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14 forthcoming

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16 **UNITED STATES DISTRICT COURT**
17 **NORTHERN DISTRICT OF CALIFORNIA**

18 DUSTIN WHIDDEN,)
19)
20 Plaintiff,) Case No.: 3:24-cv-7497
21 v.)
22) **COMPLAINT**
23 FORM ENERGY, INC.,)
24 THEODORE A. WILEY, and) **JURY TRIAL DEMANDED**
25 NICOLE MYERS,)
26)
27 Defendants.)
28)

1 **COMPLAINT**

2 Plaintiff Dustin Whidden, through undersigned counsel, files this Complaint for damages
3 and equitable relief against Defendants Form Energy, Inc., Theodore A. Wiley, and Nicole Myers.

4 **INTRODUCTION**

5 U.S. Army Reserves Major Dustin Whidden has served his country for over twenty years.
6 A devoted husband and a loving father to his three boys, he has repeatedly been commended for
7 his honesty, integrity, and skills by the Army and his employers. His former employer, Defendant
8 Form Energy, Inc. (“Form Energy”), likewise approved of his work—until he dared express
9 political beliefs on social media and participate in active-duty Reservist training during the busy
10 summer months.

11 Form Energy terminated his employment in violation of California Labor Law and federal
12 law protecting the civilian employment of our Nation’s heroes and employees’ right to maintain
13 and express political opinions. Whidden demands that Form Energy and the individual defendants
14 be held accountable for their discriminatory and retaliatory actions—actions that inflicted not only
15 substantial emotional harm, but also significant income loss for Whidden and his family.

16 **JURISDICTION AND VENUE**

17 1. Whidden brings this action under the Uniformed Services Employment and
18 Reemployment Rights Act of 1994 (USERRA), 38 U.S.C. §§ 4301–4335, California Military and
19 Veterans Code § 394, California Government Code § 12940, and California Labor Code §§ 1101–
20 1105 and § 98.6.

21 2. This Court has jurisdiction over the subject matter of this action pursuant to 28
22 U.S.C. § 1331 because Whidden’s claims arise under the laws of the United States and pursuant
23 to 38 U.S.C. § 4323(b)(3) because his claims arise under the USERRA. This Court has
24 supplemental jurisdiction under 28 U.S.C. § 1367 over Whidden’s state law claims.

25 3. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) and 38 U.S.C.
26 § 4323(c)(2) because a substantial part of the events or omissions giving rise to Whidden’s claims
27 occurred in this District and because Whidden was employed by Form Energy in this District.

1 4. Whidden has complied with all conditions precedent to the filing of his claims
2 including having received a Notice of Right to Sue from the State of California Civil Rights
3 Department dated October 24, 2024.

4 **NATURE OF THE CASE**

5 5. This is a civil action arising from Form Energy’s wrongful termination of Major
6 Whidden’s civilian employment in retaliation for his lawful exercise of his right to express his
7 political views and his participation in his annual active-duty Army Reservist training at Fort
8 Leavenworth, Kansas.

9 6. In his social media posts, Whidden expressed his personal political views, opinions,
10 and beliefs. Whidden made his posts on his personal time to his personal social media account.
11 His posts were unrelated to Form Energy.

12 7. In retaliation for Whidden’s exercise of his free speech rights, Form Energy took
13 disciplinary action against him, required him to censor his speech, attend individual “reeducation,”
14 and ultimately terminated his employment.

15 8. Further, Form Energy retaliated against Whidden, a member of the United States
16 Army for more than 20 years, in violation of the Uniformed Services Employment and
17 Reemployment Rights Act of 1994 (USERRA) and California law, which protects the civilian
18 employment of active and reserve military personnel who are called to active duty, including
19 required military training.

20 9. Form Energy fired Whidden the day he returned from active-duty training for the
21 U.S. Army Reserves.

22 10. Because Form Energy took action that harmed him, in violation of clearly
23 established law, Whidden is entitled to the relief sought herein, including damages exceeding
24 \$75,000.

25 **PARTIES**

26 11. Plaintiff Whidden is a citizen and resident of the County of Oklahoma in the State
27 of Oklahoma, having recently relocated from California for civilian employment purposes. He was
28 a resident of California during his employment with Defendant Form Energy, Inc.

1 17. After returning from deployment, he also pursued a civilian career in recruiting. He
2 began working as a Recruiting Operations Officer and Assistant Professor of Military Science for
3 universities, including Stanford University and Santa Clara University. Through his leadership in
4 those universities' shared Army ROTC program, he was awarded the Army Commendation Medal
5 in June 2014 for his exceptionally meritorious service, dedication to duty, and work ethic. Through
6 helping ROTC students gain scholarships, he felt a sense of purpose and fulfillment by making a
7 positive impact on the lives of others.

8 18. Whidden then had the opportunity to join Tesla as Veterans Program Senior
9 Recruiter. He was later promoted to Program Manager. While there, he tripled Tesla's veteran
10 hiring metrics and established Tesla as a Military Friendly Employer. After Tesla, he achieved
11 similar positive recruitment results for Palo Alto Networks and Lucid Motors.

12 19. While working full-time in civilian employment, he simultaneously served in the
13 Reserves, including as an Intelligence Section Team Lead and Physical Security Officer in the
14 483rd Transportation Battalion, 420th Military Police Company Commander, and Civil Affairs
15 Officer in the 445th Civil Affairs Battalion. In 2018, he was promoted to the field grade rank of
16 Major. Since then, he has served as an Observer Coach Trainer in the 91st Training Division,
17 where he has been recognized by senior leadership for his outstanding performance and chosen for
18 high-profile training missions as a result.

