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IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE AT NASHVILLE

HENRY HODGES,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No. 22-1440-III
	§	
LISA HELTON, *et al.,*	§	
	§	
Defendants.	§	

MEMORANDUM IN SUPPORT OF MOTION OF THE NASHVILLE BANNER TO INTERVENE FOR THE LIMITED PURPOSE OF UNSEALING SEALED RECORD DOCUMENTS

I. INTRODUCTION

"The Tennessee Constitution expressly provides that 'all courts shall be open.'" *In re Estate of Thompson*, 636 S.W.3d 1, 11 (Tenn. Ct. App. 2021) (cleaned up). In order for courts to remain "open" in the manner that Tennessee's Constitution contemplates, courts must also—whenever possible—ensure that judicial records are maximally accessible to both litigants and the public alike. *See id.*

With the above context in mind, all sealed record documents in this litigation—a case of extraordinary public concern—should be unsealed. Tennessee law carries a "strong presumption in favor of openness regarding [a] trial court's records." *See In re Est. of Thompson*, 636 S.W.3d at 23. The rare considerations that would warrant keeping judicial records sealed in their entirety also have not been established here, at least not on the present record. *See Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996) ("The burden of justifying the confidentiality of each and every document sought to be covered

by a protective order is on the party seeking the order."). *Cf. Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 308 (6th Cir. 2016) (requiring sealing proponents to establish "on a document-by-document, line-by-line basis—that specific information in the court record meets the demanding requirements for a seal."). Accordingly, all sealed documents that have been filed in this action should be unsealed.

II. FACTS AND PROCEDURAL HISTORY

This litigation arises from Plaintiff Henry Hodges' allegations that the conditions of his confinement are tantamount to torture. *See generally* Verified Compl. Upon review, this Court has already granted the Plaintiff temporary relief, including by finding and ordering—among other things—that: (1) "Plaintiff stands to suffer immediate and irreparable injury, loss or damage due to certain conditions as described in the Complaint[;]" (2) "Defendants are further restrained from use of the 6-point restraint device;" (3) "Defendants are restrained from depriving the Plaintiff of mental stimuli during the period of time for which he is immobile due to recovery;" and (4) "Defendants are further restrained from any treatment of the Plaintiff which would constitute cruel and unusual punishment or violate any of his Constitutional Rights." *See* Order Granting Appl. for Restraining Order at 2–4 (Oct. 28, 2022).

Movant the Nashville Banner—a media outlet—has already covered these proceedings for the benefit of the public. *See, e.g.,* Demetria Kalodimos, *Death Row, Mental Illness and Henry Hodges*, THE NASHVILLE BANNER (Nov. 11, 2022), https://www.youtube.com/watch?v=sxwlTjzSyQY. The Nashville Banner also intends to continue its coverage of these proceedings, which involve governmental litigants and asserted violations—by government officials—of a citizen's fundamental federal and state constitutional rights. The Nashville Banner's ability to cover these proceedings, however,

is hampered by the fact that several documents—which appear to include extensive video footage of the Plaintiff's asserted constitutional violations—have been filed and maintained under seal.

To date, the sealed records at issue have been filed under seal pursuant to the Court's pre-filing, November 4, 2022 *Order to File All Medical Records and Documents [Containing] Medical Information Under Seal*. In that Order, the Court stated:

> The Court hereby orders counsel to file all medical records and documents pertaining medical information under seal regarding the physical and mental status of Plaintiff.
>
> The Court hereby ORDERS counsel to file all medical records and documents pertaining medical information under seal that contain portions which refer to protected information regarding the physical and mental status of Plaintiff.

Id. at 1.

Consequently, every document that has been filed under seal to date has been sealed based on a pre-filing order without any specific findings being made by the Court that any sealed document actually warrants sealing. *But see In re NHC--Nashville Fire Litig*., 293 S.W.3d 547, 560 (Tenn. Ct. App. 2008) ("'The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.'") (quoting *State v. Drake*, 701 S.W.2d 604, 607–08 (Tenn.1985) (in turn quoting *Press–Enter. Co. v. Superior Court*, 464 U.S. 501, 506 (1984)). Thus, at this juncture, this Court has never made any of the findings necessary to support sealing of any specific document. The propriety of sealing any medical record—a requirement adopted, presumably, for the benefit of the Plaintiff to

maintain his privacy—has also been called into substantial doubt since entry of the Court's November 4, 2022 sealing order, given that the Plaintiff himself has filed notice with the Court that he is "waiving all privacy and [HIPAA] protections" and "requests records and exhibits regarding his custody and treatment, including medical treat[ment], be open to the public." *See* Pl.'s Status Update to Court at 2, ¶ 5 (Dec. 5, 2022).

