

United States District Court
Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF SAN MATEO,
Plaintiff,
v.
CSL LIMITED, et al.,
Defendants.

Case No. [10-cv-05686-JSC](#)

**ORDER DENYING DEFENDANTS’
PARTIAL MOTION FOR SUMMARY
JUDGMENT**

Re: Dkt. No. 133

In this California-law antitrust action, Plaintiff County of San Mateo alleges that certain manufacturers of pharmaceutical products derived from human blood plasma conspired to restrict the supply of such products thereby causing Plaintiff, among others, to pay artificially high prices for the products. Now pending before the Court is the motion of Defendants CSL Limited, CSL Behring LLC, CSL Plasma (collectively “CSL”), Baxter International Inc. (“Baxter”), and Plasma Protein Therapeutics Association for partial summary judgment. (Dkt. No. 133.) Defendants contend that Plaintiff, as a matter of law, may not seek damages from Defendants for blood plasma products purchased from rival non-conspirators at prices that were inflated by Defendants’ anti-competitive conduct. After carefully considering the parties’ submissions, and having had the benefit of oral argument on August 14, 2014, the Court DENIES the motion.¹

SUMMARY JUDGMENT EVIDENCE

CSL and Baxter manufacture the plasma-derivative protein therapies IVIG and albumin, among others. These therapies are derived from human blood plasma collected from donors and sellers at U.S. collection centers. CSL and Baxter control approximately 60 percent of the U.S.

¹ The parties have all consented to the jurisdiction of the undersigned magistrate judge pursuant to 28 U.S.C. § 636(c).

1 market for all plasma-derivative protein therapies. The therapies, which are necessary to treat
2 numerous life-threatening medical conditions, are sold by CSL and Baxter either directly to
3 healthcare providers or to distributors who then sell to healthcare providers. Plaintiff bought its
4 IVIG and albumin indirectly from distributors ASD Specialty Healthcare and Blood Centers of the
5 Pacific.

6 Plaintiff alleges that beginning in 2003 CSL and Baxter, along with the trade group Plasma
7 Protein Therapeutics Association, conspired to reduce the supply of plasma-derivative protein
8 therapies. This conspiracy caused artificial shortages of IVIG and albumin, which in turn caused
9 inflated prices for those therapies that were paid by Plaintiff. At least for purposes of this motion,
10 the parties do not dispute that Plaintiff was unable to avoid the price increases by, for example,
11 purchasing substitutes for IVIG and albumin.

12 The vast majority of the IVIG and albumin Plaintiff purchased was manufactured by non-
13 defendants that are not alleged to have participated in any conspiracy. While Plaintiff purchased
14 some IVIG and albumin from CSL, it made no such purchases from Baxter. Plaintiff contends
15 that the IVIG and albumin purchased from non-conspirators were nevertheless purchased at
16 supracompetitive prices caused by Defendants' conspiracy to reduce supply.

17 LEGAL STANDARD

18 Summary judgment is appropriate "if the pleadings, depositions, answers to
19 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
20 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
21 of law." Fed. R. Civ. P. 56(c). "A moving party without the ultimate burden of persuasion at
22 trial—usually, but not always, a defendant—has both the initial burden of production and the
23 ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins.*
24 *Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). "[T]he moving party must
25 either produce evidence negating an essential element of the nonmoving party's claim or defense
26 or show that the nonmoving party does not have enough evidence of an essential element to carry
27 its ultimate burden of persuasion at trial . . . and persuade the court that there is no genuine issue
28 of material fact." *Id.*

1 If the “moving party carries its burden of production, the nonmoving party must produce
 2 evidence to support its claim or defense.” *Id.* at 1103. If the nonmoving party fails to do so, “the
 3 moving party wins the motion for summary judgment.” *Id.* “But if the nonmoving party
 4 produces enough evidence to create a genuine issue of material fact, the nonmoving party defeats
 5 the motion.” *Id.* In deciding whether there exist genuine issues of material fact, the court draws
 6 all reasonable factual inferences in favor of the non-movant. *Anderson v. Liberty Lobby Inc.*,
 7 477 U.S. 242, 255 (1986).

