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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SAM KOHLI ENTERPRISES, INC., a  
California Corporation,  
  
Plaintiff,  
  
vs.  
  
THE BOC GROUP, INC., a member of the  
Linde Group; LINDE NORTH AMERICA,  
INC., a Delaware Corporation; and DOES 1  
through 10,  
  
Defendants.

CASE NO. 11CV299 DMS (BLM)  
  
**ORDER GRANTING IN PART  
AND DENYING IN PART  
MOTION TO DISMISS  
PLAINTIFF’S FIRST AMENDED  
COMPLAINT BY DEFENDANTS  
THE BOC GROUP, INC. AND  
LINDE NORTH AMERICA, INC.**

Pending before the Court is a motion to dismiss Plaintiff’s First Amended Complaint (“FAC”) brought by Defendants the BOC Group, Inc., a member of the Linde Group (“BOC”), and Linde North America, Inc. (“Linde”). For the following reasons, Defendants’ motion to dismiss is granted in part and denied in part.

**I.  
BACKGROUND**

This action arises from an agreement between two corporations with diversity of citizenship. On December 3, 2007, Plaintiff Sam Kohli Enterprises, a corporation incorporated under the laws of the State of California, entered into a Unified Service Agreement (“the Contract”) with Defendant BOC. In the Contract, Plaintiff agreed to “become the ‘employer of record’ for BOC’s workers and to manage and assume risk for all aspects of employment taxes, including workers’ compensation

1 insurance.” (FAC ¶ 7.) BOC, an industrial supply company incorporated under the laws of the State  
2 of Delaware, agreed to “pay a set rate for each worker Plaintiff supplied,” where “[t]he rate for each  
3 worker varied according to the worker[’]s classification [as] . . . professional, clerical, light industrial,  
4 or industrial.” (Mot. to Dismiss at 6.) A Master Rate and Services Schedule fixed the rate for each of  
5 the pertinent classifications. (FAC, Ex. A at 5.)

6 On December 3, 2010, Plaintiff filed a Complaint with the Superior Court for the State of  
7 California. (Doc. 1, App. A.) On February 11, 2011, Defendant Linde removed the action to federal  
8 court on the basis of diversity jurisdiction. On March 21, 2011, the parties filed a joint motion for  
9 leave to allow Plaintiff to file a FAC, which the Court granted. (Docs. 6-8.)

10 In the FAC, Plaintiff alleges that BOC is a wholly-owned subsidiary of Linde and that Linde  
11 owned and controlled BOC during “all relevant times.” (FAC ¶ 3.) Plaintiff pleads four claims for  
12 relief as to BOC alone: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing,  
13 (3) promissory estoppel, and (4) unjust enrichment. Additionally, Plaintiff pleads a fifth claim of fraud  
14 against both BOC and Linde. On April 11, 2011, Defendants filed a motion to dismiss each of the  
15 claims in the FAC. (Doc. 10.) Plaintiff filed an opposition, Defendants filed a reply, and Plaintiff filed  
16 a motion for leave to file a sur-reply, which the Court granted. (Docs. 11, 12, 14, 16, 17.) The Court  
17 further granted Defendants’ request to file a sur-reply in response. (Doc. 15.)

## 18 II.

### 19 LEGAL STANDARD

20 A party may move to dismiss a claim under Rule 12(b)(6) if the claimant fails to state a claim  
21 upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The Federal Rules require a pleading to  
22 include a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.  
23 R. Civ. P. 8(a)(2). The Supreme Court, however, recently established a more stringent standard of  
24 review for pleadings in the context of 12(b)(6) motions to dismiss. *See Ashcroft v. Iqbal*, \_\_\_ U.S.  
25 \_\_\_, 129 S. Ct. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). To survive a motion  
26 to dismiss under this new standard, “a complaint must contain sufficient factual matter, accepted as  
27 true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 129 S. Ct. at 1949 (quoting  
28 *Twombly*, 550 U.S. at 570). “A claim has facial plausibility when the plaintiff pleads factual content

1 that allows the court to draw the reasonable inference that the defendant is liable for the misconduct  
2 alleged.” *Id.* (citing *Twombly*, 550 U.S. at 556). “Determining whether a complaint states a plausible  
3 claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its  
4 judicial experience and common sense.” *Id.* at 1950 (citing *Iqbal v. Hasty*, 490 F.3d 143, 157-58 (2d  
5 Cir. 2007)). The reviewing court must therefore “identify the allegations in the complaint that are not  
6 entitled to the assumption of truth” and evaluate “the factual allegations in [the] complaint to  
7 determine if they plausibly suggest an entitlement to relief.” *Id.* at 1951.