III. THE NON-PARTY MOVANT'S RIGHT TO INTERVENE TO ACCESS JUDICIAL PROCEEDINGS AND RECORDS

"*Ballard* and other Tennessee cases have 'firmly establishe[d] the right of the public, including the media, to intervene in court proceedings for the purpose of attending the proceedings, or for the purpose of petitioning the Court to unseal documents and allow public inspection of them.'" *See Kocher v. Bearden*, 546 S.W.3d 78, 84 (Tenn. Ct. App. 2017) (quoting *Knoxville News–Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998)). Thus, the public's right of access to judicial proceedings and records being collateral to the primary action but necessarily common to it, a non-party that intervenes for the limited purpose of challenging an order restricting access to judicial proceedings or records definitionally "meets the requirement of Rule 24.02 of a question of law or fact in common with the main action." *See id*. *See also Ballard*, 924 S.W.2d at 657 ("Here, **as in all such cases**, by virtue of the fact that the media entities challenge the validity of the protective order entered in the main action, they meet the requirement of Rule 24.02, that their claim have 'a question of law or fact in common' with the main action.") (emphasis added).

Notably, federal courts applying a substantially identical permissive intervention rule—including the U.S. Supreme Court—are in accord. *See Price v. Dunn*, 139 S. Ct. 2764 ("Motion of National Public Radio, Inc., et al. for leave to intervene to file motion to unseal

granted, and motion to unseal granted.").[1] Thus, "despite the lack of a clear fit with the literal terms of Rule 24(b), every circuit court that has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." *See E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (citing *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988); *Martindell v. International Telephone and Telegraph Corp.*, 594 F.2d 291, 294 (2nd Cir. 1979); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3rd Cir. 1994); *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir. 1979); *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 162 (6th Cir. 1987); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 896 (7th Cir. 1994); *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 473 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Insurance Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990)). "[C]ourts have been willing to adopt generous interpretations of Rule 24(b) because of the need for 'an effective mechanism for third-party claims of access to information generated through judicial proceedings.'" *See id.* (citing *Public Citizen*, 858 F.2d at 783). As a result, throughout federal courts generally, *see id.*, including in the Sixth Circuit, specifically, non-parties are routinely afforded a right to intervene for the purpose of challenging trial court orders that restrict access to judicial proceedings. *See, e.g., Application of Storer Commc'ns, Inc.*, 828 F.2d 330, 335 (6th Cir. 1987) ("media

[1] The Supreme Court's ruling in *Price* followed a long tradition of rulings providing that members of both the press and the general public must be afforded an opportunity to be heard regarding access to judicial proceedings. *See Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 609, n.25 (1982) (holding that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'") (quoting *Gannett Co. v. DePasquale*, 443 U.S., at 401, 99 S.Ct., at 2916 (POWELL, J., concurring)); *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98, (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.").

organizations may move to intervene for the purpose of contesting . . . the sealing of documents."); *Meyer Goldberg, Inc.*, 823 F.2d at 164 ("we REVERSE and REMAND this matter to the district court for a hearing in which the parties may be heard fully concerning May's claim to seek to unseal the records[.]"); *Goodman v. Fuller*, 960 F.2d 149 (6th Cir. 1992) ("[M]embers of the public have a presumptive right to inspect and copy judicial records. . . . Appellant Security Finance Group, Inc., a non-party that has been treated as an intervenor, subsequently moved to unseal the record. . . . [W]e VACATE the order denying the motion to unseal the record and REMAND the case for further proceedings not inconsistent with this opinion.") (citing *Meyer Goldberg, Inc.*, 823 F.2d at 163); *CBS Inc. v. Young*, 522 F.2d 234, 237–38 (6th Cir. 1975) ("the order of May 6, in denying to petitioner access to potential sources of information, at least arguably impairs rights guaranteed to the petitioner by the First Amendment. We are not persuaded by the argument that petitioner lacks standing because it is not a party to the civil litigation. The fact remains that its ability to gather the news concerning the trial is directly impaired or curtailed.").

