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3
4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

5
6 THE UNITED STATES OF AMERICA
for the use and benefit of EC POWER
7 SYSTEMS ELECTRICAL
CONSTRUCTION COMPANY dba EC
8 COMPANY,

9 Plaintiff,

10 v.

11 INSURANCE COMPANY OF THE
STATE OF PENNSYLVANIA,

12 Defendant.

CASE NO. C15-5326 BHS

ORDER GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

13
14 This matter comes before the Court on Defendant Insurance Company of the State
15 of Pennsylvania's ("ICSP") motion for summary judgment (Dkt. 15). The Court has
16 considered the pleadings filed in support of and in opposition to the motion and the
17 remainder of the file and hereby grants the motion for the reasons stated herein.

18 **I. PROCEDURAL HISTORY**

19 On May 15, 2015, Plaintiff EC Power Systems Electrical Construction Company
20 ("EC Company") sued ICSP under the Miller Act, 40 U.S.C. § 3131. Dkt. 1 ("Comp.").
21 EC Company seeks to recover the expenses it incurred as a result of work delays on a
22 Kitsap Naval Base repair project. *Id.* ¶¶ 4, 8, 22, 24.

1 On January 21, 2016, ICSP moved for summary judgment. Dkt. 15. On February
2 19, 2016, EC Company responded. Dkt. 22. On February 26, 2016, ICSP replied. Dkt.
3 25.

4 II. FACTUAL BACKGROUND

5 This case arises out of work performed by EC Company in connection with the
6 Electric Substation 2 at the Kitsap Naval Base in Silverdale, Washington.

7 On September 28, 2011, the Department of the Navy (“Navy”) entered into a
8 contract with TolTest, Inc. (“TolTest”) to repair the Electrical Substation 2 (the
9 “Project”). Dkt. 24, Declaration of Joel Scroggy (“Scroggy Dec.”), Ex. A. Under the
10 contract, TolTest was required to provide payment and performance bonds for the
11 Project. *Id.* at 2. On October 6, 2011, TolTest, as principal, and ICSP, as surety,
12 executed the required payment and performance bonds. Dkt. 23, Declaration of Angela
13 Otto (“Otto Dec.”), Ex. O.

14 On October 24, 2011, TolTest issued a purchase order to EC Company for the
15 supply of labor and materials in connection with the contract between TolTest and the
16 Navy. Scroggy Dec., Ex. B at 34. TolTest agreed to pay EC Company \$2,564,818.22 for
17 a little over five months of work. *Id.* at 46. The subcontract provides that EC Company
18 “agrees to be bound to TolTest in the same manner and to the same extent as TolTest is
19 bound to the [Navy] under the Prime Contract.” *Id.* at 48.

20 Under TolTest’s original work schedule, EC Company would start its work on
21 January 4, 2012, and finish its work on June 13, 2012. Scroggy Dec. ¶ 4. EC Company’s
22 start date was delayed several times. *Id.* TolTest issued a revised schedule on September

1 11, 2013. *Id.* ¶ 5. Under the revised schedule, EC Company would complete its work by
2 February 28, 2014. *Id.* Due to additional delays, EC Company’s work was not complete
3 as of April 29, 2014. *Id.*

4 On April 29, 2014, TolTest voluntarily terminated its contract with the Navy
5 because it was “financially unable to complete the performance of the work and to
6 comply with its contractual obligations on the . . . Project.” Dkt. 16, Declaration of
7 Douglas Fine (“Fine Dec.”), Ex. 2A. TolTest filed for Chapter 7 bankruptcy on May 2,
8 2014. Fine Dec., Ex. 5.

9 On May 7, 2014, ICSP notified the Navy that ICSP was hiring Vertex Companies,
10 Inc. (“Vertex”) to complete the Project:

11 Pursuant to the Voluntary Letter of Termination from Toltest, Inc.
12 (aka Lakeshore Toltest) and our subsequent discussions, [ICSP] as surety
13 for the above-referenced Contract and Project, hereby appoints and
14 delegates Vertex . . . as its representative for the Substation Project. . . .

15 [ICSP] appoints its representatives as an interim measure and to
16 mitigate the costs to perform the work as we continue to work with the
17 Navy on the specific terms for completion of the Contract to be defined in a
18 mutually agreed Takeover Agreement between [ICSP] and the Navy. . . .
19 We look forward to on-going discussions with the Navy and we share in the
20 desire to avoid any unnecessary suspension of site activities during this
21 period of discussion.

