Hon. Richard A. Jones

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT SEATTLE**

CYPRESS INSURANCE COMPANY, as subrogee of Microsoft Corporation,

Plaintiff,

vs.

SK HYNIX AMERICA, INC.,

Defendant.

Case No. 2:17-cv-00467-RAJ

**DEFENDANT SK HYNIX AMERICA INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFF'S REQUEST FOR LEAVE TO FILE AMENDED COMPLAINT**

Note on Motion Calendar:
June 1, 2018

Oral Argument Requested

**REDACTED VERSION OF DOCUMENT PROPOSED TO BE FILED UNDER SEAL**



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## I. INTRODUCTION

Plaintiff Cypress Insurance Company ("Cypress") has failed to demonstrate "good cause" for its request for relief from the scheduling order, and its motion for leave to amend its complaint yet again should be denied on that basis. Indeed, "good cause" is lacking because Cypress failed to act diligently in both acquiring its basis for amendment—an assignment of rights from Microsoft Corporation—and in seeking leave to amend before the March 14, 2018 deadline set by this Court.

As background, when Cypress sued Defendant SK Hynix America, Inc. ("Hynix") in March 2017, it elected to do so as an equitable subrogee of Microsoft. To be sure, it could have gotten an assignment of rights from Microsoft then, as Microsoft was obligated to provide one, but Cypress chose not to. Instead, Cypress waited until almost a full year later—sometime in March 2018—to get a purported assignment. After it had that, which was *before* the amendment deadline, Cypress amended its complaint but *did not* include allegations that it was suing as an assignee of Microsoft. More recently, the parties asked the Court to modify its scheduling order, but Cypress notably *did not* request an adjustment of the amendment deadline. Now, more than two months after acquiring its factual basis for the proposed amendment, and after flubbing the deadline, Cypress asks this Court to abide its lack of diligence just so it can try to plead around one of Hynix's defenses. The Court should decline.

But even if this Court were to find good cause for relief from the scheduling order (which it should not), it should deny Cypress motion under Rule 15, since the proposed amendment is futile, Cypress unduly delayed in seeking it, and Hynix would be unfairly prejudiced if amendment is allowed. Most significantly, the proposed amendment does not make Cypress's already untenable claims any more viable than before. For one, any breach-of-contract claim Microsoft might have had against Hynix was time-barred by March 2018, and thus, Microsoft did not have a viable claim it could have assigned to Cypress.

For at least those reasons, and for all the reasons set forth more fully below, the



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Court should deny Cypress' motion and not allow it a third bite at the apple.

## II. FACTUAL BACKGROUND

### A. Procedural Posture

Cypress filed its initial complaint on March 23, 2017. (Dkt. No. 1.) The Court issued its scheduling order on July 26, 2017, and set the deadline to amend pleadings as March 14, 2018. (Dkt. No. 24.) On March 6, 2018, after the Court granted the parties' stipulated motion for leave and before the deadline, Cypress filed an amended complaint (the "FAC"), which is the operative complaint. (Dkt. No. 34.) At that time, depositions had not yet occurred.

On April 24, 2018, the parties filed a stipulated motion to amend the Court's scheduling order. (Dkt. No. 37.) The parties did not ask the Court to adjust the deadline to amend pleadings. *Id.* On April 30, 2018, the Court issued a scheduling order amending the trial date and certain pre-trial deadlines. (Dkt. No. 38.) The Court did not modify the March 14, 2018 deadline for amending pleadings. Further, the Court emphasized to the parties that the dates reflected in the scheduling order could only be altered upon a showing of "good cause." (*Id.*)

Between March 6 and May 14, the date Cypress filed its current motion, the parties collectively deposed 11 fact witnesses.[1] Non-expert discovery is now substantially complete, except for the subrogation-related witnesses that Hynix still intends to depose. (Declaration of Jen C. Won ["Won Decl."], ¶ 4.)

