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17 UNITED STATES DISTRICT COURT
18 SOUTHERN DISTRICT OF CALIFORNIA
19

20 CARY A. JARDIN,
21 Plaintiff,
22 v.
23 DATALLEGRO, INC. and STUART FROST,
24 Defendants.

Case No. 10-CV-2552 IEG (WVG)

**JOINT STATEMENT REGARDING
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER OR, IN THE
ALTERNATIVE, STAY OF DISCOVERY**

Oral Argument Requested

Courtroom: F

Honorable William V. Gallo

1 **I. DECLARATION OF COMPLIANCE WITH MEET AND CONFER**
2 **REQUIREMENTS**

3 Defendants DATAlegro, Inc. and Stuart Frost (“Defendants”) have met and conferred
4 with Plaintiff Cary Jardin (“Plaintiff”) on all the issues raised in Defendants’ Motion for
5 Protective Order. (Decl. of Jason W. Wolff in Sup. of Joint Statement (“Wolff Decl.”) ¶ 2).

6 **II. DEFENDANTS’ MEMORANDUM OF POINTS AND AUTHORITIES IN**
7 **SUPPORT OF MOTION FOR PROTECTIVE ORDER OR, IN THE ALTERNATIVE,**
8 **STAY OF DISCOVERY**

9 Defendants move for a protective order pursuant to Rule 26(b) of the Federal Rules of
10 Civil Procedure against irrelevant, premature, redundant, and overly burdensome discovery served
11 by Plaintiff in two related cases. In the alternative, Defendants seek a continuance of the
12 discovery for both sides in the earlier-filed case until discovery can start in the later-filed case, to
13 avoid duplicative and premature discovery and piecemeal disputes. Defendants request that the
14 Court set a hearing on this motion and hold oral argument.

15 The discovery, mainly a series of at least eight depositions noticed by Plaintiff, concerns
16 the following related cases filed by Plaintiff Cary Jardin against Defendants DATAlegro and
17 Stuart Frost: *Cary Jardin v. DATAlegro, Inc. and Stuart Frost*, Case No. 08-CV-1462 IEG
18 (WVG) (“the 2008 case”) and *Cary Jardin v. DATAlegro, Inc. and Stuart Frost*, Case No. 10-CV-
19 2552 IEG (WVG) (“the 2010 case”). (See Doc. No. 5, Not. of Related Case; Doc. No. 6, Order of
20 Transfer; Wolff Decl. ¶¶ 3-4, Ex. A). Plaintiff appears to be using the 2008 action as a vehicle to
21 take premature discovery in his newly filed 2010 action, in violation of the Federal Rules of Civil
22 Procedure, the Local Rules, and the Protective Order in the 2008 case.¹

23 The 2008 case alleges that Defendants made and sold products infringing Plaintiff’s patent
24 No. 7,177,874 (“the ‘874 patent”). (Case No. 08-CV-1462, Compl. ¶¶ 14-21). Plaintiff seeks
25 damages for infringement and an injunction. (*Id.* ¶¶ 16, 21).

26
27 ¹ Prior to submitting this Joint Statement, Defendants’ counsel conferred with Plaintiff’s
28 counsel on Defendants’ concerns regarding the two parallel cases. Plaintiff’s counsel represented
that they would not violate the protective order or the Federal or Local Rules and agreed that there
was an overlap between discovery in the two matters. (Wolff Decl. ¶ 2).

1 The 2010 case, although styled as a “complaint for correction of inventorship,” is a thinly
2 veiled attempt to allege trade secret misappropriation. Plaintiff alleges that Frost, while employed
3 by Plaintiff’s company, had access to Plaintiff’s confidential intellectual property. (Case No. 10-
4 CV-2552, Complaint ¶¶ 22-23, 27-37, 41-43). Frost allegedly used this intellectual property to
5 obtain his patent No. 7,818,349 (“the ‘349 patent”) and assigned the patent to DATAlegro. (*See*,
6 *e.g.*, *id.* ¶¶ 100-06, 126-47). Microsoft then acquired DATAlegro. (*Id.* ¶ 95). Plaintiff alleges
7 counts for correction of inventorship, declaration of ownership, conversion, constructive trust,
8 accounting, and slander of title. Plaintiff seeks to be named as a co-inventor on the ‘349 patent, be
9 declared its owner, and be compensated for its value. (*Id.* ¶¶ 106, 125, 147, 160, 169, 198). In
10 other words, everything that does not infringe the patent (the 2008 case) is a misappropriated trade
11 secret (the 2010 case).