19 20. By all accounts, Whidden is an exceptional soldier. During his over twenty years
20 in the Army and Army Reserves, he has earned a Combat Action Badge, two Army Commendation
21 Medals, two Army Achievement Medals, an Army Good Conduct Medal, a National Defense
22 Service Medal, an Army Overseas Service Ribbon, an Army Service Ribbon, two Global War on
23 Terrorism Medals, a Military Outstanding Volunteer Service Medal, Army Forces Reserves
24 Medal, and an Army Reserve Component Achievement Medal for exemplary behavior, efficiency,
25 and fidelity. He also volunteers with the Veterans of Foreign Wars, mentors for the military
26 network Veterati, and has even served on the board of his son's little league teams.

27 21. On October 25, 2022, Form Energy extended an offer of full-time civilian
28 employment to Whidden to join the company as Veteran and University Recruiting Manager in its

1 Talent Acquisition Department. Form Energy offered him an annual salary of \$150,000, with the
2 option to purchase 10,800 shares in the company.

3 22. The position required seven or more years of talent acquisition experience
4 combined with at least three years of experience with university recruiting, strong commitment to
5 candidate experience and developing talent, experience with designing and executing creative
6 university and veterans recruiting strategies and programs that scale, and experience acting as a
7 trusted and effective hiring partner. Whidden met and exceeded each of these qualifications.

8 23. Whidden's employment began November 14, 2022, and he reported to Nicole
9 Myers, who at that time was Senior Manager of Talent Acquisition.

10 24. Because Form Energy had seen Whidden's resume and Whidden had been
11 forthcoming in his interview about his Reserves commitments, Form Energy knew about
12 Whidden's membership in the U.S. Army Reserves at the time he was hired. Whidden timely
13 provided his monthly drill schedule, which required him to spend one weekend a month in battle
14 assembly training. He also notified the company of his annual obligation to serve on active duty.

15 25. Assigned to the Berkeley, California office of Form Energy, Whidden generally
16 worked from home and was expected to travel regularly for recruiting events. Travel often came
17 with difficulty because of Whidden's commitment to serve as an Observer Coach Trainer in the
18 Reserves.

19 26. In his role at Form Energy, Whidden recruited veterans, university students, new
20 graduates, and others to positions within the company. He coordinated university and military job
21 fairs, presentations, and networking events. Additionally, he managed year-round internship and
22 skilled trade programs, and he ensured the company's compliance with hiring laws and regulations.

23 27. Within days of starting at Form Energy, Whidden also took over intern hiring and
24 recruiting, established the Talent Acquisition Department's first intern hiring tracker, cleaned up
25 inequities in intern compensation, and launched relationships to recruit more veterans.

26 28. In conjunction with Whidden's recruiting strategies, Form Energy significantly
27 expanded its internship program. For instance, in 2022, Form Energy had 16 interns. In 2023, that
28 number more than doubled to 41.

1 29. Whidden received excellent feedback on his performance. For example, notes from
2 meetings with his manager show Myers telling him, “Amazing job presenting to the Pops team.
3 Thank you!”

4 30. Not long after Whidden started with Form Energy, Myers recommended that he
5 receive 5,040 shares of Form Energy’s common stock “[i]n recognition of [his] contributions to
6 Form Energy.” At that time, she told him, “Thank you for your many contributions; we’re excited
7 for you to continue your amazing work at Form Energy!”

8 31. According to Form Energy’s Amended and Restated 2017 Equity Incentive Plan,
9 employees were granted such stock options to “attract, retain and motivate persons who make (or
10 are expected to make) important contributions.”

11 32. On March 9, 2023, Whidden received notice of the dates of his active-duty training,
12 to take place July 9 through 22, 2023. Once he learned the dates of his two-week training, he told
13 Myers of the upcoming training and forwarded her his orders.

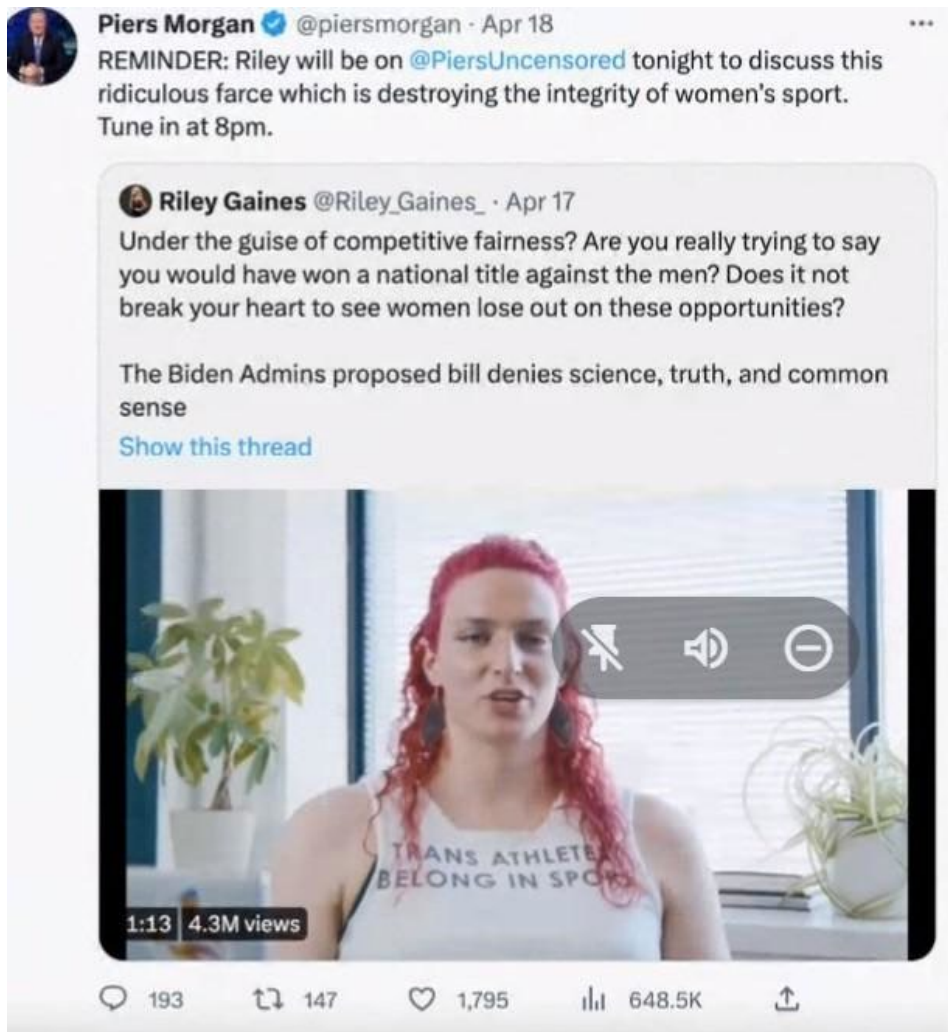
14 33. On May 2, 2023, Maggie Crosby from Form Energy’s Human Resources
15 Department informed Whidden that the company had received a complaint related to his social
16 media. She did not identify who made the complaint but showed him several screenshots of his
17 allegedly concerning posts.

