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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

SERGIO MIRANDA, et al., Individually and on Behalf of All Those Similarly Situated, Plaintiffs, v. OFFICE OF THE COMMISSIONER OF BASEBALL, an unincorporated association doing business as MAJOR LEAGUE BASEBALL, et al., Defendants.	**Case No. 3:14-cv-05349-HSG** **CLASS ACTION** **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**

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INTRODUCTION

It is undisputed that the defendant baseball teams and the commissioner conspired to fix and keep Minor League baseball players' salaries artificially low in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2. Indeed, defendants force all Minor League players to sign a uniform standardized contract, which sets a non-negotiable, below market salary for Minor Leaguers. The Minor Leaguer either signs it or he cannot pursue his profession as a professional baseball player. He has no bargaining power, no union, no collective bargaining agreement, no arbitration agreement, no strike capability, no free agency, and according to the defendant baseball clubs, no legal basis to sue the baseball clubs for redress for their antitrust violations.

No other industry, including all other professional sports industries, is allowed to per se violate the antitrust laws by freely allowing competitors to conspire to fix, at non-competitive levels, the compensation paid to employees.

The defendants claim the so-called non statutory "business of baseball exemption" allows them to brazenly violate the antitrust laws by colluding to fix the below market compensation they pay Minor League players. Defendants are wrong. There is no statutory exemption in the antitrust laws that allows defendants to conspire to fix the compensation they pay Minor League players. *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 364 (1953) (Justice Burton dissent).

Nor has any court, let alone the United States Supreme Court held that Major League teams can conspire to fix, at artificially low salaries, the compensation paid to Minor League baseball players. None of the so-called baseball trilogy of cases decided that issue.

This is a case of first impression regarding defendants' antitrust violations with respect to minor league baseball players' salary. There is no stare decisis barrier to a finder of fact in this case finding that defendants have violated federal antitrust laws.

Likewise, there is no merit to the eight "12(b)(2) defendants'" argument that this Court lacks personal jurisdiction over them since they all have agents for service here, all filed waiver of service here, and all conspired to and directed their antitrust violations at California. *Jung v. Association of American Medical Colleges*, 300 F. Supp. 2d 119, 141 (D.D.C. 2004).

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The Pleadings

On a Rule 12(b)(6) motion to dismiss, the facts alleged in the Complaint must be taken true. *Lee v. City of Los Angeles*, 250 F.3d 668, 679 (9th Cir. 2001). Therefore, the Defendants[1] are either members of or govern the cartel known as Major League Baseball ("MLB"). In order to monopolize minor leaguers, restrain and depress minor league players' salaries, the MLB cartel inserted a provision (known as the reserve clause) into all minor league players' contracts that allows the defendant team to retain for seven (7) years the contractual rights to players and restrict their ability to negotiate with other teams for their baseball services, which reserve clause preserves MLB's minor league system of artificially low salaries and nonexistent contractual mobility. (Complaint, ¶ 81-95; Complaint Exhibit A, Attachment 3, ¶ VII).

Unlike major leaguers, minor leaguers have no union or collective bargaining agreement, even though they comprise the overwhelming majority of baseball players employed by the Defendants. The Major League Baseball Players' Association ("MLBPA") does not represent the interests of minor leaguers.

Minor leaguers are powerless to combat the collusive power of the MLB cartel. Major leaguers' salaries have increased by more than 2,000 percent since 1976 while minor leaguers' salaries have, on average, increased only 75 percent since that time. Inflation has risen by more than 400 percent over that same time period. (Complaint, ¶ 6).

Most minor leaguers earn between $3,000 and $7,500 for the entire year, despite routinely working between 50 and 70 hours per week during the roughly five-month championship season. They receive no overtime pay, and instead, routinely receive less than minimum wage during the championship season. (Complaint, ¶ 8).

The Defendants have conspired to pay no wages at all for significant periods of minor leaguers' work. The Defendants do not pay minor leaguers their salaries during spring training, even though the Defendants require minor leaguers to often work over fifty hours per week during spring training. Similarly, the Defendants do not pay salaries during other training periods such as instructional leagues and winter training.[2] (Complaint, ¶ 9).

[1] The term "Defendants" applies to all defendants named in the Complaint.

[2] *See* Exhibit A attached to the Complaint, Major League Rules ("MLR") Attachment 3, UPC ¶ VII, B; ¶ VI, B.

This suit seeks to recoup the damages sustained by minor leaguers as a result of MLB's violations of the antitrust laws, 15 U.S.C. §§ 1, 2, and 15, and to enjoin Defendants from continuing their antitrust violations. (Complaint, ¶ 10).

The Baseball Industry

MLB is big business. Its games are broadcast throughout the United States. During the 2013 season, over 74 million fans paid to attend MLB games. (Complaint, ¶ 64).

In 2012, revenue for MLB and its thirty teams surpassed $7.5 billion. Annual revenue is expected to reach $9 billion dollars in 2014.[3] (Complaint, ¶ 65).

Franchise values for the thirty MLB teams have grown as well. The average value of the thirty Franchises is estimated at $744 million each.[4] (Complaint, ¶ 66).

Without a union to counteract MLB's power, MLB and its teams have exploited minor leaguers by, among other things, continuing to promulgate and impose oppressive rules on minor leaguers' entry into the industry, restriction of movement to other teams, and on contracts, salaries, and compensation. (Complaint, ¶ 67).

