UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF FLORIDA

Case No.: 0:21-md-02994-RAR

In re:

MEDNAX SERVICES, INC.,

CUSTOMER DATA SECURITY BREACH LITIGATION

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This Document Relates to All Actions

DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO EXCLUDE EXPERT TESTIMONY OF GARY OLSEN AND MARY FRANTZ

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Plaintiffs' two experts are unreliable, unhelpful, and violative of Rule 26. Plaintiffs' arguments in opposition do not remedy these defects and the Court should grant Defendants' motion to exclude.

I. ARGUMENT AND CITATIONS TO AUTHORITY

A. Frantz's Opinions Must Be Excluded Because They Are Unreliable.

1. Frantz Fails to Support Her Statements with Citations or Evidence.

Mary Frantz's opinions must be excluded because they are unreliable and unsupported. *See* Mot. at 3-11. Contrary to Plaintiffs' Opposition (Opp. at 2), it is black letter law that expert testimony whose factual basis is not adequately explained must be excluded under Rule 702. Mot. at 4. Plaintiffs' attempt to remedy this fundamental defect by suggesting Frantz's deposition testimony can cure her inadequate reports is flatly incorrect. "Rule 26(a)(2) does not allow parties to cure deficient expert reports by supplementing them with later deposition testimony." *Moore v. GNC Holdings, Inc.*, 2014 WL 12684287, at *4 (S.D. Fla. Jan. 24, 2014) (citation omitted). Moreover, Plaintiffs are simply wrong that in her depositions, Frantz was able to "provide sufficient facts and data in support of her conclusions" (Mot. at 2)—Frantz repeatedly failed to articulate the factual basis for her conclusions during her deposition, choosing to ignore counsel's questions and address a different subject instead.[1]

Nor can Plaintiffs excuse Frantz's failure to consider at least ***twenty-one*** of Mednax's policies by claiming that she cited to Mednax's responses and objections to Plaintiffs' requests for production in her "materials considered." Opp. at 2. Mednax's responses and objections did not identify, much less describe, Mednax's policies and procedures. Rule 26(a)(2)(B)(ii) requires Frantz to list "the facts or data considered,"[2] and none of the 21 policies are included in that list. Because these deficiencies pervade Frantz's opinions, her report should be excluded as unreliable.

2. Frantz Fails to Articulate or Employ a Coherent Methodology for Assessing Mednax's Cybersecurity.

In addition to the lack of factual support and citation, nothing in Plaintiffs' Opposition changes the fact that Frantz draws sweeping conclusions without explaining how or why those conclusions are warranted or even relevant to the issues in this case.

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[1] In fact, counsel had to *repeatedly* address Frantz's failure to actually respond to the questions asked. *E.g.*, ECF No. 252-12 (Frantz First Dep.) at 159:15-16, 215:22-23, 218:22-23, 193:7-23; ECF No. 252-13 (Frantz Second Dep.) at 70:24-25, 72:9-10, 92:19-20, 98:8, 102:14, 119:23-25, 127:8-13, 127:23-24, 160:11-12, 21-22, 244:5-6. And when asked to identify supporting documents, Frantz *repeatedly* could not comply. *E.g.*, ECF No. 252-12 (Frantz First Dep.) at 299:4-19, 305:5-25; ECF No. 252-13 (Frantz Second Dep.) at 106:16-24, 133:16-24.

[2] *See* ECF 252-5 (Frantz Rep.) at 111.

First, Plaintiffs incorrectly claim that Frantz's reports and deposition testimony "sets out the documents and 'industry standards' she relied upon in drawing her conclusions." Opp. at 3. That is not true. Paragraphs 12, 149, and the "Publicly Available Documents" she considered to support the so-called "industry standard" that shapes her opinions simply use the words "industry standard" and cite a series of articles in an appendix—without identifying what the industry standard is or how she applied it to Mednax or the Cyberattack. Paragraphs 17 through 122 merely discuss what Frantz has deemed to be "significant" cybersecurity events—while saying *nothing* to explain *why* those events are significant or how they have any bearing on the Cyberattack. *Id.*

