THE HONORABLE RICHARD A. JONES

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ABDIQAFAR WAGAFE, *et al., on behalf of himself and other similarly situated*,

Plaintiffs,

v.

DONALD TRUMP, President of the United States, *et al.*,

Defendants.

CASE NO. 2:17-cv-00094-RAJ

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO COMPEL DOCUMENTS WITHHELD UNDER THE LAW ENFORCEMENT AND DELIBERATIVE PROCESS PRIVILEGES**



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## INTRODUCTION

Defendants have properly, and in accordance with the Court's prior orders, asserted the law enforcement and deliberative process privileges over the redacted portions of the 41 documents remaining at issue in Plaintiffs' motion to compel. These documents contain redactions over types of information the Court has found to be law enforcement-privileged, such as database codes, personally identifying information, and third-party law enforcement agency information. The documents also contain redactions over DHS information identifying the types of information the United States receives from foreign governments and revealing the scope and limitations of the government's screening and vetting practices. The documents additionally contain redactions over internal USCIS information that is closely interwoven with the aforementioned, third agency privileged information, and accordingly, is privileged as well. Furthermore, Plaintiffs' non-compelling need for the law enforcement-sensitive information they seek is far outweighed by the public's interest in nondisclosure of information that, if disclosed, would pose risks to public safety and national security.

These documents also contain redactions over types of information the Court has found to be deliberative process-privileged, such as pre-decisional policy options, recommendations, proposals, and suggestions that were never implemented. Nondisclosure of these types of deliberative information is appropriate where the information lacks relevance to Plaintiffs' claims, other evidence related to Plaintiffs' claims is available, and the disclosure would hinder agency officials' candid communication about policy choices.

Finally, contrary to Plaintiffs' claims, the existence of a Stipulated Protective Order in this case does not sufficiently guard against the harm that would result from the disclosure of the information in these documents redacted pursuant to the law enforcement and deliberative process privileges.



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## PROCEDURAL HISTORY

Plaintiffs challenge CARRP, USCIS's policy for identifying and processing cases with national security concerns, on both statutory and constitutional grounds. *See generally* Dkt. 47. Defendants have produced to Plaintiffs, *inter alia*, roughly 40,000 documents. Plaintiffs have made numerous challenges to Defendants' law enforcement and deliberative process privilege redactions in produced documents. *See*, *e.g.*, Dkt. Nos. 109, 152, 221, 260. And the Court has issued various orders on these topics. *See*, e.g., Dkt. Nos. 148, 189, 263, 274, 320.

On January 9, 2020, Plaintiffs filed a motion to compel challenging Defendants' law enforcement and deliberative process privilege redactions in a number of documents in several respects. However, following the Court's January 16, 2020 order addressing related issues, the parties met and conferred, and Defendants reproduced a portion of the initially challenged documents with fewer redactions. As a result, Plaintiffs currently challenge Defendants' redactions in 41 documents, including five documents that are part of the Certified Administrative Record ("CAR"),[1] pursuant to the law enforcement and deliberative process privileges. *See* Ex. B; *see also* Dkt. 320. The response therefore addresses the propriety of the redactions in those documents.

[1] Based on Plaintiffs' initial challenge that privileges had never been properly asserted over the CAR, Defendants directed Plaintiffs to CAR duplicates or near-duplicates that were produced with privilege logs and declarations. *See* Dkt. 312 at 2; *see also* Ex. A, CAR Duplicate Chart. On January 31, 2020, Plaintiffs stated that they "agree[d] to withdraw their challenge that Defendants improperly asserted privilege over the [CAR], at this time." Ex. B, E-Mails Between Heath Hyatt and Victoria Braga. Then, on February 2, 2020, in response to a statement made by Defendants following Plaintiffs' January 31, 2020 e-mail, Plaintiffs informed Defendants that they are challenging six CAR documents, *see* Ex. B, for two of which Defendants identified the same document as a duplicate or near-duplicate, *see* Ex. A. Defendants understand that Plaintiffs are challenging the redactions in these six CAR documents, and not the manner in which Defendants claimed privilege over the redacted information therein. However, as a result of how Plaintiffs initially challenged the CAR, Defendants will refer to these documents in this response by the Bates numbers of their five otherwise-produced duplicates or near-duplicates. *See* Ex. A.