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1 34. One of the posts Crosby identified from Whidden's X account (formerly known as
2 Twitter), was the following:



1 35. Another post Crosby referenced was the following:



36. Whidden’s posts were made on his personal time and on his personal account with fewer than 100 followers. And the posts at issue were not Whidden’s own original posts, but rather “retweets” of posts from others.

37. While claiming to have received a complaint, Form Energy never identified any employee, applicant, or other person associated with Form Energy who made any such complaint or was somehow harmed or even offended by his retweets.

38. At their May 3, 2023 regular meeting, Whidden and Myers discussed their recruiting programs, interns, diversity, and upcoming assignments, such as a May 22 follow-up

1 meeting, June resumes, a June 12–13 virtual conference, and how these events would work with
2 Whidden’s Reserves responsibilities. They did not discuss Whidden’s social media usage.

3 39. Then, on May 4, 2023, Form Energy co-founder, President, and Chief Operating
4 Officer Theodore A. Wiley called Whidden to a meeting. Wiley told Whidden that he was lucky
5 that he was not already fired because of his social media posts and that the purpose of their meeting
6 was to decide whether to continue Whidden’s employment. Wiley said he was toying with the idea
7 of a probationary period for Whidden but was concerned about “tension” from having
8 “conservatives” in the company.

9 40. The next week, Whidden met with Crosby and Myers, who was also promoted to
10 Director, Talent Acquisition that same month. They discussed Myers’ and Crosby’s ideas for a
11 probationary period and plans for improvement for Whidden even though there had been no
12 previous concerns with his work performance.

13 41. On May 10, Whidden received a final warning document for allegedly violating
14 Form Energy policy based on his X posts. Though it was his first such warning, it was called a
15 “Final” warning.

16 42. The warning described the violation as follows:

17 On your public-facing Twitter account
18 (<https://twitter.com/dustinwhidden/>), you shared multiple posts containing
19 content that violates Form Energy’s EEOC policy, code of conduct, and
20 Blogging and Social Networking policy. These posts included (but were not
21 limited to): content that was derisive of non-binary individuals based on
22 their gender identity, perpetuated a negative stereotype of women who are
23 not mothers because of their status as women, and negatively stereotyped
24 members of the LGBTQ community. Exhibit A contains three (3) posts that
25 were publicly available on your Twitter account as of at least May 1, 2023.

26 43. The warning added, “Sharing these posts demonstrates poor judgment, a lack of
27 integrity and violates Form policies and is not aligned with the company’s values.”

28 44. Whidden disagrees with Form Energy’s characterization of the posts.

1 45. The warning also placed Whidden on a “Plan for improvement,” or, in reality, a
2 censorship and “reeducation” plan:

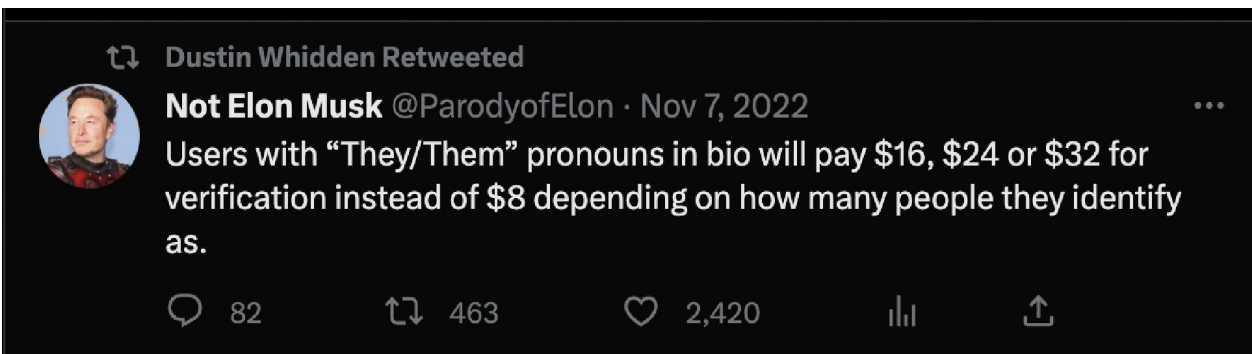
- 3 ● You will be required to make private or remove your Twitter account and make
4 restitution with any individuals impacted by your actions
- 5 ● You will be required to successfully complete mandatory trainings as assigned by
6 your manager
- 7 ● You will be required to work onsite from the Berkeley office no fewer than two
8 days per week
- 9 ● You will be placed on a 90 day probationary period

10 46. Form Energy never identified any individual “impacted by” Whidden’s posts or
11 explained how he could “make restitution.”