The MLB's rules require all minor league contracts to be filed with and approved by the Commissioner, Mr. Selig.[5]

Defendants require all teams to use the same uniform player contract ("UPC") when signing amateur players. MLR 3(b)(2) states:

> To preserve morale among Minor League players and to produce the similarity of conditions necessary for keen competition, all contracts…shall be in the form of the Minor League Uniform Player Contract that is appended to these Rules as Attachment 3. All Minor League Uniform Player Contracts between either a Major or a Minor League Club and a player who has not previously signed a contract with a Major or Minor League Club shall be for a term of seven Minor League playing seasons….The minimum

[3] *See* Maury Brown, *MLB Revenues $7.5B for 2012, Could Approach $9B by 2014*, Biz of Baseball (Dec. 10, 2012), http://www.bizofbaseball.com/?catid=30:mlb-news&id=5769:mlb-revenues-75b-for-2012-could-approach-9b-by-2014&Itemid=42&option=com_content&view=article.

[4] Mike Ozanian, *Baseball Team Valuations 2013: Yankees on Top at $2.3 Billion*, Forbes (Mar. 27, 2013), http://www.forbes.com/sites/mikeozanian/2013/03/27/baseball-team-valuations-2013-yankees-ontop-at-2-3-billion/.

[5] *See* MLR 3(e) (requiring all contracts to be approved by the Commissioner); MLR Attachment 3, UPC ¶ XXVI (requiring approval by the Commissioner for the contract to have effect).

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> salary in each season covered by a Minor League Uniform Player Contract shall be the minimum amount established from time to time by the Major League Clubs….
>
> (Complaint, ¶ 81).

Moreover, "[a]ll contracts shall be in duplicate," and "[a]ll…must be filed with the Commissioner…for approval."[6] No contract can vary any term without the approval of the Commissioner.[7] A minor leaguer cannot work for an MLB team without signing the UPC because a "player's refusal to sign a formal contract shall disqualify the player from playing with the contracting Club or entering the service of any Major or Minor League Club."[8] (Complaint, ¶ 82).

Thus, the UPC grants the MLB team the exclusive rights to the minor leaguer for seven championship seasons (about seven years).[9]

But the minor leaguer cannot leave voluntarily to play for another baseball team—even outside of MLB, and even outside of the United States.[10] A player doing so "shall be subject to the discipline of the Commissioner."[11] Retirement from baseball during the seven-year term requires the Commissioner's approval.[12] (Complaint, ¶ 84).

MLB rules make clear that MLB and its Franchises remain the employers of minor leaguers at all times. MLR 56(g) states:

> The players so provided shall be under contract exclusively to the Major League Club and reserved only to the Major League Club. The Minor League Club shall respect, be bound by, abide by and not interfere with all contracts between the Major League Club and the players that it has provided to the Minor League Club.
>
> (Complaint, ¶ 88).

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[6] MLR 3(b)(3); *see also* MLR 3(b)(4) (saying that a player cannot play until the UPC is signed).

[7] MLR 3(b)(3).

[8] MLR 3(d).

[9] MLR 3(b)(2); MLR Attachment 3, UPC ¶ VI.A.

[10] MLR 18; MLR Attachment 3, UPC ¶ XVI.

[11] MLR 18.

[12] MLR 14.

Since minor leaguers do not belong to a union, nothing has prevented the Defendants from artificially and illegally depressing minor league wages. Because of Defendants' monopoly over the entryway into the highest levels of baseball, and given the young minor leaguer's strong desire to enter the industry, Defendants have exploited minor leaguers by paying them depressed compensation, below what they would receive in a competitive market. (Complaint, ¶ 90).

Defendants, through the Commissioner, issue minor league salary "guidelines" for players signed to an initial UPC, and teams deviate very little from these guidelines. MLR 3(c) requires that all first-year minor leaguers earn "the amount established by" MLB.[13] It is currently believed that all first-year minor leaguers employed by the Defendants must earn $1,100 per month. (Complaint, ¶ 91).

While salary guidelines are not publicly available, the Plaintiffs are informed and believe, based on the salaries paid by the Defendants across the minor leagues, that MLB currently imposes the following salaries, paid only during the championship season: $1,100 per month for Rookie and Short-Season A; $1,250 per month for Class-A; $1,500 per month for Class-AA; and $2,150 for Class-AAA. (Complaint, ¶ 93).

Beyond the first year, the UPC required by MLB, and enforced by Mr. Selig, purports to allow salary negotiation by the minor leaguer, as the UPC states that salaries will be set out in an addendum to the UPC and subject to negotiation.[14] But the same UPC provision states that if the Franchise and minor leaguer do not agree on salary terms, the Franchise may unilaterally set the salary and the minor leaguer must agree to it.[15] As the 2013 Miami Marlins Minor League Player Guide states, "This salary structure will be strictly adhered to; therefore, once a salary figure has been established and sent to you, there will be NO negotiations." (Complaint, ¶ 95).

The UPC required by MLB, and enforced by Mr. Selig, further states that salaries are only to be paid during the championship season, which lasts about five months out of the year.

[13] As the 2013 Miami Marlins Minor League Player Guide states, "all first-year players receive $1,100 per month regardless of playing level per the terms of the [UPC]."

[14] MLR Attachment 3, UPC ¶ VII.A.

[15] MLR Attachment 3, UPC ¶ VII.A.

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[16] Plaintiffs believe that most minor leaguers earn less than $7,500 per calendar year. Some earn $3,000 or less. Despite only being compensated during the approximately five-month championship season. (Complaint, ¶ 97).

MLB is made up of competitive member teams and has market power in the provision of minor league professional baseball games in North America and Latin America. Use by Defendants of the reserve clause, the UPC, and draft, which grants each Club absolute veto power and control over their minor league players' ability to negotiate and contract for higher compensation with other teams, are unreasonable, unlawful, and anticompetitive restraints under Section 1 of the Sherman Act. (Complaint, ¶ 107).

