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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NAZARIO AGUILAR; GREGORIO )  
NICANOR; HUGO SANDOVAL; JOSE )  
SOLANO; OSCAR URBINA; LUIS )  
ALVAREZ; SERGIO ALVAREZ; )  
LOUIS AGUILAR; JOSE AMARO; )  
ARMANDO CARLOS, ALEJANDRO )  
CASILLAS, OLEGARIO DURAN, )  
JOSE LUIS HERRERA, ANTONIO )  
HINOJOSA, GILBERTO HINOJOSA, )  
FERMIN MENDOZA, DOLORES )  
MEZA; ERIC NICANOR, )  
FRANCISCO NICANOR, MAGDALENO )  
NICANOR, MANUEL SOLANO, )  
JORGE D. RIVAS, JOSE )  
GUADALUPE TORRES and MIGUEL )  
ZAMORE, )

Plaintiff,

v.

MEGA LIGHTING, INC., d/b/a )  
MEGA WAY ENTERPRISES, a )  
California corporation; )  
PIERRE SALIM SAAD, an )  
individual; SAM KASBAR, an )  
individual; CHARBEL RAMEH, )  
an individual; and HECTOR )  
ZAVALA, an individual, )

Defendants. )

Case No. CV 08-07313 DDP (JTLx)

**ORDER DENYING DEFENDANTS' MOTION  
TO DISMISS; DENYING PLAINTIFFS'  
REQUEST FOR DISCOVERY**

[Motions filed on February 11 and  
22, 2009, Dkt. Nos. 39, 50]

1 **I. BACKGROUND**

2 Plaintiffs are 25 former employees of Defendants Mega  
3 Lighting, Pierre Saad, and Sam Kasbar (collectively, "Mega  
4 Employer"<sup>1</sup>). Defendants Charbel Rameh and Hector Zavala worked for  
5 the Mega Employer in a managerial capacity (collectively, "Mega  
6 Defendants"; the persons sued - Saad, Kasbar, Rameh, and Zavala -  
7 will be referred to as the "Individual Mega Defendants").<sup>2</sup>

8 Mega Lighting is a California corporation licensed by  
9 California to perform landscaping. (FAC ¶ 40.) Mega Lighting's  
10 business is the construction and maintenance of landscaping for  
11 public and private gardens, including on "public works" projects as  
12 defined by California Labor Code § 1720. (FAC ¶ 41.) On public  
13 works projects, a "prevailing wage" must be paid to all workers,  
14 pursuant to California Labor Code § 1771.<sup>3</sup> (FAC ¶ 41.)  
15 Additionally, on public works projects an employer is required to  
16 submit to the contracting public agency a certified payroll record,  
17 under penalty of perjury, listing the employees on a project, the  
18 hours worked each day, and wages (among other things). Cal. Lab.  
19 Code § 1776(a).

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22 <sup>1</sup> Plaintiffs allege that Mega Lighting is an alter ego of Saad  
and Kasbar. (FAC ¶ 35-37.)

23

24 <sup>2</sup> The final defendant, North American Specialty Insurance  
Company ("NASIC"), insures payment bonds; and Plaintiffs have sued  
it to enforce the payment of wages on the projects where Plaintiffs  
25 worked. NASIC filed a separate answer to Plaintiffs' complaint on  
December 26, 2008 and did not join the present motion to dismiss.

26

27 <sup>3</sup> Labor Code § 1771 provides that on public works projects of  
greater than \$1,000, "not less than the general prevailing rate of  
per diem wages for work of a similar character in the locality in  
28 which the public work is performed" must be paid. Cal. Lab. Code §  
1771.

1 Plaintiffs list seventeen individual public works projects  
2 performed by Mega Lighting, including for the Cities of Brea,  
3 Huntington Beach, Riverside, Fontana, West Covina, Pomona, Chino,  
4 Montebellow, Fullerton, Rancho Cucamonga, Maywood, Paramount,  
5 Perris, Rialto, and Newport Beach. (FAC ¶ 41.) Plaintiffs allege  
6 that the Mega Employer violated various labor laws, including  
7 deliberately failing to pay them the prevailing wage on these  
8 public works projects by refusing to compensate them for all hours  
9 worked. (FAC at 11-12.) Plaintiffs further allege that the Mega  
10 Employer reported fraudulently reduced hours to public agencies of  
11 the above cities, in order to receive payment from the agencies  
12 without penalty. (FAC ¶ 59.)

