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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

NOEL HUDSON, on behalf of the State of
California, as a private attorney general,

Plaintiff,

vs.

ASPEN SURGERY CENTER, LLC, a
Limited Liability Company; SURGERY
PARTNERS, INC., a Corporation; and DOES
1 through 50, inclusive,

Defendants.

Case No. **C21-02137**

**REPRESENTATIVE ACTION
COMPLAINT FOR:**

1. Civil Penalties Pursuant to Labor Code §
2699, *et seq.* for violations of Labor Code
§§ 201, 202, 203, 204 *et seq.*, 210, 221,
226(a), 226.7, 227.3, 351, 510, 512,
558(a)(1)(2), 1194, 1197, 1197.1, 1198,
2802, California Code of Regulations,
Title 8, Section 11040, Subdivision 5(A)-
(B)

SUMMONS ISSUED

FILED
SEP 30 2021

K. BIEKER CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA

By T. Schrader, Deputy Clerk

PER LOCAL RULE, THIS
CASE IS ASSIGNED TO
DEPT. 39, FOR ALL
PURPOSES

1 Plaintiff Noel Hudson (“PLAINTIFF”) on behalf of the people of the State of California
2 and as an “aggrieved employee” acting as a private attorney general under the Labor Code
3 Private Attorney General Act of 2004, § 2699, *et seq.* (“PAGA”) only, alleges on information
4 and belief, except for her own acts and knowledge which are based on personal knowledge, the
5 following:

6 **INTRODUCTION**

7 1. PLAINTIFF brings this action against Aspen Surgery Center, LLC and Surgery
8 Partners, Inc. (“DEFENDANT”) seeking only to recover PAGA civil penalties for herself, and
9 on behalf of all current and former aggrieved employees that worked for DEFENDANT.
10 PLAINTIFF does **not seek to recover anything other than penalties as permitted by**
11 **California Labor Code § 2699**. To the extent that statutory violations are mentioned for wage
12 violations, PLAINTIFF does not seek underlying general and/or special damages for those
13 violations, but simply the civil penalties permitted by California Labor Code § 2699.

14 2. California has enacted the PAGA to permit an individual to bring an action on
15 behalf of herself and on behalf of others for PAGA penalties *only*, which is the precise and sole
16 nature of this action.

17 3. Accordingly, PLAINTIFF seeks to obtain all applicable relief for
18 DEFENDANT’s violations under PAGA and solely for the relief as permitted by PAGA – that
19 is, penalties and any other relief the Court deems proper pursuant to the PAGA. Nothing in this
20 complaint should be construed as attempting to obtain any relief that would not be available in
21 a PAGA-only action.

22 **THE PARTIES**

23 4. Defendant Aspen Surgery Center, LLC is a limited liability company that at all
24 relevant times mentioned herein conducted and continues to conduct substantial business in the
25 state of California.

26 5. Defendant Surgery Partners, Inc. is a corporation that at all relevant times
27 mentioned herein conducted and continues to conduct substantial business in the state of
28

1 California.

2 6. Defendants Aspen Surgery Center, LLC and Surgery Partners, Inc. were the joint
3 employers of PLAINTIFF as evidenced by pay stubs and other company documents and by the
4 company PLAINTIFF performed work for respectively, and are therefore jointly responsible
5 as employers for the conduct alleged herein, and are therefore collectively referred to herein as
6 "DEFENDANT."

7 7. DEFENDANT provides outpatient surgical care in California.

8 8. Plaintiff Hudson was employed by DEFENDANT in California from April of
9 2016 to August of 2020 and was at all times classified by DEFENDANT as a non-exempt
10 employee, paid on an hourly basis, and entitled to the legally required meal and rest periods and
11 payment of minimum and overtime wages due for all time worked.

12 9. PLAINTIFF, and such persons that may be added from time to time who satisfy
13 the requirements and exhaust the administrative procedures under the Private Attorney General
14 Act, brings this Representative Action on behalf of the State of California with respect to herself
15 and all individuals who are or previously were employed by Aspen Surgery Center, LLC and/or
16 Surgery Partners, Inc. in California and classified as non-exempt employees ("AGGRIEVED
17 EMPLOYEES") during the time period of June 17, 2020 until a date as determined by the Court
18 (the "PAGA PERIOD").

