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INTRODUCTION

1
2 On December 17, 2009, the California Sea Urchin Commission, Peter Halmay, Harry
3 Liquornik, California Abalone Association, and Sonoma County Abalone Network
4 (collectively, “applicants”) filed a motion for leave to intervene as of right, or in the alternative,
5 permissively, pursuant to Federal Rule of Civil Procedure 24 (Docket #19). Also on December
6 17, 2009 applicants filed a notice for that motion to be heard on an expedited basis on January
7 25, 2010 as part of the initial case management conference already scheduled for that date
8 (Docket # 20). Although the Court has not yet acted on applicants’ motion for expedited
9 consideration, plaintiffs file this response brief based on the deadline that would be established
10 under Local Rule 7-3(a) in the event the motion is granted.

11 Plaintiffs do not object to applicants’ motion for expedited consideration. With respect
12 to their motion for intervention, however, applicants have not demonstrated that disposition of
13 this action “may as a practical matter impair or impede [their] ability to protect [their]
14 interest[s],” and therefore they fail to satisfy the Federal Rules of Civil Procedure requirements
15 for establishing a right to intervene. Fed. R. Civ. P. 24(a)(2); *United States v. Alisal Water*
16 *Corp.*, 370 F. 3d 915 (9th Cir. 2004). As discussed in greater detail herein, applicants
17 misconstrue and overstate the purpose of the underlying litigation, and misrepresent the effect
18 of such litigation on their interests. In addition, although plaintiffs concede that applicants
19 have economic interests that are related to the underlying subject matter of the litigation, the
20 management of the southern sea otter under the *Final Rule Establishing an Experimental*
21 *Population of Southern Sea Otters*, 52 Fed. Reg. 29,754 (Aug. 11, 1987) (“1987 Rule”),
22 applicants overstate the nature and scope of those interests. Accordingly, plaintiffs also
23 address the scope of applicants’ alleged interests in this response brief.

24 On December 23, 2009, plaintiffs filed their First Amended Complaint, primarily to
25 better explain and more fully clarify the agency inaction being challenged and the remedy
26 being sought in this case (Docket #24). Under the amended Complaint, plaintiffs request a
27 simple remedy: that this Court compel defendant U.S. Fish and Wildlife Service (“FWS”) to
28 carry out its mandatory and discrete duties under the 1987 Rule (*i.e.* finalize its failure

1 determination and if failure is found, undertake a rulemaking process to terminate the
 2 experimental population and no other management zone designation) within a reasonable and
 3 enforceable time frame—a remedy that will have no immediate or direct impact on applicants’
 4 interests. Even *if* FWS ultimately decides to abolish the management zone—the speculative
 5 future action that forms the basis of applicants’ allegations that its interests will be impaired by
 6 plaintiffs’ litigation—that decision would not occur until *after* a transparent rulemaking process
 7 with notice and full opportunity for comment from applicants and all other stakeholders. Thus,
 8 contrary to applicants’ assertion that the relief sought by plaintiffs will impair its interests “in a
 9 real and immediate fashion,” Intervention Brief at p.19, plaintiffs’ proposed remedy will leave
 10 applicants in no worse position than before, and would ensure applicants the full opportunity to
 11 advocate for their interests before any final decision is made.

12 Because applicants’ interests will not be impaired or impeded, their motion for
 13 intervention as of right should be denied. Plaintiffs do not object to a grant of permissive
 14 intervention to applicants, so long as applicants are not permitted to broaden the narrow scope
 15 of the litigation currently presented to the Court.

16 ARGUMENT

17 I. APPLICANTS ARE NOT ENTITLED TO INTERVENTION OF RIGHT

18 Federal Rule of Civil Procedure 24(a) provides:

19 Upon timely application anyone shall be permitted to intervene in
 20 an action . . . when the applicant claims an interest relating to the
 21 property or transaction which is the subject of the action and the
 22 applicant is so situated that the disposition of the action may as a
 practical matter impair or impede the applicant’s ability to protect
 that interest, unless the applicant’s interest is adequately
 represented.

