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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 BETTER HOMES REALTY, INC.,
12 Plaintiff,
13 v.
14 JOHN FRANCO WATMORE; FLORIAN
15 ANTONIETTA LOSAPIO; FLS AND
16 ASSOCIATES, INC.; and DOES 1 to 25,
17 Defendants.

Case No.: 3:16-cv-01607-BEN-MDD

**ORDER GRANTING MOTION TO
DISMISS IN PART**

[ECF No. 9]

18
19 Plaintiff Better Homes Realty, Inc. (“Plaintiff” or “BHR”) filed a complaint
20 alleging trademark infringement, unfair competition, false designation of origin, and
21 injury to business reputation against Defendants John Franco Watmore (“Watmore”),
22 Florian Antonietta Losapio (“Losapio”), and FLS and Associates, Inc. (“FLS”). (Compl.,
23 ECF No. 1.) Defendants now move to dismiss the complaint. (Mot., ECF No. 9.)
24 Plaintiff opposes the motion. (Opp’n, ECF No. 10.) For the following reasons, the Court
25 grants the motion to dismiss in part.

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1 **BACKGROUND¹**

2 Plaintiff BHR is a real estate brokerage franchising business in Nevada. (Compl. ¶
3 5, 9.) BHR has franchise locations throughout California and the United States. (*Id.* ¶ 9.)
4 Plaintiff’s predecessor registered the marks “BETTER HOMES” and “BETTER HOMES
5 REALTY” with the U.S. Patent and Trademark Office on June 25, 1985. (*Id.* ¶ 10.) The
6 relevant trademark registration numbers are 1509510 and 1344964. (*Id.*) Plaintiff
7 received the rights to the trademarks through an assignment in June 2015. (*Id.*)

8 Defendants offer real estate and investment services in San Diego, California under
9 the names “San Diego Better Homes,” “sandiegbetterhomes.com”, and/or “San Diego
10 Better Homes Realty.” (*Id.* ¶ 11.) Defendants’ website and advertising materials use the
11 “BETTER HOMES” and “BETTER HOMES REALTY” marks. (*Id.*) Their marketing
12 materials include the following mark:



18 **San Diego Better Homes Realty**

19 **John Watmore**

20 **Floriana LoSapio**

21
22 (*Id.*) Defendants market to the same potential customers as Plaintiff, and through the
23 same market channels. (*Id.*) Plaintiff has not authorized Defendants’ use of Plaintiff’s
24 trademarks. (*Id.* ¶ 12.) Plaintiff alleges that Defendants’ use of its marks is likely to
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27 ¹ The Court is not making any findings of fact, but rather, summarizing the relevant
28 allegations of the Complaint for purposes of evaluating Defendants’ Motion to Dismiss.

1 cause confusion, mistake, or deception among the public. (*Id.* ¶ 14.) Plaintiff demanded
2 that Defendants cease and desist all use of the “BETTER HOMES” trade name and
3 service marks, but Defendants refused. (*Id.* ¶ 15.)

4 Plaintiff subsequently brought a lawsuit alleging federal trademark infringement
5 under 15 U.S.C. § 1114(1), unfair competition and false designation of origin under 15
6 U.S.C. § 1125(a), unfair competition under California Business and Professions Code §
7 17200 *et seq.*, common law unfair competition, and common law injury to business
8 reputation. It seeks damages, an injunction, an accounting for all profits derived from
9 Defendants’ use of the marks, destruction of all of Defendants’ promotional materials
10 bearing the marks, and attorneys’ fees and costs. Defendants move to dismiss the
11 complaint for failing to state a claim against any and all Defendants pursuant to Federal
12 Rule of Civil Procedure 12(b)(6).