22 Otto Dec., Ex. U at 36. Vertex’s representatives contacted EC Company and indicated
“that they had been delegated by ICSP to take over the work and that they were interested
in having [EC Company] return to the Project to complete its work.” Scroggy Dec. ¶ 6.

On May 30, 2014, Vertex contacted EC Company about pricing for air switches.
Scroggy Dec., Ex. C at 83. EC Company told Vertex “it doesn’t make sense” for EC
Company to price additional work because EC Company was “not under contract with

1 Vertex.” *Id.* Vertex subsequently sent EC Company a proposed Subcontract
2 Ratification, Confidential Release and Indemnity Agreement (“Ratification”) under
3 which EC Company would agree to complete the balance of its work on the Project for
4 ICSP. *Id.* at 84–89. In response, EC Company told Vertex that the proposed Ratification
5 did not address its delay claim against TolTest and that issue would “need to be dealt
6 with as part of any agreement.” *Id.* at 91. Vertex asked EC Company to compile a list of
7 all outstanding issues. *Id.* According to Vertex, “[t]hese items should be memorialized
8 in the Ratification” *Id.*

9 On June 5, 2014, Vertex and EC Company discussed by phone the proposed
10 Ratification, EC Company’s pending change orders, EC Company’s willingness to
11 continue work on the Project, and EC Company’s delay claim. Scroggy Dec. ¶ 9. That
12 same day, a Vertex employee internally recommended “mov[ing] forward without [EC
13 Company]” because EC Company would not “play ball” with the proposed Ratification.
14 Otto Dec., Ex. P at 9. In response, another Vertex employee “agree[d] we need to discuss
15 all subcontractor claims and how we want to handle but at the same time not necessarily
16 let subcontractors walk off the project if we have legal standing to require them to finish
17 their work. At a minimum, we need to document their refusal to move forward.” *Id.*

18 On June 9, 2014, a Vertex employee followed up with EC Company by email.
19 Scroggy Dec., Ex. D at 96. The email states:

20 As I mentioned on the call, Vertex will have the responsibility to
21 complete the project. To do so, we will need a team of subcontractors that
22 are committed to the project and their scopes.

Please correct me if I am mistaken, but I sensed ambiguity. I
understood that EC would prefer to not return. I also heard that EC would

1 abide by its agreement with LTC if enforced. The form of this enforcement
I cannot address.

2 Furthermore, at this time, Vertex is not in a position to address EC's
3 large claim, nor do we have such authority. So I cannot offer a rapid
settlement as incentive for returning to work.

4 *Id.* Vertex then outlined "three possible options" for EC Company to consider:

- 5 1. EC Company completes its contract and would agree to newly
6 priced work like the air switches. . . . EC would have to deal with
[ICSP] for its claim. . . .
- 7 2. EC could receive a termination for convenience without
penalty EC could pursue its claim or not. . . .
- 8 3. EC could receive a termination. . . .

8 *Id.*

9 On June 12, 2014, EC Company responded to Vertex's email. Scroggy Dec., Ex.
10 E at 98–99. EC Company acknowledged that "Vertex is not in a position to address EC
11 Company's delay claim, and will proceed directly with the surety on that issue." *Id.* at
12 99. EC Company also told Vertex it was "ready and willing to perform [the] remainder
13 of the work under its subcontract." *Id.* As for EC Company's role moving forward, EC
14 Company proposed two options: (1) EC Company completes its work on the Project; or
15 (2) EC Company "walk[s] away from the Project due to the extreme delays and current
16 conditions, not contemplated by EC Company's subcontract with TolTest." *Id.* Finally,
17 EC Company advised Vertex that it would not agree to release its claims against TolTest
18 or ICSP under either scenario. *Id.*

19 On July 22, 2014, Vertex informed EC Company that "we are on hold, pending
20 additional direction from [ICSP] and the Navy." *Id.* at 98. Vertex explained:

21 Until an agreement is reached between [ICSP] and the Navy, [Vertex]
22 cannot recommend a course of action regarding the EC subcontract. We

1 are keeping a termination for convenience option open and will likely get
2 pricing for EC's remaining scope plus the anticipated changes related to
3 EC's work and related, adjacent work. That is all [Vertex] can provide at
4 this time.

