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10 SOFTBANK AMERICA, INC. and SOFTBANK
CORPORATION
11

12
13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15

16 IN RE UTSTARCOM, INC. SECURITIES)
LITIGATION)

Master File No. C-04-4908-JW (PVT)

17)
18)
19)
20 This Document relates to:)
ALL ACTIONS)

**DEFENDANTS SOFTBANK HOLDINGS,
INC., SOFTBANK AMERICA, INC. AND
SOFTBANK CORPORATION'S NOTICE
OF MOTION AND MOTION TO DISMISS
PLAINTIFFS' FOURTH AMENDED
CONSOLIDATED COMPLAINT;
MEMORANDUM OF LAW IN SUPPORT
THEREOF**

Judge: Hon. James A. Ware
Hearing: December 4, 2008
Time: 9:00 a.m.

NOTICE OF MOTION AND MOTION

TO PLAINTIFFS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 4, 2008, at 9:00 a.m., or as soon thereafter as counsel may be heard in a courtroom of the United States District Court for the Northern District of California, located at 280 South First Street, San Jose, CA 95113, Defendants Softbank Holdings, Inc., Softbank America, Inc. and Softbank Corporation will and hereby do move this court to dismiss Plaintiffs' Fourth Amended and Consolidated Complaint on the ground that Plaintiffs have failed to state a claim upon which relief can be granted. This Motion is made pursuant to the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), 15 U.S.C. § 78u-4(a) *et seq.* and Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure, and is based on this Notice of Motion, the accompanying Memorandum of Points and Authorities, all pleadings and papers filed herein, oral argument of counsel, and any other matter which may be submitted at the hearing.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Defendants Softbank Holdings, Inc., Softbank America, Inc. and Softbank Corporation
3 (collectively the “Softbank Defendants) submit this Memorandum of Points and Authorities in support
4 of their motion to dismiss Plaintiffs’ Fourth Amended and Consolidated Complaint for Violation of the
5 Federal Securities Laws (“4AC).

6 **ISSUE TO BE DECIDED**

7 Does the 4AC’s failure to state a claim against the Softbank Defendants under 20(a) of
8 the Securities Exchange Act of 1934, 15 U.S.C. § 78t (2000) (“Section 20(a)) in conformity with
9 Rule 8 of the Federal Rules of Civil Procedure and the pleading requirements of the Private Securities
10 Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a) *et seq.* require dismissal with prejudice?

11 **PRELIMINARY STATEMENT**

12 After four years and four rounds of briefing, Plaintiffs have failed to attribute a single
13 false statement to any of the Softbank Defendants. In acknowledgement of this fact, they have
14 voluntarily dismissed their Section 10(b) and attendant group pleading claims against the Softbank
15 Defendants. Nonetheless, Plaintiffs continue to assert that the Softbank Defendants are secondarily
16 liable for UTStarcom’s alleged misstatements as control persons under Section 20(a). This claim fails as
17 a matter of law for two reasons. First, it fails because liability under Section 20(a) requires a primary
18 violation, and Plaintiffs have yet again failed to allege such a violation by UTStarcom.¹ Second, even if
19 Plaintiffs have successfully alleged a primary violation of the securities laws by UTStarcom, they have
20 again failed to allege that any Softbank defendant ever exercised day-to-day operational control over
21 UTStarcom, let alone at the time of any such alleged violation. Plaintiffs’ inability after four rounds of
22 briefing to state any claim against any Softbank defendant requires dismissal with prejudice.

23 **ALLEGATIONS AGAINST THE SOFTBANK DEFENDANTS**

24 According to the 4AC, UTStarcom, a California company, designs, manufactures and
25 sells wireless, “limited mobility telecommunications systems (known as Personal Access Systems

26 _____
27 ¹ For the reasons set forth in the moving papers of the other defendants, which are incorporated
28 herein by reference, after four rounds of briefing, Plaintiffs have again failed adequately to plead
primary liability as to UTStarcom.