Through MLB and the exclusionary and anticompetitive provisions in the MLB Constitution, Defendants have conspired to violate the antitrust laws, and have willfully acquired and maintained monopoly power in violation of Section 2 of the Sherman Act within the market for minor league professional baseball players by preventing such minor league players from freely negotiating with other teams for their services and the compensation they should receive. (Complaint, ¶ 108).

This action challenges — and seeks to remedy — Defendants' violation of the federal antitrust laws and the use of the illegal cartel to institute and maintain the reserve clause and UPC as a means to stifle competition and suppress the compensation that minor leaguers receive, which would be significantly higher absent Defendants antitrust violations, which eliminate competition in the payment of minor leaguers. Not only are such agreements not necessary to producing baseball contests, they are directed at reducing the compensation paid to minor leaguers by eliminating competition for their services. (Complaint, ¶ 109).

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[16] MLR Attachment 3, UPC ¶ VII.B. ("Obligation to make such payments to Player shall start with the beginning of Club's championship playing season…[and] end with the termination of Club's championship playing season….").

ARGUMENT

I. THERE IS NO "EXEMPTION" FROM THE ANTITRUST LAWS THAT ALLOWS DEFENDANTS TO CONSPIRE TO FIX THE SALARIES PAID TO MINOR LEAGUE PLAYERS

It is undisputed that the defendants, and all of them have and continue to, conspire to fix the salaries they pay their Minor League players. Plaintiffs have alleged that defendants conspire to fix (at artificially low levels) the amount of compensation they pay their players. This is done in several ways. Every Minor League must sign a standardized contract that fixes the amount he is paid ($1,100/month for first year players, $1,250/month for second year players).

The players cannot negotiate with the team that drafted him or with other teams for a higher salary. Unlike Major League players, there is no free agency so the player either accepts the fixed compensation or he cannot work as a minor league player.

Because the defendants have created a monopoly for the playing of minor league baseball games, the plaintiffs and the class of minor league baseball players have no alternatives to seek employment for their professional services, thereby further stifling competition and damaging Plaintiffs and the class of minor league baseball players they represent by being forced to work for below market compensation.

No Exemption From Antitrust Laws For Horizontal Price Fixing of Minor League Baseball Players' Salaries

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination … or conspiracy, in restraint of trade or commerce … is declared to be illegal.

The courts, including the United States Supreme Court, have repeatedly held that it is a violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and section 4 of the Clayton Act, 15 U.S.C. § 15, for competitors to conspire to fix the compensation paid to employees in a sports

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or entertainment industry. *Mackey v. National Football League*, 543 F.2d 606, 617 (8th Cir. 1976). The court in *Mackey*, 543 F.2d at 617 stated:

> In other cases concerning professional sports, courts have not hesitated to apply the Sherman Act to club owner imposed restraints on competition for players' services. See *Kapp v. National Football League*, 390 F.Supp. 73 (N.D.Cal.1974); *Robertson v. National Basketball Ass'n*, 389 F.Supp. 867 (S.D.N.Y.1975). See also *Radovich v. National Football League*, supra; *Smith v. Pro-Football*, supra; *Boston Professional Hockey Ass'n, Inc. v. Cheevers*, supra; *Denver Rockets v. All-Pro Management, Inc.*, 325 F.Supp. 1049 (C.D.Cal.1971), stay vacated, 401 U.S. 1204, 91 S.Ct. 672, 28 L.Ed.2d 206 (1971) (Justice Douglas, Opinion in Chambers).

In the present case, the Uniform Player Contract, which all minor league players must sign, sets the salary they will receive, does not allow for negotiations, and if the minor leaguer does not agree, he cannot play professional baseball:

> VII. Payment
>
> A. … Club will pay Player at the monthly rate set out in Addendum C-1 … The Player and Club shall attempt annually to negotiate an applicable monthly salary rate … If the Player and Club do not reach agreement, then the Player's monthly salary rate for the next championship playing season shall be set by the Club … (Emphasis added).
>
> (Complaint, Exhibit A, Attachment 3, § VII).

Indeed, defendants do not dispute that they have conspired to fix (depress) minor league baseball players' compensation. Rather, they argue that their conspiracy to fix minor league baseball players' compensation is exempt from the Sherman Act's restrictions on restraint of trade, based on the so-called judicially created "business of baseball exemption." There is no statutory exemption in the Sherman Act exempting "business of baseball" (or minor league baseball) from the antitrust laws. Rather, the so-called "business of baseball" exemption supposedly was created by the Supreme Court in three cases: *Federal Baseball Club of Baltimore v. National League of Professional Base Ball Clubs*, 259 U.S. 200 (1922), *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953), and *Flood v. Kuhn*, 407 U.S. 258 (1972). Those

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decisions have been severely criticized by the Supreme Court itself. None of those three cases ruled on or decided the issue in this case of whether major league baseball and its constituent clubs could conspire to fix the salaries paid to minor league players.

In *Federal Baseball*, the owner of a professional baseball team of a defunct baseball league brought an antitrust suit claiming the National and American Leagues and others conspired to monopolize baseball by destroying the competing league. The issue was whether the business of giving exhibitions of baseball constituted interstate commerce. The Supreme Court held that it was not interstate commerce and therefore not subject to the Sherman Act. *Federal Baseball Club of Baltimore*, 259 U.S. at 209.