### B. Relevant Factual Allegations

Hynix is an electronic memory chip supplier based in San Jose, California. (FAC ¶¶ 4, 11.) For several years, Hynix has supplied Dynamic Random Access Memory ("DRAM") chips to non-party Microsoft. (*Id.* ¶ 11.) The parties' dealings were governed by a written agreement titled "Microsoft Component Purchase Agreement," as modified through subsequent amendments, including an Amendment No. 9 that was dated April 1,

[1] On May 16, Cypress deposed a twelfth fact witness. (*See* Won Decl., ¶ 4.)



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2013 (Won Decl., Exh. 1, the "Ninth Amendment"). (FAC, ¶¶ 9-10.)

According to Cypress, Hynix breached its agreement with Microsoft by, among other things, "failing to supply DRAM chips to Microsoft" and "failing to meet the capacity requirements for the DRAM chips in accordance" with the provisions of the Ninth Amendment. (*Id.* ¶ 19.) The FAC alleges that Hynix was obligated to provide an "uninterruptible supply" of DRAM chips to Microsoft, and that Hynix failed to do so. (*Id.* ¶¶ 11-12.) [redacted]

Cypress alleges that Hynix's breach "forced" Microsoft to "secure alternate chip sourcing at a higher price to support its shipment requirements." (*Id.* ¶ 13.) As a result, Cypress asserts that Microsoft is entitled to recover from Hynix as damages the difference between the cost of cover and the contract price, as well as other direct and incidental damages. (*Id.* ¶ 21.)

In its initial complaint, Cypress sought to recover from Hynix the policy benefits allegedly paid to Microsoft in the amount of $150,000,000.00. (Dkt. No. 1 ["Complaint"], ¶ 25.) But in its FAC, Cypress increased the amount it sought from Hynix to $175,000,000.00. (FAC ¶ 23.)

**C. Microsoft's Insurance Claim**

[redacted] The insurers eventually paid out on Microsoft's claim up to the policy sublimit of $150,000,000. (Complaint ¶¶ 24-25.)



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Sometime in March 2018, Microsoft purportedly assigned all of its rights relating to its insurance claim—as well as any claims it then had against Hynix—to Cypress. (Dkt. No. 39-1 [Motion, Exh. B].)

## III. LEGAL STANDARD

### A. Requests For Relief From Court's Scheduling Order

Motions for leave to amend are generally governed by Fed. R. Civ. P. 15(a).[2] But where the deadline to amend pleadings in the scheduling order has passed, as here, "a court faced with a motion for leave to amend must first address the issue under" the Rule 16(b) "good cause" standard, rather than the more liberal standard of Rule 15(a). *See Coleman v. Quaker Oats Co*. 232 F.3d 1271, 1294 (9th Cir. 2000), *cert. denied,* 533 U.S. 950 (2001); *Du Maurier v. Laguna Beach Police Dep't*, 2011 WL 13143565, at *2 (C.D. Cal. Sept. 2, 2011). This is because "[a] scheduling order is 'not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.'" *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992) (citations omitted).

Under Rule 16(b)(4), a scheduling order may be modified "only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4). "Good cause" requires that the deadline for amending pleadings could not "reasonably be met despite the diligence of the

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[2] As a preliminary matter, Cypress incorrectly styled its motion under Rule 15(a)(2). Rule 15(a) allows a party to amend a pleading where the party desires to set forth allegations concerning events which took place *before* the original pleading was filed. *See e.g.*, *Eid v. Alaska Airlines, Inc.*, 621 F.3d 858, 874-875 (9th Cir. 2010). Here, Cypress' proposed amendment and its claim as an assignee of Microsoft entirely rest on the purported March 2018 assignment. These allegations cannot, therefore, be brought as amended pleadings under Rule 15(a). *See Cabrera v. City of Huntington Park*, 159 F.3d 374, 382 (9th Cir. 1998) (per curiam); *U.S. for Use of Atkins v. Reiten*, 313 F.2d 673, 674 (9th Cir. 1963) ("Since the additional allegations in the appellant's 'amended complaint' related to events which had 'happened since the date of the pleading sought to be supplemented,' Rule 15(d), Federal Rules of Civil Procedure, was applicable."). The only available mechanism for adding Cypress' allegations based on the purported assignment is Rule 15(d), which allows parties to file a supplemental pleading based on facts that didn't exist when the original complaint was filed. Cypress, however, seeks to add allegations arising from conduct which happened nearly a year after it filed its first complaint. Since an amendment pursuant to Rule 15(a) is not available to Cypress, its motion may be denied on that basis alone. *See Eid*, 621 F.3d at 875 (affirming denial of plaintiff's motion for leave to supplement because the pleading should have been amended under Rule 15(a), not Rule 15(d)).

