, 106, 115. During this review, they discovered that Plaintiff had saved and sent several  
19 inappropriate emails using Defendant’s computer system in violation of Defendant’s electronic  
20 communications policy. See Def.’s Mot. for Summ. J. 11 (summarizing the inappropriate contents  
21 of Plaintiff’s company laptop).

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23 **B. Procedural History**

24 On July 13, 2011, Plaintiff filed a First Amended Complaint against Defendant in Santa  
25 Clara County Superior Court. See Notice of Removal Ex. A. In the First Amended Complaint,  
26 Plaintiff alleged four causes of action against Defendant: (1) failure to pay overtime wages; (2)  
27 failure to provide meal and rest periods; (3) failure to pay earned wages upon termination of  
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1 employment; and (4) wrongful termination. Id. On August 12, 2011, Defendant removed the action  
2 to this Court on the basis that this Court has original jurisdiction under 28 U.S.C § 1332 based on  
3 diversity of the citizenship of the parties.<sup>3</sup> On October 26, 2012, Defendant filed the present  
4 Motion for Summary Judgment, seeking dismissal of the entirety of the action. See Docket Item  
5 No. 25.

## 7 **II. Motion for Summary Judgment Standard**

8 A motion for summary judgment should be granted if “there is no genuine dispute as to any  
9 material fact and the movant is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(a);  
10 Addisu v. Fred Meyer, Inc., 198 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the  
11 initial burden of informing the court of the basis for the motion and identifying the portions of the  
12 pleadings, depositions, answers to interrogatories, admissions, or affidavits that demonstrate the  
13 absence of a triable issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

14 If the moving party meets this initial burden, the burden then shifts to the non-moving party  
15 to go beyond the pleadings and designate “specific facts showing that there is a genuine issue for  
16 trial.” Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. The court must regard as true the opposing  
17 party’s evidence, if supported by affidavits or other evidentiary material. Celotex, 477 U.S. at 324.  
18 However, the mere suggestion that facts are in controversy, as well as conclusory or speculative  
19 testimony in affidavits and moving papers, is not sufficient to defeat summary judgment. See  
20 Thornhill Publ’g Co. v. GTE Corp., 594 F.2d 730, 738 (9th Cir. 1979). Instead, the non-moving  
21 party must come forward with admissible evidence to satisfy the burden. Fed. R. Civ. P. 56(c); see  
22 also Hal Roach Studios, Inc. v. Feiner & Co., Inc., 896 F.2d 1542, 1550 (9th Cir. 1990).

23 A genuine issue for trial exists if the non-moving party presents evidence from which a  
24 reasonable jury, viewing the evidence in the light most favorable to that party, could resolve the  
25 material issue in his or her favor. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248–49 (1986);

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27 <sup>3</sup> Plaintiff is a citizen and resident of Santa Clara County, California; Defendant is an entity incorporated in Illinois  
28 with its principal place of business in Illinois. Notice of Removal ¶ 9. The amount in controversy exceeds \$75,000. Id.  
¶¶ 16–18.

1 Barlow v. Ground, 943 F.2d 1132, 1134–36 (9th Cir. 1991). Conversely, summary judgment must  
2 be granted where a party “fails to make a showing sufficient to establish the existence of an  
3 element essential to that party’s case, on which that party will bear the burden of proof at trial.”  
4 Celotex, 477 U.S. at 322.

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6 **III. Discussion**

7 **A. First Cause of Action: Failure to Pay Overtime Wages**

8 The California Labor Code requires employers to compensate non–overtime exempt  
9 employees one-and-one-half or two times the regular wages for hours worked in excess of eight  
10 hours in one workday, forty hours in one workweek, or on the seventh consecutive day of work.  
11 Cal. Lab. Code § 510. Plaintiff submits that he “routinely worked twelve to fourteen hour days five  
12 days per week . . . and often did additional work on either Saturday or Sunday of the work week.”  
13 First Am. Compl. ¶ 7. Plaintiff argues that he was not compensated for these overtime hours with  
14 the required overtime wages. Id.

15 Section 510 of the California Labor Code is not a strict liability statute; in other words, in  
16 order to prevail on his claim, Plaintiff must prove that Defendant had actual or constructive  
17 knowledge that Plaintiff was working overtime hours and still failed to pay the overtime wages.  
18 Morillion v. Royal Packing Co., 22 Cal.4th 575, 585 (2000); White v. Starbucks Corp., 497 F.  
19 Supp. 2d 1080, 1083 (N.D. Cal. 2007); Koike v. Starbucks Corp., No. C 06-3215 VRW, 2008 WL  
20 7796650, at \*6 (N.D. Cal. June 20, 2008).

21 It is not disputed that Plaintiff was aware of Defendant’s policy requiring employees to  
22 record all overtime hours. Moreover, Plaintiff has admitted that he was paid overtime  
23 compensation for all the overtime hours he reported. One example of this is as follows:

24 Q: . . . Have you ever put time on your time sheet beyond your regular working  
25 hours, so exceeding, you know, eight hours per day, where you were not paid  
26 for it?