That decision has been soundly criticized. In fact, the sole underpinning for that decision—that the business of giving exhibitions of baseball is not interstate commerce—has since been rejected by the Supreme Court in *Flood v. Kuhn*, 407 U.S. at 282 ["Professional baseball is a business and it is engaged in interstate commerce." (Emphasis added).]. Thus, *Federal Baseball* has no precedential value and certainly did not decide the issue in this case of whether defendants' admitted conspiracy to fix minor leaguers' salaries is a restraint of trade in violation of section 1 of the Sherman Act. *Brown v. Mesirow Stein Real Estate, Inc.*, 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998).

In *Toolson*, supra, the Supreme Court, in a one paragaph per curiam decision, held "[w]ithout reexamination of the underlying issues" of the underlying cases on review, that based on the authority of *Federal Baseball*, "Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." *Toolson*, 346 U.S. at 357. There was no analysis, and respectfully, no basis for that holding. As made clear by Justice Burton's dissent in *Toolson*, there was no statutory exemption for baseball in the Sherman Act whereas there were express exemptions from federal antitrust laws created by Congress for other industries such as labor organizations, farm cooperatives, and insurance. ["Congress, however, has enacted no express exemption from that [Sherman] Act of any sport…."], *Toolson*, 346 U.S. at 364 and n.11.

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The majority in *Toolson* simply stated that because *Federal Baseball* supposedly held that the business of providing public baseball games for profit between clubs of professional baseball players was not within the scope of the federal antitrust laws and Congress had allowed the baseball business to develop based on the *Federal Baseball* decision,[17] that the business of baseball was exempt from the federal antitrust laws. Of course, as Justice Burton correctly pointed out in his dissent, *Toolson*, 346 U.S. at 364, Congress had already enacted legislation—the Sherman Act—that brought the "business of baseball" within the ambit of federal antitrust laws, i.e., Congress, by not expressly exempting baseball or the conspiracy to fix minor league baseball players' salaries from the antitrust laws, had subjected baseball and minor league baseball to the antitrust laws.

In *Radovich v. National Football League*, 352 U.S. 445 (1957), the Supreme Court refused to apply the so-called baseball antitrust exemption to the business of professional football,[18] holding that "we now specifically limit the rule there established [in *Toolson* and *Federal Baseball*] to the facts there involved, i.e., the business of organized professional baseball. … were we considering the question of baseball for the first time upon a clean slate we would have no doubts." *Id.* at 451 and 452.

In *Flood v. Kuhn*, 407 U.S. 259 (1972), the Supreme Court, in a four to three majority decision (in which Chief Justice Burger voted with the majority but agreed with the dissent), the court reluctantly upheld the reserve clause applicable to major league baseball players' contracts (the different reserve clause applicable to minor league players' contracts was also not an issue in that case) exempt from federal antitrust laws based on stare decisis—even though that judicially-created exemption was an "anomaly" and an "aberration"—because Congress had acquiesced in that judicially-created exemption. *Id.* at 282. Justice Douglas (who had voted with the majority in *Toolson* but who later stated he had "lived to regret it") stated in his dissent

[17] As discussed *infra*, the so-called reliance theory for not overruling an incorrect case has much less force in antitrust cases which are meant to be adapted to changing economic realities. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

[18] Mr. Radovich successfully sued the National Football League for antitrust violations for conspiring to blackballing him from professional football in violation of the Sherman Act, 15 U.S.C. §§ 1 and 2, and the Clayton Act, 15 U.S.C. §§ 15 and 26.

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in *Flood* that upholding the exemption based on the *Federal Baseball* decision "is a derelict in the stream of the law that we, its creators, should remove." (Douglas dissent, *Flood*, 407 U.S. 259 at 286). Indeed, *Federal Baseball* had not even considered the reserve clause and was erroneously based solely on professional baseball not being interstate commerce. *Flood* relied on *Federal Baseball* even though the *Flood* court held, contrary to the *Federal Baseball* and *Toolson* decisions, that professional baseball is engaged in interstate commerce. *Flood*, 407 U.S. 259, 282. Thus, the *Flood* court based its decision to uphold a judicially-created exemption from the federal antitrust laws for baseball based on a stare decisis foundation that it held was unfounded. The Court felt it was for Congress to enact legislation to undo what it had created out of whole cloth 50 years earlier, because supposedly baseball had relied on the court's mistaken prior decisions and Congress had not seen fit to take any action to correct the Court's mistake.

In none of those three decisions did the Supreme Court decide the issue presented in this case of whether the defendants' conspiracy to fix *minor league* baseball players' salaries was exempt from the federal antitrust laws. Thus, the doctrine of stare decisis does not apply.

The Defendants, here, argue that the Ninth Circuit's recent decision in *City of San Jose v. Office of the Com'r of Baseball*, 776 F.3d 686 (2015) is also a stare decisis bar which binds this Court to hold that the "business of baseball exemption" bars the minor leaguers' antitrust salary-fixing antitrust claims. Defendants are again wrong. The *City of San Jose* was a franchise relocation case. That case had nothing to do with whether major league teams could conspire to fix the salaries that minor leaguers receive. Therefore, that case is not a stare decisis bar to the case before this Court. *Gately v. Com. of Mass.*, 2 F.3d 1221, 1226 (1st Cir. 1993); *Brown v. Mesirow Stein Real Estate, Inc.*, 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998).

Stare Decisis Does Not Apply To This Case

Defendants, here, argue that under the doctrine of *stare decisis*, the so-called "business of baseball exemption" supposedly enunciated in *Federal Baseball*, *Toolson*, and *Flood*, bars the plaintiffs in this case. Defendants argue that stare decisis is applicable here and prevents this Court from allowing the case to be tried for the reasons set forth in *Flood*, i.e., that legislative

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changes to the antitrust laws should be left to Congress and that baseball has relied on those cases and inaction of Congress. Respectfully, defendants are wrong. Stare decisis does not apply because those cases did not decide the antitrust issues presented here. Morever, even if they had, this Court can decline to follow those cases.