13 **LEGAL STANDARD**

14 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) must be
15 granted where the pleadings fail to state a claim upon which relief can be granted. When
16 considering a Rule 12(b)(6) motion, the court must “accept as true facts alleged and draw
17 inferences from them in the light most favorable to the plaintiff.” *Stacy v. Rederite Otto*
18 *Danielsen*, 609 F.3d 1033, 1035 (9th Cir. 2010). A plaintiff must not merely allege
19 conceivably unlawful conduct but must allege “enough facts to state a claim to relief that
20 is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim
21 is facially plausible ‘when the plaintiff pleads factual content that allows the court to
22 draw the reasonable inference that the defendant is liable for the misconduct alleged.’”
23 *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013) (quoting *Ashcroft v. Iqbal*, 556
24 U.S. 662, 678 (2009)). “Threadbare recitals of the elements of a cause of action,
25 supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

26 **DISCUSSION**

27 The Court will first consider the parties’ respective requests for judicial notice.
28 The Court will then discuss and analyze the grounds for dismissal advanced by

1 Defendants.

2 **I. Requests for Judicial Notice**

3 **a. Defendants' Request for Judicial Notice**

4 In support of their motion to dismiss, Defendants ask this Court to take judicial
5 notice of 25 documents. (Defs.' Request for Judicial Notice ("RJN"), ECF No. 9-3; *see*
6 *also* Notice of Errata to Defs.' RJN, ECF No. 12-2.) The documents fall into six
7 categories: (1) certified copies of San Diego County Fictitious Business Name
8 Statements for "San Diego Better Homes Realty" and "SanDiegoBetterHomes.com"
9 (Defs.' RJN Nos. 1-2); (2) saved screenshots of online searches run on the County's
10 Fictitious Business Name Statement website (Defs.' RJN Nos. 3-7); (3) saved screenshots
11 of Google searches (Defs.' RJN Nos. 8-13); (4) saved screenshots of webpages on
12 Plaintiff's website (Defs.' RJN Nos. 14-19); (5) saved screenshots of webpages on
13 Defendants' website sandiegotbetterhomes.com (Defs.' RJN Nos. 20-23); and (6) U.S.
14 Patent and Trademark Office Registration Numbers 1509510 and 1344964 (Defs.' RJN
15 Nos. 24-25.) Houston M. Watson II, attorney for Defendants, performed the searches and
16 collected the screenshots on September 7, 2016. (Decl. of Houston M. Watson ¶¶ 1-2.)
17 Plaintiff objects to the request for judicial notice. (Pls.' Opp'n to Defs.' RJN, ECF No.
18 10-1.)

19 When considering a motion to dismiss, a court typically does not look beyond the
20 complaint to avoid converting a motion to dismiss into a motion for summary judgment.
21 *Spy Optic, Inc. v. Alibaba.Com, Inc.*, 163 F. Supp. 3d 755, 760 (C.D. Cal. 2015) (citing
22 *Mack v. S. Bay Beer Distribs., Inc.*, 798 F.3d 1279, 1282 (9th Cir. 1986)).
23 Notwithstanding this precept, a court may take judicial notice of material which is
24 included in, referenced in, or relied upon by the complaint, matters in the public record,
25 and facts "not subject to reasonable dispute" that are "generally known within [this
26 Court's] territorial jurisdiction" or "can be accurately and readily determined from
27 sources whose accuracy cannot reasonably be questioned" under Federal Rule of
28 Evidence 201(b). *Id.* (internal citations omitted).

1 In this case, the Court **GRANTS** Defendants’ request for judicial notice of the
2 certified copies of San Diego County Fictitious Business Name Statements, the
3 screenshots of searches run on the County’s Fictitious Business Name Statement website,
4 and the trademark registration information from the U.S. Patent and Trademark Office.
5 (Def’s.’ RJN Nos. 1-7 & 24-25.) Plaintiff does not substantively object to these
6 documents, but rather contends that some of the documents are incorrectly described in
7 Defendants’ request. Defendants have corrected these inadvertent omissions in their
8 Notice of Errata. These documents are proper subjects of judicial notice because they are
9 public records and the registration information is referenced in the complaint. *See*
10 *Celebrity Chefs Tour, LLC v. Macy’s, Inc.*, 16 F. Supp. 3d 1159, 1163 (S.D. Cal. 2014)
11 (granting request for judicial notice of public records filed with the U.S. Patent and
12 Trademark Office).