13 In addition, Plaintiffs allege that when they sought advice of  
14 counsel regarding legal action, the Individual Mega Defendants  
15 retaliated against them by, among other things, delaying paychecks,  
16 threatening Plaintiffs with bodily harm and termination, and  
17 actually terminating Plaintiffs' employment. (FAC ¶ 72.)  
18 Plaintiffs also allege that the Individual Mega Defendants used  
19 "extortion" to obtain Plaintiffs' waivers of their right to legal  
20 remedies. (FAC at 14-17.)

21 Plaintiffs allege fourteen different claims in their First  
22 Amended Complaint ("FAC"), three of which are federal. The Mega  
23 Defendants now move to dismiss Plaintiffs' three federal claims:

- 24
- 25 1) against the Individual Mega Defendants - mail and wire  
26 fraud, extortion, and racketeering, in violation of the  
27 Racketeer Influenced and Corrupt Organization Act ("RICO"), 18  
28 U.S.C. § 1961 et seq.;
  - 2) against the Mega Employer - failure to pay overtime and  
minimum wage, under the Fair Labor Standards Act ("FLSA"),  
U.S.C. § 216(b);

1 3) against the Mega Employer - retaliation for exercising  
2 protected rights, under the FLSA, 29 U.S.C. § 215(a)(3).

3 (FAC 17-23.)

4 **II. LEGAL STANDARD**

5 A. Rule 12(b)(6)

6 Under Rule 12(b)(6), a complaint is dismissed when a  
7 plaintiff's allegations fail to state a claim upon which relief can  
8 be granted. Fed. R. Civ. P. 12(b)(6). When considering a 12(b)(6)  
9 motion, "all allegations of material fact are accepted as true and  
10 should be construed in the light most favorable to the plaintiff."  
11 Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). A court  
12 properly dismisses a complaint under Rule 12(b)(6), based upon the  
13 "lack of a cognizable legal theory" or "the absence of sufficient  
14 facts alleged under the cognizable legal theory." Baliesteri v.  
15 Pacifica Police Dept., 901 F.2d 696, 699 (9th Cir. 1990). The  
16 plaintiff's obligation requires more than "labels and conclusions"  
17 or a "formulaic recitation of the elements of a cause of action."  
18 Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1964-65 (2007)  
19 (internal quotation omitted). However, the complaint must state  
20 "only enough facts to state a claim to relief that is plausible on  
21 its face." Id. at 1974. A well-pleaded complaint may proceed even  
22 if it appears "that a recovery is very remote and unlikely." Id.  
23 at 1964 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)).

24 B. Evidentiary Issues and Application for Discovery

25 Generally, a district court "may not consider any material  
26 beyond the pleadings" (e.g., facts presented in briefs, affidavits,  
27 or discovery materials) on a motion to dismiss. Hal Roach Studios,  
28 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.10 (9th Cir.

1 1989). Plaintiffs present a declaration with contracts signed by  
2 Mega Lighting and various public agencies, which is relevant to  
3 prove jurisdictional requirements under the FLSA and RICO. The  
4 Court declines to consider this evidence on this motion.

5 The Mega Defendants also ask the Court to consider exhibits  
6 outside the pleadings, in particular Mega Lighting's contractor's  
7 license and the notice of related cases filed in the instant action  
8 by Plaintiffs. The Court declines to take judicial notice of the  
9 Mega Defendants' exhibits.

10 Lastly, Plaintiffs have also filed a request for limited  
11 discovery under Federal Rule of Civil Procedure 56(f) in order to  
12 fix any jurisdictional or other pleading deficiencies in their  
13 complaint. As discussed below, the Court denies Defendants' motion  
14 to dismiss and, accordingly, the Court also denies Plaintiff's  
15 request for discovery under Rule 56(f).

