

**UNITED STATES DISTRICT COURT  
DISTRICT OF CONNECTICUT**

VIP OF BERLIN, LLC, a Connecticut Limited Liability Company	:	CIVIL ACTION NO. 3:06CV01811(SRU)
	:	
	:	
v.	:	
	:	
THE TOWN OF BERLIN, CONNECTICUT, a Municipal Corporation; and HERMAN MIDDLEBROOKS, JR., in his official capacity as Town Manager for the Town of Berlin, Connecticut	:	
	:	MARCH 19, 2007

**AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF THE  
DEFENDANTS AND IN OPPOSITION TO THE PLAINTIFF’S MOTION FOR  
PRELIMINARY INJUNCTION**

The State of Connecticut (the “State”), as amicus curiae, is submitting this brief in opposition to the plaintiff VIP of Berlin’s motion for preliminary injunction and in support of the defendants, the Town of Berlin and Herman Middlebrooks.<sup>1</sup>

The issue in this case – the extent of a town’s authority to regulate a sexually oriented business seeking to do business within its borders – is a matter of significant statewide concern. Across the State, cities and towns are facing a proliferation of sexually oriented businesses, including adult bookstores, adult theaters, massage parlors, and facilities featuring live nude entertainment. Studies show that such businesses cause increased crime, especially sex-related crimes, reduced property values, the deterioration of neighboring businesses, and a lower quality of life for residents in the surrounding area. Common complaints of those forced to live in the

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<sup>1</sup> The State has filed, concurrently with this memorandum, a motion for leave to file an amicus curiae brief.

vicinity of sexually oriented businesses include safety concerns, excessive noise, parking problems, the presence of discarded sexually oriented material on residential lawns, visible explicit signage, and the performance of sexual acts in public places.

Seeking to control such problems, to protect the health, safety and general welfare of their citizens, and to preserve the quality of life within their communities, cities and towns across the State have enacted or are in the process of enacting regulations similar to Berlin's. The purpose of such regulations is not to ban sexually oriented businesses, but rather to reduce or eliminate their adverse secondary effects.

In seeking to strike down Berlin's ordinance, the present suit threatens similar ordinances statewide. Because ordinances such as Berlin's do not violate the federal constitution and are vitally important to the ability of all towns to protect the citizens of this State from the adverse secondary effects of sexually oriented businesses, the plaintiff's motion for a preliminary injunction should be denied.

### **BACKGROUND**

The plaintiff in this case, VIP of Berlin, LLC ("VIP"), wants to open a store in the Town of Berlin (the "Town") within 250 feet of a residential neighborhood that contains almost 200 homes. The store would sell primarily "lingerie, club wear, women's shoes, lotions, oils, greeting cards, gag gifts as well as sexually explicit DVDs, books, magazines and sex positive and sex enhancing novelties and products." (Amended Complaint ¶ 11). It would have no on-site entertainment or facilities for previewing merchandise. (Amended Complaint ¶ 11).

On July 25, 2006, VIP applied to the Town for a Certificate of Zoning Compliance. (Amended Complaint ¶ 16). The Town's chief zoning enforcement officer denied the application

because VIP had not obtained a license to operate a sexually oriented business. Such a license is required by the Town's Sexually Oriented Business Ordinance ( "SOB Ordinance") set forth in the Town Code, section 14-241 et seq. Among other provisions, the SOB Ordinance requires a sexually oriented business to be located at least 250 feet away from any residentially zoned land. (Berlin Town Code, § 14-291(c)). Because VIP's proposed business location is within 250 feet of a residential zone, it is ineligible for an SOB license. (Amended Complaint ¶ 36). Although VIP appealed the denial of its application for a certificate of zoning compliance to the Berlin Zoning Board of Appeals, the Board denied its appeal. (Amended Complaint ¶ 18).

On November 9, 2006, VIP filed the present suit challenging the constitutionality of Berlin's SOB Ordinance. In particular, VIP claims that the Ordinance violates the First and Fourteenth Amendments. By way of relief, VIP is seeking a declaratory judgment that the SOB Ordinance is unconstitutional, preliminary and permanent injunctions enjoining its enforcement, damages, attorneys' fees, and costs.

### **ARGUMENT**

#### **I. THE FIRST AMENDMENT DOES NOT PROHIBIT TOWNS FROM REGULATING SEXUALLY ORIENTED BUSINESSES.**

The United States Supreme Court has firmly established that the right to freedom of speech protected by the First Amendment is not absolute. Although governments may not enact regulations for the purpose of restraining speech based on its content, "so-called 'content-neutral' time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication." Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986). A regulation is

“content-neutral” if it is “justified without reference to the content of the regulated speech.” *Id.* at 48.

