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

STEVEN M. GARDNER, an individual,

Plaintiff,

v.

CAFEPRESS INC., a Delaware Corporation, et al.,

Defendants.

CASE NO. 3:13-cv-1108-GPC-JLB

ORDER:

(1) GRANTING IN PART AND DENYING IN PART CAFEPRESS’S MOTION FOR SUMMARY JUDGMENT ON LIABILITY OR, ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT ON DAMAGES;

[ECF No. 96]

(2) GRANTING CAFEPRESS’S MOTION TO STRIKE;

[ECF No. 128]

(3) VACATING HEARING DATE

I. INTRODUCTION

Before the Court is Defendant CafePress Inc.’s (“CafePress”) Motion for Summary Judgment on Liability, or, Alternatively, for Partial Summary Judgment on Damages. (ECF No. 96.) Plaintiff Steven M. Gardner (“Gardner”) opposes. (ECF No. 117.) CafePress replied to Gardner’s opposition. (ECF No. 127.)

The parties have fully briefed the motion. (ECF Nos. 96, 117, 127.) The Court finds the motion suitable for disposition without oral argument pursuant to Civil Local

1 Rule 7.1(d)(1). For the reasons discussed below, the Court GRANTS IN PART AND
2 DENIES IN PART CafePress’s motion for summary judgment or partial summary
3 judgment.

4 **II. PROCEDURAL HISTORY**

5 On May 8, 2013, Gardner filed a complaint against CafePress alleging copyright
6 infringement. (ECF No. 1.) On May 13, 2013, Gardner filed a first amended complaint.
7 (ECF No. 3.) On October 14, 2014, Gardner filed a second amended complaint (the
8 “SAC”). (ECF No. 112.)

9 On August 28, 2014, CafePress filed a motion for summary judgment, or
10 alternatively partial summary judgment on damages. (ECF No. 96.) On October 24,
11 2014, Gardner filed an opposition to CafePress’s motion. (ECF No. 117.) On
12 November 7, 2014, CafePress filed a response to Gardner’s opposition. (ECF No. 127.)

13 On November 7, 2014, Gardner filed objections to the Declaration of Lindsay
14 Moore, (ECF No. 96-2). (ECF No. 129.) On November 8, 2014, CafePress filed a
15 motion to strike three documents: (1) the declaration of Darren J. Quinn, (ECF No.
16 119); (2) Gardner’s response to CafePress’s statement of undisputed facts, (ECF No.
17 124); and (3) Gardner’s objections to the declaration of Lindsay Moore, (ECF No.
18 125). (ECF No. 128.)

19 **III. FACTUAL BACKGROUND**

20 CafePress is an e-commerce vendor that operates <http://www.cafepress.com>.
21 (ECF No. 96-2 ¶ 3.) CafePress allows users to upload images of artwork, slogans, and
22 designs for printing on items such as shirts, bags, and mugs. (*Id.* ¶ 5.) These images are
23 uploaded at the direction of CafePress users and are stored on CafePress’s servers
24 through its website. (*Id.* ¶¶ 3, 8.) CafePress provides its users services including
25 “online service, printing, shipping and related services.” (*Id.* ¶ 38.) CafePress users
26 can also offer the uploaded images for sale to third parties who then select one of
27 CafePress’s unbranded items on which to print the image. (*Id.* ¶ 5.) These items or
28 images are sold through either: (1) a user’s “virtual shop” on CafePress’s website, (2)

1 the CafePress Marketplace on CafePress’s website, or (3) a CafePress “feed” on a third
2 party website such as <http://www.amazon.com> or <http://www.ebay.com> . (*Id.* ¶ 16.)
3 Once a customer purchases an item bearing a CafePress user’s uploaded image,
4 CafePress’s employees then “hand print[]” the item. (ECF No. 119 ¶ 14; ECF No. 119-
5 14.)