13 However, the Court **DENIES** Defendants’ request as to the Google search result
14 screenshots and the screenshots of Plaintiff’s and Defendants’ websites. Defendants seek
15 to use these documents to establish that a consumer would not be confused between BHR
16 and FLS’s business and ask the Court to accept the truth of the facts stated in the various
17 screenshots. The documents purportedly demonstrate that Plaintiff entered the San Diego
18 market after Defendant FLS, that Plaintiff operates in San Diego as “BHR San Diego,”
19 and that a consumer seeking to buy real estate in San Diego would never see Defendants’
20 and Plaintiff’s marks on the same internet screen at the same time.

21 Information on websites, especially a party’s website, is often not considered an
22 appropriate subject of judicial notice. *Gerritsen v. Warner Bros. Entm’t*, 112 F. Supp. 3d
23 1011, 1030-31 (C.D. Cal. 2015) (citing cases and declining to take judicial notice of
24 defendant’s website); *Spy Optic*, 163 F. Supp. 3d at 763 (“[P]rivate corporate websites,
25 particularly when describing their own business, generally are not the sorts of sources
26 whose accuracy cannot reasonably be questioned.” (quoting *Victaulic Co v. Tieman*, 499
27 F.3d 227, 237 (3d Cir. 2007))). Similarly, Google search results are not proper subjects
28 of judicial notice because the “results of a Google search are continually changing and

1 thus cannot “be accurately and readily determined from sources whose accuracy cannot
2 reasonably be questioned.” *Novation Ventures, LLC v. J.G. Wentworth Co., LLC*, No.
3 15-00954 BRO (PJWx), 2015 WL 12765467, at *3 (C.D. Cal. Sept. 21, 2015) (citing
4 cases and declining to take judicial notice of Google search results).

5 Here, Defendants ask the Court to take notice of information on corporate websites
6 and Google search results to establish that Plaintiff cannot demonstrate consumer
7 confusion as a matter of law. This is a key disputed issue. Defendants fail to show that
8 the information in these documents is “not subject to reasonable dispute.” Accordingly,
9 to the extent Defendants seek judicial notice to demonstrate the lack of consumer
10 confusion, the Court declines to take judicial notice of the documents. *See Pinterest, Inc.*
11 *v. Pintrips, Inc.*, 15 F. Supp. 3d 992, 997 (N.D. Cal. 2014) (declining to take judicial
12 notice of documents to demonstrate that plaintiff’s mark is generic because “this hotly
13 contested question cannot be answered solely by reference to information gleaned from
14 judicially noticeable documents”); *see also Victaulic Co.*, 499 F.3d at 237 (“Taking a
15 bare ‘fact’ that is reflected not in the pleadings, but on a corporate website, and then
16 drawing inferences *against* the non-moving party so as to dismiss its well-pleaded claims
17 on the basis of an affirmative defense, takes us, as a matter of process, far too afield from
18 the adversarial context of litigation.”).

19 To the extent Defendants’ website sandiegotbetterhomes.com is nonetheless
20 noticeable because it is referenced in the complaint (*see* Compl. ¶¶ 11, 13), it is
21 noticeable only for its existence but not the truth of the facts stated therein, and thus is
22 irrelevant for resolving Defendants’ motion to dismiss. *See Hologram USA Inc. v.*
23 *Arena3d Indus. Illusions LLC*, No. CV 14-03072 BRO, 2014 WL 12560619, *3 (C.D.
24 Cal. July 23, 2014) (“The Court has reviewed Plaintiffs’ request and finds that only the
25 existence of the [parties’] websites, and not the content on those websites, is properly
26 subject to judicial notice.”).

27 **b. Plaintiff’s Request for Judicial Notice**

28 In its opposition to Defendants’ motion, Plaintiff requests the Court take judicial

1 notice of a printout from the U.S. Patent and Trademark Office online database showing
2 the “Trademark Assignment Cover Sheet” and “Recordation of Name Change” for
3 registered trademark numbers 1509510 and 1344964. (Pls.’ RJN, ECF No. 10-2.)