5 *Id.*

6 On September 24, 2014, EC Company's attorney, Evan Lenneberg ("Lenneberg"),
7 issued a written demand to ICSP, Vertex, TolTest, and the Navy regarding EC
8 Company's role in the Project and its outstanding claims. Scroggy Dec., Ex. G.
9 Lenneberg reiterated the two options proposed by EC Company and emphasized that EC
10 Company would not release its claims against any entity under either scenario. *Id.*
11 Lenneberg also notified the recipients that EC Company would pursue a Miller Act claim
12 absent a response within ten business days. *Id.*

13 On October 9, 2014, Vertex notified Lenneberg that it had received the demand
14 letter, and requested Lenneberg to resend copies of documents that appeared to be
15 incomplete. Scroggy Dec., Ex. L at 124. Lenneberg followed up on November 11, 2014,
16 noting that EC Company had "yet to receive any meaningful response" from Vertex and
17 "will have to move forward with its bond claim." *Id.*

18 On November 21, 2014, a Vertex employee, Bethany Boomer ("Boomer"), asked
19 EC Company to resend its invoices because EC Company's file had changed hands.
20 Scroggy Dec., Ex. H. During a conference call that same day, EC Company "indicated
21 that it was willing to complete the work on the Project and Vertex indicated that it
22 intended that [EC Company] complete that work." Scroggy Dec. ¶ 15. EC Company
followed up with Boomer about Vertex's proposal on November 25, 2014. Scroggy

1 Dec., Ex. H at 107. Boomer responded that Vertex was “working on a few additional
2 approvals.” *Id.*

3 On December 2, 2014, a Vertex employee asked Boomer for an update on the
4 status of EC Company’s claim because he “would like to call and check in with EC
5 [Company] this week, in order to keep the conversations upbeat and fresh.” Otto Dec.,
6 Ex. Q at 14.

7 EC Company’s Senior Vice President, Joel Scroggy (“Scroggy”), asked about the
8 status of EC Company’s claim on December 23, 2014. Otto Dec., Ex. R. In response,
9 Boomer stated Vertex had just received EC Company’s proof of claim form. *Id.*

10 On January 5, 2015, Lenneberg sent a Notice of Miller Act Bond Claim to ICSP,
11 Vertex, TolTest, and the Navy. Scroggy Dec., Ex. J. The notice stated that EC Company
12 had a claim against the payment bond for \$59,269.50 in unpaid work on the Project, as
13 well as a claim for \$648,086 in delay damages. *Id.*

14 ICSP acknowledged receipt of EC Company’s unpaid work claim and requested
15 additional documentation on January 28, 2015. Scroggy Dec., Ex. K. The
16 acknowledgement letter did not mention the delay claim. *See id.* The letter also advised
17 EC Company that “this action is taken at this time without waiver of or prejudice to any
18 of the rights and defenses, past or present, known or unknown which either the above
19 referenced Surety or Principal may have in this matter.” *Id.*

20 On February 6, 2015, Lenneberg emailed Vertex to check on the status of EC
21 Company’s claims. Scroggy Dec., Ex. L at 123. Lenneberg explained that “EC
22

1 Company still has an open subcontract for the project and hasn't received direction on
2 how to proceed or termination of its contract." *Id.*

3 Boomer sent EC Company a partial release for the unpaid work claim on February
4 10, 2015. Scroggy Dec., Ex. L. at 120. Boomer asked EC Company to "sign and remit
5 the attached partial release, so that we can pay your due invoice while we work through
6 the remainder of the delay claim." *Id.*

7 That same day, Boomer contacted Lenneberg about EC Company's delay claim.
8 *Id.* at 123. Boomer notified Lenneberg that she had sent EC Company a partial release
9 because Vertex would "like to at least get EC paid for work that they've completed as we
10 continue to work through their delay claim." *Id.* Boomer informed Lenneberg that
11 "[w]e've also asked EC if they'd be willing to bid on the project's completion" and that
12 "[w]e'd very much like to continue working with EC." *Id.* Finally, Boomer asked
13 Lenneberg to provide information regarding EC Company's delay claim:

14 To properly address the delays, we would need to eliminate the concurrent
15 costs claimed by EC with those costs already covered in the change orders
16 issued. . . . We will need documentation supporting that EC's claimed costs
17 are in excess of those provided for in the change orders [W]e will need
18 to see actual costs and EC's overhead rate rather than a per-diem rate for
19 the delays. If you have any documentation supporting these actual costs,
20 we'd be happy to add them to our continued review of the delay claim.

