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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

PRISON LEGAL NEWS, a project of the HUMAN RIGHTS DEFENSE CENTER,

Plaintiff,

v.

COLUMBIA COUNTY; COLUMBIA COUNTY SHERIFF'S OFFICE; JEFF DICKERSON, individually and in his capacity as Columbia County Sheriff,

Defendants.

No. 3:12-CV-71-SI

PLAINTIFF'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT ON DEFENDANTS' FAILURE TO MITIGATE AFFIRMATIVE DEFENSE

The Sheriff wants the Court to permit him to shift blame for his long-standing policy and practice of violating the United States Constitution from himself to Prison Legal News. His stated rationale is that PLN was obligated to warn him of his reckless disregard for the First Amendment and ask that he stop his censorship and denial of due process before PLN exercised its rights again and before PLN investigated his unconstitutional conduct. This is not the law and the Sheriff has failed to cite any precedent for his constitutionally destructive notion, which would establish an entirely new form of exhaustion requirement contrary to existing law. Nor has he offered any facts that support his defense if it was legitimate under the law.

First, Defendant claims but fails to show that PLN had a duty to mitigate its damages by informally educating Defendants that they were violating the Constitution before PLN continued to exercise its First Amendment rights.

Second, Defendants have not articulated a single fact that had PLN mitigated in the manner Defendants claim that Defendants would have changed their behavior.

Both points are fatal to Defendants' defense. The question presented is not *whether* the defense of failure to mitigate damages ever applies to a section 1983 claim, but rather *how* it applies to this section 1983 action. Defendants have the burden of showing that a mitigation of damages defense applies, but its only articulated theory is illogical and contrary to law, and Defendants offers no facts that support a legitimate defense.

I. FACTS

Defendants have not presented a question of fact for the jury. None of the facts articulated by the Sheriff in his brief support his defense of failure to mitigate damages.[1] He emphasizes the kinds of damages that PLN claims, the wages that PLN pays its employees, the

[1] Defendants offer the Sheriff's website and his Inmate Manual as evidence that PLN—like the rest of the public, the prisoners, and his deputies— must have known the Sheriff would violate their rights. Def's Resp. at 3. This is ironic since the Sheriff has taken refuge in his claimed ignorance of what was posted on his own website for two years, Dkt. 29 at 3, n.1, and his failure to notice the unconstitutional provisions in his inmate manual, Dkt. 99-1, at 21 (Dickerson Dep. at 123:13-124:18: "I did not catch the differences between our policy and what our manual said, the inmate manual said.").

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rates PLN claims as damages, and that PLN first notified Defendants they had been repeatedly violating the Constitution when PLN filed this lawsuit. But none of this has any relevance to a mitigation of damages defense.[2] Defendants have not identified any damages that PLN could have mitigated let alone how PLN could have mitigated them but didn't.

These damages include the diversion of resources in the form of considerable time that PLN spent investigating Defendants' illegal conduct, such as responding to and investigating the complaints of prisoners and their families about Defendants' censorship. *See* Dkt. 46, at 24-25. As the Court has recognized, PLN has challenged the constitutionality of Defendants' policies and practices not only on its own behalf but also on behalf of prisoners and the multitude of family members, friends, businesses, and others who correspond with them. And, similarly, Defendants have not shown how PLN could mitigate its frustration of mission damages, which are necessary to counter the Defendants' unconstitutional behavior. *See Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002).

At his deposition, Undersheriff Moyer was asked for a single example that would support a mitigation defense. He could come up with none:

Q. BY MR. WING: Undersheriff Moyer, I asked you earlier in the deposition whether you could think of any situation in which the sheriff's department has changed its policy because of a grievance or a complaint. Do you remember that question?