8 DISCUSSION

9 Plaintiff’s only remaining claim is a cause of action under the Cartwright Act (California
 10 Business and Professions Code Section 16700 *et seq.*), California’s antitrust statute.² Defendants’
 11 motion for partial summary judgment seeks to bar Plaintiff from recovering as damages any
 12 overcharges³ Plaintiff incurred in purchasing IVIG and albumin from non-conspirators, even if
 13 Plaintiff would have paid a lower price in the absence of Defendants’ anticompetitive conduct.
 14 These so-called “umbrella damages” are based on Plaintiff’s theory that Defendants’ conspiracy to
 15 decrease supply created a “price umbrella” that spread the artificially inflated price throughout the
 16 market. Defendants argue that umbrella damages are precluded as a matter of law for two reasons:
 17 1) they are “unacceptably speculative” (Dkt. No. 133 at 6), and 2) Plaintiff lacks standing to seek
 18 such damages. Although the two issues are somewhat interconnected, the Court addresses each
 19 separately.

20 A. Whether Umbrella Damages are Unduly Speculative Under the 21 Cartwright Act as a Matter of Law

22 Section 16750(a) of the Cartwright Act authorizes anyone “injured in his or her business or
 23 property” by actions forbidden under the Cartwright Act to recover three times the “damages
 24 sustained.” The California Supreme Court has remarked that this text, which has been virtually
 25 unchanged from the original version of the act passed in 1907, “says nothing about how the injury

26 ² Plaintiff’s original complaint included federal antitrust claims as well as class-action allegations.
 27 The federal claims were dismissed during Multidistrict Litigation (“MDL”) proceedings, and
 28 Plaintiff voluntarily dropped its class allegations following remand from the MDL.

³ An “overcharge” is the “difference between the price actually paid and the price that would have
 been paid ‘but for’ the unlawful conduct multiplied by the quantity purchased.” 12 P. Areeda &
 H. Hovenkamp, *Antitrust Law* ¶ 395, p. 376 (3d ed. 2007) (hereinafter *Areeda*).

1 or damages are to be quantified.” *Clayworth v. Pfizer, Inc.*, 49 Cal. 4th 758, 770 (2010).

2 Nonetheless, under California law (as under federal law), damages cannot be awarded in antitrust
3 cases upon “sheer guesswork or speculation.” *In re Wholesale Electricity Anti-Trust Cases I & II*,
4 147 Cal. App. 4th 1293, 1309 (2007) (internal quotation marks omitted). Rather,

5 a plaintiff seeking such damages must establish to a reasonable
6 probability that there was some causal connection between
7 defendant’s wrongful act and the damages alleged, such as lost
8 profits. Once that has been accomplished, the jury will be permitted
to act upon probable and inferential proof and to make a just and
reasonable estimate of the damage based on relevant data, and
render its verdict accordingly.

9 *Id.* (citations and internal quotation marks omitted).

10 Defendants, relying solely on federal caselaw, contend that calculating the overcharge that
11 Plaintiff incurred when purchasing the products from Defendants’ competitors is “unacceptably
12 speculative.” Defendants assert that Plaintiff’s status as an indirect purchaser in a multi-tiered
13 distribution system causes this undue speculation; specifically, they contend that any fact-finder
14 would have to speculate about whether, and to what extent, a rival non-conspirator manufacturer’s
15 price increase was based on the conspiracy, “as opposed to the myriad and complex other
16 variables that factor into individual pricing decisions.” (Dkt. No. 136 at 3.) The alleged
17 speculation “would only increase when the fact-finder would have to run the analysis again to
18 determine what portion, if any, of the *distributor’s* price could be attributed to the conspiracy.”
19 (*Id.* (emphasis added).)

