IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
WESTERN DIVISION

AMERICAN MEDICAL ASSOCIATION, on behalf of itself and its members; ACCESS INDEPENDENT HEALTH SERVICES, INC., d/b/a RED RIVER WOMEN'S CLINIC, on behalf of itself, its physicians, and its staff; and KATHRYN L. EGGLESTON, M.D., Plaintiffs, v. WAYNE STENEHJEM, in his official capacity as Attorney General for the State of North Dakota; and BIRCH BURDICK, in his official capacity as State Attorney for Cass County, as well as their employees, agents, and successors, Defendants.	)	Case No. 1:19-cv-125-DLH-CRH

HEARTBEAT INTERNATIONAL, INC.'S
MOTION AND NOTICE OF MOTION AND
MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

TO THE PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that Heartbeat International, Inc. ("Heartbeat") will and hereby does move this Court to permit it to intervene in this matter in order to protect and defend its ability and right to operate the Abortion Pill Reversal Network, to protect its clients from inadequately informed consent to abortion, and to protect and defend its member-affiliates from a misinterpretation and mischaracterization of *National Institute of Family & Life Advocates v. Becerra*.

Proposed Defendant–Intervenor Heartbeat, pursuant to Federal Rule of Civil Procedure 24, seeks intervention of right, or in the alternative, permissive intervention. The State Defendants consent to Heartbeat's intervention, and Plaintiffs state that they will oppose. Heartbeat is entitled to intervention of right because its motion is timely, it has a significantly protectable interest in this action, the disposition of this action will almost certainly impair or impede its ability to protect its interest, and no parties will adequately represent its interests.

In addition or in the alternative, Heartbeat is entitled to permissive intervention, because its motion is timely, its intervention will cause no undue delay or prejudice, and it has a defense that shares questions of law and fact in common with Plaintiffs' claims.

Heartbeat respectfully requests that this Court grant it the right to intervene in this matter. This request is based upon this Notice of Motion and Motion, the accompanying Memorandum in Support, the supporting declarations of Jor-El Godsey, President of Heartbeat, along with the papers, records, and evidence on file in this action, as well as any other written or oral evidence that may be presented at or before the time this motion is considered by the Court. Defendant–Intervenor Heartbeat respectfully requests oral argument on this Motion if it is opposed.

A proposed answer that will be filed with this Court if intervention is granted is submitted herewith.

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**Pro hac vice admission pending*

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Introduction

This lawsuit challenging the constitutionality of North Dakota's abortion informed-consent statute raises critical questions about the requirements and limits of informed consent. In particular, it raises scientific questions about the medical evidence regarding chemical abortions and the potential to clinically reverse the effect of abortion-inducing drugs, as described in the Abortion Pill Reversal (APR) Disclosure, N.D. Cent. Code § 14-02.1-02.11.b.(5). While Plaintiffs and Defendants have referenced the science underlying the APR Disclosure—indeed, making it a central issue in this case and the sole basis for the preliminary injunction sought—no party has the expertise or access to comprehensive evidence on the subject that Heartbeat International, Inc. does.

Heartbeat is the largest network of pregnancy resource center affiliates in the world, and its stake in this litigation is manifold. As the center of operations for the international Abortion Pill Reversal Network (APRN), Heartbeat will likely be involved in the process almost every time a pregnant woman in North Dakota wishes to follow up on the information provided in the APR Disclosure. The research done by Heartbeat's APRN Founder and current member of the APRN Medical Advisory Team has already been put in issue in this litigation, attacked by Plaintiffs as unsound medicine. In the process, the integrity of Heartbeat's entire APR program has been called into question, with the potential effect of unfairly tarnishing the reputation of Heartbeat's medical leaders and standards, or, worse yet, misleading an entire population of women into believing that a potential life-saving medical treatment is unavailable. An adverse ruling in this Court on the APR Disclosure could undermine Heartbeat's ability to work with other states and government programs to deliver urgent medical care to women in their time of need.