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## ARGUMENT

### I. Defendants Have Properly Withheld Information as Law Enforcement-Privileged

Defendants' law enforcement redactions fall within the scope of the privilege as defined by applicable law and the Court in this litigation. The attached declarations of the Matthew D. Emrich – Associate Director of USCIS's Fraud Detention and National Security ("FDNS") Directorate – and Michael Scardaville – a Senior Advisor for the Screening and Vetting Directorate in the Office of Strategy, Policy, and Plans within the Department of Homeland Security ("DHS") – discuss three broad categories of law enforcement-privileged information within the 41 documents at issue: third-party agency information, USCIS information intertwined with third-party agency information, and DHS information. *See generally* Ex. C, Emrich Decl.; Ex. D, Scardaville Decl.

Defendants redacted third-party law enforcement agency information from 31 of the documents at issue. *See* Ex. C at 8 ¶ 23; Ex. D at 3 ¶ 4. The redacted information in these documents includes, *inter alia*, information about "sensitive electronic systems, as well as codes," Ex. C at 8 ¶ 24, information "related to the Federal Bureau of Investigation's ("FBI") National Namecheck Program and fingerprint check," *id.* at 8 ¶ 26, and information about law enforcement agencies "processes and techniques for making national security and law enforcement evaluations," Ex. D at 3 ¶ 6. Declarations submitted by third-party law enforcement agencies attest that such information is included in the documents at issue, and explain, as they have in the past, how the disclosure of such information poses a risk to national security and public safety. *See generally* Ex. E, Campbell Decl.; Ex. F, Allen Decl.; Ex. G, Jung Decl. Mr. Emrich and Mr. Scardaville add that the disclosure of third-party law enforcement agency information could harm critical information-sharing relationships that mutually benefit the work and mission of these agencies and USCIS and DHS. *See* Ex. C at 9-10 ¶ 32; Ex. D at 4 ¶ 9.



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Moreover, this Court has been cognizant of the dangers of disclosing third-party law enforcement agency information. *See In re Dept. of Homeland Security*, 459 F.3d 565, 569 (5th Cir. 2006) (noting reasons for protecting law enforcement information from disclosure "are even more compelling" in "today's times," when "the compelled production of government documents could impact highly sensitive matters relating to national security"). The Court has recognized the existence of a law enforcement privilege four times in this litigation. *See* Dkt. 98 at 3, Dkt. 148 at 3; Dkt. 274 at 4-5; Dkt. 320 at 6-8. Most recently, the Court specified that "[i]nformation regarding law enforcement databases," and "[t]hird-party law enforcement agency information" could remain redacted as law-enforcement privileged information. Dkt. 320 at 6-; *see also In re Dep't of Investigation of the City of N.Y.*, 856 F.2d 481, 484 (2d Cir. 1988) (listing "prevent[ing] disclosure of law enforcement techniques and procedures" and "otherwise prevent[ing] interference with an investigation" as two "purpose[s] of the [law enforcement privilege").

Plaintiffs, too, seemingly recognize the danger in the disclosure of this information, recently noting that they are "not challenging redactions that appear to be screenshots of USCIS or third-party computer databases . . . the redaction of personal identifying information . . . [or] the redaction of methods and techniques that third-agencies use to collect information." Ex. B; *see also Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D. Pa. 1973) (listing "the importance of the information sought to the plaintiffs' case" as a factor to consider when balancing the public's interest in nondisclosure against the moving party's need for access to the privileged information). Ultimately, given this Court's prior rulings and Plaintiffs' clarification about the types of information in which they are and are not interested, there is no question that the third-party law enforcement agency information in the documents at issue has been properly withheld as law enforcement privileged. *See* Dkt. 320 at 6-7; *see also Dep't of Investigation of the City of N.Y.*, 856 F.2d at 484.