20 The Court is not persuaded. The overcharge damages flowing from purchases from non-
21 conspiring rivals are based on the same calculation that must be made for damages flowing from
22 purchases from Defendants; that is, the amount over the price that would have occurred in the
23 absence of the anticompetitive conduct. *See In re Uranium Antitrust Litigation*, 552 F. Supp. 518,
24 524-55 (D.C. Ill. 1982) (rejecting defendants’ argument that umbrella damages should be barred as
25 a matter of law and reasoning that “this calculation, whatever the difficulties it poses, is no more
26 problematic than determining damages in any price-fixing case.”). If it would be too speculative
27 as a matter of law to make this computation with respect to non-conspiring rivals, it would also be
28 too speculative to make the same calculation in regards to cartel members. Defendants, however,

1 do not challenge as inherently speculative Plaintiff’s claim for damages against them. Nor can
2 they. California law, in contrast to federal law, allows indirect purchasers in a multi-tiered
3 distribution chain to sue and collect damages, such as overcharges, from antitrust defendants. *See*
4 Cal. Bus. & Prof. Code § 16750(a) (allowing suit by any injured person “regardless of whether
5 such injured person dealt directly or indirectly with the defendant”); *see also Union Carbide Corp.*
6 *v. Superior Court*, 36 Cal. 3d 15, 19–20 (1984) (explaining that § 16750 was amended to repudiate
7 the *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) bar against indirect purchaser recovery).

8 To be sure, calculating the overcharge is no simple feat—and the task may ultimately be
9 insurmountable for Plaintiff. A leading antitrust treatise explains that, while the actual prices paid
10 are “usually straightforward” to establish, “the real problem arises in establishing the ‘but for’
11 price”—the price that would have been paid “but for” the unlawful conduct. *Areeda* at ¶ 395b, p.
12 383. This is particularly true in damages claims by indirect purchasers where each purchase along
13 the chain of distribution must be examined. To reach the “but for” price at each stage, a complex
14 damages model must be created that predicts what the price would have been in the market under
15 competitive conditions during the conspiracy period—taking into account cost increases, as well
16 as other market forces, that existed during the conspiracy period that may have increased prices
17 absent the anticompetitive conduct. *See id.* at ¶ 395b, p. 383-87, ¶ 396f (providing the following
18 as examples of factors that need to be controlled in estimating the “but for” cost: changes in costs
19 (increased wages, rising insurance premiums, etc.), changes in demand, entry of new firms, and
20 product improvements). Difficulty alone, however, does not render Plaintiff’s damages
21 calculation fundamentally speculative. Further, neither imprecision nor uncertainty pose a
22 categorical bar to umbrella damages; in fact, the evidentiary standard anticipates some degree of
23 estimation. *See Wholesale Electricity*, 147 Cal. App. 4th at 1309 (“Once [plaintiff has established
24 causation], the jury will be permitted to act upon *probable and inferential* proof and to make a just
25 and reasonable *estimate* of the damage based on relevant data, and render its verdict accordingly.”)
26 (emphasis added). In short, while calculating the amount of Plaintiff’s umbrella damages may be
27 inherently difficult, it does not follow that it will be impossible for Plaintiff to make a non-
28 speculative estimation of such damages.

1 Nor is it impossible for Plaintiff to establish with a “reasonable probability,” *id.*, that
2 Defendants’ supply restriction caused a price umbrella; that is, caused Plaintiff to incur an
3 overcharge when purchasing IVIG and albumin from non-conspirators. To the extent Defendants
4 contend that such a determination cannot be made with complete certainty, Defendants overstate
5 Plaintiff’s evidentiary burden. *See id.* (“[A] plaintiff seeking such damages must establish to a
6 *reasonable probability* that there was some causal connection between defendant’s wrongful act
7 and the damages alleged”) (emphasis added); *see also In re Uranium*, 552 F. Supp. at 525
8 (“Once it is established that nonconspirators have charged more than competitive prices, the
9 inference that the cost increase was caused by the cartel is inescapable. Granted there will be
10 some uncertainty regarding these calculations, but no more so than in any price fixing case where
11 it is uncertain what price the defendants would have charged but for the antitrust violation.”); *see*
12 *also Pollock v. Citrus Assocs. of N.Y. Cotton Exch., Inc.*, 512 F. Supp. 711, 719 n.9 (D.C.N.Y.
13 1981) (“In a market in which supply is restricted, prices move up naturally pursuant to basic laws
14 of supply and demand.”).