12 Plaintiff’s subpoenas and document requests issued in the 2008 case² seek improper
13 premature discovery in the 2010 trade secret case, prohibited by Fed. R. Civ. P. 26(f) and trade
14 secret statutes. In particular, Plaintiff has issued multiple subpoenas and has noticed multiple
15 depositions seeking information regarding the acquisition and valuation of DATAlegro by
16 Microsoft. Only the 2010 Complaint makes allegations regarding the acquisition and seeks
17 damages based on the consideration paid by Microsoft.³ (Compl. ¶ 95, 166-67). In contrast, the
18 2008 Complaint seeks damages caused by patent infringement, which are not related to the entire
19 value of DATAlegro. The damages for infringement – the reasonable royalty for the use of the
20 invention – are usually determined through a “hypothetical negotiation, occurring between the
21 parties at the time that infringement began.” *Uniloc USA, Inc. v. Microsoft Corp.*, --F.3d--, 2011
22 WL 9738, 16 (Fed. Cir. 2011). The parties to the negotiation are the licensor and licensee of the
23 technology. Microsoft was not a licensee of DATAlegro’s technology, but a third-party
24 purchaser of the company, and Microsoft’s valuation and its acquisition of DATAlegro are

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26 ² *See, e.g.*, related case *Jardin v. DATAlegro, et al.*, Case No. 11-CV-00087 IEG (WVG)
regarding Plaintiff’s subpoena seeking discovery related to the Frost patent.

27 ³ Indeed, Plaintiff initially tried to devise a damages theory in the 2008 case based on the
28 acquisition price paid for DATAlegro by Microsoft. It appears that once Plaintiff realized that it
would be futile to pursue such a theory, he devised new claims against the Defendants and filed
the 2010 case.

1 irrelevant to the 2008 case.⁴ Plaintiff has issued at least five subpoenas in the 2008 case seeking
2 discovery on this topic.

3 This Court should grant a protective order against any discovery served in the 2008 case
4 but seeking information related to the 2010 case. First, discovery cannot be conducted before a
5 Rule 26(f) meeting. Fed.R.Civ.P.(d)(1); *Collagen Nutraceuticals, Inc. v. Neocell Corp.*, 2010 WL
6 3069715, 4 (S.D. Cal. 2010). In the 2010 case, a Rule 26(f) meeting has not occurred and will not
7 occur until after a ruling on Defendants' Motion to Dismiss and for a More Definite Statement, set
8 for hearing on March 21, 2011. Second, this discovery is related to trade secrets allegedly
9 misappropriated by Defendants and cannot be conducted before Plaintiff identifies the alleged
10 secrets with reasonable particularity. *See* Cal. Code Civ. P. § 2019.210; *nSight, Inc. v. PeopleSoft,*
11 *Inc.*, 296 Fed.Appx. 555, 560, 2008 WL 4542855, 4 (9th Cir. 2008); *I-Flow Corp. v. Apex Medical*
12 *Technologies, Inc.*, 2008 WL 2233962, 1 (S.D. Cal. 2008). The 2010 Complaint alleges several
13 common law claims related to "conversion" of confidential information. (Case No. 10-CV-
14 02552, Compl. ¶¶ 126- 198). All of these claims are preempted by the California Trade Secret
15 Act because they are based on allegations of misappropriation of trade secrets or confidential
16 information. *See Mattel, Inc. v. MGA Entertainment, Inc.*, 2010 WL 5422504, 21, 54 (C.D. Cal.
17 2010). This issue is one of the grounds for Defendants' pending Motion to Dismiss or Motion for
18 a More Definite Statement, set for hearing on March 31, 2011. (Case No. 10-CV- 02552, Dkt.
19 No. 16). Plaintiff alleges that DATAlegro was acquired due to the value of these trade secrets,
20 therefore the depositions are discovery related to trade secrets. (Compl. ¶¶ 126-47, 164-67).
21 Plaintiff has referred to the trade secrets only as unspecified "intellectual property" and has not
22 identified them with reasonable particularity. Therefore any discovery regarding the acquisition is
23 barred.