### 8 III.

### 9 DISCUSSION

10 In their motion to dismiss, Defendants argue (1) Plaintiff fails to demonstrate that BOC  
11 breached the Contract, (2) Plaintiff fails to demonstrate it suffered actual harm, (3) Plaintiff’s claim  
12 of a breach of the covenant of good faith and fair dealing fails because it is dependant upon the breach  
13 of contract claim, (4) Plaintiff’s claim of unjust enrichment fails because it cannot be raised as an  
14 independent claim for relief, and (5) Plaintiff’s second, third, fourth, and fifth claims each fail because  
15 they lack particularized factual allegations and because they are based on the breach of contract claim.  
16 Additionally, Defendants argue that an indemnification clause in the contract insulates them from  
17 liability for each of Plaintiff’s claims.

#### 18 A. Indemnification Clause

19 As an initial matter, Defendants argue that an indemnification clause in the contract invalidates  
20 all of Plaintiff’s claims. The indemnification clause states, “[Plaintiff] shall indemnify [BOC] for any  
21 damages including attorney fees, arising in connection with [BOC’s] or a Worker’s negligence,  
22 recklessness, or intentional misconduct.” (FAC, Ex. A at 3.) In its sur-reply, Plaintiff cites California  
23 law stating, “[a]ll contracts which have for their object, directly or indirectly, to exempt anyone from  
24 responsibility for his own fraud, or willful injury to the person or property of another, or violation of  
25 law, whether willful or negligent, are against the policy of the law.” Cal. Civ. Code § 1668.  
26 “However, the word ‘wilful’ as used . . . may be said to connote an act done with malevolence, as  
27 distinguished from an act motivated by good intentions but founded in negligence.” *Davidson v.*  
28 *Welch*, 75 Cal. Rptr. 676, 685 (Cal. Ct. App. 1969) (referencing Insurance Code § 533, but indicating

1 similar considerations apply to California Civil Code § 1668). Therefore, in light of § 1668, an  
2 indemnification clause may exempt a party from liability for claims that require mere ordinary  
3 negligence, but not for claims involving fraud, willful injury, or willful or negligent violation of the  
4 law. *See Werner v. Knoll*, 201 P.2d 45, 46-47 (Cal. Ct. App. 1948) (“Contracts seeking to relieve  
5 individuals from the results of their own ordinary negligence are not invalid as against the policy of  
6 the law.”). Accordingly, the indemnification clause at issue here cannot protect Defendants from  
7 liability for claims requiring more than mere negligence.

8 Furthermore, “the law does not look with favor upon attempts to avoid liability or secure  
9 exemption for one’s own negligence, and such provisions are strictly construed against the person  
10 relying upon them.” *Basin Oil Co. v. Baash-Ross Tool Co.*, 271 P.2d 122, 131 (Cal. Ct. App. 1954)  
11 (citations omitted). The indemnification clause in question is the third and final bullet under a heading  
12 excluding Plaintiff and workers from all rights to BOC’s benefit plans. The first and second bullets  
13 address third party claims alleging violation of Title 7, the civil rights act, or sexual harassment. So  
14 situated, the indemnification clause is not sufficiently explicit to support Defendants’ claim of  
15 entitlement to indemnification for the conduct alleged by Plaintiff at this stage. *Viotti v. Giomi*, 41  
16 Cal. Rptr. 345, 350 (Cal. Ct. App. 1964) (“Seemingly broad language will not be isolated from its  
17 context and will be read with due regard to the maxim of strict construction.”) (citing *Sproul v. Cuddy*,  
18 280 P.2d 158, 164 (Cal. Ct. App. 1955)).