party seeking the extension." *Johnson*, 975 F.2d at 609. If the party seeking amendment "was not diligent, *the inquiry should end.*" *Id.* (emphasis added).

**B. Motion For Leave To Amend**

While Rule 15 states that "[t]he court should freely give leave when justice so requires," leave to amend is not automatically granted. *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). When, as here, "a district court has already granted a plaintiff leave to amend, its discretion in deciding subsequent motions to amend is 'particularly broad.'" *Chodos v. W. Publ'g Co., Inc.*, 292 F.3d 992, 1003 (9th Cir. 2002) (citation omitted).

Futility alone justifies the denial of a motion for leave to amend. *Naas v. Stolman*, 130 F.3d 892, 893 (9th Cir. 1997); *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 537-42 (9th Cir. 1989). An amendment is futile if the applicable statute of limitations has run or the amendment would be subject to dismissal. Leave to amend must be denied if it constitutes an exercise in futility. *See Deutsch v. Turner Corp.*, 324 F.3d 692, 718 n. 20 (9th Cir.2003) (denying leave to amend complaint where amendment would be futile because statute of limitations had run); *See also Eaglesmith v. Ward*, 73 F.3d 857, 860 (9th Cir. 1996) (denying leave to amend where new claims that plaintiff sought to add were time-barred); *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293, 1298 (9th Cir. 1998) ("Although there is a general rule that parties are allowed to amend their pleadings, it does not extend to cases in which any amendment would be an exercise in futility, or where the amended complaint would also be subject to dismissal.") (citations omitted).

Potential prejudice to the opposing party also weighs heavily in the determination. *See, e.g.*, *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003) ("As this circuit and others have held, it is the consideration of prejudice to the opposing party that carries the greatest weight[.]"); *Texaco, Inc. v. Ponsoldt*, 939 F.2d 794, 799 (9th Cir. 1991) (amendment denied where defendant "would have been unreasonably prejudiced by the addition of numerous claims so close to trial, regardless of [plaintiff's] argument that they were 'implicit' in the previously pleaded claims"). If the moving party

failed to take advantage of previous opportunities to amend, without explanation, that alone warrants denial of leave to amend. *See e.g., Acri v. Int'l Ass'n of Machinists & Aerospace Workers*, 781 F.2d 1393, 1398 (9th Cir. 1986) ("[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action.") (citing *M/V American Queen v. San Diego Marine Construction Corp.*, 708 F.2d 1483, 1492 (9th Cir.1983); *Stein v. United Artists Corp.*, 691 F.2d 885, 898 (9th Cir.1982)).

## IV. ARGUMENT

### A. Cypress Did Not Act Diligently To Attain Its Basis For Amendment Or In Seeking To Amend Before The March 14, 2018 Deadline.

Cypress failed to act diligently before the March 14, 2018 deadline for amending pleadings or in the two-plus months between that deadline and the filing of its motion. Its motion should therefore be denied under Rule 16(b)(4) for a lack of "good cause." Fed. R. Civ. P. 16(b)(4). Indeed, Cypress should not be allowed to amend its complaint because it delayed in both (i) getting an assignment from Microsoft in the first place, and (ii) seeking amendment once it had a purported assignment.