Even if Plaintiffs were permitted to use deposition testimony to bolster Frantz's patently deficient report, Frantz's deposition testimony would not move the needle either. *None* of the deposition testimony Plaintiffs cite sheds light on how or why Frantz deemed the events she discusses "significant" or how they have any bearing upon Defendants' liability. This is plainly insufficient. *See Grayson v. No Labels, Inc.*, 599 F. Supp. 3d 1184, 1191 (M.D. Fla. 2022) (excluding expert testimony that defendant violated "mainstream reporting standards" because expert's report lacked "any discussion of what constitutes 'mainstream reporting standards'" and did not explain "how those standards apply to the [d]efendants").

Second, Frantz's deposition testimony that [redacted] (Opp. at 3 (citing ECF No. 252:12 at 181:19–22)), actually *contradicts* Plaintiffs' argument that [redacted] Opp. at 3. Frantz herself testified that [redacted].[3] Thus, Plaintiffs seek permission to introduce an "expert" who will testify that [redacted].[4]

Finally, Frantz's reliance on her thirty years of professional experience does not automatically render her opinions reliable. *Hendrix ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1183, 1201 (11th Cir. 2010).

[3] ECF No. 252-12 (Frantz First Dep.) at 180:1–25.

[4] Plaintiffs summarily dismiss Defendants' argument that Frantz's methodology cannot be peer-reviewed on the grounds that another cybersecurity expert could simply read her report, review the documents produced, and draw a conclusion as to whether Frantz was right. Opp. at 3-4. But this argument ignores that any such expert would have no way to know how to replicate or test the validity of Frantz's assumptions and methodology because Frantz repeatedly fails to cite any support for her statements and could not even identify which documents she reviewed.

Frantz fails to "explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts." Fed. R. Evid. 702 advisory committee's note to 2000 amendment; *Pearson v. Deutsche Bank AG*, 2023 WL 2613635, at *8 (S.D. Fla. Mar. 23, 2023) (excluding expert's opinions on this basis).

3. Frantz Fails to Articulate or Employ a Coherent Methodology for Assessing the Adequacy of Mednax's Investigation into the Cyberattack.

Frantz cannot cite or employ a standard for evaluating the sufficiency of a forensic investigation into a phishing attack. Mot. at 8–9. Plaintiffs make two arguments to attempt to get around this patent deficiency, and both fail.

First, CRA's representative never testified, as Plaintiffs' claim (Opp. at 4), that [redacted]. Rather, the deposition excerpts Plaintiffs cite are simply CRA's explanations of the documents reviewed in the investigation and the configuration of Mednax's systems.

Second, Plaintiffs' contention that Frantz considered [redacted] fares no better. Opp. at 4. At the outset, it is difficult to imagine how Frantz can render an opinion on the sufficiency of the investigation, when her report [redacted]. Moreover, nothing Plaintiffs cite describes those thirty years of experience Frantz purportedly developed during that time. Frantz simply concludes that she would not find the data sufficient to complete an investigation. That is not a "scientifically valid" standard. *See United States v. Frazier*, 387 F.3d 1244, 1261–62 (11th Cir. 2004) (reliability turns on whether the expert's underlying "reasoning or methodology . . . is scientifically valid and . . . can be applied to the facts in issue").

4. Frantz's Dark Web Methodology is Unreliable.

In the Motion, Defendants showed that Frantz's Dark Web Opinion is unreliable because she [redacted] Mot. at 9–11. Each of Plaintiffs' three points falls short.

First, Plaintiffs contend that Frantz's report [redacted] Opp. at 5. As a threshold issue, Frantz expressly disavows she is offering such an opinion.[5] But more

[5] Ex. 252-12 (Frantz First Dep.) at 268:3–10 [redacted]).

important—it is a patently false statement. The "circumstantial evidence" is based exclusively on the Frantz's conclusion [redacted].[6] This is flawed for several reasons. [redacted][7] [redacted]. Again, she cannot have it both ways. [redacted] Thus, Plaintiffs' ultimate conclusion [redacted] is based on a demonstrably false premise and would be the epitome of prejudice.[8]

