

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

TOM GONZALES,

Plaintiff,

VS.

SHOTGUN CREEK LAS VEGAS, LLC et al.

Defendants.

2:13-cv-00931-RCJ-VPC

ORDER

TOM GONZALES,

Plaintiff,

VS.

DESERT LAND LLC et al

Defendants

2:15-cv-00915-RCJ-VPC

ORDER

This case arises out of the alleged breach of a settlement agreement that was part of a final judgment in a Chapter 11 bankruptcy. Pending before the Court are cross-motions for summary judgment.

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1 **I. PROCEDURAL HISTORY**

2 This case is the third action in this Court by Plaintiff Tom Gonzales concerning his
3 alleged entitlement to a fee under a plan of confirmation the undersigned entered years ago while
4 sitting as a bankruptcy judge.

5 **A. The Desert Land Bankruptcies**

6 On December 7, 2000, Plaintiff loaned \$41.5 million to Desert Land, LLC and Desert
7 Oasis Apartments, LLC to finance their acquisition and development of land in Las Vegas,
8 Nevada. The loan was secured by a deed of trust. On May 31, 2002, Desert Land, LLC, Desert
9 Oasis Apartments, LLC, and Desert Ranch, LLC filed for bankruptcy, and the undersigned
10 jointly administered those bankruptcies while sitting as a bankruptcy judge. The court confirmed
11 the Second Amended Plan of Reorganization (“the Plan”), and the resulting confirmation order
12 (“the Confirmation Order”) included a finding that a settlement had been reached (“the
13 Settlement Agreement,” which, along with the Plan, was attached to the Confirmation Order)
14 under which Plaintiff would extinguish his note and reconvey his deed of trust as to his interest
15 in Parcel A, Plaintiff and another party would convey their fractional interests in Parcel A to
16 Desert Land, LLC and/or Desert Oasis Apartments, LLC so that those entities would own 100%
17 of Parcel A, Plaintiff would receive Desert Ranch, LLC’s 65% interest in another property, and
18 Plaintiff would receive \$7.5 million or \$10 million if Parcel A were sold or otherwise
19 transferred, depending on the date of transfer (“the Parcel A Transfer Fee”). Plaintiff appealed,
20 and the Bankruptcy Appellate Panel (“BAP”) affirmed except as to a provision subordinating
21 Plaintiff’s interest in the Parcel A Transfer Fee to up to \$45 million in financing. The Court of
22 Appeals affirmed the BAP’s ruling.

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1 **B. The First Action**

2 In 2011, Plaintiff sued Desert Land, LLC, Desert Oasis Apartments, LLC, Desert Oasis
3 Investments, LLC, Specialty Trust, Specialty Strategic Financing Fund, LP, Eagle Mortgage Co.,
4 and Wells Fargo in state court for: (1) declaratory judgment that a transfer of Parcel A had
5 occurred entitling him to the Parcel A Transfer Fee; (2) declaratory judgment that the lender
6 defendants in that action knew of the bankruptcy proceedings and the requirement of the Parcel
7 A Transfer Fee; (3) breach of contract; (4) breach of the implied covenant of good faith and fair
8 dealing; (5) judicial foreclosure against Parcel A under Nevada law; and (6) injunctive relief. He
9 defendants removed the case to the Bankruptcy Court. The Bankruptcy Court recommended
10 withdrawal of the reference because the undersigned had issued the Confirmation Order while
11 sitting as a bankruptcy judge. One or more parties so moved, and the Court granted the motion.
12 In that case, No. 3:11-cv-613, the Court ruled against Plaintiff, and the Court of Appeals
13 affirmed, ruling that the Parcel A Transfer Fee had not been triggered based on the allegations
14 made there, and that Plaintiff had no lien against Parcel A.