6 Gardner is the holder of U.S. copyright registrations in four works at issue in this
7 case: (1) “Alaska Wildlife”; (2) “Polar Bears 10 Hidden Bears”; (3) “Find 12 Tigers”;
8 and (4) “Harmony of Wolves.” (ECF Nos. 118-1, 118-2, 118-3, 118-4, Exs. A–D.)
9 Several CafePress users, including Beverly Teall, Lakin Southall, and PrideAndMore,
10 uploaded copies of Gardner’s works to CafePress’s service. (ECF No. 119 ¶ 2.) These
11 CafePress users then sold items bearing copies of Gardner’s works through CafePress’s
12 service on <http://www.cafepress.com> and other websites. (ECF No. 119 ¶ 3.) CafePress
13 generated approximately \$6,000¹ in revenue from these allegedly infringing sales. (ECF
14 No. 96-2 ¶¶ 38, 42, 43.)

15 CafePress also purchased advertisements which display copies of Gardner’s
16 works. (*See, e.g.*, ECF Nos. 118-7, 118-8, 118-9, 118-10, 118-11, 118-12, Exs. G–L)
17 CafePress generated revenue from users who clicked on these advertisements. (ECF
18 No. 121, Ex. 4.)

19 IV. LEGAL STANDARD

20 Federal Rule of Civil Procedure 56 empowers the Court to enter summary
21 judgment on factually unsupported claims or defenses, and thereby “secure the just,
22 speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*, 477
23 U.S. 317, 325, 327 (1986); FED. R. CIV. P. 56. Summary judgment is appropriate if the
24 “pleadings, depositions, answers to interrogatories, and admissions on file, together
25 with the affidavits, if any, show that there is no genuine issue as to any material fact
26

27 ¹ ECF No. 96-2 ¶ 43 appears to contain two typos referring to this number as
28 \$6,320 rather than \$6,230 which would be the number obtained from adding the two
revenue figures in ECF No. 96-2 ¶¶ 38, 42. In any event, whether the amount is \$6,320
or \$6,230 is immaterial for the purposes of this order.

1 and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P.
2 56(c). A fact is material when it affects the outcome of the case. *Anderson v. Liberty*
3 *Lobby, Inc.*, 477 U.S. 242, 248 (1986).

4 The moving party bears the initial burden of demonstrating the absence of any
5 genuine issues of material fact. *Celotex*, 477 U.S. at 323. The moving party can satisfy
6 this burden by demonstrating that the nonmoving party failed to make a showing
7 sufficient to establish an element of his or her claim on which that party will bear the
8 burden of proof at trial. *Id.* at 322–23. If the moving party fails to bear the initial
9 burden, summary judgment must be denied and the Court need not consider the
10 nonmoving party’s evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 159–60
11 (1970).

12 Once the moving party has satisfied this burden, the nonmoving party cannot rest
13 on the mere allegations or denials of his pleading, but must “go beyond the pleadings
14 and by her own affidavits, or by the ‘depositions, answers to interrogatories, and
15 admissions on file’ designate ‘specific facts showing that there is a genuine issue for
16 trial.’” *Celotex*, 477 U.S. at 324 (citing FED. R. CIV. P. 56 (1963)). If the non-moving
17 party fails to make a sufficient showing of an element of its case, the moving party is
18 entitled to judgment as a matter of law. *Id.* at 325. “Where the record taken as a whole
19 could not lead a rational trier of fact to find for the nonmoving party, there is no
20 ‘genuine issue for trial.’” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
21 574, 587 (1986) (citing FED. R. CIV. P. 56 (1963)). In making this determination, the
22 Court must “view [] the evidence in the light most favorable to the nonmoving party.”
23 *Fontana v. Haskin*, 262 F.3d 871, 876 (9th Cir. 2001). The Court does not engage in
24 credibility determinations, weighing of evidence, or drawing of legitimate inferences
25 from the facts; these functions are for the trier of fact. *Anderson*, 477 U.S. at 255.

26 V. EVIDENTIARY OBJECTIONS

27 CafePress objects to paragraphs 2, 4, 5, 6, and 9, and exhibits 1, 2, 8, 12, and 13
28 of the declaration of Darren J. Quinn, (ECF No. 119), for lack of personal knowledge,

1 speculation, relevance, and lack of authentication. (ECF No. 128-1, at 1–5.) As the
2 objected to paragraphs and exhibits are immaterial to the Court’s ruling on this motion,
3 the Court has not considered the challenged evidence. To the extent that any
4 objected-to-evidence is relevant and relied on by the court herein, the court overrules
5 any asserted objections to that evidence.