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25 _____
26 ⁴ Plaintiff asserts below that he is seeking discovery for later work by Microsoft related to
27 the alleged infringement by DATAlegro in the 2008 case. However, this is also not likely to lead
28 to relevant information in the 2008 case. The two patent claims that remain are method claims,
and only DATAlegro and Frost are alleged to infringe, and Microsoft is not a party, so what
Microsoft did or did not do after the acquisition was completed are not relevant nor likely to lead
to admissible evidence regarding this theory. The request is a ruse to gain early discovery for the
2010 case.

1 In addition, it is unfair and prejudicial to allow Plaintiff's counsel to conduct discovery
2 into Defendants' highly confidential and proprietary materials when the same legal team will craft
3 Plaintiff's trade secret statement. One of the purposes for requiring the plaintiff in a trade secret
4 misappropriation case to provide a statement of the alleged trade secrets before conducting any
5 discovery is to prevent the plaintiff from invading the defendants' trade secrets or potentially using
6 them as the basis for plaintiff's claim later. *See Advanced Modular Sputtering, Inc. v. Superior*
7 *Court*, 132 Cal.App.4th 826, 833-834 (2005); *see also See Computer Economics, Inc. v. Gartner*
8 *Group*, 50 F.Supp.2d 980, 985 (S.D. Cal. 1999) (both cases stating that the trade secret statement
9 requirement serves the purpose of preventing plaintiffs from using discovery to obtain defendants'
10 trade secrets).

11 Furthermore, considering the overlap between the two cases, the discovery outstanding in
12 the 2008 case is redundant, unduly burdensome, and should be stayed until discovery can start in
13 the 2010 case to avoid piecemeal discovery disputes. Due to the common factual background, the
14 discovery in two cases will overlap for both sides. Most of the witnesses are third parties who will
15 suffer a higher burden than parties from being deposed. Therefore it is a burdensome and wasteful
16 exercise for Plaintiff to issue deposition notices for witnesses who will have to testify again.

17 Noticing these depositions now is also likely to create multiple discovery disputes
18 regarding which case the testimony is relevant to. The disputes will have to be resolved in a
19 piecemeal fashion, wasting the Court's time and requiring it to draw relevance lines. Therefore
20 Defendants discussed with Plaintiff the alternative relief of staying discovery on the overlapping
21 witnesses and extending the schedule in the 2008 case until discovery can start in the 2010 case.⁵
22 This solution will eliminate the need to draw and police discovery lines and to burden the same
23 witnesses repeatedly. (Wolff Decl. ¶ 2).

24 Accordingly, Defendants seek relief from the Court in the form of a protective order: (1)
25 barring Plaintiff's counsel and team with access to Defendants' highly confidential and proprietary

26 ⁵ The discovery in the 2010 case is likely to start around mid- or late May. Rule 26(f)
27 meeting will not take place until the ruling on Defendants' Motion to Dismiss, set for hearing on
28 March 21, 2011, Plaintiff's amendment, and Defendants' Answer. The issue regarding the Trade
Secret Act preemption and service of a sufficient trade secret statement will not be resolved prior
to that time. The case schedule will thus have to be extended by approximately five months.

1 materials in the 2008 case from participating in the drafting of the trade secret statement in the
2 2010 case and sharing such designated materials or information from the 2008 case with the trial
3 team handling the 2010 case until after a sufficient trade secret statement is served; (2) prohibiting
4 Plaintiff from conducting redundant depositions of the same witnesses in the two cases; or, in the
5 alternative, (3) staying the overlapping discovery in the 2008 case until discovery can start in the
6 2010 case and extending the schedule in the 2008 case by approximately five months.