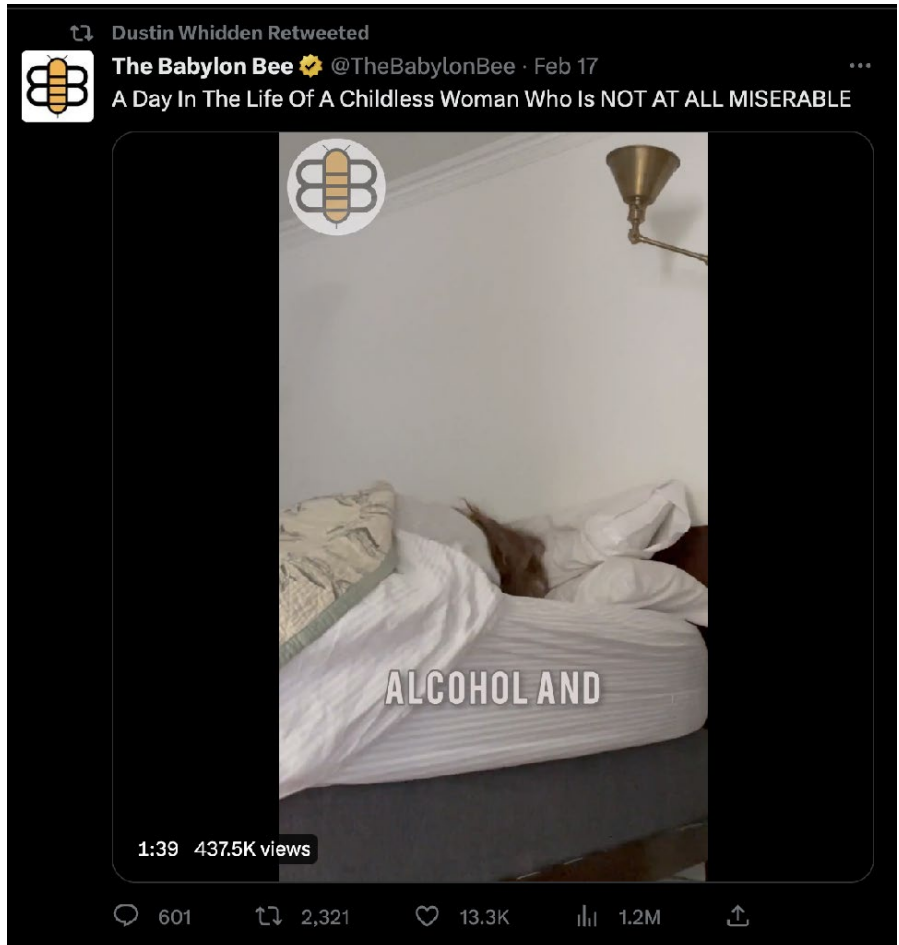
12 47. The warning was signed by Myers on May 9 and by Whidden and Wiley on May
13 10, 2023.

14 48. The warning attached the following three posts, all three of which were “retweets”
15 on the X platform.

16 49. First, Whidden retweeted a November 7, 2022 post from an account parodying Elon
17 Musk, who had recently purchased Twitter, which read:



1 50. Second, Whidden retweeted a February 17, 2023 post from *The Babylon Bee*, a
2 political satire website with the logo “Fake news you can trust.”¹ That post read:



27 ¹ @TheBabylonBee, X [formerly Twitter], <https://x.com/TheBabylonBee> (last visited Oct. 29,
28 2024).

1 51. Third, Whidden retweeted an April 19, 2023 post from an account called End
2 Wokeness that read:



22 52. Through these posts, Whidden exercised his First Amendment right to free speech
23 related to hot-button political issues.

24 53. Nevertheless, in an effort to keep his employment, Whidden complied with the
25 requirements of the plan for improvement. He made his X account private (going so far as to make
26 the name of the account anonymous) and deleted all posts, likes, reposts, comments, etc., made
27 under the name @DustinWhidden, including those posts to which Form Energy objected, thus
28

1 suppressing the expression of political views to keep his job. He also started going into the office
2 despite a long commute.

3 54. Whidden also attended two one-on-one sessions with an Equal Opportunity
4 Consultant hired by Form Energy, who took notes on Whidden's reactions. Whidden felt that these
5 trainings, which lasted between an hour and an hour and a half, were intended to change and
6 "reeducate" his political beliefs.

7 55. During this time, Form Energy gave Whidden menial tasks that were not in his job
8 description and were meant to set him up to fail. In addition to his normal job duties, and for the
9 first time, he was asked to achieve certain sourcing targets, which was a duty below the level of
10 his position. And, despite having regular meetings with other recruiters in the company since he
11 started, all of a sudden they stopped returning his calls and showing up to their pre-planned times
12 to talk with him about whether they were meeting their objectives.

13 56. Between June 24 and July 8, 2023, Whidden took vacation time to spend with two
14 of his minor children who live out of state. This vacation had been preapproved long before his
15 May Final Warning.

16 57. The next day, on July 9, 2023, Whidden reported to Fort Leavenworth for his
17 active-duty military professional training, as previously ordered, designed to qualify him for
18 promotion to Lieutenant Colonel. His training was ordered for 14 days plus allowable travel time.

19 58. Whidden's active-duty training fell during a busy time in Form Energy's Talent
20 Acquisition Department. Whidden managed the summer internship program and was responsible
21 for university and veteran recruiting events across the country. Because of these obligations,
22 working remotely, Whidden completed his work for Form Energy at night while also completing
23 his required military training at Fort Leavenworth during the day—an exhausting personal
24 sacrifice.

25 59. But his sacrifice was not enough for Form Energy. Instead of honoring its plan for
26 "improvement," Form Energy fired Whidden the day after his active-duty training ended.

27 60. On July 24, 2023, on his first day back in the office, Whidden was required to attend
28 a surprise meeting with Myers and Crosby, who notified him that his employment was being

1 terminated that day. Though Whidden was never told he was not meeting objectives before this
2 meeting, they explained that Whidden had failed to meet objectives and had not reached the
3 sourcing targets he had newly been assigned that summer. They also mentioned that he had
4 inappropriately used humor in his out-of-office message while at Fort Leavenworth.