23 Fed. R. Civ. P. 24(a). In determining whether these requirements have been met, the Ninth
 24 Circuit applies a four-part test in deciding whether to grant an applicant’s motion to intervene:

- 25 (1) The application for intervention must be timely;
- 26 (2) The applicant must have a “significantly protectable”
 27 interest relating to the property or transaction that is the subject of
 28 the action;

1 (3) The applicant must be so situated that the disposition of the
2 action may, as a practical matter, impair or impede the applicant's
ability to protect that interest; and

3 (4) The applicant's interest must not be adequately represented
by the existing parties in the lawsuit.

4 *Alisal Water Corp.*, 370 F.3d at 919. As demonstrated below, applicants have not
5 demonstrated that their ability to protect their alleged interests will be impaired or impeded by
6 plaintiffs' litigation and have mischaracterized the nature and scope of their protectable
7 interests; accordingly, intervention of right should be denied.

8 **A. Plaintiffs' Litigation Will Not Impair or Impede Applicants' Interests**

9 Under the third prong of the Ninth Circuit's four-part test for intervention, applicants
10 must demonstrate that disposition of the matter "may, as a practical matter, impair or impede
11 the movant's ability to protect its interest." *Alisal Water Corp.*, 370 F.3d at 919. While the
12 "courts are guided primarily by practical and equitable considerations" in deciding motions for
13 intervention, *id.*, and thus there is no precise rule or formula for determining when an
14 applicants' interests may be impaired, the Ninth Circuit has found impairment in circumstances
15 where plaintiffs' remedy would have "direct, immediate, and harmful effects" upon the
16 applicants' interests. *Forest Conservation Council v. U.S. Forest Service*, 66 F.3d 1489, 1494
17 (9th Cir. 1995); *see also Dilks v. Aloha Airlines Inc.*, 642 F.2d 1155, 1156-57 (9th Cir. 1981)
18 (interest must be "direct, non-contingent, substantial, and legally protectable").

19 Even when the applicants' interests may be impaired, however, "[w]hen there are other
20 means available to protect the proposed intervenors' interest," then "there is no impairment
21 caused by the resolution of the underlying lawsuit." *Hazel Green Ranch, LLC v. U.S. Dep't of*
22 *the Interior*, 2007 U.S. Dist. LEXIS 68728, *30 (E.D. Cal. Sept. 4, 2007) (*citing Alisal Water*
23 *Corp.*, 370 F.3d at 921); *see also State ex rel. Lockyer v. United States*, 450 F. 3d 436, 442 (9th
24 Cir. 2006) ("Even if this lawsuit would *affect* the proposed intervenors' interests, their interests
25 might not be *impaired* if they have 'other means' to protect them.") (*quoting Alisal Water*
26 *Corp.*, 370 F.3d at 921) (emphases in original).

27 In this case, the remedy sought by plaintiffs would not have a *direct* effect on
28 applicants' alleged interests because it would work only to establish a reasonable and

1 enforceable time frame for defendant FWS to make a determination that, at most, would lead to
2 a public rulemaking process. If FWS determines that the failure criteria set forth in the 1987
3 Rule have not been met, no further action will be taken, and there will be no effect on the
4 interests of the applicants in this matter. If FWS determines that any of the failure criteria have
5 been met, there will still be no immediate or direct effect on applicants because the 1987 Rule
6 cannot be amended until FWS pursues a rulemaking process through the *Federal Register*.
7 This process would provide applicants and all other stakeholders a full and transparent
8 opportunity (*i.e.* “other means”) to advocate for their interests.¹ Accordingly, applicants’
9 interests will not be impaired or impeded by plaintiffs’ litigation.

10 ***1. Plaintiffs’ Lawsuit Does Not Seek a Remedy that Would Directly***
11 ***Abolish the No Otter Management Zone***

12 Applicants vigorously argue in their intervention brief that the “relief sought by
13 Plaintiffs threatens to impair Proposed Intervenors’ interests in a real and immediate fashion.”
14 Intervention brief at p. 19. However, applicants base their argument on the assumption that
15 disposition of plaintiffs’ lawsuit would result in the direct and immediate abolition of the no
16 otter management zone. *See* Intervention brief at p. 16 (“Proposed Intervenors have a legal
17 interest in this matter because Plaintiffs’ remedy, *i.e.*, *abolishing the Management Zone*, will
18 inevitably affect Proposed Intervenors.”) (emphasis added); *see also id.* at p. 19 (“Abolition of
19 the Management Zone will ... allow unfettered sea otter predation upon sea urchins and
20 abalone, directly resulting in the annihilation of the southern California sea urchin fishery,
21 preventing the reopening of the abalone fishery, and preventing the recovery of abalone
22 generally.”). Indeed, applicants’ entire basis for intervening rests on the allegation that the
23 remedy in plaintiffs’ litigation is abolishment of the no otter management zone.