1 (“PAS)) to service providers that operate wireline and wireless networks. (4AC ¶ 2.) During the class
 2 period of February 21, 2003 through October 12, 2007, UTStarcom allegedly issued various false or
 3 misleading public statements. None of these statements was allegedly made by or attributable to any
 4 Softbank defendant, nor are any facts alleged showing that any Softbank defendant exercised control
 5 over any such statement. Rather, Plaintiffs merely allege that, at the beginning of the class period, some
 6 unspecified Softbank entity owned 21.2% of UTStarcom’s common stock, which decreased to 14.1%
 7 less than two months after the start of the putative class period in April 2003, and then was reduced to
 8 12.8% by January 2004. (*Id.* ¶¶ 1, 36.)

9 Plaintiffs further allege that non-party Masayoshi Son (“Son) has been the CEO of
 10 Softbank Corporation, the CEO and Chairman of Softbank America, and the Chairman of Softbank
 11 Holdings at unspecified times during the class period, and that Son served as an outside director of
 12 UTStarcom as Softbank America’s “designee from October 1995 until September 15, 2004, resigning
 13 more than three years before the end of the class period. (*Id.* ¶¶ 34, 35.) In his capacity as a one-time
 14 director, Son is alleged to have signed UTStarcom’s Forms 10-K for 2002 and 2003. (*Id.* ¶ 35.)
 15 However, the 4AC contains no factual allegations of any conduct by Son during the class period, other
 16 than the allegation that he signed two UTStarcom SEC filings as an outside director. (*Id.* ¶ 35.) It does
 17 not identify any facts about any interaction between Son and any Softbank defendant regarding Son’s
 18 conduct as a UTStarcom director. It does not allege any facts showing that Son undertook any action as
 19 a UTStarcom director at the direction or request of any Softbank defendant, let alone action pertaining to
 20 any alleged fraud. And it does not allege any facts showing that any Softbank defendant participated in
 21 the drafting of any alleged UTStarcom statement or exerted control over any such statement.

22 ARGUMENT

23 I. PLAINTIFFS CANNOT STATE A CLAIM AGAINST ANY SOFTBANK DEFENDANT 24 BASED ON CONTROL PERSON LIABILITY UNDER SECTION 20(A)

25 Plaintiffs’ control person claim against the Softbank Defendants rests on an assumption
 26 that, because of Softbank America’s nomination of non-party Son as an outside director of UTStarcom
 27 for less than half of the putative class period, each of the Softbank Defendants are control persons under
 28 the meaning of Section 20(a) with respect to any and all of UTStarcom’s alleged misstatements

1 throughout the class period. This is absurd on its face. Being a one-time outside director of a
 2 corporation does not make one a control person of the corporation and thereby vicariously liable for
 3 whatever the corporation says or does. Son's status as a one-time outside director of UTStarcom is
 4 insufficient as a matter of law to sustain a control person claim against Son, let alone such a claim
 5 against any of the Softbank Defendants.

6 Rather, to state a claim of control person liability "plaintiffs must still plead and prove
 7 that [the defendant] exercised 'a significant degree of day-to-day operational control, amounting to the
 8 power to dictate another party's conduct or operations' at the time of the alleged misstatements. *In re*
 9 *McKesson HBOC, Inc. Sec. Litig.*, 126 F. Supp. 2d 1248, 1277 (N.D. Cal. 2000) (quoting *In re ZZZZ*
 10 *Best Sec. Litig.*, No. CV-87-3574-RSWL (BX), 1994 WL 746649, at *6 (C.D. Cal. Oct. 26, 1994); *see*
 11 *also Howard v. Everex Sys. Inc.*, 228 F.3d 1057, 1066 n. 10 (9th Cir. 2000); *Wool v. Tandem*
 12 *Computers, Inc.*, 818 F.2d 1433, 1441 (9th Cir. 1981). The 4AC contains no facts showing that
 13 non-party Son, let alone any of the three Softbank Defendants, had day-to-day operational control over
 14 UTStarcom or any of the individual defendants. Thus, even if Plaintiffs have adequately pled primary
 15 violations as to UTStarcom — which they have not — their control person claim against the Softbank
 16 Defendants must be dismissed.

