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THE HONORABLE RONALD B. LEIGHTON

UNITED STATES DISTRICT COURT  
FOR THE WESTRN DISTRICT OF WASHINGTON  
AT TACOMA

CAROLYN ANDERSON,  
  
Plaintiff,

NO. C11-902RBL

v.

DEFENDANT FOUR OUR FAMILIES, INC's  
TRIAL BRIEF

DOMINO'S PIZZA, INC., DOMINO'S PIZZA, LLC,  
FOUR OUR FAMILIES, INC., and CALL-EM-ALL,  
LLC,  
  
Defendants.

COMES NOW the Defendant, by and through their attorney of record, Nelson C. Fraley II and Nicole C. Brown of FAUBION, REEDER, FRALEY & COOK, P.S., and hereby submit this trial brief in the above entitled cause.

I. FACTS

During the summer of 2009, CEA's services were purchased and retained by FOFI to make automated calls to FOFI's existing customers. FOFI is a Domino's Pizza franchisee selling pizza and other menu items to its customers in Pierce County, Washington. A single call was made to Plaintiff's residential line on August 31, 2009, offering a large pizza at a

1 discounted price. At the time of the call, the Plaintiff had an existing business relationship  
2 with FOFI in the previous eighteen (18) months of the call.

3 CEA, a Texas corporation, had the equipment and technology required to make such  
4 calls. CEA provides its services to clients in different states. ECF #115. Under Washington  
5 law, the equipment technology is termed Automated Dialing and Announcing Devices.  
6 RCW 80.36.400. In May 2009, Michael Brown, president of FOFI, learned of CEA and its  
7 services during a Domino's World Wide Rally Equipment and Vendor Show in Las Vegas,  
8 Nevada. Vendors are invited to showcase their equipment and/or services to franchisees  
9 and Domino's employees. FOFI discussed CEA's services with the President of CEA, Brad  
10 Herrmann, the only CEA representative at the event. ECF #115. It was explained how  
11 easy the process was, how other Domino's franchisees had success, and that as long as  
12 the federal laws were complied with- everything would be fine. Brown was convinced, by  
13 the information provided, that this was the answer to FOFI's struggling sales in a troubled  
14 economy.  
15

16  
17 When Brown returned to Washington State, he contacted Call-Em-All. To retain CEA's  
18 services, he accessed CEA's website whereby he created a username and password,  
19 provided contact information, and purchased credits to make phone calls to FOFI's  
20 existing customers. ECF #107. During the set-up process, Brown is uncertain whether  
21 there was or was not the CEA's Terms of Use, a contract, or something he had to do in  
22 order to sign up. ECF # 107, 115. FOFI then uploaded its customer's phone numbers and  
23 recorded a message like the one that played for Plaintiff on August 31, 2009. ECF # 73  
24 Exh. 3 (Transcript of Message). CEA supplied to FOFI information regarding requirements  
25 the message must contain according to the Federal Trade Commission ("FTC"). ECF  
26

1 #107. To be in compliance with the Telephone Consumer Protection Act ("TCPA"), it  
2 requires users to identify itself, allow the option to opt out, disconnect within a specific  
3 period of time, etc. 47 USC §227, et seq., The recording was reviewed by CEA the first  
4 time its services were used by FOFI. At no time after did CEA review the messages  
5 recorded by FOFI. ECF # 115. "Because it has thousands of clients making calls all over  
6 the United States and Canada, CEA is not in a position to vet the legality of each call, just  
7 like the United States Post Office cannot guarantee whether every piece of mail it delivers  
8 is sent for a proper purpose". CEA's Motion ECF Doc #107, 4. Yet, CEA had a mechanism  
9 in place to ensure that at least one of FOFI's messages met the minimum federal  
10 requirements. ECF #115.