In *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007), the Supreme Court rejected the same arguments made here and refused to apply stare decisis. The *Leegin* Court overruled its earlier (96-year-old) antitrust decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911) (that vertical resale price maintenance is subject to a per se antitrust analysis) and held that such vertical resale price maintenance is instead subject to "rule of reason" antitrust analysis. In refusing to be bound by stare decisis and Congress's 97-year inaction, the Court in *Leegin*, 551 U.S. 877, 899-907 held:

> *Stare decisis* is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. (Citation omitted). ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. (Citations omitted). ("In antitrust, the federal courts ... act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. …
>
> …
>
> ... As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, … In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it.
>
> Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." (Citation omitted). … We have distanced ourselves from the opinion's rationales. *Khan, supra,* at 21, 118 S.Ct. 275 (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); … (*Id.* at 900).
>
> …

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> Respondent's arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. …
>
> …
>
> … We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional § 1 principles, including the principle that our antitrust doctrines "evolv[e] with new circumstances and new wisdom." (Citation omitted). *Id.* at 905.
>
> …
>
> … The purpose of the antitrust laws, by contrast, is "the protection of *competition*, not *competitors*." (Citation omitted).

The same reasoning that the *Leegin* court applied in not blindly applying outmoded, erroneous reasoning to an antitrust case applies (with even more force) here. As in *Leegin*, the precedent was nearly 100 years old. The economic realities had changed greatly. There was no valid economic reason to adhere to the old wrong law. Subsequent decisions proved the earlier decision wrong.

Here, as in *Leegin*, the prior baseball trilogy of case(s) conflicted with subsequent Supreme Court precedent, i.e., antitrust laws have repeatedly been held to apply to invalidate horizontal conspiracies to restrain athletes' salaries, in football, hockey, basketball, etc. *Mackey*, supra, 543 F.2d at 617. Indeed, the Supreme Court justices themselves do not believe in the reasoning of those "aberrant" cases. There is no reason to apply them.

Accord, *State Oil Co. v. Khan*, 522 U.S. 3, 19 (1997):

> Respondents' reliance on *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 74 S.Ct. 78, 98 L.Ed. 64 (1953) *(per curiam)*, and*Flood v. Kuhn*, 407 U.S. 258, 92 S.Ct. 2099, 32 L.Ed.2d 728 (1972), is similarly misplaced, because those decisions are clearly inapposite, having to do with the antitrust exemption for professional baseball, which this Court has described as "an aberration ... rest[ing] on a recognition and an acceptance of baseball's unique characteristics and needs," *id.*, at 282, 92 S.Ct., at 2112. In the context of this case, we infer little meaning from the fact that Congress has not reacted legislatively to *Albrecht*.

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…

> But "*[s]tare decisis* is not an inexorable command." *Ibid*. In the area of antitrust law, there is a competing interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience. Thus, the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act in light of the accepted view that Congress "expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition." (Citation omitted). *Id.* at 20.

Accord, *Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240-242:

> Nevertheless, as Mr. Justice Frankfurter wrote for the Court, '(S)tare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience.' (Citation omitted). It is precisely because *Sinclair* stands as a significant departure from our otherwise consistent emphasis … that we believe *Sinclair* should be reconsidered. Furthermore, in light of developments subsequent to *Sinclair*, … it has become clear that the *Sinclair* decision does not further but rather frustrates realization of an important goal of our national labor policy.
>
> Nor can we agree that conclusive weight should be accorded to the failure of Congress to respond to *Sinclair* on the theory that congressional silence should be interpreted as acceptance of the decision. The Court has cautioned that '(i)t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.' (Citation omitted). Therefore, in the absence of any persuasive circumstances evidencing a clear design that congressional inaction be taken as acceptance of *Sinclair*, the mere silence of Congress is not a sufficient reason for refusing to reconsider the decision. (Citation omitted).

Here too, Congress' failure to act is not a basis for applying admittedly wrong case law. There are any number of reasons why Congress has not enacted new legislation. Principle among them is that the antitrust laws have already been enacted and do apply. Moreover, congressional gridlock on an issue (baseball), which in the scheme of things is not a priority, is not a basis for applying the stare decisis doctrine.

Also, defendants have not seriously relied on the so-called antitrust exemptions. Since

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Flood, subsequent collective bargaining agreements, and free agency for major league ballplayers has rendered the so-called antitrust exemption for major leaguers virtually meaningless. ("The Curt Flood Act of 1998: A Hollow Gesture After All These Years?", 9 Marquette Sports Law Journal 314, 342).

Moreover, as Justice Thurgood Marshall noted in his dissent in *Flood*, the perceived adverse effects to baseball owners from an elimination of the "business of baseball exemption" could be mitigated by eliminating the exemption prospectively. *Flood*, supra, 407 U.S. at 293.

The Court's more recent antitrust law subjecting sports leagues to the antitrust laws in order to protect players from the owners' restraints of trade[19] and the economic realities (and fears that chaos would ensue if the reserve clause was eliminated) have shown that the basis, if any, for the exemption and those fears are unfounded.

Baseball has flourished and free agency for major leaguers and collective bargaining for higher salaries for major leaguers has not harmed the business of baseball. Only the minor leaguers have been harmed by the "exemption!"

Circumstances Have Changed Dramatically Since *Federal Baseball* Was Decided

In 1946 broadcast revenues accounted for only about 3 percent of total revenues (U.S. Congress, House 1952 p. 1610). In 1990, it had increased to 50 percent. In actual dollar figures the amount of annual national broadcasting revenues was $1.2 million in 1950. In 1992, it was $365 million.