4 Defendants do not object to the request. Because these are public records, the Court
5 **GRANTS** Plaintiff’s request. *See Celebrity Chefs Tour, LLC*, 16 F. Supp. 3d at 1163.

6 **II. Claims Against Individual Defendants Watmore and Losapio**

7 Defendants move to dismiss the claims against individual defendants John Franco
8 Watmore and Florian Antonietta Losapio. The complaint contains one allegation specific
9 to Watmore and Losapio: “Upon information and belief, plaintiff alleges that defendants
10 Watmore and LoSapio are, and at all times mentioned herein were, individuals residing in
11 the State of California and doing business in this District using the DBAs
12 “sandiegobetterhomes.com,” “San Diego Better Homes,” and/or “San Diego Better
13 Homes Realty.” (Compl. ¶ 6.) Thereafter, the complaint pleads facts and claims for
14 relief against “Defendants” generally without differentiating between Watmore, Losapio,
15 and FLS. The complaint does not allege that Watmore and Losapio were or are agents of
16 FLS.

17 “As a general rule, when a pleading fails ‘to allege what role each Defendant
18 played in the alleged harm,’ this ‘makes it exceedingly difficult, if not impossible, for
19 individual Defendants to respond to Plaintiffs’ allegations.’” *Adobe Sys. Inc. v. Blue*
20 *Source Grp., Inc.*, 125 F. Supp. 3d 945, 964 (N.D. Cal. 2015) (internal citations omitted).
21 “Accordingly, a complaint which ‘lump[s] together . . . multiple defendants in one broad
22 allegation fails to satisfy [the] notice requirement of Rule 8(a)(2).’” *Id.* (quoting *Gen-*
23 *Probe, Inc. v. Amoco Corp., Inc.*, 926 F. Supp. 948, 961 (S.D. Cal. 1996)). However, a
24 plaintiff’s assertion of claims against “Defendants” generally will not always be deficient.
25 *Id.* In *Adobe Systems*, Judge Koh held that the complaint did not impermissibly lump
26 together multiple defendants because the complaint alleged that the moving defendant,
27 “Blue Source, as well as Defendants UPI and JHS, supplied the SoftwareMedia
28 Defendants with infringing products, and that Blue Source was not authorized to sell or

1 distribute such products.” *Id.* at 966. Plaintiff relies on *Adobe Systems* to argue that its
2 complaint sufficiently pleads claims against the individual defendants.

3 However, *Adobe Systems* is inapposite to the situation here. In *Adobe Systems*, the
4 complaint only brought claims against entity defendants and, importantly, Blue Source
5 was the only remaining defendant. Moreover, while the complaint included allegations
6 against “Defendants” generally, it also included some allegations specific to Blue Source.
7 Here, in contrast, there is an entity defendant and two individual defendants, and the
8 complaint does not distinguish between the actions of the three. Furthermore, while it
9 appears there is some relationship between the individual defendants and the entity
10 defendant,² the complaint does not say what it is.

11 The cursory references to the individual defendants and the allegations against all
12 defendants generally fail to give the individual defendants notice of their infringing acts
13 that caused harm to Plaintiff. On this ground, the Court dismisses the complaint and
14 grants Plaintiff leave to amend.

15 **III. Likelihood of Trademark Confusion**

16 Defendants move to dismiss all claims on the grounds that there is no likelihood of
17 confusion between Plaintiff’s and Defendants’ marks as a matter of law. “To maintain an
18 action for trademark infringement under 15 U.S.C. § 1114, false designation of origin
19 under 15 U.S.C. § 1125(a), and unfair competition under California law, a plaintiff must
20 prove the defendant’s use of the same or similar mark would create a likelihood of
21 consumer confusion.” *Murray v. Cable Nat’l Broad. Co.*, 86 F.3d 858, 860 (9th Cir.
22 1996). If a court determines from the pleadings and judicially noticed facts that
23 confusion is unlikely as a matter of law, the complaint should be dismissed. *Id.* But,

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26 ² The complaint includes a copy of Defendants’ mark, which includes the names of the
27 individual defendants next to the business’s name. The Court also has taken judicial
28 notice of the Fictitious Business Name Statements filed with the County of San Diego for
“San Diego Better Homes Realty” and “SanDiegoBetterHomes.com,” and those
documents include Defendant Watmore’s name as the “registrant.”

