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6 UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
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8 VAN WELL NURSERY, INC., a
Washington Corp., HILLTOP
9 FRUIT TREES, LLC,

10 Plaintiffs,

11 v.

12 MONY LIFE INSURANCE COMPANY,
a New York corporation; A/B
13 HOP FARMS, INC., a Washington
corporation; BENNETT G.
14 BRULOTTE and TRACY A
BRULOTTE, individually and
15 their marital community;
WALLA WALLA PARCEL NO. 31-07-
16 23-11-00-02

17 Defendants.

18 _____
19 MONY LIFE INS. CO., a N.Y.
corp.,

20 Third-Party Plaintiff,

21 NATIONAL LICENSING ASSOC.,
22 LLC., a Washington limited
liability company (f/k/a
23 Nursery Licensing
Association, LLC),

24 Third-Party Defendant.
25
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NO. CV-04-0245-LRS

ORDER

1 BEFORE THE COURT is third-party plaintiff Mony Life Insurance
2 Company's (MONY") partial summary judgment (Ct. Rec. 153), filed December
3 1, 2006, with respect to its counterclaims and third-party claims against
4 NLA¹ for violations of Section One of the Sherman Act, 15 U.S.C. §1, and
5 Washington's parallel provision of Washington's Unfair Business
6 Practices/Consumer Protection Act, RCW 19.86.030.

7 The factual and legal basis for MONY's motion for partial summary
8 judgment is two-fold: 1) the NLA's horizontal membership structure-i.e.,
9 plant nurseries who normally compete with each other for market share and
10 brand identity of plant cultivars; and 2) NLA's patent and trademark
11 enforcement tactics launched against ancillary financial lending
12 institutions. MONY alleges that NLA's structure and enforcement tactics
13 constitute both per se and "rule of reason" antitrust violations as a
14 matter of law based on undisputed material facts set forth in MONY's LR
15 56.1 Statement of Material Facts.

16 Specifically MONY states that NLA's course of conduct ignored
17 antitrust laws and unfairly elevated the financial self interest of NLA
18 and its members at the expense of the agricultural lending community and
19 consumer social welfare. Further, MONY asserts, part of NLA's mode of

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21 ¹On February 5, 2007, during the pendency of this motion, plaintiffs
22 Van Well Nursery, Inc., and Hilltop Fruit Trees, LLC ("Nurseries") and
23 defendant MONY Life Insurance Co. entered a stipulation pursuant to Fed.
24 R. Civ. P. 41(a)(2) that the claims and counter-claims asserted against
25 each other in the above-entitled matter be dismissed with prejudice and
26 without attorneys' fees or costs to any party. Ct. Rec. 173.

1 doing business is one categorizing almost all business operations as
2 "trade secrets" resulting in NLA's refusal to divulge any internal
3 business information on that basis. Ct. Rec. 156 at 2-3. This practice,
4 MONY argues, runs afoul of the Federal Trade Commission and U.S.
5 Department of Justice Antitrust Division's "Antitrust Guidelines for
6 Collaborations Among Competitors" issued on April 7, 2000, which, in
7 itself, actually creates antitrust liability for NLA. Id. At 3-4. MONY
8 concludes that the antitrust injury flowing from the alleged antitrust
9 wrong, is MONY's litigation expenses incurred in the defense of NLA's
10 intellectual property infringement suit, allegedly pursued in bad faith,
11 in the instant case.

12 A. Statement Of Facts.

13 This case involves a for-profit Washington limited liability
14 company, the NLA, whose purpose is to enforce the plant patent and
15 trademark rights of others at standardized rates and to share proceeds
16 of its enforcement efforts with its plant nursery members. MONY's SMF²
17 ¶1. The NLA membership is comprised of at least 18 plant nurseries in
18 the United States who are otherwise competitors of each other. Id. at
19 ¶2. Each plant nursery entered into a Plant Patent and Trademark
20 Collection Agreement with the NLA. In this agreement, the plant nursery
21 agrees to assign to the NLA its plant patent and trademark enforcement
22 rights in return for a percentage recovery of the proceeds of NLA's
23 enforcement activities on behalf of all NLA members. Id. at ¶3. Despite
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25 ²MONY has "distilled" its statement of material facts in Ct. Rec.
26 156 at 5-7.