A. Yes.

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[2] PLN's damages calculations have no bearing on *whether* Defendants state a legitimate failure to mitigate defense; Defendants point to no precedent that says otherwise. But they try to make the calculations relevant by calling them "inflated" since there is a difference between what PLN pays its employees and the rates it claims as damages. Besides being irrelevant, Defendants are wrong. Courts have held that market rates are an entirely appropriate measure of damages. *See, e.g.*, *Fair Housing of Marin v. Combs*, 2000 WL 365029, * 3 (N.D. Cal. 2000) (awarding market rates for diversion of resources damages to fair housing organization because "it is completely reasonable to charge an hourly rate that does not match the pro rata salary of the individual; to find otherwise would place into question the fees and costs associated with a litany of professionals (including attorneys) whose hourly rate and salary prorated to the hour bear only passing resemblance to one another."), *aff'd, Fair Housing of Marin v. Combs*, 285 F.3d 899 (9th Cir. 2002).

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Q. And you could not think of one then. Can you think of one now?

A. I can't....

Wing Reply Dec., Ex. 1 (Moyer Dep. at 238:5-14). Mr. Moyer conceded that it was an important question and claimed that he would research the matter. *Id.* at 238:14-19. It is telling that Mr. Moyer could think of nothing. Ultimately, the Sheriff and his Undersheriff have offered no examples to the Court. In contrast, Plaintiff has offered numerous counter-examples, which are the only evidence on this issue in the case.

As a factual matter, Defendants have failed to show any genuine issue of material fact that would support their defense. Accordingly, the Court should enter partial summary judgment in PLN's favor and dismiss Defendants' defense of failure to mitigate damages.

II. ARGUMENT

A. Defendants Bear the Burden to Prove Their Affirmative Defense But Fail to Do So

Defendants cite to the Ninth Circuit Model Civil Jury Instructions, which state they bear the burden of proving a defense of failure to mitigate damages, Def's Resp. at 7, but Defendants have not, and cannot, show that mitigation of damages has any legal application here and they have identified no facts to support the defense even if it had any application.

Allowing Defendants to pursue the failure to mitigate defense they describe would create a perverse incentive for them to continue violating the Constitution until someone challenges them. In essence, their defense is that whenever they violate someone's constitutional rights the victim of their illegal conduct acts unreasonably if it exercises its rights again without first asking Defendants to change their ways. That is not the law so it is unsurprising that Defendants have been unable to identify any precedent to support their position.

Such a defense would shift the burden of following the Constitution away from the public officials sworn to uphold it and onto the general public. It would also severely impair constitutional rights, erecting barriers of time, money, unequal access, and ability. In an employment matter, it is clear that a terminated employee must attempt to mitigate by looking

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for another job. But what must a member of the public do to mitigate against a public official's manifest refusal to comply with the Constitution? Defendants claim only that "The duty to mitigate does not impose a standard of conduct or an affirmative duty to act in a particular manner. Rather, it is a principle that applies to the calculation of the 'level' of recoverable compensatory damages by requiring an injured party to take reasonable measures to minimize the damages suffered." Def's Resp. at 10-11.

Defendants fail to articulate what would have been reasonable conduct on the part of Plaintiff *and* they fail to show that it would have made a difference. Would a telephone call to the Defendants have been sufficient or did it need to be a letter? Did the caller need to get through to the Sheriff himself or would it have been enough to talk to a deputy since the Sheriff claimed to be unaware of his staff's practices? Would a letter from a member of the public have been enough or did it need to be prepared and sent by a lawyer so as to carry the necessary weight to be taken seriously by the government? Did the letter need to reference studies, identify evidence, or supply legal citations? Was analysis of the known facts applied to the law required of such a letter? Who must have actually received the letter to the government for it to be reasonably considered, or does that matter? How long must a member of the public wait for an answer before exercising its Constitutional rights again? Must the public negotiate or can it take a stand, or is it just the effort that matters? Defendants do not even attempt to explain what they claim PLN had to do to satisfy this exceedingly vague requirement that it imagines members of the public have, let alone how it would be clearly conveyed in instructions to a jury.