Second, Plaintiffs contend that [redacted] is inconsequential because "[i]f Mednax's standards were applied, a cybersecurity expert would never be able to prove that someone's information is available on the dark web." Opp. at 4. This misinterprets Defendants' position. It is not simply that [redacted]—it is that Plaintiffs are wrong that Frantz "preserved and produced evidence of what she observed on the website" and, because [redacted], that omission can never be cured. Opp. at 4. Frantz further testified at her deposition that [redacted]. As

[6] ECF 252-5 (Frantz Rep.) ¶ 208.
[7] ECF 252-5 (Frantz Rep.) at Ex. E.
[8] Frantz likewise does not acknowledge the evidence produced indicating that [redacted] Instead, Plaintiffs bury in a footnote that "Mednax has not produced any policies or procedures stating it did *not* require or save Plaintiffs' Social Security numbers." Opp. at 1, n. 1. Plaintiffs cannot carry their burden of rebutting direct evidence from Mednax's systems and a sworn affidavit that Mednax did not have Social Security numbers on its system, by arguing Mednax did not present a *policy* saying it does not require Social Security numbers.

one example, Frantz relies heavily on [redacted].[9] Similarly, Frantz contends that [redacted]. Plaintiffs cannot have it both ways—they cannot argue that [redacted]

B. The Opinions of Mary Frantz Should Be Excluded Because They Are Unhelpful.

1. Frantz's Cybersecurity Opinion is Unhelpful.

In the Motion, Defendants show that Frantz's Cybersecurity Opinion—which is essentially [redacted]—would not assist the trier of fact because she fails to connect it to Plaintiffs' claims or the Cyberattack. Mot. at 12–13. Plaintiffs' Opposition does not cure this deficiency. Plaintiffs simply summarize [redacted], but they still do not explain how they are connected to the Cyberattack. Plaintiffs cannot be permitted to unfairly bias the jury by taking unrelated [redacted] out of context and using a purported "expert" to elevate their significance to suggest improperly and without basis that the Cyberattack could have been prevented.

2. Frantz's Investigation Opinions are Unhelpful.

Defendants' Motion demonstrates that Frantz's opinions regarding Mednax's investigation into the Cyberattack would not assist the trier of fact because [redacted] Mot. at 13–14. Plaintiffs' Opposition merely summarizes Frantz's existing statements [redacted] without tying her opinions to any of Plaintiffs' claims. They fail to address or explain how any Plaintiff or member of the putative class was allegedly harmed by [redacted] Opp. at 9. Absent a connection to the harms alleged in the Complaint, Frantz's opinions regarding [redacted] are unhelpful[10] and should be excluded.

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[9] *See* ECF No. 252-12 (Frantz First Dep.) at 266:8–12 ("Q. But you don't detail the screenshots of those placebos in your report anywhere, do you? A. No. As I stated, the only thing we included was the responsive screenshots"); *see, e.g., id.* at 246:21–24; 270:22–24; 273:7–13.

[10] Plaintiffs assert—without any legal, record, or expert support—that [redacted] Opp. at 9. The Court should disregard this *ipse dixit* and conclude that Frantz's [redacted] are unhelpful. The two are unrelated.

C. Frantz's Rebuttal Opinions Violate Rule 26 and Must Be Excluded.

Wojcieszek Rebuttal. Defendants moved to exclude Frantz's Wojcieszek Rebuttal as an impermissible attempt to revise her original report, given that more than half of the report is spent [redacted]—even though Wojcieszek's contemporaneously-filed report [redacted].[11] Mot. at 15–16. Plaintiffs do not address this fatal flaw. And the fact that Frantz, in a few instances, [redacted] does not mean that her rebuttal "solely contradicts" Wojcieszek's report, as required by Rule 26(a)(2)(D)(ii).[12] Rebuttals with a "dual purpose" like this one (i.e., rebutting or contradicting an expert's opinions while also bolstering the plaintiff's case in chief) must be excluded. *Bell v. Progressive Select Ins. Co.*, 2023 WL 5940306, at *2 (M.D. Fla. Sept. 13, 2023).

