No. 16-15388

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

HENRY TUKAY
Plaintiff-Appellant

v.

UNITED AIRLINES, INC.
Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CIVIL CASE NO. 3:14-cv-04343-JST

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION[1]

Appellee United Airlines, Inc. claims that Appellant Henry Tukay was terminated *only* because of alleged vandalism. Yet United gutted his nearly 24-year career with allegedly "smoking gun" surveillance video footage that it inexplicably withheld from its summary judgment evidence. Without this evidence, summary judgment was improperly granted because United failed to support its burden to produce admissible evidence of its legitimate non-discriminatory business reason.

Nonetheless, this is not a standard summary judgment appeal: Tukay seeks remand to develop the factual record further, rather than to confirm the existence of triable issues of material fact. Due to the improper briefing of both parties' counsels at summary judgment, Tukay respectfully requests that this Court reverse and remand this decision back to the District Court with instructions to re-litigate summary judgment based only upon a *complete* factual record.

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1 Pursuant to Circuit Rule 28-2.7, Tukay sets forth verbatim the following rules applied in this Reply Brief:

Fed. R. Evid. 103(d): "Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means."

Fed. R. Evid. 901(a): "In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."

II. LAW & ARGUMENT

"Summary judgment is appropriate only when the facts are fully developed and the issues clearly presented." *Confederated Tribes & Bands of the Yakama Nation v. Gregoire*, 680 F. Supp. 2d 1258, 1262 (E.D. Wash. 2010) (citing *Anderson v. American Auto. Ass'n,* 454 F.2d 1240, 1242 (9th Cir. 1972)). Courts have denied summary judgment where the moving party—or both parties—improperly briefed the issues. See e.g., *Miller v. Wash. Cty.*, 650 F. Supp. 2d 1113, 1119 (D. Or. 2009); *McHugh v. City of Tacoma*, 2011 U.S. Dist. LEXIS 63641, at *23 (W.D. Wash. June 16, 2011).

Here, United has failed to support its alleged legitimate non-discriminatory reasons for terminating Tukay with admissible evidence. As such, remand is both necessary and appropriate.

A. THE SUMMARY JUDGMENT RECORD BELOW WAS INSUFFICIENT AS A MATTER OF LAW.

United was required at summary judgment to produce admissible evidence to support its termination decision. *Cornwell v. Electra Cent. Credit Union*, 439 F.3d 1018, 1028 (9th Cir. 2006). By design, this stage of the *McDonnell Douglas* burden-shifting analysis is meant to provide Tukay with the full and fair opportunity to satisfy his pretext burden:

[T]he defendant must clearly set forth, through the introduction of

> admissible evidence, the reasons for the [adverse action]. The explanation provided must be legally sufficient to justify a judgment for the defendant. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity. Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 255-56 (1981). United's burden is no mere formality. See *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (stating that the plaintiff must be awarded judgment as a matter of law in the Fed. R. Civ. P. 50 context if the employer fails to meet its burden of production).

This appeal ultimately hinges on the contents of the surveillance video, particularly because Colin Botto identified himself as the sole decision-maker for a termination based solely on alleged vandalism. (EOR 068, ¶ 8; SEOR 0022, ¶ 8; Answering Brief, p. 10, 15). Botto only summarizes the contents of the video footage that he used make his determination. (*See* EOR 067-068, ¶¶ 5-6). These statements are inadmissible as lacking foundation, and thus cannot sustain United's burden to produce *admissible* evidence supporting the alleged basis of Tukay's termination.

Courts do not grant summary judgment where the employer has failed this

burden. *Clay v. UPS*, 501 F.3d 695, 705 n.4 (6th Cir. 2007) (ruling that the employer "has failed to meet its burden of production, because it has articulated a reason, but cited nothing in the record which supports that reason."); *Ndulue v. Fremont-Rideout Health Grp.*, 2010 U.S. Dist. LEXIS 63189, at *21 (E.D. Cal. June 24, 2010) (denying summary judgment as to the plaintiff's discrimination claim because the defendants failed to produce evidence of a legitimate, nondiscriminatory reason for their conduct).

United attempts to distract from its own failed burden of production through a series of overlapping arguments that Tukay only had one unintelligible objection that he waived by not requesting a ruling at summary judgment. (Answering Brief, p. 18-19, 44-49). These arguments are meritless.

Tukay's former counsel objected to "any and all electronic evidence" as insufficiently authenticated. (EOR 027). This would logically implicate the surveillance video, which both Botto and Van Wart reviewed in deciding Tukay's fate. (EOR 067-068, ¶¶ 5-7; EOR 072, ¶ 6). However, "[t]o satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a); *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) ("[U]nauthenticated documents cannot be considered in a

motion for summary judgment.").

