IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ORANNA BUMGARNER FELTER, et al., Plaintiffs,	)	No. 1:02 CV 2156(RWR)
v.	)	**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS**
KEN SALAZAR, Secretary of the Interior, et al., Defendants.	)	

I. INTRODUCTION

Pursuant to a Minute Order dated October 27, 2009, the Court ordered that the parties submit by December 1, 2009 supplemental memoranda regarding the preclusive effects of the prior judgments identified in the Defendants' motion to dismiss. The Court further directed the parties to specifically address:

1. What, if any, preclusive effects the judgments have specifically on Plaintiffs' demand for an accounting in the eighth cause of action of the Plaintiffs' amended complaint;
2. With respect to the issue of collateral estoppel, whether any issue of fact or law that would be conclusive with respect to the demand for an accounting was actually litigated and determined by a valid and final judgment; and
3. Whether the Plaintiffs had an incentive to fully litigate those issues in the earlier proceedings.

With respect to the issue of res judicata, the Court ordered the parties to address:

4. Whether a demand for an accounting arose from the same nucleus of

common facts as any of the claims made in the cases cited by the Defendants in their motion to dismiss, such that the Plaintiffs were required to bring the claim for an accounting in an earlier litigation.

The following District of Columbia Circuit Court of Appeals decisions were cited by the Court as precedential in guiding the parties' respective argument on these four (4) questions:

Consolidated Edison Co. of New York v. Bodman, 449 F.3d 1254 (D.C. Cir. 2006)

Yamaha Corp. of America v. United States, 961 F.2d 245 (D.C. Cir. 1992)

Apotex, Inc. v. Food & Drug Admin., 393 F.3d 210 (D.C. Cir. 2004)

The principles and rules of law established by these Court of Appeals decisions are compared in relation to this pending case and to the issues of law and fact in the prior judgments identified in the Defendants' motion to dismiss. The cases identified in Defendants' motion to dismiss, p. 9, are the following:

Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972);

Murdock v. Ute Indian Tribe, 975 F.2d 683 (10th Cir. 1992), *cert. denied*,

Murdock v. Ute Distribution Corp., 507 U.S. 1042 (1993);

Affiliated Ute Citizens, 199 Ct. Cl. 1004;

Affiliated Ute Citizens, 215 Ct. Cl. 935 (1977);

United States v. Murdock, 132 F.3d 534 (10th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998); and

Ute Indian Tribe v. Probst, 428 F.2d 491 (10th Cir. 1970) (on rehearing), *cert. denied*, 400 U.S. 926).

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II. ARGUMENT

A. Circuit Principles and Rules of Law

1. *Consolidated Edison Co. of New York v. Bodman*, 449 F.3d 1254 (D.C. Cir. 2006).

Consolidated Edison Co. of New York v. Bodman, was a lawsuit over the question of whether states and federal agencies could obtain refunds under a 1986 agreement implicating stripper wells. The decision, at p. 1260, hinged upon another decision issued four (4) years earlier where the district court had actually addressed the issue and necessarily resolved that same issue against claimants:

> For these reasons, we conclude that the district court in *ConEd IV* actually addressed the issue posed by the Claimants here - whether States and non-DOE parts of the federal government, and their departments and agencies are eligible to obtain reimbursements from the Reserve Fund - and necessarily resolved the question in a manner adverse to the Claimants. Because the other elements for a finding of issue preclusion are also met, and because the Claimants had "one fair and full opportunity to prove a claim and [have] failed in that effort," they may not re-litigate the claim a second time, [citations omitted], and we affirm the dismissal of the complaint.

This Court pointed the parties to those principles enunciated in *Consolidated Edison Co.*, p. 1258:

1. When an issue of fact or law is "actually" litigated;
2. Those issues of fact or law are determined by a "valid and final judgment" to be "essential" to the judgment;
3. Preclusion in the second case must not work a "basic unfairness" to the

party bound by the first determination.

2. *Yamaha Corp. of America v. United States*, 961 F.2d 245 (D.C. Cir. 1992).

Yamaha Corp. of America v. United States was a lawsuit challenging the legality of certain regulations of the United States Custom Services. In the course of reaching its decision, the United States Court of Appeals, District of Columbia Circuit, examined a *prior 1983* decision rendered in the Central District Court of California seeking damages and injunctive relief by Yamaha Corp. of America against ABC International Traders Corporation for trademark infringement and unfair competition under the Lanham Act and the laws of California. "Incentive to fully litigate those issues in the earlier proceedings" was the definitive point stressed by this District Court in its Minute Order as arising from *Yamaha Corp. of America v. United States*.