12 In FOFI's answer to CEA's Requests for Production No. 5, it provided a response to  
13 CEA's request with, "Also attached are CEA's Privacy Statement, Terms of Use, and  
14 Features dated June 23, 2010 and accessed via CEA's website". ECF #107. These items  
15 were retrieved by FOFI's counsel on that date. ECF #115. CEA has several items on its  
16 website to try and make sure its "clients are using the technology responsibly". ECF  
17

18 #107. The alleged Terms of Use at issue in this Motion states:

19 You will not use, or attempt to use, the Call-Em-All Service in connection with  
20 any...messages...that are...unsolicited

21 User FOFI agrees that it is the sole responsibility of User to abide by any laws  
22 defined by the State or Federal Government in which Call-Em-All Services will be  
23 applicable. User understands and agrees that Call-Em-All will not be held  
24 responsible for damages to the User or any third party incurred due to User's  
25 failure to abide by State and/or Federal laws.

26 You agree to indemnify, defend, and hold harmless Call-Em-All, its officers,  
directors, owners, employees, agents, other Service Providers, vendors or  
customers from and against all losses, liabilities, expenses, damages and costs,

1 including reasonable attorneys' fees resulting from any violation of the User  
2 Agreement by you or any harm you may cause to anyone. You agree and we  
3 reserve the right, at your expense, to assume the exclusive defense and control of  
4 any matter otherwise subject to indemnification by you. ECF # 107.

5 FOFI chose to terminate any future use of CEA's services on September 1, 2009, after it  
6 was required to have written express permission from each customer. ECF #115. FOFI did  
7 not feel the hassle was worth the return. *Id.* CEA noted in its deposition, due to this new  
8 requirement, business with Domino's franchisees essentially ceased. ECF #115.

9 Procedural history of this litigation:

10 Anderson filed suit on or about April 2010 in King County Superior Court against  
11 Domino's Pizza and FOFI and amended her Complaint in May 2011 adding CEA as a  
12 Defendant to this action. On May 31, 2011, CEA timely moved this action to the Western  
13 District of Washington when it was added as a Defendant to this litigation. The Plaintiff  
14 alleged violations of the TCPA and RCW 80.36.400 on behalf of a class. Plaintiff failed to  
15 form a class under the TCPA and within the time constraints of Local Rule 23(i)(3).  
16 Therefore, on May 15, 2012, her motion was denied. ECF Doc. #104. Defendant  
17 Domino's Pizza, Inc. and Domino's Pizza, LLC were granted summary judgment and  
18 FOFI's request was denied. *Id.* On June 26, 2012, CEA filed its summary judgment motion  
19 with a hearing date of September 7, 2012. ECF Doc. #107. Trial is set to begin on this  
20 matter on September 24, 2012.

21  
22 FOFI submitted an Offer of Judgment to Plaintiff. The Offer was accepted and filed  
23 with the Court on August 27, 2012. ECF Doc. #110. CEA recently filed a Stipulated  
24 Judgment as to Defendant Call-Em-All, LLC. on August 28, 2012, whereby it promised to  
25 pay Plaintiff \$5,000. ECF Doc. # 111.  
26

1 In attempting to resolve this matter, e-mail correspondence was sent between the  
2 legal counsel of all parties involved. ECF #107. The e-mail by FOFI's counsel was made in  
3 settlement discussions and was simply a summation of the status of those discussions.

## 4 II. ISSUES AT TRIAL

- 5 1. Whether FOFI promised to indemnify CEA by accepting the alleged Terms of Use?
- 6 2. Whether CEA's actions were negligent causing harm to Plaintiff?
- 7 3. Whether the alleged indemnity clause clearly stated FOFI was to defend against  
8 the harm CEA caused to Plaintiff?
- 9 4. Whether FOFI has violated the alleged Terms of Use by violating state/federal law  
10 or by causing harm to Plaintiff and therefore must indemnify CEA?  
11

## 12 III. LAW AND LEGAL ARGUMENT

13 A. CEA has never established that FOFI agreed to, accepted, or acknowledged the  
14 Terms of Use in 2009.

15 CEA has not established that FOFI signed and accepted the Terms of Use at issue in  
16 this litigation. On September 30, 2010, the deposition testimony of Michael Brown  
17 ("Brown") was taken by Plaintiff's counsel.

18 Q: So when you would go online- - when you went on - - excuse me, went initially to  
19 do this, was there some portion of their [CEA] web page where you had to, in  
20 effect, sign a contract, where you had to click 'I agree' or somehow there was  
21 something that went that - - that you had to do?"

22 A: "Yeah, I believe there was." - ECF #107.

23 Brown never identifies in his answer whether it was a contract, "something that he had to  
24 do", and more specifically, whether it was CEA's Terms of Use he had, if at all, agreed to.