6 CafePress argues that Gardner’s response to CafePress’s statement of undisputed
7 facts, (ECF No. 124), and Gardner’s objections to the declaration of Lindsay Moore,
8 (ECF No. 125), should be stricken because they were filed after the deadline. (ECF No.
9 128-1, at 5.) Generally, good cause must be shown to extend a deadline. *See* FED. R.
10 CIV. P. 6(b)(1). This Court entered a briefing schedule setting the deadline to oppose
11 CafePress’s motion as October 24, 2014. (ECF No. 98.) Gardner did not file his
12 response to CafePress’s statement of facts and his objections to the declaration of
13 Lindsay Moore until November 7, 2014, approximately two weeks after the deadline
14 to oppose and (*See* ECF Nos. 98, 124, 125.) To date, Gardner has not responded to
15 CafePress’s motion to strike and thus has not shown good cause. Accordingly, the
16 Court GRANTS CafePress’s motion to strike and strikes ECF Nos. 124 and 125.

17 VI. DISCUSSION

18 A. Contributory Infringement

19 CafePress argues that the undisputed facts show that it is not liable for
20 contributory infringement. (ECF No. 96-1, at 14–17.) Indeed, Gardner states that he
21 “does not contend[] that CafePress is liable for contributory infringement.” (ECF No.
22 117, at 21.) Accordingly, the Court GRANTS CafePress’s motion for summary
23 judgment on Gardner’s contributory infringement cause of action.

24 B. Direct Infringement

25 1. Direct Liability

26 There are three elements to a prima facie case of direct infringement: (1)
27 ownership of the allegedly infringed material, (2) violation of at least one exclusive
28 right granted to copyright holders under 17 U.S.C. § 106, and (3) volitional conduct by

1 the defendant. *Fox Broad. Co. v. Dish Network L.L.C.*, 747 F.3d 1060, 1067 (9th Cir.
2 2014) (holding that a direct infringement claim requires that “the defendant cause the
3 copying”) (citing *Cartoon Network LP v. CSC Holdings, Inc.* (“*Cablevision*”), 536 F.3d
4 121, 130 (2d Cir. 2008)); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1159
5 (9th Cir. 2007). 17 U.S.C. § 106 grants four rights to the holders of graphical
6 copyrights: (1) reproduction, (2) derivative creation, (3) distribution, and (4) public
7 display. 17 U.S.C. § 106. Gardner argues that CafePress violated all four rights granted
8 to him as a holder of a graphical copyright. (ECF No. 117, at 6–13.)

9 As an initial matter, the parties dispute whether the Ninth Circuit has ruled on
10 whether direct infringement requires volitional conduct. (*Compare* ECF No. 117, at 14
11 *with* ECF No. 127, at 2–3.) Citing *Oppenheimer v. Allvoices, Inc.*, No. 14-cv-0499-LB,
12 2014 WL 2604033, at *6 (N.D. Cal. June 10, 2014), Gardner argues that the Ninth
13 Circuit has not yet addressed this issue. (ECF No. 117, at 14.) Gardner further argues
14 that the Supreme Court’s recent decision in *American Broadcasting Cos. v. Aereo, Inc.*,
15 134 S. Ct. 2498 (2014), further militates against the volitional conduct requirement. (*Id.*
16 at 15–16.) However, Gardner’s argument ignores the Ninth Circuit’s decision in *Fox*.
17 *See* 747 F.3d 1060. The fact that the magistrate judge in *Oppenheimer* overlooked *Fox*
18 does not affect the controlling force of *Fox*. *See* 2014 WL 2604033, at *6. Moreover,
19 the Supreme Court expressly decided not to address the volitional conduct issue which
20 leaves *Fox* undisturbed. *See Aereo*, 134 S. Ct. 2498, 2507 (“In other cases involving
21 different kinds of service or technology providers, a user’s involvement in the
22 operation of the provider’s equipment and selection of the content transmitted may well
23 bear on whether the provider performs within the meaning of the Act.”). As this Court
24 is bound by Ninth Circuit precedent and *Fox* is still good law, the Court finds that
25 volitional conduct is a required element of direct infringement. *See* 747 F.3d at 1067.

