

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CLIFTON W. MARSHALL, et al.,
Plaintiffs,

v.

NORTHROP GRUMMAN
CORPORATION, et al.,
Defendants.

Case No. 2:16-cv-06794-AB (JCx)

**ORDER DENYING WITHOUT
PREJUDICE JOINT MOTION FOR
FINAL APPROVAL OF
SETTLEMENT AND PLAINTIFFS'
MOTION FOR ATTORNEYS' FEES
[DKT. NOS. 331, 341]**

I. INTRODUCTION

Before the Court is Plaintiffs'¹ and Defendants'² joint motion for final approval of class settlement, and Plaintiffs' motion for attorneys' fees. (Dkt. Nos. 331, 341.)

¹ "Plaintiffs" refers to the following individuals: Clifton Marshall; Thomas Hall; Manuel Gonzalez; Ricky Hendrickson; Phillip Brooks; and Harold Hylton.

² "Defendants" refers to the following entities and individuals: Northrop Grumman Corporation; Northrop Grumman Savings Plan Administrative Committee; Northrop Grumman Savings Plan Investment Committee; Denise Peppard; Michael Hardesty; Kenneth Bedingfield; Kenneth Heintz; Prabu Natarajan; Maria Norman; Mark Caylor; Mark Rabinowitz; Richard Boak; Debora Catsavas; Teri Herzog; Tiffany McConnell King; Christopher McGee; Gary McKenzie; Constance Soloway; Rajender Chandhok; Gloria Flach; James Myers; Sunil Navale; Eric Scholten; and Steven Spiegel.

1 The Court has received objections to the proposed settlement from the following class
2 members: Michael Friedlander, John Murray, Alan Carlson, Peter DeLuca, and Robert
3 Stolte. (Dkt. Nos. 333, 335, 338.) The Court held a hearing on the parties' joint
4 motion for final approval of class settlement on June 30, 2020. For the reasons stated
5 below, the Court **DENIES without prejudice** the parties' joint motion for final
6 approval of class settlement. Because the Court denies final approval of class
7 settlement, the Court **DENIES without prejudice** Plaintiffs' motion for attorneys'
8 fees, reimbursement of expenses, and incentive awards for class representatives.
9 Based on the parties' representations that renewed motions for final approval of an
10 amended settlement agreement and for attorneys' fees are forthcoming, the Court set a
11 hearing date of August 20, 2020, at 9:00 a.m. for these forthcoming motions. (Dkt.
12 No. 348.)

13 **II. BACKGROUND**

14 **a. Plaintiffs' allegations**

15 This class action arises out of the decisions and actions of alleged fiduciaries of
16 Defendant Northrop Grumman Corporation's 401(k) retirement plan. Plaintiffs'
17 operative complaint alleged that Defendants breach their fiduciary duties under
18 ERISA in three respects: (1) by distributing assets of the Northrop Grumman Savings
19 Plan ("the Savings Plan") to Defendant Northrop Grumman Corporation as payment
20 for services it provided to the Savings Plan, (2) by paying unreasonable recordkeeping
21 fees to the Saving Plan's recordkeeper, and (3) by using an active-management
22 strategy for the Savings Plan's Emerging Markets Equity Fund and failing to consider
23 whether to convert the Emerging Markets Equity Fund to passive management. (Dkt.
24 Nos. 132, 264.) Plaintiffs further alleged that Defendants engaged in prohibited
25 transactions by hiring and paying third-party service providers, and that Defendants
26 failed to monitor their appointed fiduciaries. (Dkt. No. 132 ¶¶ 135–48.) Plaintiffs
27 additionally sought to recover, as an equitable remedy, payments to Defendant
28 Northrop Grumman Corporation allegedly made in breach of Defendants' fiduciary

1 duties. (*Id.* ¶¶ 149–53.)

2 **b. Procedural history**

3 Plaintiffs filed their complaint on September 9, 2016. (Dkt. No. 1.) On February
4 13, 2017, Plaintiffs filed their First Amended Complaint.³ (Dkt. No. 70.) Following a
5 joint stipulation of the parties, Plaintiffs filed their Second Amended Complaint, the
6 operative complaint at this juncture, on November 3, 2017. (Dkt. No. 132.)