Significantly, enabling non-parties to intervene to seek access to presumptively public judicial records furthers a longstanding common law and First Amendment-protected tradition of judicial transparency. *See, e.g., Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178 (6th Cir. 1983) ("public access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court."). This "long-established" tradition dates back to at least the 19th century. *See In re Knoxville News Sentinel Co.*, 723 F.2d at 474 ("This long-established legal tradition is the presumptive right of the public to inspect and copy judicial

documents and files. . . . The recognition of this right of access goes back to the Nineteenth Century, when, *in Ex Parte Drawbraugh*, 2 App.D.C. 404 (1894), the D.C. Circuit stated: 'Any attempt to maintain secrecy, as to the records of this court, would seem to be inconsistent with the common understanding of what belongs to a public court of record, to which all persons have the right of access.'"). Simply stated: because "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption," *see Brown*, 710 F.2d at 1179, members of the public and the media alike must be afforded an opportunity to intervene for the purpose of contesting orders that restrict public access.

With these considerations in mind, the movant is entitled to intervene—pursuant to both Tenn. R. Civ. P. 24.02 and the statutory rights afforded by Tenn. Code Ann. § 1-3-121 and 42 U.S.C. § 1983—to contest the denial of public access to sealed documents. *See Kocher*, 546 S.W.3d at 84. *See also* Tenn. Code Ann. § 1-3-121 ("Notwithstanding any law to the contrary, a cause of action shall exist under this chapter for any affected person who seeks declaratory or injunctive relief in any action brought regarding the legality or constitutionality of a governmental action. A cause of action shall not exist under this chapter to seek damages."). Such intervention enables the movant to vindicate "the general public right of access to courts and their records" and should be permitted as a result. *See Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998). For all of these reasons, the movant should be permitted to intervene in this action for the limited purpose of unsealing the sealed record documents in this action.

IV. ARGUMENT

A. All sealed documents should be unsealed.

"'[T]he courts of this country recognize a general right to inspect and copy public

records and documents, including judicial records and documents.'" *In re NHC—Nashville Fire Litig.*, 293 S.W.3d at 560 (quoting *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 98 S.Ct. 1306, 1316, 55 L.Ed.2d 570 (1978)). Further, Tennessee's Constitution expressly "provides that 'all courts shall be open.'" *In re Estate of Thompson*, 636 S.W.3d at 11 (quoting *Kocher*, 546 S.W.3d at 85 (in turn quoting Tenn. Const. Art. I, § 17). That constitutional requirement includes a mandate that "a court's judicial records" remain open to the public. *See id.* Court records that should remain presumptively open to the public by virtue of being "public records" include "[t]he pleadings, **documents, and other papers filed with the clerks of all courts, including the courts of record**[.]" *See* Tenn. Code Ann. § 10-7-403(2) (emphasis added). *See also Doe by Doe v. Brentwood Acad. Inc.*, 578 S.W.3d 50, 53 (Tenn. Ct. App. 2018) ("all documents filed with the trial court clerk are public records and are open to the public unless they are protected from disclosure by a statute, rule, or court order.").

Given the foregoing, Tennessee law reflects a "strong presumption in favor of openness regarding the trial court's records." *In re Est. of Thompson*, 636 S.W.3d at 23. The Tennessee Supreme Court has accordingly "recognized a qualified right of the public, founded in common law and the First Amendment to the United States Constitution, . . . to examine the documents generated in [judicial] proceedings." *See Knoxville News-Sentinel*, 982 S.W.2d at 362 (citing *Ballard*, 924 S.W.2d at 661).

To be sure, the right of the public to access and inspect judicial records "is not absolute[.]" *Id.* at 362–63. Thus, courts retain inherent discretion to seal judicial records under narrow and appropriate circumstances. However, "because of the long-standing presumption of public access to court records, a seal on such records must be 'essential to preserve higher values and narrowly tailored to serve [a compelling] interest.'" *In re Est.*

of Thompson, 636 S.W.3d at 12 (quoting *Bottorff v. Bottorff*, No. M2019-00676-COA-R3-CV, 2020 WL 2764414, at *9 (Tenn. Ct. App. May 27, 2020)).