Without discussing the intricate details of the different cases involved, *Yamaha Corp. of America v. United States* sets standards for establishing the preclusive effects of a *prior* holding on the same issues raised by a party in a *later second action:*

1. The same issue now being raised must have been "contested" by the parties and submitted for judicial determination in the prior case;
2. The issue must have been "actually" and "necessarily" determined by a court of competent jurisdiction in that prior case; and
3. Preclusion in the second case must not work a "basic unfairness" to the party bound by the first determination.

The principles and rules of law as to the "basic unfairness" factor are the same in *Consolidated Edison Co. of New York v. Bodman* and *Yamaha Corp. of America v. United States.* Both Circuit rulings above require that the parties in the current action must have

actually litigated the issues and that a *determination* must have been reached in a court of competent jurisdiction. If the defendants hit within the circle of all three (3) parameters drawn in these cases, then the determination is conclusive in a subsequent action between the parties, whether on the same or different claim. Plaintiffs' position is that Defendants cannot match up the law and facts as determined in the cases they cite in the Memorandum in Support of Motion to Dismiss with those allegations in the action for accounting.

3. Apotex, Inc. v. Food & Drug Admin., 393 F.3d 210 (D.C. Cir. 2004).

Apotex stands for the doctrine of *res judicata* which requires that a judgment on the merits in a *prior suit* bars a second suit involving *identical parties* or their privies based on the *same cause of action*. At issue in *Apotex* was a dispute over the proper interpretation and application of a specific provision of the federal laws and regulations administered by the Food & Drug Administration. The United States Court of Appeals, District of Columbia Circuit, determined that *res judicata* barred plaintiff Apotex from bringing its suit: "Also known as claim preclusion, the doctrine of *res judicata* holds that a judgment on the merits in a prior suit bars a second suit involving identical parties or their privies based on the same cause of action." *Apotex*, p. 217.

Apotex gives guidance in drawing the target in these simple terms as to whether two (2) cases implicate the same cause of action because they share the same "nucleus of facts":

1. Whether the facts of the cases are related in time, space, origin, or motivation; and
2. Whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

B. Prior Cases Cited by Defendants

The Defendants can only prevail in their motion to dismiss all causes of action posted in Plaintiff's Amended Complaint, including the accounting action, if they hit the mark defined by *Consolidated Edison Co. of New York v. Bodman*, *Yamaha Corp. of America v. United States* and *Apotex, Inc. v. Food & Drug Admin.* Defendants bear the burden of identifying the legal issues and facts previously established in several cases cited in their motion to dismiss. These cases, i.e, their determined issues and alleged facts, must be compared to the precedential principles and rules in the Circuit Court decisions.

1. *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972)

The *Affiliated Ute Citizens v. United States* case was actually the culmination of two actions brought by mixed-blood Indians or their representatives arising directly from the Ute Partition and Termination Act (UPA). The essence of these two cases, which together form the underlayment for the claims in *Affiliated Ute Citizens* was a dispute over pro rata distribution to individual members of the Affiliated Ute Citizens (AUC) of oil, gas and mineral rights from subsurface natural resources lying beneath the Ute Indian Reservation, and for violations of the Securities Exchange Act of 1934.

This 1972 AUC case did not seek an accounting of any of those specifically identified monies derived from the disposition of settlement funds earmarked and targeted for distribution to Plaintiffs that arose from a $32 million dollar Indian Claims Commission judgment allocated under the "share and share alike" agreement as approved by Act of Congress on August 21, 1951. Nothing can be read into the *Affiliated Ute Citizens* case that

necessarily or even reasonably leads to a conclusion that the Indian Claims Commission monies awarded by Act of Congress in 1951 were ever accounted for or properly distributed to the *Felter* Plaintiffs at anytime after those funds were placed in control of the United States of America as trustee.