1 Court rulings made earlier in this case that the plant patent and
2 trademarks were invalidly assigned to NLA, NLA has not re-assigned those
3 rights back to the plant nurseries nor has NLA taken steps to alter the
4 USPTO public records which still purport to show that NLA has been
5 assigned patent and trademark enforcement rights of various NLA members.
6 Id. at ¶11.

7 B. MONY'S ARGUMENTS

8 MONY argues that the NLA form and structure is not exempt from
9 application of federal or state antitrust laws under any recognized
10 antitrust exemption. MONY further argues that NLA had no good faith
11 basis for any belief that its activities were exempt from the application
12 of the antitrust laws. Ct. Rec. 156 at 5. MONY argues that assignment
13 of plant patent "rights to sue" to alleged infringers have long been
14 invalid in the United States and constitute a form of patent misuse. The
15 NLA, MONY asserts, had no good faith basis for believing that such
16 assignments were valid and enforceable. MONY additionally argues that
17 assignment of trademark "rights to sue" are invalid and unenforceable as
18 a form of "naked licensing" under binding legal precedent. Id. at 6.

19 MONY further argues that "[b]y amassing the patent and trademark
20 rights of individual plant nursery owners under the control of the NLA,
21 the NLA gained tactical leverage in obtaining standardized licensing fees
22 and recoveries from those engaged in agricultural lending activities."
23 Ct. Rec. 156 at 6. As a result of NLA tactics, MONY asserts that there
24 was an increased unwillingness of agricultural financial lending
25 institutions to grant loans and an increase in the cost of agricultural
26 loan transactions.

1 Finally, MONY points out that NLA's claim that its activities and
2 membership constitute protectible trade secrets reinforces the economic
3 advantage gained by organizing horizontal competitors into a group cartel
4 because, by definition, a trade secret can only be a trade secret if it
5 confers an economic advantage. Id. at ¶10.

6 C. SUMMARY JUDGMENT STANDARD APPLICABLE IN ANTITRUST CASES

7 Motions for summary judgment are particularly disfavored in
8 antitrust actions because motive and intent are so important, and the
9 proof is often in the hands of the defendants. *Poller v. CBS*, 368 U.S.
10 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); *Hospital Building Co. v.*
11 *Trustees of Rex Hospital*, 425 U.S. 738, 96 S.Ct. 1848, 48 L.Ed.2d 338
12 (1976); *Fusco v. Xerox Corporation*, 676 F.2d 332 (8th Cir.1982). MONY
13 asserts that "[h]ow NLA organizes itself internally remains a black box,
14 shrouded in alleged trade secrets . . ." (Ct. Rec. 163 at 2) suggesting
15 that at least some proof that is needed to succeed on this motion for
16 partial summary judgment is in the hands of NLA.

17 In general, it is difficult to resolve antitrust cases on summary
18 judgment because of their factual complexity. See *Rickards v. Canine Eye*
19 *Registration Found.*, 783 F.2d 1329, 1332 (9th Cir.1986). This does not
20 mean, however, that a district court may not award summary judgment when
21 appropriate. See *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1409 (9th
22 Cir.1991). In fact, an appropriate award of summary judgment may save the
23 parties and the courts from unnecessarily spending the extraordinary
24 resources required for a full-blown antitrust trial. See *id.*

25 The Supreme Court's decision in *Matsushita* significantly clarified
26 the standards for resolving summary judgment cases in the antitrust

1 arena. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S.
2 574, 586, 106 S.Ct. 1348, 89 L.Ed.2d 538, 585-88 (1986). Since that
3 time, the Ninth Circuit has shown on numerous occasions that summary
4 judgment on an antitrust claim may be appropriate. See *Bhan*, 929 F.2d at
5 1409.