19 10. PLAINTIFF, on behalf of herself and all AGGRIEVED EMPLOYEES presently
20 or formerly employed by DEFENDANT during the PAGA PERIOD, brings this representative
21 action pursuant to Labor Code § 2699, *et seq.* seeking fixed civil penalties for DEFENDANT's
22 violation of California Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3,
23 351, 510, 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations,
24 Title 8, Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s). Based upon
25 the foregoing, PLAINTIFF and all AGGRIEVED EMPLOYEES are aggrieved employees
26 within the meaning of Labor Code § 2699, *et seq.*

27 11. The true names and capacities, whether individual, corporate, subsidiary,
28 partnership, associate or otherwise of defendants DOES 1 through 50, inclusive, are presently

1 unknown to PLAINTIFF who therefore sues these Defendants by such fictitious names pursuant
2 to Cal. Civ. Proc. Code § 474. PLAINTIFF will seek leave to amend this Complaint to allege
3 the true names and capacities of Does 1 through 50, inclusive, when they are ascertained.
4 PLAINTIFF is informed and believes, and based upon that information and belief alleges, that
5 the Defendants named in this Complaint, including DOES 1 through 50, inclusive, are
6 responsible in some manner for one or more of the events and happenings that proximately
7 caused the injuries and damages hereinafter alleged.

8 12. The agents, servants and/or employees of the Defendants and each of them acting
9 on behalf of the Defendants acted within the course and scope of his, her or its authority as the
10 agent, servant and/or employee of the Defendants, and personally participated in the conduct
11 alleged herein on behalf of the Defendants with respect to the conduct alleged herein.
12 Consequently, the acts of each Defendant are legally attributable to the other Defendants and
13 all Defendants are jointly and severally liable to PLAINTIFF and the other AGGRIEVED
14 EMPLOYEES, for the loss sustained as a proximate result of the conduct of the Defendants'
15 agents, servants and/or employees.

16 17 **THE CONDUCT**

18 13. Pursuant to the Industrial Welfare Commission Wage Orders, DEFENDANT is
19 required to pay PLAINTIFF and the AGGRIEVED EMPLOYEES for all their time worked,
20 meaning the time during which an employee is subject to the control of an employer, including
21 all the time the employee is suffered or permitted to work. DEFENDANT required PLAINTIFF
22 and other AGGRIEVED EMPLOYEES to work from time to time while they were clocked out
23 for what was supposed to be their off duty meal break. DEFENDANT required PLAINTIFF
24 and the AGGRIEVED EMPLOYEES to work off the clock without paying them for all the time
25 they performed duties while on their meal break, specifically by failing to provide enough labor
26 hours to accomplish all the job tasks that DEFENDANT expected PLAINTIFF and the
27 AGGRIEVED EMPLOYEES to complete on a daily and/or weekly basis. PLAINTIFF and the
28 AGGRIEVED EMPLOYEES also worked off the clock with respect to time spent undergoing

1 mandatory drug testing or any other testing and/or examination required as a condition of
2 employment. Further, PLAINTIFF and other AGGRIEVED EMPLOYEES from time to time
3 were not paid wages for all time worked, including overtime wages, such that in the aggregate
4 employees were underpaid wages as a result of DEFENDANT's pattern and practice of
5 unevenly rounding time worked by its employees. PLAINTIFF and other AGGRIEVED
6 EMPLOYEES were also not paid for their work time putting on their work scrubs (which they
7 were not allowed to take home) because they were not paid until they were fully uniformed and
8 clocked in for the day. As a result, PLAINTIFF and other AGGRIEVED EMPLOYEES
9 forfeited minimum wage and overtime compensation by from time to time working without their
10 time being accurately recorded and without compensation at the applicable minimum wage and
11 overtime rates. DEFENDANT's policy and practice not to pay PLAINTIFF and other
12 AGGRIEVED EMPLOYEES for all time worked is evidenced by DEFENDANT's business
13 records.