Under this standard, articulating a compelling interest "demands more than broad, vague allusions to general privacy interests or potential harm." *Id.* at 23. Instead, the "'presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *In re NHC—Nashville Fire Litig.*, 293 S.W.3d at 560 (quoting *State v. Drake*, 701 S.W.2d at 607–08 (in turn quoting *Press–Enter. Co.*, 464 U.S. at 506)). Any resulting restriction on public access must also be narrowly tailored. *See Knoxville News-Sentinel*, 982 S.W.2d at 363 ("This balance must be carefully struck, and any restriction on public access must be narrowly tailored to accommodate the competing interest without unduly impeding the flow of information."). *See also Kocher*, 546 S.W.3d at 86 ("Any restriction on public access to judicial proceedings and documents 'must be narrowly tailored to accommodate the competing interest without unduly impeding the flow of information.'") (cleaned up).[2] Granular specificity regarding that interest is also essential. *See id.* ("The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."). *Cf. Shane Grp., Inc.*, 825 F.3d at 306 ("a district court that chooses to seal court records must set forth specific findings and conclusions 'which justify nondisclosure to the public.'") (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1176 (6th Cir. 1983)). Thereafter, courts must "balance the privacy of litigants against the public's

[2] For example, even when dealing with material that is normally "universally recognized as confidential"—such as medical records—some portions of the records nonetheless retain a presumption of access not only to the parties, but to the public generally. *See Doe by Doe*, 578 S.W.3d at 54–55. As a result, wholesale sealing is rarely appropriate.

right to access the courts and their records[.]" *In re Est. of Thompson*, 636 S.W.3d at 12. *Cf. Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594 (6th Cir. 2016) ("a court must balance the litigants' privacy interests against the public's right of access, recognizing our judicial system's strong presumption in favor of openness.").

Here, the lone court-permitted justification for sealing any document in this case concerns an effort to maintain the privacy of the Plaintiff's "medical records and documents." *See* Order to File All Medical Records and Docs. Pertaining Medical Information Under Seal at 1 (Nov. 4, 2022). Since entry of the Court's order, though, the Plaintiff himself has stated that he is "waiving all privacy and [HIPAA] protections" and "requests records and exhibits regarding his custody and treatment, including medical treat[ment], be open to the public." *See* Pl.'s Status Update to Court at 2, ¶ 5 (Dec. 5, 2022). Accordingly, the lone justification for sealing that the Court has identified to date has dissipated, and any judicially authorized seal should be lifted as a result.

Further, by virtue of the fact that this Court's sealing order preemptively directed the Parties to file certain records under seal before the Court itself had seen or reviewed them, this Court has never made a finding that any compelling interest justified sealing of any specific document. Thus, no judicial findings have ever been made in connection with any sealed document at issue. Given that the lone justification identified for sealing—maintaining the privacy of the Plaintiff's medical records—is no longer applicable in light of the Plaintiff's express post-order waiver of any claim to privacy, any previous findings would also have no bearing on the propriety of sealing today. *Cf. Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 167 (3d Cir. 1993) ("In determining whether any document or portion thereof merits protection from disclosure, the district court should be guided by our prior advice that continued sealing must be

based on 'current evidence to show how public dissemination of the pertinent materials now would cause the competitive harm [they] claim[ ].") (quoting *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991)).

Given the foregoing, this Court did not and could not have conducted the robust inquiry necessary to support a determination that there was a compelling need to seal any document filed in this case to date, and the original justification for sealing is no longer applicable. Further, to the extent that supposed security concerns have been identified by the Defendants to provide an alternative basis for sealing, the movant notes that "broad, vague allusions to general privacy interests or potential harm" are insufficient to support sealing. *See In re Thompson*, 636 S.W.3d at 23. The movant observes, further, that the Plaintiff's counsel—who both has the benefit of being able to see the sealed records and was apparently afforded access to them without advance entry of a protective order—has identified myriad detailed reasons why the Defendants' professed security concerns are *not* compelling, are provably overstated, and lack substantive merit. Specifically, in a recent filing, the Plaintiff explains:

> **The Information Covered by Defendants' Proposed Protective Order is Already Public.**
>
> Defendants have already publicly disclosed the very same details about RMSI that they claim will cause safety and security concerns if disclosed by Mr. Hodges. TDOC owns a public YouTube page in which TDOC has posted numerous videos depicting the inside and outside of their prisons, including RMSI. *See* B. Leonard Dec. at 2. Any member of the public with access to the Internet can view the videos on TDOC's YouTube page without a subscription, username or password. *Id.* In a public video on TDOC's YouTube page showcasing a "Day in the Life [of a] TN Correction Officer," available at Day in the Life: TN Correctional Officer – YouTube, TDOC displays a variety of information about RMSI, including, inter alia, security procedures for entry into the prison, the inside of central control, layouts of the prison and individual units, keys and labelled location of the keys, video footage showing the location of multiple security cameras, inside the pods, including photos of security camera placements inside the pods, sallyports

> and gates, a view from inside central control showing the security procedure for entry from central control onto the compound and the doors leading to the compound, a control center with multiple bullet proof vests, schematics of cells, and live security cameras, the low side showing multiple doorways, including in and out of the medical unit, and the entire security perimeter of the institution showing the layout of the gates and the prison. *See id*. at 2-3. By contrast, Defendants seek to prevent Plaintiff from publicly disclosing photographs or videos that depict "the application of security restraints or other security techniques," "the location of windows, doors, and other points of ingress and egress not externally visible at RMSI," "the layout and interconnectedness of the units," and "the layout of the overall facility." However, this is the exact same information that is readily available on TDOC's own social media account to any member of the public with access to the internet.