24 In amending their Complaint, plaintiffs have clarified that the appropriate remedy in
25 this case is for the Court to compel FWS to complete its failure evaluation under the 1987 Rule.

26
27 ¹ In the event FWS undertakes a rulemaking process, it would also presumably finalize its
28 environmental impact statement process under the National Environmental Policy Act, 42
U.S.C. § 4321 *et seq.*, which would provide an additional opportunity for public comment on
the final environmental impact statement.

1 In providing this clarification, Plaintiffs expressly disclaim that they seek any remedy under
2 which this Court would order FWS to abolish the no otter zone or otherwise dictate the
3 substance of any FWS decision. Instead, plaintiffs simply ask this Court to compel FWS to
4 take the action required by 50 C.F.R. § 17.84(d)(8) within an enforceable and reasonable time
5 frame. *See* First Amended Complaint at p. 31-34. Because the allegations of impaired interest
6 in applicants' intervention brief are based on remedies not sought by plaintiffs in their First
7 Amended Complaint, applicants have not demonstrated how the litigation would, as a practical
8 matter, impair their interests. *See United States v. City of Los Angeles*, 288 F.3d 391, 399 (9th
9 Cir. 2002) ("When the potential scope of an action is narrowed by amended pleadings or court
10 orders, or when an existing party expressly and unequivocally disclaims the right to seek
11 certain remedies, the court may consider the case as restructured rather than on the original
12 pleadings in ruling on a motion to intervene.").

13 **2. Plaintiffs Seek an Open and Transparent Rulemaking Process Open to**
14 **All Stakeholders**

15 Under the remedy proposed in plaintiffs' First Amended Complaint, this Court would
16 compel defendant FWS to take at least one, and possibly two, separate final agency actions
17 within 180 and 360 days, respectively. First, plaintiffs seek to compel FWS to issue its final
18 determination as to whether the southern sea otter translocation effort has failed, as determined
19 by the five regulatory criteria at 50 C.F.R. § 17.84(d)(8), within 180 days; and second, *if* FWS
20 determines that the translocation has failed, plaintiffs also seek to compel FWS to initiate a
21 proposed rulemaking to terminate the experimental population designation and associated no
22 otter management zone, and to complete that rulemaking within 360 days. While this
23 rulemaking may culminate in a decision adverse to applicants' interests, the substance of that
24 decision is not at issue in this lawsuit and applicants will have full opportunity to defend their
25 interests through that process. By seeking enforceable and reasonable timelines for FWS
26 action, plaintiffs are not impairing applicants' or anyone else's interests, but are simply seeking
27 to compel the action required by FWS' own regulations.
28

1 The primary cases cited by applicants in their intervention brief do not support a
2 contrary conclusion. In the first case, *United States v. Oregon*, 859 F.2d 635 (9th Cir. 1988),
3 the court granted intervention for residents of a facility for mentally retarded persons where a
4 proposed settlement of litigation brought by the United States against the State of Oregon for
5 substandard conditions at that facility was going to directly impact those residents by
6 immediately reallocating funding and other resources at the facility. In the other case cited by
7 applicants, *Yniguez v. State of Arizona*, 939 F.2d 727, 737 (9th Cir. 1991), the court granted
8 intervention to sponsors of a ballot initiative where the district court had declared the initiative
9 unconstitutional and the Arizona governor had declared her intention not to appeal the decision.
10 In both instances, the Ninth Circuit emphasized the fact that the applicants' interests would be
11 directly and immediately affected by the litigation, and that the applicants had no alternative
12 avenues or remedies to defend those interests. Numerous additional Ninth Circuit cases have
13 also emphasized these principles in finding that an intervenor applicant's interests may be
14 impaired. *See, e.g., Forest Conservation Council*, 66 F.3d 1489 (finding impairment of
15 interest where logging injunction on National Forest lands resulted in "immediate and direct"
16 impact to economic and other interests of county and state agencies); *State ex rel. Lockyer v.*
17 *United States*, 450 F.3d at 442 (finding impairment of interest where groups supporting law
18 being challenged on constitutional grounds had "no alternative forum where they [could]
19 mount a robust defense" of their interests.).