25 CEA's Terms of Use provided to the Court in Exhibit 3 of Shaffer Dec. was provided by CEA  
26 in Response to Plaintiff's Requests for Production propounded to Defendant Call-Em-All.

1 No representative of FOFI has ever confirmed this was the Terms of Use reviewed or  
2 accepted at the time it signed up for CEA's services in 2009 or whether a Terms of Use  
3 was ever agreed to at all.

4 Again, FOFI never confirms or admits accepting or signing the Terms of Use  
5 referenced in CEA's Motion. The Terms of Use provided in FOFI's response was accessed  
6 via CEA's website over a year later by FOFI's counsel. ECF #115. Anyone could access  
7 these documents on CEA's website. ECF # 107. FOFI has maintained this position prior to  
8 CEA's involvement. The following Requests for Admission illustrates it is unclear whether  
9 CEA's Terms of Use referenced were agreed to by FOFI in 2009.  
10

11 REQUEST FOR ADMISSION NO. 1: Admit that You agreed to Call-Em-All's Terms of  
12 Use as part of the registration process for Call-Em-All's Internet website.

13 ANSWER: This answering Defendant admits that "Terms of Use" may have been  
14 part of the registration process, but has no way of verifying that "Terms of Use" to  
15 which this request refers is the one that was provided on the date and time of  
16 registration."

17 REQUEST FOR ADMISSION NO. 2: Admit that Exhibit A contains the identical terms,  
18 with respect to Paragraphs 13 and 22, as the Terms of Use You agreed to prior  
19 to doing business with CEA in 2009.

20 ANSWER: Denied.

21 REQUEST FOR ADMISSION No. 3: Admit that You have a duty to indemnify, defend,  
22 and hold CEA harmless for all allegations in this Action.

23 RESPONSE: Denied

24 ECF #107.

25 The Terms of Use have never been confirmed by CEA to be the Terms of Use FOFI  
26 accepted or rejected in the summer of 2009. CEA has provided as Exhibit 3 Terms of Use  
Bate stamped as CEA000043-48. During Herrmann's deposition, the Terms of Use were  
not admitted as an exhibit. ECF #115. From that point forward, the document was  
referred to generally throughout the deposition. CEA doesn't provide any affirmative proof

1 that FOFI agreed to any terms, liability, etc. A dispute of fact exists as to whether FOFI is  
2 liable to CEA. FOFI respectfully requests the Court deny CEA's motion for summary  
3 judgment.

4 **B. The indemnity clause contained within CEA's Terms of Use does not extend to the**  
5 **negligent actions of CEA, but only harm caused by FOFI to others, and thus fails the**  
6 **express negligence test.**

7 CEA's involvement in this litigation has always been focused on whether CEA caused  
8 harm to Plaintiff, not whether FOFI did or did not cause harm to Plaintiff. Under the  
9 indemnity clause in the alleged Terms of Use, FOFI is only required to cover the harm it  
10 causes to others, not CEA's harm to others.

11 You agree to indemnify, defend, and hold harmless Call-Em-All...against all losses,  
12 liabilities, expenses, damages and costs, including reasonable attorneys' fees  
13 resulting from any violation of the User Agreement by you or any harm you may  
14 cause to anyone. Exh. 3 to Shaffer Decl at CEA 000048 ¶23.

15 The alleged Terms of Use requires the application of Texas law. Shaffer Dec. Exh. 3, ¶23.

16 Under Texas law, an indemnity clause must meet certain requirements to be considered  
17 valid. CEA relies on both the case of *Boyd v. Amoco Prod. Co.* and *Fisk Electric Company*  
18 *v. Constructors & Associates* to describe its entitlement to recover costs incurred in the  
19 defense of a claim against it. See CEA Motion #107, 19. In certain circumstances, its  
20 interpretation may be correct, but it is not today. *Fisk and Boyd* discusses how an  
21 indemnity clause must meet the express negligence test for an indemnitor to be required  
22 to pay the indemnitee's attorney's fees and other expenses incurred. *Fisk* at 813 (See  
23 *Ethyl Corp. v. Daniel Construction Co.*, 725 S.W.2d 705 (Tex. 1987); *Boyd v. Amoco Prod.*  
24 *Co.*, 786 S.W.2d 528, 530 (Tex.App.—Eastland 1990, no writ). "Parties seeking to  
25 indemnify themselves for their own negligence must express that intent in specific terms.  
26