Heartbeat also serves women who are currently protected by, and would be harmed by removing, the Human Being Disclosure as part of informed consent. Through decades of serving affiliates who counsel post-abortive women nationwide, and through the more than 1,000 daily calls Heartbeat receives on its Options Line, Heartbeat has learned the significance of pregnant women understanding that abortion ends the life of another human being—their own child. The clients and potential clients of Heartbeat's North Dakota affiliates deserve this protection before choosing a life-ending procedure, so that they are not burdened with additional confusion and suffering after the fact. Heartbeat's North Dakota affiliates' post-abortion programs would be directly impacted.

For these reasons and as detailed below, Heartbeat moves to intervene as a defendant in this case, where its interest is substantial but currently not adequately represented.

Statement of Facts and Interest

Heartbeat has a unique interest in the litigation over the APR Disclosure. Heartbeat International operates the Abortion Pill Reversal Network, a program comprising more than 600 health care professionals in the United States who are willing and able to administer the drugs shown to reverse the effects of chemical abortions that have been initiated. Second Decl. of Jor-El Godsey ("Second Godsey Decl."), ¶ 2.[1] Heartbeat's APRN offers a free telephone helpline, as well as email, text, and internet chat support, available 24/7 for women who are having second thoughts about their abortion and wish to save their pregnancy. *Id.* at ¶ 3. Heartbeat receives roughly 170 inquiries a month about abortion-pill reversal. *Id.* at ¶ 4.

[1] Concurrently filed. References to the previously filed Declaration of Jor-El Godsey, filed by Proposed Intervenors Dakota Hope Clinic, et al. ("Proposed Intervenors") on August 22, 2019, will be cited by its docket number, Dkt. 81.

The Abortion Pill Reversal Network is grounded in decades of scientific research and hundreds of real-life results, including over 850 mothers who have successfully saved their babies' lives using the protocol. *Id.* at ¶ 7. Dr. George Delgado, an APRN founder and current medical advisor, and Dr. Mary Davenport, an APRN founder and former Research Director, have been pioneers in this field, which now provides great promise to women and their unborn babies. *Id.* at ¶ 6. Heartbeat thus controls the repository of what might be the most extensive information on the clinical process of abortion-pill reversal, including the success rate and supportive evidence. *Id.* at ¶¶ 6, 7.

Heartbeat also has a unique interest in Plaintiffs' constitutional challenge to the Human Being Disclosure, N.D. Cent. Code § 14-02.1-02.11.a.(2). As the world's largest affiliation of pregnancy resource centers, Heartbeat has a vested interest in ensuring that informed-consent laws provide the information that pregnant mothers find helpful and relevant to their voluntary, informed decision. Two of those centers are in North Dakota. Dkt. 81 at ¶ 3. Heartbeat's affiliate centers are often the refuge for pregnant women who have questions or doubts about abortion, or who have undergone an abortion and are seeking answers and healing. This experience of counseling tens of thousands of similarly situated clients has developed Heartbeat's deep expertise in what pregnant women give weight to when making an informed decision about the consequences of abortion. Dkt. 81 at ¶ 4. The information provided by the Human Being Disclosure is precisely the sort of medical facts that helpfully inform women about the nature of abortion. Dkt. 81 at ¶¶ 6, 7. Upholding the Human Being Disclosure therefore will have a significant, widespread effect on Heartbeat's Option Line contacts, affiliates, affiliates' clients, and potential clients—including by altering the nature and magnitude of counseling Heartbeat affiliates will need to engage in with North Dakota women.

In addition, Heartbeat has a strong interest in ensuring that the First Amendment principles articulated in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. __, 138 S. Ct. 2361 (2018) ("*NIFLA*"), are interpreted and applied properly.[2] Heartbeat was protected by the ruling in *NIFLA*, which reiterated the distinction between informed consent to a medical procedure and unconstitutional compelled speech. The *NIFLA* decision guarantees that Heartbeat and its members cannot be forced to speak a message unrelated to the medical services they provide; at the same time, it ensures that women undergoing abortion (or any other medical procedure) will be protected by longstanding canons of medical ethics requiring that they be told about the risks, alternatives, and consequences of the procedure. This Court's proper consideration of *NIFLA* is necessary to safeguard the pregnant women who will be hearing the Human Being Disclosure and APR Disclosure before consenting to a life-altering medical procedure—women who may soon be contacting Heartbeat for information, medical treatment, or support.

