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13 UNITED STATES DISTRICT COURT  
14 NORTHERN DISTRICT OF CALIFORNIA

15 SANTEYA DANYELL WILLIAMS,  
16 MARY RUTH SCOTT, KAREN  
LATREECE COLEMAN, PRISCILLA  
17 BUNTON, and ALYCE DENISE PAYNE,  
on behalf of themselves and all others  
18 similarly situated,

19 Plaintiffs,

20 v.

21 CITY OF ANTIOCH,

22 Defendant.

No. C-08-2301 SBA

**MOTION TO STRIKE PORTIONS OF  
DEFENSE EXPERT OPINIONS**

Date: January 12, 2010

Time: 1:00 pm.

Before: Honorable Sandra Brown Armstrong

23 Please take notice that, on January 12, 2010, at 1:00 p.m. before the Honorable Sandra  
24 Brown Armstrong, U.S. District Court, 1301 Clay St., Suite 400, Oakland, CA, plaintiffs will  
25 move for an order striking portions of the expert declarations of Dr. Brian Withrow, Joseph  
26 Callanan, and Chief Richard Word, submitted by defendant in opposition to class certification.  
27 The motion is based upon this memorandum, the declaration of Richard A. Marcantonio and  
28 attached exhibits, and any further evidence or argument submitted at the hearing.

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1 **I. INTRODUCTION**

2 In opposition to class certification, Defendant City of Antioch proffers the testimony of  
3 three expert witnesses on the ultimate question of unlawful discrimination: Dr. Brian Withrow,  
4 Joseph Callanan, and Police Chief Richard Word. Because these expert opinions fail to satisfy  
5 Federal Rule of Evidence 702, plaintiffs move to strike the testimony.

6 Dr. Withrow, Mr. Callanan and Chief Word offer essentially the same opinion on the  
7 ultimate legal issue on the merits: having reviewed some of the evidence in the case, each  
8 concludes that plaintiffs have failed to establish unlawful discrimination on the basis of race.  
9 Their testimony is inadmissible because, even if the merits were relevant at the class certification  
10 stage, Ninth Circuit law establishes that experts may not offer an opinion on an ultimate issue of  
11 law. *Elsayed Mukhtar v. Cal. State Univ., Hayward*, 299 F.3d 1053, 1066 n. 10 (9th Cir. 2002),  
12 *modified by*, 319 F.3d 1073 (9th Cir. 2003). In fact, courts in this and other circuits have  
13 repeatedly excluded expert testimony exactly like this — an opinion as to whether the facts in a  
14 particular case are sufficient to prove illegal discrimination. Such testimony is often based on  
15 little or no reliable methodology, as it is here, and improperly usurps the role of the fact finder.<sup>1</sup>

16 In addition, Plaintiffs move to strike the conclusory opinions of Mr. Callanan, who  
17 admits that he is “not a statistician, [and] not globally aware of the subject matter” (Marcantonio  
18 Decl., Ex. B [Callanan Dep.] at 52:5-7), yet purports to opine on the validity of the statistical  
19 analysis of Dr. Barry Krisberg.

20 Finally, Plaintiffs move to strike a portion of Dr. Withrow’s opinion, which is based on  
21 an analysis that he neither prepared nor could explain.

22 \_\_\_\_\_  
23  
24 <sup>1</sup> Plaintiffs further object to and move to strike these opinions on relevance grounds.  
25 While the ultimate issue of whether CAT’s policy and practice of targeting Section 8 recipients  
26 for unwarranted police scrutiny discriminates against African Americans raises common  
27 questions of law and fact that establish commonality under Rule 23, it is improper to determine  
28 the merits of those common questions at this stage of the proceedings. *Californians for  
Disability Rights v. Cal. Dept. of Transportation*, 249 F.R.D. 334, 345 (N.D.Cal. 2008), *citing  
Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

1 **II. ARGUMENT**

2 **A. Expert Opinion on the Presence or Absence of Illegal**  
3 **Discrimination Is Not Admissible Under Rule 702**