1 Indemnity provisions that do not state the intent of the parties within the four corners of  
2 the instrument are unenforceable as a matter of law.” *Fisk* at 814 (citing *Gulf Coast*  
3 *Masonry, Inc. v. Owens-Illinois, Inc.*, 739 S.W.2d 239 (Tex. 1987). An agreement must  
4 expressly state the intention to indemnify the harm caused by the indemnitee. *Fisk* at  
5 815. When there is no duty to indemnify, there is no duty to pay attorney’s fees and  
6 costs. The express negligence test is required to prevent indemnitees from settling cases  
7 before harm is admitted or established. *Fisk* at 816.

9 FOFI did not agree to bear this burden- to be liable for costs resulting from CEA’s  
10 harm it caused to Plaintiff. The language of the alleged indemnity clause is very specific,  
11 “resulting from any violation of the User Agreement by you or any harm you may cause  
12 to anyone”. Exh. 3 to Shaffer Decl at CEA 000048 ¶23. It only describes FOFI’s harm.  
13 Also, CEA has settled with Plaintiff without a determination or admission of harm. Due to  
14 its failure to expressly state in the indemnity clause that FOFI would bear the burden to  
15 defend and indemnify CEA from the harm itself caused, summary judgment should be  
16 denied based on its failure to meet the express negligence test.

18 CEA operates its business in a negligent manner and pushes the responsibility of  
19 protection on its customers. CEA has knowledge that the TCPA contains very specific  
20 requirements in order to be in compliance with the federal law.<sup>1</sup> It also has knowledge  
21 that state laws vary greatly across the country on whether the practice of using ADAD is  
22 allowed and if it is allowed, the extensive requirements that must be met. Its knowledge  
23

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24  
25 <sup>1</sup> “When we review each client, we are not purporting to be attorneys, but what we are looking for are things that are obviously  
26 something that we know, like, for example, might violate a federal law or if they are doing—making promotional calls, we make sure  
they have the proper sales introduction and opt out information at the beginning of the call, some basics that we are looking for”. ECF  
#115.



1 ends there. CEA seems familiar with the TCPA-established business relationship,  
2 promotional vs. informational calls, link to FTC website, connection to a live operator. It  
3 did not have knowledge of specific state laws, except for the state of Illinois for reasons  
4 unknown.<sup>2</sup> It knows there are complex rules in certain states including the inability to  
5 make ADAD calls, but yet it does not concern itself with becoming knowledgeable of the  
6 specifics.

7  
8 Q: Do you know, in 2009, in the summer before the FTC changed its ruling  
9 about getting written permission, whether making automated calls into  
10 Washington was legal under Washington state law?

11 A: I wouldn't have any specific way of knowing, no.

12 Q: You, I assume, are pretty familiar with the federal rules?

13 A: Yes.

14 Q: But you didn't have...You and Call-Em-All did not purport to have an  
15 understanding of all the various state laws and have a list of those laws or  
16 other information about them for your various clients; is that correct?

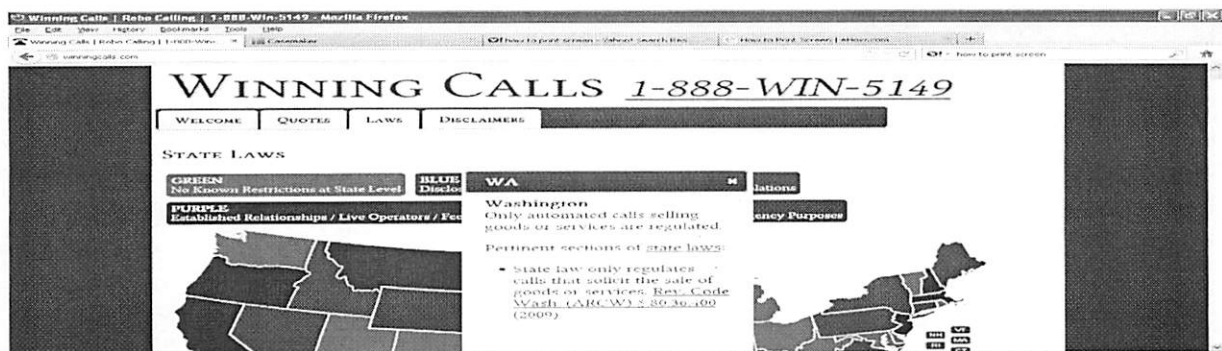
17 A: Correct. ECF #115.