When Cypress sued Hynix in March 2017, it must have known that its contractual subrogation rights could only be perfected through an assignment from Microsoft. *See e.g., Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wash. App. 185, 205 (2013) ("Equitable subrogation entitles a paying primary insurer to seek reimbursement for losses paid. It does not allow the insurer to assert an insured's statutory rights without express agreement."). [redacted] That is, the policy does not expressly confer subrogation rights to Cypress absent a separate assignment from Microsoft. Nevertheless, Cypress elected to sue Hynix as an equitable subrogee of Microsoft without getting an assignment. Then it waited almost a full year until March 2018 before getting a purported assignment from Microsoft.



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And once it had the purported assignment, Cypress waited at least two more months without justification to seek amendment. This alone is sufficient to deny Cypress's request for leave. *See Optivus Technology, Inc. v. Ion Beam Applications S.A.*, 2004 WL 5543277, at *5 (C.D. Cal. Dec. 29, 2004) (finding two-month delay from time plaintiff learned of facts prompting amendment until time it filed its motion to amend "inexcusable"); *Rooney v. Sierra Pac. Windows*, 2011 WL 5034675, at *7 (N.D. Cal. Oct. 11, 2011) (plaintiff failed to act diligently where he "waited nearly three months" after having "sufficient information to amend the complaint").

In fact, Cypress had the purported assignment *at the time it filed its FAC*. Otherwise, it could not have increased the amount it was claiming from $150,000,000 to $175,000,000, since the first figure is the amount Cypress paid Microsoft under the policy and thus the most it could be subrogated to Microsoft. The additional $25,000,000 must have come (if anywhere) from an ostensible assignment of claims from Microsoft. Cypress counsel admitted on March 13, 2018 that Cypress had obtained an assignment from Microsoft. (Won Decl., ¶ 2). Yet, while Cypress could have amended its complaint before the March 14, 2018 deadline in the same way it proposes to do now, it chose not to. It should not be given another chance to excuse its carelessness, lack of diligence, or both. *Johnson*, 975 F.2d at 609 ("[C]arelessness . . . is not compatible with a finding of diligence and offers no reason for a grant of relief.").

And even if the Court were to credit Cypress' tortured argument that it did not "discover" the basis for its proposed amendment until discussions among counsel in mid-March (Won Decl., ¶ 2), "good cause" is lacking given that Cypress could have asked the Court to extend the deadline to amend pleadings, either through its own motion or as part of the parties' recent joint motion to modify the scheduling order (Dkt. No. 37), but instead chose to disregard it entirely. *See, e.g.*, *Tapia v. Sterling Jewelers Inc.*, No. 5:14-cv-00624-EJD, at *7 (N.D. Cal. May 22, 2015) ("Plaintiff could have moved the court to modify the deadline to amend the pleadings, but failed to do so. As such, the time to finalize the complaint has passed . . . Plaintiff has failed to show good cause for modifying

the deadline . . . to amend the pleadings."); *Martinez v. Martinez*, No. CIV-09-281, at *4 (D.N.M. July 6, 2011) ("[A] party who totally disregards a scheduling order – without requesting that the Court stay or extend compliance with the order . . . does so at her own peril . . . [Plaintiff] could have filed a motion to extend the deadlines before they expired or to stay the effect of the scheduling order, but she did not do so . . . [Plaintiff] has not shown good cause to extend [the] . . . deadline.").

Because Cypress lacks "good cause," the Court should deny its motion and "need not address" whether to grant leave under Rule 15. *P.E.A. Films, Inc. v. Metro-Goldwyn Mayer*, 2016 WL 7017624, at *3 (C.D. Cal. Jan. 1, 2016).

**B. Cypress Should Not Be Granted Leave to Amend Under Rule 15.**

Although Rule 15 gives the Court broad discretion to grant a party leave to amend a complaint when justice requires, this discretion is limited. Cypress' proposed amendment is futile, and the denial is warranted on that basis alone. Cypress' undue delay in seeking the amendment and undue prejudice to Hynix are additional reasons that require a denial of Cypress' motion.

