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U.S. DISTRICT COURT
N.D. OF ALABAMA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

MARION WATERS,	)	
	)	
Plaintiff,	)	
	)	**CIVIL ACTION NO.**
v.	)	**2:07-CV-00394-LSC**
	)	
COOK'S PEST CONTROL, INC.,	)	
	)	
Defendant.		

DEFENDANT COOK'S PEST CONTROL, INC.'S BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

COMES NOW the defendant in the above-styled action, Cook's Pest Control, Inc. ("defendant" or "Cook's"), and submits this brief in support of its Motion for Summary Judgment on all claims asserted by plaintiff Marion Waters ("Waters").

I. INTRODUCTION

The United States Supreme Court, the Eleventh Circuit and the federal courts of Alabama have all emphatically held that a plaintiff cannot bring a class action alleging discrimination under Title VII, unless and until that named Plaintiff has first established a prima facie case of discrimination ***on his own behalf***. In this case, the named plaintiff, Marion Waters, has alleged claims of disparate treatment race discrimination, pattern-and-practice discriminatory treatment and

disparate impact discrimination, and seeks to represent a broad putative class that would include past, present and future applicants for employment with Defendant. Waters has failed, however, to establish the single most fundamental prerequisite of this case -- ***his own case of discrimination against Defendant***. Waters has not established a *prima facie* case of race discrimination under Title VII under any of his theories, and thus, he has no standing to bring this case, either for himself or on behalf of a class. He has produced no evidence in support of any of his theories.

As a threshold matter, any plaintiff who asserts a Title VII failure-to-hire claim must establish two elementary facts: that he applied for an available job and was rejected as an applicant for that job. Waters has failed to cross this threshold. The undisputed facts clearly establish that Waters applied for employment with Defendant's Birmingham North office and that no available job existed at the time he applied. These facts also establish that Waters never applied for employment with any of Defendant's other offices, even when employees for Defendant advised him that a position might be available at Defendant's commercial office only one mile away from the North District office.

An employer does not commit a discriminatory act by failing to hire an applicant where no job is available or when an individual has not even applied for a job. Thus, as a matter of law, Waters has not established a *prima facie* case, and therefore, he is unable to prevail on his claims either as an individual or as a class

representative. Therefore, Defendant's motion for summary judgment is due to be granted.

II. STATEMENT OF THE FACTS

A. Cook's Pest Control Hiring Policies

1. Cook's provides professional pest control services to homes and businesses in more than 22 cities in Alabama, Georgia, and Tennessee. (Affidavit of Sherrill Hodges, Exhibit A, ¶ 3.)

2. Cook's operates its business through district offices. (Hodges aff., ¶ 3.)

3. Cook's hiring for district offices is performed at the local district office. (Hodges aff., ¶ 4; Affidavit of Robbie Cole, Ex. C, ¶ 4.)

4. Applicants must submit applications at each district office they seek to be considered for employment. (Hodges aff., ¶ 4; Cole aff., ¶ 4.)

5. Applicants may submit a preliminary application on-line through Cook's website or other internet services, but all applicants are required to complete an application at the site where he or she wants to work. (Hodges aff., ¶ 4.)

6. The pre-application on Cook's web site states: "I further understand that this is only a preliminary application and that I am still required to fill out a

detailed written employment application at one of Cook's locations prior to employment." (Hodges aff., ¶ 4 & Att. A.)

7. Cook's application states, "Your application will not be considered unless a specific job is included in the space designated 'Position Applied For.'" (Hodges aff., ¶ 5 & Att. B.)

8. Cook's hires its managerial and supervisory personnel from within the company. (Hodges aff., ¶ 6.)

9. Prior to employment, all applicants are subject to a criminal background report, a driving record report, and a drug screen. (Hodges aff., ¶ 5.)

B. Plaintiff's Application at the Birmingham North District Office

10. Plaintiff Marion Waters decided to apply for employment with Defendant because "a friend had told me that Cook's was hiring and that it was a great opportunity." (Plaintiffs Responses to Defendant's First Interrogatories, Response, Exhibit D, Response to Interrogatory # 18.)