27 A: Maybe overtime was approved in advance, for whatever reason—

28 Q: Regardless of whether it was approved in advance.

1 A: Yeah, it was approved in advance, and I would put it on my time sheet before  
2 [Stanley]—before it’s entered on my sheet, it’s already discussed with  
3 [Stanley].

4 Q: Okay. But my question is this. Did you ever put time on your time sheet,  
5 overtime, that was not paid for?

6 A: No.

7 Reece Dep. Vol. I., at 72; see also Def.’s Mot. for Summ. J. 13 (listing other examples of Plaintiff’s  
8 testimony which suggests that he was paid for reported the overtime hours he worked). Evidence  
9 also suggests that Defendant would compensate Plaintiff and other employees even if they did not  
10 obtain pre-approval for overtime hours. See id. at 5.

11 In support of his claims and opposition to Defendant’s Motion for Summary Judgment,  
12 Plaintiff contends that Defendant had reasons to believe that Plaintiff was working unreported  
13 overtime hours based on work-related emails Plaintiff would send with timestamps outside the  
14 normal work hours. Pl.’s Opp’n to Def.’s Mot. for Summ. J. 5–6. Therefore, Plaintiff argues,  
15 Defendant was required by law to compensate him for those hours. Id. The Court disagrees.  
16 Plaintiff’s argument is belied by Plaintiff’s own deposition testimony; Plaintiff has admitted that  
17 when he was asked whether he was working unreported hours on multiple occasions, he  
18 consistently answered in the negative. One example of this is as follows:

19 Q: It’s true, is it not, that Lyons asked you if you had any overtime to report at  
20 one point during your employment; correct?

21 A: Yes.

22 Q: And you told them you did not?

23 A: Yes.

24 Reece Dep. Vol. II, at 253; see also Def.’s Mot. for Summ. J. 7 (summarizing other similar  
25 instances as shown through deposition testimony by Plaintiff, Lyons, and Stanley). This evidence  
26 shows that even if Plaintiff was working unreported overtime hours—a contention that Plaintiff has  
27 provided no evidence to support—Plaintiff dispelled any reasons for Defendant to believe that he  
28 was working those overtime hours.

1 Plaintiff also suggests that he did not report some of his overtime hours because he feared  
2 doing so would threaten his job. First Am. Compl. ¶ 5; Pl’s Opp’n to Def.’s Mot. for Summ. J. 5.  
3 However, this notion is proven false or implausible by the evidence presented by Defendant—  
4 including Plaintiff’s own deposition testimony—which shows that Defendant never denied any of  
5 Plaintiff’s requests to work overtime or complained about his requesting overtime. Reece Dep. Vol.  
6 I, at 72–76 (repeatedly answering in the negative when asked whether Stanley ever denied  
7 Plaintiff’s overtime requests); *id.* at 239 (same); Reece Dep. Vol. II, at 247–49 (suggesting that  
8 Stanley never complained about Plaintiff’s overtime hours or requests for overtime); see also  
9 Stanley Dep., at 133, 140–41. As such, Plaintiff’s argument that he feared reporting his overtime  
10 hours neither holds merit nor does it create a genuine issue of material fact so as to defeat  
11 Defendant’s summary judgment motion. See *Porch v. Masterfoods, USA, Inc.*, 685 F. Supp. 2d  
12 1058, 1068–69 (C.D. Cal. 2008).

13 Accordingly, the Court finds that Plaintiff has failed to establish his burden or raise a  
14 genuine issue of material fact as to whether Defendant knew or should have known that Plaintiff  
15 was working overtime hours. As such, Plaintiff’s First Cause of Action has no merit.

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17 **B. Second Cause of Action: Failure to Provide Meal and Rest Periods**

18 The California Labor Code prohibits employers from employing employees for a work  
19 period of more than five hours per day without providing those employees with a meal period of at  
20 least 30 minutes. Cal. Lab. Code § 512(a); see also Cal. Code Regs., tit. 8, § 11040(11)(A).  
21 California’s Wage Order No. 4 requires employers to “authorize and permit” their employees to  
22 take a ten minute rest break for every four hours worked. *Id.* § 11040(12); see also *id.*  
23 § 11040(12)(A) (“Every employer shall authorize and permit all employees to take rest periods,  
24 which insofar as practicable shall be in the middle of each work period.”). Wage Order No. 5  
25 prescribes rest periods. *Id.* § 11050. The Labor Code prevents employers from requiring employees  
26 to work during any meal or rest period mandated by an applicable order such as the Wage Order  
27 No. 4 or No. 5. Cal. Lab. Code § 226.7.  
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1           The California Supreme Court has interpreted these statutes and orders as requiring  
2 employers to ensure only that these meal and break periods are made available to employees.  
3 Brinker Restaurant Corp. v. Superior Court, 53 Cal.4th 1004, 1038–40 (2012). An employee must  
4 show that the employer actually prevented the employee from taking breaks; mere proof of  
5 knowledge that the employee was forgoing breaks is insufficient. Id. at 1040 (“Proof an employer  
6 had knowledge of employees working through meal periods will not alone subject the employer to  
7 liability for premium pay . . .”).