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Defendants also protected USCIS information intertwined with third agency information as law-enforcement privileged in 15 documents. Ex. C at 10 ¶ 34. Mr. Emrich indicates that the withheld USCIS information in these documents is interlinked with the third agency law enforcement-privileged information discussed above. *See generally id.* 10-13 ¶¶ 34-44. Redacted UCSIS information within these documents is only withheld in so far as "the disclosure . . . would provide insight into third agency law enforcement information." *Id.* at 10 ¶ 34.

First, redacted USCIS information in these documents may reveal "investigative information obtained from" law enforcement agencies. Ex. C at 10 ¶ 35. The Court's January 16, 2020 order squarely determined that "third-party agency information [relied upon] to make CARRP determinations" and information that could "thwart future cross-agency information sharing" was protected from disclosure. Dkt. 320 at 6-7. The Court also clarified that where USCIS information is intertwined with third agency information, that information may remain redacted. *Id.* at 8, fn 2. "Investigative information obtained from" law enforcement agencies fits within those categories. *See* Ex. C at 10 ¶ 35.

Next, Mr. Emrich describes certain information related to the Fraud Detection and National Security – Data System (FDNS-DS) and ATLAS (not an acronym) that remains withheld. *Id.* at 10-12 ¶¶ 36-39. ATLAS is a USCIS platform that works within FDNS-DS and interacts with third agency databases, such as TECS. *Id.* at 12 ¶ 39. In its January 16, 2020 order, the Court found that information related to FDNS-DS in prior documents was properly withheld. *See* Dkt. 320 at 6 (citing the paragraphs of Mr. Emrich's prior declaration discussing FDNS-DS and denying Plaintiffs' motion to compel this information). The redacted information at issue here is of the same nature as the information the Court determined was properly withheld. Further, the redacted information is generally screenshots, from which plaintiffs have disclaimed interest. *See* Ex. B.



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Last, Mr. Emrich describes information from actual "USCIS administrative investigation[s]" where an individual "may have also been under investigation by a third-party law enforcement agency." Ex. C at 12 ¶ 40. In these instances, Defendants disclosed general descriptions of cases, but withheld specific personally identifying information, in accordance with the Court's recent order. *Id.*; *see* Dkt. 320 at 6.

In its recent order, the Court found "the balance of factors [to] weigh in favor of disclosure" of "[i]nternal USCIS information." Dkt. 320 at 7. However, the Court was clear that to the extent internal USCIS information implicates the types of information the Court found to be properly redacted pursuant to the law enforcement privilege – third-party law enforcement agency information, information regarding law enforcement databases, and personal identifying information – the USCIS information could remain redacted. *Id.* at 8 n.2. As discussed above, the types of internal USCIS information that remains redacted from the documents at issue here falls squarely within this category of information, and is privileged on that basis.

Furthermore, the fact that all of the internal USCIS information discussed in paragraphs 34-39 of Mr. Emrich declaration is intertwined with third agency information establishes a "strong presumption against lifting the privilege." *See* Dkt. 320,at 6-7; *see also In Re City of N.Y.*, 607 F.3d 923, 945 (2d Cir. 2010) (quoting *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1125 (7th Cir. 1997)). And Plaintiffs have certainly failed to show a "compelling need" for the redacted USCIS information that is intertwined with third agency information, much less one that "outweighs the public interest in nondisclosure." *See City of N.Y.*, 607 F.3d at 945. In this regard, Plaintiffs have admitted that they are not interested in databases, personally identifying information, and third-party law enforcement agency methods and techniques, Ex. B, precisely the types of information implicated by the USCIS information at issue, *see* Ex. C at 36-41; *see also Frankenhauser,* 59 F.R.D. at 344 (E.D. Pa. 1973) (listing "the importance of the information sought to the plaintiffs'