7 On February 15, 2018, the Court granted in part and denied in part Defendants’
8 partial motion to dismiss Plaintiffs’ Second Amended Complaint. (Dkt. No. 146.) In
9 particular, the Court dismissed with prejudice Plaintiffs’ first through sixth causes of
10 action against Defendant Northrup Grumman Corporation, and struck Plaintiffs’ jury
11 trial demand. (*Id.*) The Court denied Defendants’ motion to dismiss Plaintiffs’ seventh
12 and eighth causes of action against Defendant Northrop Grumman Corporation, and
13 denied Defendants’ motion to dismiss Plaintiffs’ first through eighth causes of action
14 against Individual Defendants.⁴ (*Id.*)

15 On February 1, 2019, Defendants moved for partial summary judgment as to
16 Plaintiffs’ second, third, sixth, and seventh causes of action. (Dkt. No. 168.) The
17 Court granted Defendants’ motion for summary judgment with respect to Plaintiffs’
18 second, sixth, and seventh causes of action. (Dkt. No. 264.) The Court denied
19 Defendants’ motion for summary judgment with respect to Plaintiffs’ third cause of
20 action. (*Id.*) Accordingly, only Plaintiffs’ eighth cause of action against Defendant
21 Northrup Grumman Corporation and Plaintiffs’ first, third, fourth, fifth, and eighth
22

23 ³ Plaintiffs filed their First Amended Complaint after the Court granted in part and
24 denied in part Defendants’ motion to dismiss Plaintiffs’ complaint. (See Dkt. No. 68.)

25 ⁴ “Individual Defendants” refers to the following individuals: Denise Peppard;
26 Michael Hardesty; Kenneth Bedingfield; Kenneth Heintz; Prabu Natarajan; Maria
27 Norman; Mark Caylor; Mark Rabinowitz; Richard Boak; Debora Catsavas; Teri
28 Herzog; Tiffany McConnell King; Christopher McGee; Gary McKenzie; Constance
Soloway; Rajender Chandhok; Gloria Flach; James Myers; Sunil Navale; Eric
Scholten; and Steven Spiegel. (*See* Dkt. No. 146 at 1 n.1.)

1 causes of action against Individual Defendants remain.

2 On the morning of October 15, 2019, the day this case was scheduled for a
3 bench trial, the parties informed the Court that a settlement had been reached. (Dkt.
4 No. 312.) The parties filed their proposed settlement with the Court on January 13,
5 2020, and jointly moved for preliminary approval of the proposed class settlement.
6 (Dkt. No. 321.) The Court held a hearing on the parties' joint motion for preliminary
7 approval of class settlement on January 31, 2020, and issued an order granting
8 preliminary approval of the settlement on February 3, 2020. (Dkt. Nos. 325, 326.)

9 After granting preliminary approval of the settlement, the Court set a Fairness
10 Hearing for June 5, 2020. (Dkt. No. 326.) The parties filed their joint motion for final
11 approval of the settlement on May 22, 2020. (Dkt. No. 341.) On June 1, 2020, in light
12 of an intervening public health emergency, the Court issued an order converting the
13 Fairness Hearing to a telephonic status conference. (Dkt. No. 345.)

14 At the June 5, 2020 telephonic status conference, the Court asked the parties
15 how it could ensure that objecting class members could meaningfully participate in the
16 Fairness Hearing. The Court additionally requested that Plaintiffs' attorneys provide
17 (1) notice of a rescheduled Fairness Hearing on the settlement notice website, and (2)
18 direct notice to the two objectors who were not represented by counsel. After this
19 hearing, the Court continued the Fairness Hearing to Tuesday, June 30, 2020, at 9:00
20 a.m. (Dkt. No. 346.) In its order, the Court stated that any objectors that wished to
21 participate at the hearing could contact Plaintiffs' counsel and/or this Court's
22 Courtroom Deputy. (*Id.*) On June 16, 2020, Plaintiffs' counsel filed a declaration
23 stating (1) that the settlement notice website was updated on June 8, 2020 to notify
24 class members that the Fairness Hearing had been postponed to June 30, 2020, and (2)
25 that Plaintiffs' counsel delivered via FedEx letters informing the unrepresented
26 objectors that the Fairness Hearing had been continued to June 30, 2020. (Dkt. No.
27 347.)