Not only does Botto fail to authenticate the video, but he openly testifies as to its contents:

> I reviewed the security footage, which showed an individual appearing to be Tukay walk through the parking lot, brush up against Mr. Sahebjami's car on one side, turn around and go back in the direction he came from while brushing up against the other side of the car, and then come back through the lot again a minute or two later.

(EOR 067, ¶ 5). Botto and United provide no admissible evidentiary support at summary judgment for a "finding that the [video] is what [Botto] claims it is." *See* Fed. R. Evid. 901(a).

Even after the 2010 amendments to Fed. R. Civ. P. 56,[2] courts in this Circuit still recognize that "'documents which have not had a proper foundation laid to authenticate them cannot support a motion for summary judgment.'" *Quanta Indem. Co. v. Amberwood Dev., Inc.*, 2014 U.S. Dist. LEXIS 40211, at *7 (D. Ariz. Mar. 26, 2014) (quoting *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987). Botto's sworn statements—unaccompanied by the evidence they purport to describe—remain substantively inadmissible, and thus cannot support summary judgment. See *Fraser v. Goodale*, 342 F.3d 1032, 1036 (9th Cir. 2003).

United attempts to sidestep the lack of foundations for its proffered summary

2 See generally *Gonzales v. Saul Ewing, LLP (In re Vaughan)*, 471 B.R. 263, 270-71 (Bankr. D.N.M. 2012).

judgment evidence by claiming that Tukay waived his evidentiary objection by not requesting a ruling. The authorities cited by United apparently discuss waiver of objections not made in open court. See e.g., *Murrelet v. Pac. Lumber Co.*, 83 F.3d 1060, 1066-67 (9th Cir. 1996). Here, the District Court decided summary judgment on the papers, affording Tukay's former attorney no opportunity to make an oral objection. In any case, at least one district court has declined to hold procedure over substance where the lack of admissible evidence was striking:

> [T]he court cannot believe that the Court of Appeals would allow a summary judgment to stand which was based on evidence completely lacking indicia of admissibility simply because the opposing party failed to make an evidentiary objection. Regardless of whether a party objects, the Court of Appeals will always recognize plain error. Fed. R. Evid. 103(d); *McClaran v. Plastic Indus.*, 97 F.3d 347, 357 (9th Cir. 1996). If consideration of the evidence would be so obviously improper and substantial, such that "failure to notice and correct it would affect the fairness, integrity, or public reputation of judicial proceedings[,]" a party could still challenge its consideration on appeal even if it initially failed to object to its admission. *Permian Petroleum Co. v. Petroleos Mexicanos*, 934 F.2d 635, 647-48 (5th Cir. 1991); see also *United States v. Sua*, 307 F.3d 1150, 1154 (9th Cir. 2002).

Burch v. Regents of the Univ. of Cal., 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). Accordingly, this Court may rightfully consider Tukay's evidentiary objections stemming from United's failure to authenticate—and thus lay foundation for—the alleged basis of its termination decision.

United shops its "honest belief" in Tukay's culpability as a panacea for its

various evidentiary shortcomings.[3] (Answering Brief, p. 1, 2, 8-10, 16-17, 26-32, 34-35, 49-50; EOR 067-068, ¶¶ 5-7). United thus tries to spring forward to the third stage of the *McDonnell Douglas* analysis without satisfying the second. Tukay respectfully urges this Court to reject United's circular logic whereby he must satisfy his pretext burden by demonstrating the falsity of the asserted justification without the actual supporting evidence.[4] See *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 148 (2000); *Burdine*, 450 U.S. at 256 (defining the plaintiff's pretext burden as demonstrating "a discriminatory reason more likely motivated the employer" **or** "indirectly by showing that the employer's proffered explanation is unworthy of credence.") Without supporting evidence, an employer is free to say literally anything under oath and label it an "honest belief" with impunity. This is not the law and leads only to absurd results. Accordingly, Tukay respectfully requests that this Court remand summary judgment so that United can produce the surveillance video, if it exists, and adequately lay the full foundation

3 *See* Answering Brief, p. 49-50. In *Haddad v. Lockheed Cal. Corp*., 720 F.2d 1454, 1456 (9th Cir. 1983), this Court denied evidentiary objections against testimony that management had "received" complaints because the testimony "was not offered to prove the truth of the complaints." *Id*. This is a far cry from Botto's description of the surveillance video's contents, as well as interviews with witnesses whose statements informed the termination decision.