19 **B. Breach of Written Contract**

20 To state a claim for breach of contract, a plaintiff must allege (1) the existence of a contract,  
21 (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damages as  
22 a result of the breach. *CDF Firefighters v. Maldonado*, 70 Cal. Rptr. 3d 667, 679 (Cal. Ct. App.  
23 2008). BOC argues Plaintiff’s claim for breach of contract should be dismissed because Plaintiff has  
24 failed to demonstrate a breach or actual injury resulting from the alleged breach. Plaintiff bases the  
25 breach of contract claim against BOC on BOC’s alleged intentional provision of inaccurate job  
26 descriptions of workers. (FAC ¶ 17.) BOC argues that, per the terms of the Contract, Plaintiff was  
27 in fact responsible for classifying the workers.

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1           **1. Defendant BOC’s Breach**

2           Plaintiff alleges that BOC had a contractual duty to provide Plaintiff with an accurate job  
3 description for each employee in order to allow Plaintiff to properly classify each employee. Further,  
4 BOC had a duty to pay Plaintiff a specified rate for each worker Plaintiff supplied, depending on the  
5 worker’s classification as professional, clerical, light industrial, or industrial. Rates for each  
6 classification were delineated in Plaintiff’s Master Rate and Services Schedule. (FAC, Ex. A at 6.)  
7 Plaintiff alleges “BOC deliberately . . . provided inaccurate job descriptions so that it could avoid  
8 paying higher rates[,]” in violation of the Contract. (FAC ¶ 12.)

9           BOC claims no breach of contract occurred because Plaintiff was solely responsible for  
10 classifying employees. On BOC’s theory, Plaintiff could not have “assumed the risks for all aspects  
11 of insuring [BOC’s] workers,” as stated in the Contract, “without also assuming responsibility for  
12 determining each worker’s classification after the job description was ‘pre-approved’ by Plaintiff.”  
13 (Mot. to Dismiss at 5.) In construing a contract, the Court should “avoid an interpretation that will  
14 make the contract unusual, extraordinary, harsh, unjust or inequitable, or which would result in  
15 absurdity.” *Hertzka & Knowles v. Salter*, 86 Cal. Rptr. 23 (Cal. Ct. App. 1970)(quotations and  
16 citations omitted); *see also Sample v. Fresno Flume & Irrigation Co.*, 61 P. 1085, 1086 (Cal. 1900)  
17 (holding that under California Civil Code § 3542, “a contract should receive a reasonable  
18 interpretation”); *Shean v. Weeks*, 169 P. 231, 232 (Cal. 1917) (holding that under California Civil Code  
19 § 1644, the words of a contract are to be understood in their ordinary meaning).

20           Accepting Plaintiff’s factual assertions as true, Plaintiff has stated a plausible claim for relief  
21 for breach of contract. Taken in their ordinary sense, the words of the Contract describe a process  
22 dependant on BOC’s provision of accurate job descriptions to Plaintiff. (FAC, Ex. A at 1 (“[A]  
23 worker . . . is identified by [BOC] and placed on to [Plaintiff’s] payroll . . . based on Job Requisitions  
24 that [BOC] provides.”), 3 (“[Plaintiff] reserves the right to not hire a Candidate if the job description  
25 has not been pre-approved by [Plaintiff].”), 1 (“Plaintiff will extend 30 days notice prior to terminating  
26 this agreement, unless [BOC] intentionally mis-represents a job description.”).) Despite BOC’s correct  
27 assertion that ambiguities in a contract are construed against the drafter, *see Oceanside 84, Ltd. v.*  
28 *Fidelity Federal Bank*, 66 Cal. Rptr. 2d 487 (Cal. Ct. App. 1997), Plaintiff has alleged sufficient facts

1 to support a plausible claim for breach of contract based upon BOC’s alleged provision of inaccurate  
2 job descriptions for workers.<sup>1</sup>

3 **2. Damages**

4 Plaintiff alleges BOC’s provision of inaccurate job descriptions for employees resulted in  
5 underpayment to Plaintiff in accordance with the Master Rates and Services Table attached to the  
6 FAC. (FAC ¶ 17.) For example, Plaintiff argues, “when [BOC] provided an inaccurate job description  
7 of ‘professional’ rather than ‘industrial’ for a worker, [Plaintiff] suffered injury because it charged  
8 [BOC] a lower rate (15.75%) than [BOC was] obligated to pay (24.75%).” (Opp’n at 6.) Such an  
9 assertion, accepted as true, provides sufficient factual matter for a facially plausible claim as to  
10 damages.