Last year in 2014 major league baseball franchises earned $8 billion dollars in revenue. The Dodgers alone took in $120 million in local television money in 2014 as part of a $8.35 billion dollar deal with Time Warner Cable. During the last few years mega cable deals and new broadcasting contracts with ESPN, Fox, and TBS will pay a total of $12.4 billion over the next eight years.

[19] See *Mackey*, supra, 543 F.2d 606 at 617 and cases cited therein.

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In light of recent trends in revenues but with no collective bargaining and supposedly no antitrust rights for minor league players, it is time to take another look at the "baseball exemption" based on current factors particularly as they relate to professional minor league players who have been completely left out of the financial explosion.

The most common defense of the reserve clause during the first half of the 20th century was that it was necessary in order to prevent the richest clubs from signing all the best players. In the era before broadcast and licensing revenues became so significant clubs in bigger cities had an advantage and it was argued that this would adversely affect competitive balance. The richest clubs would always win and that would destroy the league.

But now according to research and reporting by Forbes Magazine Major League Baseball is worth $36 billion. The average baseball franchise is now worth $1.2 billion with 15 teams worth at least $1 billion. Some of these teams with the higher values are not located in the largest cities (e.g. St. Louis, Seattle, San Francisco).

Certainly major league players' salaries have accelerated since free agency became part of the collective bargaining agreement in 1976. In 1976, the final season without free agency, the average major league salary was $51,000. In 1973, one year after the *Flood* decision, salary arbitration by a neutral arbitrator was negotiated and agreed to in MLB's collective bargaining agreement. In 1974, two years after *Flood v. Kuhn*, baseball had its first free agent, Catfish Hunter of the Oakland Athletics. Contrary to earlier concerns, MLB knows that free agency has had a positive effect on competitive balance and has not hurt the business. In the first 15 seasons with free agency, twelve different teams won the World Series and sixteen different teams made it to the World Series.

Primarily due to free agency and salary arbitration gained through collective bargaining, the average major league salary in 2015 will exceed $4 million, BUT NOT FOR MINOR LEAGUERS who are paid a fixed starting salary of $1,100/month for five months.

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Because of the so-called baseball exemption, the thousands and thousands of professional baseball players who have worked over the years pursuant to a minor league contract do not have a union, have no rights to free agency, arbitration, or to have grievances heard by a neutral; they all sign unilateral uniform contracts renewable for six additional years at salaries set by scale having nothing to do with performance and they have no antitrust protection.

In three separate arbitration proceedings (Collusion I, II, and III) following the 1985, 1986, and 1987 baseball seasons the MLB owners were charged with acting in concert to boycott the signing of free agents and conspiracy to destroy free agency. After examining and hearing extensive evidence, arbitrator Thomas Roberts ruled in September of 1987 that the club owners were guilty of collusion. On December 21, 1990 a settlement for damages in the amount of $280 million was reached. None of that is available or possible for minor league players because it is believed that they cannot assert their antitrust conspiracy claims due to baseball's supposed antitrust exemption.

Even If *Federal Baseball* Decided The Minor League Issue, This Court Could Still Not Apply It

Moreover, even if, arguendo, the Supreme Court had ruled 45 years ago on the issue in this case, stare decisis would still not bar this Court from reconsidering the applicability of the federal antitrust laws to Plaintiffs' claims in this case. Where, as here, it is almost certain that because of changed circumstances, the strong split among the justices regarding the issue, the different factual and economic circumstances relating to the issue now, the fact that the court has admitted the cases were decided wrongly and were an "aberration," "a derelict in the stream of law," are all bases for a lower court not applying stare decisis. *Brown*, 7 F. Supp. 2d at 1006. See also 56 Harv. L. Rev. 652, 653; 50 Yale L. Rev. 1448; and cases cited therein.

Under such circumstances, a lower court can refuse to apply stare decisis or because of

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different facts and issues, hold that it does not apply. *Gately v. Com. of Mass.*, 2 F.3d 1221, 1226 (1st Cir. 1993) ["As stare decisis is concerned with rules of law, however, a decision dependent upon its underlying facts is not necessarily controlling precedent as to the subsequent analysis of the same question on different facts and a different record."]. Accord, *Brown v. Mesirow Stein Real Estate, Inc.*, 7 F. Supp. 2d 1004, 1006 (N.D. Ill. 1998) ["'[f]or stare decisis to be applied, an issue of law must have been heard and decided. If an issue is not argued, ... the decision does not constitute a precedent to be followed in subsequent cases in which the same issue arises.' … Furthermore, even assuming that stare decisis does apply, the court is not required to blindly follow [a prior case] in disregard of the more recent opinions … ('Ordinarily a lower court has no authority to reject a doctrine developed by a higher one.... If, however, events subsequent to the last decision by that court … —make it almost certain that the higher court would repudiate the doctrine if given a chance to do so, the lower court is not required to adhere to the doctrine.')."].

Here, the issue of the minor league reserve clause and the defendants' agreement to fix (set) all minor league players' salary at the same low amount and the effect on minor leaguers of those restraints of trade and monopoly practices, are different issues than decided in *Flood*, *Toolson*, and *Federal Baseball*, and the economic facts have greatly changed even from the time of the *Flood* decision.