15 **C. The Second Action**

16 In Case No. 2:13-cv-931, also removed from state court, Plaintiff alleges that Shotgun
17 Investments Nevada, LLC made various loans to the Desert entities for the development of
18 Parcel A between 2012 and January 2013 despite its awareness of the Plan and the Parcel A
19 Transfer Fee provision therein. (*See* Compl. ¶¶ 22–23, ECF No. 1). Plaintiff sued Shotgun
20 Investments Nevada, LLC (erroneously named as “Shotgun Nevada Investments, LLC”),
21 Shotgun Creek Las Vegas, LLC, Shotgun Creek Investments, LLC, and Wayne M. Perry for
22 intentional interference with contractual relations, intentional interference with prospective
23 economic advantage, and unjust enrichment. Defendants removed and moved for summary
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1 judgment, arguing that the preclusion of certain issues decided in the First Action controlled the
2 Second Action. The Court granted that motion as a motion to dismiss, with leave to amend.

3 Plaintiff filed the Amended Complaint (“AC”). (*See* Am. Compl., ECF No. 28).

4 Defendants moved for summary judgment, and Plaintiff moved to compel discovery. The Court
5 struck the conspiracy and declaratory judgment claims from the AC, because Plaintiff had no
6 leave to add them. The Court otherwise denied the motion for summary judgment and granted
7 the motion to compel discovery, although the Court noted that the intentional interference with
8 prospective economic advantage claim was legally insufficient. Defendants moved for summary
9 judgment after further discovery. The Court denied the motion and a motion to reconsider but
10 granted a motion to strike the untimely jury demand. The Court held a bench trial in Las Vegas
11 on the claim for intentional interference with contractual relations, and the case settled during a
12 recess of the trial.

13 **D. The Present (Third) Action**

14 In the present case, Plaintiff sued the various Desert entities, SkyVue Las Vegas, LLC,
15 Howard Bulloch, and David Gaffin variously in this Court for breach of contract, breach of the
16 covenant of good faith and fair dealing, and conspiracy, making a timely jury demand. No
17 parties filed dispositive motions before trial. The case is scheduled for a jury trial on April 17,
18 2017. The Court has invited the parties to file summary judgment motions, and they have done
19 so.

20 **II. SUMMARY JUDGMENT STANDARDS**

21 A court must grant summary judgment when “the movant shows that there is no genuine
22 dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.
23 Civ. P. 56(a). Material facts are those which may affect the outcome of the case. *See Anderson*

1 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if
2 there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See*
3 *id.* A principal purpose of summary judgment is “to isolate and dispose of factually unsupported
4 claims.” *Celotex Corp. v. Catrett*, 477 U.S. 317, 323–24 (1986).

5 In determining summary judgment, a court uses a burden-shifting scheme. The moving
6 party must first satisfy its initial burden. “When the party moving for summary judgment would
7 bear the burden of proof at trial, it must come forward with evidence which would entitle it to a
8 directed verdict if the evidence went uncontested at trial.” *C.A.R. Transp. Brokerage Co. v.*
9 *Darden Rests., Inc.*, 213 F.3d 474, 480 (9th Cir. 2000) (citation and internal quotation marks
10 omitted). In contrast, when the nonmoving party bears the burden of proving the claim or
11 defense, the moving party can meet its burden in two ways: (1) by presenting evidence to negate
12 an essential element of the nonmoving party’s case; or (2) by demonstrating that the nonmoving
13 party failed to make a showing sufficient to establish an element essential to that party’s case on
14 which that party will bear the burden of proof at trial. *See Celotex Corp.*, 477 U.S. at 323–24.

15 If the moving party fails to meet its initial burden, summary judgment must be denied and
16 the court need not consider the nonmoving party’s evidence. *See Adickes v. S.H. Kress & Co.*,
17 398 U.S. 144 (1970). If the moving party meets its initial burden, the burden then shifts to the
18 opposing party to establish a genuine issue of material fact. *See Matsushita Elec. Indus. Co. v.*
19 *Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). To establish the existence of a factual dispute,
20 the opposing party need not establish a material issue of fact conclusively in its favor. It is
21 sufficient that “the claimed factual dispute be shown to require a jury or judge to resolve the
22 parties’ differing versions of the truth at trial.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors*
23 *Ass’n*, 809 F.2d 626, 631 (9th Cir. 1987). In other words, the nonmoving party cannot avoid

1 summary judgment by relying solely on conclusory allegations unsupported by facts. *See Taylor*
2 *v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). Instead, the opposition must go beyond the
3 assertions and allegations of the pleadings and set forth specific facts by producing competent
4 evidence that shows a genuine issue for trial. *See Fed. R. Civ. P. 56(e); Celotex Corp.*, 477 U.S.
5 at 324.