Ellman Rebuttal. First, Defendants seek to exclude Frantz's Ellman Rebuttal because Frantz [redacted]. Mot. at 14–15. Plaintiffs do not address Defendants' arguments, instead stating simply that Frantz is [redacted]. Opp. at 11. Yet Plaintiffs do not explain [redacted]. Accordingly, the Motion is unopposed on this point and should be granted on this basis alone. *See Appleby v. Knauf Gips KG*, 2023 WL 2401800, at *4 (S.D. Fla. Mar. 8, 2023) (Ruiz, J.) ("[A] 'party's failure to respond to any portion or claim in a motion indicates such portion, claim or defense is unopposed.'").

Next, Defendants' Motion shows that Frantz's Ellman Rebuttal exceeds the proper scope of rebuttal testimony because her conclusions and statements do not "solely" contradict Ellman's opinions, and, in many cases, are completely divorced from Ellman's report. Mot. at 16–18. Plaintiffs argue that "Frantz directly rebuts Ellman's report"—but then proceed to list out four opinions that do not correspond to any opinions offered by Ellman. *See* Opp. at 10. Frantz's Ellman Rebuttal is an improper opinion and should be excluded.[13]

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[11] *See* ECF 252-14 (Frantz Rebuttal Rep. to Wojcieszek) at pp. 2, 11–20.

[12] *See, e.g.*, ECF 252-14 (Frantz Rebuttal Rep. to Wojcieczek) ¶ 20 ("EKP [i.e., Frantz] uses various registered DNM identities which are established and [hopefully] (sic) trusted on the darknet to access these markets and perform searches."); ¶ 22 ("EKP did not perform any purchases. Instead, we utilized the negotiation and sampling available to buyers and used both the exact format of an SSN, with and without dashes[,] separating the various components of an SSN.")

[13] Plaintiffs also contend that Frantz rebuts Ellman by [redacted] because

Ehuan Rebuttal. Defendants' Motion shows that Frantz's Ehuan Rebuttal, much like her Wojcieszek Rebuttal, improperly attempts to bolster her original report. Mot. at 18. Plaintiffs do not dispute the overlap between Frantz's rebuttal and her original report, nor do they disagree that Frantz's discussion of the HIPAA Security Rule and her evaluation of Mednax's compliance with it is more robust than in her original report. Rather, Plaintiffs' sole contention is that Frantz's statements "give context and explanation to her rebuttal offerings." Opp. at 11. Nearly 25 pages of duplicative, detailed HIPAA opinions, occupying well over half of her rebuttal's 33 pages, is not mere "context." The Ehuan Rebuttal violates Rule 26 and should be excluded.

D. Frantz's opinions related to NAPA are irrelevant and should be excluded.

Plaintiffs do not dispute that other than AA, no entity affiliated with North American Partners in Anesthesia ("NAPA") is a party to this litigation. They offer no case law to support their baseless and misleading assertion that Frantz's opinions concerning a non-party are relevant. Instead, they falsely claim that Exhibit 8 to their Opposition demonstrates that [redacted][14] Plaintiffs know that [redacted]; Plaintiffs even state in their response that *NAPA did not acquire AA until May 6, 2020.*[15] And Exhibit 8 in no way supports Plaintiffs' baseless assertions to the contrary; indeed, Exhibit 8 [redacted] Whether Plaintiff's misrepresentations on this front were intentionally made in bad faith or were carelessly misleading, the Court's conclusion on this issue should be the same: Frantz's opinions concerning non-party NAPA are irrelevant and should be excluded.

E. Olsen's opinions and calculations are unreliable and not admissible.

Rather than addressing the merits of Defendants' arguments concerning the admissibility of Olsen's testimony, Plaintiffs' Opposition largely focuses on issues not before the Court, such as Olsen's qualifications and the reliability of [redacted] generally, versus Olsen's improper

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[redacted] a. Opp. at 11. *See* ECF 252-15 (Frantz Rebuttal Rep. to Ellman) ¶¶ 14–19. But if [redacted], thereby increasing the need to assess causation on an individual basis. *See* ECF 252-13 (Frantz Second Dep.) at 52:12–53:7 (acknowledging that [redacted]).