Applying this standard in Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47 (1986), the Supreme Court considered the constitutionality of a city zoning ordinance that restricted the location of adult movie theatres in order to “prevent crime, protect the city’s retail trade, maintain property values, and generally protect and preserve the quality of the city’s neighborhoods, commercial districts, and the quality of urban life.” *Id.* at 48 (brackets and internal quotation marks omitted). Because the ordinance did not target speech itself, but rather was justified by the city’s substantial interest in preventing the negative “secondary effects” of adult theaters on the surrounding community, and did not deprive such businesses of a reasonable opportunity to operate within the city, the Court found no First Amendment violation.

In so holding, the Court made clear not only that cities may regulate sexually oriented businesses based on concerns for the businesses’ “adverse secondary effects,” but also that evidence of such secondary effects need not include studies of the regulating city itself. Specifically, the Court explained that “[t]he First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.” *Id.* at 51-52. Justice Kennedy’s concurrence in City of Los Angeles v. Alameda Books, 535 U.S. 425 (2001), on which VIP relies, reiterates this point and notes that “very little evidence is required” to satisfy the city’s threshold burden. See Alameda Books, 535 U.S. at 451 (Kennedy, J., concurring); see also 535 U.S. at 438 (plurality opinion).

Based on the secondary effects doctrine set forth in Renton, courts across the country have upheld ordinances regulating sexually-oriented businesses based on evidence of the businesses' adverse secondary effects in other jurisdictions. See, e.g., H and A Land Corp. v. City of Kennedale, Texas, No. 05-11474, 2007 U.S. App. Lexis 3941 (5<sup>th</sup> Cir. Feb 22, 2007)(upholding ordinance barring location of SOBs within 800 feet of residences and other entities based on two studies from other states showing that off-site SOBs cause decreased property values in the surrounding areas); Z.J. Gifts D-2, LLC v. City of Aurora, 136 F.3d 683 (10<sup>th</sup> Cir.), cert. denied, 525 U.S. 868 (1998)(upholding ordinance prohibiting SOBs within 1500 feet of residential districts, noting that city "may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated"); Richland Bookmart, Inc. v. Nichols, 137 F.3d 435 (6<sup>th</sup> Cir. 1998), cert. denied, 537 U.S. 823 (2002)(concluding that the Tennessee legislature reasonably relied on the experience of other jurisdictions in restricting SOB hours of operation); ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8<sup>th</sup> Cir.), cert. denied, 513 U.S. 1017 (1994)(preliminary injunction in favor of adult bookstore reversed because city could properly rely on other cities' studies of secondary effects of reasonably similar businesses).

Even if another jurisdiction's study does not involve the identical type of establishment that the city is seeking to regulate, the city may properly rely on it if it involves establishments in the same business category. Thus, for example, in City of Erie v. Pap's A.M., 529 U.S. 277 (2000), the Court, in a plurality opinion, held that the City of Erie, Pennsylvania, in enacting an ordinance banning public nudity, could rely on evidence of negative secondary effects associated with adult movie theaters. As stated by the Court, "[b]ecause the nude dancing at [plaintiff's

establishment] is of the same character as the adult entertainment at issue in Renton [adult movies], it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects.” Id. at 296-297 (plurality opinion; internal citations omitted).

Similarly, courts have concluded that cities seeking to regulate “off-site” SOB’s, such as VIP (which require customers to leave the premises to view or use their purchases), may rely on studies of the secondary effects of “on-site” SOB’s (which permit customers to view content on the premises), because the two businesses are reasonably similar. See, e.g., Doctor John’s Inc. v. City of Roy, 465 F.3d 1150, 1166 (10<sup>th</sup> Cir. 2006)(“the City’s reliance on the ‘package’ of studies commonly invoked to justify SOB ordinances is quite permissible to meet the City’s slight initial burden, even if the studies do not address SOB’s precisely like Dr. John’s”); Z.J. Gifts D-2, LLC v. City of Aurora, 136 F.3d 683, 690 (10<sup>th</sup> Cir. 1998)(“[e]ven if [the appellant] is a new type of adult business, it may not avoid time, place and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses”); ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413, 1418 (8<sup>th</sup> Cir.), cert. denied, 513 U.S. 1017 (1994)(same).