See Pl.'s Opp. to Defs.' Mot. for Protective Order at 6–7 (Dec. 7, 2022).

The movant additionally notes that the TDOC, unfortunately, does not have a history of being a reliably honest broker of truthful information in prison conditions cases, and that the TDOC should not be blindly trusted to make accurate representations as a result. For instance, in one recent case, the Middle District of Tennessee observed that TDOC Defendants and their counsel had made "blatant factual misrepresentations" to the Court regarding material facts, explaining:

> In the Answer to the Complaint, Defendants deny that two cells are "known or referred to as ... 'iron man' cells," that "Unit 1 has 'iron man' cells," and that Mr. Friedmann's "cell is an 'iron man' cell." (Doc. No. 16 ¶¶ 18, 41). This is remarkable given Defendants' own exhibits contain a TDOC report signed by multiple Defendants that describes Mr. Friedmann's cell as "an iron man cell." (Doc. No. 15-4 at 15). The Court resolves "disputed" facts in Mr. Friedmann's favor where **the record contradicts Defendants' denials. The Court warns Defendants there may be repercussions for future blatant factual misrepresentations presented to it.** *See* Fed. R. Civ. P. 11.

Friedmann v. Parker, 573 F. Supp. 3d 1221, 1226, n.2 (M.D. Tenn. 2021) (emphasis added).

For all of these reasons, all of the sealed documents filed in this action should be unsealed. The necessary findings that support sealing have not been made; a compelling

need for sealing has not been demonstrated; the original justification for sealing is no longer applicable; and the alternative grounds for sealing advanced by the Defendants are unpersuasive.

B. To the extent sealing any document is appropriate, the seal must be narrowly tailored.

Separate and apart from whether sealing is appropriate as an initial matter, any seal must also be narrowly tailored. Courts have a variety of tools at their disposal to ensure a sealing order is narrowly tailored, including limited redaction where appropriate. Here, however, no such attempt at narrow tailoring appears to have been made to date, given the Court's determination that medical records would be sealed in their entirety before they were filed or reviewed by the Court independently.

That deficiency, too, warrants revision. *See, e.g.*, *In re Est. of Thompson*, 636 S.W.3d at 24 ("The Appellees did not establish in the trial court a compelling interest justifying the seal . . . . Moreover, minimal if any efforts were taken to ensure the seal on these documents was narrowly tailored as required. . . . Accordingly, the trial court's decision to place the above-listed documents under seal is reversed[.]"). To maintain a document under seal, proponents of sealing must demonstrate that sealing is appropriate as to "each and every document" that has been filed under seal, *see Ballard*, 924 S.W.2d at 658, and they must further establish "on a document-by-document, line-by-line basis—that specific information in the court record meets the demanding requirements for a seal." *See Shane Grp., Inc.*, 825 F.3d at 308. Further, even then, any claim of sealing must outweigh "the significant and well-established interests underpinning the presumptive openness of court records" in order to be sustained. *In re Est. of Thompson*, 636 S.W.3d at 24.

To date, at least, none of these showings has been made. Indeed, the Defendants have not even attempted to make them. Accordingly, to the extent that this Court determines that sealing is appropriate as to any document, it should order the proponents of sealing to identify "page by page, or line by line," what, specifically, they contend merits sealing. *See In re FCA US LLC Monostable Elec. Gearshift Litig.*, 377 F. Supp. 3d 779, 784 (E.D. Mich. 2019). Thereafter, this Court should order unsealed every line of every page—and every second of every video—regarding which sealing proponents fail to make the showing necessary to support sealing with specific evidence.

V. CONCLUSION

For the foregoing reasons, this Court should permit the movant's limited intervention and order that the sealed documents filed in this action be unsealed, either in whole or in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this the 9th day of December, 2022, a copy of the foregoing was served via the Court's e-filing system, via email, or via USPS mail, postage prepaid, upon:

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