14 14. As a result of their rigorous work schedules, PLAINTIFF and other AGGRIEVED
15 EMPLOYEES were also from time to time unable to take off duty meal breaks and were not
16 fully relieved of duty for meal periods. PLAINTIFF and other AGGRIEVED EMPLOYEES
17 were from time to time required to perform work as ordered by DEFENDANT for more than
18 five (5) hours during a shift without receiving an off-duty meal break. Further, DEFENDANT
19 failed to provide PLAINTIFF and the other AGGRIEVED EMPLOYEES with a second off-
20 duty meal period from time to time in which these employees were required by DEFENDANT
21 to work ten (10) hours of work from time to time. PLAINTIFF and the other AGGRIEVED
22 EMPLOYEES therefore forfeited meal breaks without additional compensation and in
23 accordance with DEFENDANT's corporate policy and practice.

24 15. During the PAGA PERIOD, PLAINTIFF and other AGGRIEVED EMPLOYEES
25 were also required from time to time to work in excess of four (4) hours without being provided
26 ten (10) minute rest periods. Further, these employees were denied their first rest periods of at
27 least ten (10) minutes for some shifts worked of at least two (2) to four (4) hours from time to
28 time, a first and second rest period of at least ten (10) minutes for some shifts worked of

1 between six (6) and eight (8) hours from time to time, and a first, second and third rest period
2 of at least ten (10) minutes for some shifts worked of ten (10) hours or more from time to time.
3 PLAINTIFF and other AGGRIEVED EMPLOYEES were also not provided with one hour
4 wages in lieu thereof. As a result of their rigorous work schedules, PLAINTIFF and other
5 AGGRIEVED EMPLOYEES were from time to time denied their proper rest periods by
6 DEFENDANT and DEFENDANT's managers. Additionally, the applicable California Wage
7 Order requires employers to provide employees with off-duty rest periods, which the California
8 Supreme Court defined as time during which an employee is relieved from all work related
9 duties and free from employer control. In so doing, the Court held that the requirement under
10 California law that employers authorize and permit all employees to take rest period means that
11 employers must relieve employees of all duties and relinquish control over how employees
12 spend their time which includes control over the locations where employees may take their rest
13 period. Employers cannot impose controls that prohibit an employee from taking a brief walk -
14 five minutes out, five minutes back. Here, DEFENDANT's policy restricted PLAINTIFF and
15 other AGGRIEVED EMPLOYEES from unconstrained walks and was unlawful based on
16 Defendant's rule which stated PLAINTIFF and other AGGRIEVED EMPLOYEES could not
17 leave the work premises during their rest period.

18 16. State law provides that employees must be paid overtime and meal and rest
19 premiums at one-and-one-half times their "regular rate of pay." PLAINTIFF and other
20 AGGRIEVED EMPLOYEES were compensated at an hourly rate plus incentive pay that was
21 tied to specific elements of an employee's performance.

22 17. The second component of PLAINTIFF's and other AGGRIEVED EMPLOYEES'
23 compensation was DEFENDANT's non-discretionary incentive program that paid PLAINTIFF
24 and other AGGRIEVED EMPLOYEES incentive wages based on their performance for
25 DEFENDANT, including but not limited to shift differential payments and cash in lieu of
26 benefits. The non-discretionary incentive program provided all employees paid on an hourly
27 basis with incentive compensation when the employees met the various performance goals set
28 by DEFENDANT. However, when calculating the regular rate of pay in order to pay overtime

1 and meal and rest break premiums to PLAINTIFF and other AGGRIEVED EMPLOYEES,
2 DEFENDANT failed to include the incentive compensation as part of the employees' "regular
3 rate of pay" for purposes of calculating overtime pay and meal and rest break premium pay.
4 Management and supervisors described the incentive program to potential and new employees
5 as part of the compensation package. As a matter of law, the incentive compensation received
6 by PLAINTIFF and other AGGRIEVED EMPLOYEES must be included in the "regular rate
7 of pay." The failure to do so has resulted in an underpayment of overtime compensation and
8 meal and rest break premium pay to PLAINTIFF and other AGGRIEVED EMPLOYEES by
9 DEFENDANT.