7 **III. PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT**
8 **OF OPPOSITION TO MOTION FOR PROTECTIVE ORDER**

9 Defendants continue to waste the resources of the Court, as well as of Mr. Jardin, by filing
10 motions designed to mire down the discovery process rather than to resolve disputes between the
11 parties. Here, Defendants request *another* protective order that addresses activities that are
12 prohibited by the existing protective order in the 2008 case, as well as Federal and Local Rules.
13 The protective order in the 2008 case prohibits the improper use of Protected Material. Therefore,
14 the requested relief has either been addressed through that protective order (requested relief 1) or
15 is improper under that protective order (requested relief 2) or both (requested relief 3). Moreover,
16 Defendants' first request is more akin to a platform to broadcast their desperate plea that the Court
17 recast the 2010 inventorship case as a trade secret action. Defendants have already filed another
18 motion requesting that the 2010 inventorship case be recast as a trade secret case, and its first
19 request is therefore redundant and/or premature.

20 **A. The Existing Protective Order Prohibits Improper Use of Protected Material**

21 A protective order already exists in the 2008 infringement case that prevents use of
22 Protected Material for any other purpose – including other litigation. (2008 case, Dkt. No. 77, ¶6).
23 There is no dispute that this protective order also offers protection to third parties – even those like
24 Microsoft who are intimately intertwined with the 2008 case. (*Id.*, ¶26). The parties are also
25 bound to follow the Federal and Local Rules related to discovery. Defendants' first request for
26 relief therefore has already been addressed. (2008 case, Dkt. No. 78; Fed. R. Civ. P., 26-37; Local
27 Rules). Specifically, paragraph 6 of the protective order prevents use of Defendants Protected
28 Material “for any other purpose ... including ... any other litigation,” which would necessarily

1 include the 2010 inventorship case. (2008 case, Dkt. No. 77, Ex. 1, ¶6).

2 The true purpose of Defendants' first requested relief is belied through the request itself –
3 it is a platform to try to once again broadcast its plea that the 2010 case might somehow be
4 transmogrified from an inventorship dispute into a trade secret dispute. Specifically, Defendants
5 ask that Mr. Jardin's counsel be barred from participating in the 2010 case "until after a sufficient
6 trade secret statement is served." *Supra*, at 5. Such relief would be long lasting indeed – as the
7 2010 case is an action to correct inventorship and *not* a trade secret case. (2010 case, Dkt. No. 1).
8 Thus, no trade secret statement will be served in that action.

9 Defendants undoubtedly have a strategic reason for wanting to recast the 2010
10 inventorship case into a trade secret case, and are filing multiple papers to try to achieve that goal.
11 They have filed letter briefs (2008 case, Dkt. No. 144, now withdrawn; 2010 case, Dkt. No. 20,
12 now withdrawn), a Motion to Dismiss (2010 case, Dkt. No. 16), and now this joint statement
13 (repeatedly revised by Defendants in response to Mr. Jardin's arguments) each delivering their
14 desperate pleas asking this Court to somehow contort the 2010 case from an inventorship suit into
15 a trade secret suit.

16 Defendants concede that the issue of whether the 2010 inventorship case could somehow
17 be transmogrified into a trade secret action is the subject of a pending motion before the Court.
18 (*Supra* at 3; 2010 case, Dkt. No. 16, hereinafter "Motion to Dismiss"). Yet, Defendants
19 apparently believe that they will have a sufficient strategic advantage if the inventorship action is
20 recast as a trade secret suit that they persist in repeatedly raising the issue, filing duplicative papers
21 attempting to seek that change, and misrepresenting the record as to these issues.⁶

22 Let there be no mistake about it – the 2010 case "is an action for correction of inventorship
23 arising under the patent laws of the United States, 35 U.S.C. §256, with related counts." (2010
24 case, Dkt. No. 1, ¶4). The Complaint describes the collaboration between Mr. Frost and Mr.
25 Jardin and Mr. Frost's inclusion of information from Mr. Jardin's non-public patent applications in

26 _____
27 ⁶ Despite Defendants' assertions on page 3, Mr. Jardin *never* alleged that DATAlegro was
28 acquired due to the value of any "trade secrets." Defendants' statement on page 3 that "Plaintiff
alleges that DATAlegro was acquired due to the value of these trade secrets, therefore the
depositions are discovery related to trade secrets" misrepresents the record and is not well-taken.