Defendants fail to present any facts to support a defense that they would have changed their ways in response to a request from PLN. They deny this on the sole ground that that they finally changed *some* of their unconstitutional conduct, but only after PLN sued them and in the

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face of PLN's motion for preliminary injunction. That is not evidence of voluntary compliance at all, let alone evidence that Defendants would have changed their conduct before litigation.[3]

And, Defendants wrongly claim that whether "defendants have no evidence that the Jail would have changed its unconstitutional practices had PLN given pre-litigation notice of its concerns…is of no import." Def's Resp. at 10 n. 5. Defendants, not Plaintiff, bear the burden of presenting evidence in the first instance that efforts of mitigation likely would have mitigated the harm that they caused.

More than forty-five years ago, the Ninth Circuit articulated the Defendant's "burden of proving a failure to mitigate damages" in the context of a federal employment discrimination dispute:

> To satisfy this burden, defendant must establish (1) that the damage suffered by plaintiff could have been avoided, [i]. e. *that there were suitable positions available* which plaintiff could have discovered and *for which he was qualified*; and (2) that *plaintiff failed to use reasonable care and diligence* in seeking such a position.

(Emphasis added). *Sias v. City Demonstration Agency*, 588 F.2d 692, 696 (9th Cir. 1978). And, as the Ninth Circuit explained, on a motion for summary judgment—where a defendant bears the burden on its affirmative defense—the defendant must present evidence that "during the time in question there were substantially equivalent jobs available, which [plaintiff] could have obtained, and that she failed to use reasonable diligence in seeking one." *E.E.O.C. v. Farmer Bros.* Co., 31 F.3d 891, 906 (9th Cir. 1994) (citing *id.*).

In other words, to withstand summary judgment, Defendants must present actual evidence that mitigation efforts would have likely reduced PLN's harm. *Wilson v. Union Pacific R.R. Co.* ., 56 F.3d 1226, 1232 (10th Cir. 1995) ("[The plaintiff's] general failure to seek employment for eighteen months before trial does not alone suffice to justify a mitigation instruction; *the defendant must also show that appropriate jobs were available.*") (Emphasis

[3] Defendants claim that they have provided other evidence but do not articulate what that evidence is or how it supports their defense. *See* Def's Resp. at 15 (stating merely "(See Factual Summary, supra, pp. 2-5)").

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added). The mere theoretical possibility is not a sufficient showing, and that is all Defendants have offered.

And, in fact, the evidence shows that Defendants would not have readily changed their conduct in response to a request that they do so. As shown in Plaintiff's Motion, Defendants repeatedly ignored prisoner grievances about their postcard-only policy and then refused to change that policy until ordered to do so by the Court. Yet, in their brief, Defendants do not mention this at all let alone try to explain why it is anything other than the best illustration of how they would have responded to a request from PLN too.

The Sheriff admitted under oath that he knew when he first read the Inmate Manual at the beginning of his tenure that it prohibited magazines and that it did not provide for due process but he did nothing to correct these illegalities. He plainly admitted that the provisions in his Manual violated the Constitution. In short, he was aware of the directions he was giving to his staff and to prisoners but knowingly ignored that they were unconstitutional. [4] He cannot be heard now to imply that if only PLN pointed out what he already knew that he would have changed his practices.

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[4] To matter legally, the Defendant must show that the avenues of mitigation allegedly available must be meaningful. In the employment context, for example, an employer must show that jobs available were "substantially equivalent" to count as mitigation. *See, e.g, Jackson v. Shell Oil Co.*, 702 F.2d 197, 202 (9th Cir. 1983) ("To meet its burden of showing that there were suitable alternative positions available, Shell demonstrated the presence of only one possibility, the position with Diamond. Jackson refused to apply for that job, contending that it was not 'substantially equivalent' to his position with Shell."). As Plaintiff showed in its briefs and at oral argument, even in response to full blown litigation including a motion for preliminary injunction, Defendants' initial efforts were feeble and inadequate: as examples, the January and February 2012 mail policies were a confusing, illogical mess and the training was ineffective; Defendants failed to update their website for five months, they failed to replace the Cutright Memorandum (banning magazines) in the prisoner pods until Plaintiff conducted its on-site inspection, and they continued to issue their Inmate Manuals (banning magazines and not affording due process) to every prisoner who entered the facility. These responses are not "substantially equivalent" to compliance with the Constitution and PLN could have expected even less compliance in response to an informal request to Defendants.