6 No special burden exists for summary judgment in antitrust cases.
7 *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 US 451, 119 L Ed
8 2d 265, 112 S Ct 2072 (1992). If a material issue of fact exists then the
9 matter should proceed to trial and summary judgment should not be
10 granted. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 US
11 574, 89 L Ed 2d 538, 106 S Ct 1348 (1986).

12 1. SHERMAN ACT § 1 VIOLATION/RCW 19.86 VIOLATION

13 MONY claims that there have been violations of Sherman Act § 1(15
14 U.S.C. § 1). In order to sustain a cause of action under this section
15 of the Sherman Act, the claimant must prove anti-competitive effects
16 within the relevant product and geographic markets. *Martin B. Glauser*
17 *Dodge Co. v. Chrysler Corp.*, 570 F.2d 72 (3d Cir. 1977); *American Motor*
18 *Inns, Inc. v. Holiday Inns Inc.*, 521 F.2d 1230 (3d Cir. 1975).

19 a. Standing

20 The antitrust injury requirement specifies that to have standing
21 under the antitrust laws, the plaintiff must have suffered "antitrust
22 injury," meaning "injury of the type the antitrust laws were intended to
23 prevent and that flows from that which makes the defendant's acts
24 unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489,
25 97 S. Ct. 690, 50 L. Ed. 2d 701, 1977-1 Trade Cas. (CCH) P 61255 (1977).
26 Implicit in this definition are two separate conceptual issues. First,

1 the claimed injury must be of a type that the antitrust laws were meant
2 to discourage (e.g., lost profits from a reduced ability to compete, as
3 opposed to lost profits from increased competition in the market). And
4 second, the plaintiff's injury must have been proximately caused by the
5 defendant's antitrust violation, and not by some other act or event.
6 More simply, to satisfy the antitrust injury requirement, a plaintiff
7 must be "adversely affected by an anticompetitive aspect of the
8 defendant's conduct." *Atlantic Richfield Co. V. USA Petroleum Co.*, 495
9 U.S. 328, 339 (1990) (citations omitted).

10 MONY asserts the cost of litigation incurred in the defense of the
11 intellectual property infringement suit in this case is the sort of
12 antitrust injury recognized as compensable. See *Handgards, Inc. v.*
13 *Ethicon, Inc.*, 601 F.2d 986, 997 (9th Cir. 1979)(holding costs of
14 litigating a frivolous suit are cognizable under the antitrust laws). A
15 liberal construction of the complaint and pleadings demonstrates that
16 MONY has alleged a cognizable antitrust injury under the antitrust laws.
17 NLA's litigation against MONY, arguably an anticompetitive aspect of
18 NLA's conduct considering the basis (or lack thereof) for NLA's
19 enforcement rights, affected MONY's business in a negative way.

20 b. Antitrust Claim Elements

21 The Court agrees with MONY that to establish a section 1 violation
22 under the Sherman Act in the Ninth Circuit, a plaintiff must demonstrate
23 three elements: (1) an agreement, conspiracy, or combination among two or
24 more persons or distinct business entities; (2) which is intended to harm
25 or unreasonably restrain competition; and (3) which actually causes
26 injury to competition, beyond the impact on the claimant, within a field

1 of commerce in which the claimant is engaged (i.e., "antitrust injury").
2 See *Coastal Transfer Co. v. Toyota Motor Sales, U.S.A.*, 833 F.2d 208, 211
3 (9th Cir.1987); *Aydin Corp. v. Loral Corp.*, 718 F.2d 897, 902 (9th
4 Cir.1983); *Rickards v. Canine Eye Registration Found.*, 783 F.2d 1329,
5 1332 (9th Cir.), cert. denied, 479 U.S. 851, 107 S.Ct. 180, 92 L.Ed.2d
6 115 (1986); *Cascade Cabinet Co. v. Western Cabinet & Millwork*, 710 F.2d
7 1366, 1373 (9th Cir.1983).