[14] ECF No. 252 at 12.

[15] *Id.* This assertion is also inaccurate with respect to "NAPA." NMSC II, a corporate affiliate of NAPA, is the actual entity that acquired AA. ECF No. 256 at ¶ 3.

application of that approach to the facts at issue in this case. Plaintiffs' misdirection cannot save Olsen's unreliable and unhelpful opinions and calculations from exclusion.

1. Plaintiffs' assertions concerning Olsen's qualifications are distracting non sequiturs.

Plaintiffs dedicate an inordinate portion of their Opposition to Olsen's qualifications. Defendants' Motion did not address Olsen's qualifications, so Plaintiffs' claims on this front are non-responsive distractions and should be disregarded.

Notwithstanding Plaintiffs' belief to the contrary (Opp. at 13-14), Olsen's qualifications have no bearing on the reliability of his work in this case. "A qualified expert" "must still offer reliable testimony." *Coquina Invs. v. Rothstein*, 2011 WL 4949191, at *1 (S.D. Fla. Oct. 18, 2011). Plaintiffs' listing of other factually dissimilar cases where Olsen has not been excluded as an expert is thus misplaced.[16] No court has admitted Olsen as an expert in a cybersecurity case over the same suite of objections lodged by Defendants in this case.

2. Olsen's application of the market approach methodology is unreliable.

Plaintiffs fail to address most of Defendant's arguments addressing Olsen's improper application of the market value approach, and only raise four flawed points in response. All fail.

First, Plaintiffs incorrectly claim that Defendants' arguments concerning Olsen's varied improper applications of the market value approach go to the *weight* of Olsen's testimony. Opp. at 16. They do not. They are instead challenges to Olsen's basis for and *application* of the market value approach that go to the *admissibility* of his opinions. *See* Fed. R. Evid. 702, advisory committee's note to 2023 amendment ("[M]any courts have held that the critical questions of the sufficiency of an expert's basis, and the application of the expert's methodology, are questions of weight and not admissibility. These rulings are an incorrect application of Rules 702 and 104(a).").

Second, Plaintiffs claim Olsen used the best data he could obtain. But using the best available data does not equate to reliability. *Siharath v. Sandoz Pharms. Corp.*, 131 F. Supp. 2d 1347, 1372 (N.D. Ga. 2001) ("Plaintiffs argue that they have used the best methodology available for this case. That may

[16] *See United States v. Talmage*, 2019 WL 1787493, at *1, *3 (D. Utah Apr. 24, 2019) (property ownership action where defendants did not present "challenges [to] the reliability of the principles or methods on which Olsen's testimony is based" nor to "the reliability of Olsen's application of these principles and methods to the facts"); *AngioScore, Inc. v. TriReme Med., Inc.*, 87 F. Supp. 3d 986, 995-96, 1017 (N.D. Cal. 2015) (patent infringement and unfair competition case where defendants challenged Olsen's corporate opportunity and present value of purported profits opinions); *AngioScore, Inc. v. TriReme Med., Inc.*, No. 2015 WL 5258786, at *6 (N.D. Cal. Sept. 8, 2015) (patent infringement case where Olsen's opinions on starting royalty rate and adjustment of that rate were challenged).

be so, but their methodology does not satisfy the requirements of *Daubert*."). Plaintiffs have not shown, much less explained, how or why Olsen's market value opinions are reliable even though his method for selecting his source materials is unreliable, he used unreliable information and information he does not understand to form his opinion, incorrectly uses [redacted] in his calculations, and grouped disparate types of data together to back into his ultimate conclusions.

Third, Plaintiffs criticize Defendants' experts for not offering an alternative methodology or providing different data for Olsen to use.[17] But rebuttal experts are not obligated to offer alternative theories—they can solely identify the methodological shortcomings in another expert's work. *Wreal, LLC v. Amazon.com, Inc.*, 2016 WL 8793317, at *4 (S.D. Fla. Jan. 7, 2016) ("[R]ebuttal expert witnesses may criticize other experts' theories and calculations without offering alternatives.").