21 *Id.*

22 Between February 25 and March 2, 2015, Vertex and EC Company exchanged
revised versions of the partial release. *See* Scroggy Dec., Ex. M. During these
exchanges, EC Company informed Vertex on two occasions that EC Company needed to
preserve its right to assert its delay claim. *Id.* at 128–29.

1 On March 16, 2015, EC Company signed the final partial release for work
2 performed through February 1, 2015. Scroggy Dec., Ex. N. The partial release
3 “expressly reserves [EC Company’s] bond claim and related claims arising from project
4 delays and associated impacts.” *Id.* at 133. EC Company received a payment for
5 \$56,302.06 from ICSP. Scroggy Dec. ¶ 22.

6 According to Scroggy, “in May 2015, [EC Company] learned that Vertex was
7 accepting bids to finish the project, including [EC Company’s] scope of work. [EC
8 Company] understood this to be an indication that its Contract was effectively terminated
9 at that time.” *Id.* ¶ 23.

10 III. DISCUSSION

11 ICSP moves for summary judgment, arguing EC Company’s suit is barred by the
12 statute of limitations. Dkt. 15.

13 A. Summary Judgment Standard

14 Summary judgment is proper only if the pleadings, the discovery and disclosure
15 materials on file, and any affidavits show that there is no genuine issue as to any material
16 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).
17 The moving party is entitled to judgment as a matter of law when the nonmoving party
18 fails to make a sufficient showing on an essential element of a claim in the case on which
19 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,
20 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,
21 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*
22 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must

1 present specific, significant probative evidence, not simply “some metaphysical doubt”).
2 *See also* Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists
3 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or
4 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477
5 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d
6 626, 630 (9th Cir. 1987).

7 The determination of the existence of a material fact is often a close question. The
8 Court must consider the substantive evidentiary burden that the nonmoving party must
9 meet at trial—e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477
10 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual
11 issues of controversy in favor of the nonmoving party only when the facts specifically
12 attested by that party contradict facts specifically attested by the moving party. The
13 nonmoving party may not merely state that it will discredit the moving party’s evidence
14 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*
15 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,
16 nonspecific statements in affidavits are not sufficient, and missing facts will not be
17 presumed. *Lujan v. Nat’l Wildlife Fed’n*, 497 U.S. 871, 888–89 (1990).

18 **B. Statute of Limitations**

19 ICSP contends EC Company’s suit is untimely under the Miller Act. Dkt. 15. A
20 suit brought under the Miller Act must be filed “no later than one year after the day on
21 which the last of the labor was performed or material was supplied by the person bringing
22 the action.” 40 U.S.C. § 3133(b)(4). The Miller Act’s statute of limitations is a

1 “procedural requirement rather than a jurisdictional requirement.” *U.S. ex rel Air Control*
2 *Tec. Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2012). Thus, “a
3 defendant may, if the circumstances warrant, be estopped from defending on the ground
4 that the action was not commenced within the [statute of limitations].” *U.S. for Use of E.*
5 *E. Black Ltd. v. Price-McNemar Constr. Co.*, 320 F.2d 663, 666 (9th Cir. 1963).

6 EC Company filed its complaint on May 15, 2015. Comp. In order for EC
7 Company’s suit to be timely, EC Company must have performed work or supplied
8 material on or after May 15, 2014. EC Company admits that it did not perform work or
9 supply material after TolTest’s termination date, which was more than a year before EC
10 Company filed suit. Dkt. 22 at 10; *see also* Fine Dec., Ex. 6 at 3–4. EC Company’s suit
11 is therefore untimely under the Miller Act.

12 **C. Equitable Estoppel**

13 EC Company argues ICSP should be equitably estopped from asserting the statute
14 of limitations as an affirmative defense. Dkt. 22 at 12. EC Company contends ICSP’s
15 representative, Vertex, caused EC Company to defer filing suit because Vertex
16 represented that (1) EC Company would continue its work on the project, and (2) Vertex
17 or ICSP were processing EC Company’s delay claim. Dkt. 22 at 14–16.