16 **III. DISCUSSION**

17 A. Jurisdiction

18 The Mega Defendants first argue that there is no statutory  
19 jurisdiction over their conduct under RICO and the FLSA, because  
20 Mega Lighting's activities are local and do not affect interstate  
21 commerce. Specifically, the Mega Defendants allege that Mega  
22 Lighting performs only "asthetic" and "horticultural" improvements  
23 by installing sprinklers, plants, and foliage, and therefore  
24 creates nothing that enters the "stream of commerce." (Mot. 6-7.)  
25 The Court will address this argument under each statute.

26 1. RICO

27 RICO grants jurisdiction over "any enterprise engaged in, or  
28 the activities of which affect[] interstate or foreign commerce,"

1 which is used for "a pattern of racketeering activity." 18 U.S.C.  
2 § 1962(c). RICO requires that the activities of the "enterprise,"  
3 not each RICO "predicate act," affect interstate commerce. United  
4 States v. Rone, 598 F.2d 564, 573 (9th Cir. 1979). A "minimal" or  
5 "de minimis" effect on interstate commerce is sufficient to  
6 establish jurisdiction in a civil RICO prosecution. United States  
7 v. Juvenile Male, 118 F.3d 1344, 1348 (9th Cir. 1997)(citing United  
8 States v. Rone, 598 F.2d 564, 573 (9th cir. 1979). A minimal  
9 effect on interstate commerce is demonstrated by "proof of a  
10 probable or potential impact." Id. at 1349.

11 The Mega Defendants argue that they are not engaged in  
12 interstate commerce, because they are involved in local landscaping  
13 work in California. However, Plaintiffs provide sufficient  
14 allegations of the Mega Employers' probable impact on interstate  
15 commerce to justify jurisdiction under RICO. For example, Mega  
16 Lighting's payment bonds are provided by Defendant NASIC, which is  
17 a New Hampshire insurance company. (FAC ¶¶ 39, 185.)  
18 Additionally, agriculture and landscaping are activities which  
19 affect "interstate commerce" in the aggregate. Wickard v. Filburn,  
20 317 U.S. 111 (1942); United States v. Frega, 179 F.3d 793, 800 (9th  
21 Cir. Cal. 1999)(stating that "RICO is aimed at activities which, in  
22 the aggregate, substantially affect interstate commerce"). The  
23 Court also notes that a significant number of Mega Lighting's  
24 landscaping projects were on streets and meridians connecting  
25 interstate commerce. (See FAC ¶ 41.)

26 As such, the Court finds that the jurisdictional requirements  
27 of RICO have been met.

28 2. FLSA

1 FLSA claims are based on violations of the statute's overtime  
2 and minimum wage requirements, which apply to any employee "engaged  
3 in interstate commerce." 29 U.S.C. § 207(a). An employee is  
4 engaged in interstate commerce where the "enterprise" he or she  
5 works for is "engaged in the production of goods for commerce." 29  
6 U.S.C. § 207(a)(1). An "enterprise engaged in the production of  
7 goods for commerce" is one which:

8 (A)(i) has employees engaged in commerce or in the production  
9 of goods for commerce, or that has employees handling,  
10 selling, or otherwise working on goods or materials that have  
11 been moved in or produced for commerce by any person; and  
12 (ii) is an enterprise whose annual gross volume of sales made  
or business done is not less than \$500,000 (exclusive of  
excise taxes at the retail level that are separately stated)

13 29 U.S.C. § 203(s)(1)(A)(i)-(ii).

14 For the reasons stated above, the Court finds that the Mega  
15 Employer is engaged in interstate commerce for the purposes of the  
16 FLSA. The Mega Defendants' primary argument against jurisdiction  
17 is based on caselaw<sup>4</sup> interpreting jurisdiction under the FLSA prior  
18 to its amendment, which did not have the current statute's language  
19 including "employers engaged in commerce or in the production of  
20 goods for commerce." See 29 U.S.C. § 207(a)(1)(emphasis added).

21 Accordingly, the Court finds that there is jurisdiction under  
22 the FLSA.

23 B. RICO

24 Plaintiffs' RICO claim are brought against the Individual Mega  
25 Defendants, and not the corporate entity Mega Lighting (which is  
26 the alleged "enterprise"). A civil RICO action may be brought by

27 \_\_\_\_\_  
28 <sup>4</sup> See Goldberg v. Wade Lahar Constr. Co., 290 F.2d 408 (8th  
Cir. 1961).