28 As of the date of the Fairness Hearing, June 30, 2020, five objectors have raised

1 objections to the parties' proposed settlement. Two of those objectors, Michael
2 Friedlander and John Murray, submitted letters to the Court. (Dkt. Nos. 335, 338.)
3 Three of those objectors, Alan Carlson, Peter DeLuca, and Robert Stolte, filed their
4 objections with the Court through their attorneys. (Dkt. No. 333.) No other individuals
5 have thus far raised an objection to the parties' proposed settlement agreement.

6 **c. Overview of the settlement agreement**

7 The key provisions of the parties' proposed settlement agreement are as
8 follows:

9 **i. Class definition**

10 The parties' proposed settlement agreement includes, by reference, the class
11 that this Court certified, which is as follows:

12 All persons, excluding defendants and/or other individuals who are
13 liable for the conduct described in the complaint, who are or were
14 participants or beneficiaries of the Northrop Grumman Savings Plan at
15 any time between September 9, 2010 and the date of judgment, and
16 were affected by the conduct set forth in this Complaint.

(See Dkt. No. 321-1 "Proposed Settlement" § 1.2; *see also* Dkt. No. 130 at 22.)

17 **ii. Payment to class members**

18 Under the parties' proposed settlement agreement, Defendants agree to pay a
19 sum of \$12,375,000 into a Qualified Settlement Fund. (Proposed Settlement § 2.27.)
20 From this \$12,375,000 figure, class counsel seeks to recover \$4,125,000 in attorneys'
21 fees, as well as litigation expenses in an amount not to exceed \$450,000. (*Id.* § 7.1.)
22 Class counsel also seeks to recover an incentive award for each of the class
23 representatives in an amount not to exceed \$25,000 per class representative, which
24 would also be paid from the gross settlement amount. (*Id.*) Accordingly, the net
25 settlement amount for all class members would equal \$12,375,000 less the fees, costs,
26 and expenses identified in the proposed settlement agreement. (*Id.* § 2.29.)

27 **iii. Plan of allocation**

28 To distribute the net settlement amount to class members, the proposed

1 settlement agreement establishes a Plan of Allocation. (*Id.* § 2.33.) Under the Plan of
2 Allocation, the net settlement amount would be divided into two portions: (1) the
3 Administrative Fee Portion (equal to 80% of the net settlement amount), and (2) the
4 Emerging Markets Equity Fund Portion (equal to 20% of the net settlement amount).
5 (*Id.* § 6.4.3.)

6 With respect to the Administrative Fee Portion, class members would receive a
7 percentage of this portion that is the product of the sum of the participant's quarter-
8 ending total account balances for each quarter from September 30, 2010 through
9 December 31, 2013 divided by the sum of the quarter-ending net asset value of the
10 Savings Plan for each quarter during that period. (*Id.* § 6.4.4.)

11 With respect to the Emerging Markets Equity Fund Portion, class members
12 would receive a percentage of this portion that is the product of the sum of the
13 participant's quarter-ending account balances invested in the Emerging Markets
14 Equity Fund for each quarter from December 31, 2010 through December 31, 2014
15 divided by the sum of the quarter ending net asset value of the Emerging Markets
16 Equity Fund for each quarter during that period. (*Id.* § 6.4.5.)

17 The proposed settlement agreement clarifies that “[n]o amount shall be
18 distributed to a Class Member that is five dollars (\$5.00) or less because such an
19 amount is de minimis and would cost more in processing than its value.” (*Id.*) The
20 proposed settlement further clarifies that “[i]n the event that the Settlement
21 Administrator determines that the Plan of Allocation would otherwise require
22 payments exceeding the Net Settlement Amount, the Settlement Administrator is
23 authorized to make such changes as are necessary to the Plan of Allocation such that
24 said totals do not exceed the Net Settlement Amount.” (*Id.* § 6.4.8.) The Settlement
25 Administrator is defined in the proposed settlement agreement as “an independent
26 contractor to be retained by Class Counsel.”⁵ (*Id.* § 2.41.) The Settlement
27

28 ⁵ Class counsel has retained Analytics Consulting LLC to serve as the Settlement

1 Administrator is authorized to calculate payments pursuant to the Plan of Allocation
2 outlined above. (*Id.* §§ 6.4, 6.8.)