18 “In order to assert successfully the doctrine of equitable estoppel, a plaintiff must
19 show that the defendant’s conduct was so misleading as to have caused the plaintiff’s
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1 failure to file suit.” *Atkins v. Union Pac. R. Co.*, 753 F.2d 776, 777 (9th Cir. 1985).¹

2 Specifically, EC Company must show that (1) Vertex knew the facts, (2) Vertex intended
3 its conduct to be acted upon or gave EC Company the right to believe it so intended, (3)
4 EC Company was ignorant of the true state of facts, and (4) EC Company reasonably
5 relied on Vertex’s conduct to its detriment. *See U.S. for Use of Youngstown Welding &*
6 *Engineering Co. v. Travelers Indem. Co.*, 802 F.2d 1164, 1168 (9th Cir. 1986).

7 “[E]quitable estoppel will not apply to a claim such as this one unless the plaintiff shows
8 either (1) an affirmative statement that the statutory period to bring the action was longer
9 than it actually was; (2) promises to make a better settlement of the claim if plaintiff did
10 not bring the threatened suit; or (3) similar representations or conduct on the part of the
11 defendants.” *Atkins*, 753 F.2d at 777.

12 At the outset, EC Company has not shown that Vertex misrepresented the statute
13 of limitations period, agreed to settle EC Company’s delay claim in return for a promise
14 not to sue, or made similar representations or promises.

15 EC Company has also failed to demonstrate that Vertex’s conduct was misleading.
16 The record shows that Vertex and EC Company discussed whether or not EC Company
17 would return to the Project to complete its work under a contract with ICSP, and if so,
18 what the terms of that contract would be. In May 2014, Vertex sent EC Company a
19 proposed Ratification. Between May 2014 and September 2014, Vertex and EC
20

21 ¹ EC Company’s equitable estoppel defense is governed by federal common law as this
22 suit arises under a federal statute. *See Audit Servs., Inc. v. Rolfson*, 641 F.2d 757, 762 (9th Cir.
1981).

1 Company discussed the proposed Ratification and the possible options for EC Company
2 moving forward. There is no evidence, however, that the parties reached an agreement
3 with respect to the proposed Ratification or EC Company's return to the Project.
4 Although Vertex indicated it would like to continue working with EC Company, EC
5 Company has not pointed to promises Vertex made with respect to EC Company's return
6 to the Project. Indeed, Vertex told EC Company that it could not recommend a course of
7 action with respect to EC Company's subcontract in July 2014. As late as February
8 2015, the evidence shows that Vertex merely asked EC Company if it would be willing to
9 bid on the Project's completion.

10 With respect to EC Company's delay claim, Vertex requested additional
11 documentation from EC Company in January and February 2015. Vertex further advised
12 EC Company that it was not waiving any of the rights or defenses that Vertex or ICSP
13 may have. Scroggy Dec., Ex. K. Although Vertex agreed to pay EC Company's unpaid
14 work claim, Vertex told EC Company it was continuing to work through the delay claim.
15 Vertex also worked with EC Company's counsel on drafting a partial release that
16 expressly preserved EC Company's right to assert the delay claim. Viewing the evidence
17 in the light most favorable to EC Company, a reasonable juror would not conclude that
18 Vertex's conduct was misleading.

19 Even assuming Vertex's conduct could be considered misleading, no reasonable
20 juror would conclude that EC Company reasonably relied on Vertex's conduct. As a
21 preliminary matter, EC Company has not presented evidence that it actually relied on
22 Vertex's statements or conduct in delaying to file suit. EC Company has also not pointed

1 to any statements or conduct by Vertex that would justify any reliance. The record shows
2 that EC Company and Vertex engaged in discussions between May 30, 2014 and March
3 16, 2015. Although Vertex indicated it was interested in EC Company returning to
4 complete its work on the Project and was reviewing EC Company's delay claim, there is
5 no evidence that Vertex misrepresented the statute of limitations period, agreed to settle
6 or pay EC Company's delay claim, or made similar promises.