11 BOC argues that, according to Plaintiff’s original Complaint, Plaintiff suffered no actual  
12 damages due to BOC’s alleged breach. BOC states that even if BOC provided inaccurate job  
13 descriptions for employees to avoid higher rates for high-risk workers, any decrease in payments made  
14 to Plaintiff was offset by an equivalent decrease in costs paid by Plaintiff to Workmans’ Compensation  
15 Insurance, leaving no damages against Plaintiff. (Mot. to Dismiss at 7.) BOC argues the Court should  
16 disregard factual allegations in the FAC which contradict those in a prior Complaint. (Reply at 1.)  
17 However, the Ninth Circuit has recently held that even inconsistent pleadings may not be stricken  
18 unless the Court finds that they were made in bad faith. *PAE Gov’t Servs. v. MPRI, Inc.*, 514 F.3d 856,  
19 859 (9th Cir. 2007).

20 There is nothing in the Federal Rules of Civil Procedure to prevent a party from filing  
21 successive pleadings that make inconsistent or even contradictory allegations. Unless  
22 there is a showing that the party acted in bad faith—a showing that can only be made  
after the party is given an opportunity to respond under the procedures of Rule  
11—inconsistent allegations are simply not a basis for striking the pleading.

23 *Id.* at 860; *see also Rhodes v. Robinson*, 621 F.3d 1002, 1005 (9th Cir. 2010) (“The amended  
24 complaint supercedes the original, the latter being treated thereafter as non-existent.”). Under the  
25 reasoning set forth in *PAE Government Services*, the Court accepts the factual matter of the FAC as

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27 <sup>1</sup> Plaintiff also alleges BOC “reversed payment of invoices paid to [Plaintiff] by BOC via  
28 procurement card.” (FAC ¶ 14.) However, Plaintiff fails to state any additional factual allegations in  
support of this claim. Accordingly, to the extent Plaintiff relies on this as a second basis for its breach  
of contract claim, the claim is dismissed.

1 true and finds Plaintiff has alleged a plausible claim as to the damages element of the breach of  
2 contract claim. Plaintiff therefore states a facially plausible claim for breach of contract and the Court  
3 **denies** BOC’s motion to dismiss this claim.

4 **C. Fraud**

5 Plaintiff states a claim for fraud as to both BOC and Linde. To recover for common law fraud  
6 under California law, a plaintiff must demonstrate: (1) misrepresentation of a material fact, (2) with  
7 knowledge of its falsity, (3) with intent to defraud, (4) plaintiff’s justifiable reliance on the  
8 misrepresentation, and (5) resulting damage. *Lazar v. Super. Ct.*, 12 Cal.4th 631, 638 (1996). Fraud  
9 claims are subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b).  
10 *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003). Rule 9(b) requires  
11 a party alleging fraud or mistake to “state with particularity the circumstances constituting fraud or  
12 mistake” and is applied by a federal court to both federal law and state law claims. *Vess v. Ciba-Geigy*  
13 *Corp. USA*, 317 F.3d 1097, 1102-03 (9th Cir. 2003). A pleading will be “sufficient under Rule 9(b)  
14 if it identifies the circumstances of the alleged fraud so that the defendant can prepare an adequate  
15 answer.” *Fecht v. Price Co.*, 70 F.3d 1078, 1082 (9th Cir. 1995) (quoting *Kaplan v. Rose*, 49 F.3d  
16 1363, 1370 (9th Cir. 1994)). The same is true for allegations of fraudulent conduct. *Vess*, 317 F.3d  
17 at 1103-04. In other words, fraud allegations must be accompanied by “the who, what, when, where,  
18 and how” of the misconduct charged. *Id.* at 1106 (quoting *Cooper v. Pickett*, 137 F.3d 616, 627 (9th  
19 Cir. 1997)).