5 61. These reasons were a pretext for firing Whidden for his protected activity. During
6 this termination meeting, when Whidden asked why he was really being fired, the individual
7 defendants responded that his posts and Reserve duties had gotten the ball rolling on his
8 termination.

9 62. Wiley, as COO, and Myers, as Director, Talent Acquisition, both had the authority
10 to terminate Whidden and exercised that authority on behalf of Form Energy.

11 63. Form Energy presented him with a Separation and Release Agreement. Whidden
12 never signed the agreement.

13 64. On September 15, 2023, Whidden was able to exercise only 100 vested shares of
14 his 5,040 stock options in Form Energy, losing the remaining 4,940 shares because of his unlawful
15 termination.

16 65. Form Energy's and the individual defendants' actions were calculated, malicious,
17 and knowingly in violation of California law that protects employees such as Whidden from
18 discrimination because of the employee's political views.

19 66. The Defendants' actions were likewise calculated, malicious, and knowingly in
20 violation of federal and state laws that protect the civilian employment of members of the United
21 States military.

22 67. As a result of Form Energy's actions, Whidden spent months seeking comparable
23 employment before finally finding a job that required him to move his family to Oklahoma at
24 considerable expense.

1 **FIRST CLAIM FOR RELIEF:**
2 **UNIFORMED SERVICES EMPLOYMENT**
3 **AND REEMPLOYMENT RIGHTS ACT OF 1994 (USERRA)**

4 **38 U.S.C. §§ 4301–4335**

5 68. Whidden re-alleges and incorporates by reference all prior paragraphs of this
6 Complaint as though fully set forth herein.

7 69. Congress enacted the Uniformed Services Employment and Reemployment Rights
8 Act (USERRA) in 1994 “to encourage noncareer service in the uniformed services by eliminating
9 or minimizing the disadvantages to civilian careers and employment which can result from such
10 service” and “prohibit discrimination against persons because of their service in the uniformed
11 services.” 38 U.S.C. § 4301(a)(1)). Through USERRA, Congress endeavored to “clarify, simplify,
12 and, where necessary, strengthen the existing veterans’ employment and reemployment rights
13 provisions.” *Leisek v. Brightwood Corp.*, 278 F.3d 895, 898 (9th Cir. 2002) (citation omitted).

14 70. USERRA defines “service in the uniformed services” as “the performance of duty
15 on a voluntary or involuntary basis in a uniformed service under competent authority.” 38 U.S.C.
16 § 4303(13). It includes, in relevant part, “active duty, active duty for training, initial active duty
17 for training, inactive duty training, full-time National Guard duty, ... [or] a period for which a
18 person is absent from a position of employment for the purpose of an examination to determine
19 the fitness of the person to perform any such duty.” *Id.*

20 71. Private employers violate USERRA by taking “any adverse employment action
21 against any person because such person ... has exercised a right provided for in this chapter.” 38
22 U.S.C. § 4311(b). This includes when a person’s “membership, application for membership,
23 service, application for service, or obligation for service in the uniformed services is a motivating
24 factor in the employer’s action, unless the employer can prove that the action would have been
25 taken in the absence of such membership, application for membership, service, application for
26 service, or obligation for service.” *Id.* § 4311(c)(1).

27 72. By adopting this “motivating factor” formulation, Congress amended USERRA’s
28 antecedent to replace the “sole cause” standard. *Leisek*, 278 F.3d at 898 (citation omitted). As a

1 result, “[m]ilitary status need not be the sole cause of an adverse action; rather, it only must be one
2 of the factors that a truthful employer would list if asked for the reasons for its decision.” *Burgener*
3 *v. Union Pac. Corp.*, No. C 07-5160 JF (HRL), 2009 WL 1082356, at *6 (N.D. Cal. Apr. 22, 2009)
4 (Fogel, J.) (citations and quotation marks omitted).

5 73. An employer’s discriminatory motive may be shown by direct evidence, or it may
6 be inferred from “circumstantial evidence, including proximity in time between the employee’s
7 military activity and the adverse employment action” *Id.* at *7 (citation and quotation marks
8 omitted). Discriminatory motive also may be inferred from “inconsistencies between the proffered
9 reason and other actions of the employer,” or “an employer’s expressed hostility towards members
10 protected by the statute together with knowledge of the employee’s military activity, and disparate
11 treatment of certain employees compared to other employees with similar work records or
12 offenses.” *Id.* (citation and quotation marks omitted).

13 74. Individuals asserting USERRA claims have the option to privately file court
14 actions. 38 U.S.C. § 4323(a)(3); 20 C.F.R. §§ 1002.303–304. They may do so even if they have
15 not filed a complaint with the U.S. Department of Labor, requested that the Department of Labor
16 refer their complaint to the U.S. Attorney General, or been refused representation by the Attorney
17 General. *Id.*

18 75. USERRA imposes individual liability against those “to whom the employer has
19 delegated the performance of employment-related responsibilities.” 38 U.S.C. § 4303(4)(A)(i); *see*
20 20 C.F.R. § 1002.5(d)(1)(i). These responsibilities include hiring, firing, and otherwise affecting
21 the benefits of employment. *See, e.g., Rimando v. Alum Rock Union Elementary Sch. Dist.*, No. C
22 08-1874 JF (RS), 2008 WL 4414717, at *3 (N.D. Cal. Sept. 26, 2008), *aff’d*, 356 F. App’x 989
23 (9th Cir. 2009); *Robnett v. County of Fresno*, No. CV F 12-1924 LJO GSA, 2013 WL 1087854, at
24 *5 (E.D. Cal. Mar. 14, 2013); *Schuyler v. Nek Advanced Sec. Grp. Inc.*, No. 10CV1527 JLS (JMA),
25 2012 WL 12846091, at *9–10 (S.D. Cal. May 29, 2012); *Marion v. County of Los Angeles*, No.
26 CV 09-04361 MMM (RZx), 2009 WL 10670589, at *7–9 (C.D. Cal. Oct. 8, 2009) (because
27 USERRA definition of employer is “quite different and much broader” than under several civil
28 rights acts, individual “supervisor[s] who control employment opportunities” may fall within

1 USERRA’s definition of employer); *see also Mace v. Willis*, 259 F. Supp. 3d 1007, 1022–23
2 (D.S.D. 2017) (concluding that under USERRA, the meaning of employer is like that under the
3 Fair Labor Standards Act, which includes supervisors and corporate officers), *aff’d*, 897 F.3d 926
4 (8th Cir. 2018).