26 The parties do not dispute the first two elements of direct infringement: (1) that
27 Gardner is the owner of the copyrights, and (2) that at least one of Gardner’s rights in
28 those copyrights was violated. (*See* ECF No. 117, at 1, 6–13; *see also* ECF No. 127,

1 at 5 (“[CafePress] assumes for the purposes of this motion that there was some
2 underlying act of infringement as a result of the alleged misconduct of Lakin Southall
3 and Beverly Teall.”) However, the parties do dispute whether CafePress engaged in
4 volitional conduct. (*Compare* ECF No. 117, at 16 *with* ECF No. 127, at 5.)

5 CafePress argues that it is similar to the satellite and cable television providers
6 whose users were the cause of the infringement in *Fox* and *Cablevision*. (ECF No. 96-
7 1, at 10–11.) Gardner argues that CafePress is similar to the copy shop operator who
8 physically made copies at a customer’s request in *Princeton Univ. Press v. Mich.*
9 *Document Servs., Inc.*, 99 F.3d 1381 (6th Cir. 1996) (en banc). (ECF No. 117, at
10 15–16.)

11 In *Cablevision*, a cable television provider developed a digital video recorder
12 (“DVR”) that allowed its customers to record copies of cable television programs on
13 hard drives owned by the provider and housed at the provider’s premises. 536 F.3d at
14 124. The provider’s DVR software was entirely automated, i.e. customer commands
15 to copy the television programs were issued directly to the provider’s software system
16 tha automatically obeyed the command with no human involvement. *Id.* at 131–32.
17 Similarly, in *Fox*, a satellite television provider developed a feature for its DVR that
18 allowed its customers “to record any and all primetime programming on the four major
19 broadcast networks . . . every night of the week.” 747 F.3d at 1064. While the provider
20 did exercise some discretion, such as determining the start and end times for the
21 primetime block, the customer still had to enable the feature which then automatically
22 recorded the primetime programming to the customer’s DVR. *Id.* at 1065. In both
23 cases, the courts found that because the customer was the one who chose whether or
24 not to record the programming, the provider had not engaged in volitional conduct.
25 *Cablevision*, 536 F.3d at 131–33; *Fox*, 747 F.3d at 1067–68.

26 In *Princeton*, a college professor gave copyrighted material to a human employee
27 at a copy shop. 99 F.3d at 1384. The copy shop’s employee then performed the physical
28 acts such as printing copies and selling the copies to students. *Id.* The Sixth Circuit

1 found that this constituted a prima facie case of copyright infringement. *See id.* at 1383.
2 Thus the issue in this case is whether CafePress is more similar to a copy shop that
3 “makes photocopiers available to the public on its premises” or to a copy shop where
4 customers request a copy from the copy shop’s human employees “who then
5 volitionally operate[] the copying system to make the copy.” *See Cablevision*, 536 F.3d
6 at 131–32.

7 While some of the CafePress process is similar to the DVR cases—specifically
8 where users upload images to the site and customers request items—a significant
9 portion of the process is done by CafePress itself, namely the production and sale of
10 the allegedly infringing items. In making the allegedly infringing items, CafePress’s
11 employees respond to a customer request to purchase the item. CafePress does not
12 contend that its production facility and shipping process are completely automated and
13 thus devoid of human employees engaging in volitional conduct. CafePress’s
14 employees, not its customers, are the ones operating the machinery used by CafePress
15 to create the allegedly infringing items.

16 As the evidence appears to show that CafePress does engage in at least some
17 volitional conduct, the Court DENIES CafePress’s motion for summary judgment on
18 Gardner’s direct liability cause of action.

19 **2. Vicarious Liability**

20 There are two elements to a prima facie case of vicarious infringement: (1)
21 “direct financial benefit” from third party’s direct infringement, and (2) “the right
22 ability to supervise” a third party’s infringing activity. *Ellison v. Robertson*, 357 F.3d
23 1072, 1078 (9th Cir. 2004). A service provider receives a “direct financial benefit”
24 when “the infringing activity constitutes a draw for [customers], not just an added
25 benefit.” *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102, 1117 (9th Cir. 2007) (citation
26 and quotation marks omitted).