10 18. DEFENDANT also failed to provide PLAINTIFF and the other AGGRIEVED
11 EMPLOYEES with complete and accurate wage statements which failed to show, among other
12 things, the correct gross and net wages earned. Cal. Lab. Code § 226 provides that every
13 employer shall furnish each of his or her employees with an accurate itemized wage statement
14 in writing showing, among other things, gross wages earned and all applicable hourly rates in
15 effect during the pay period and the corresponding amount of time worked at each hourly rate.
16 Aside, from the violations listed above, DEFENDANT failed to issue to PLAINTIFF an
17 itemized wage statement that lists all the requirements under California Labor Code 226 *et seq.*
18 As a result, DEFENDANT from time to time provided PLAINTIFF and the other AGGRIEVED
19 EMPLOYEES with wage statements which violated Cal. Lab. Code § 226.

20 19. Cal. Lab. Code § 204 provides that "[a]ll wages. . . earned by any person in any
21 employment are due and payable twice during each calendar month, on days designated in
22 advance by the employer as the regular paydays." Further, Cal. Lab. Code § 204(d) expressly
23 requires employers to pay employees all wages owed within Seven (7) days of the close of the
24 payroll period. DEFENDANT from time to time failed to pay PLAINTIFF and other
25 AGGRIEVED EMPLOYEES all wages owed to them within seven (7) days of the close of the
26 payroll period.

27 20. Pursuant to Cal. Lab. Code Section 221, "It shall be unlawful for any employer
28 to collect or receive from an employee any part of wages theretofore paid by said employer to

1 said employee.” DEFENDANT failed to pay all compensation due to PLAINTIFF and other
2 AGGRIEVED EMPLOYEES, made unlawful deductions from compensation payable to
3 PLAINTIFF and other AGGRIEVED EMPLOYEES, failed to disclose all aspects of the
4 deductions from compensation payable to PLAINTIFF and other AGGRIEVED EMPLOYEES,
5 and thereby failed to pay these employees all wages due at each applicable pay period and upon
6 termination.

7 21. DEFENDANT underpaid sick pay wages to PLAINTIFF and other AGGRIEVED
8 EMPLOYEES by failing to pay such wages at the regular rate of pay in violation of Cal. Lab.
9 Code Section 246. Specifically, PLAINTIFF and other non-exempt employees earn non-
10 discretionary remuneration. Rather than pay sick pay at the regular rate of pay, DEFENDANT
11 underpaid sick pay to PLAINTIFF and other AGGRIEVED EMPLOYEES at their base rates
12 of pay.

13 22. Cal. Lab. Code Section 246(1)(2) requires that paid sick time for nonexempt
14 employees be calculated by dividing the employee’s total wages, not including overtime
15 premium pay, by the employee’s total hours worked in the full pay periods of the prior 90 days
16 of employment.

17 23. DEFENDANT violated Cal. Lab. Code Section 246 by failing to pay sick pay at
18 the regular rate of pay. PLAINTIFF and other AGGRIEVED EMPLOYEES routinely earned
19 non-discretionary incentive wages, including but not limited to shift differential payments and
20 cash in lieu of benefits, which increased their regular rate of pay. However, when sick pay was
21 paid, it was paid at the base rate of pay for PLAINTIFF and the other AGGRIEVED
22 EMPLOYEES, as opposed to the correct, higher regular rate of pay, as required under Cal. Lab.
23 Code Section 246.

24 24. As a pattern and practice, DEFENDANT regularly failed to pay PLAINTIFF and
25 other AGGRIEVED EMPLOYEES their correct wages and accordingly owe waiting time
26 penalties pursuant to Cal. Lab. Code Section 203. Further, PLAINTIFF is informed and believes
27 and based thereon alleges that such failure to pay sick pay at regular rate was willful, such that
28 PLAINTIFF and other AGGRIEVED EMPLOYEES whose employment has separated are

1 entitled to waiting time penalties pursuant to Cal. Lab. Code Sections 201-203.

2 25. DEFENDANT intentionally and knowingly failed to reimburse and indemnify
3 PLAINTIFF and the other AGGRIEVED EMPLOYEES for required business expenses
4 incurred by PLAINTIFF and other AGGRIEVED EMPLOYEES in direct consequence of
5 discharging their duties on behalf of DEFENDANT. Under California Labor Code Section
6 2802, employers are required to indemnify employees for all expenses incurred in the course
7 and scope of their employment. Cal. Lab. Code § 2802 expressly states that "an employer shall
8 indemnify his or her employee for all necessary expenditures or losses incurred by the employee
9 in direct consequence of the discharge of his or her duties, or of his or her obedience to the
10 directions of the employer, even though unlawful, unless the employee, at the time of obeying
11 the directions, believed them to be unlawful."