1 a patent application Mr. Frost filed that did not name Mr. Jardin as an inventor. (2010 case, Dkt.
2 No. 1, ¶¶13-55, 129-132, 151-158, 162-164, 167, 177). Despite the initial non-public nature of a
3 patent application, a patent application is the antithesis of a trade secret. A trade secret requires,
4 among other things, information that is “the subject of efforts that are reasonable under the
5 circumstances to maintain its secrecy.” Cal. Civ. Code. §3426.1(d)(2). A classic example is the
6 formula for Coca-Cola. At the opposite end of the spectrum of secrecy are patents, which require
7 the inventor to describe the invention to the public in “full, clear, concise, and exact terms” in
8 exchange for the opportunity of having a limited monopoly over the invention after the issuance of
9 a patent. 35 U.S.C. §112; *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722,
10 731 (2002). The distinction could not be more clear – the federal patent system encourages
11 disclosure and gives inventors the choice of keeping the invention a secret and reaping the fruits
12 indefinitely or disclosing the invention through the patent process. *Bonito Boats, Inc. v. Thunder*
13 *Craft Boats, Inc.*, 489 U.S. 141, 150-51 (1989). A discovery cannot be both the subject of a patent
14 and also a trade secret. *Id.* at 149 (an inventor “must content himself with either secrecy or a legal
15 monopoly”)(citation omitted). Mr. Jardin chose the protection offered by the limited legal
16 monopoly of a patent, and in return disclosed his discovery to the public through the filing of his
17 patent applications.

18 Mr. Jardin’s Opposition to Defendants’ Motion to Dismiss, which will be filed in the 2010
19 inventorship case, will address this distinction in greater detail. For now, Defendants put the
20 proverbial cart in front of the horse when they request that Mr. Jardin’s counsel be barred from
21 participation in the 2010 case “until after a sufficient trade secret statement is filed.” Mr. Jardin
22 has no intention of filing such a statement, because the inventorship case is not a trade secret case.
23 For this reason alone, Defendants’ first request for relief should be denied in its entirety.

24 Even disregarding the dispute over the nature of the 2010 case (which need not be decided
25 now), the protective order from the 2008 case already prohibits use of Protected Material in the
26 2010 case. Thus, Defendants’ first request must be dismissed for seeking redundant relief.

27 **B. Defendants Seek Relief Prohibited by the Existing Protective Order**

28 Defendants’ second request seeks to prohibit Mr. Jardin from conducting “depositions of

1 the same witnesses in the two cases.” *Supra* at 5. However, paragraph 6 of the protective order
2 prevents use of Defendants’ Protected Material “for any other purpose ... including ... any other
3 litigation,” which necessarily includes the 2010 inventorship case. (2008 case, Dkt. No. 77, ¶6).
4 Defendants’ second requested relief, if granted, would effectively force Mr. Jardin from deposing
5 a witness in one of the two cases, even though that witness’ testimony may have relevance to both
6 cases. In fact, Defendants concede that “discovery in the two cases will overlap for both sides”
7 and assert that some discovery “is redundant.” *Supra* at 4. The only viable option that doesn’t run
8 afoul of the protective order in the 2008 case is to allow a witness to be deposed in both cases.

9 As part of his damages discovery in the 2008 infringement case, Mr. Jardin seeks to
10 distinguish the value of the accused technology from the rest of Microsoft’s valuation of
11 Datallegro. Defendants concede *supra* that damages from infringement include a reasonable
12 royalty, but deny that Microsoft’s valuation of the infringing technology is relevant to determining
13 that reasonable royalty.⁷ A relevant matter is “any matter that bears on, or that reasonably could
14 lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer*
15 *Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Moreover, “***factual developments occurring***
16 ***after the date of the hypothetical negotiation can inform the damages calculation***” and “***the***
17 ***hypothetical negotiation analysis ‘permits and often requires a court to look to events and facts***
18 ***that occurred thereafter*** and that could not have been known to or predicted by the hypothesized
19 negotiators.” *Lucent Techs. v. Gateway, Inc.*, 580 F.3d 1301, 1333 (Fed. Cir. 2009), *cert. denied*,
20 ___ U.S. ___, 130 S. Ct. 3324 (2010) (citations omitted, emphasis added). Thus, some of the
21 witnesses will provide relevant testimony in the 2008 infringement case as well as in the 2010
22 inventorship case. This issue has been briefed and is before the Court for resolution. (*Jardin v.*
23 *DATALlegro, et al.*, No. 11-cv-00087 IEG (WVG), Dkt. Nos. 1, 8, 10).