27 **a. Direct Financial Benefit**

28 Gardner argues that the “direct financial benefit” is CafePress paying image

1 uploaders a 10% royalty and that advertising bearing images of Gardner’s copyright
2 works increased CafePress’s sales. (ECF No. 117, at 21.) Citing *A&M Records, Inc. v.*
3 *Napster, Inc.*, 239 F.3d 1004, 1119–22 (9th Cir. 2001), CafePress argues that CafePress
4 is distinguishable from Napster “where 90% or more of [Napster’s] files . . . were found
5 to be infringing.” (ECF No. 127, at 2 n.4.) However, CafePress’s attempt to distinguish
6 *Napster* and citation to the 90% figure implies that the draw must be “substantial,” a
7 requirement that the Ninth Circuit has rejected, holding that “[t]here is no requirement
8 that the draw be ‘substantial.’” *See Ellison*, 357 F.3d at 1079 (“The essential aspect of
9 the ‘direct financial benefit’ inquiry is whether there is a causal relationship between
10 the infringing activity and any financial benefit a defendant reaps, regardless of *how*
11 *substantial* the benefit is in proportion to a defendant’s overall profits.”). It is
12 undisputed that a certain number of CafePress customers saw ads bearing images of
13 Gardner’s copyrighted works, clicked through those ads, and generated revenue for
14 CafePress and that some CafePress customers bought items bearing images of
15 Gardner’s copyright works. (*See* ECF No. 121, Ex. 4; ECF No. 98-2 ¶ 38.) Though it
16 is unclear whether those customers clicked the ads or bought the items because of the
17 images of Gardner’s copyrighted works or because of some other reason, that
18 determination is for the trier of fact. At the summary judgment stage, the fact that at
19 least some of CafePress’s customers bought the items and clicked those ads, thus
20 generating revenue for CafePress, creates a dispute of material fact as to whether the
21 infringing activity drew customers and thus whether there was a “direct financial
22 benefit.” *See Ellison*, 357 F.3d at 1079.

23 **b. Control**

24 A service provider has “the right and ability to control” where it “exert[s]
25 substantial influence on the activities of users.” *UMG Recordings, Inc. v. Shelter*
26 *Capital Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013) (quoting *Viacom Int’l, Inc.*
27 *v. YouTube, Inc.*, 676 F.3d 19, 38 (2d Cir. 2012)). “‘Substantial influence’ may include
28 . . . high levels of control over activities of users. . . . [o]r it may include purposeful

1 conduct.” *Id.* at 1030.

2 Gardner argues that “CafePress has complete control over what products are
3 displayed and sold on its CafePress Marketplace (www.cafepress.com) and related
4 feeds to Amazon, eBay and other major retailers such as Wal-Mart and Kmart.” (ECF
5 No. 117, at 20.) CafePress argues that its infringement prevention is an “after-the-fact
6 ability to remove or block access to infringing activities” that “does not constitute an
7 ability to control or supervise.” (ECF No. 96-1, at 18 (quoting *Ellison v. Robertson*,
8 189 F. Supp. 2d 1051, 1060 (C.D. Cal. 2002).) Essentially, CafePress is arguing that
9 its activities are similar to those of Amazon or eBay where the service provider was not
10 “actively involved” in the sale of allegedly infringing material. *See, e.g., Corbis Corp.*
11 *v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1110 (W.D. Wash. 2004); *Hendrickson v.*
12 *Amazon.com, Inc.*, 298 F. Supp. 2d 914, 918 (C.D. Cal. 2003); *Hendrickson v. eBay,*
13 *Inc.*, 165 F. Supp. 2d 1082, 1094 (C.D. Cal. 2001).