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Even if a mitigation defense exists along the lines that Defendants asserts, the facts explained above render any such defense dead on arrival. And, by continuing to send its mailings every month to communicate its message to prisoners despite Defendants' unconstitutional practice of censorship, PLN *was* engaged in reasonable efforts to reduce the harm that the Defendants were causing.

Defendants should not be permitted to confuse the jury with their deceptive defense and unsupported claims that they would have done things differently if PLN had only asked.

1. The Defense Argued by Defendants is Nothing More than Comparative Negligence, Which Defendant Has Not Pleaded And As a Matter of Law Does Not Apply Here

As Plaintiff showed at length in its Motion, the duty to mitigate damages arises only *after* the Defendants have violated the Plaintiff's rights and only to ameliorate the harm caused by *that* violation—not to prevent future violations. Pl's Mot. at 3-5. Defendants never explain how asking them to stop future violations ameliorates the harm caused by the past ones. That is fatal to the defense.

The defense that Defendants describe in their Response brief is really a form of *comparative negligence*, dressed up as *mitigation of damages*. Comparative negligence limits a plaintiff's damages where the plaintiff was found partly to blame for the cause of the injury in the first place. *See, e.g., Phillips v. Monday & Associates, Inc.*, 235 F. Supp. 2d 1103, 1105 (D. Or. 2001) ("Under the comparative negligence statutes, the trier of fact determines the parties' relative negligence and determines the plaintiff's damages."). But Defendants did not plead comparative negligence as defense. Nor could they successfully.

A comparative (or contributory) negligence defense is limited to negligence actions; it is not a defense to intentional torts, like government censorship. "The general rule is that contributory negligence is a defense only to actions grounded on negligence…." *Curry v. Fred Olsen Line*, 367 F.2d 921, 928 (9th Cir. 1966) (holding that California follows the general rule);

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Field v. Mans, 516 U.S. 59, 70 (1995) ("contributory negligence is no bar to recovery because fraudulent misrepresentation is an intentional tort.").

"Comparative negligence is not applied in suits for violations of federal constitutional rights under § 1983." *Quezada v. County of Bernalillo*, 944 F.2d 710, 721 (10th Cir. 1991) (citing *Clappier v. Flynn*, 605 F.2d 519, 530 (10th Cir.1979) (§ 1983 does not allow comparison of fault between the plaintiff and defendant)); *Jackson v. Hoffman*, No. 91-4054-RDR, 1994 WL 114007, at *1 (D. Kan. 1994) (noting that "comparative negligence is not applied in § 1983").

For example, in *Quintana v. Baca*, 233 F.R.D. 562, 565-66 (C.D. Cal. 2005), where a prisoner brought a constitutional challenge to the Los Angeles County Jail assigning him and other prisoners to sit on the floor, the Court rejected the government's "defense of comparative negligence," holding that "the Court does not see how it is applicable to this case; i.e. how fault for the alleged floor-residing injury could be apportioned between the plaintiff and the defendant." The Court explained: "Either the defendant failed to provide the plaintiff with sufficient seating, and this amounts to a constitutional violation, or he did not." *Id.* (citing *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986), for the proposition that "negligence does not give rise to a § 1983 claim," suggesting that comparative negligence cannot be a defense to an intentional constitutional violation).