6 At the summary judgment stage, a court’s function is not to weigh the evidence and
7 determine the truth, but to determine whether there is a genuine issue for trial. *See Anderson*, 477
8 U.S. at 249. The evidence of the nonmovant is “to be believed, and all justifiable inferences are
9 to be drawn in his favor.” *Id.* at 255. But if the evidence of the nonmoving party is merely
10 colorable or is not significantly probative, summary judgment may be granted. *See id.* at 249–50.
11 Notably, facts are only viewed in the light most favorable to the nonmoving party where there is
12 a genuine dispute about those facts. *Scott v. Harris*, 550 U.S. 372, 380 (2007). That is, even
13 where the underlying claim contains a reasonableness test, where a party’s evidence is so clearly
14 contradicted by the record as a whole that no reasonable jury could believe it, “a court should not
15 adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.*

16 **III. ANALYSIS**

17 **A. Parcel A Transfer**

18 Since Plaintiff transferred his interest in Parcel A to Desert Land, LLC and/or Desert
19 Oasis Apartments, LLC (and caused the interest of the Barry and Amy Fieldman Trust in Parcel
20 A to also be so transferred) as required under the Settlement Agreement incorporated into the
21 Plan and Confirmation Order, Parcel A was wholly owned in unspecified fractions by Desert
22 Land, LLC and Desert Oasis Apartments, LLC. (Settlement Agreement 1–3, Ex. 1).¹ On April
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24 1 The Court will refer to exhibits adduced at trial in the consolidated ‘931 Case.

1 29, 2014, Desert Land, LLC conveyed eight parcels of land to Desert Oasis Investments, LLC.
2 (Deed, Ex. 270). The April 29, 2014 transfer was not a “Parcel A Transfer” as contemplated
3 under Section A(e) of Article III of the Plan. The sold land was identified in the deed as being
4 part of Clark County Assessor’s Parcel No. 162-28-202-013. (*Id.*). The sold land as identified by
5 a list and corresponding maps appears to consist of a square with Giles St. to the West, E. Ali
6 Baba Ln. to the North, Haven St. to the East, and E. Mandalay Bay Rd. to the South. (Chart of
7 Shotgun Parcels, Ex. 174; Maps, Exs. 175, 176). No part of the sold land is within Parcel A;
8 rather, the sold land is entirely to the North of Parcel A, which consists of an irregular shape
9 occupying approximately 75% of the land bordered by E. Mandalay Bay Rd. to the North, Haven
10 St. to the East, Four Seasons Dr. to the South, and S. Las Vegas Blvd. to the West. (Aerial Photo,
11 Ex. 181). There is no evidence in the record of Desert Land, LLC or Desert Oasis Apartments,
12 LLC having ever transferred title to any other real property, and there is therefore no evidence of
13 any Parcel A Transfer.

14 **B. Parcel A Equity Transfer**

15 A “Parcel A Equity Transfer” under the Plan is a subtype of Parcel A Transfer consisting
16 of the conveyance of “any legal or beneficial interest in the entity or entities that own Parcel A.”
17 (Plan 6:26–27). When such a transfer occurs, Plaintiff is entitled to 50% of the “Net Proceeds”
18 thereof until the entire \$10 million of the Parcel A Transfer Fee has been cumulatively satisfied.
19 (Plan 5:17–22). “Net Proceeds” means gross proceeds minus related transaction costs paid to
20 unrelated parties, and it excludes consideration in the form of stock, memberships, partnerships,
21 or other equity interests in any entity wholly owned or controlled by Howard Bulloch or David
22 Gaffin or their trusts. (*Id.* 6:11–17).