4 Rather ironically, United contends that the factual accuracy of the evidence it withholds is immaterial. (*See* Answering Brief, p. 28-29).

for his termination.

B. REMAND FOR FURTHER FACTUAL DEVELOPMENT IS WARRANTED AS TO THE *PRIMA FACIE* ELEMENTS OF TUKAY'S CLAIMS.

Summary judgment was not the appropriate outcome for this case. This Court has emphasized the importance of "'zealously guarding'" a Title VII plaintiff's right to a full trial, "'since discrimination claims are frequently difficult to prove without **a full airing of the evidence** and an opportunity to evaluate the credibility of the witnesses.'" *Davis v. Team Elec. Co.*, 520 F.3d 1080, 1089 (9th Cir. 2008) (quoting *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1112 (9th Cir. 2004)) (emphasis added).

Accordingly, district courts in this Circuit are expressly "desirous" of a "full record" before making summary judgment decisions. See e.g., *Engquist v. Or. Dep't of Agric.*, 2004 U.S. Dist. LEXIS 18844, at *3 (D. Or. Sep. 14, 2004) (denying summary judgment as to an undeveloped factual issue). This mirrors judicial reticence to affirm summary judgment in civil rights cases where the defendant did not satisfy its summary judgment burden. See *Dean v. City of Shreveport*, 438 F.3d 448, 458 (5th Cir. 2006) (reversing and remanding summary judgment for further factual development because legal analysis was appropriate "[o]nly when" the district court had "reliable" evidence from the employer); see

also *Horton v. City of Hous.*, 179 F.3d 188, 196 (5th Cir. 1999) (reversing and remanding because the appellee had not met its summary judgment burden).

Ultimately, United fails to distinguish Tukay's authorities demonstrating the appropriateness of remanding this case for further factual development. Similar to the instant appeal, the Seventh Circuit in *Fanslow v. Chi. Mfg. Ctr., Inc.*, 384 F.3d 469, 486 (7th Cir. 2004) identified that the decision-maker's "conclusory affidavit" did not provide a "sufficient basis" as to the employer's rationale for terminating the employee. *Id*. Here, United failed to provide the District Court, and hence this Court, with surveillance video footage that has crucial probative value because United does not claim that any eyewitnesses observed the alleged vandalism.

Further, contrary to United's characterization of *Anderson v. Hodel*, 899 F.2d 766, 770 (9th Cir. 1990), the instant appeal necessitates remand based on a far reaching issue: i.e., how an employer satisfies its evidentiary obligations at summary judgment. If this Court affirms the judgment in favor of an employer that purposefully withheld key video evidence supporting an employee's termination, this creates harmful precedent whereby any "decision-maker" can summarize "secret" evidence and merely invoke the employer's "honest belief" to throttle any meaningful attempt by the employee to establish pretext based on the falsity of the evidence. This is not—and cannot—be the law of the Ninth Circuit.

1. Title VII Race Discrimination

United identifies only two elements of Tukay's *prima facie* case for Title VII Race Discrimination as allegedly deficient: whether he had satisfactory work performance, and whether he proffered evidence of a discriminatory motive. To contrary, Tukay has adequately satisfied his minimal burden of presenting evidence that need only give rise to an inference of unlawful discrimination. *Messick v. Horizon Indus.*, 62 F.3d 1227, 1229 (9th Cir. 1995); *Wallis v. J.R. Simplot Co.*, 26 F.3d 885, 889 (9th Cir. 1994).

a. ***Tukay Had Satisfactory Work Performance Prior to His Termination.***

United claims Tukay cannot meet this second *prima facie* element because he was terminated for vandalizing a coworker's car. Following this circular logic perverts and thwarts the first stage of the *McDonnell Douglas* analysis in any disparate punishment case. The summary judgment record, viewed in the light most favorable to Tukay, reflects the inference that he had 23 years of satisfactory work performance before his termination. (EOR 015, ¶ 3; *see* EOR 68, ¶ 7; see also Answering Brief, p. 7-8). This is enough to satisfy the second *prima facie* element of his Race Discrimination claim. *Frazier v. UPS*, 2005 U.S. Dist. LEXIS 13894, *44 (E.D. Cal. May 3, 2005) ("The relevant question is […] whether [the plaintiff] was performing his job in a satisfactory manner before the issuance of the

discharge letter.") (emphasis in original).