15 At bottom, Defendants’ argument is that because the Ninth Circuit has held that umbrella
16 damages are not recoverable under the Sherman Act, they are not recoverable under the Cartwright
17 Act. The Court disagrees. In *In re Coordinated Pretrial Proceedings in Petroleum Products*
18 *Antitrust Litigation*, 691 F.2d 1335 (9th Cir. 1982) (“*Petroleum Products*”), the Ninth Circuit held
19 that umbrella damages are categorically barred under federal antitrust law because such damages
20 are inconsistent with the Supreme Court’s rationale underlying its decision in *Illinois Brick Co. v.*
21 *Illinois*, 431 U.S. 720 (1977).

22 The *Illinois Brick* Court held that, in most instances, indirect purchasers—*i.e.*, purchasers
23 of goods who did not buy directly from cartel members—are barred from seeking antitrust
24 damages under federal law. The Court reasoned that suits from indirect purchasers created a risk
25 of multiple liability for defendants since, under the Court’s earlier ruling in *Hanover Shoe*, a direct
26 purchaser could recover the full amount of an overcharge regardless of whether it passed on the
27 overcharge to subsequent buyers. In a world with *Hanover Shoe* and indirect purchaser suits, “the
28 indirect purchaser could sue to recover the same amount.” *Illinois Brick*, 431 U.S. at 2067. The

1 Court also reasoned that the time and energy devoted to parsing the pricing decisions throughout
2 the chain of distribution disfavored allowing indirect purchaser suits. *Id.* (adopting *Hanover*
3 *Shoe*'s practical concerns "of the uncertainties and difficulties in analyzing price and out-put
4 decisions in the real economic world rather than an economist's hypothetical model, and of the
5 costs to the judicial system and the efficient enforcement of the antitrust laws of attempting to
6 reconstruct those decisions in the courtroom") (citation and internal quotation marks omitted).

7 Although umbrella damages were not at issue in *Illinois Brick*, the *Petroleum Products*
8 court applied *Illinois Brick*'s rationale to the plaintiffs' umbrella claims for overcharges resulting
9 from their indirect purchases of gasoline at artificially inflated prices. In addition to worries about
10 double recovery, the court held that plaintiffs' umbrella damages were barred under *Illinois Brick*
11 because they were "unacceptably speculative and complex." *Petroleum Products*, 691 F.2d at
12 1340-41. The court stated:

13 Under an umbrella theory, the result of any attempt to ascertain with
14 reasonable probability whether the non-conspirators' prices resulted
15 from the defendants' purported price-fixing conspiracy or from
16 numerous other pricing considerations would be speculative to some
17 degree. When the fact of a multi-tiered distribution system is
18 imposed upon the above complex set of variables, the obstacles to
19 intelligent inquiry become nearly insurmountable. The causal effect
20 of each pricing decision would have to be pursued through the chain
21 of distribution. Not only would we be required to speculate that
22 plaintiffs were injured solely as the result of umbrella pricing, but
23 also we would be required to sanction complex judicial inquiry into
24 the pricing decisions of sellers remote from plaintiffs. We decline to
25 do either, and accordingly hold that under the facts of this case,
26 application of an umbrella theory is unwarranted.

27 *Id.* at 1341 (footnotes omitted).

28 As an initial matter, the Ninth Circuit's decision in *Petroleum Products* construing federal
antitrust law is not binding on this Court's interpretation of California's Cartwright Act. *See*
Aryeh v. Canon Bus. Solutions, Inc., 55 Cal. 4th 1185, 1195 (2013) ("Interpretations of federal
antitrust law are at most instructive, not conclusive, when construing the Cartwright Act, given
that the Cartwright Act was modeled not on federal antitrust statutes but instead on statutes
enacted by California's sister states around the turn of the 20th century."). Further, contrary to
Defendants' assertion at oral argument, the absence of caselaw from the California courts

1 regarding umbrella damages does not elevate the instructiveness of federal antitrust law
2 interpretations. The Court will not assume that umbrella damages are disallowed under California
3 law, as under federal law, just because a California court has not addressed the issue.