1 SkyVue Las Vegas, LLC was incorporated on June 21, 2011 with David Gaffin and
2 Howard Bulloch as its managers. (Art. Org., Ex. 191). Effective October 18, 2011, Compass
3 Investments, LLC gave its 99.5% interests in Desert Land, LLC and Desert Oasis Apartments,
4 LLC to SkyVue Las Vegas, LLC (with Bruce Bulloch retaining his 0.5% interests in Desert
5 Land, LLC and Desert Oasis Apartments, LLC) in exchange for a 64.4445% interest in SkyVue
6 Las Vegas, LLC. (Second Am. to Amd. & Restated Op. Agr. of Desert Oasis Apts., LLC, Ex.
7 259; Am. to Second Amd. & Restated Op. Agr. of Desert Land, LLC, Ex. 260; Action by
8 Written Consent of Members of Compass Investments, LLC, Ex. 263; Action by Written
9 Consent of Members of Desert Oasis Apartments, LLC, Ex. 264; Action by Written Consent of
10 Members of SkyVue Las Vegas, LLC, Ex. 265). The October 18, 2011 transfer was a Parcel A
11 Equity Transfer as contemplated under Section A(e) of Article III of the Plan because it was a
12 transfer of beneficial interest in the entities that owned Parcel A, i.e., Desert Land, LLC and
13 Desert Oasis Apartments, LLC.

14 The October 18, 2011 Parcel A Equity Transfer, however, did not result in any Net
15 Proceeds as contemplated under Section A(e) of Article III of the Plan because the consideration
16 given was a membership interest in a limited liability company wholly controlled by Howard
17 Bulloch and David Gaffin, i.e., SkyVue Las Vegas, LLC. The transaction therefore did not
18 require any partial payment of the Parcel A Transfer Fee to Plaintiff. The only evidence in the
19 record as to control of SkyVue Las Vegas, LLC as of October 18, 2011 is its Articles of
20 Organization filed in June of that year, which list Howard Bulloch and David Gaffin as the only
21 managers. (Art. Org., Ex. 191). Because SkyVue Las Vegas, LLC was wholly controlled by
22 Howard Bulloch and David Gaffin, it does not matter who owned SkyVue Las Vegas, LLC for
23 the purpose of whether the transaction triggered a partial Parcel A Transfer Fee under the Plan.

1 There is no evidence of any further transfers of equity interests in Desert Land, LLC or Desert
2 Oasis Apartments, LLC, and there is therefore no evidence of any further Parcel A Equity
3 Transfer.

4 **C. Parcel A Permitted Financing**

5 It appears that Defendants caused Desert Land, LLC to encumber Parcel A with no less
6 than \$31.5 million in various Mortgages as of January 3, 2013. (Am. Deed of Trust, Ex. 91).
7 Perry signed the deed of trust on behalf of his three co-Defendants. (*Id.*). And Perry has
8 admitted that Parcel A was encumbered by approximately \$100 million as of October 29, 2015.
9 (Perry Dep. 35, ECF No. 175-14). Desert Land, LLC's encumbrance of Parcel A with more than
10 \$25 million in Mortgages was a breach of the Parcel A Permitting Financing clause of Section
11 A(e) of Article III of the Plan, although it did not trigger the Parcel A Transfer Fee, no matter
12 how over-encumbered the land was.

13 The Plan excludes “a Parcel A Mortgage” from the definition of Parcel A Transfer. (Plan
14 6:22–23, Ex. 2). The Plan does not separately define “Parcel A Mortgage.” That term is most
15 naturally read to mean any Mortgage against Parcel A. “Mortgage” is defined generically to
16 include deeds of trust, security agreements, or other collateral assignments securing bona fide
17 loans for value. (*Id.* 6:9). The Plan defines “Parcel A Permitting Financing” as, *inter alia*, “one
18 or more Mortgages against Parcel A or any part thereof, securing financing in the principal
19 amount of up to \$25,000,000 any one time outstanding . . .” (*Id.* 6:28–7:2). The Court must
20 give effect to each word of the Plan if possible. *Royal Indem. Co. v. Special Serv. Supply Co.*,
21 413 P.2d 500, 502 (Nev. 1966).