17 **A. Son's Position as an Outside Director Is Not a Basis for Imposing Control-Person**
 18 **Liability Against Non-Party Son Or Any of the Softbank Defendants**

19 Son's status as an outside director of UTStarcom for nineteen of the fifty-five months of
 20 the class period cannot provide the basis for a control person claim against himself, let alone any
 21 Softbank Defendant. Because facts showing actual control are essential to a control person claim, the
 22 courts have repeatedly and emphatically held that merely alleging that a particular defendant is a
 23 director of a company is not sufficient to allege control. *See Burgess v. Premier Corp.*, 727 F.2d 826,
 24 832 (9th Cir. 1984) ("A director is not automatically liable as a controlling person. There must be some
 25 showing of actual participation in the corporation's operation or some influence before the consequences
 26 of control may be imposed.) (internal citations omitted); *Cromer Fin., Ltd. v. Berfer*, 137 F. Supp. 2d
 27 452, 484 (S.D.N.Y. 2001) ("[O]fficer or director status alone does not constitute control.); *Kimmel v.*
 28 *Labenski*, No. 85-Civ. 0804, 1988 WL 19229, at *5 (S.D.N.Y. Feb. 10, 1988) ("[A]n individual's status

1 as a corporate director, standing alone, is insufficient to impose liability under Section 20.); *Paracor*
 2 *Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1163-64 (9th Cir. 1996) (upholding dismissal of
 3 claim against CEO based on § 20(a) because plaintiffs did not “introduce evidence that [the CEO]
 4 exercised direct or indirect control over the company’s allegedly fraudulent transaction).

5 Moreover, the cases specifically establishing that an *outside* director may not, by virtue
 6 of such status, be held liable under Section 20(a) are legion. *See, e.g., Travelers Ins. Co. v. Lewis*, 756
 7 F. Supp. 172, 177 (S.D.N.Y. 1991) (“[Defendant] had no control over [the primary violator] by virtue of
 8 his position as a director, insofar as he was an outside director of a four-member Board, two of whom
 9 were chosen by [a majority shareholder] and had overriding power.); *In re GlenFed, Inc. Sec. Litig.*, 60
 10 F.3d 591, 593 (9th Cir. 1995) (affirming the district court’s dismissal of control person claims against
 11 outside director defendants because the complaint did not contain allegations that they had “either
 12 participated in the day-to-day corporate activities, or had a special relationship with the corporation,
 13 such as participation in preparing or communicating group information at particular times); *see also*
 14 *Mitzner v. Hastings*, No. C 04-3310, 2005 WL 88966, at *6 (N.D. Cal. Jan. 14, 2005) (“Outside
 15 directors are not typically held liable for allegedly false or misleading information conveyed in
 16 prospectuses, registration statements, annual reports, press releases, or other ‘group published’
 17 information.); *O’Sullivan v. Trident Microsystems, Inc.*, No. C-93-20621 RMW (EAI), 1994 WL
 18 124453, at *18 (N.D. Cal. Jan. 31, 1994) (dismissing complaint against outside director defendants
 19 because “plaintiffs have alleged no facts that [the outside directors] exerted control over the company or
 20 participated in its operations); *In re Lernout & Hauspie Sec. Litig.*, 286 B.R. 33, 43 (D. Mass. 2002)
 21 (dismissing § 20(a) claims against outside directors for failure to plead the requisite degree of control
 22 where the plaintiffs’ “allegations [did] not go beyond run-of-the-mill duties of a director of a large
 23 corporation).