1 while likelihood of confusion *can* be decided as a matter of law, “[w]hether confusion is
2 likely is a factual determination woven into the law” that courts “routinely treat . . . as [an
3 issue] of fact.” *Parts.com, LLC v. Yahoo! Inc.*, 996 F. Supp. 2d 933, 936 (S.D. Cal.
4 2013) (quoting *Levi Strauss & Co. v. Blue Bell, Inc.*, 778 F.2d 1352, 1356 (9th Cir.
5 1985)).

6 The likelihood of confusion is the central element of trademark infringement, and
7 the “issue can be . . . cast as the determination of whether ‘the similarity of the marks is
8 likely to confuse customers about the source of the products’” or services. *GoTo.com,*
9 *Inc. v. Walt Disney Co.*, 02 F.3d 1199, 1205 (9th Cir. 2000) (internal citation omitted).
10 The Ninth Circuit uses eight factors, set out in *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d
11 341 (9th Cir. 1979), *abrogated on other grounds by Mattel, Inc. v. Walking Mountain*
12 *Prods.*, 353 F.3d 792 (9th Cir. 2003), to determine whether a defendant’s use of a mark
13 or name creates a likelihood of confusion. The factors are: (1) the strength or
14 distinctiveness of the mark; (2) the proximity or relatedness of the goods; (3) the
15 similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used;
16 (6) type of goods and the degree of care likely to be exercised by the purchaser; (7)
17 defendant’s intent in selecting its mark; and (8) the likelihood of expansion into other
18 markets. *Sleekcraft*, 599 F.2d at 348. The *Sleekcraft* factors are non-exhaustive and
19 should be applied flexibly. *Network Automation, Inc. v. Adv. Sys. Concepts, Inc.*, 638
20 F.3d 1137, 1149 (9th Cir. 2011).

21 Considering these factors, and taking the facts alleged in the complaint to be true
22 and the matters judicially noticed, Plaintiff sufficiently alleges a likelihood of confusion.
23 First, Plaintiff has sufficiently pled the strength of the mark because federal registration
24 gives the mark a presumption of distinctiveness. *Vapor Spot, LLC v. Breathe Vape Spot,*
25 *Inc.*, No. CV 15-02110 MMM, 2015 WL 12839123, *8 (C.D. Cal. Sept. 15, 2015). The
26 mark has been registered since 1985 and used throughout the United States, including
27 Plaintiff’s franchise locations in southern California. (Compl. ¶¶ 9-10.) Second, Plaintiff
28 sufficiently alleges the relatedness of the goods because both parties offer services in

1 residential real estate. (*Id.* ¶¶ 9-11.) Third, the complaint plausibly alleges that
2 Plaintiff’s mark “BETTER HOMES REALTY”³ is sufficiently similar to Defendants’
3 marks “San Diego Better Homes, “sandiegbetterhomes.com,” and “San Diego Better
4 Homes Realty” such that a reasonable consumer would be confused. The marks use
5 some of the same words, and the parties operate in the same industry generally. *See*
6 *Vapor Spot*, 2015 WL 12839123, at *12 (“A diminished standard of similarity is . . .
7 applied when comparing the marks of closely related goods.”). As to the fourth factor,
8 Plaintiff has not alleged evidence of actual confusion; however, “the absence of such
9 allegations is not fatal to [Plaintiff’s] claims at the pleading stage.” *Id.* Such evidence
10 may be developed in discovery. The complaint fails on the fifth factor, the degree to
11 which the parties’ marketing channels converge. On this factor, the complaint only
12 pleads in a conclusory manner that the two businesses compete for the same customers
13 through the same marketing channels. (Compl. ¶ 11.) However, market convergence “is
14 merely one of several relevant factors, . . . and likelihood of confusion can still be found
15 in its absence.” *Vapor Spot*, 2015 WL 12839123, at *14 (finding that plaintiff failed to
16 adequately plead market convergence factor but nevertheless plausibly alleged a
17 likelihood of consumer confusion). Similarly, Plaintiff’s allegations about Defendants’
18 intent are conclusory. (*See* Compl. ¶ 20.) The complaint is devoid of facts about how the
19 type of good and degree of care likely to be exercised by the purchaser may affect
20 consumer confusion. Lastly, Plaintiff does not allege any factors about either party’s
21 intent to expand into new markets.