18 CEA was a vendor at the 2009 Domino's World Wide Rally Equipment and Vendor Show.  
19 CEA sought Domino's franchisees as customers on a national level. It sought after FOFI  
20 as a customer and other Domino's franchisees when it provided and made available  
21 information describing its services. FOFI did not seek out CEA. Due to the event, CEA  
22 received business from about 50 franchisees from different parts of the country. ECF  
23 #115. It also has other clients outside of Texas. *Id.* If a company is not aware or does not  
24 take the time to ensure the integrity of its business, then the business should not provide  
25 those services; lack of knowledge is not a defense that CEA should be able to hide  
26 behind.

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2 "Well, Indiana was one state where we know they were really strict on calling". *Id.*

1 CEA had the ability to determine whether automated calls/pre-recorded messages  
2 were allowed in Washington State by simply doing a little research. A Winning Call, a  
3 company that engages in similar services as CEA, provides on its website brief  
4 information of the legality of pre-recorded calls according to each state with links to the  
5 actual statute that applies. [www.winningcalls.com/statelaws.com](http://www.winningcalls.com/statelaws.com). It provides a map and  
6 a brief summation of the state's position on pre-recorded messages when the state is  
7 clicked on. ECF # 115.



14 For Washington it describes, "Only automated calls selling goods or services are  
15 regulated. Pertinent sections of state laws: State law only regulates calls that solicit the  
16 sale of goods or services. Rev. Code Wash. (ARCW) § 80.36.400 (2009)". *Id.* This  
17 company did not leave it solely to its customers to determine the legality of its services.  
18 RCW 80.36.400 has been in effect since 1986. The law has not changed since CEA's  
19 inception.

21 Even though the client recorded the message, CEA had the ability to review, at  
22 least, the first recorded message of its clients. Even though the client controlled the  
23 amount of calls made each day, CEA had the ability to determine if a client was making  
24 too many calls in one day. ECF #115. This does not mean it actually reviewed or put an  
25 end to too many calls, but it had the ability to review if it wanted. Why would it? CEA

1 supposedly has terms in place that safeguarded it from its client's actions. CEA would not  
2 allow calls to be made by clients in which it did not have a preexisting relationship with-  
3 even if it meant turning "down mountains of business". ECF #115. It knows Indiana has  
4 heavy restrictions on pre-recorded messages, almost banning them entirely, but CEA does  
5 not prevent customers from using its services.

6  
7 Q: Was there anything in place in your business to not allow people from the state  
of Indiana to work with you?

8 A: No, because most clients are doing things like—that are strictly informational  
9 calls, for example, churches, schools and that kind of stuff, which those laws  
wouldn't apply to those folks.

ECF #115.

10 Indiana customers would not be prevented from using CEA's services to make ADAD calls  
11 for promotional services because CEA has not blocked them from doing so. There is no  
12 indication by the deposition testimony that if the promotional sales call box was checked  
13 by an Indiana customer it would be prevented or blocked from making calls. So even with  
14 knowledge of the illegality of the calls, CEA still allows its customers to make possibly  
15 illegal calls. It is only their customers' burden to bear.

16  
17 Another indication CEA has only been defending the harm it caused, not the harm  
18 caused by FOFI, is the agreement between Plaintiff and CEA as indicated in the Stipulated  
19 Judgment. ECF Doc. # 111. CEA offered to pay Plaintiff \$5,000 by way of an offer of  
20 judgment and Plaintiff accepted. Under RCW 80.36.400(3), Plaintiff was only allowed to  
21 receive \$500 for each call made to her. Plaintiff alleged two calls were made to her. An  
22 automated call for commercial solicitation is a violation of the Washington Consumer  
23 Protection Act ("CPA"). *Id.* The CPA provides the Court discretion to treble the award of  
24 damages. RCW 19.86.090. The most Plaintiff could have received from the Court is  
25 \$3,000.00 if she was successful in proving all of her claims. It is unclear why CEA would  
26

1 have agreed to pay to Plaintiff more than the amount allowed under the law. FOFI can  
2 only assume CEA saw that it caused Plaintiff harm in excess of the allowed statutory  
3 amount.