24 **B. Plaintiffs’ Allegation That Son Signed Two SEC Filings Does Not Establish Control**
 25 **Person Liability**

26 The only conduct alleged as to Son is that he signed two UTStarcom SEC filings as an
 27 outside director — an allegation that does nothing more than confirm his status as an outside director at
 28 that time. (4AC ¶ 35.) Courts have repeatedly held that such allegations are insufficient to establish

1 day-to-day operational control as required under Section 20(a). *See In re Gupta Corp. Sec. Litig.*, 900 F.
 2 Supp. 1217, 1241-43 (N.D. Cal. 1994) (finding allegations that a defendant was an outside director and
 3 had signed a company’s allegedly false Annual Report on Form 10-K insufficient to state a claim for
 4 control person liability because such allegations “are simply conclusory allegations unsupported by
 5 assertions of specific day-to-day involvement in the management of [the company]); *see also Picard*
 6 *Chemical Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1135 (W.D. Mich. 1996) (finding
 7 an outside director defendant’s participation on the board’s Audit, Nominating, and Compensation
 8 Committees and signature of Registration Statements and other group published documents insufficient
 9 to raise “a rational inference of control). Again, they have failed to state a control person claim as to
 10 Son, much less such a claim against any of the three Softbank defendants as to whom there are no
 11 allegations at all other than that one of them owned UTStarcom stock and appointed Son to the
 12 UTStarcom board.

13 **C. Plaintiffs’ Conclusory Statement that the Softbank Defendants Prepared**
 14 **Purportedly False Statements Cannot Stand in the Place of Facts**

15 Instead of facts showing the exercise of actual control by Son or any Softbank defendant
 16 over any specific statements, Plaintiffs make the collective and conclusory allegation that the individual
 17 defendants and the Softbank Defendants “prepared, or were responsible for preparing, the Company’s
 18 press releases and SEC filings. (4AC ¶ 425.) This global assertion is not supported by any alleged facts
 19 indicating that Son or any Softbank defendant actually prepared any of UTStarcom’s allegedly
 20 misleading statements and, therefore, cannot suffice. Likewise, Plaintiffs’ assertion that “SOFTBANK
 21 (through Son) had access to the adverse undisclosed information described in the complaint (4AC ¶
 22 407) does nothing to further their claim of control. *See In re Gupta Corp. Sec. Litig.* 900 F. Supp. at
 23 1242-43 (stating that “conclusory allegations that an outside director had access to corporate
 24 documents are insufficient to plead control person liability). Plaintiffs nowhere identify any documents
 25 Son or any Softbank defendant supposedly saw or when they saw them, any conversations Son or any
 26 Softbank defendant had with anyone or when they had them, or any interactions whatsoever between
 27 Son or any Softbank defendant and any UTStarcom employee.

1 Thus, while Plaintiffs' allegations fail for other reasons, they fail for the simple reason
 2 that conclusory allegations of control like this do not even begin to allege Son's day-to-day operational
 3 control over UTStarcom, let alone such control on the part of any Softbank defendant. *See McKesson*,
 4 126 F. Supp. 2d at 1277 ("The pleadings of control person liability are insufficient, because they do not
 5 identify *how* the Section 20(a) defendants controlled specific Section 10(b) defendants.) (emphasis
 6 added).

7 **D. Plaintiffs' Allegation That the Softbank Defendants Were Minority Stock Owners**
 8 **In UTStarcom And Designated Son to the Board of Directors Are Insufficient to**
 9 **State a Claim of Control Person Liability as to the Softbank Defendants**

10 Even if Plaintiffs had alleged facts showing actual control by Son over some alleged
 11 primary violation, the law is clear that Son's conduct in his capacity as an outside director of UTStarcom
 12 is not attributable to each of the Softbank Defendants merely because Softbank America had a minority
 13 ownership position in UTStarcom and appointed Mr. Son to the board. Indeed, numerous cases have
 14 held that minority stock ownership, even in combination with a concomitant power of delegation to the
 15 board, is insufficient to support a claim of control person liability. *See, e.g., In re Gupta Corp. Sec.*
 16 *Litig.* 900 F. Supp. at 1243 ("[A defendant's] position as a minority shareholder of [a company] with an
 17 agent on the board does not establish control person liability); *see also US Airways Group, Inc. v.*
 18 *British Airways, PLC*, 989 F. Supp. 482, 494 (S.D.N.Y. 1997) ("It is well-settled under Delaware law
 19 that a shareholder does not owe a fiduciary duty to the corporation unless it owns a majority interest in
 20 or exercises control over the business affairs of the corporation.) (internal citations omitted).