22 Although Plaintiff does not plead all of the *Sleekcraft* factors adequately, “the mere
23 number of factors is not dispositive.” *Vapor Spot*, 2015 WL 12839123, at *15 (finding
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26 ³ The Court notes that while the Complaint suggests that Plaintiff registered “BETTER
27 HOMES” as a mark, there is no such registration. Rather, U.S. Trademark Registration
28 numbers 1509510 and 1344964 claim the word mark “Better Homes Realty” and a design
crest with the words “Better Homes Realty.” (*See* Defs.’ RJN Nos. 24-25.)

1 likelihood of confusion despite plaintiff’s failure to adequately plead actual customer
2 confusion, market convergence, lack of consumer care, defendant’s intent, or planned
3 expansion of product lines). By using the factors to guide the Court in assessing the basic
4 question of likelihood of confusion, the Court finds that it is plausible that a consumer
5 seeking residential real estate services in southern California could be confused between
6 the two parties’ businesses. *See Kythera Biopharm., Inc. v. Lithera, Inc.*, 998 F. Supp. 2d
7 890, 901 (C.D. Cal. 2014) (finding plausible allegations of a likelihood of confusion);
8 *Parts.com, LLC*, 996 F. Supp. 2d at 936 (same).

9 **IV. First Use of the Mark**

10 Defendants also argue that they were first to use the mark, and that “first use” is a
11 required element for Plaintiff’s false designation of origin and state law claims. This
12 argument fails for several reasons. First, the case cited for the proposition that “first use”
13 is an element does not support this contention. Rather, “prior use” is an affirmative
14 defense. *See* 15 U.S.C. § 1115(b)(5); *Roseville Fullerton Burton Holdings, LLC. V.*
15 *SoCal Wheels, Inc.*, No. SACV 14-1954-JLS, 2016 WL 6159014, at *4 (C.D. Cal. May
16 20, 2016) (“[I]t is inappropriate at the pleading stage . . . to determine factual issues, such
17 as . . . prior use.”). Moreover, the facts on which Defendants rely to support their “first
18 use” argument are not facts of which this Court has taken judicial notice.

19 **V. Standing**

20 Finally, in a footnote, Defendants argue that Plaintiff does not have standing to
21 bring a claim with respect to the word mark “BETTER HOMES REALTY” under
22 registration number 1509510 because the U.S. Patent and Trademark Office website
23 shows that trademark as owned by Avarar Network, Inc. (*See* Defs.’ RJN No. 24.)
24 Defendants do not develop their argument beyond the few sentences in the footnote. In
25 its opposition, Plaintiff provides the assignment information for trademark registration
26 number 1509510, which is available on the U.S. Patent and Trademark Office database.
27 (Pls.’ RJN.) The documents show that Avarar Network, Inc. conveyed the mark to Better
28 Homes Realty, Inc. (Pls.’ RJN.) Defendants do not respond to this issue in their reply.

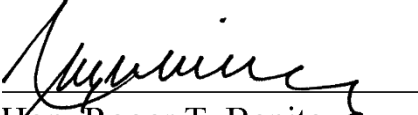
1 Because it appears that Better Homes Realty, Inc. is the proper assignee of the trademark,
2 it has standing to bring the claims.

3 **CONCLUSION**

4 For the reasons discussed above, the Court **GRANTS** the motion to dismiss **IN**
5 **PART**. The Court grants Plaintiff leave to amend to correct the deficiencies noted.
6 Plaintiff may file an amended complaint within 21 days of the signature date of this
7 Order.

8 **IT IS SO ORDERED.**

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10 Dated: April 18, 2017

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12 Hon. Roger T. Benitez
13 United States District Judge
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