Alternatively, this Court should relax consideration of the second prong or merge it with the fourth prong of Tukay's *prima facie* analysis. *Bahri v. Home Depot USA, Inc.*, 242 F. Supp. 2d 922, 931 (D. Or. 2002) ("[T]he second element of the *prima facie* case makes sense only when it is limited to the time period *prior* to the introduction of the alleged unlawful discrimination.") (emphasis in original); *Aragon v. Republic Silver State Disposal, Inc.,* 292 F.3d 654, 659 (9th Cir. 2002) (warning that effectively requiring the plaintiff to disprove alleged unsatisfactory job performance in the *prima facie* analysis improperly conflates the first and third stages of the *McDonnell Douglas* analysis); *Perez v. Thorntons, Inc.*, 731 F.3d 699, 704 (7th Cir. 2013) ("In disparate punishment cases, like this one, the second and fourth prongs merge and are satisfied by a showing that a similarly situated employee outside the plaintiff's protected class committed a similar act but was subjected to less severe discipline.").

b. *Tukay Proffered Sufficient Evidence to Satisfy the Fourth Prong of his Title VII Disparate Treatment Claim*.

United also claims that Tukay has insufficient evidence of a discriminatory motive for his termination. He can satisfy the fourth prong of his *prima facie* burden by presenting evidence that he was treated differently than a similarly

situated employee who does not belong to the same protected class as him. *Hawn v. Exec. Jet Mgmt.*, 615 F.3d 1151, 1156 (9th Cir. 2010).

In justifying Tukay's termination, United cites its own policy that employees must "[p]rotect property and resources of the Company and fellow team members, customers and others against theft, damage or misuse." (Answering Brief, p. 7 (*quoting* SEOR 0034)). United employees also are to "[r]efrain from aggressive or threatening behavior, whether through words or actions." (SEOR 0034). Tukay, however, identified an individual who "caused millions of dollars worth of damages" to an aircraft but was returned to work, as well as Ahmad Sahebjami was apparently responsible for aircraft damage that caused delay and a cancelled flight. (EOR 105; EOR 023, 024-025, ¶¶ 9, 13).

Tukay additionally identified that he personally suffered bodily harm and property damage by individuals outside of his protected class that went unremedied. His own vehicle had been previously vandalized, but United deferred any investigation to local law enforcement. (Appellant's Opening Brief ("AOB"), p. 3-4; EOR 103). In August 2007, Jose Santiago, a Hispanic co-worker, assaulted and threatened him, resulting in no discipline for Santiago even though Tukay was injured and had to file a worker's compensation claim. (AOB, p. 5, 10; EOR 20, ¶¶ 4-5). Another employee, E. Jovanessian, threatened to beat up Tukay, yet

United took no action. (AOB, p. 5; EOR 21, ¶ 7).

Tukay must prove that he is "'similarly situated to [his comparators] in all material respects.'" *Beck v. UFCW, Local 99*, 506 F.3d 874, 885 (9th Cir. 2007) (quoting *Moran v. Selig*, 447 F.3d 748, 755 (9th Cir. 2006)). This means the individuals must have *similar* jobs and display *similar* conduct. *Vasquez v. Cty. of L.A.*, 349 F.3d 634, 641 (9th Cir. 2003). They need not "be *identically* situated" to him, e.g., having "the same supervisor, [being] subject to the same standards, and [engaging] in the same conduct." *Bowden v. Potter*, 308 F. Supp. 2d 1108, 1117 (N.D. Cal. 2004). At the very least, Tukay has provided evidence that his co-worker, Sahebjami, a person outside of his protected class, went unpunished for causing ostensibly far more significant property damage, yet United makes no claim that its property damage policy only applies to Tukay. (*See* SEOR 0034; Answering Brief, p. 25). Tukay also demonstrated that he personally suffered from violent workplace misconduct that is the same or categorically similar to alleged vandalism. Thus, Tukay has presented sufficient evidence to carry his minimal *prima facie* burden as to the fourth prong.[5]

Using Retaliation case law, United uses most of its analysis to claim that

5 United's claim that the Court is not required to "scour" the record for triable facts is a diversion from the fact the Company hid directly probative facts by redacting information identifying Sahebjami's race, but not Tukay's. (*Compare* SEOR 0131 *to* SEOR 0132).

Tukay's direct evidence of racial animus—Paul Wapensky's statement that Filipinos "eat shit"—was too far attenuated from the termination decision. (Answering Brief, p. 22-25). Given the shambolic state of United's summary judgment evidence, remand for further factual development is appropriate because it remains an open factual question whether Wapensky had *any* discussions with Botto—an interested witness—about his decision-making. (EOR 068, 069, ¶¶ 13). See *Reeves*, 530 U.S. at 148 (disfavoring evidence from interested witnesses).