Fourth, Plaintiffs claim that the court in *Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 694 (N.D. Cal 2019) admitted testimony of an expert who utilized the same methodology as Olsen did in this case. However, the challenges to the expert's market analysis in *Adkins* were not the same as the flaws that defendants highlighted as problematic with Olsen's analysis. Plaintiffs' reliance on a non-binding opinion challenging the methodology of a damages expert on different bases than the ones raised by Defendants here is misplaced.

3. Olsen's [redacted] opinions and calculations are unreliable and unhelpful.

Plaintiffs' argument defending Olsen's [redacted] opinions and calculations again ignores the salient points of Defendants' arguments. Olsen does not use a discernable methodology in selecting [redacted].[18] Olsen relies exclusively on his prior litigation experience and conversation with Frantz to develop the time periods, but he never explains why those are sufficient bases for his work.[19]

Plaintiffs have not remedied these deficiencies nor do they provide the explanation necessary for the admission of his opinions and calculations. When experts do not employ a methodology for selecting a range from the universe of possibilities, their "opinion is highly speculative and unreliable." *Hi Ltd. P'ship v. Winghouse of Fla., Inc.*, 2004 WL 5486964, at *4 (M.D. Fla. Oct. 5, 2004) (excluding expert's testimony where "[t]here appear[ed] to be no real methodology underlying the process [the expert] used to select the particular range of 0-10%").

[17] *See* Opp. at 16-17.
[18] Defs.' Mot. to Exclude at 26-28.
[19] *Ids.*

Arguing that "Olsen is not being offered as an identity theft expert to opine as to the length of time the increased risk will burden Plaintiffs and class members" and that "Olsen does not purport to determine whether any particular remedy for the Class is appropriate" (Opp. at 18) does not transform his speculative and unreliable opinions into reliable, helpful, and admissible opinions. If anything, these arguments highlight the unhelpfulness of Olsen's opinions and calculations. "Proffered expert testimony must meet the legal as well as the substantive issues in the case." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1320 (11th Cir. 1999). Yet Olsen's future risk opinions do not meet the legal and substantive issues in the case, one of which is the length of time for which the putative class members are allegedly at risk of experiencing identity theft. Since Plaintiffs have not offered another expert to testify about the appropriate window for that risk and Olsen himself is not offering any opinion on that, his calculations are unhelpful and should be excluded.

4. The simple multiplication performed by Olsen to calculate the alleged statutory damages are unhelpful and inadmissible.

Plaintiffs' half-hearted attempt to stave off exclusion of Olsen's statutory damages calculation fails. Plaintiffs have not met their burden of showing how multiplying two numbers together involves any expert analysis or how it is helpful to the factfinder. They merely contend that calculations being "based upon mathematical calculations is not dispositive of the question whether that expert will assist the trier of fact," citing to two cases for that proposition. Opp. at 18. Although it may be true that the use of mathematical calculations is not alone dispositive, the cases Plaintiffs cite do not buttress a finding that Olsen's basic multiplication is helpful or needed in this case. In *Tuscaloosa v. Harcos Chemicals, Inc.*, the expert compiled the data "into utile measurements" (i.e., theoretical units that measure utility) by using three different mathematical processes: arithmetic, algebra, and multiple regression analysis. 158 F.3d 548, 566 (11th Cir. 1998). The expert in *Apple Inc. v. Corellium, LLC* likewise offered a plethora of opinions that included calculating the business's gross and net profits and statutory damages. *See* 2020 WL 8836065, at *1 (S.D. Fla. July 29, 2020), *R. & R. adopted*, 2021 WL 930292 (S.D. Fla. Mar. 11, 2021). The multiplication performed was part of a "multifaceted damages analysis," used to calculate a range of statutory damages, not a standalone calculation. *See* 2020 WL 4208652 (S.D. Fla. May 26, 2020).

II. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court grant Mednax's Motion to Exclude Expert Testimony of Gary Olsen and Mary Frantz.

Dated: January 11, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on January 11, 2024, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notice of electronic filing to all counsel of record.

/s/ Kristine M. Brown
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