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case" as factor to consider when balancing the public interest's in nondisclosure against the moving party's need for access to the privileged information). Additionally, in redacting USCIS information that is intertwined with this otherwise privileged information in which Plaintiffs are not interested, Defendants have endeavored to redact only information that is truly indistinguishable from the otherwise privileged information, and to disclose to Plaintiffs information that is pertinent to their claims. *See*, *e.g.*, Ex. C at 9 ¶ 27 (discussing the redaction of third-party law enforcement agency information from hypotheticals, while otherwise releasing the content of the hypotheticals); *id.* at 12 ¶ 40 (noting that "descriptions of the [actual] cases themselves are generally revealed . . . however, more specific information that may be sufficient to identify a particular individual . . . remains redacted"); *see also Frankenhauser*, 59 F.R.D. at 344 (listing "whether the information sought is available through other discovery or from other sources" as a factor to consider when balancing the public interest's in nondisclosure against the moving party's need for access to the privileged information). Based on these considerations, on balance, the withheld law enforcement privileged USCIS information should remain redacted.

Finally, Defendants protected DHS information as law enforcement-privileged in 8 documents. *See* Ex. D at 5 ¶¶ 13-14, 6 ¶ 16, 6-7 ¶¶ 19-20, 22, 8 ¶ 26, 9 ¶ 28. Withheld information includes information concerning an interagency evaluation of foreign governments' information sharing capabilities, *id.* at 6 ¶ 16, the development of a uniform baseline for screening and vetting procedures, *id.* at 6 ¶¶ 18-19, and information regarding sensitive electronic systems, *id.* at 8 ¶ 26, 9 ¶ 28. The national security risks associated with the disclosure of such information are readily apparent. *See*, *e.g.*, *id.* at 6 ¶ 16, 6-7 ¶ 20; *see also Dept. of Homeland Security*, 459 F.3d at 569 (noting reasons for protecting law enforcement information from disclosure "are even more compelling" in "today's times," when "the compelled production of government documents could impact highly sensitive matters relating to national security"). Moreover, Plaintiffs again fall far



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short of showing a compelling need for the DHS information they seek, much less one that outweighs the public interest in nondisclosure. *See City of N.Y.*, 607 F.3d at 945. This is particularly so where, as Mr. Scardaville explains, the DHS information Plaintiffs seek – excepting in one instance of sensitive DHS law enforcement information in a USCIS document – "includes no references to CARRP, much less any discussion of CARRP policy, procedure, or training." Ex. D at 6 ¶ 17, 7 ¶ 23, 8 ¶ 27; *see Frankenhauser*, 59 F.R.D. at 344 (listing "the importance of the information sought to the plaintiffs' case" as a factor to consider when balancing the public interest's in nondisclosure against the moving party's need for access to the privileged information). Indeed, Plaintiffs have not even attempted to explain the relevance of DHS information unrelated to CARRP—much less provide persuasive arguments that their interest outweighs the public interest in nondisclosure. *See generally* Dkt. 312. Though the vast majority of DHS documents Plaintiffs seek relate to Executive Order 13780, no mention of the Executive Order is even made in Plaintiffs' motion. *See generally id.* In fact, no reference to DHS or its interests can be found in Plaintiffs' motion at all—Plaintiffs arguments focus solely on USCIS and CARRP. *See generally id.* Consequently, it is clear that, on balance, the withheld law enforcement-privileged DHS information should remain redacted.