8           Plaintiff contends that he was unable to take meal and rest breaks due to his demanding  
9 schedule reviewing claims in person and completing the subsequent paperwork. Pl.’s Opp’n to  
10 Def.’s Mot. for Summ. J. 7. Plaintiff further argues that Defendant “structured Plaintiff’s work day  
11 so that it was . . . impossible for Plaintiff to take meal breaks” and that the “sheer volume of  
12 plaintiff’s work and the expectations placed upon him[] made taking breaks physically  
13 impossible.” Id.; First Am. Compl. ¶ 11 (“[Defendant] willfully failed to provide Plaintiff with the  
14 opportunity to take such breaks . . .”). However, Plaintiff provides no evidence to support these  
15 conclusory notions that Defendant failed to provide or prevented Plaintiff from taking the meal and  
16 rest breaks.

17           Moreover, Defendant has presented the Court with a wealth of evidence that Defendant,  
18 through its policies and actions, allowed—and in fact required—Plaintiff to take the meal and rest  
19 break. See Boyer Decl. Ex. C; Def.’s Mot. for Summ. J. 16–17. In fact, Plaintiff has admitted that  
20 he took such breaks on a regular basis. See, e.g., Reece Dep. Vol. I, at 47–48, 142–43. When  
21 asked, “Did you ever see anything or hear anything during your employment that led you to believe  
22 you were not allowed to take a meal period?” Plaintiff responded, “No, no.” Id. at 136. Plaintiff has  
23 also admitted that he never complained about not being able to take such breaks. See, e.g., id. at  
24 137; Def.’s Mot. for Summ. J. 16–17. Even if Defendant’s agents were aware that Plaintiff was not  
25 taking the meal and rest breaks—as Plaintiff so contends albeit without providing evidence to  
26 support such a contention—it would still not rise to the level of a violation of the labor laws.  
27 Brinker, 53 Cal.4th at 1040.

1           Accordingly, Plaintiff has not sufficiently established that there exists a genuine issue of  
2 material fact as to whether Defendant failed to provide the required meal and rest breaks or  
3 prevented Plaintiff from taking those breaks.

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5           **C. Third Cause of Action: Failure to Pay Earned Wages Upon Termination of  
6 Employment**

7           The Labor Code requires that employers pay employees outstanding wages immediately  
8 upon termination of employment; if an “employer willfully fails to pay[,] . . .the wages of the  
9 employee shall continue as a penalty from the due date thereof at the same rate until paid or until  
10 an action therefor is commenced.” Cal. Lab. Code §§ 201, 203. Because, as shown above, Plaintiff  
11 has failed to establish that there were outstanding wages owed to him, Plaintiff has not met the  
12 requirements of his Third Cause of Action.

13           **D. Fourth Cause of Action: Wrongful Termination**

14           Under California law, to establish a prima facie case for wrongful termination, Plaintiff  
15 must show “(1) he or she engaged in a protected activity; (2) the employer subjected the employee  
16 to an adverse employment action; and (3) a causal link between the protected activity and the  
17 employer’s action.” Akers v. County of San Diego, 95 Cal. App. 4th 1441, 1453 (2002). If a  
18 plaintiff meets this burden, the defendant must put forth a legitimate, non-discriminatory reason for  
19 the adverse employment action; if that is accomplished, the plaintiff must then show that the stated  
20 reason is pretext. Id.; see also Crown v. Wal-Mart Stores, Inc., 8 Fed. App’x 776, 778 (9th Cir.  
21 2001) (holding that a plaintiff to a retaliation complaint has the burden of proving—in addition to  
22 the engagement in protected activity and the causal link between that activity and the retaliatory  
23 conduct—that the employer’s explanation for the action was a pretext for the illegal consequence).

24           Plaintiff argues that his employment was unlawfully terminated by Defendant when  
25 Plaintiff allegedly complained to Defendant about working overtime without being duly  
26 compensated for doing so. First Am. Compl. ¶ 19. However, to support these conclusory assertions,  
27 Plaintiff provides no evidence that he complained of this activity and that his termination was a  
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1 result of those complaints. On the contrary, as noted above, Plaintiff has admitted that he did not  
2 complain about not being compensated about working overtime hours or not being allowed to take  
3 meal or rest breaks. Accordingly, Plaintiff has not established a prima facie claim of wrongful  
4 termination.

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6 **IV. Conclusion and Order**

7 Plaintiff has failed to establish each of the four claims he has alleged in his First Amended  
8 Complaint. For the aforementioned reasons, because there exists no genuine issue of material fact  
9 and judgment in favor of Defendant is proper, Defendant's Motion for Summary Judgment is  
10 GRANTED in its entirety.

11 Since this order effectively resolves this case, all previously-set deadlines and hearings,  
12 including the trial dates, are VACATED. Judgment shall be entered in favor of Defendant and the  
13 clerk shall close this file.

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15 **IT IS SO ORDERED.**

16 Dated: January 22, 2013

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18 EDWARD J. DAVILA  
19 United States District Judge  
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