12 26. In the course of her employment PLAINTIFF and other AGGRIEVED
13 EMPLOYEES as a business expense, were required by DEFENDANT to use their own personal
14 cellular phones and personal vehicles as a result of and in furtherance of their job duties as
15 employees for DEFENDANT but were not reimbursed or indemnified by DEFENDANT for the
16 cost associated with the use of their personal cellular phones for DEFENDANT's benefit.
17 Specifically, PLAINTIFF and other AGGRIEVED EMPLOYEES were required by
18 DEFENDANT to use their personal cellular phones to respond to managers while off the clock
19 (which also results in minimum wage and overtime violations). As a result, in the course of
20 their employment with DEFENDANT, PLAINTIFF and other AGGRIEVED EMPLOYEES
21 incurred unreimbursed business expenses which included, but were not limited to, costs related
22 to the use of their personal cellular phones all on behalf of and for the benefit of DEFENDANT.

23 27. In violation of the applicable sections of the California Labor Code and the
24 requirements of the Industrial Welfare Commission ("IWC") Wage Order, DEFENDANT as
25 a matter of company policy, practice and procedure, intentionally and knowingly failed to
26 compensate PLAINTIFF and the other AGGRIEVED EMPLOYEES for missed meal and rest
27 periods. This policy and practice of DEFENDANT is intended to purposefully avoid the
28 payment for all time worked as required by California law which allows DEFENDANT to

1 illegally profit and gain an unfair advantage over competitors who complied with the law. To
2 the extent equitable tolling operates to toll claims by the AGGRIEVED EMPLOYEES against
3 DEFENDANT, the PAGA PERIOD should be adjusted accordingly.

4 28. By reason of this conduct applicable to PLAINTIFF and all AGGRIEVED
5 EMPLOYEES, DEFENDANT engaged in a company-wide policy and procedure which fails
6 to accurately calculate and record all missed meal and rest periods and failed to pay all
7 minimum and overtime wages due to PLAINTIFF and other AGGRIEVED EMPLOYEES. The
8 proper recording of these employees' missed meal and rest breaks is the DEFENDANT's
9 burden. As a result of DEFENDANT's intentional disregard of the obligation to meet this
10 burden, DEFENDANT fails to properly calculate and/or pay all required compensation for work
11 performed by the AGGRIEVED EMPLOYEES and violated the California Labor Code and
12 regulations promulgated thereunder as herein alleged.

13 29. All of the conduct and violations alleged herein occurred during the PAGA
14 PERIOD. To the extent that any of the conduct and violations alleged herein did not affect
15 PLAINTIFF during the PAGA PERIOD, PLAINTIFF seeks penalties for those violations that
16 affected other AGGRIEVED EMPLOYEES pursuant to *Carrington v. Starbucks Corp.* 2018
17 AJDAR 12157 (Certified for Publication 12/19/18).

18 **JURISDICTION AND VENUE**

19 30. This Court has jurisdiction over this Action pursuant to California Code of Civil
20 Procedure, Section 410.10.

21 31. Venue is proper in this Court pursuant to California Code of Civil Procedure,
22 Sections 395 and 395.5, because PLAINTIFF worked in this County for DEFENDANT, and
23 DEFENDANT (i) currently maintains and at all relevant times maintained offices and facilities
24 in this County and/or conducts substantial business in this County, and (ii) committed the
25 wrongful conduct herein alleged in this County against PLAINTIFF and the AGGRIEVED
26 EMPLOYEES.

27 ///

1 **FIRST CAUSE OF ACTION**

2 **For Violation of the Private Attorneys General Act**

3 **[Cal. Lab. Code §§ 2698, *et seq.*]**

4 **(By PLAINTIFF and Against All Defendants)**

5 32. PLAINTIFF realleges and incorporates by this reference, as though fully set forth
6 herein, the prior paragraphs of this Complaint.