4 A district court must conduct a rigorous analysis of the evidence offered in support of,  
5 and in opposition to, a motion for class certification. *Gen. Tel. Co. of the Southwest v. Falcon*,  
6 457 U.S. 147, 161 (1982). As part of that Rule 23 inquiry, district courts are frequently called  
7 upon to evaluate competing expert testimony proffered by the parties. *See e.g. In re Wal-Mart*  
8 *Stores, Inc. Wage and Hour Litigation*, 2008 WL 413749 \*6 - 9 (N.D. Cal. Feb. 13, 2008); *Ellis*  
9 *v. Costco Wholesale Corp.*, 240 F.R.D. 627, 638 - 39 (N.D. Cal. 2007); *Dukes v. Wal-Mart*  
10 *Stores*, 222 F.R.D. 189 (N.D. Cal. 2004). While a district court is not obliged to conduct “a full-  
11 fledged *Daubert* analysis” of expert testimony at the class certification stage, it must nonetheless  
12 ensure that the evidence is useful in ascertaining “whether class certification requirements have  
13 been met.” *In re Wal-Mart Stores Inc. Wage and Hour Litigation*, 2008 WL 413749 at \*14,  
14 *citing to Kurihara v. Best Buy Co., Inc.*, 2007 WL 2501698 at \*5 (N.D. Cal. Aug. 30, 2007).

15 Expert testimony is only admissible if it will “assist the trier of fact to understand the  
16 evidence or to determine a fact in issue.” Fed. R. Evid. 702. An expert opinion must be “both  
17 relevant and reliable.” *Elsayed Mukhtar*, 299 F.3d at 1063. District courts have excluded expert  
18 testimony submitted at the class certification stage where it lacked sufficient reliability or  
19 relevance to the issues. *See e.g. Carlson v. C.H. Robinson Worldwide, Inc.*, 2005 WL 758602 \*5  
20 (D. Minn. March 31, 2005) (testimony of human resources professional excluded because of lack  
21 of relevant expertise); *Dukes*, 222 F.R.D. 189, 196 - 98 (N.D. Cal. 2004) (expert testimony based  
22 upon a survey that failed to meet scientific standards excluded).

23 In addition, experts are not permitted to offer testimony about an ultimate issue of law.  
24 *Mukhtar*, 299 F.3d at 1066 n. 10. An expert may not testify as to his or her legal conclusion  
25 because, to do so, would supplant the role of the trier of fact. *Id.* Whether a defendant’s  
26 conduct constitutes illegal discrimination is an ultimate issue of law in many cases, and is one of  
27 the ultimate issues of law in this case. First Amended Complaint, ¶¶ 109, 114, 119, 122.

28 Numerous courts in this circuit have excluded expert testimony which expresses an

1 opinion as to whether the facts in a particular case are sufficient to prove illegal discrimination.  
2 *Hernandez v. City of Vancouver*, 2009 WL 279038 at \*5 (W. D. Wash. Feb. 5, 2009) (expert  
3 report which is a “recitation of Plaintiff’s evidence combined with [expert’s] conclusion that the  
4 evidence demonstrates that Plaintiff was discriminated against” excluded); *Humphreys v.*  
5 *Regents of the University of California*, 2006 WL 1867713 at \*4-5 (N.D. Cal. July 6, 2006)  
6 (same); *Walker v. Contra Costa County*, 2006 WL 3371438 at \*5 (N.D. Cal. Nov. 21, 2006)  
7 (discrimination expert who will “do little more than deliver[ ] plaintiff’s closing argument from  
8 the witness box” excluded); *Ibok v. Advanced Micro Devices, Inc.*, 2003 WL 25686529 at \*4  
9 (N.D. Cal. July 2, 2003) (expert excluded because nine question test for determining  
10 discrimination unreliable and addresses ultimate legal issue). *See Ward v. Westland Plastics*,  
11 651 F.2d 1266, 1271 (9th Cir. 1980) (“expert incompetent to voice an opinion on whether. . .  
12 conduct constituted illegal sex discrimination”). *See also Mukhtar*, 299 F.3d at 1068 (new trial  
13 ordered because district court failed to determine whether testimony of discrimination expert was  
14 reliable).