22 It is most easily argued that interpreting “Parcel A Permitted Financing” to set a trigger
23 for a Parcel A Transfer would be to ignore the exclusion of Mortgages against Parcel A from the
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1 definition of a Parcel A Transfer, and that Parcel A Permitted Financing must therefore not be
2 read as establishing a trigger of a Parcel A Transfer. That is, whether or not the encumbrance of
3 Parcel A with more than \$25 million in Mortgages at any one time outstanding violates the
4 Parcel A Permitted Financing clause, it nevertheless does not directly trigger a Parcel A Transfer.
5 The two are simply separate clauses of the Plan that do not depend on one another. So although
6 the over-encumbrance of Parcel A would breach the Plan, Plaintiff would still have to prove
7 damages from such a breach under familiar principles of contract law. But in no case would the
8 over-encumbrance directly trigger his entitlement to the Parcel A Transfer Fee.

9 It can also be argued that one should read the exclusion of “a Parcel A Mortgage” from
10 the definition of Parcel A Transfer to simply mean that a Mortgage against Parcel A does not in-
11 and-of-itself constitute a Parcel A Transfer, although the existence of more than \$25 million in
12 Mortgages against Parcel A outstanding at any given time does. The “Parcel A *Permitted*
13 *Financing*” language indicates that the \$25 million is some kind of limitation on Mortgages
14 against Parcel A. This interpretation is strained, however, because “a Parcel A Mortgage” is
15 altogether excluded from the definition of a “Parcel A Transfer.” If the drafters of the Plan
16 intended only that a Mortgage against Parcel A would not constitute a Parcel A Transfer unless it
17 were too large, they would surely have stated something to that effect with qualifying language
18 such as “within the limitations of the Parcel A Permitted Financing” or “subject to any
19 limitations elsewhere in this Plan.” The total absence of any such limitation on the exclusion
20 requires the Court to interpret the exclusion as absolute if it can do so without rendering some
21 other provision of the Plan superfluous.

22 Another potential interpretation of “a Parcel A Mortgage” is any Mortgage against Parcel
23 A already in force as of the date of confirmation of the Plan. In other words, existing mortgages
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1 (including refinancing of those mortgages up to the total principal amount as of the date of
2 confirmation) would not count against the \$25 million limitation of Parcel A Permitted
3 Financing. This interpretation is not ideal, however, because—in addition to the problem of the
4 lack of qualifying language noted *supra*—a Parcel A Transfer is naturally contemplated as a
5 future event, and it was known when the Plan was written that some Mortgages already existed
6 against Parcel A. A provision providing that existing Mortgages against Parcel A would not
7 trigger a Parcel A Transfer is therefore unnecessary.

8 The Court finds that the Plan language is not ambiguous as to whether the \$25 million
9 limitation on Mortgages against Parcel A is a trigger of the Parcel A Transfer Fee. It is not. The
10 definition of Parcel A Transfer unambiguously excludes Mortgages against Parcel A without
11 qualification, and the Court must give this language effect if it can do so without rendering any
12 other language of the Plan superfluous. The Court can do so without even straining any other
13 language of the Plan. The efficacy of the \$25 million limitation of the Parcel A Permitted
14 Financing clause is given effect by the Court’s ruling that if more than \$25 million in Mortgages
15 has been at some time outstanding against Parcel A, that clause of the Plan has been breached.
16 But a breach of the Parcel A Permitted Financing clause is not the same as an occurrence of the
17 conditions precedent to the Parcel A Transfer Fee, as identified in the Parcel A Transfer and
18 Parcel A Equity Transfer clauses. Plaintiff may or may not have damages from any breach of the
19 Parcel A Permitted Financing clause. If so, he would have to prove them under familiar
20 principles of contract law.