8 The Sherman Act's prohibition against concerted activity in
9 restraint of trade is analyzed under either the "per se" rule or the
10 "rule of reason." The per se analysis is applied to practices that are
11 presumptively illegal, such as (1) horizontal and vertical price-fixing;
12 (2) horizontal market division; (3) group boycotts and concerted refusals
13 to deal; and (4) tie-in sales. See *Cascade Cabinet Co.*, 710 F.2d at
14 1370. The per se rule governs only if the practice at issue "facially
15 appears to be one that would always or almost always tend to restrict
16 competition and decrease output." *National Collegiate Athletic*
17 *Association v. Board of Regents of University of Oklahoma*, 468 U.S. 85,
18 104 S.Ct. 2948, 2960, 82 L.Ed.2d 70 (1984) (quoting *Broadcast Music, Inc.*
19 *v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551,
20 1562, 60 L.Ed.2d 1 (1979)). When a plaintiff establishes that the
21 defendants engaged in conduct clearly falling within one of the
22 categories to which the per se rule applies, it is not necessary to show
23 actual anticompetitive effect; such effect is presumed. See *Northern*
24 *Pacific Railway v. United States*, 356 U.S. at 5, 78 S.Ct. at 518.

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1 MONY has analyzed its case under both the "per se" rule and the
2 "rule of reason," alleging that antitrust violation can be proven under
3 either analysis.

4 It is at this juncture that MONY fails in its effort to establish a
5 per se violation of section 1 of the Sherman Act³ sufficient for summary
6 judgment purposes. MONY has failed to show sufficient adverse effect
7 upon competition. The only evidence in the record before the Court
8 about the marketplace and competition is that the NLA is made up of at
9 least 18 plant nurseries in the United States who are otherwise
10 competitors of each other. Even if MONY had shown that the restraint
11 had injured competition, the Court would be reluctant to apply the per se
12 rule because of the lack of experience by the courts with the challenged
13 conduct. "It is only after considerable experience with certain business
14 relationships that courts classify them as per se violations." *Broadcast*
15 *Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. at 9, 99
16 S.Ct. at 1557; *quoting United States v. Topco Associates, Inc.*, 405 U.S.
17 596, 607-08, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972).

18 Conduct that is not conclusively presumed to be illegal under the
19 per se rule must be proved to be unreasonable under the rule of reason
20 test. Rule of reason analysis calls for a "thorough investigation of
21 the industry at issue and a balancing of the arrangement's positive and
22 negative effects on competition." *Northrop Corp. v. McDonnell Douglas*
23 *Corp.*, 705 F.2d 1030, 1050 (9th Cir.1983). The rule of reason requires
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25 ³This holds true for Washington's parallel provision of Washington's
26 Unfair Business Practices/Consumer Protection Act, RCW 19.86.030.

1 " 'the fact-finder to decide whether under all the circumstances of the
2 case the restrictive practice imposes an unreasonable restraint on
3 competition.' " *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332,
4 343, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48 (1982)).

5 MONY states, citing *MetroNet Services Corp. V. U.S. West*
6 *Communications*, 383 F.3d 1123, 1130 (9th Cir.2004), that an analysis of
7 "market power" is not necessary in this case because it has not alleged
8 a violation of §2 of the Sherman Act. The Court, however, needs more to
9 find MONY is entitled to partial summary judgment. Proof that the
10 defendant's activities had an impact upon competition in a relevant
11 market is an absolutely essential element of the rule of reason case.
12 *Kaplan v. Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir.1979), *cert.*
13 *denied*, 447 U.S. 924, 100 S.Ct. 3016, 65 L.Ed.2d 1116 (1980). It is the
14 impact upon competitive conditions in a definable market which
15 distinguishes the antitrust violation from the ordinary business tort.