14 CafePress’s business is distinguishable from both companies. For instance, eBay
15 is “not actively involved in the listing, bidding, sale and delivery of any item offered
16 for sale on its website” and “does not have any control over the allegedly infringing
17 items.” *Hendrickson v. eBay, Inc.*, 165 F. Supp. 2d at 1094. Similarly, Amazon “merely
18 provide[s] the forum for an independent third party seller to list and sell his
19 merchandise” and is “not actively involved in the listing.” *Hendrickson v. Amazon.com,*
20 *Inc.*, 298 F. Supp. 2d at 918. In contrast, the evidence appears to show that CafePress
21 does have active control over at least some of the allegedly infringing items during the
22 process in which CafePress produces and then ships those items to customers. While
23 CafePress’s actions in response to allegedly infringing uploads may be similar to
24 Amazon and eBay where it is not actively involved and can only engage in after-the-
25 fact removal and access blocking, CafePress’s production of allegedly infringing items
26 at its production facility does appear to be “purposeful conduct” such that CafePress
27 has the “right and ability to control.” (See ECF No. 119-14, Ex. 14); *see also UMG*
28 *Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d at 1030.

1 As the evidence surrounding both elements are disputed, the Court DENIES
2 CafePress's motion for summary judgment on Gardner's vicarious liability cause of
3 action.

4 **C. Damages**

5 In the alternative, CafePress seeks partial summary judgment establishing the
6 maximum potential damages as \$405. (ECF No. 96-1, at 19.) 17 U.S.C. § 504 allows
7 a copyright plaintiff to recover "actual damages and any additional profits of the
8 infringer."² 17 U.S.C. § 504(a)(1). While expenses may be deducted from gross
9 revenue, the burden of proof for deductible expenses is on the infringer. 17 U.S.C. §
10 504(b). Gardner argues that CafePress's profits from alleged infringement are disputed
11 because: (1) the revenue amount argued by CafePress does not include any revenue
12 from the allegedly infringing advertising, and (2) CafePress has not satisfied its burden
13 of proof for expenses. (ECF No. 117, at 21–22.) CafePress argues that Gardner has
14 failed to bear his burden of proving that the alleged infringement in the advertisements
15 was the cause of the approximately \$436 in revenue generated from that advertising.
16 (ECF No. 127, at 9–10.)

17 CafePress's only support for its claimed expenses is the declaration of its
18 "Intellectual Property Manager." (See ECF No. 96-2 ¶ 43.) CafePress has neither
19 broken down what types of expenses are being claimed nor shown whether such
20 expenses are directly related to the allegedly infringing and which are overhead. See
21 *Kamar Intern., Inc. v. Russ Berrie and Co.*, 752 F.2d 1326, 1332 (9th Cir. 1984)
22 (Overhead expenses are deductible "only when the infringer can demonstrate it was of
23 actual assistance in the production, distribution or sale of the infringing product" which
24 is a "factual determination."). Accordingly, the Court finds that CafePress has failed
25 to carry its burden regarding expenses and thus DENIES CafePress's alternative

26
27 ² While copyright plaintiffs can potentially recover statutory damages and
28 attorneys' fees, the Court has previously ruled that Gardner cannot recover these. (See
ECF No. 48, at 16.) Copyright plaintiffs can also potentially recover actual damages,
however Plaintiff appears not to be pursuing such damages. (See ECF No. 96-15, Ex.
C, at 3 ("Plaintiff is not seeking any damages under 17 U.S.C. § 504(b).").)

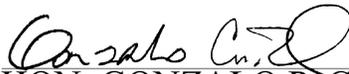
1 motion for partial summary judgment on damages.

2 **VII. CONCLUSION AND ORDER**

3 For the reasons stated above, **IT IS HEREBY ORDERED** that:

- 4 1. CafePress's Motion for Summary Judgment on Liability or, Alternatively,
5 Partial Summary Judgment on Damages, (ECF No. 96), is **GRANTED** as
6 to Gardner's contributory infringement cause of action, **DENIED** as to
7 Gardner's direct liability cause of action, **DENIED** as to Gardner's
8 vicarious liability cause of action, and **DENIED** as to damages;
- 9 2. CafePress's Motion to Strike, (ECF No. 128), is **GRANTED** and ECF
10 Nos. 124 and 125 are **STRICKEN**; and
- 11 3. The hearing set for December 5, 2014, is **VACATED**.

12 DATED: December 4, 2014

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15 HON. GONZALO P. CURIEL
16 United States District Judge
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