20 In contrast, plaintiffs in this case do not seek any remedy which will result in any direct
21 and immediate impact to applicants, or that will prejudice or impair applicants' ability to
22 protect their interests in the future. Instead, plaintiffs seek a remedy that will provide
23 applicants with an opportunity to participate fully in any future agency rulemaking process.

24 **B. Applicants Overstate and Mischaracterize the Nature and Scope of their**
25 **Protectable Interests**

26 As noted above, the second prong of the Ninth Circuit's four-part test for intervention
27 requires that applicant have a "significantly protectable" interest relating to the property or
28 transaction that is the subject of the action. To establish an interest that is "significantly

1 protectable,” applicants must establish that their interest “is protected under some law,” and
2 that is there is a “relationship between the legally protected interest and the plaintiffs’ claims.”
3 *Nw. Forest Res. Council v. Glickman*, 82 F.3d 825, 839 (9th Cir. 1996). While plaintiffs
4 concede that P.L. 99-625 was enacted, in part, to protect applicants’ interests, as explained
5 below applicants have greatly overstated the extent of that interest, ignored how its alleged
6 interest relates to defendant FWS’ compliance with other federal laws including the
7 Endangered Species Act, and have overstated the extent to which their interests would be
8 adversely impacted in the event that the no otter management zone is eventually abolished.

9 ***1. Public Law 99-625 Did Not Create a Permanent Resource***
10 ***Management System but a Temporary Framework for Reintroducing***
11 ***Southern Sea Otters at San Nicolas Island***

12 In their intervention brief, applicants claim that they have a protectable interest under
13 P.L. 99-625, because “Proposed Intervenors benefit from the current resource management
14 system established by P.L. 99-625.” Intervention Brief at 16. Applicants further claim that
15 “Plaintiffs seek to change that system to the detriment of Proposed Intervenors.” *Id.* However,
16 to the extent that one of the purposes underlying 99-625 was to benefit applicants and their
17 interests through mandating the creation of the no otter zone in the event FWS reintroduced
18 southern sea otters to San Nicolas Island, that benefit was not intended to be a permanent
19 system, but a *temporary framework contingent upon the success of the translocation effort*. As
20 stated by Congress, P.L. 99-625 was intended to be simply and primarily, “a planning
21 mechanism for translocation itself.” 1987 Rule, 52 Fed. Reg. 29,754 at 29,756; First Amended
22 Complaint at ¶¶ 59-64; *see id.* (legislative history stating that the translocation rule “is not
23 intended to replace the Recovery Plan as the primary long-term management document.”).

24 Accordingly, contrary to applicants’ suggestions, P.L. 99-625 did not bestow upon
25 applicants a right to, or protectable interest in, a permanent “no otter zone” encompassing all of
26 southern California’s marine waters and islands. Instead, under the 1987 Rule, FWS is plainly
27 required to judge the success or failure of the translocation effort by five criteria, and if any one
28 of those criteria is met, it must undertake a rulemaking process to withdraw the experimental
population and abolish the management zone. In seeking to compel these long overdue actions,

1 plaintiffs do not, as alleged by applicants, seek to “change” the southern sea otter management
2 system, but merely to *enforce* the rules of the system as established by the 1987 rule.

3 **2. *Fish and Wildlife Service Has Concluded That the No Otter***
4 ***Management Zone Violates Substantive Requirements of the***
5 ***Endangered Species Act (ESA)***

6 Applicants’ claim of a protectable interest in a permanent no otter management zone is
7 further undermined by FWS’ conclusions in the revised Southern Sea Otter Recovery Plan that
8 the experimental population and management zone designation have become a primary
9 impediment to sea otter recovery, and its 2000 biological opinion concluding that sea otter
10 containment substantively violates section 7 of the ESA by jeopardizing the continuing
11 existence of the species. *See* First Amended Complaint at ¶¶ 105-121.