11. On July 11, 2006, Waters visited Cook's Birmingham North District office and completed an application. (Hodges aff., ¶¶ 7-8; Affidavit of Rob Gerchow, Exhibit B, ¶¶ 6-7.)

12. At the time Plaintiff completed an application at the Birmingham North District office, he lived in Elmore County. (Gerchow aff, ¶ 6-7 & Atts. C & D.)

13. The application Mr. Waters completed did not ask him to list his race. (Gerchow aff., ¶ 7 & Att. D.)

14. Mr. Waters submitted a resume to Cook's which stated that his objective was "[t]o obtain an exciting and challenging position in sales/marketing, leveraging any teamwork, leadership, and communication skills." (Hodges aff., ¶ 7 & Att. C; Gerchow aff., ¶ 6 & Att. C.)

15. Although Plaintiff did not list on his application a specific position to which he was applying, as required, he informed Cook's that he was interested in a sales position. (Hodges aff., ¶ 8; Gerchow aff, ¶ 7.)

16. District Manager Sherrill Hodges noticed that Mr. Waters was dressed well and made a good appearance, and thus directed Sales Manager Rob Gerchow to interview Plaintiff even though the office had no opening. (Hodges aff., ¶ 9; Gerchow aff, ¶ 8.)

17. At the time Plaintiff applied with the Birmingham North District office, all seven approved sales positions were filled. (Hodges aff., ¶ 9; Gerchow aff, ¶ 8.)

18. The Birmingham North District office allows individuals to complete applications and submit them at the office even when the office has no available positions for hire. (Hodges aff., ¶ 9; Gerchow aff, ¶ 8.)

19. All applicants for sales positions take a math test when they submit their application. (Hodges aff., ¶ 10.)

20. Although he was not evaluated for a particular position at the Birmingham North District office because no such position was available, Waters performed very well on his test, answering nine out of 10 questions correctly. (Hodges aff., ¶ 10.)

21. Plaintiff's performance on the test would not have excluded him from any employment position and would not have negatively affected his application for any available position. (Hodges aff., ¶ 10.)

22. Most individuals submitting applications are not interviewed on their first visit, but instead, are called back for an interview if there is an opening and the company is interested in the applicant. (Hodges aff., ¶ 8; Gerchow aff, ¶ 8.)

C. Cook's Birmingham Commercial Office

23. Because the Birmingham North District office did not have an opening in sales, Mr. Gerchow suggested that Plaintiff apply with Cook's commercial office, which is about one mile from the Birmingham North District office. (Gerchow aff., ¶ 9; Affidavit of Robbie Cole, Exhibit C, ¶ 5.)

24. Mr. Gerchow called Robbie Cole with the commercial office, to alert him to the fact that Mr. Waters might be stopping by the office to apply for a position. (Gerchow aff., ¶ 9; Cole aff., ¶ 5.)

25. Waters neither visited the commercial office nor submitted an application with that office. (Cole aff., ¶ 5.)

26. At the time of Plaintiff's visit to the Birmingham North District office, the commercial office had a sales opening, for which Plaintiff would have been eligible. (Cole aff., ¶ 6.)

D. Plaintiff's Race Discrimination Allegations

27. Marion Waters filed the Original Complaint on February 28, 2007 (Doc. 1), and a First Amended Complaint on July 7, 2007 (Doc. 2), alleging claims under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000, et seq. ("Title VII") and 42 U.S.C. §1981, as amended by the Civil Rights Act of 1991 ("§1981"); on behalf of himself and a class of plaintiffs including "all African-American applicants for employment for jobs, or who may become applicants for jobs, or who were discouraged from applying for jobs, for the period **two** years [sic] preceding the date of the filing of this complaint to the date of class certification." (Amended Complaint, Doc. 3, ¶14).

28. Waters alleged that Defendant denied employment to Waters and the class members due to "disparate treatment and/or applications of facially neutral selection criteria which have an impermissible and unjustified impact upon African-Americans" (Doc. 3, ¶ 18.) and that Defendant "maintained a pattern and practice of discrimination in employment on the basis of race " (Id., § 21.)