3 **iv. Attorneys' fees and costs**

4 As noted above, class counsel seeks to recover their attorneys' fees in an
5 amount not to exceed \$4,125,000, in addition to litigation costs and expenses in an
6 amount not to exceed \$450,000. (*Id.* § 7.1.) Class counsel also seeks to recover
7 \$25,000 per class representative as an incentive award. (*Id.*) Each of these expenses
8 would be paid from the gross settlement amount identified above (\$12,375,000). (*Id.*
9 §§ 2.27, 2.29.)

10 **v. Release of claims**

11 The parties' proposed settlement agreement also contains provisions addressing
12 class members' release of claims and covenant not to sue. (*Id.* §§ 8.1, 8.2, 8.3.) In
13 particular, the proposed settlement agreement states that "[a]s of the Settlement
14 Effective Date, the [Savings Plan] and the Class Members . . . on behalf of themselves
15 and the [Savings Plan] . . . shall be deemed to have fully . . . settled, released,
16 relinquished, waived, and discharged the Released Parties from the Released
17 Claims[.]" (*Id.* § 8.1.) The proposed settlement agreement further provides that "[a]s
18 of the Settlement Effective Date, the Class Members on behalf of themselves and the
19 [Savings Plan] . . . expressly agree that they . . . shall not sue or seek to institute . . . in
20 any action or proceeding . . . any cause of action, demand, or claim on the basis of,
21 connected with, or arising out of any of the Released Claims." (*Id.* § 8.2.) With respect
22 to unknown claims, the proposed settlement agreement provides that "[e]ach Class
23 Member and the Plan . . . stipulate and agree with respect to any and all Released
24 Claims that, upon entry of the Final Order, the Class Members are conclusively
25 deemed to . . . settle, release, relinquish, waive, and discharge any and all rights or
26 benefits that they may now have, or in the future may have, under any law relating to

27 _____
28 Administrator. (*See* Dkt. No. 342-1 ¶ 2.)

1 the releases of unknown claims, including without limitation, Section 1542 of the
2 California Civil Code[.]” (*Id.* § 8.3.)

3 The parties’ proposed settlement agreement extensively defines “Released
4 Claims.” In particular, the proposed settlement agreement states that Released Claims
5 means, in part, “any and all actual or potential claims, actions, demands, rights,
6 obligations, liabilities, damages, attorneys’ fees, expenses, costs, and causes of action .
7 . . . whether brought in an individual, representative, or any other capacity . . . whether
8 known or unknown . . . for actions or omissions that occurred during the Class Period
9 only, that:” (1) were asserted in the class action or might have been asserted in the
10 Class Action, or (2) would be barred by the principles of res judicata or collateral
11 estoppel had the claims been fully litigated and resulted in a final judgment. (*See Id.*
12 § 2.39.) The proposed settlement agreement clarifies, however, that its definition of
13 Released Claims “specifically excludes claims of individual denial of benefits under
14 ERISA § 502(a)(1)(B) other than claims for benefits under the [Savings Plan] during
15 the Class Period, wages, labor or employment claims of any type, including but not
16 limited to employment discrimination or wrongful termination, or any workers’
17 compensation claim.” (*Id.* § 2.39.8.)

18 **III. LEGAL STANDARD**

19 Under Federal Rule of Civil Procedure 23(e)(2), the Court may approve a class
20 action settlement “only after a hearing and only on finding that it is fair, reasonable,
21 and adequate[.]” In reviewing proposed class action settlements, the Court must
22 “ensure[] that unnamed class members are protected from unjust or unfair settlements
23 affecting their rights, while also accounting for the strong judicial policy that favors
24 settlements, particularly where complex class action litigation is concerned.” *See*
25 *Campbell v. Facebook, Inc.*, 951 F.3d 1106, 1121 (9th Cir. 2020) (citing *In re*
26 *Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 556, 568 (9th Cir. 2019) (en banc)).
27 In evaluating the fairness of a proposed class action settlement, the Court may
28 consider some or all of the following factors: (1) the strength of the plaintiffs’ case,

(2) the risk, expense, complexity, and likely duration of further litigation, (3) the risk of maintaining class action status throughout the trial, (4) the amount offered in settlement, (5) the extent of discovery completed and the stage of the proceedings, (6) the experience and views of counsel, (7) the presence of a governmental participant, and (8) the reaction of the class members to the proposed settlement. *See Id.* (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)).