Argument

Federal Rule of Civil Procedure 24 allows both intervention of right and permissive intervention, and "is to be construed liberally in favor of intervention." *Kinetic Leasing, Inc. v. Nelson*, No. 3:16-CV-99, 2016 WL 8737876, at *2 (D.N.D. Sept. 22, 2016). When considering a motion to intervene, the Court must "accept the allegations of the prospective intervenors as true and . . . construe the motion in their favor." *ALPS Prop. & Cas. Ins. Co. v. Durick*, No. 1:15-CV-

[2] Heartbeat's amicus role in *NIFLA* was significant, with Heartbeat's brief being cited by the Supreme Court at oral argument. *See* Transcript of Oral Argument at 15, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140); Brief for Heartbeat International, Inc. as Amicus Curiae Supporting Petitioners at 24, *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16-1140).

90, 2015 WL 12803618, at *1 (D.N.D. Nov. 2, 2015). These favorable procedural rules and Heartbeat's unique position support intervention.

I. Heartbeat International is entitled to intervene as of right to timely protect its interests that are imperiled and not adequately represented.

Federal Rule of Civil Procedure 24(a)(2) provides that "[o]n timely motion, the court must permit anyone to intervene who claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." As shown below, Heartbeat satisfies the criteria for intervention of right under Rule 24 and Article III.

A. The motion to intervene is timely.

Whether a motion to intervene is timely "is a decision within the district court's discretion, and is based on all the circumstances." *Am. Civil Liberties Union of Minn. v. Tarek ibn Ziyad Acad.*, 643 F.3d 1088, 1094 (8th Cir. 2011) (citations omitted). The Eighth Circuit has articulated factors that should be considered by the Court when determining whether a motion to intervene is timely: "(1) the extent the litigation has progressed at the time of the motion to intervene; (2) the prospective intervenor's knowledge of the litigation; (3) the reason for the delay in seeking intervention; and (4) whether the delay in seeking intervention may prejudice the existing parties." *Id.* (citing *United States v. Ritchie Special Credit Invs., Ltd.*, 620 F.3d 824, 832 (8th Cir. 2010)).

Heartbeat moves to intervene merely 66 days after this lawsuit was filed, and at a time when the litigation has consisted only of Plaintiffs' complaint, Defendants' answers, and briefing on Plaintiffs' motion for preliminary injunction. Aside from last week's scheduling conference, no hearings have been held, no substantive rulings made, and no discovery commenced.

Intervention at this early stage is timely. *See Mille Lacs Band of Chippewa Indians v. Minnesota*, 989 F.2d 994, 999 (8th Cir. 1993) (motion to intervene timely when, "[a]lthough a substantial time passed between the commencement of the suit and the . . . motion to intervene, the legal proceedings were still at a preliminary stage); *Target Logistics Mgmt., LLC v. City of Williston*, No. 1:16-CV-076, 2017 WL 6459800, at *1 (D.N.D. Dec. 18, 2017) (granting motion to intervene filed 15 months after the complaint, when "[d]iscovery has not been completed and no dispositive motions have been filed," and "the only activity of substance in the case has been the issuance and vacation of the preliminary injunction").

When Heartbeat became aware that this lawsuit was filed, just two months ago on June 25, 2019, Heartbeat immediately took steps to assess how it could best protect its interests in this case and ensure that the Court would be able to fully consider Heartbeat's rights, interests, and relevant factual contributions. Heartbeat, in consultation with counsel, quickly concluded that intervention was necessary and appropriate to protect its interests, and set about preparing for intervention. There has been no delay. This motion is being filed within the ordinary time required to prepare for intervening in a lawsuit. *See S. Dakota Farm Bureau, Inc. v. S. Dakota*, 189 F.R.D. 560, 563 (D.S.D. 1999) (intervention was "clearly timely" when intervenors "acted immediately upon learning of this lawsuit . . . [and] filed their motion to intervene only three months after the complaint was filed").