29. The only factual basis that Plaintiff has set forth to support his Title VII claims are as follows:

> Around June or July 2006, I filled out job applications and took employment tests at Cook's office on Lakeshore Parkway. I applied for any position at any Cook's location. Cook's never offered me employment despite the fact that I believe I was qualified for multiple positions and feel that I did well on the test. I know of no legitimate reason I was passed over for employment. It is my impression based on my experience applying at Cook's and the employment screening procedures that I was categorized as a black applicant and unfairly and illegally discriminated against in Cook's decision not to hire me. I do not recall the names of any Cook's employees I had contact with. Nor do I know what positions any of those persons held with Cook's. Cook's should know who handled their job application procedures and what positions those persons hold. *See also* factual allegations in the First Amended Complaint.

(Plaintiff's Responses to Defendant's First Interrogatories and Requests for Production to Plaintiff Marion Waters ("Waters Discovery Responses", Exhibit D, Paragraph 20.)

30. Plaintiff knows of no individuals who he contends have been discriminated against by Cook's on the basis of race and knows of no other members of the class of individuals he purports to represent in this action. ("Waters Discovery Responses", Ex. D, ¶¶ 15 & 16.)

31. Plaintiff has offered no further facts in support of his allegations of pattern and practice race discrimination and disparate impact. (Waters Discovery Responses, Ex. D, ¶¶ 21-22.)

IV. ARGUMENT

"The legitimacy of a private Title VII suit brought on behalf of a class depends upon the satisfaction of two distinct prerequisites." *Griffin v. Duggar*, 823 F. 2d 1476, 1482 (11th Cir. 1987). "First, there must be an individual plaintiff with a cognizable claim, that is, an individual who has constitutional standing to raise the claim (or claims) and who has satisfied the procedural requirements of Title VII." *Id.* "Second, the requirements of Rule 23 must be fulfilled." *Id.* In this case, the first prerequisite cannot be met, and the second is thus mooted.

The fact that a claim is brought in the context of a class action does not in any way diminish the rigor of this threshold standing inquiry by purporting to bring a class action. "Standing cannot be acquired through the back door of a class action." *Allee v. Medrano*, 416 U.S. 802, 829 (1974) (Burger, C.J., concurring in part and dissenting in part). "Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing even if the persons described in the class definition would have standing themselves to sue." *Griffin*, 823 F. 2d at 1483, quoting *Brown v. Sibley*, 650 F. 2d 760, 771 (5th Cir. Unit A 1981); *see also Dallas Gay Alliance, Inc. v. Dallas County Hosp. Dist.*, 719 F. Supp. 1380 (N.D. Tex. 1989) (holding plaintiff lacked standing to assert class claims for declaratory

and injunctive relief forbidding defendant from depriving eligible persons of AIDS remedies when the individual representative lacked standing to bring such claims).

Accordingly, well before the certification of a class, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim. *Griffin,* 823 F. 2d 1482 (11th Cir. 1987) ("[A]ny analysis of class certification must begin with the issue of standing"); *see also Brown v. Sibley*, 650 F. 2d at 771 (stating that the "constitutional threshold [of standing] must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed. R. Civ. P. 23"). Moreover, it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to *one* of many claims he wishes to assert; rather, "each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim." *Griffin*, 823 F. 2d at 1483.

As shown below, the Amended Complaint and discovery responses make clear from the outset that Waters cannot establish even ***one*** individual, prima facie claim under Title VII, and thus has no standing to bring an array of such claims on behalf of a broad putative class. The Court should, therefore, grant Defendant's motion for summary judgment.