The ones being harmed in this case are the minor league players. While their owners get richer and richer and everyone in baseball gets more money (even major leaguers) as a result of the minor leaguers' efforts, the minor leaguers are forced to work for essentially slave wages with no opportunity to better their compensation. As Justice Thurgood Marshall stated in his dissent in *Flood*, supra, 407 U.S. at 289-292:

> To non-athletes it might appear that petitioner was virtually enslaved by the owners of major league baseball clubs who bartered among themselves for his services. But, athletes know that

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> it was not servitude that bound petitioner to the club owners; it was the reserve system. …
>
> …
>
> 'Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. . . . Implicit in such freedom is the notion that it cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy.' *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

That labor law/antitrust relationship of protection for major leaguers does not apply to minor leaguers. They have no union or collective bargaining that could obviate or lessen the need for antitrust protection.

Justice

Then, there is also the simple matter of justice. When a practice or law is not right, it is for the courts to correct it. The courts have been the bastion of last resort for the oppressed and discriminated against. Laws that treat unfavored persons differently have been corrected (sometimes after long periods) by the courts. Stare decisis has not been a barrier to correcting a law or precedent that has been applied incorrectly. Thus, in *Brown v. Board of Ed. of Topeka, Shawnee County, Kan.*, 347 U.S. 483 (1954), the Supreme Court erased the discriminatory concept of separate but equal enunciated nearly sixty years earlier in *Plessy v. Ferguson*, 163 U.S. 537 (1896).

And just days ago, in *Obergefell v. Hodges*, 576 U.S. ____ (Slip Op. June 26, 2015), it was the Court, not Congress, that finally gave gays equal marriage rights.

In this case, this Court can and should correct nearly a hundred years of deprivation and apply the antitrust laws as they are required to be applied to the victims—the minor leaguers.

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The Curt Flood Act Does Not Apply To This Case

Defendants next argue that even if the trilogy of Supreme Court baseball cases does not bar this action, the Curt Flood Act, 15 U.S.C. § 27, does. Defendants are again wrong.

Contrary to defendants' assertions, the Curt Flood Act does not make the other antitrust laws (Sherman Act and Clayton Act) inapplicable to minor league baseball players; it leaves those antitrust laws intact. The Curt Flood Act only makes 15 U.S.C. § 27 inapplicable to minor leaguers. Congress chose to take no definitive stance on the issue of a baseball antitrust exemption for minor leaguers and left it to the courts to decide the question of whether the existing federal antitrust laws (Sherman and Clayton Acts) apply to minor league players. The Curt Flood Act, 15 U.S.C. § 27(b) provides in pertinent part:

> (b) No court shall rely on the enactment of this section as a basis for changing the application of the antitrust laws … This section does not create, permit or imply a cause of action by which to challenge under the antitrust laws, or otherwise apply the antitrust laws to, any conduct, acts, practices, or agreements that do not directly relate to or affect employment of major league baseball players to play baseball at the major league level …
>
> …
>
> (c) Only a major league baseball player has standing to sue under this section. (Emphasis added).
>
> …

Thus, it is clear that the Curt Flood Act does not affect, restrict, limit, or eliminate any rights a minor league player has to pursue antitrust violations under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, or under section 4 of the Clayton Act, 15 U.S.C. §§ 15, 26. The Curt Flood Act only restricts application of the Curt Flood Act.

II. THIS COURT HAS PERSONAL JURISDICTION OVER THE BALTIMORE ORIOLES LIMITED PARTNERSHIP, THE BOSTON RED SOX BASEBALL CLUB L.P., CHICAGO WHITE SOX, LTD., NEW YORK YANKEES, P'SHIP, THE PHILLIES, PITTSBURGH ASSOCIATES, L.P., TAMPA BAY RAYS BASEBALL, LTD., AND WASHINGTON NATIONALS BASEBALL CLUB, LLC. (COLLECTIVELY REFERRED TO AS "THE 12(b)(2) DEFENDANTS")

Eight of the 30 defendant baseball clubs have moved to dismiss pursuant to Federal

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Rules of Civil Procedure, Rule 12(b)(2), claiming this Court lacks personal jurisdiction over them. The former Commissioner of Baseball (Bud Selig) and the other 22 teams do not contest personal jurisdiction of this Court over them in this case.

As to the eight "12(b)(2) defendants," their motion to dismiss on lack of personal jurisdiction grounds must be denied because this Court does have personal jurisdiction over them pursuant to the conspiracy theory of long-arm jurisdiction. *Jung v. Association of American Medical Colleges*, 300 F. Supp. 2d 119, 141 (D.D.C. 2004) ["So long as any one co-conspirator commits at least one overt act in furtherance of the conspiracy in the forum jurisdiction, there is personal jurisdiction over all members of the conspiracy."]; *Second Amendment Foundation v. U.S. Conference of Mayors*, 274 F.3d 521, 524 (D.C. Cir. 2001); *Kentucky Speedway, LLC v. National Ass'n of Stock Car Auto Racing, Inc.,* 410 F. Supp. 2d 592, 599-602 (E.D. Kent. 2006); *Modesto City Schools v. Riso Kagaku Corp.*, 157 F. Supp. 2d 1128, 1132 (E.D. Cal. 2001).

In this case, it is alleged that all the defendants, including each of the eight 12(b)(2) defendants, conspired to fix and depress the salaries of minor league players by agreeing to and requiring all minor league ballplayers for all teams to sign the subject illegal contracts that fixed their salaries as required by defendants' conspiratorial agreement. (Complaint, ¶s 81-95; and Exhibit A, Attachment 3 Section VII). Indeed, these defendants do not, and cannot, deny that they so conspired to fix minor leaguers' salaries through Uniform Player Contracts. It is also undisputed that some of the members of the MLB conspiracy reside and do business in California and in the Northern District of California, i.e., the Oakland A's and the San Francisco Giants reside here and executed and forced those minor league contracts to their minor leaguers from the Northern District of California.