1 "[a]ny person injured in his business or property by reason of a  
2 violation of section 1962 of Title 18." 18 U.S.C. § 1964(c).  
3 Section 1962 prohibits both "conducting an enterprise through a  
4 pattern of racketeering" and a "conspiracy" to violate RICO. 18  
5 U.S.C. § 1962(c)-(d). The elements of a civil RICO claim are: (1)  
6 conduct (2) of an enterprise (3) through a pattern (4) of  
7 racketeering activity, (5) causing injury to the plaintiff's  
8 business or property. Fireman's Fund Ins. Co. v. Stites, 258 F.3d  
9 1016, 1021 (9th Cir. 2001). The fifth element further requires  
10 that the plaintiff (1) show the injury was proximately caused by  
11 the fraudulent conduct and (2) show concrete financial loss by  
12 documenting the amount of damages. Id.

13 The Mega Defendants argue that Plaintiffs have not  
14 sufficiently alleged fraud under RICO, as required by Rule 9(b).  
15 See Moore v. Kayport Package Express, 885 F.2d 531, 541 (9th Cir.  
16 1989)(finding the particularity requirements of rule 9(b) apply to  
17 RICO claims). However, as detailed below, the Court finds that  
18 there are sufficient allegations in the Plaintiffs' FAC to describe  
19 their injury and Defendants' fraudulent conduct.

20 1. Enterprise

21 An "enterprise" under RICO is a "group of persons associated  
22 together for a common purpose of engaging in a course of conduct .  
23 . . . proved by evidence of an ongoing organization, formal or  
24 informal, and by evidence that the various associates function as a  
25 continuing unit." United States v. Turkette, 452 U.S. 576, 583  
26 (1981). Here the alleged enterprise is the corporation Mega  
27 Lighting. (FAC ¶ 68.) A corporation can constitute the  
28 "enterprise," 18 U.S.C. § 1961(4), and corporate employees or

1 owners may use the corporation in a manner that violates RICO, §  
2 1962(c). See also Cedric Kushner Promotions, Ltd. v. King, 533  
3 U.S. 158, 164-165 (2001). Plaintiffs allege that the Individual  
4 Mega Defendants used the Mega Lighting entity in order to obtain  
5 public works projects from public agencies, and then defrauded  
6 those agencies and their employees by under-reporting and  
7 underpaying wages. Again, in their attachment to the FAC,  
8 Plaintiffs provide specific evidence from 2008 of wages certified  
9 to public agencies, versus amounts actually paid by the Mega  
10 Defendants to Plaintiffs. While Plaintiffs do not provide the  
11 specific public agency to which the misrepresentations were made,  
12 these allegations are still sufficient to give Defendants "notice  
13 of the particular misconduct . . . so that they can defend against  
14 the charge and not just deny that they have done anything wrong."  
15 Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

16 Defendants argue that there is insufficient particularity as  
17 to the participation of the Individual Mega Defendants in the  
18 affairs of the enterprise. However, as noted by Plaintiffs, the  
19 Individual Mega Defendants are an owner, director, and two  
20 managerial employees. (FAC ¶ 28-31.) Plaintiffs further allege  
21 that these specific persons were involved in the defrauding of  
22 public agencies, employees, and threatening employees in order to  
23 force them to waive legal rights. (FAC ¶¶ 80-82.) This is  
24 sufficient to allege participation in the affairs of the enterprise  
25 for the purposes of RICO. See Reves v. Ernst & Young, 507 U.S.  
26 170, 179 (1993) ("In order to 'participate, directly or indirectly,  
27 in the conduct of such enterprise's affairs,' one must have some  
28 part in directing those affairs . . . . RICO liability is not

1 limited to those with primary responsibility for the enterprise's  
2 affairs . . . but some part in directing the enterprise's affairs  
3 is required." ).