A. Plaintiff Cannot Establish a Prima Facie Case on His Claim of Race Discrimination under Any of His Proposed Theories.

1. Plaintiff Has Not Established a Prima Facie Case on His Claim of Disparate Treatment Race Discrimination.

The U.S. Supreme Court has firmly declared that, in order to establish a prima facie case for a discrimination claim, the plaintiff must show: "(1) that he belongs to a racial minority; (2) that he applied and was qualified for a job for which the employer was seeking applications; (3) that, despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *see also Godoy v. Habersham Cty.*, 211 Fed. Appx. 850, 853 (11th Cir. 2006) (same). Here, Waters has met the first factor by establishing the fact that he is an African-American and is, therefore, a member of a protected class. Waters has, however, utterly failed to establish a prima facie showing as to any of the remaining factors of the *McDonnell Douglas* test -- in fact, Waters failed to provide any factual basis to support the allegations that he does make. The Court should, therefore, grant Defendant's motion for summary judgment.

Waters is also required to show that he sought a specific job for which the Defendant was actually "***seeking*** applicants"; that is, a job that was actually vacant and available. Because "[a] failure to hire claim obviously depends on the

availability of a job," *Velez v. Janssen Ortho, LLC*, 467 F. 3d 802, 807-08 & fn. 5 (1st Cir. 2006) (stating that a failure to hire claim begins with the fact that the plaintiff has "applied for and been rejected for a specific job), such a claim is not viable if a plaintiff cannot "eliminate one of the most common legitimate nondiscriminatory reasons for a failure to hire: the absence of a vacancy." *Black v. Tomlinson*, 425 F. Supp. 2d 101 (D.D.C. 2006). "An employer does not discriminate or retaliate illegally if it has no job opening." *Adams v. Groesbeck Ind. Sch. Dist.*, 475 F. 3d 688, 691 (5th Cir. 2007) (reversing district court finding that plaintiff established a *prima facie* case when individual applied for coaching position that was not announced as available and for which no candidates were interviewed); *Dare v. Wal-Mart Stores, Inc.*, 267 F. Supp. 2d 987, 993 (D. Minn. 2003) (granting summary judgment on plaintiff's failure to hire claim because plaintiff failed to establish the seeking applicants element of the prima facie case when the employer was seeking applicants only in the event a current employee did not transfer stores to the position); *Rush v. McDonald's Corp.*, 966 F. 2d 1104, 1118 (7th Cir. 1992) ("[I]f an employer is willing to consider white persons for an open position, but would refuse to consider applications from minorities for that position, it appears logical to characterize that conduct as discriminatory. On the other hand, it would not appear discriminatory if the employer is not hiring

anybody, for example, if there is no vacancy to be filled, and that would normally be the end of a Title VII claim.").

Here, Waters has never even *alleged* that an open position existed at the North District office. The undisputed evidence confirms that, at the time Waters applied to the North District office, all seven approved sales positions were filled. (Facts, ¶ 17.)

The facts establish the simple, nondiscriminatory truth -- Waters was not hired simply because a job was not available for him in the North District office and because he did not apply for any job with any other office. Under these facts, Waters cannot establish that he applied for a "specific available position for which Defendant was seeking applicants" and thus cannot go on to establish that, "despite his qualifications, he was rejected" from employment with Defendant. *McDonnell Douglas Corp., supra,* 411 U.S. at 802. Likewise, because there was no open position in the North District office to begin with, and thus no rejection of Waters by Defendant, there is no way in which Waters can establish "that after his rejected the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *Id.* Because Waters has not -- and cannot -- establish an individual *prima facie* claim for relief under either Title VII or §1981, he may not maintain the instant action on behalf of himself or the

proposed class. The Court should therefore grant Defendant's motion for summary judgment.

2. Plaintiff Has Not Established a Claim of Pattern and Practice Race Discrimination.

Waters' Amended Complaint includes a pattern-and-practice disparate treatment claim, which requires him to establish not only the "mere occurrence of isolated discriminatory acts" but also "that racial discrimination was the employer's standard operating procedure - the regular rather than the unusual practice." *Hall v. Alabama Ass'n of School Boards*, 326 F. 3d 1157, 1171 (11th Cir. 2003). Because, as discussed, Waters cannot prove even the most basic elements of his own individual claim for discrimination, he also cannot establish a *prima facie* claim of race discrimination by pattern and practice evidence.