Plaintiffs have alleged, or can, if necessary, amend to more particularly allege personal jurisdiction over these 12(b)(2) defendants, and if necessary, can and should be allowed some

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limited jurisdictional discovery to establish either general or specific jurisdiction over them.

Moreover, as alleged in Paragraph 63 of the Complaint, venue for this action is appropriate under 15 U.S.C. § 22 against all defendants. 15 U.S.C. § 22 provides:

> Any suit, action, or proceeding under the antitrust laws against a corporation may be brought … in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found. (Emphasis added).

Where, as here, jurisdictional discovery has been reserved (at defendants' request),[20] plaintiff only needs to establish a prima facie case that personal jurisdiction over the defendants exists to survive a 12(b)(2) motion to dismiss. *In re Cathode Ray Tube Antitrust Litigation*, 27 F. Supp. 3d 1002, 1008 (N.D. Cal. 2014); *Jung*, supra, at 128.

Since the Oakland A's and the San Francisco Giants are co-conspirators with the 12(b)(2) defendants and since the Oakland A's and San Francisco Giants committed some of the antitrust violations in this district, their co-conspirators are liable for the resident co-conspirators' acts, i.e., the antitrust conspiracy to fix minor league players' salaries here, and are subject to personal jurisdiction here. *Jung*, supra; *Kentucky Speedway*, supra.

The 12(b)(2) defendants focus their lack of personal jurisdiction arguments on the due process concepts of general jurisdiction or specific personal jurisdiction but ignore the conspiracy theory of personal jurisdiction discussed above, which is enough to confer personal jurisdiction on all eight of these co-conspirators irrespective of whether general or specific personal jurisdiction as to each particular defendant exists.

Moreover, it is undisputed that all the defendants conspired to coerce all minor league players, including California minor league players to work for fixed anti-competitive salaries. Therefore, the requirements for specific personal jurisdiction (tortious, intentional conduct

[20] See transcript of April 14, 2015 case management conference hearing where defendants stated that no discovery would be needed because they were merely attacking the complaint for failure to plead sufficient facts to establish personal jurisdiction over seven (sic) defendants. Dkt No. 43 (p. 5).

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aimed at the forum causing harm that defendant knows is likely to be suffered in the forum state) have been satisfied. *In re Cathode,* supra, at 1011.

Moreover, where, as here, each defendant has accepted service of the Complaint filed in this Court (Dkt Nos. 33), the federal court obtains personal jurisdiction over each such defendant. *Action Embroidery Corp. v. Atlantic Embroidery, Inc.*, 368 F.3d 1174, 1177 (9th Cir. 2004) quoting *Butcher's Union Local No. 498, United Food and Commercial Workers v. SDC Inv., Inc.*, 788 F.2d 535, 538 (9th Cir. 1986) ["[a] federal court obtains personal jurisdiction over a defendant if it is able to serve process on him."].

Moreover, venue and personal jurisdiction over the 12(b)(2) defendants are appropriate here because the case is already proceeding against the other 22 defendant co-conspirator baseball clubs. To dismiss these eight only to have the cases refiled against them in another forum with duplicate process and litigation and then have the cases transferred back to this venue and consolidated with this case against their 22 co-conspirators would be a colossal waste of the courts' time, energy, and the parties' expense.

Here, the 12(b)(2) defendants' due process concerns are satisfied. Each defendant operates in and is at home in the United States and therefore in a suit brought, as here, under section 12 of the Clayton Act, "the relevant forum with which a defendant must have 'minimum contacts' … is the United States." *Action Embroidery Corp.*, supra, 368 F.3d at 1180. In a statute providing for nationwide service of process, the inquiry to determine whether minimum contacts exist is whether the defendant has sufficiently caused foreseeable consequences in this country. *Id*. citing *Securities Inv. Prot. Corp. v. Vigman*, 764 F.2d 1309, 1316 (9th Cir. 1985). Thus, the requirements of due process are complied with by subjecting the 12(b)(2) defendants to personal jurisdiction by this Court.

The 12(b)(2) defendants' reliance on *California Clippers, Inc. v. U.S. Soccer Football Ass'n*, 314 F. Supp. 1057 (1970) for the proposition that § 12 of the Clayton Act does not

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provide for service of process against an unincorporated association, is misplaced. There, service of process was not effected by service within the State of California. However, this Court held that service would be (and was) proper under Fed. R. Civ. P. 4(f) if authorized by the federal rules of civil procedure, i.e., Fed. R. Civ. P. 4(e) which incorporates applicable California law (C.C.P. § 411(2.1)) which dealt with service on unincorporated associations, by serving an agent for service in California for the defendant. Here, all eight of the 12(b)(2) defendants consented to a waiver of service. (Dkt No. 33).

Finally, the Court can take judicial notice that these same defendants have been held to be subject to personal jurisdiction in another case pending in this Court, *Senne v. Major League Baseball*, Case No. 3:14-cv-00608-JCS (Docket No. 379) (after considerable personal jurisdiction discovery was allowed).

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss should be denied. In the alternative, the motions should be continued so that Plaintiffs can do limited jurisdictional discovery to fully respond to the 12(b)(2) defendants' motion to dismiss based on lack of personal jurisdiction.

DATED: June 30, 2015

LAW OFFICES OF SAMUEL KORNHAUSER

and

LAW OFFICES OF BRIAN DAVID

By: */s/ Samuel Kornhauser*
Samuel Kornhauser

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the forgoing **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** has been filed electronically with the U.S. District Court, Northern District of California this 30th day of June, 2015. Notice of this filing will be sent to all parties of record by operation of the Court's electronic filing system.

/s/ Samuel Rolnick
Samuel Rolnick

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