2. *Murdock v. Ute Indian Tribe*, 975 F.2d 683 (10th Cir. 1992), *cert. denied*, *Murdock v. Ute Distribution Corp*., 507 U.S. 1042 (1993)

Murdock turned on the question of whether *collateral estoppel* precluded litigation asserting that the AUC and not the Ute Distribution Corporation (UDC) was the authorized representative of the mixed-blood Utes for purposes of managing the mixed-blood Utes' portion of the Ute Tribe's indivisible assets. *Murdock v. Ute Indian Tribe*, p. 684. Clearly, this suit was a dispute over management of certain indivisible assets, consisting primarily of mineral rights and unliquidated claims. There is no indication in this case that the Plaintiffs sought an accounting to determine whether settlement funds described in the Eighth Cause of Action in this case were placed in dispute as a consequence of the Defendants' alleged erroneous implementation of the UPA.

3. *Affiliated Ute Citizens*, 199 Ct. Cl. 1004 and *Affiliated Ute Citizens*, 215 Ct. Cl. 935 (1977)

These cases were filed within the lawful jurisdiction of the United States Court of Claims. A complaint filed in the Court of Claims must include allegations as to the court's jurisdiction and citation to the underlying statue or regulation that mandates the payment of money. Plaintiffs sought an equitable accounting of funds alleged to have been commingled by federal trustee. None of the *individual Plaintiffs* in this action could have ever invoked

the jurisdiction of the Court of Claims to obtain an accounting of those monies as described in their Eighth Cause of Action.

4. *United States v. Von Murdock*, 132 F.3d 534 (10th Cir. 1997), *cert. denied*, 525 U.S. 810 (1998)

Perry Von Murdock, a non-enrolled member of the Uinta Band of Ute Indians, was charged with violating 18 U.S.C. § 1165 which prohibits hunting on land belonging to an Indian Tribe without lawful authority or permission. *United States v. Von Murdock*, p. 535. There is nothing in this 1997 10th Circuit Court of Appeals decision indicating that the substantive legal and factual issues were over anything more than the alleged right of a non-tribal member to hunt and fish on lands of the Ute Indian Tribe.

5. *Ute Indian Tribe v. Probst*, 428 F.2d 491 (10th Cir. 1970) (on rehearing), *cert. denied*, 400 U.S. 926

This 1970 decision issued by the 10th Circuit Court of Appeals was the result of an action by the Ute Indian Tribe for equitable relief and cancellation of a deed for land given by the administratrix of the estate a deceased mixed-blood to a non-Indian. *Ute Indian Tribe v. Probst*, p. 491-492. This dispute involved the construction and application of certain provisions of the UPA. The suit was brought by the Tribe on September 20, 1967. *Id.,* p. 495. Although Oranna Bumgarner Felter was a party in *Probst*, the record proves that the 10th Circuit was more concerned with the "rights of the tribe," p. 498, and the plaintiff Tribe would not have sought an equitable accounting of any Court of Claims monies awarded to the individual Plaintiffs in this action *prior to* 1954. When the Tribe filed its action to cancel the deed to land in 1967, it had no incentive to seek an accounting of monies that could

diminish its portion of monies distributed under the "share and share alike" provision to foreign bands of Colorado Utes.

C. Collateral Estoppel

The allegations in Defendants' Amended Complaint must fit within the circle of all three (3) parameters established in *Consolidated Edison Co. of New York v. Bodman*, *Yamaha Corp. of America v. United States* and *Apotex, Inc. v. Food & Drug Admin.* Defendants' allegations do not, and cannot be crafted to, fit within the *Con-Ed Yamaha Apotex* circle, and thus will miss the "bull's eye" of the target set by this Court, as will be demonstrated in the following discussion.

1. What, if any, preclusive effects [do] the judgments have specifically on Plaintiffs' demand for an accounting in the eighth cause of action of the Plaintiffs' amended complaint?

Plaintiffs' Amended Complaint states:

> **EIGHTH CAUSE OF ACTION**
> **[Action for Accounting]**
>
> 105. Plaintiffs re-allege and incorporate herein by reference the allegations contained in Paragraphs 1 to 104.
>
> 106. Pursuant to the trust relationship between the United States and plaintiffs existing prior to and as confirmed by the 1937 IRA Constitution and Bylaws of the Ute Indian Tribe, a consolidation of separate Ute Bands each separately exercising their independence and traditional autonomy, defendants were and are obligated to safeguard the trust status of the lands and Indian rights and status of the individual "mixed-blood" members [of the] Uinta Band, their Estates, their children and their descendants and their immunities until such rights, status and immunities were lawfully extinguished in accordance with the intent of the Act of Congress in enacting the UPA and to compensate said Indians of the Uinta Band for monetary losses sustained by reason of defendants' breach of said obligations.