In addition to studies, or as an alternative to studies, a city may rely on public testimony. For example, in World Wide Video of Washington, Inc. v. Spokane, 368 F.3d 1186, 1195 (9<sup>th</sup> Cir. 2004), the court, in upholding an SOB, concluded that “[t]he citizen testimony concerning pornographic litter and public lewdness, standing alone, was sufficient to satisfy the ‘very little’ evidence standard of Almeida Books.”

In sum, all that is required is that the municipality rely upon evidence that is “reasonably believed to be relevant to the problem” that it seeks to address. Renton, 475 U.S. at 52. The

Town of Berlin, in relying both on studies from other towns, as well as public testimony from local individuals and a real estate agent concerning the negative impact of VIP's proposed opening on the marketability of surrounding properties, has clearly met this standard.

II. **SEXUALLY-ORIENTED BUSINESSES CAUSE SIGNIFICANT NEGATIVE SECONDARY EFFECTS.**

The adverse secondary effects of sexually-oriented businesses are well documented in studies of cities and towns from across the country. See [www.communitydefense.org/cdcdocs/landuse/secondaryeffects.html](http://www.communitydefense.org/cdcdocs/landuse/secondaryeffects.html), containing links to secondary effects studies conducted in Phoenix, AZ; Tucson, AZ; Garden Grove, CA; Los Angeles, CA; Whittier, CA; Adams County, CO; Denver, CO; Manatee County, FL; St. Mary's, GA; Rome, GA; Indianapolis, IN; Minneapolis, MN; St. Paul, MN; Kansas City, MO; New Hanover County, NC; Las Vegas, NV; Cattaraugus County, NY; Islip, NY; New York City, NY; New York Times Square; Cleveland, OH; Oklahoma City, OK; Amarillo, TX; Austin, TX; Beaumont, TX; Cleburne, TX; Dallas, TX; El Paso, TX; Houston, TX; Newport News, VA; Bellevue, WA; DesMoines, WA; Seattle, WA; St. Croix County, WA.

As these studies demonstrate, crime rates are significantly higher in areas with one or more SOBs than in areas without such establishments. See Peter R. Hecht, Report to the American Center for Law and Justice on the Secondary Impacts of Sex Oriented Businesses, Environmental Research Group (1996)(available at [www.communitydefense.org/cdcdocs/landuse/pdf/aclj.pdf](http://www.communitydefense.org/cdcdocs/landuse/pdf/aclj.pdf)), at pp. 5-12.

For example, in Indianapolis, researchers found that major crimes (homicide, rape, robbery, aggravated assault, burglary, larceny, and vehicle theft) occurred in areas containing at least one SOB at a rate that was 23% higher than in areas not containing such businesses. Adult

Entertainment Businesses in Indianapolis: An Analysis, Dept. of Metropolitan Development, pp. ii, 18, (1984)(“Indianapolis Study”), available at [www.communitydefense.org/cdcdocs/landuse/pdf/inindianapolis.pdf](http://www.communitydefense.org/cdcdocs/landuse/pdf/inindianapolis.pdf). Sex-related crimes (rape, indecent exposure, obscene conduct, child molestation, adult molestation, and commercial sex) occurred at a rate that was 77% higher in areas with SOBs. Id., pp. 2, 18. The impact was particularly pronounced in residential areas with at least one SOB. In such areas, sex-related crimes were found to occur four times more frequently than in commercial areas with one or more SOBs. Id., pp. ii, 26.

Studies in other cities, including Phoenix, Dallas, Austin, Denver, and Adams County, Colorado, have similarly shown significantly greater rates of crime and sex-related crime in residential and commercial neighborhoods with at least one SOB when compared to similar neighborhoods with no SOBs. See Planning Department, City of Phoenix, Arizona, Adult Business Study (1979)(area with SOB had six times more sex crimes than area without SOB); Peter Malin, MAI, An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas (April, 1997), p. 8 (sex-crime arrests five times higher in area with SOBs than in area without SOBs); Office of Land Development Services, Austin, Texas, Report on Adult Oriented Businesses in Austin (May 19, 1986)(“Austin Study”)(sex-related crimes were two to five times higher in areas with at least one SOB); A Report on the Secondary Impacts of Adult Use Businesses in the City of Denver, [Colorado], pp. 33-41 (Jan. 1998)(“Denver Study”); Adams County [Colorado] Sheriff’s Department, Adams County Nude Entertainment Study (1990).<sup>2</sup>

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<sup>2</sup> All of these studies, and the studies referenced below, are available at [www.communitydefense.org](http://www.communitydefense.org).