21 Plaintiff has not proved any damages as a result of any breach of the Parcel A Permitted
22 Financing clause of Section A(e) of Article III of the Plan. Such damages might result, for
23 example, via the foreclosure of a loan against Parcel A at a time when Desert Land, LLC and
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1 Desert Oasis Apartments, LLC did not have enough equity in Parcel A to satisfy the Parcel A
2 Transfer Fee (which would presumably be triggered by a foreclosure deed) out of the proceeds of
3 such a foreclosure. This was the reason for the Parcel A Permitted Financing clause—to protect
4 Plaintiff's \$10 million indirect interest in Parcel A even assuming the limitation did not function
5 as a subordination clause, i.e., to ensure that the loan-to-value ratio in Parcel A was kept high
6 enough to ensure the owner of Parcel A retained enough equity that Plaintiff would realize his
7 \$10 million upon a transfer even if by way of foreclosure. (Tr. 26:16–27:4, Mar. 31, 2003, Ex.
8 185; Tr. 24, 37, Nov. 28, 2011, Ex. 31). But Plaintiff has not produced evidence of any damages
9 under this or any other theory.

10 The Court finds that Plaintiff has not yet incurred damages as a result of any over-
11 encumbrance of Parcel A, and his fear of impending damages is too speculative for an alternative
12 remedy at this point. There has been a breach of the Parcel A Permitted Financing clause, but
13 Plaintiff has provided no evidence that Parcel A is in fact over-encumbered. At an estimate of
14 \$10–15 million value per acre, Parcel A is worth \$380–570 million. (*See* Perry Dep. 35).
15 Plaintiff has adduced no contrary evidence of Parcel A's value, and even \$100 million in
16 Mortgage debt against Parcel A does not remotely imperil Plaintiff's \$10 million Parcel A
17 Transfer Fee in the eventuality of a foreclosure. His interest in the Parcel A Transfer Fee has not
18 been injured, because a foreclosure would not currently leave Defendants without the equity in
19 Parcel A required to make good on the fee. Still, there has been a breach, and Plaintiff cannot in
20 equity be made to suffer it without any remedy until some harm materializes, e.g., if Defendants
21 continue to encumber Parcel A to an amount near or beyond its value, at which point no remedy
22 will be available because Defendants will have no equity in the property with which to pay the
23 fee triggered by a foreclosure sale. Accordingly, after further briefing and argumentation, the
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1 Court may impose an equitable remedy to protect Plaintiff's interest in the Parcel A Transfer Fee
2 going forward. Whether that remedy should be in the form of a lien against Parcel A,
3 reformation of the Plan, or something else, is for the parties to brief and argue. For the time
4 being, the Court grants summary judgment to Defendants as to damages. This eliminates the
5 conspiracy claim. The bad faith claim is moot, because the Court finds no genuine issue of
6 material fact as to a breach of contract. Plaintiff is entitled to summary judgment as to liability
7 for the breach of contract, but Defendants are entitled to summary judgment as to damages.

8 **CONCLUSION**

9 IT IS HEREBY ORDERED that the Motions for Summary Judgment (ECF Nos. 175,
10 176) as to Case No. 2:15-cv-915 are GRANTED IN PART and DENIED IN PART. Defendants
11 are entitled to summary judgment against all claims except the claim for breach of contract.
12 Plaintiff is entitled to summary judgment on liability for breach of contract. Defendants are
13 entitled to summary judgment on the issue of damages.

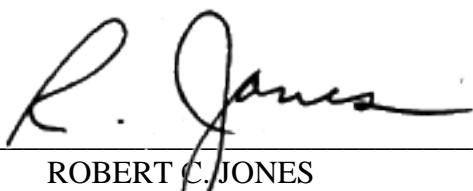
14 IT IS FURTHER ORDERED that Plaintiff shall FILE a motion as to suggested
15 equitable remedies for the breach within twenty-one (21) days. Defendants shall have fourteen
16 (14) days to respond, and Plaintiff shall have seven (7) days to reply.

17 IT IS FURTHER ORDERED that Howard Bulloch and David Gaffin are DISMISSED.

18 IT IS FURTHER ORDERED that the jury trial scheduled for May 22, 2017 in Case No.
19 2:15-cv-915 is VACATED.

20 IT IS SO ORDERED.

21 DATED: This 13th day of April, 2017.

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23 ROBERT C. JONES
24 United States District Judge