107. The individually named plaintiffs maintain vested rights and ownership interest to a portion of monies derived from the disposition of settlement funds earmarked and targeted for distribution to them that arise from a $32 million dollar Indian Claims Commission judgment allocated under the "share and share alike" agreement as approved by Act of Congress on August 21, 1951.

108. Defendants have failed to account for the principal and interest of funds owed to them as members of the Uinta Band by Act of Congress that was lost to them and their children, including the mishandling and maladministration of "offsets" charged against them when they were full members of the Uinta Band.

109. At all times alleged herein, defendants were charged with carrying out the trust obligations of the United States to account and properly withhold the distribution of the claims settlement funds *until the UPA was implemented as intended by Congress.*

110. On information and belief, defendants have grossly mismanaged and continue to grossly mismanaged trust funds and they have failed to account for such funds belonging to plaintiffs.

111. Plaintiffs are owed an accounting by defendants, acting as their fiduciaries, of the funds deposited to their benefit [under a] mandate issued by Act of Congress on August 21, 1951.

112. Upon precise accounting by defendants of the amounts owed and due to them under the "share and share alike" agreement with the other foreign band of Colorado Utes, defendants must return such sums to plaintiffs with interest in addition to paying back the value of any "offsets" that were held against them during all times they were full members of the Uinta Band.

Plaintiffs here argue that the same issue now being raised, an equitable accounting, has never been "contested" by the parties nor has it ever previously been submitted for judicial determination in prior cases. As noted above, *Affiliated Ute Citizens v. United States*, supra., was a dispute over pro rata distribution to individual members of the AUC of oil, gas and mineral underlying the Ute Indian Reservation and violations of the Securities Exchange Act of 1934. There is no indication from a close reading of this 1972 judgment

that the AUC placed in issue an accounting of the type demanded by the individual Plaintiffs in this action.

Murdock v. Ute Indian Tribe, 975 F.2d 683, 687 (10th Cir. 1992), *cert. denied*, *Murdock v. Ute Distribution Corp*., 507 U.S. 1042 (1993) cast no additional light on whether it has any preclusive effects on this case. The court in *Murdock* ruled thus:

> We hold that the Supreme Court did reach a final decision on the merits of whether the AUC was the mixed-blood Utes' authorized representative with respect to the indivisible tribal assets.

As definitive as the above ruling was, the *Murdock* court did *not* specifically reach the accounting question as it is raised in the instant case, either in its reference to precedent or in its analysis of the case then at bar. The case that the 1992 10th Circuit Court of Appeals was referring to was *Affiliated Ute Citizens v. United States*.

In their brief-in-chief, pp. 9-10, Defendants contend that *Affiliated Ute Citizens*, 199 Ct. Cl. 1004 and *Affiliated Ute Citizens*, 215 Ct. Cl. 935 (1977) disposed of the same issue, lack of an equitable accounting, now contested by the parties and submitted for judicial determination in these prior Court of Claims cases. Whether the accounting Defendants claim was adequate to serve as a disposition of the issue under current scrutiny is a matter of disputed fact. Defendants offered in the record Exhibits 1 and 2 which - in an effort to dispose of Plaintiffs' cause of action for an accounting - they claim have preclusive effects. Plaintiffs' Opposition brief, p. 6, Plaintiffs took issue with the bare statements on the funds allegedly transferred and purportedly accounted for in those Court of Claims cases:

> Accountings such as those contemplated above would necessarily

> include a fully compiled data and historical record using commonly accepted accounting and auditing methods (i.e., similar to or precisely those methods routinely employed to satisfy the fiscal reporting requirements of major corporations and/or the United States government), methods that would stand up to scrutiny by all parties and allow for implementation and verification of a full and complete distribution to the intended individual Plaintiffs.

It is one thing to simply submit Exhibits to prove up a bare statement that these documents conclusively show a full accounting as sought by Plaintiffs in their Amended Complaint. It is another wholly different matter of fact whether discovery in this case will produce sufficient documentation beyond what is offered by the Defendants to preclude Plaintiffs demand for an equitable accounting.