16 The balancing process of the rule of reason is not applied to a
17 particular agreement or practice until after the plaintiff has
18 established that the challenged conduct constitutes a restraint on
19 competition. *Gough v. Rossmoor Corp.*, 585 F.2d 381, 389 (9th Cir.1978),
20 *cert. denied*, 440 U.S. 936, 99 S.Ct. 1280, 59 L.Ed.2d 494 (1979). To
21 establish a cause of action for an unreasonable restraint of trade in
22 violation of section 1 under the rule of reason, the plaintiff must show
23 the following elements: "(1) an agreement among two or more persons or
24 distinct business entities; (2) which is intended to harm or unreasonably
25 restrain competition; and (3) which actually causes injury to

1 competition." *Reid Brothers Logging Co. v. Ketchikan Pulp Co.*, 699 F.2d
2 1292, 1296 (9th Cir.1983).

3 MONY's attempt to establish a rule of reason violation fails for the
4 same reason as its attempt to establish a per se violation: there is
5 insufficient evidence of injury to competition for purposes of summary
6 judgment. Although MONY complains of its litigation expenses incurred,
7 economic injury to a competitor, or in this case a noncompetitor or
8 ancillary lending institution, does not equal injury to competition in
9 the marketplace. *Mutual Fund Investors, Inc. v. Putnam Management Co.,*
10 *Inc.*, 553 F.2d 620, 627 (9th Cir. 1977). The Ninth Circuit has stressed
11 that "[i]t is injury to the market, not to individual firms, that is
12 significant." See *Klamath-Lake Pharmaceutical Ass'n v. Klamath Medical*
13 *Service*, 701 F.2d 1276, 1292 (9th Cir. 1983).

14 MONY argues that the purportedly frivolous NLA litigation coupled
15 with the improper assignment of indivisible patent and trademark
16 enforcement rights to a collective entity resulted in an impact upon
17 competition thus constituting the antitrust liability. The record is not
18 sufficient to satisfy the Court regarding the impact on the relevant
19 market and competition for MONY to be entitled to partial summary
20 judgment.

21 2. PATENT MISUSE DOCTRINE

22 The patent misuse doctrine is an extension of the equitable doctrine
23 of unclean hands, whereby a court of equity will not lend its support to
24 enforcement of a patent that has been misused. See *Senza-Gel Corp. v.*
25 *Seiffhart*, 803 F.2d 661, 668, 231 USPQ 363, 368 (Fed.Cir.1986). Patent
26 misuse arose, as an equitable defense available to the accused infringer,

1 from the desire "to restrain practices that did not in themselves violate
2 any law, but that drew anticompetitive strength from the patent right,
3 and thus were deemed to be contrary to public policy." *Mallinckrodt, Inc.*
4 *v. Medipart, Inc.*, 976 F.2d 700, 704, 24 USPQ2d 1173, 1176
5 (Fed.Cir.1992).

6 The policy of "patent misuse doctrine" is to prevent a patentee from
7 using a patent to obtain market benefit beyond that which inures in
8 statutory patent right. *Monsanto Co. v. McFarling*, 363 F.3d 1336, 70
9 U.S.P.Q.2d (BNA) 1481, 2004-1 Trade Cas. (CCH) P 74358 (Fed. Cir. 2004),
10 petition for cert. filed (U.S. July 6, 2004).

11 Since the creation of the doctrine of patent misuse almost seventy
12 years ago, the Supreme Court has consistently distinguished between
13 patent misuse and violations of the antitrust laws. See *Zenith Radio*
14 *Corp. v. Haseltine Research, Inc.*, 395 U.S. 100, 14041 (1969);
15 *Transparent-Wrap Machine Corp. v. Stokes & Smith Co.*, 329 U.S. 637, 641
16 (1947); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488, 494 (1942).

17 Although the patent misuse doctrine and the antitrust doctrine are
18 independent bodies of law, many of the same public policy considerations
19 underlie both misuse and antitrust cases, so that in an action where
20 improprieties in the use of intellectual property are alleged, either or
21 both doctrines may apply. While one who misuses a patent does not also
22 necessarily violate antitrust laws, one who violates antitrust laws by
23 inappropriate use of a patent is necessarily guilty of patent misuse.
24 *Hunter Douglas, Inc. v. Comfortex Corp.*, 44 F.Supp.2d 145, 156
25 (N.D.N.Y.1999).