Finally, because Heartbeat did not delay in seeking intervention, there is no prejudice to the parties. *See United States v. Union Elec. Co.*, 64 F.3d 1152, 1159 (8th Cir. 1995) (the prejudice factor in determining timeliness asks "how much prejudice *the delay in seeking intervention* may cause to other parties") (emphasis supplied). This motion therefore meets the timeliness criteria.

B. Heartbeat International has a legally protectable interest, which may be impaired.

Under Rule 24(a), "an asserted interest must be 'significantly protectable,' which has been interpreted to mean 'legally protectable.'" *United States v. Metro. St. Louis Sewer Dist.*, 569 F.3d 829, 839 (8th Cir. 2009) (citing *Donaldson v. United States*, 400 U.S. 517, 531 (1971)). Proposed intervenors "must also demonstrate that the subject matter of the action affects its interests in a direct rather than tangential way." *Id*. A significantly protectable interest is very closely linked with the third requirement for intervention of right: that the outcome of the challenge may impair the proposed intervenor's interest.

Heartbeat has a direct and cognizable interest in this litigation, one that plainly may be impaired absent intervention. First, Heartbeat operates the Abortion Pill Reversal Network, the international program comprising hundreds of physicians willing and able to successfully assist with halting chemical abortions. Central to the Abortion Pill Reversal Network's operation is the ability to connect with women who have changed their minds soon after beginning a chemical abortion, to offer those women the potentially life-saving medical treatment. The APR Disclosure is the most effective way in which Heartbeat's potential North Dakota clients can become aware of this medical care. It would therefore be detrimental to Heartbeat if this Court were to block the State from providing means for women to access and associate with APRN. Such a ruling would harm Heartbeat's interests in protecting their clients' rights to be given accurate medical information and to have access to medical care.

If the law is enjoined, Heartbeat would be hindered in its efforts to offer its APRN program within North Dakota or, depending on the Court's findings and conclusions, around the nation. It would be extremely harmful to Heartbeat if this Court were to rule for Plaintiffs on the APR Disclosure in a way that questions the evidence supporting abortion-pill reversal. Such a

ruling from this Court could have far-reaching effects on Heartbeat's ability to keep its APRN program functioning, potentially blacklisting APR from consideration by other states' legislatures, and staining the reputation of Heartbeat's medical programs and affiliated medical professionals. An adverse ruling from this Court could also have an influential precedential effect on any future litigation involving the validity of informed-consent laws for chemical abortions. *Kinetic Leasing*, 2016 WL 8737876, at *2 (granting intervention of right where the Court's "findings and conclusions could . . . bind [the movant]" going forward).

On the flip side, even a favorable ultimate ruling in this case would likely not adequately protect Heartbeat's interests, unless Heartbeat is allowed to intervene. Unless this Court is afforded the opportunity to thoroughly assess the evidence behind abortion-pill reversal—which Heartbeat is uniquely situated to provide—any ruling will necessarily be based on limited information and incomplete evidence. Absent intervention, Heartbeat will be unable to fully participate in defending its interest and providing the Court with the relevant detailed medical evidence regarding abortion-pill reversal and, relatedly, the APR Disclosure.

In addition, an adverse ruling by this Court on the Human Being Disclosure would substantially harm Heartbeat's Option Line contacts and affiliates' clients, many of whom may suffer greatly when they learn too late the truth that abortion terminated the life of their own living child. Striking the Human Being Disclosure from the informed-consent law would make consent to abortion less than fully informed and voluntary, in a way that would emotionally, mentally, and physically damage the North Dakota women Heartbeat's affiliates serve. Dkt. 81 at ¶ 7. It would impair Heartbeat's interests in preserving its clients' relationships with their children. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (nonprofit organization

has standing in its own right where defendant's actions impaired its ability to provide counseling and referral services to its clients).