Later discovery will prove out that Plaintiffs must have had their pro rata share - $19,043,084.06 - placed in an account No. 14X7178 consisting of the proceeds of labor Affiliated Citizens of Utah. *See* Def. Exhibit No. 2. This resulted in the Defendants purportedly crediting on November 20, 1956 the Mixed-Bloods' cash accounts in the U.S. Treasury and on deposit at the Ft. Duchesne Agency with its pro rata share of tribal funds on deposit.

Further discovery will prove out that in 1953 tribal members each held $10,532 dollars as their respective share in the Colorado Judgment. Undoubtedly, Defendants Exhibits do not demonstrate if these monies were actually deposited in said accounts or at what time these accounts were closed if indeed they were closed. Later discovery will prove out that Plaintiffs have no knowledge as to whether these funds were actually placed in to an account

or whom they were paid out too. The Defendants' exhibits demonstrate nothing more than an accrual accounting of account No. 14x7178 that remains uncompleted in terms of an accounting done in accordance with the law of accounting. A close look proves that the Exhibits proffered by Defendants do not state how Plaintiffs received the funds they were lawfully entitled as alleged in their accounting cause of actions.

Defendants have supplied no documentation of the alleged full disposition of an accounting of the monies at issue in the Eighth Cause of Action other than self-serving statements by a federal official who was greatly distanced from the issue at hand by and who inherited the transferable fiduciary liability along with the federal appointment. There is every reason to conclude this is no "accounting" at all.

The substance of the judgment in *United States v. Von Murdock*, supra., centered on a violation of federal criminal law and had nothing to do with an equitable accounting. Likewise, *Ute Indian Tribe v. Probst*, supra., cannot be considered a determination that precludes Plaintiffs from an accounting. In *Probst*, the Ute Tribe filed its action to cancel a deed to disputed land in 1967 and there is nothing in this judgment implicating a cause of action for an accounting.

2. The issue must have been "actually" and "necessarily" determined by a court of competent jurisdiction in the prior case.

The judgments in *Consolidated Edison Co. of New York v. Bodman* and *Yamaha Corp. of America v. United States* turned on the question of whether the parties actually litigated the same issue in a prior action. "In *ConEd IV* the parties actually litigated the

question of government claims to the Reserve Fund." *Consolidated Edison Co. of New York,* p. 1258. *Yamaha Corp. of America v. United States,* at 252, states:

> The issues regarding the Lanham and Tariff Acts in the instant case are identical to those actually litigated and necessarily decided in ABC International Traders. Moreover, the issues here - - whether the Lanham and Tariff Acts provide plaintiff a basis to block the goods manufactured by Yamaha Japan - - were actually and necessarily determined in ABC.

All of the cases cited by Defendants in the memorandum fail to specifically refer to the $32 million dollar Indian Claims Commission judgment allocated under the "share and share alike" agreement as approved by Act of Congress on August 21, 1951.

The U.S. Court of Federal Claims requires that a complaint include allegations as to the court's jurisdiction and citation to the underlying statue or regulation that mandates the payment of money. The Court of Claims has jurisdiction over most claims for money damages against the United States, disputes over federal contracts, unlawful "takings" of private property by the federal government, and a variety of other claims against the United States. 28 U.S.C. § 1491. At this point, Plaintiffs in this action are not seeking to obtain money damages from the federal government. Their primary objective is to determine whether specific *pre-UPA* monies awarded by Act of Congress were properly accounted for amidst the background of a complex and confusing set of laws and regulations. The Court of Claims, as a court of special jurisdiction, would not entertain an action for an equitable accounting. Consequently, the issue of an accounting for the monies described in the Eighth Cause of Action could have not been "actually" and "necessarily" determined by a court of

competent jurisdiction in any prior cases.

A careful reading of the cases relied upon by the Defendants does not conclusively show any issue of fact or law with respect to the demand for an accounting to prove it was actually litigated and determined by a valid and final judgment. Nor can any of these cases resolve whether the Plaintiffs had an incentive to fully litigate those issues in the earlier proceedings.