**1. The Proposed Amendment Is Futile Because The Applicable Statute Of Limitations Has Run.**

Any breach-of-contract claims Microsoft could have asserted were time-barred by the time of the March 2018 purported assignment. Under Washington's Uniform Commercial Code, which governs the sale of movable goods, "[a]n action for breach of contract for sale must be commenced within *four years* after the cause of action has accrued." RCW § 62A.2-725 (emphasis added); *see also Hamilton v. Pearce*, 15 Wash. App. 133, 134, 139 (1976) (court applied four-year statute of limitations to written contract for the sale of goods). Here, the agreement between Hynix and Microsoft was for the sale of DRAM chips, *i.e.*, movable goods, and thus, any breach-of-contract claim should have been brought within four years of when that claim accrued. By March 2018, however, the four-year statute of limitations had long elapsed, and Microsoft had no valid claims it could have assigned to Cypress.



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Under Washington law, "[a] cause of action accrues when the breach occurs . . . ." RCW § 62A.2-725(2). "[A]n action for breach of contract accrues at the date of breach and is not postponed until the date of discovery by the aggrieved party or by the fact that all or a substantial amount of the damages did not occur until a later date. Stated another way, a cause of action accrues when the holder thereof first becomes entitled to sue." *Ford v. Int'l Harvester Co.*, 399 F.2d 749, 751 (9th Cir. 1968).

[redacted]

And certainly by the end of 2013, Microsoft would have known whether Hynix had discharged its contractual obligations or not, since the Ninth Amendment covered performance that was to occur wholly within 2013. (*See* Won Decl., Exh. 1, at 4.) By the time Microsoft purported to assign its breach-of-contract claims against Hynix to Cypress in March 2018, its claims had expired. When Cypress executed the purported assignment, Microsoft had no viable claims it could have assigned to Cypress based on Hynix's alleged breach of the Ninth Amendment.

The assignee is subject to the same statute of limitations defense as applied to the assignor. *Puget Sound Nat. Bank v. State Dep't of Revenue*, 123 Wash. 2d 284, 292 (1994) ("[A]n assignment carries with it the rights and liabilities as identified in the assigned



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contract, but also all applicable statutory rights and liabilities.") As such, whatever claims Cypress bases on the purported assignment from Microsoft are time-barred by the four-year statute of limitations.

Additionally, Cypress' proposed amendment cannot relate back to the original complaint so as to overcome the statute of limitations defense. The Ninth Circuit has denied relation back for the statute of limitation purposes where, as here, a plaintiff filed suit on a claim before it was actually assigned to the plaintiff. *U.S. For Use and Benefit Of Wulff v. CMA, Inc.*, 890 F.2d 1070, 1073 (9th Cir. 1989). Thus, any amendment based on the untimely assignment would be futile.

**2. The Proposed Amendment Is Futile Because It Cannot Confer Standing On Cypress As Microsoft's Assignee.**

Similarly, Cypress' amendment is futile because it cannot confer retroactive standing on Cypress as Microsoft's assignee. *Bell v. City of Kellogg*, 922 F.2d 1418, 1425 (9th Cir. 1991) (an amendment would be futile where the plaintiffs' case was dismissed for lack of standing and no amendment could have cured this defect). Cypress' purported assignment cannot confer standing on Cypress as Microsoft's assignee because it was obtained after Cypress filed the original complaint. *See Freed Designs, Inc. v. Sig Sauer, Inc.*, No. 2:13-cv-9570, 2014 WL 6837042, *2 (C.D. Cal. Dec. 2, 2014) (rejecting plaintiff's attempt to cure assignment after filing the complaint); *Procter & Gamble Co. v. Paragon Trade Brands, Inc.*, 917 F. Supp. 305, 310 (D. Del. 1995) ("As a general matter, parties should possess rights before seeking to have them vindicated in court."). Nor is this defect cured by the assignment's *nunc pro tunc* provision that purports to retroactively set its "effective date" as the date on which Cypress first made a policy payment to Microsoft (Purported Assignment, Dkt No. 39-1 at 2). *See Enzo APA & Son, Inc. v. Geapag A.G.*, 134 F.3d 1090, 1093-94 (Fed Cir. 1998) ("nunc pro tunc assignments are not sufficient to confer retroactive standing") (citing *Proctor & Gamble Co.*, 917 F. Supp. at 310).