7 33. PAGA is a mechanism by which the State of California itself can enforce state
8 labor laws through the employee suing under the PAGA who do so as the proxy or agent of the
9 state's labor law enforcement agencies. An action to recover civil penalties under PAGA is
10 fundamentally a law enforcement action designed to protect the public and not to benefit private
11 parties. The purpose of the PAGA is not to recover damages or restitution, but to create a
12 means of "deputizing" citizens as private attorneys general to enforce the Labor Code. In
13 enacting PAGA, the California Legislature specified that "it was ... in the public interest to
14 allow aggrieved employees, acting as private attorneys general to recover civil penalties for
15 Labor Code violations ..." Stats. 2003, ch. 906, § 1. Accordingly, PAGA claims cannot be
16 subject to arbitration.

17 34. PLAINTIFF, and such persons that may be added from time to time who satisfy
18 the requirements and exhaust the administrative procedures under the Private Attorney General
19 Act, brings this Representative Action on behalf of the State of California with respect to herself
20 and all individuals who are or previously were employed by Aspen Surgery Center, LLC and/or
21 Surgery Partners, Inc. in California and classified as non-exempt employees ("AGGRIEVED
22 EMPLOYEES") during the time period of June 17, 2020 until a date as determined by the Court
23 (the "PAGA PERIOD").

24 35. On June 17, 2021, PLAINTIFF gave written notice by electronic mail to the Labor
25 and Workforce Development Agency (the "Agency") and by certified mail to the employer of
26 the specific provisions of this code alleged to have been violated as required by Labor Code §
27 2699.3. The statutory waiting period for PLAINTIFF to add these allegations to the Complaint
28 has expired. As a result, pursuant to Section 2699.3, PLAINTIFF may now commence a

1 representative civil action under PAGA pursuant to Section 2699 as the proxy of the State of
2 California with respect to all AGGRIEVED EMPLOYEES as herein defined.

3 36. The policies, acts and practices heretofore described were and are an unlawful
4 business act or practice because DEFENDANT (a) failed to provide PLAINTIFF and the other
5 AGGRIEVED EMPLOYEES accurate itemized wage statements, (b) failed to properly record
6 and provide legally required meal and rest periods, (c) failed to pay minimum wages, (d) failed
7 to pay overtime and sick pay wages, (e) failed to reimburse employees for required expenses,
8 and (f) failed to provide wages when due, all in violation of the applicable Labor Code sections
9 listed in Labor Code §§ 201, 202, 203, 204 *et seq.*, 210, 221, 226(a), 226.7, 227.3, 351, 510,
10 512, 558(a)(1)(2), 1194, 1197, 1197.1, 1198, 2802, California Code of Regulations, Title 8,
11 Section 11040, Subdivision 5(A)-(B), and the applicable Wage Order(s), and thereby gives rise
12 to civil penalties as a result of such conduct.¹ PLAINTIFF hereby seeks recovery of only civil
13 penalties as prescribed by the Labor Code Private Attorney General Act of 2004 as the
14 representative of the State of California for the illegal conduct perpetrated on PLAINTIFF and
15 the other AGGRIEVED EMPLOYEES.

16
17 **PRAYER FOR RELIEF**

18 WHEREFORE, PLAINTIFF prays for judgment against each Defendant, jointly and
19 severally, as follows:

20 1. On behalf of the State of California and with respect to all AGGRIEVED
21 EMPLOYEES:

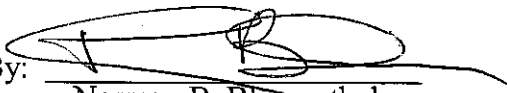
22 A) Recovery of civil penalties as prescribed by the Labor Code Private
23 Attorneys General Act of 2004; and,

24 B) An award of attorneys' fees and cost of suit, as allowable under the
25 law, including, but not limited to, pursuant to Labor Code §2699.

26
27 _____
28 ¹Plaintiff specifically excludes and/or does not allege any claims under California Labor
Code §558(a)(3).

1 Dated: September 30, 2021

BLUMENTHAL NORDREHAUG BHOWMIK
DE BLOUW LLP

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3
4 By: 
Norman B. Blumenthal
Attorneys for Plaintiff