2. FEHA Retaliation

United claims that Tukay's Retaliation claim fails at the *prima facie* stage due to insufficient evidence of causation. (Answering Brief, p. 17-18, 32-33). Causation is generally a factual question for a jury. *Lucas v. County of Los Angeles*, 47 Cal.App.4th 277, 289 (1996). California case law reflects that the causal link between Tukay's protected activities and his termination "may be established by an inference derived from circumstantial evidence, 'such as [United]'s knowledge that [he] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.'" *Fisher v. San Pedro Peninsula Hospital*, 214 Cal.App.3d 590, 615 (1989) (quoting *Jordan* v. *Clark*, 847 F.2d 1368, 1376 (9th Cir. 1988)).

Here, remand for further factual development is appropriate because United

does not make any offering that completely forecloses the element of causation. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Botto fails to identify each of the "employees" with whom he consulted in before his decision. (EOR 068, ¶ 8). See *Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95, 108 (2004) ("Certainly a defendant does not conclusively negate the element of causation by showing only that some responsible actors, but not all, were ignorant of the occasion for retaliation."). Their identities remain an open question.

3. United's Evidentiary Objections Only Further Support the Necessity of Remand.

United attempts to object to Tukay's summary judgment evidence was wholly inadmissible. (*See* Answering Brief, p. 51-53). These objections, however, suffer from exactly the same alleged procedural defect as his objections: the District Court never made an evidentiary ruling, and United never requested one. (*See* EOR 004-013).

In any case, United's objections are mostly incorrect. Tukay's declaration did contain testimony relevant to his claims, including sworn statements supporting his satisfactory work performance. (*See e.g.*, EOR 014-105, ¶¶ 2-3). Any objections purely based on the admissibility of his evidence's *form* are specious because this Court is more concerned with the admissibility of its *contents*. *Fraser*, 342 F.3d at 1036. To that end, given United's above-described evidentiary

deficiencies, any alleged issues with the admissibility of Tukay's evidence further demonstrates the necessity of remand:

> In granting summary judgment neither the magistrate judge nor the district court did or could weigh evidence or make findings of fact. Moreover, while [the plaintiff] submitted an affidavit and several exhibits in opposing summary judgment, our review of the record indicates that the defendant officers offered no exhibits or affidavits in support of their motion. Thus the evidentiary record before the district court when it considered the defendants' summary judgment motion was sparse.

Williams v. Benjamin, 77 F.3d 756, 768 (4th Cir. 1996) (granting remand). Similarly here, remand is the only appropriate outcome of this appeal.

4. United Fails to Show Tukay Misrepresented the Record to this Court.

At the end of its Answering Brief, United makes a series of incorrect counter-assertions that can be quickly rebutted. (Answering Brief, p. 53-55). First, any claim by United that Botto investigated of the vandalism incident is belied by the evidentiary gaps in the summary judgment record: e.g., as noted above, he did not identify which "employees" with whom he spoke before making the determination, much less the substance of his alleged interviews. The evidentiary *substance* of United's termination decision is the heart of this appeal.

Second, United tellingly does not deny that it withheld part of Tukay's EEOC Charge from the summary judgment record, instead relying on procedural arguments. In a Retaliation case where the employer withheld allegedly "smoking

gun" evidence of the employee's culpability, any omission of evidence should be treated as suspect and further support for necessity of remand for further factual development.

Third, United claims that Tukay misleads the Court by pointing out discrepancies in its summary judgment briefing below, but Botto's declaration statement that he "was informed" about the settlement agreement lacks foundation and does not successfully rebut the statement made in United's own document regarding the timing of when Tukay received the agreement. (*Compare* EOR 069, ¶ 16 *to* EOR 078, ¶ 8).

Lastly, United claims of misrepresentation by Tukay regarding his alleged "might have" statements fail because the source cited by United was Botto's recollection of an interview in his declaration, not any EEOC statement. (EOR 067-068, ¶ 6). Moreover, these are hardly "party admissions" by Tukay, given that Botto himself declared under oath that Tukay denied guilt. (EOR 068:6-8).

III. CONCLUSION

Based on the foregoing, Tukay respectfully requests that this Court reverse and remand the District Court's summary judgment decision for further factual development.

Respectfully submitted, this 28th day of November, 2016,

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CERTIFICATE OF COMPLIANCE

I, DOW W. PATTEN, counsel of record for Plaintiff-Appellant, hereby certify that the foregoing Appellant's Reply Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,932 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Apache OpenOffice 4.1.1, in 14-point Times New Roman.

Dated: November 28, 2016

SMITH PATTEN

/s/ Dow W. Patten
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9th Circuit Case Number(s) 16-15388

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