Such an outcome would also tax Heartbeat's limited resources and force Heartbeat's North Dakota affiliates to spend extra funds, staff time, and administration on healing unnecessary post-abortion trauma. Second Godsey Decl. at ¶ 10. This would divert resources from the other valuable free support services—ultrasounds, STD testing and treatment, parenting classes, community resource referrals, and much more—that Heartbeat affiliates currently provide to North Dakota women. *Id.* These operational consequences, coupled with the injury to Heartbeat's clients, are substantial and sufficient for intervention. *Cf. Granville House, Inc. v. Dep't of Health & Human Servs.*, 715 F.2d 1292, 1299 (8th Cir. 1983) (nonprofit's interest in "serv[ing] indigent and minority clients" and its "economic injury" were sufficient to establish standing in an action that could reduce the number of clients it could serve).

The Eighth Circuit has already held, in a virtually identical scenario, that pregnancy care centers had a right to intervene to defend South Dakota's Human Being Disclosure law, because of their legally protectable interests at stake. *Planned Parenthood Minn., N. Dakota, S. Dakota v. Alpha Ctr.*, 213 F. App'x 508, 510 (8th Cir. 2007). Those centers, like Heartbeat and its affiliates here, had "potential reputational and financial interests . . . [,] which th[e] litigation could impair." *Id.*

Because of Heartbeat's unique interests at stake and the importance of judicial economy, "the propriety of permitting intervention should be resolved in favor of allowing it" here. *Cf. Sierra Club v. Robertson*, 960 F.2d 83, 86 (8th Cir. 1992).

C. No existing parties to the action adequately represent Heartbeat International.

Heartbeat meets the threshold for demonstrating inadequate representation. "Typically, persons seeking intervention need only carry a 'minimal' burden of showing that their interests are inadequately represented by the existing parties." *Mille Lacs*, 989 F.2d at 999 (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). "Intervention [of right] is appropriate where those interests are disparate, even though directed at a common legal goal." *Kinetic Leasing*, 2016 WL 8737876, at *3.

Although Heartbeat shares Defendants' and Proposed Intervenors' ultimate goal of ensuring that the law is upheld, their interests are distinct. Plaintiffs have attacked the integrity and medical legitimacy of Heartbeat's premier APRN program, alleging that the medical protocol is "not . . . credible, medically accepted[,] . . . effective or safe." Compl., Dkt. 1, at ¶ 58. Plaintiffs allege that APR "does not meet clinical standards." *Id.* at ¶ 60. And Plaintiffs make confusing allegations about the drugs used in chemical abortion, misleadingly suggesting that there is "zero evidence" that APR works. *See id.* at 63. Worse yet, Plaintiffs' motion for preliminary injunction relies on personal attacks on the scientific work of Dr. George Delgado, an APRN founder and current medical advisor, and Dr. Mary Davenport, an APRN founder and former Research Director. Dkt. 6-1, at 5–6. Plaintiffs call the work of these two doctors "flawed and ethically problematic." *Id.* at 6.

This is precisely the sort of distinct interest that warrants intervention of right. For example, in *Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 870 (8th Cir. 1977), the Eighth Circuit reversed the district court's denial of intervention of right when "accus[ations] of invidiously discriminating" and "[a]llegations of bad faith" as to one party gave rise to disparate interests between the proposed intervenors and defendants. The

Eighth Circuit explained that the district court had incorrectly "concluded that the [movants] are adequately represented by defendants, with whom they seek to align themselves," while in fact "their respective interests, while not adverse, are disparate." *Id.* Accordingly, intervention of right was warranted there, as it is here.