## II. Defendants Have Properly Withheld Information Under the Deliberative Process Privilege

Defendants' deliberative process redactions fall within the scope of the privilege as defined by applicable law and the Court in this litigation. Defendants have protected USCIS information in 14 documents, and DHS and/or third-party information in 11 documents, as deliberative. Ex. C at 5 ¶ 10; *see generally* Ex. D at 3-8 ¶¶ 4-27. The USCIS information withheld as deliberative includes draft documents, as well as documents presenting "options," "proposals," "suggestions," and "considerations" regarding USCIS policy, many of which were not ultimately part of implemented



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USCIS policy and/or may have been implemented in an altered form. *See* Ex. C at 5-6 ¶¶ 11-18. The Court has recently confirmed that such information is "predecisional and deliberative," and therefore subject to the application of the deliberative process privilege. *See* Dkt. 320 at 9 ("the deliberative process privilege applies to this document because it is (1) predecisional and (2) deliberative in nature, in that it relates to "opinions, recommendations, [and] advice about agency policies") (citing *F.T.C. v. Warner Connc'ns Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984)); *see also* Dkt. 189 at 4, Dkt. 263 at 3.

The privilege over the deliberative USCIS information at issue here should not be pierced. Mr. Emrich details the detrimental effect the release of this information would have on candid communication among USCIS policymakers, thereby impeding USCIS's ability to base policy decisions on the best information available. Ex. C at 7 ¶¶ 19-20. The Court has found the existence of such risks to weigh against disclosure. Dkt. 320 at 9 ("the extent to which disclosure of this document could hinder 'frank and independent discussion[s] regarding contemplated policies and decisions' weighs in favor of denying the motion"); *see F.T.C. v. Warner Connc'ns Inc.*, 742 F.2d at 1161 (establishing this consideration as a factor to consider when balancing whether a moving party's need for materials and accurate fact-finding overrides the government's interest in nondisclosure). Additionally, Defendants have produced 40,000 documents to Plaintiffs, many of which describe former and current CARRP policy, guidance, and training. As Mr. Emrich explains, providing Plaintiffs, as these documents do, "with descriptions of unimplemented ideas, proposals, and recommendations is confusing and has to potential to mislead" with regard to how CARRP operated in the past and operates today. Ex. C at 7 ¶ 21. The release of this information is therefore not only detrimental to the government, but also to the effective litigation of Plaintiffs' claims. *See F.T.C. v. Warner Connc'ns Inc.*, 742 F.2d at 1161 (establishing the relevance of the evidence and the availability of other evidence as factors to consider when balancing whether a moving party's need



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for materials and accurate fact-finding overrides the government's interest in nondisclosure). Ultimately, on balance, the deliberative USCIS information in these documents should not be disclosed. *See id.*

DHS information and/or third-party law enforcement agency information withheld as deliberative includes draft documents, Ex. D at 3 ¶ 5, 7 ¶ 22, 8 ¶ 26; proposed talking points, *id.* at 8 ¶ 25; and deliberative, predecisional interagency discussions regarding the implementation of two sections Executive Order 13780, which ordered the Secretary of Homeland Security, in consultation with other agencies, to establish "global requirements for information sharing in support of immigration screening and vetting," and which ordered the Secretary of State, the Attorney General, the Secretary of Homeland Security, and the Director of National Intelligence to "implement a program" that would include the "development of a uniform baseline for screening and vetting standards and procedures," *id.* at 4-5 ¶¶ 12-14, 6-7 ¶¶ 18-20. The predecisional, deliberative nature of these documents, particularly because these disclose interagency policymaking deliberations, is unquestionable. *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 150 (1975) (stating that the deliberative process privilege may be invoked to protect "documents reflecting . . . deliberations comprising part of a process by which governmental decisions and policies are formulated").

As with the deliberative USCIS information discussed above, the privilege over the deliberative DHS and third-party law enforcement agency information at issue here should not be pierced. Mr. Scardaville explains that the disclosure of such information presents a risk of chilling candid communication between policymakers as they make decisions concerning national security policy, thereby posing a risk that such policy will not be based on the best information available. *See* Ex. D at 5 ¶ 14, 8 ¶¶ 25-26. This weighs heavily against its disclosure. *See* Dkt. 320 at 9 ("the extent to which disclosure of this document could hinder 'frank and independent discussion[s] regarding contemplated policies and decisions' weighs in favor of denying the motion"); *see F.T.C.*