Furthermore, Waters has offered no evidence of any discriminatory treatment of other individuals. In his discovery responses, plaintiff testified that he knows of no individuals whom Cook's has discriminated against on the basis of race. (Facts, ¶ 30.) As plaintiff has shown no evidence that he nor any other individuals suffered discrimination on the basis of race, he falls well short of demonstrating that "racial discrimination was the standard operating procedure," and thus, his claim of pattern and practice disparate treatment must fail.

Waters has failed to offer **any** evidence in support of the twelve allegations in his complaint on which he alleges that Cook's maintained a pattern or practice

on the basis of race. He has not offered evidence that he or any other African American individual (a) was discouraged from submitting an application because of the what he or she was told by a Cook's representative on the phone or in an office; (b) was discouraged from submitting an application for an available position because he or she was required to submit an application at each office to which he or she wished to apply; (c) was discouraged from submitting an application because of the race of individuals used in advertising; (d) was denied a management position, which Cook's only hires from within, based on race; (f) was discouraged from submitting an application because offices were staffed with white workers; (g) was discouraged from submitting an application because Cook's announced that a math test is required; (h) was excluded from a position because of the alleged, but not explained, "good old boy," "word of mouth," or "tap on the shoulder" system of recruitment, hiring, or promotion; (i, j) was excluded from a position because of performance on a written test; (k) was discouraged from submitting an application because of Cook's failure to notify applicants of a training program; or (l) was excluded from a position because of subjective selection criteria. (Facts, ¶¶ 29-31.) Waters' allegation in subsection (e) that he was required to state his race on his application is false as demonstrated by his application. (Facts, ¶ 13.) As these examples make clear, Waters has failed to establish how he has been injured by any pattern or practice of discrimination, or to

produce any facts to show the existence of such practices. The facts only show that Waters did not obtain employment with Defendant because he did not apply for an available job.

Waters brought this action, attempting to obtain a class action, without any evidence in support of any of his claims. As Waters has not submitted any evidence in support of his own claims or to demonstrate Cook's discriminated against any other individuals, his pattern and practice disparate treatment claim must be dismissed.

3. Plaintiff has not shown individual harm as required to establish a disparate impact claim.

In addition to his disparate treatment claims, Waters has brought a race discrimination claim under the disparate impact theory. "To make out a prima facie case under a disparate impact theory, the complaining party must demonstrate that the defendant employed a facially neutral employment practice that had a significant discriminatory effect." *Stephen v. PGA Sheraton Resort, Ltd.*, 873 F. 2d 276, 279 (11th Cir. 1989). Even where an individual alleges a disparate impact theory of recovery, he must prove individual harm to himself arising from the facially neutral employment practice. *Id.* A plaintiff must prove individual harm. In order to demonstrate individual harm, the individual plaintiff must show that application of the specific discriminatory practice has caused him to suffer a significant adverse effect. *See Hill v. Seaboard Coast Line R. Co.*, 885 F. 2d 804,

811 (11th Cir. 1989). A defendant can rebut a plaintiff's claim of individual injury by demonstrating that the adverse effect he complains of was dictated by a legitimate, nondiscriminatory reason. *See Stephen*, 873 F. 2d at 279. "[T]he employer must be given an opportunity to demonstrate a legitimate nondiscriminatory reason why, absent the offending practice, the individual plaintiff would have not have been awarded the job or job benefit at issue anyway." *In re Employment Discrimination Litigation against the State of Alabama*, 198 F. 3d 1305, 1315-16 (11th Cir. 1999).

Waters cannot show that any of the policies or practices that he alleges cause a disparate impact have caused him any individual harm. In his Amended Complaint, Waters alleges twelve practices, policies, or procedures of Cook's which could cause a disparate impact. (Amended Complaint, ¶ 21.) Waters lacks standing to bring any of these allegations and cannot demonstrate that he suffered any individual harm because of these alleged practices, policies, or procedures. He cannot establish claims on the allegations in subparagraphs (a), (b), (c), (f) or (g), in which he alleges that Cook's practices discourage applications, because he actually did submit an application at the Birmingham North District office. (Facts, ¶ 11.) Thus, he did not suffer a significant adverse effect because of these alleged practices. He has not offered any evidence that any individuals were discouraged from submitting an application because of these alleged practices. (Facts, ¶ 30.)