With respect to the proper scope of a settlement agreement’s release of liability, “[a] settlement agreement may preclude a party from bringing a related claim in the future ‘even though the claim was not presented and might not have been presentable in the class action,’ but only where the released claim is ‘based on the identical factual predicate as that underlying the claims in the settled class action.’” *See Hesse v. Spring Corp.*, 598 F.3d 581, 590 (9th Cir. 2010) (quoting *Williams v. Boeing Co.*, 517 F.3d 1120, 1133 (9th Cir. 2008)). “Put another way, a release of claims that ‘go beyond the scope of the allegations in the operative complaint’ is impermissible.” *Lovig v. Sears, Roebuck & Co.*, No. EDCV 11-00756-CJC (RNBx), 2014 WL 8252583, at *2 (C.D. Cal. Dec. 9, 2014) (quoting *Willner v. Manpower, Inc.*, No. 11-CV-02846-JST, 2014 WL 4370694, at *7 (N.D. Cal. Sept. 3, 2014)).

IV. DISCUSSION

a. The parties’ proposed settlement agreement releases claims that go beyond the scope of the allegations in the operative complaint

The Court concludes that the parties’ proposed settlement agreement contains an overly broad release of liability. As class objectors Alan Carlson, Peter DeLuca, and Robert Stolte state in their objections, the factual allegations underlying Plaintiffs’ claims concern Defendants’ management and administration of the Savings Plan. (*See* Dkt. No. 333 at 4–5.) In particular, Plaintiffs allege in their operative complaint that Defendants (1) distributed the Saving Plan’s assets to Defendant Northrop Grumman Corporation as payment for services it provided to the Savings Plan, (2) paid unreasonable recordkeeping fees to the Saving Plan’s recordkeeper, and (3) used an

1 active-management strategy for the Savings Plan’s Emerging Markets Equity Fund
 2 and failed to consider whether to convert the Emerging Markets Equity Fund to
 3 passive management. (*See* Dkt. Nos. 132.)

4 Despite the limited factual predicate upon which Plaintiffs bring suit, the
 5 parties’ proposed settlement agreement purports to preclude “any cause of action,
 6 demand, or claim on the basis of, connected with, or arising out of any of the Released
 7 Claims.” (Proposed Settlement § 8.2.) As noted above, Released Claims is defined
 8 extensively in the proposed settlement agreement to include, among other things, “any
 9 and all actual or potential claims, actions, demands, rights, obligations, liabilities,
 10 damages, attorneys’ fees, costs, and causes of action . . . whether known or unknown .
 11 . . for actions or omissions that occurred during the Class Period only,” that (1) were
 12 asserted in the class action or could have been asserted in the Class Action, or (2)
 13 would be barred by the principles of res judicata or collateral estoppel had the claims
 14 been fully litigated and resulted in a final judgment. (*See Id.* § 2.39.)

15 By releasing “any cause of action, demand, or claim on the basis of, connected
 16 with, or arising out of any of the Released Claims,” the parties’ proposed settlement
 17 agreement “could capture claims that go beyond the scope of the allegations in the
 18 operative complaint, which the Ninth Circuit has held is inappropriate.” *See Willner v.*
 19 *Manpower, Inc.*, 2014 WL 4370694, at *7 (N.D. Cal. Sept. 3, 2014) (citing *Hesse*, 598
 20 F.3d at 590).⁶ The overly broad scope of this release is underscored by the expansive
 21 interpretations that courts give to phrases such as “connected with” or “arising out of.”
 22 *Cf. Yei A. Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir.
 23 2018) (interpreting the phrase “relating to” a particular agreement to cover “any
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 26 ⁶ Although this broad language prohibiting Plaintiffs from bringing suit is styled as a
 27 covenant not to sue, as opposed to a release from liability, this distinction alone does
 28 not render it permissible. *See Skilstaf, Inc. v. CVS Caremark Corp.*, 669 F.3d 1005,
 1017 n.10 (9th Cir. 2012) (“[U]nder the modern view a covenant not to sue, like a
 release, operates as a complete bar to the underlying litigation.”).