3. Preclusion in the second case must not work a "basic unfairness" to the party bound by the first determination.

None of the cases noted in Defendants' memorandum in support of their motion to dismiss unequivocally proves that the Plaintiffs had one fair and full opportunity to prove a claim and consequently failed in that effort. Equally, none of these cases resulted in a "first determination" that a $32 million dollar Indian Claims Commission judgment approved by Act of Congress on August 21, 1951 was properly accounted for and distributed to Plaintiffs under the UPA. With no first determination, this third requirement is inapplicable to an inquiry on whether Plaintiffs are precluded from going forward with their Eighth Cause of Action.

D. Res Judicata

1. Whether the facts of the cases are related in time, space, origin, or motivation.

There was no doubt that there was a judgment on the merits by a court of competent jurisdiction in *Apotex, Inc. v. Food & Drug Admin.,* supra. at 217: "In this case, Apotex does not dispute that *TorPharm* was a judgment on the merits by a court of competent jurisdiction

involving the identical parties." In the case instant, however, Plaintiffs dispute that there has *ever* been an accounting of the monies that were awarded under the 1951 Act of Congress.

There has been no cause of action for an equitable accounting in those cases listed in Defendants' memorandum. With no prior cause of action, there is no room for any argument that the Eighth Cause of Action here is identical to any causes in those cases listed in Defendants' memorandum. Further, it is obvious that the dispute described in the Eighth Cause of Action and the other disputes over management of the various properties distributed under the UPA and other different issues are unrelated in time, space, origin, or motivation. Without this connection, Defendants' allegation that this situation fits the criteria of a *Con-Ed Yamaha Apotex* circle misses the target and fails the claim preclusion test.

2. Whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

Each of the cases cited by Defendants and discussed above derived from the implementation of the UPA and none was directed toward finding out if the $32 million dollars was correctly divided up as intended by Act of Congress. The case at bar and the others listed by Defendants involve disputes so disparate in origin and time that the underlying facts of the cases are not sufficiently closely related to have formed a convenient trial unit. In addition, Plaintiffs could not have invoked the jurisdiction of the Court of Claims even if their accounting did conform to the parties' expectations or business understanding or usage.

/ / / /

3. Whether a demand for an accounting arose from the same nucleus of common facts as any of the claims made in the cases cited by the Defendants in their motion to dismiss, such that the Plaintiffs were required to bring the claim for an accounting in an earlier litigation.

Affiliated Ute Citizens v. United States, supra, was a dispute brought by mixed-blood Indians or their representatives over pro rata distribution to individual members of the AUC of oil, gas and mineral interest in natural resources underlying the Ute Indian Reservation, and violations of the Securities Exchange Act of 1934. The nucleus of facts in *Affiliated Ute Citizens* was not at all common with any of the facts alleged in the Eighth Cause of Action for an Accounting. In contrast, the three (3) District Court decisions discussed in *Apotex,* p. 211, all arose from disputes over the marketing of a generic version of the drug gabapentin that turned on the proper interpretation and application of federal regulations. These *Apotex* decisions were all made between 2002 and 2004.

Murdock v. Ute Indian Tribe, supra., has no bearing in answering the same nucleus of common facts query since it was dismissed on the basis of collateral estoppel. The Court of Claims cases discussed above would have barred the filing of an action for an accounting. The other cases noted by the Defendants were disputes implicating the invalidation of a deed and a violation of federal criminal laws. The holding in *Apotex* does not bring within its scope the numerous actions separated by many years and involving disputes based upon widely disparate facts and issues.

Despite Defendants' claims to the contrary, the foregoing analysis demonstrates that there is no reasonable basis for any court to conclude that Plaintiffs were required to bring

their claim for an accounting in an earlier litigation.

III. CONCLUSION

Based on the discussion above, Plaintiffs respectfully request that the Court deny Defendants' Renewed Motion to Dismiss.

Dated this 21st day of December 2009.

/s/

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PROOF OF ELECTRONIC SERVICE AND SERVICE BY UNITED STATES MAIL

I, Linda C. Amelia, declare as follows:

I am a citizen of the United States of America, over the age of 18 years, and not a party to the above-entitled action. My business address is P.O. Box 292122, Sacramento, CA 95829.

On December 21, 2009, a true and correct Adobe PDF version of **PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS** was served by electronic means upon:

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On this same date, I served on each party listed below a true and correct paper copy of the same document by placing true and correct copies thereof in sealed envelopes, first-class postage thereon fully prepaid and depositing same for collection by the United States Postal Service at Sacramento, CA addressed as follows:

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/s/
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