24 _____
25 ⁷ Defendants assert that Microsoft’s valuation and acquisition of Datallegro are irrelevant
26 to the 2008 case. On February 10, 2011, in an attempt to address Defendants’ concerns, Mr.
27 Jardin offered to discontinue pursuing damages discovery from Microsoft in exchange for the
28 stipulation – for use only in the 2008 case and any appeals – that the entirety of the \$275 million
consideration paid for Datallegro was attributed to acquire the technology that is accused of
infringing the ‘874 patent. Defendants’ refusal to accept that offer tacitly acknowledges that
Microsoft’s valuation of the accused technology in 2008 is indeed relevant to Mr. Jardin’s
damages theories in the 2008 case. (Decl. of Regis C. Worley, Jr., in Sup. of Joint Statement, ¶ 2).

1 Through their second request, Defendants expose their ongoing efforts to obstruct Mr.
2 Jardin's permissible discovery. Either Mr. Jardin can share discovery between both cases or he
3 can depose witnesses separately in each case. Because the existing protective order prevents
4 unrestricted sharing of information between cases, only one option remains.

5 The parties agree that the existing protective order limits the use of certain information to
6 only the 2008 case. Accordingly, Defendants' second request impermissibly asks the Court to
7 preclude Mr. Jardin from taking meaningful discovery in the 2010 inventorship case once that case
8 gets underway. Defendants' second request must be denied.

9 **C. There Is No Benefit to a Five-Month Stay in Discovery in the 2008 Case**

10 Defendants' third request seeks to extend the schedule in the 2008 case by approximately
11 five months. This solution achieves nothing. Defendants' implication that a witness' testimony
12 could be used for both the 2008 infringement case and the 2010 inventorship case is simply
13 improper. Again, as noted above, paragraph 6 of the protective order prevents use of Defendants
14 Protected Material "for any other purpose ... including ... any other litigation," which would
15 necessarily prevent the use of a deposition from the 2008 infringement case in the 2010
16 inventorship suit. (2008 case, Dkt. No. 77, ¶6). So, even five months from now, Mr. Jardin would
17 be prohibited from using discovery obtained from the 2008 case in the 2010 case.

18 The existing protective order in the 2008 case both addresses and prohibits Defendants'
19 third request. Defendants' concerns that discovery from the 2008 infringement case will
20 improperly be used in the 2010 inventorship case has already been addressed through paragraph 6
21 of the existing protective order that prevents such improper use. (*Id.*) Defendants' implication that
22 – in five months from now – a witness' deposition could be used in **both** cases is in stark contrast
23 to the same paragraph of the existing protective order that prohibits such use. (*Id.*) There is simply
24 no proper reason to extend discovery in the 2008 case by an additional five months so "discovery
25 can start in the 2010 case" as Defendants request. Defendants' relief must be denied in its entirety.

26 **D. Conclusion**

27 The existing protective order in the 2008 case prevents improper use of discovery material
28 in the 2010 case. Defendants' first request for relief is addressed through that protective order and

1 is redundant and/or premature in view of other motions previously filed with the Court.
2 Defendants' second request – prohibiting depositions of the same witnesses in each case – seeks
3 relief that is improper under the existing protective order. Defendants' third request achieves
4 nothing – instead, it seeks relief granted in part under the existing protective order and prohibited
5 in part by that order. Therefore, it is proper to deny the entirety of Defendants' requested relief.

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Dated: February 18, 2011

FISH & RICHARDSON P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on February 18, 2011 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civ. L.R. 5.4(d). Any other counsel of record will be served by U.S. mail.

/s/ Jason W. Wolff

Jason W. Wolff

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