Similarly, in *Logan v. City of Pullman Police Dept.*, CV-04-214-FVS, 2006 WL 994759, * 2 (E.D. Wash. Apr. 14, 2006), the Court held: "because comparative fault is inapplicable in the context of an intentional tort, *Morgan*, 137 Wash.2d at 896, 976 P.2d at 623, the Court concludes Defendants' affirmative defense of comparative fault is inapplicable to Plaintiffs' Section 1983 claims." In explanation, the court stated, "in the Ninth Circuit, liability under Section 1983 requires proof "the acts or omissions of the defendant were intentional." *Id.* (citing Manual of Model Civil Rule Instructions (9th Cir. 2004 ed.), Section 11.1, www.ce9.uscourts.gov." *Id.*

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For the same reason, federal courts have likewise rejected attempts to defend against employment discrimination claims based on defenses that the employee was negligent. *See Smith v. Sheahan*, 189 F.3d 529, 534 (7th Cir.1999) ("[t]here is no assumption-of-risk defense to charges of workplace discrimination."). In this vein, just a few months ago, in *E.E.O.C. v. Prod. Fabricators, Inc.*, CIV. 11-2071 MJD/LIB, 2012 WL 2775009, * 6-7 (D. Minn. July 10, 2012), in a Title VII action, the Court struck "Defendants' affirmative defenses of contributory negligence and assumption of the risk" on these grounds. Defendants cannot defend against the damages caused by their intentional torts by claiming that the Plaintiff could have avoided them.

To support the basic and unremarkable concept that a Plaintiff must attempt to mitigate its damages even under section 1983, Defendants cite to four employment cases. Def's Resp. at 7. But this is no help to the Defendants, who have not articulated a viable failure to mitigate damages defense and who have no legal basis for asserting a comparative fault defense against their intentionally tortious misconduct—which is the only defense their theory fits.

The Court in *E.E.O.C. v. Prod. Fabricators, Inc.* explained: "failure to mitigate is distinct from comparative fault ... [because] [t]he duty to mitigate arises after the plaintiff has been injured, [while] the duty of care before." *Id.* at * n. 4. There is no comparative fault defense here because there is no negligence claim. And, there is no failure to mitigate defense here because Defendant has not articulated any actions that PLN could have taken, let alone should have taken, to ameliorate the harm flowing from Defendants past violations. That is a major reason why Defendants cannot rely on an employee's duty to look for another job after wrongful termination as precedent for a failure to mitigate damages defense here. In an employment case, the employee is seeking future lost wages so must mitigate that future harm by looking for work. That would ameliorate lost future wages caused by the prior termination. Here, by contrast, Defendant has not articulated any way that PLN could, let alone did, fail to mitigate damages flowing from the government's *prior* deprivation of its speech. Asking the government to change its behavior—which is the only failure that Defendants allege—may

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prevent future violations but not remedy past ones. This is why Defendants have no legitimate failure to mitigate defense and why employment litigation fails to serve as relevant precedent for Defendants here.

Also notable is the fact that the terminated employee generally mitigates by looking for a job with a different employer from the one who discriminated against her. The Defendant employer must show failure to mitigate by affirmatively presenting the many jobs that the employee could have gotten had she applied for them, and must likewise show that the employee likely would have gotten one of the jobs but for her unreasonable failure to seek them. Here, however, the sole focus of Defendants' criticism is that PLN was obligated to seek relief from the bad actors themselves—the Defendants. This is a seriously flawed approach for two reasons: (1) Defendants concede that they, not Plaintiff, were the sole source of any mitigation that could have occurred; (2) Defendants have presented no evidence that they would have changed their ways had PLN just asked. Indeed, while they seem to imply it, nowhere in their brief do Defendants actually state that they would have changed any policy or practice if PLN has asked. And Defendants supply no testimony or other evidence in support of their motion to state this either.