Moreover, he cannot establish a claim based on subparagraph (b), because, although he traveled from Elmore County (Facts, ¶ 12), he failed to visit a Cook's location which had available positions, to which he was referred, and which was located only one mile from the Birmingham North District office. (Facts, ¶¶ 23-26.) He lacks standing to bring the allegation in subparagraph (d) because he did apply for a sales position and Cook's had no management positions available at the North District Office. (Facts, ¶¶ 8, 14-15.) Waters cannot establish a claim of discrimination based on subparagraph (e), because his application does not require him to state his race as he alleges. (Facts, ¶ 13.) Waters cannot establish claims of discrimination based on his allegations in subparagraph (h) and (l) because he was not denied an available position and his application for employment was not rejected. (Facts, ¶¶ 17, 23.) Finally, Waters has not established claims of discrimination based on the allegations in subparagraphs (i), (j), or (k), because he took the test which accompanied his application, performed very well on the test, and his test score would have been a positive, and not a negative factor, in evaluating his application had he applied for an available position. (Facts, ¶¶ 19-21.)

Here, as discussed previously, there has been no failure to hire Waters, much less a discriminatory failure to hire him, because there was no available job in the North District office when he applied. Plaintiff's failure to obtain a position with

Cook's was based on the fact that no available positions existed at the office he applied, and he did not follow up at other offices, even though he was referred to those office by the Birmingham North District office's Sales Manager. Because Cook's has established that Plaintiff would not have been awarded a position even if the policies that allegedly created a disparate impact were not applied, his disparate impact claim must be dismissed.

B. Waters Lacks Standing To Bring Claims On Behalf Of The Class.

"[J]ust as a plaintiff cannot pursue an individual claim unless he proves standing, a plaintiff cannot represent a class unless he has standing to raise the claims of the class he seeks to represent." *Murray v. U.S. Bank Trust Nat'l Ass'n*, 365 F. 3d 1284, 1288-89, n.7 (11th Cir. 2004). "A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone -- not for himself, and nor for any other member of the class." *Griffin v. Duggar*, 823 F. 2d 1476, 1482 (11th Cir. 1987); *see also O'Shea v. Littleton*, 414 U.S. 488 (1974) (if "none of the named plaintiffs purporting to represent a class establishes a requisite of a case or controversy with the defendant, none may seek relief on behalf of himself or any other member of the class."). As demonstrated above, plaintiff must be able to establish a case regarding each of his individual claims to have standing to bring

each individual claim on behalf of the class. *See Griffin v. Duggar*, 823 F.2d 1476, 1483 (11th Cir. 1987).

Here, plaintiff fails to establish a *prima facie* case with regard to any of his allegations. Thus, he has no standing to bring any of these allegations on behalf of a class. It is clear from the outset that Plaintiff cannot establish a *prima facie* case on any of his claims against Cook's, and further discovery will not change this. The facts are what they are -- no available position existed in the North District Office at the time that Waters applied, and he never applied for a job at any of Defendant's other offices, even when advised to do so. Additional discovery will not alter these fundamental facts, which fatally undercut Plaintiff's ability to establish even the most basic elements of a failure-to-hire claim under Title VII. The Court should, therefore, grant Defendant's motion for summary judgment as to Waters' disparate treatment and disparate impact claims.

As the foregoing makes clear, Waters cannot establish a prima facie claim of discrimination on his own behalf, and thus cannot bring an action on behalf of any putative class. The Court should, therefore, grant Defendant's motion for summary judgment on all claims and dismiss this action.

V. CONCLUSION

For the foregoing reasons, this Court should grant Defendant's motion for summary judgment, dismiss all of Plaintiff's claims, and tax costs to Plaintiff.

Respectfully submitted,

/s/ Mac B. Greaves
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CERTIFICATE OF SERVICE

I hereby certify that on the 5th of June, 2008, I electronically filed the foregoing Motion with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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