4           2.    Conduct

5           Plaintiffs allege that the "conduct" of Mega Lighting includes  
6 (1) concealing wage violations by falsifying certified payrolls and  
7 (2) threatening employees in order to obtain employee waivers of  
8 the right to remedy wage violations and in order to obtain payment  
9 on projects by falsely representing to municipalities that all  
10 workers had been adequately paid. (FAC ¶¶ 68, 81-82, 87-89.)  
11 Again, attached to their complaint, Plaintiffs provide an exhibit  
12 which specifically describes the amount of pay withheld from  
13 Plaintiffs for a period of two months in 2008, by falsely reducing  
14 the amount of hours worked compared to what was reported. (FAC Ex.  
15 A.) Plaintiffs also allege seventeen specific projects where they  
16 allege they were not paid the prevailing wage. (FAC ¶ 41.)  
17 Plaintiffs further describe a specific day, October 22, 2008, when  
18 Saad, Kasbar, Rameh, and Zavala refused to turn over Plaintiffs'  
19 paychecks until they signed documents that Plaintiffs believed were  
20 releases or waivers. (FAC ¶¶ 81-82.) Plaintiffs were unable to  
21 read or understand these documents. However, for the purposes of  
22 this motion it is reasonable to infer these documents were waivers,  
23 as alleged by Plaintiffs, because the Individual Mega Defendants  
24 refused to describe or provide copies of the documents to  
25 Plaintiffs after Plaintiffs had signed them.

26           As such, the Court finds that Plaintiffs have alleged Mega  
27 Lighting's conduct with sufficient particularity.

28           3.    Pattern

1 A "pattern" under RICO involves at least two related,  
2 predicate acts over the course of 10 years. 18 U.S.C. § 1961(5).  
3 In order to establish a pattern, Plaintiffs must demonstrate that  
4 the racketeering predicates "amount to, or that they otherwise  
5 constitute a threat of, continuing racketeering activity." H. J.  
6 Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 240 (1989). The  
7 "pattern" alleged by Plaintiffs are unlawful wages and the  
8 certification of false payroll records in at least seventeen  
9 projects extending over the course of three years. (FAC ¶ 41.)  
10 These acts are thus related and have the same or similar purpose  
11 and "methods of commission." H. J. Inc., 492 U.S. at 240.  
12 Plaintiffs also allege that the pattern is continuing, because the  
13 Mega Employer Defendants required Plaintiffs to sign waivers of  
14 their right to remedy any violations. (FAC ¶¶ 81-82.)  
15 Accordingly, the Court finds that there is a pattern of activity  
16 for the purposes of this motion.

#### 17 4. Racketeering Activity

18 RICO defines racketeering activity as various enumerated  
19 "predicate acts," including extortion, wire fraud, and mail fraud.  
20 18 U.S.C. § 1961(1).

##### 21 a. Mail and Wire Fraud

22 Mail fraud involves: (1) the "existence of a scheme to  
23 defraud, and (2) using or causing<sup>5</sup> the use of the mails in  
24 furtherance of the scheme." United States v. Stein, 37 F.3d 1407,  
25 1408 (9th Cir. 1994). Similarly, wire fraud has three elements:  
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27 <sup>5</sup> The second element also requires that: (1) "the defendant  
28 caused the mail to be used and 2) the mailings be sufficiently  
closely related to the scheme." Stein, 37 F.3d at 1408.

1 (1) "a scheme to defraud, (2) use of the wires in furtherance of  
2 the scheme and (3) a specific intent to deceive or defraud."  
3 United States v. Garlick, 240 F.3d 789, 792 (9th Cir. 2001)(citing  
4 United States v. Blinder, 10 F.3d 1468, 1472 (9th Cir. 1993)).

5 As alleged in the FAC and described above, Defendants' scheme  
6 involves underpaying workers and misreporting the workers' true  
7 hours to public agencies, in order to receive payment from those  
8 agencies without penalty. Plaintiffs allege that falsified payroll  
9 reports, signed under penalty of perjury, were sent by the mail or  
10 fax to public agencies. (FAC ¶¶ 91-93.)