5 76. USERRA allows for attorney’s fees and costs for anyone “claiming rights under
6 this chapter.” 38 U.S.C. § 4323(h).

7 77. After serving four years in the U.S. Army, Whidden has been a member of the
8 United States Army Reserves for over sixteen years. Form Energy knew of his military obligations
9 when hiring him.

10 78. Whidden was ordered to report for active-duty training at Fort Leavenworth for
11 fourteen days plus travel time to begin July 9, 2023.

12 79. Whidden notified Form Energy orally and in writing that he was ordered to active
13 duty and the dates he would be away from work.

14 80. Even when away on active-duty training, Whidden continued to actively perform
15 his work for Form Energy.

16 81. Whidden’s military service was a motivating factor in Form Energy’s decision to
17 terminate his employment.

18 82. Defendants Theodore A. Wiley and Nicole Myers are similarly liable under
19 USERRA because they were personally responsible for Whidden’s termination.

20 83. As co-founder, president, and Chief Operating Officer, Wiley told Whidden that he
21 would be deciding whether to maintain Whidden’s employment.

22 84. Director Myers determined Whidden’s eligibility to receive stock options, reviewed
23 his performance, conducted the termination meeting, and arranged his plan for improvement.

24 85. Wiley and Myers thereafter prepared to terminate Whidden based upon an alleged
25 failure to meet objectives as a pretext for firing him for other, improper reasons, including his
26 military service.

1 86. In short, Wiley and Myers had control over firing Whidden and authority over his
2 employment opportunities, which they exercised by altering the terms and conditions of his
3 employment.

4 87. Defendants knew that, or showed reckless disregard as to whether, their actions
5 were in violation of USERRA, thus constituting a willful violation of the statute. 20 C.F.R.
6 § 1002.312(c).

7 88. Because of Defendants' violation of USERRA, Whidden is entitled to an award of
8 all lost wages and benefits, an equal amount as liquidated damages, attorney's fees and costs.

9 **SECOND CLAIM FOR RELIEF:**

10 **California Military and Veterans Code § 394**

11 89. Whidden re-alleges and incorporates by reference all prior paragraphs of this
12 Complaint as though fully set forth herein.

13 90. California Military and Veterans Code § 394(d) states: "An employer or officer or
14 agent of a corporation, company, or firm, or other person, shall not discharge a person from
15 employment because of the performance of any ordered military duty or training or by reason of
16 being a member of the military" *See also Bursese v. Paypal, Inc.*, No. C-06-00636RMW, 2007
17 WL 485984, at *6 (N.D. Cal. Feb. 12, 2007) ("same analysis" in USERRA "applies to plaintiff's
18 claim under California Military and Veterans Code section 394").

19 91. As detailed above, all Defendants violated this provision by discharging Whidden
20 from employment, at least in part, because of Whidden's performance of an ordered military duty
21 or training.

22 92. Because of Defendants' violation of California Military and Veterans Code § 394,
23 Whidden is entitled to collect all actual damages plus his reasonable costs and attorneys' fees.

24 **THIRD CLAIM FOR RELIEF:**

25 **MILITARY STATUS DISCRIMINATION**

26 **California Government Code § 12940**

27 93. Whidden re-alleges and incorporates by reference all prior paragraphs of this
28 Complaint as though fully set forth herein.

1 94. Section 12940 of the California Government Code provides:

2 It is an unlawful employment practice . . .

3 (a) For an employer, because of the race, religious creed, color,
4 national origin, ancestry, physical disability, mental disability,
5 reproductive health decisionmaking, medical condition, genetic
6 information, marital status, sex, gender, gender identity, gender
7 expression, age, sexual orientation, or veteran or military status of
8 any person, to refuse to hire or employ the person or to refuse to
9 select the person for a training program leading to employment, or to
10 bar or to discharge the person from employment or from a training
11 program leading to employment, or to discriminate against the person
12 in compensation or in terms, conditions, or privileges of
13 employment.

14 95. Form Energy treated Whidden differently than his similarly situated co-workers
15 who are not military service members.

16 96. Form Energy terminated Whidden because of his military status and the
17 requirement he participate in Reservist training in July 2023.

18 97. Whidden has suffered compensatory damages and emotional distress as a result of
19 Form Energy's actions.

20 98. Form Energy's actions complained of herein were done with the knowledge,
21 approval and even at the direction of individuals who served as officers, directors, or managing
22 agents of Defendant Form Energy. Cal. Civ. Code § 3294.

23 99. Form Energy's harassment and termination of Whidden were
24 (1) intended to cause injury to Whidden; (2) amounted to despicable conduct undertaken with
25 willful and conscious disregard of Whidden's rights under California law; and (3) amounted to
26 despicable conduct that subjected Whidden to cruel and unjust hardship in conscious disregard of
27 his rights, thus supporting punitive damages.

**FOURTH CLAIM FOR RELIEF:
WRONGFUL DISCHARGE**

California Labor Code § 1101 *et seq.*

100. Whidden re-alleges and incorporates by reference all prior paragraphs of this Complaint as though fully set forth herein.