21 Son's status as a designee does not transform him into an agent of any Softbank
 22 defendant. To the contrary, the law presumes that in his role as a director of UTStarcom, Son assumed a
 23 set of personal, non-delegable duties and obligations to, and was acting as an independent director in
 24 good faith and in the interest of, UTStarcom and all its shareholders. *See In re Global Crossing Ltd.*
 25 *Sec. Litig.*, No. 02 Civ. 910, 2005 WL 1881514, at *3-*4, *9-*10, * 12-*13 (S.D.N.Y. Aug. 5, 2005)
 26 (holding that defendants Microsoft and Softbank could not be held liable for actions of designees on
 27 ACG's Board, emphasizing that directors "had fiduciary duties to act on behalf of the shareholders of
 28 ACG itself, not on behalf of the entities that appointed them, and that "the mere fact that they held high
 positions with Microsoft and Softbank, and were appointed to the ACG board by those corporations,

1 cannot, standing alone, establish that they acted as agents . . . of Microsoft and Softbank); *In re Silicon*
 2 *Graphics Inc. Sec. Litig.*, 183 F.3d 970, 990 (9th Cir. 1999) (“At the pleading stage, Board independence
 3 and compliance with the business judgment rule are presumed.); *Aronson v. Lewis*, 473 A.2d 805, 816
 4 (Del. 1984) (finding that to challenge the independence of a director, “it is not enough to charge that a
 5 director was nominated by or elected at the behest of those controlling the outcome of a corporate
 6 election. That is the usual way a person becomes a corporate director.); *Grobow v. Perot*, 526 A.2d
 7 914, 924 (Del. Ch. 1987) (rejecting the argument that a director lacks independence from the person
 8 who nominated or appointed him as a director). The 4AC is devoid of facts that might even begin to
 9 rebut this presumption.

10 **E. The Softbank Defendants’ One-Time Power to Influence Does Not Establish its**
 11 **Control over UTStarcom at Any Time**

12 Although Plaintiffs make much of it, UTStarcom’s disclosure that by virtue of their stock
 13 ownership and appointment of Son to the board of directors the Softbank Defendants had “significant
 14 influence over UTStarcom does not establish that any Softbank defendant exercised day-to-day control
 15 over any relevant operations at UTStarcom through Son or otherwise. (4AC ¶ 37.) These disclosures,
 16 which appear as boilerplate language in the risk factors section of UTStarcom’s Forms 10-K, are
 17 unaccompanied by any factual allegations indicating that the Softbank Defendants exerted real control
 18 over UTStarcom, and do not therefore establish that the Softbank Defendants actually had or exercised
 19 control over UTStarcom’s alleged primary violations. As this Court has previously held, “section 20(a)
 20 is not aimed at minority shareholders who possess only limited and indirect power to influence the
 21 management and policies of the securities violator. *In re Genentech, Inc. Sec. Litig.*, No. C-88-4038-
 22 DLJ, 1989 WL 201577, at *7 (N.D. Cal. Dec. 11, 1989) (finding that the defendants’ minority stock
 23 ownership and ability to appoint a member of the board insufficient to allege control); *In re Gupta Corp.*
 24 *Sec. Litig.*, 900 F. Supp. at 1241 (dismissing plaintiffs’ control person claim “[b]ecause plaintiffs have
 25 not alleged any facts suggesting that [the defendants] exerted real control or influence over [the primary
 26 violator]....). Even if some of the Softbank Defendants had the power to influence UTStarcom at some
 27 point, the ability to “influence is not equivalent to real day-to-day operational control over public
 28 disclosures throughout the class period, as a matter of law.