11 The Mega Defendants argue that there is no mail or wire fraud  
12 predicate, because Plaintiffs did not rely on the  
13 misrepresentations Defendants made to the public agencies.  
14 However, "[u]sing the mail to execute or attempt to execute a  
15 scheme to defraud is indictable as mail fraud, and hence a  
16 predicate act of racketeering under RICO, even if no one relied on  
17 any misrepresentation." Bridge v. Phoenix Bond & Indem. Co., 128  
18 S. Ct. 2131, 2138 (2008).

19 Again, Plaintiffs have provided specific evidence of the hours  
20 reported versus the hours actually worked during a three month  
21 period in 2008, and allegations relating to seventeen specific  
22 projects. (FAC ¶ 41, Ex. A.) Accordingly, the Court finds that  
23 Plaintiffs have stated sufficient allegations of mail and wire  
24 fraud for the purposes of this motion.

25 b. Extortion

26 Extortion is a predicate act where it is "chargeable under  
27 State law and punishable by imprisonment for more than one year."  
28 18 U.S.C. § 1961(1). Extortion is punishable by over one year's

1 imprisonment in California, Cal. Pen. Code § 520, and is defined as  
2 the "obtaining of property from another, with his consent, or the  
3 obtaining of an official act of a public officer, induced by a  
4 wrongful use of force or fear, or under color of official right."  
5 Cal. Pen. Code § 518.

6 Plaintiffs allege that they were forced to sign waivers of  
7 their rights to enforce labor laws under threat of termination,  
8 delayed payment of wages, or (in one instance) bodily harm. (FAC  
9 ¶¶ 73, 79, 81-82.)

10 The Court finds that this is sufficient to plead extortion  
11 under RICO.

12 5. Injury and Causation

13 Lastly, Plaintiffs must show (1) their injury was proximately  
14 caused by Defendants' fraudulent conduct and (2) concrete financial  
15 loss by documenting the amount of damages. Fireman's Fund Ins.  
16 Co., 258 F.3d at 1021.

17 Lost wages constitute a form of injury under RICO; and an  
18 employer who fraudulently depresses wages to gain commercial  
19 advantage causes this injury. Mendoza v. Zirkle Fruit Co., 301  
20 F.3d 1163, 1170 (9th Cir. 2002) ("They allege that the scheme had  
21 the purpose and direct result of depressing the wages paid to them  
22 by the growers. Thus, as the district court correctly determined,  
23 'plaintiffs have stated a claim that they are the direct victims of  
24 the illegal hiring scheme.'"). Here, Plaintiffs allege that they  
25 were paid significantly less than owed over a period of three  
26 years, over the course of at least 17 projects. (FAC ¶ 41; Ex. A.)

27 The Mega Defendants cite to Anza v. Ideal Steel Supply Corp.,  
28 547 U.S. 451, 458 (2006) for the proposition that Plaintiffs are

1 only the indirect victims of any fraudulent behavior, which was  
2 directed toward the public agencies. However, Anza is  
3 distinguishable. In that case, the plaintiff was a competitor of  
4 defendant's, and unable to show direct injury from defendant's tax  
5 evasion. See id. ("The direct victim of this conduct was the  
6 [State], not [plaintiff]. It was the State that was being defrauded  
7 and the State that lost tax revenue as a result."). Here, both the  
8 public agencies and employees are simultaneously being defrauded  
9 and injured as a part of the same scheme by Defendants. The  
10 purpose of the scheme was and is to defraud both Plaintiffs and the  
11 public agencies by under-reporting and under-paying wages, then  
12 attempting to conceal this violation by threatening employees.

13 Defendants argue that RICO claims here merely involve multiple  
14 preparatory acts leading to a "single scheme." See, e.g., Selman  
15 v. American Sports Underwriters, Inc., 697 F. Supp. 225, 232 (W.D.  
16 Va. 1988). Again, Plaintiffs plead a wide-ranging series of  
17 contracts where the Mega Defendants defrauded both numerous cities  
18 and employees.

19 Accordingly, Plaintiffs have established both concrete loss  
20 and causation.

21 **IV. CONCLUSION**

22 The Court DENIES the motion to dismiss and Plaintiffs' request  
23 for discovery.

24 IT IS SO ORDERED.

25

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27 Dated: April 6, 2009

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DEAN D. PREGERSON  
United States District Judge