Similarly, the Eighth Circuit found in *Alpha Center* that the pregnancy care centers' interests were "not identical to those which the state seeks to protect," even when both the state and the pregnancy care centers were seeking to defend the informed-consent law. *Alpha Center*, 213 Fed. App'x at 510. Further, the Eighth Circuit held that the issues the pregnancy care centers sought to raise were "different from those which the state officials raise," such that the centers would not fully be represented by the existing state defendants. *Id.* The same is true here, where "state officials cannot adequately represent [Heartbeat's] interests" on the APR Disclosure, given Heartbeat's unique reputational and operational harms, as well as Heartbeat's singular perspective on key issues involving abortion-pill reversal. *See id.*

In the same way, Heartbeat's interest in the Human Being Disclosure is distinct from other Defendants' interest in defending it. While the State and State Attorney have general interests in upholding duly enacted legislation based on sound public policy reasons, Heartbeat would suffer a particular harm if it experiences an increase in women who were not informed that their unborn baby was a living human being. As mentioned, the scientific accuracy of the Human Being Disclosure can have a significant effect on the clients Heartbeat's North Dakota affiliates serve, and on the Heartbeat affiliates' programs. Dkt. 81 at ¶ 7. This unique interest is not adequately represented by the parties and warrants intervention notwithstanding "[t]he tactical similarity of the legal contentions" between Heartbeat other Defendants. *Sierra Club*,

960 F.2d at 86 (finding intervention appropriate when private parties' interests were "sufficiently disparate," yet consistent with, the state's).

II. Alternatively, Heartbeat International should be granted permissive intervention, which will cause no undue delay or prejudice to the parties.

Federal Rule of Civil Procedure 24(b)(1) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." "In contrast to the rigid and non-discretionary nature of intervention under Rule 24(a), Rule 24(b) intervention is marked by broad flexibility." *Franconia Minerals (US) LLC v. United States*, 319 F.R.D. 261, 266 (D. Minn. 2017).

"[T]he principal consideration in ruling on a Rule 24(b) motion" is "whether the intervention will cause 'undue delay' or 'prejudice the adjudication of the original parties' rights.'" *Coffey v. Comm'r*, 663 F.3d 947, 951 (8th Cir. 2011) (citations omitted); *see also* Fed. R. Civ. P. 24(b)(3). Here, there is no risk of undue delay or prejudice from Heartbeat's permissive intervention. Rather, Heartbeat will timely shed light on the constitutional issues, by presenting legal arguments and facts relevant to the existing questions in this case, and requesting no modification to the Court's scheduling order. *Cf. Med. Liab. Mut. Ins. Co. v. Alan Curtis LLC*, 485 F.3d 1006, 1009 (8th Cir. 2007) (no abuse of discretion to deny permissive intervention sought "more than a year after this action was filed and only shortly before the discovery deadline"). No prejudice will result to the existing parties' rights, because Heartbeat is not seeking any unique relief. Denying permissive intervention in such circumstances, when there is no threat of undue delay or prejudice, may be reversible error. *Coffey*, 663 F.3d at 951–52 (reversing district court for "using an incorrect legal standard to deny permissive intervention," when intervention would not cause undue delay or prejudice).

In addition, Heartbeat's proposed defenses have commonality with the main action. Heartbeat's defense of the Human Being Disclosure and the APR Disclosure will share common questions of law and fact to the existing constitutional claims and defenses of those statutory provisions that have been raised by Plaintiffs and Defendants. Indeed, Heartbeat's defenses will rely on many of the Supreme Court cases and constitutional principles already cited by the parties. Heartbeat's arguments will also involve overlapping as well as supplemental facts regarding key factual issues in the case, including fetal development, informed consent to medical procedures, the process of chemical abortion, and the therapeutic administration of progesterone. Heartbeat proposes no claims or defenses that are untethered to the existing issues in the case.

Permissive intervention has been permitted in similar situations, where "[p]ermitting the [movant] to intervene will contribute to the resolution of the constitutional issues." *Alleghany Corp. v. Pomeroy*, 698 F. Supp. 809, 815 (D.N.D. 1988), *rev'd on other grounds*, 898 F.2d 1314 (8th Cir. 1990). Heartbeat's intervention is needed, "so that all of the legal issues may be adequately presented to the court." *Id.*

Conclusion

Because Heartbeat timely presents this motion attesting to its unique and imperiled interest in this case, and because Heartbeat's participation as defendant–intervenor would pose no undue delay or prejudice to the parties, Heartbeat respectfully requests this Court grants its motion to intervene in this case.

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Certificate of Service

I hereby certify that on August 30, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to counsel for the parties.

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