15 Courts outside the Ninth Circuit also exclude such testimony, finding that no specialized  
16 knowledge of the issue of discrimination is required to assist the trier of fact. *Barfield v. Orange*  
17 *County*, 911 F.2d 644, 651 n.8 (11th Cir. 1990); *Tuli v. Brigham & Women’s Hospital*, 592 F.  
18 Supp. 2d 208, 212 (D. Mass. 2009); *Brink v. Union Carbide Corp.*, 41 F. Supp. 2d 402, 405 &  
19 n.8 (S.D.N.Y. 1997). *See also Kotla v. Regents of the Univ. of Calif.*, 115 Cal. App. 4th 283,  
20 292-94 (2004).

21 The decision in *Tuli v. Brigham & Women’s Hospital*, an individual gender  
22 discrimination case, is particularly relevant here. Tuli, the first and only board-certified female  
23 neurosurgeon at defendant hospital, alleged that she had been subjected to a hostile work  
24 environment and retaliation. Defendant proffered the expert testimony of a highly-credentialed  
25 African-American surgeon and academic who reviewed “the documentation” and opined that  
26 there “is no convincing documentation that [defendants] have orchestrated or designed a hostile  
27 employment environment” for the plaintiff. *Tuli*, 592 F. Supp. 2d at 212-213 & n.5. In  
28 excluding the testimony, the district court observed that the testimony “amounts to nothing more

1 than a well-credentialed physician[] saying: Take my word for it. . . this is not discrimination.”

2 *Id.* at 211. Judge Gertner further explained:

3 [w]hether the facts prove discrimination . . . in this case depend upon more than the cold  
4 record. It depends upon jurors evaluating the credibility of witnesses and drawing  
5 complex inferences from the facts they find.

6 *Tuli*, 592 F. Supp. 2d at 211. The court concluded that the witness lacked the necessary  
7 expertise, was not helpful to the jury, and was highly prejudicial. As further described below,  
8 this “take my word for it” opinion on the ultimate issue in the case is precisely the kind of expert  
9 testimony that defendant offers here.

10 **B. Defendant’s Expert Opinions on the Ultimate Issue of  
11 Discrimination Are Improper Under Rule 702**

12 **1. Dr. Withrow’s Opinions Concerning the Evidence of  
13 Discrimination Must Be Stricken**

14 Defendant offers the opinion of Dr. Brian Withrow, an associate professor of Criminal  
15 Justice at Texas State University, San Marcos and a private consultant for law enforcement  
16 agencies. Dr. Withrow offers no opinion relevant to the issues presented at class certification.  
17 Instead, he selectively reviews the evidence and opines that, on the merits, plaintiffs have failed  
18 to prove discrimination, the ultimate legal issue in the case. As such, his opinion should be  
19 excluded under Rule 702.

20 Dr. Withrow’s assignment was to determine “whether the available evidence supports the  
21 plaintiff’s claims.” Withrow Decl., App. B (Withrow Report at 1). In his deposition, he  
22 admitted that his method involved weighing the evidence:

23 Q. You made an evaluation?

24 A. I made an evaluation, right.

25 Q. And you weighed the information that you gleaned from documents and from  
26 depositions and from oral statements?

27 A. That’s exactly right.

28 Marcantonio Decl., Ex. A, Withrow Dep. at 123:22 – 124:2. But, Dr. Withrow also conceded  
that he did not treat the evidence even-handedly. He accepted the information provided by the  
police department as true:

1  
2 Q. But when you talked – to determine the CAT goal and its approach, you took  
3 information given to you by the police department and you assumed that information was  
4 true?

5 A. Yes. Plus other – other information. . . .

6 *Id.* at 115:23 – 116:2. On the other hand, Dr. Withrow dismissed evidence from plaintiffs and  
7 third-party witnesses, which contradicted the position of the Antioch police, as nothing more  
8 than “allegations.”

9 Q. When you say “absolutely no evidence [of discrimination],” that statement  
10 does not consider the testimony of plaintiffs and Section 8 members that you review or  
11 does it review and consider that?

12 A. *I don’t view as statements made by a witness as particularly – as what would  
13 be evidence.* Now, I know maybe legally it is.