101. Section 1101 of the California Labor Code provides:

No employer shall make, adopt, or enforce any rule, regulation, or policy:

(a) Forbidding or preventing employees from engaging or participating in politics ...

(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees.

102. In violation of Section 1101(a) of the California Labor Code, Form Energy terminated Whidden's employment based on his social media posts engaging in political discussion, thereby unlawfully forbidding or preventing him from engaging or participating in political matters.

103. In violation of Section 1101(b) of the California Labor Code, Form Energy terminated Whidden's employment based on his social media posts engaging in political discussion, thereby unlawfully controlling, directing, or tending to control or direct his political activities or affiliations.

104. Section 1102 of the California Labor Code provides:

No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity.

105. In violation of Section 1102, Form Energy coerced, influenced, and/or attempted to coerce and influence Whidden because of his social media posts engaging in political discussion by means of a threat of discharge or loss of employment to adopt, follow, or refrain from adopting

1 or following any particular course or line of political action or political activity. Form Energy
2 actually carried out that threat of discharge or loss of employment.

3 106. Form Energy's disciplinary action and termination of Whidden's employment was
4 substantially motivated by Form Energy's disagreement with the political beliefs and views that
5 Whidden shared on social media, and were efforts to censor or improperly coerce him to refrain
6 from sharing those political beliefs and views, actions which caused Whidden harm.

7 107. Form Energy's attempt to curtail Whidden's political activities outside of the
8 workplace and control his political expression through its Plan of Improvement, standing alone,
9 violates Sections 1101 and 1102. *See Smedley v. Capps, Staples, Ward, Hastings & Dodson*, 820
10 F. Supp. 1227, 1230 (N.D. Cal. 1993) ("Similarly, if plaintiff had been instructed to curtail her
11 gay-oriented political activities outside the office, this would constitute a violation of § 1101.");
12 *Ross v. Indep. Living Res. of Contra Costa Cnty.*, No. C08-00854 TEH, 2010 WL 1266497, at *6
13 (N.D. Cal. Apr. 1, 2010) ("The allegation that Ross was terminated as a result of his political
14 activity is sufficient to plausibly suggest the existence of such a policy.").

15 108. The termination of Whidden's employment served as an implicit warning and
16 message to Form Energy's other employees that the expression of views departing from Form
17 Energy's own perspectives would not be tolerated. *See Napear v. Bonneville Int'l Corp.*, No. 2:21-
18 CV-01956-DAD-DB, 2023 WL 4747623, at *10 (E.D. Cal. July 25, 2023) (holding such implicit
19 messages constituted an employer policy under Sections 1101 and 1102).

20 109. Form Energy's actions were done with the knowledge, approval, and direction of
21 individuals who served as its officers, directors, or managing agents. *See Cal. Civ. Code* § 3294.

22 110. Section 1105 of the California Labor Code provides:

23 Nothing in this chapter shall prevent the injured employee from recovering
24 damages from his employer for injury suffered through a violation of this
25 chapter.

26 111. These Sections provide employees with a private right of action against employers.
27 *See Cal. Lab. Code* § 1105 (providing for the availability of monetary damages); *Gay L. Students*
28 *Ass'n v. Pac. Tel. & Tel. Co.*, 595 P.2d 592, 611 (Cal. 1979) ("Thus, since the allegations of the

1 complaint do allege that PT&T has engaged in conduct which violates these statutory provisions,
2 the complaint also states a cause of action against PT&T on this ground.”); *Ross*, 2010 WL
3 1266497, at *5 (“It is not necessary for [Whidden] to plead the elements of breach of contract in
4 order to bring a section 1101 claim.”).

5 112. Form Energy’s actions damaged Whidden in the loss of his employment, loss of
6 stock, loss of employee benefits, and other financial losses.

7 113. Whidden has suffered emotional distress because of Form Energy’s actions.

8 114. Form Energy’s disciplinary action and termination of Whidden were (1) intended
9 to cause injury to Whidden; (2) amounted to despicable conduct undertaken with willful and
10 conscious disregard of Whidden’s rights under California law: and (3) amounted to despicable
11 conduct that subjected Whidden to cruel and unjust hardship in conscious disregard of his rights,
12 thus supporting punitive damages.

13 **FIFTH CLAIM FOR RELIEF:**

14 **WRONGFUL DISCHARGE**

15 **California Labor Code § 98.6**

16 115. Whidden re-alleges and incorporates by reference all prior paragraphs of this
17 Complaint as though fully set forth herein.

18 116. Section 98.6 of the California Labor Code provides in pertinent part:

19 (a) A person shall not discharge an employee or in any manner
20 discriminate, retaliate, or take any adverse action against any employee
21 or applicant for employment because the employee or applicant engaged
22 in any conduct delineated in this chapter, including the conduct described
23 in subdivision (k) of Section 96, and Chapter 5 (commencing with
24 Section 1101) of Part 3 of Division 2, ... or because of the exercise by
25 the employee or applicant for employment on behalf of themselves or
26 others of any rights afforded them.

27 (b)(1) Any employee who is discharged, threatened with discharge,
28 demoted, suspended, retaliated against, subjected to an adverse action, or

1 in any other manner discriminated against in the terms and conditions of
2 their employment because the employee engaged in any conduct
3 delineated in this chapter, including the conduct described in subdivision
4 (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part
5 3 of Division 2, ... shall be entitled to reinstatement and reimbursement
6 for lost wages and work benefits caused by those acts of the employer. If
7 an employer engages in any action prohibited by this section within 90
8 days of the protected activity specified in this section, there shall be a
9 rebuttable presumption in favor of the employee's claim.

10 117. In violation of Section 1101(a) of the California Labor Code, Form Energy
11 disciplined and terminated Whidden based on his social media posts engaging in political
12 discussion, thereby unlawfully forbidding or preventing Whidden from engaging or participating
13 in politics.