12 In addition to P.L. 99-625, the 1987 Rule was promulgated pursuant to existing
13 statutory authority under section 10(j) of the ESA, which permits the “release”, *i.e.*
14 *reintroduction*, of any threatened or endangered species “outside the current range of such
15 species” if FWS “determines that such release will further the conservation of the species.” *Id.*
16 § 1539(j)(2)(A). These reintroduced populations, such as the southern sea otters reintroduced at
17 San Nicolas Island, are defined as “experimental populations” under the ESA, and are provided
18 fewer protections than they would normally receive under the Act. *Id.* § 1539(j)(1). FWS has
19 used its authority under section 10(j) to reintroduce numerous populations of imperiled species
20 into their historic habitats, including celebrated reintroductions of gray wolves in Yellowstone
21 National Park and National Forest lands in Idaho, 50 C.F.R. § 17.84(i), and California condors
22 at the Grand Canyon in Arizona and Big Sur coastline in California, *id.* § 17.84(j). FWS was
23 able to achieve these successes, in part, due to section 10(j)’s flexibility, which was used in the
24 wolf reintroduction, for example, to relax ESA section 7 consultation requirements for ranchers
25 with public lands grazing allotments within the reintroduction area, and to allow those ranchers
26 to take individual wolves known to have depredated on their livestock.

27 The creation of the no otter zone for the benefit of the fishing industry—encompassing
28 *all* of the species’ historic southern California habitat—represents one of the FWS’ most
sweeping and remarkable uses of section 10(j)’s flexibility, but unfortunately neither the

1 creation of the no otter zone nor the translocation itself appear to have succeeded, and in fact
 2 are now directly undermining the recovery of this imperiled species. Critically, as is the case
 3 with all section 10(j) rules, the benefit provided to the fishing industry in the form of the no
 4 otter management zone was intended to mitigate for, and ease opposition to, *the reintroduction*
 5 *of a threatened or endangered species, in this case the reintroduction of southern sea otters at*
 6 *San Nicolas Island.* Accordingly, the continuing validity of this concession, the enormous no
 7 otter zone, was logically made dependent on the success of the San Nicolas Island translocation
 8 effort, and made subject to specific criteria. Under the plain language of FWS' own
 9 regulations, if any one of those criteria is met, then the translocation effort must be declared a
 10 failure and a rulemaking initiated to terminate the no otter zone and experimental population
 11 designation. Applicants do not have a right to, or protectable interest in, the permanent
 12 retention of the no otter management zone.²

13 **3. *Natural Range Expansion of Southern Sea Otters into Southern***
 14 ***California Waters Is Expected to Be a Gradual Process Taking***
 15 ***Decades***

16 In their intervention brief, applicants assert that they will suffer disastrous consequences
 17 if the no otter management zone is abolished and southern sea otters are allowed to reoccupy
 18 their historic southern California range. *See* Intervention Brief at p. 5 (return of sea otters
 19 would “reduce the fishable sea urchin and abalone populations to unsustainable levels, thus
 20 ending the California sea urchin fishery and preventing the reopening of the abalone fishery”);
 21 *id.* at p. 16-17 (predicting that termination of management zone would result in \$6.5 million in

22
 23 ² This is especially true now that substantial numbers of male sea otters have begun to *naturally*
 24 expand the species' range into its historic southern California habitat. The flexibility afforded
 25 to FWS when it undertakes a reintroduction effort under section 10(j) and P.L. 99-625 is not
 26 relevant to the southern sea otter's *natural expansion* into southern California waters. Neither
 27 the ESA nor the Marine Mammal Protection Act allows FWS or other government agencies to
 28 actively prohibit an endangered or threatened species from reinhabiting its former habitats; in
 fact, the law requires those agencies to take every action within their authority to *promote* such
 expansion. *See, e.g.,* 16 U.S.C. 1536(a)(1). In addition, the natural expansion of range by
 large numbers of sea otters from the fully protected Central Coast population southward into
 the no otter management zone calls into question the continuing legality of the experimental
 population designation under the ESA. *Id.* § 1539(j)(2) (authorizing experimental population
 designation “*only when, and at such times as, the population is wholly separate geographically*
from nonexperimental populations of the same species.”) (emphasis added).

1 sea urchin harvest revenue losses, \$658,000 in lost wages to tenders, 615 job losses, and \$7
2 million in losses to local economies from wages lost).