4 CEA's posture in this case has always been defending against the harm it caused  
5 to Plaintiff, not the harm FOFI caused. Between May 2011 to December 2011, the only  
6 filings with the Court by CEA were preliminary matters such as an Answer to the  
7 Complaint and Initial Disclosures. Finally on January 9, 2012, CEA filed a Response to  
8 Plaintiff's Motion to Certify Class and on January 18, 2012, it filed a Response to  
9 Plaintiff's Motion for Extension of Time to the Class Certification Deadline. CEA did not  
10 submit a Response or Joinder to FOFI's Motion for Summary Judgment filed on March 7,  
11 2012. This summary judgment determined whether the matter against FOFI and CEA  
12 would be dismissed. CEA did not care about the harm FOFI did or did not cause to  
13 Plaintiff. Only the harm it caused to her. CEA waited until June 2012 to file its Motion for  
14 Summary Judgment which addressed the defense of a common carrier against liability.  
15 CEA has always defended against the harm it caused to Plaintiff.

16  
17  
18 FOFI recognizes that it would be difficult and expensive for CEA to know every specific  
19 requirement in each state, but to not even know where its services are banned all  
20 together is different. It is negligent. "Because it has thousands of clients making calls all  
21 over the United States and Canada, CEA is not in a position to vet the legality of each call,  
22 just like the United States Post Office cannot guarantee whether every piece of mail it  
23 delivers is sent for a proper purpose". CEA is nothing like the United States Post Office.  
24 Packages are sealed when received by the post office. Everything is submitted to CEA  
25 prior to its transmission and open for its review. A product manufacturer is required to  
26

1 know the laws that apply to its product. It cannot put that responsibility to its buyers who  
2 then turn around and sell its product. Domino's Pizza cannot have the attitude, yea, we  
3 know it is a legal requirement for our pizza delivery drivers to have a driver's license and  
4 automobile insurance, but instead of checking to make sure, we will trust that the  
5 delivery driver is in compliance. Anyone would recognize that is a negligent way to run a  
6 business. That is exactly what CEA is doing to its customers- we know there are strict and  
7 varying regulations across the country about our business but we are going to put the  
8 responsibility only on our customers. It essentially put its head in the sand. CEA has  
9 received the benefit of increased business through sales and customer awareness due to  
10 its relationship with Domino's franchisees and more importantly from its relationship with  
11 FOFI. It now wants FOFI to suffer all the consequences of that relationship. This is an  
12 unfair, unjust, and a problematic means of running a business.  
13

14 C. If the Court finds the existence of a valid indemnity clause between the parties, it  
15 was not violated because CEA admits the calls were not illegal, therefore a  
16 violation of the Terms of Use does not exist.

17 The Terms of Use require a violation of state/federal law. The Court has never  
18 determined that there was a violation of either and the parties have come to a settlement  
19 before any such liability could be established. ECF #107. In fact, "CEA believes there was  
20 nothing illegal about the call." ECF # 107. By its own admission, FOFI could not have  
21 violated the User Agreement contained within the alleged Terms of Use.  
22

## 23 VII. VOIR DIRE

24 A jury trial was requested at the time of filing by the Plaintiff, Carolyn Anderson. The  
25 claims requiring a jury have either been dismissed by the Court or resolved by the parties. A  
26

1 jury is no longer needed on the remaining issues between CEA and FOFI because there is a  
2 mixed question of law and fact.

3 VIII. JURY INSTRUCTIONS

4 See Section VII. Voir Dire

5 IV. CONCLUSION

6 The foregoing are issues to be presented at trial.

7 Dated this 13<sup>th</sup> day of September, 2012.

8  
9 /s Nelson C. Fraley, II  
10 Nelson C. Fraley, II, WSBA No. 26742  
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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically filed the foregoing 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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