disputes that reference the agreement or have some ‘logical or causal connection’ to the agreement,” and explaining that the phrase “relating to” is synonymous with “in connection with.”). Because the scope of the proposed settlement agreement’s release of liability could extend to any cause of action that has a logical or causal connection to the Released Claims, and is not limited to claims based on an identical factual predicate, the proposed release of liability is impermissible.

The parties’ response to these objections is unavailing. In particular, the parties contend that any ambiguity regarding the scope of released claims can be resolved by stipulating that “Released Claims” as defined in Section 2.39 are limited to the facts of the operative complaint. (*See* Dkt. No. 340 at 3.) However, it is well established that a court “may not delete, modify, or substitute provisions of [a proposed settlement agreement,]” but rather “must consider the proposal as a whole and as submitted.” *See Officers for Justice v. Civil Serv. Com’n of City and Cty. of San Francisco*, 688 F.2d 615, 630 (9th Cir. 1982); *see also In re Bluetooth Headset Products Liability Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (holding that an interpretation of a settlement agreement that “effectively ‘delete[d]’ [a provision] from the settlement . . . is beyond the scope of the court’s discretion.”).⁷ Additionally, although the parties propose stipulating to a definition of “Released Claims” in Section 2.39, the overly broad release of liability appears in Section 8.2 of the proposed settlement agreement,

⁷ The parties’ reliance on *Campbell v. Facebook, Inc.* 951 F.3d 1006 (9th Cir. 2020) does not demonstrate otherwise. In *Campbell*, the court relied on Facebook’s counsel’s assurances at oral argument that the phrase claims for declaratory and injunctive relief was intended to apply only to those claims that shared an identical factual predicate. *See* 951 F.3d at 1124. In relying on these assurances from counsel, the court was not compelled to adopt an interpretation of a settlement agreement that effectively deleted certain provisions of the agreement. Moreover, any interpretation of *Campbell* that is inconsistent with prior Ninth Circuit precedent is impermissible. *See Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (“[A] later three-judge panel considering a case that is controlled by the rule announced in an earlier panel’s opinion has no choice but to apply the earlier-adopted rule; it may not any more disregard the earlier panel’s opinion than it may disregard a ruling of the Supreme Court.”).

1 wherein class members would be barred from bringing “any cause of action, demand,
2 or claim on the basis of, connected with, or arising out of any of the Released
3 Claims.” (Proposed Settlement § 8.2.) Because the parties’ proposed stipulation does
4 not address the overly broad language of Section 8.2, and would compel the Court to
5 adopt an interpretation that effectively deletes Section 8.2 from the proposed
6 settlement agreement, such an approach is beyond the Court’s discretion to adopt.

7 In sum, because the parties’ proposed settlement agreement includes a release
8 of liability that extends beyond claims based on an identical factual predicate as the
9 claims at issue in the operative complaint, the Court must deny approval of the
10 proposed settlement.

11 V. CONCLUSION

12 For the reasons stated above, the parties’ joint motion for final approval of
13 settlement is **DENIED**. Plaintiffs’ motion for attorneys’ fees is similarly **DENIED**.
14 These denials are **without prejudice**, as the parties may move again for final approval
15 of settlement and attorneys’ fees should the parties reach an agreement that cures the
16 deficiency identified in this order. Based on the parties’ representations that renewed
17 motions for final approval of an amended settlement agreement and for attorneys’ fees
18 are forthcoming, the Court set a hearing date of August 20, 2020, at 9:00 a.m. for
19 these forthcoming motions. (Dkt. No. 348.)

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21 **IT IS SO ORDERED.**

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23 Dated: June 30, 2020



24 HONORABLE ANDRÉ BIROTTE JR.
25 UNITED STATES DISTRICT COURT JUDGE
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