3 As discussed in detail above, the remedy sought by plaintiffs in this case is for the Court
4 to compel FWS to make required decisions within a reasonable and enforceable time frame, not
5 to substantively order the agency to conclude that translocation has failed and to end the
6 management zone and experimental population designation. Plaintiffs do believe, however,
7 that the evidence overwhelmingly supports FWS ultimately making those decisions, and that
8 the economic and other impacts of ending the management zone experimental population
9 designation on applicants and other stakeholders will need to be carefully considered and
10 addressed. Importantly, FWS has already conducted much of the relevant analysis in its 2005
11 Draft Supplemental Environmental Impact Statement (“DSEIS”). *See* First Amended
12 Complaint at ¶¶ 122-132. In that document, FWS notes the challenges posed by ending the
13 management zone and pledges to work with stakeholders to address those challenges. *See*
14 DSEIS at p. 6 (FWS “propose[s] to work closely with the California Department of Fish and
15 Game and affected fishers to develop fishery management strategies that would minimize
16 effects on individual fishers.”). Moreover, contrary to applicants’ characterization of the sea
17 otters’ return to their historic southern California habitats as a zero-sum undertaking, the
18 information presented in the DSEIS and other economic studies suggest that the predictions
19 relied upon by applicants are overly simplistic. In fact, it is expected that otters will gradually
20 expand their range over many decades (never reaching all areas of southern California) in a
21 manner that allows for both adjustment by affected fisheries and the emergence of new
22 industries and economies, including potential new fisheries resulting from the fact that otters
23 tend to increase productivity of some species, as well as new economies that capitalize on the
24 public’s appreciation for and love of sea otters and marine biological diversity generally. In
25 fact, the DSEIS predicts that any expansion of the southern sea otter range “would take place
26 over many decades, allowing for a gradual transition of fishery and ecotourism activities that
27 would likely dampen any regional economic impacts that could occur.” *Id.*

1 **II. PLAINTIFFS DO NOT OBJECT TO PERMISSIVE INTERVENTION,**
 2 **PROVIDED APPLICANTS ARE NOT ALLOWED TO UNDULY DELAY OR**
 3 **PREJUDICE THE ADJUDICATION OF PLAINTIFFS' CLAIMS**

4 Rule 24 allows the court to permit intervention where the applicant “has a claim or
 5 defense that shares with the main action a common question of law or fact.” Fed. R. Civ. P.
 6 24(b)(1)(B). However, in exercising its discretion in considering the application for permissive
 7 intervention, the court “must consider whether the intervention will unduly delay or prejudice
 8 the adjudication of the original parties’ rights.” Fed R. Civ. P. 24(b)(3).

9 To the extent that the applicants demonstrate an interest in the narrow issue before the
 10 Court—whether FWS has a duty to complete its failure evaluation under the 1987 Rule—
 11 plaintiffs do not object to permissive intervention. However, to the extent that applicants’
 12 interests are tied to a future action of the agency that requires a formal public rulemaking
 13 process, their interests are not ripe or directly relevant to the case at hand.

14 Thus, if the Court decides to grant permissive intervention, we respectfully request that
 15 the Court limit the role of intervenors to addressing the single claim raised in the First
 16 Amended Complaint, *i.e.*, whether the 1987 Rule compels FWS to issue a final determination
 17 as to whether the translocation effort has failed and, if a positive determination is made, to
 18 publish a proposed rulemaking (with opportunity for notice and comment) in the *Federal*
 19 *Register*.

20 **CONCLUSION**

21 For the reasons stated above, plaintiffs respectfully request that the Court deny
 22 applicants’ motion for leave to intervene as of right in this action. Plaintiffs do not oppose this
 23 Court granting permissive intervention to applicants, so long as applicants are not permitted to
 24 broaden the narrow scope of the litigation currently presented to the Court

25 Respectfully submitted this 4th day of January, 2010,
 26 ENVIRONMENTAL DEFENSE CENTER
 27 LINDA KROP
 28 BRIAN SEGEE

/s/

 Brian Segee

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2010, I electronically filed plaintiffs' RESPONSE IN PARTIAL OPPOSITION TO MOTION OF CALIFORNIA SEA URCHIN COMMISSION ET AL. FOR LEAVE TO INTERVENE with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the following:

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/s/ _____

Brian Segee