14 *Id.* at 125:13 – 20 (emphasis added). Dr. Withrow went on to explain that he only considered  
15 witness statements as “evidence” if they could be corroborated by written documents. *Id.* at  
16 125:21 – 126:5; 131:22 – 132:3. Applying this double standard, Dr. Withrow’s conclusion is,  
17 not surprisingly, that there “is no evidence that the Community Action Team either intentionally  
18 or inadvertently used their authority to discriminate against racial minorities or Housing Choice  
19 Voucher Program participants.” *Id.* at 39. He affirmed that he intended to use the word  
20 “discriminate” in the legal sense. *Id.* at 131:5 – 9.

21 Dr. Withrow’s opinion on the underlying merits is irrelevant at this stage of this  
22 litigation. In addition, like the expert in *Tuli*, he purports to evaluate the evidence and conclude,  
23 based on the cold record, that there was no discrimination.<sup>2</sup> This legal conclusion, little more  
24 than a recitation of defendant’s argument on the merits, fails to satisfy Fed. R. Evid. 702.

25 \_\_\_\_\_  
26 <sup>2</sup> Even if expert testimony evaluating the evidence of discrimination were otherwise  
27 admissible, Dr. Withrow’s one-sided methodology would never pass muster under *Daubert*. See  
28 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993) (requiring court to consider  
the reliability of the expert’s methodology including the degree of its acceptance within the  
relevant scientific community).

1                   **2. Mr. Callanan’s Opinions Concerning the Evidence of**  
 2                   **Discrimination Must Be Stricken**

3                   Next, defendant offers the opinion of Joseph Callanan. A former Sheriff’s deputy, Mr.  
 4 Callanan frequently testifies as an expert in police cases, the “great majority” of which concern  
 5 excessive force by law enforcement officers. Marcantonio Decl., Ex. B at 7:22-8:1. Like Dr.  
 6 Withrow, Mr. Callanan offers no opinion relevant to the issues presented at class certification.  
 7 Instead, he selectively weighs the “totality” of the evidence and opines that, on the merits,  
 8 plaintiffs have failed to prove discrimination, the ultimate legal issue in the case. As such, his  
 9 opinion should be excluded under Rule 702.

10                   Mr. Callanan was retained for the purpose of “reviewing and evaluating the police  
 11 procedures” giving rise to this case (Callanan Decl., Exhibit [hereafter “Callanan Report”] at 1),  
 12 in order to focus on “the construction and operation of the Community Action Team” and to  
 13 “evaluate. . .whether there was impropriety or abuse of authority during [a variety of police]  
 14 contacts.” Marcantonio Decl., Ex. B at 81:7-24. Ultimately, Mr. Callanan was specifically  
 15 asked to “reach an opinion about whether the CAT team discriminated on the basis of race.” *Id.*  
 16 at 82:23-83:1.

17                   Mr. Callanan concludes that “[t]aken as a whole, . . . the plaintiffs have not put forth  
 18 sufficient information in a logical presentation to support the original complaint of racial and  
 19 societal status discrimination.” Callanan Report at 16. He specifically opines on the ultimate  
 20 legal issue of whether unlawful discrimination based on race occurred:

21                   Q. I just want to make sure I’m clear that your opinion in this case is that  
 22 there’s no intentional race discrimination.

23                   A. Within the materials, correct.

24                   Q. And there’s no disparate impact race discrimination within the materials?

25                   A. Correct.

26                   Marcantonio Decl., Ex. B at 169:12-18.

27                   Asked to explain this opinion, Mr. Callanan stated repeatedly that it was based on the  
 28 “totality” of the materials he reviewed. Although he acknowledged that those materials  
 disclosed a wealth of disputed facts (*id.* at 228:15-19; *see id.* at 71:16-25), he nonetheless  
 concluded that that “in the totality of the material put in front of me, . . . there’s just nothing to

1 support that assertion [of discrimination].” *Id.* at 104:25-105:3.

2 Q. You reached a conclusion that there’s absolutely no evidence of racial  
3 discrimination?

4 A. Well, not in the totality of these readings.

5 *Id.* at 122:22-24.

6 He made it clear, in fact, that he explicitly weighed conflicting evidence, and reached his  
7 own conclusions about its credibility:

8 Q. [Y]ou weighed that evidence and reached a conclusion that in fact the  
9 chief was correct?

10 A. Absolutely.

11 *Id.* at 65:22-24.