1 Whereas patent misuse has traditionally been used defensively by a
2 licensee or competitor charged with intellectual property infringement,
3 it has also recently been used offensively. *Grid Systems Corp. v. Texas*
4 *Instruments, Inc.*, 771 F.Supp. 1033 (N.D. Cal. 1999). The "misuse"
5 doctrine has even been expanded to cover other forms of intellectual
6 property, such as copyrights and trademarks. *Lasercomb America, Inc. v.*
7 *Reynolds*, 911 F2d 970 (4th Cir. 1990). The Supreme Court has not
8 expressly recognized copyright and trademark misuse, but has strongly
9 suggested their validity as defenses. *United States v. Loew's, Inc.*,
10 371 U.S. 38 (1962); *Broadcast Music, Inc. v. Columbia Broadcasting*
11 *System, Inc.*, 441 US 1 (1979).

12 MONY appears to argue patent misuse in two ways. MONY first states
13 that the alleged antitrust violation, which is sufficiently related to
14 the patent(s), is a patent misuse. As discussed above, the Court finds
15 for purposes of this motion that the record does not support all elements
16 of an antitrust violation. Therefore a patent misuse finding cannot be
17 based on a finding of antitrust. Looking at MONY's other patent misuse
18 assertion, i.e., that through invalid assignments of 'rights to sue'
19 and/or enforcement practices NLA has engaged in patent misuse, the Court
20 finds triable issues exist. The Court, however, is not asked to analyze
21 the offensive claim of patent misuse in this motion before it.

22 3. NLA ANTITRUST IMMUNITY

23 In its briefing, NLA contends it has antitrust immunity and requests
24 this Court to find that it is immune from any antitrust allegations under
25 the Capper-Volstead Act and its Washington counterpart RCW Ch. 24.34; and
26 the Noerr-Pennington immunity doctrine. A review of those statutes and

1 related case law does NOT suggest obvious grounds for immunity. However,
2 insufficient facts are currently known to make such a determination. No
3 ruling is necessary at present in light of the Court's disposition of
4 Mony's motion.

5 D. CONCLUSION

6 As to the antitrust claim, the record does not demonstrate the
7 impact on the relevant market and effects from the alleged
8 anticompetitive conduct for entitlement to summary judgment. MONY has
9 not presented evidence for the trier of fact to conclude as a matter of
10 law that NLA is engaged in a form of unreasonable or illegal restraint of
11 trade.

12 Additionally, "[p]atent misuse is viewed as a broader wrong than
13 antitrust violation because of the economic power that may be derived
14 from the patentee's right to exclude." *C.R. Bard, Inc. v. MS Systems,*
15 *Inc.*, 157 F.3d 1340, 1372 (Fed.Cir.1998). Accordingly, "misuse may arise
16 when the conditions of antitrust violation are not met." *See Zenith*
17 *Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 140-41, 89 S.Ct.
18 1562, 23 L.Ed.2d 129, 161 USPQ 577, 597 (1969). The record presents fact
19 issues as to patent misuse, which, together with fact issues as to the
20 antitrust claim, preclude summary judgment. *See Sonobond Corp. v. Uthe*
21 *Technology, Inc.*, 314 F.Supp. 878 (D.C.Cal. 1970).

22 **IT IS HEREBY ORDERED** that Third-party plaintiff Mony Life Insurance
23 Company's partial summary judgment, **Ct. Rec. 153**, filed December 1, 2006,
24 is **DENIED**.

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1 **IT IS SO ORDERED.** The District Court executive is directed to enter
2 this order and provide copies to counsel.

3 **DATED** this 6th day of March, 2007.

4 ***s/Lonny R. Suko***

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6 LONNY R. SUKO
7 UNITED STATES DISTRICT JUDGE

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