1 **II. THE FOURTH AMENDED COMPLAINT SHOULD BE DISMISSED WITH**
2 **PREJUDICE AND THE COURT SHOULD CONSIDER AWARDING SOFTBANK ITS**
3 **FEES**

4 After four attempts and despite extensive guidance from this Court, Plaintiffs have again
5 failed to state a claim against any of the Softbank Defendants. Giving Plaintiffs yet another chance
6 would be futile. *In re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1097 (9th Cir. 2002) (finding that it was
7 not “unreasonable for the district court to conclude that it would be pointless to give Plaintiffs yet
8 another chance to amend when the plaintiffs had been given “three opportunities to plead their best
9 possible case); *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990) (“The district court’s
10 discretion to deny leave to amend is particularly broad where plaintiff has previously amended the
11 complaint.); *Silicon Graphics*, 183 F. 3d at 991 (denying leave to amend where plaintiff had failed to
12 offer additional facts which might cure defects in complaint); *In re VeriFone Sec. Litig.*, 11 F.3d 865,
13 872 (9th Cir. 1993) (same). It is well established “that courts are not required to repeatedly advise
14 Plaintiffs on how to improve their complaints. *In re Merrill Lynch & Co., Inc.*, 273 F. Supp. 2d 351,
15 393 (S.D.N.Y. 2003) aff’d sub nom *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161 (2d Cir. 2005).
16 The Court’s dismissal should be with prejudice.

17 In addition, given how far short the 4AC is from stating a claim against any Softbank
18 defendant, given the clarity of the law in this area, given the total absence of any facts that could
19 plausibly be construed to give rise to the day-to-day control required for control person liability, given
20 that this is Plaintiffs’ fourth try to state a claim, and given the significant expenses the Softbank
21 Defendants have incurred in briefing each successive motion to dismiss, the Court should consider
22 awarding the Softbank Defendants their fees and costs. *See* FED. R. CIV. P. 11(b)(2); 28 U.S.C. § 1927.
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CONCLUSION

The Court should dismiss the 4AC without leave to amend.

Dated: September 8, 2008

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Attorneys for Softbank Holdings, Inc.
Softbank America, Inc. and Softbank
Corporation

PROPOSED ORDER

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2 Before the court is Defendants Softbank Holdings Inc., Softbank America, Inc, and
3 Softbank Corporation’s (the “Softbank Defendants) motion and proposed order to dismiss the
4 Plaintiffs’ Fourth Amended Consolidated Complaint (the “Complaint) for Violation of the Federal
5 Securities Laws without leave to amend and order for Plaintiffs to show cause why sanctions should not
6 issue (the “Motion). Having considered the parties’ papers in support of and opposed to the motion,
7 papers on file, the record and all applicable authorities, and good cause appearing:

8 THE COURT HEREBY FINDS:

9 1. Plaintiffs fail to plead with the requisite particularity that defendant UTStarcom,
10 Inc., Hong Liang Lu, Michael J. Sophie, Ying Wu, or Thomas J. Toy made false and misleading
11 statements, and fail to raise a strong inference of scienter, with respect to the accounting allegations,
12 demand for products, status of product development, economic forecasts, and internal control
13 deficiencies under 15 U.S.C. § 78u-4(b)(1) and (b)(2). The allegations also fail to plead all facts on
14 which the allegations are based.

15 2. Plaintiffs fail to plead sufficient facts to establish a control person claim under 15
16 U.S.C. § 78t (“Section 20(a)) as to any of the Softbank Defendants.

17 3. Plaintiffs claim under Section 20(a) is not warranted by existing law or by a non-
18 frivolous argument for extending, modifying, or reversing existing law or for establishing new law, and
19 Plaintiffs’ continued prosecution of this claim has unreasonably and vexatiously multiplied this
20 proceeding.

21 IT IS HEREBY ORDERED that the Softbank Defendants’ motion to dismiss the
22 Complaint without leave to amend is Granted in its entirety under Rules 9(b) and 12(b)(6) of the Federal
23 Rules of Civil Procedure and the Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 78u-4(a)
24 *et seq.*

1 IT IS FURTHER ORDERED that Plaintiffs shall show cause why the conduct described
2 in this order has not violated Rule 11(b)(2), and why this court should not, therefore, award the Softbank
3 Defendants their excess costs, expenses, and attorneys' fees, reasonably incurred because of such
4 conduct on or before _____.

5 Dated:

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7 _____
8 The Honorable James A. Ware
9 United States District Judge
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