12 Confronted with specific contrary evidence – for instance, the declarations of a landlord  
13 who states that a CAT officer told him that he should “remove his black tenants because they  
14 cause crime” and of another witness who states that an APD officer told her that APD “had a  
15 way of trying to get rid of black Section 8 tenants” – Mr. Callanan agreed that if a jury were to  
16 credit that evidence, his opinion would be quite different. In particular, his opinion – and that of  
17 “any competent expert” (*id.* at 123:7) – would be “hypothetically if that’s true, improper police  
18 procedure, discriminatory practice, counter-productive to the Police [mission], outside norms, I  
19 think substandard, I think unconstitutional . . . .” *Id.* at 122:13-16; *see id.* at 234:13-15 (“It’s  
20 certainly misconduct on the part of the police officer. It may be indicative of some racial  
21 animus.”). Mr. Callanan did not reach that conclusion, but only because he weighed evidence of  
22 discrimination, speculated about its veracity, and rejected it. *See id.* at 124:7-8 (“She may be an  
23 anomaly, she may be – there’s probably a better witness that was of interest to me . . . .”).

24 Given his admitted “bias. . .for professional law enforcement” (*id.* at 127:20), it is not  
25 surprising that, in all of the hundreds of cases he has evaluated, he has only once, “many years  
26 ago,” found “sufficient information to support a claim of race discrimination.” *Id.* at 105:8-15.  
27 His conclusion on the ultimate legal issue here is plainly inadmissible, particularly given his  
28 “methodology” of selectively weighing the “totality” of the evidence.

1                   **3. Chief Word’s Opinions Concerning the Evidence of**  
 2                   **Discrimination Must Be Stricken**

3                   Finally, defendant offers the opinion of Richard Word, chief of the Vallejo Police  
 4 Department and a former police officer and chief of the Oakland Police Department.<sup>3</sup> Chief  
 5 Word was asked to focus on the CAT team “from the perspective of a police chief” in order to  
 6 review CAT’s actions toward the named plaintiffs. Word Decl., Exhibit (“Word Report”) at 2.  
 7 In forming his opinion, he relied in part on Mr. Callanan’s report. *Id.*

8                   Piggybacking on Mr. Callanan’s report, Chief Word echoes Callanan’s opinion that he  
 9 “did not find any evidence of racial profiling in all of the reports and activities [he] reviewed in  
 10 connection with this case.”<sup>4</sup> Word Report at 13. His conclusion is not founded in any  
 11 established scientific methodology, and he does not claim otherwise. Instead, he baldly asserts  
 12 about racial profiling: “I would know it when I see it.” Word Report at 13. (Mr. Callanan  
 13 makes the same assertion. Marcantonio Decl., Ex. B at 155:15-17.) The testimony of both  
 14 “amounts to nothing more than a well-credentialed [person] saying: Take my word for it. . . this  
 15 is not discrimination.” *Tuli*, 592 F. Supp. 2d at 211. And as in *Tuli*, “[w]hether the facts prove  
 16 discrimination . . . in this case depend upon more than the cold record. It depends upon jurors  
 17 evaluating the credibility of witnesses and drawing complex inferences from the facts they find.”  
 18 *Id.* Chief Word’s opinion should be stricken.

19                   **C. Mr. Callanan’s Conclusory Criticism of Dr. Krisberg’s Expert**  
 20                   **Statistical Analysis Must Be Stricken Because He is Not**  
 21                   **Qualified To Offer A Statistical Opinion**

22                   Mr. Callanan purports to critique the expert statistical analysis of Dr. Krisberg, the only  
 23 expert before the court who has performed a quantitative analysis of the data regarding the racial

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24                   <sup>3</sup> Plaintiffs have not yet had an opportunity to depose Chief Word, who became  
 25 unavailable for his scheduled deposition on December 8 due to family reasons. Defendant has  
 26 agreed to make him available for deposition on December 21, after the due date for Plaintiffs’  
 27 reply papers, and to allow Plaintiffs to supplement their reply or move to strike Chief Word’s  
 28 testimony no later than December 28. Marcantonio Decl., ¶ 4.

<sup>4</sup> Chief Word states that “[r]acial profiling is frequently defined as law enforcement  
 activities . . . that are initiated solely on the basis of race.” Word Report at 5.