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*v. Warner Connc'ns Inc.*, 742 F.2d at 1161 (establishing this consideration as a factor to consider when balancing whether a moving party's need for materials and accurate fact-finding override the government's interest in nondisclosure). Also weighing against the disclosure of this information is the fact that, in at least one instance of draft information, "[t]he final document . . . was produced." *See* Ex. D at 7 ¶ 22; Dkt. 320 at 9; *see also F.T.C. v. Warner Connc'ns Inc.*, 742 F.2d at 1161 (establishing the availability of other evidence as a factor to consider when balancing whether a moving party's need for materials and accurate fact-finding override the government's interest in nondisclosure). Finally, and most importantly, additionally weighing against the disclosure of the deliberative DHS information at issue is the fact that the information "includes no references to CARRP, much less any discussion of CARRP policy, procedure, or training," and it is therefore "unrelated to Plaintiffs' claims." Ex. D at 6 ¶ 17, 7 ¶ 23, 8 ¶ 27; *see F.T.C. v. Warner Connc'ns Inc.*, 742 F.2d at 1161 (establishing the relevance of the evidence as a factor to consider when balancing whether a moving party's need for materials and accurate fact-finding override the government's interest in nondisclosure). And, as explained above, Plaintiffs do not even argue that—much less make compelling arguments explaining why—they are entitled to information regarding deliberations between DHS officials and interagency partners that are wholly unrelated to CARRP. *See generally* Dkt. 312. As such, on balance, it is clear that the deliberative DHS information in these documents should not be disclosed. *See F.T.C. v. Warner Connc'ns Inc.*, 742 F.2d at 1161.

**III. Disclosing Privileged Documents Subject to a Protective Order is Insufficient to Prevent Harm**

With respect to both the law enforcement-privileged information and deliberative process-privileged information discussed above, Plaintiffs argue that harm resulting from disclosure will be mitigated by the Stipulated Protective Order in this case. Dkt. 312 at 14, 16. As Defendants have argued elsewhere, Dkt. 119 at 10-13, Dkt. 226-1 at 18-19, Dkt. 257 at 11-12, Dkt. 266 at 13, that



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"deeply flawed procedure" cannot fully protect the confidentiality of the privileged information. *See City of N.Y.*, 607 F.3d at 935 n.12. Defendants incorporate those arguments herein by reference.

Defendants emphasize that, given the highly sensitive nature of the law enforcement information at issue in this case, only full protection of the withheld information ensures that public safety and national security is not compromised. *See Dept. of Homeland Security*, 459 F.3d at 569 (noting reasons for protecting law enforcement information from disclosure "are even more compelling" in "today's times," when "the compelled production of government documents could impact highly sensitive matters relating to national security"); *see also* Ex. C at 13 ¶¶ 46 (explaining that the USCIS information remaining redacted in the documents at issue "implicates the law enforcement privilege of third-party agencies, and therefore should not be disclosed even under an Attorneys Eyes Only restriction); Ex. D at 9 ¶ 29. Likewise, the deliberations reflected in (and redacted from) these documents concern this type of law enforcement sensitive information – *i.e.*, vetting, screening, and information-sharing practices. Ex C. at 5-7 ¶ 11-18, Ex. D at 5-9 ¶¶ 11-28. It is therefore essential that these deliberations remain fully protected to ensure frank and candid discussion on such issues, leading to decisions impacting national security and public safety that are based on the best information available. *See* Ex. C at 7 ¶ 19, Ex. D at 5 ¶ 14, 8 ¶¶ 25-26; *see also* Ex. C at 7-8 ¶ 22 (noting that the release of deliberative information under a protective order might invite Plaintiffs to "explore these pre-decisional and deliberative discussions in depositions or testimony, further chilling open and candid communications about contemplated policy changes").

**CONCLUSION**

For the reasons set forth above, the Court should deny Plaintiffs' Motion to Compel Documents Withheld Under the Law Enforcement and Deliberative Process Privileges.



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DATED this 4th day of February, 2020.

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 4, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

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