In some limited instances, courts have allowed the plaintiff to supplement the

complaint to cure the standing defect based on the assignment that the plaintiff obtained after filing the complaint. *See e.g.*, *Northstar Fin. Advisors, Inc. v. Schwab Investments*, 779 F.3d 1036, 1044-1045 (9th Cir. 2015). Here, however, Cypress waited nearly an year after filing the complaint to obtain the purported assignment after the statute of limitations had run. Cypress should not be allowed to amend the complaint based on the purported assignment.

Cypress' newly asserted claims based on the purported assignment are futile because they are time-barred and cannot retroactively confer standing that Cypress seeks. Accordingly, Cypress' motion should be denied on the futility basis alone.

**3. Cypress Unduly Delayed In Seeking Amendment.**

As discussed more fully in Section IV.A. *supra*, Cypress unduly delayed in seeking both its basis for amendment and leave itself, a factor that weighs against allowing amendment.

**4. Hynix Would Be Unfairly Prejudiced By The Proposed Amendment.**

The Ninth Circuit has found undue prejudice where the claims sought to be added "would have greatly altered the nature of the litigation and would have required defendants to have undertaken, at a late hour, an entirely new course of defense." *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990). Here, Cypress' *stated basis* for seeking an amendment is to try to plead around one of Hynix's defenses to Cypress' subrogation action: the voluntary-payment doctrine. Hynix raised the voluntary payment as one of its affirmative defenses in its Answer filed on March 20, 2018. Cypress waited nearly three months to amend the FAC, after Hynix had spent substantial time and resources taking discovery to develop a factual record around affirmative defenses, including the voluntary payment doctrine. (*See* Won Decl., ¶¶ 3-4.) Hynix would be unfairly prejudiced if amendment is allowed, since it would have to alter the course of its defense near the end of fact discovery. After Hynix has spent significant resources developing the record, Cypress now abruptly seeks to insert a new theory of recovery in an



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improper attempt to skirt Hynix's affirmative defense. Because Cypress has never alleged its standing as an assignee, Hynix did not conduct substantial discovery on this issue. Hynix will not have a chance to depose witnesses again based on Cypress' proposed new theory. Indeed, Cypress should not be allowed to try to make an end-run around one of Hynix's primary defenses this late in the game. The Court should decline to entertain Cypress' wait-and-see approach to pleading and deny its motion.

## V. CONCLUSION

Cypress's motion must be denied because Cypress did not act diligently in seeking its basis for amendment or in seeking leave to amend and thus cannot show "good cause." The futility of Cypress' proposed amendment and its resulting prejudice to Hynix, combined with Cypress' undue delay, require a denial of Cypress' motion.

DATED this 25th day of May, 2018

Respectfully submitted,

/s Alex Baehr

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**CERTIFICATE OF SERVICE**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 1875 Century Park East, 23rd Floor, Los Angeles, CA 90067-2561.

On May 25, 2018, I served the foregoing document on the interested parties in this action as follows:

**BY CM/ECF NOTICE OF ELECTRONIC FILING:** I electronically filed the document(s) with the Clerk of the Court by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Participants in the case who are not registered CM/ECF users will be served by mail or by other means permitted by the court rules.

**BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused the foregoing document (including the under seal/unredacted version, as applicable) to be sent from e-mail address jwon@birdmarella.com to the persons at the e-mail addresses listed in the attached Service List. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on May 25, 2018, at Los Angeles, California.

s/ Jen C. Won
Jen C. Won

**SERVICE LIST**
***Cypress Insurance Co. v. SK Hynix America Inc.***
**Case No. 2:17-cv-00467-RAJ**

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