Lastly, Defendants' claim that PLN should have contacted them is not enough to present this defense to a jury. Courts have recognized that where a plaintiff's attempt to mitigate damages would have been futile, it is not an appropriate defense. "'Mitigation' does not require an exercise in futility." *RBC Bank (USA) v. Glass*, 773 F. Supp. 2d 1245, 1247 (N.D. Ala. 2011). In *Pathways Psychosocial v. Town of Leonardtown, MD*, 223 F. Supp. 2d 699, 709 (D. Md. 2002), for example, the court rejected the defendant's request for a mitigation of damages instruction because the defense was based on the theory that was "that Plaintiffs would have been petitioning the same groups which discriminated against them in the first place." Citing precedent from the Fourth and Ninth Circuits, the court explained that a plaintiff is not required to engage in a futile attempt to mitigate by asking the defendant not to violate the law again:

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> In the employment context, plaintiffs do not have to pursue employment with a firm after being rejected based on discrimination if they justifiably believe that it would be futile. *EEOC v. Service News Co.*, 898 F.2d 958, 963 (4th Cir.1990); *see also Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir.1986) (plaintiff not required to accept job offer when plaintiff would be walking back into hostile work environment).

223 F. Supp.2d at 709. The Court held that "Like the plaintiff in *Service News*, 898 F.2d at 963-964, Plaintiffs' belief in the futility of their further efforts to appeal the zoning decision was "rooted in the factual context of [their] rejection." *See also Ingram v. Madison Square Garden Ctr., Inc.*, 535 F. Supp. 1082, 1092 (S.D.N.Y. 1982) *aff'd and modified*, 709 F.2d 807 (2d Cir. 1983) (on class action claims under Title VII and sections 1981 and 1985, the Court rejected the defendant's mitigation argument, "Since feelings of futility justified the victims' failure to apply for Garden laborer jobs, it is obviously absurd for the defendant to argue, as it does, that these claimants should nevertheless be required to make this futile application for mitigation purposes."); *c.f. Phillips v. Monday & Associates, Inc.*, 235 F. Supp. 2d 1103, 1107 (D. Or. 2001) (denying amendment to Answer because "proposed amendment to add contributory fault raises a futile defense rather than a reasonable issue of law").

Unlike mitigation of wages in employment cases where it is in the discretion of a third party to hire the plaintiff for a new job, here Defendants were in complete control of the only mitigation option that they claim was available. Having violated the law repeatedly and never implementing the only mitigation available (i.e., changing their practices) until after PLN sued them, Defendants now have not been able to show, even through self-serving testimony, that they would have changed their ways if only PLN had asked.

2. The Defense is Illogical and Contrary to the Constitution

Defendants' defense is premised on a simple but incorrect notion: that since Defendants made a practice of violating the First Amendment, PLN had a legal obligation to refrain from exercising its First Amendment rights until PLN attempted to persuade Defendants to follow the law. Defendants' cramped and narrow interpretation of constitutional rights is the latest

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Exhibit A on why a permanent injunction is needed to force them to comply with the First and Fourteenth Amendments. Any Sheriff who urges this interpretation on the Federal Court has not irrevocably eradicated his unconstitutional policies and practices. Constitutional rights reside in the People, and here in the Press as well. These rights are not granted by public officials, to be doled out or permitted once the People or the Press has been sufficiently persuasive and patient.

After she had been arrested the first time, did Rosa Parks have a legal obligation to ask the authorities to forgo racial segregation before she sat in the front of a Birmingham bus a second time? It is a galling notion. Yet, that is the Sheriff's premise here: it was unreasonable for PLN to try to send its mailings to our prisoners if PLN knew or should have known that we would censor them; PLN shares the blame because it did not ask us to change our ways first. As explained below, that notion finds no aid and comfort in the law. A section 1983 Defendant is expected to know clearly established law and avoids liability for damages by following the law, not by shifting blame to the victim of its deliberate acts of misconduct. Members of the public have no legal responsibility to warn public officials to follow the Constitution before exercising their constitutional rights the first time or the fiftieth.

III. CONCLUSION

Defendants have failed to meet their burden of showing that their affirmative defense has any application to this case and have failed to show there are genuine issues of material fact in dispute which if believed would support their defense. Accordingly, Plaintiff respectfully asks the Court to please enter an order granting partial summary judgment on the affirmative defense in favor of PLN and against Defendants.

DATED this 22nd day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2012, I electronically filed the foregoing to the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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