4 *Petroleum Products* is not instructive here for several reasons. Most prominently, the
5 court's reliance on *Illinois Brick* for the proposition that tracing overcharges through a multi-tiered
6 distribution chain is "unacceptably speculative and complex" is inapposite to claims under the
7 Cartwright Act because California has rejected *Illinois Brick*. See *Clayworth*, 49 Cal. 4th at 781
8 ("[*Illinois Brick*] evoked an immediate legislative response. Within months of the decision,
9 Assembly Bill No. 3222 (1977–1978 Reg. Sess.) was introduced to prevent *Illinois Brick* from
10 having any effect on judicial interpretation of the Cartwright Act."). The California Legislature,
11 unlike the United States Supreme Court, does not believe that a plaintiff's attempt to estimate
12 overcharges incurred through a multi-tiered distribution chain is unacceptably speculative and
13 complex; rather, the California Legislature has expressly allowed such claims. See Cal. Bus. &
14 Prof. Code § 16750(a). Thus, umbrella damages—which, as explained above, are calculated the
15 same way as indirect purchaser non-umbrella damages—cannot be categorically barred under the
16 Cartwright Act for failing to meet *Illinois Brick*'s benchmark for speculation and complexity.
17 *Petroleum Products* is also unpersuasive to the extent it elevates mere uncertainty to
18 impermissible speculation. The court's concern that determining causation to a reasonable
19 probability would be speculative to "some degree" merely reflects the lack of absolute certainty
20 facing the fact-finder; however, as discussed above, such uncertainty does not automatically doom
21 a plaintiff's damages claim. See *Wholesale Electricity*, 147 Cal. App. 4th at 1309.

22 A court in this District has nevertheless held that, under the reasoning of *Petroleum*
23 *Products*, an indirect purchaser's claims for umbrella damages arising from a multi-tiered
24 distribution chain are barred under the Cartwright Act. See *In re TFT-LCD (Flat Panel) Antitrust*
25 *Litigation*, 2012 WL 6708866, at *6-7 (N.D. Cal. Dec. 26, 2012). For the reasons stated above,
26 this Court respectfully disagrees with the *In re TFT-LCD* court and declines to follow its contrary
27 holding.
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1 At oral argument Defendants argued that the California Supreme Court's decision in
2 *Clayworth* supports their assertion that, notwithstanding the *Illinois Brick* repealer statute, unduly
3 complex damages are not allowed under California law. *Clayworth* adopted the *Hanover Shoe*
4 rule, which bars antitrust defendants from asserting the affirmative defense that direct purchasers
5 who pass on an overcharge cannot sue for damages. In reaching this holding, the court examined
6 the text and early history of the Cartwright Act, legislative amendments to the law, as well as
7 policy considerations. Among these policy considerations, the court determined that allowing a
8 pass-on defense would hamper enforcement of California's antitrust laws because it "would
9 plunge parties and courts into minitrials attempting to trace every penny of an initial overcharge."
10 *Clayworth*, 49 Cal. 4th at 784. The court reconciled this concern about complexity with the state's
11 *Illinois Brick* repealer statute, which invited complexity:

12 While the Legislature when it enacted the *Illinois Brick* repealer
13 statute imposed that task for the small universe of cases in which
14 multiple levels of purchasers might sue, rejection of the *Hanover*
15 *Shoe* rule would extend that burden to nearly every case. Accepting
16 the rule, in contrast, streamlines antitrust trials, renders the process
17 of proving antitrust damages less daunting, and ultimately enhances
18 enforcement.

16 *Id.* At best, the *Clayworth* court's brief discussion of complexity concerns is applicable where
17 such complexity frustrates enforcement of California's antitrust laws; in other words, where it
18 imposes additional burdens on a plaintiff's ability to prove antitrust damages. That particular
19 concern is inapplicable here because allowing Plaintiff to pursue its umbrella damages theory in
20 no way imposes a burden on Plaintiff. If anything, allowing umbrella damages actually *promotes*
21 the policy concern identified in *Clayworth* since the availability of umbrella damages is an
22 additional incentive for an injured party to file suit.

23 Because the Court concludes that umbrella damages under the Cartwright Act are not
24 barred as a matter of law as too inherently speculative, Defendants' motion for partial summary
25 judgment is accordingly DENIED on this basis. Defendants may renew their challenge to
26 Plaintiff's damages claim upon a fuller factual record and with reference to Plaintiff's actual
27 evidentiary showing.