1 targeting of CAT’s resources. Mr. Callanan admits that he is “not a statistician, [and] not  
2 globally aware of the subject matter” (Marcantonio Decl., Ex. B at 52:5-6), and lacks the “level  
3 of statistical expertise that would be required to teach at the university level.” *Id.* at 35:2-6. He  
4 has never testified as a statistical expert (*id.* at 32:21-23) beyond making an “odds and  
5 probabilities kind of presentation (*id.* at 33:9-14), and was not retained in this case as a statistical  
6 expert. *Id.* at 220:24-25 (“Again, I’m not your statistician here”).

7 Despite his admitted lack of expertise in the field of sophisticated quantitative analysis,  
8 Mr. Callanan offers his opinion that “[t]he statistical analysis offered by Mr. Barry Krisberg,  
9 PhD, is highly dubious at best.” Callanan Report at 16. His opinion rests not on expertise (much  
10 less on his own expert analysis of the data), but on the speculation that “there could be a  
11 perfectly reasonable explanation for what appears to be a statistical disparity.” Marcantonio  
12 Decl., Ex. B at 145:16-18.

13 In fact, the basis for that opinion, explicitly, is that there continue to be African-American  
14 Section 8 residents living in Antioch. Callanan Report at 16. As Mr. Callanan testified,

15 A. [I]f you could show that to me here and again and again and again, and the  
16 consequence as your expert reveals in his impact study is that we have no Black people in  
17 Antioch, that’s pretty shocking. You know, that would even be indicative of racial  
18 profiling and racial discrimination.

19 Marcantonio Decl., Ex. B at 122:16-21.

20 Mr. Callanan is not “a witness qualified as an expert by knowledge, skill, experience,  
21 training, or education” in the field of statistical and quantitative analysis. Fed. R. Evid. 702. He  
22 is not qualified to offer an opinion about Dr. Krisberg’s analysis, and his speculative opinion on  
23 this matter should be excluded.

24 **D. Dr. Withrow Improperly Offers As His Own An Analysis  
25 About The Basis For Housing Authority Termination  
26 Decisions That He Did Not Prepare, Did Not Check, And Did  
27 Not Even Understand**

28 In regard to the termination rate for African American families that CAT referred for  
29 termination of their housing subsidy to the Housing Authority of Contra Costa County  
30 (“HACCC”), Dr. Withrow misleadingly states in his report that:

1 according to my analysis of the HACCC logbook, in 63 of the 69 cases the plaintiff  
2 alleges to be based on flimsy evidence the HACCC independently determined that the  
submitted allegations were based on factual information.

3 Withrow Report at 24. In deposition, however, he admitted that this analysis was not his, but  
4 was instead actually done by an unknown person in the office of defense counsel.

5 Q. So you relied on someone else's analysis?

6 A. Absolutely.

7 Q. And you do not know who did that analysis?

8 A. No, I do not.

9 Q. Did you attempt to check that other analysis?

10 A. No I did not.

11 Marcantonio Decl., Ex. A at 85:25-86:8; *see also id.* at 85:14-24 ("I do not recall evaluating  
12 cases in the HAC [sic] logbook and said that this one they found it was factual and this one they  
13 found was not factual. I didn't go to the actual logbook and review those cases, nor did I review  
14 the hearing officer's determination about whether or not it's factual or not factual information  
15 directly to the direct original source. There was another – another document somewhere in that  
16 21,000 documents that I was sent that had – somebody else had done that analysis and I used  
17 that."); *id.* at 79:16-80:1 (he did not know the source of the document, and did not talk to anyone  
about what it is or means).

18 While Dr. Withrow's misrepresentation severely undermines the *weight* of his testimony  
19 in this case generally, this particular "opinion" lacks the reliability that the rules of evidence  
20 require of an admissible expert opinion. He simply regurgitated the conclusion reached by  
21 someone else, without any basis for doing so. The basis of the opinion he offers as his own, in  
22 short, is not "of a type reasonably relied upon by experts" in any reputable field. Fed. R. Evid.  
23 703. It must be stricken.

1  
2 **III. CONCLUSION**

3 For all the foregoing reasons, the motion to strike portions of the defense expert  
4 testimony should be granted.

5  
6 DATED: December 18, 2009

PUBLIC ADVOCATES, INC.

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