20 Defendants argue Plaintiff’s fraud claim contains only “boilerplate and conclusory allegations.”  
21 (Mot. to Dismiss at 8.) Defendants reason that Plaintiff’s assertions that BOC “purposefully provided  
22 inaccurate job descriptions in order to underpay [Plaintiff] for workers [Plaintiff] was providing  
23 [BOC],” are far too vague to provide Defendants adequate notice under the law. (Mot. to Dismiss at  
24 8.) The Court agrees. Plaintiff alleges BOC entered into the Contract on December 3, 2007, and that  
25 Plaintiff first became aware of the alleged inaccurate job descriptions “in or about July 2010.” (FAC  
26 ¶ 12.) Plaintiff also provides examples of the types of inaccurate job descriptions provided by BOC:  
27 “For example, BOC mis-classified workers as ‘professional,’ ‘clerical,’ and/or ‘light industrial’ when  
28 it knew the workers were in fact performing services that would have required them to be classified

1 as construction workers and/or in other high-risk jobs.” (*Id.*) However, these allegations are not  
2 sufficiently particular to support a plausible claim for fraud. Accordingly, Defendants’ motion to  
3 dismiss Plaintiff’s claim for fraud is **granted**.

4 **D. Breach of Good Faith and Fair Dealing**

5 As stated above, to state a claim for breach of contract, Plaintiff must show the existence of  
6 a contract, plaintiff’s performance or excuse for nonperformance, defendant’s breach, and damages  
7 as a result of the breach. *CDF Firefighters*, 70 Cal. Rptr. 3d. at 679. “A claim for breach of the  
8 implied covenant of good faith and fair dealing requires the same elements, except that instead of  
9 showing that defendant breached a contractual duty, the plaintiff must show, in essence, that defendant  
10 deprived the plaintiff of a benefit conferred by the contract in violation of the parties’ expectations at  
11 the time of contracting.” *Boland, Inc. v. Rolf C. Hagen (USA) Corp.*, 685 F. Supp. 2d 1094, 1101  
12 (E.D. Cal. 2010).

13 BOC argues that Plaintiff’s claim for a breach of the duty of good faith and fair dealing is  
14 insufficient because it merely duplicates Plaintiff’s claim for breach of contract. “If allegations do not  
15 go beyond the statement of mere contractual breach, rely on the same alleged acts, simply seek the  
16 same damages or other relief already claimed in a companion contract cause of action, they may be  
17 disregarded as ‘superfluous’ as no additional claim is actually stated.” (*See* Mot. to Dismiss at 10  
18 (citing *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, 272 Cal. Rptr. 387, 393 (Cal. Ct. App. 1990)).)  
19 While *Careau* certainly states that a “‘breach of the implied covenant of good faith and fair dealing  
20 involves something beyond breach of the contractual duty itself,’” the additional element it requires  
21 is merely bad faith on the part of the accused. *Careau*, 272 Cal. Rptr. at 399 (quoting *Congleton v.*  
22 *Nat’l. Union Fire Ins. Co.*, 234 Cal. Rptr. 218 (1987)).

23 Thus, allegations which assert such a claim must show that the conduct of the  
24 defendant, *whether or not it also constitutes a breach of a consensual contract term*,  
25 demonstrates a failure or refusal to discharge contractual responsibilities, prompted not  
26 by an honest mistake, bad judgment or negligence but rather by a conscious and  
deliberate act, which unfairly frustrates the agreed common purposes and disappoints  
the reasonable expectations of the other party thereby depriving that party of the  
benefits of the agreement.

27 *Id.* at 399-400 (emphasis added).