7 EC Company was also represented by counsel as of September 2014. The record
8 shows that EC Company's counsel was aware of EC Company's delay claim and that
9 Vertex notified him that Vertex and ICSP were not waiving any rights or defenses. EC
10 Company concedes that its discussions with Vertex ceased in March 2015 when EC
11 Company signed the partial release. Dkt. 22 at 16. The partial release expressly reserved
12 EC Company's right to pursue its delay claim. Even viewing the evidence in the light
13 most favorable to EC Company, no reasonable juror would conclude that a party
14 represented by counsel justifiably relied on Vertex's conduct in delaying to file suit until
15 May 15, 2015.

16 EC Company nevertheless argues that Vertex's internal emails establish that
17 Vertex intended EC Company to defer filing suit. Dkt. 22 at 14–15. In one email
18 exchange from June 2014, a Vertex employee recommends “mov[ing] forward without
19 [EC Company],” while another suggests “not necessarily let[ting] subcontractors walk off
20 the project.” Otto Dec., Ex. P at 9. In another email in December 2014, a Vertex
21 employee says he wants to keep conversations with EC Company “upbeat and fresh.”
22 Otto Dec., Ex. Q at 14. Even assuming Vertex's internal emails (of which there is no

1 evidence EC Company had knowledge of) show that Vertex intended for EC Company to
2 defer filing suit, EC Company has not shown affirmative conduct by Vertex that was so
3 misleading as to cause EC Company's failure to timely file suit. *See Atkins*, 753 F.2d at
4 777.

5 For these reasons, the Court concludes that EC Company has failed to show
6 equitable estoppel should be applied in this case.

7 **D. Equitable Tolling**

8 Finally, EC Company contends that equitable tolling applies. Dkt. 22 at 17.
9 Equitable tolling focuses on "whether there was excusable delay by the plaintiff: If a
10 reasonable plaintiff would not have known of the existence of a possible claim within the
11 limitations period, then equitable tolling will serve to extend the statute of limitations for
12 filing suit until the plaintiff can gather what information he needs." *Johnson v.*
13 *Henderson*, 314 F.3d 409, 414 (9th Cir. 2002). "However, equitable tolling does not
14 postpone the statute of limitations until the existence of a claim is a virtual certainty."
15 *Santa Maria v. Pacific Bell*, 202 F.3d 1170, 1178 (9th Cir. 2000), *overruled on other*
16 *grounds by Scoop-Gonzalez v. INS*, 272 F.3d 1176 (9th Cir. 2011).

17 EC Company argues it believed its delay claim was not "ripe" because Vertex
18 indicated it wanted EC Company to continue working on the Project. Dkt. 22 at 17. This
19 argument is unavailing. The test for equitable tolling is not whether EC Company knew
20 that its delay claim was a virtual certainty, but rather whether EC Company knew it had a
21 possible delay claim. EC Company's delay claim stems from its work on the Project
22 under its subcontract with TolTest. Viewing the evidence in the light most favorable to

1 EC Company, EC Company knew it had a possible delay claim when it learned TolTest
2 voluntarily terminated its contract with the Navy. Indeed, EC Company concedes that it
3 notified Vertex of its delay claim “as soon as it learned that TolTest terminated its
4 Contract with [the Navy].” Dkt. 22 at 14; *see also* Scroggy Dec., Ex. C at 91 (raising
5 delay claim with Vertex on May 30, 2014). Moreover, EC Company was represented by
6 counsel as of September 2014. *See Johnson*, 314 F.3d at 414 (“[O]nce a claimant retains
7 counsel, tolling ceases because she has gained the means of knowledge of her rights and
8 can be charged with constructive knowledge of the law's requirements.” (quoting *Leorna*
9 *v. U.S. Dep’t of State*, 105 F.3d 548, 551 (9th Cir. 1997))). EC Company’s counsel
10 formally notified Vertex and ICSP of EC Company’s delay claim in January 2015.

11 Although EC Company may have believed its delay claim was not a virtual
12 certainty because it was not yet “ripe,” the evidence shows that EC Company
13 nevertheless knew it had a *possible* delay claim well before the statute of limitations ran.
14 EC Company has failed to show equitable tolling applies.

15 IV. ORDER

16 Therefore, it is hereby **ORDERED** that ICSP’s motion for summary judgment
17 (Dkt. 15) is **GRANTED**. The Clerk shall close this case.

18 Dated this 12th day of April, 2016.

19
20 

21 BENJAMIN H. SETTLE
22 United States District Judge