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1 **B. Whether Plaintiff Lacks Standing under the Cartwright Act**

2 Section 16750(a) of the Cartwright Act, as noted above, authorizes anyone “injured in his
3 or her business or property” by actions forbidden under the Cartwright Act to sue for damages. As
4 an initial matter, the parties dispute what test governs a plaintiff’s standing to sue under the
5 Cartwright Act. (*Compare* Dkt. No. 135 at 9 (Plaintiff asserting that it need only show that the
6 violation was the proximate cause of injuries and that it is within the “target area” of the antitrust
7 violation), *with* Dkt. No. 133 at 8 (Defendants contending that the Supreme Court’s test for
8 antitrust standing in *Associated General Contractors of California, Inc. v. California State*
9 *Council of Carpenters*, 459 U.S. 519 (1983) (“AGC”) applies.) The issue has not been explicitly
10 addressed by any California state court, and courts in this District have reached different
11 conclusions. *Compare In re Dynamic Random Access Memory (Dram) Antitrust Litigation*, 516
12 F. Supp. 2d 1072, 1088-89 (N.D. Cal. 2007) (applying AGC to indirect purchasers’ Cartwright Act
13 claims), *with In re TFT-LCD (Flat Panel) Antitrust Litigation*, 586 F. Supp. 2d 1109, 1123 (N.D.
14 Cal. 2008) (“The Court agrees with Judge Alsup that it is inappropriate to broadly apply the AGC
15 test to plaintiffs’ claims under the [Illinois Brick] repealer states’ laws in the absence of a clear
16 directive from those states’ legislatures or highest courts”), *and In re Optical Disk Drive Antitrust*
17 *Litigation*, 2011 WL 3894376, at *11-12 (N.D. Cal. Aug. 3, 2011) (same). Nevertheless, the
18 Court finds that even if the AGC test did apply, Defendants have not shown that Plaintiff lacks
19 standing as a matter of law. Under AGC, courts consider (1) the nature of the plaintiffs’ injuries
20 and whether the plaintiffs were participants in the relevant markets; (2) the directness of the
21 alleged injury; (3) the speculative nature of the alleged harm; (4) the risk of duplicative recovery;
22 and (5) the complexity in apportioning damages. 459 U.S. at 536–39.

23 The only factor Defendants discuss is the third factor regarding the speculative nature of
24 the harm. As already discussed above, Plaintiff’s umbrella damages claim is not inherently
25 speculative; thus, for the same reasons it is possible for Plaintiff to produce non-speculative
26 evidence that Defendants’ conduct caused a price umbrella, the Court concludes that the
27 speculative nature of the alleged harm does not warrant a finding that Plaintiff lacks standing. The
28 other factors, which Defendants do not address, also do not support a finding that Plaintiff lacks

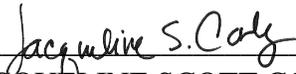
1 standing. It is undisputed that Plaintiff was, and is, a participant in the relevant market. Further,
 2 the nature of Plaintiff's injuries caused by the alleged price umbrella have been recognized by
 3 other courts as "antitrust injuries," at least under federal law. *See, e.g., U.S. Gypsum Co. v. Ind.*
 4 *Gas Co., Inc.*, 350 F.3d 623, 627-28 (7th Cir. 2003) ("A cartel cuts output, which elevates price
 5 throughout the market; customers of fringe firms (sellers that have not joined the cartel) pay this
 6 higher price, and thus suffer antitrust injury, just like customers of the cartel's members.").
 7 Regarding the fourth factor, the parties do not discuss the risk of duplicative recovery in this
 8 action, and such a risk is not readily apparent to the Court given the lengthy procedural history of
 9 the case. Finally, and for the reasons discussed above, apportioning damages to Plaintiff in this
 10 case is not impermissibly complex simply because Plaintiff alleges umbrella damages.

11 **CONCLUSION**

12 For the reasons stated above, Defendants' motion for partial summary judgment is
 13 DENIED.

14 **IT IS SO ORDERED.**

15 Dated: August 20, 2014

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 18 JACQUELINE SCOTT CORLEY
 19 United States Magistrate Judge
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