14 118. In violation of Section 1101(b) of the California Labor Code, Form Energy
15 disciplined and terminated Whidden based on his social media posts engaging in political
16 discussion, thereby unlawfully controlling, directing, or tending to control or direct Whidden's
17 political activities or affiliations.

18 119. In violation of Section 1102 of the California Labor Code, Form Energy coerced,
19 influenced, and/or attempted to coerce and influence Whidden because of his social media posts
20 engaging in political discussion by means of a threat of discharge or loss of employment. Form
21 Energy's threats and harassment were undertaken in an effort to force Whidden to adopt or follow
22 or refrain from adopting or following any particular course or line of political action or political
23 activity. Form Energy actually carried out that threat of discharge or loss of employment.

24 120. Form Energy's discipline and termination of Whidden was done with the
25 knowledge, approval, and direction of individuals who served as officers, directors, or managing
26 agents. Cal. Civ. Code § 3294.

1 Dated: October 29, 2024

2 Respectfully submitted,

3 /s/ Donald M. Falk

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24 *Pro hac vice application forthcoming

25 *Counsel for Plaintiff*

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial in this case.

Dated: October 29, 2024

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**Pro hac vice* application
forthcoming

Counsel for Plaintiff Dustin Whidden

CIVIL COVER SHEET

The JS-CAND 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DUSTIN WHIDDEN

(b) County of Residence of First Listed Plaintiff Oklahoma County, Oklahoma (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

SCHAERR | JAFFE LLP, Four Embarcadero Center, Suite 1400, San Francisco, CA 94111, (415) 562-4942

DEFENDANTS

FORM ENERGY, INC.; THEODORE A. WILEY; NICOLE MYERS

County of Residence of First Listed Defendant (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Large table with categories: CONTRACT, REAL PROPERTY, TORTS, CIVIL RIGHTS, PRISONER PETITIONS, HABEAS CORPUS, OTHER, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation-Transfer
8 Multidistrict Litigation-Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 38 U.S.C. §§ 4301-4335

Brief description of cause:

Violation of Uniformed Servs. Employment & Reemployment Rts. Act (USERRA), 38 U.S.C. §§4301-4335; Cal. Mil. & Veterans Code §394; Cal. Gov't Code §12940; Cal. Labor Code §§1101 et seq. & 98.6

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, Fed. R. Civ. P. DEMAND \$

CHECK YES only if demanded in complaint: JURY DEMAND: Yes No

VIII. RELATED CASE(S), IF ANY (See instructions):

JUDGE

DOCKET NUMBER

IX. DIVISIONAL ASSIGNMENT (Civil Local Rule 3-2)

(Place an "X" in One Box Only) SAN FRANCISCO/OAKLAND SAN JOSE EUREKA-MCKINLEYVILLE

DATE 10/29/2024

SIGNATURE OF ATTORNEY OF RECORD

/s/ Donald M. Falk

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS-CAND 44

Authority For Civil Cover Sheet. The JS-CAND 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved in its original form by the Judicial Conference of the United States in September 1974, is required for the Clerk of Court to initiate the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

- I. a) Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.
- b) County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the “defendant” is the location of the tract of land involved.)
- c) Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section “(see attachment).”
- II. Jurisdiction.** The basis of jurisdiction is set forth under Federal Rule of Civil Procedure 8(a), which requires that jurisdictions be shown in pleadings. Place an “X” in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
- (1) United States plaintiff. Jurisdiction based on 28 USC §§ 1345 and 1348. Suits by agencies and officers of the United States are included here.
 - (2) United States defendant. When the plaintiff is suing the United States, its officers or agencies, place an “X” in this box.
 - (3) Federal question. This refers to suits under 28 USC § 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
 - (4) Diversity of citizenship. This refers to suits under 28 USC § 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; **NOTE: federal question actions take precedence over diversity cases.**)
- III. Residence (citizenship) of Principal Parties.** This section of the JS-CAND 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.
- IV. Nature of Suit.** Place an “X” in the appropriate box. If the nature of suit cannot be determined, be sure the cause of action, in Section VI below, is sufficient to enable the deputy clerk or the statistical clerk(s) in the Administrative Office to determine the nature of suit. If the cause fits more than one nature of suit, select the most definitive.
- V. Origin.** Place an “X” in one of the six boxes.
- (1) Original Proceedings. Cases originating in the United States district courts.
 - (2) Removed from State Court. Proceedings initiated in state courts may be removed to the district courts under Title 28 USC § 1441. When the petition for removal is granted, check this box.
 - (3) Remanded from Appellate Court. Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
 - (4) Reinstated or Reopened. Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
 - (5) Transferred from Another District. For cases transferred under Title 28 USC § 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
 - (6) Multidistrict Litigation Transfer. Check this box when a multidistrict case is transferred into the district under authority of Title 28 USC § 1407. When this box is checked, do not check (5) above.
 - (8) Multidistrict Litigation Direct File. Check this box when a multidistrict litigation case is filed in the same district as the Master MDL docket. Please note that there is no Origin Code 7. Origin Code 7 was used for historical records and is no longer relevant due to changes in statute.
- VI. Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC § 553. Brief Description: Unauthorized reception of cable service.
- VII. Requested in Complaint.** Class Action. Place an “X” in this box if you are filing a class action under Federal Rule of Civil Procedure 23. Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction. Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.
- VIII. Related Cases.** This section of the JS-CAND 44 is used to identify related pending cases, if any. If there are related pending cases, insert the docket numbers and the corresponding judge names for such cases.
- IX. Divisional Assignment.** If the Nature of Suit is under Property Rights or Prisoner Petitions or the matter is a Securities Class Action, leave this section blank. For all other cases, identify the divisional venue according to Civil Local Rule 3-2: “the county in which a substantial part of the events or omissions which give rise to the claim occurred or in which a substantial part of the property that is the subject of the action is situated.”
- Date and Attorney Signature.** Date and sign the civil cover sheet.