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1 As noted above, Plaintiff states a facially plausible claim of breach of contract. Additionally,  
2 Plaintiff alleges BOC acted in bad faith when BOC “deliberately . . . provided inaccurate job  
3 descriptions so that it could avoid paying higher rates[.]” (FAC ¶ 12.) Accepted as true, Plaintiff’s  
4 allegations provide a sufficient basis for a facially plausible claim of breach of the duty of good faith  
5 and fair dealing. Therefore the Court **denies** BOC’s motion to dismiss this claim.

6 **E. Promissory Estoppel**

7 To state a claim for promissory estoppel, a plaintiff must allege (1) the defendant made a clear  
8 unambiguous promise to the plaintiff, (2) the defendant had reason to believe that the plaintiff would  
9 rely on the promise, (3) the plaintiff did rely on the promise, (4) and foreseeable damages resulted to  
10 the plaintiff. *See Morrison v. Home Sav. & Loan Ass’n.*, 346 P.2d 917, 920 (Cal. Ct. App. 1959)  
11 (citing *Drennan v. Star Paving Co.*, 51 Cal. 2d 409, 413 (1958)). The purpose of promissory estoppel  
12 is “to make a promise binding, under certain circumstances, without consideration in the usual sense  
13 of something bargained for and given in exchange.” *Youngman v. Nevada Irrigation Dist.*, 70 Cal. 2d  
14 240, 249 (1969).

15 BOC argues the claim of promissory estoppel is redundant of the breach of contract claim and  
16 Plaintiff could not have relied on BOC’s job descriptions because Plaintiff assumed all risk for  
17 employee classifications. Promissory estoppel is a claim for relief independent from a breach of  
18 contract claim. To the extent that Plaintiff’s claims for promissory estoppel and breach of contract are  
19 in conflict, the federal rules allow a plaintiff to plead inconsistent claims in a complaint. *See*  
20 *Molsbergen v. United States*, 757 F.2d 1016, 1019 (9th Cir. 1985) (holding that the federal rules give  
21 freedom to plead inconsistent claims). Plaintiff argues that BOC made a promise to provide accurate  
22 job descriptions; that BOC had reason to believe Plaintiff would rely on that promise because Plaintiff  
23 could not otherwise correctly classify the workers; that Plaintiff did rely on the promise by classifying  
24 workers according to BOC’s provided job descriptions; and that Plaintiff suffered foreseeable damages  
25 by accepting lower payments than it was owed. (Opp’n at 6.) Accepting Plaintiff’s factual assertions  
26 as true, Plaintiff states a plausible claim for promissory estoppel. Accordingly, the Court **denies**  
27 BOC’s motion to dismiss Plaintiff’s promissory estoppel claim.

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1 **F. Unjust Enrichment**

2 Unjust enrichment is not itself an independent claim for relief. *McKell v. Washington Mut.,*  
3 *Inc.*, 49 Cal. Rptr. 3d 227, 254 (Cal. Ct. App. 2006). The Court therefore construes Plaintiff's  
4 purported claim for unjust enrichment as an attempt to plead a claim for relief giving rise to a right of  
5 restitution. A party is required to make restitution "if he or she is unjustly enriched at the expense of  
6 another. A person is enriched if the person receives a benefit at another's expense." *McBride v.*  
7 *Boughton*, 20 Cal. Rptr. 3d 115, 122 (Cal. Ct. App. 2004) (citing *First Nationwide Sav. v. Perry*, 15  
8 Cal. Rptr. 2d 173 (1992)). Plaintiff here makes adequate factual allegations to state a facially plausible  
9 claim to a right of restitution to the value of services provided to BOC for which Plaintiff was not paid  
10 in accordance with the Contract. Therefore, the Court **denies** BOC's motion to dismiss this claim.

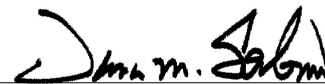
11 **IV.**

12 **CONCLUSION**

13 For the foregoing reasons, the Defendants' motion to dismiss is granted in part and denied in  
14 part. The Court grants Plaintiff's request for leave to amend the Complaint. Plaintiff may file an  
15 amended Complaint consistent with this Order within 20 days of entry of the Order.

16 **IT IS SO ORDERED.**

17 DATED: August 1, 2011

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19 HON. DANA M. SABRAW  
20 United States District Judge

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