SOBs not only bring increased crime, but also reduce surrounding property values. Studies in numerous cities have found that the value of residential property drops in areas surrounding SOBs. See, e.g., Austin Study, pp. 24-25; Newport News, Virginia, Adult Use Study, pp. 18-19 (March, 1996)(“Newport News Study”); McCleary, R. and J.W. Meeker, Final Report to the City of Garden Grove: The Relationship Between Crime and Adult Business Operations on Garden Grove Boulevard, City of Garden Grove, California, pp. 33-47 (1991)(“Garden Grove Study”); Denver Study, pp. 25-32, 42-55; City of Oklahoma City, Community Development Department, Adult Entertainment Businesses in Oklahoma City: A Survey of Real Estate Appraisers (March 3, 1986)(“Oklahoma City Study”). Reasons cited for the decline include reduced interest in such properties among families with children and the reluctance of mortgage underwriters to make financing available because of concerns that the neighborhood is in decline. Austin Study, pp. 26-27. In addition, residents report problems with pornographic materials littering their lawns, increased noise, parking problems, trespassing, excessive and explicit signage, and a decreased “quality of life.” Garden Grove Study, pp. 36-37; Hubert H. Humphrey, III, Attorney General of Minnesota, Report of the Attorney General’s Working Group on the Regulation of Sexually Oriented Businesses, pp. 12-13 (June 6, 1989); Denver Study, pp. 25-32.

Properties in commercial areas with SOBs similarly experience a loss in value, which is manifested not only in lower selling prices, but also difficulty leasing, difficulty attracting customers, difficulty keeping employees, and increased operating costs due to the need for additional security patrols, burglar alarms and better locks, and trash clean-up. Peter Malin, MAI, An Analysis of the Effects of SOBs on the Surrounding Neighborhoods in Dallas, Texas, p. 7

(April, 1997); Garden Grove Study, pp. 33-38; Denver Study, pp. 25-32, 42-55; Austin Study, pp. 25 and 27; Department of City Planning, City of Los Angeles, Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles, p. 35 (June, 1977).

Although most of these studies considered the secondary effects of all types of SOBs, it should be noted that the Indianapolis Study and the Oklahoma City study focused *specifically on* “adult bookstores.” In the Indianapolis study, approximately 75% of real estate appraisers surveyed responded that an adult bookstore would have a significant negative effect on the value of both residential and commercial properties within a one block radius of the store. See Indianapolis Study, pp. 34 and 51. Most of these appraisers estimated that the decrease in residential property values would be between 1 and 20%, but 21% of the appraisers predicted that the loss would exceed 20%. Id., p. 34. Similarly, in the Oklahoma City Study, 74% of responding real estate appraisers indicated that an adult bookstore within one block of a residential neighborhood would decrease property values. Thirty two (32) percent of these appraisers believed that the decline would exceed 20%, while forty two (42) percent believed that the decline would be between one and twenty percent. City of Oklahoma City, Community Development Department, Adult Entertainment Businesses in Oklahoma City: A Survey of Real Estate Appraisers (March 3, 1986). As the Fifth Circuit recently concluded, “[t]he Indianapolis and Oklahoma City studies support the belief that off-site sexually-oriented businesses cause harmful secondary effects to the surrounding area in the form of decreased property value.” H and A Land Corp. v. Reliable Consultants, Inc., No. 05-11474, 2007 U.S. App. Lexis 3941 at \*12 (5<sup>th</sup> Cir. Feb. 22, 2007).

The State is not aware of any formal studies of the secondary effects of SOBs in Connecticut. There is no reason to believe, however, that the secondary effects here are any different than in other States. Indeed, in Manchester, Connecticut, where VIP recently opened a new adult bookstore, it has made little effort to be a good neighbor. Instead, it has provoked outrage from local residents by painting its new store “neon yellow.” As one resident railed:

The building looks like a grotesque interpretation of Disney World, with shades of Miami and Las Vegas. The front is marked with two-story arched windows and fake columns. Topping it off on the third story is a pyramid-type cupola. The entire exterior is painted the kind of yellow that makes your eyes wobble. No nuance. The original building was brick. The new owner painted over the brick. There’s no accounting for taste, but this is a business that from the start was not welcome in Manchester. The owner must have known that. Instead of working with nearby residents on plans that might have calmed them, he erected this horrible neon monument to retail sex at one of the town’s gateways.

Susan Plese, “VIP: A Garish Monument to Retail Sex,” *Hartford Courant*, p. B4 (Aug. 5, 2006).

Another resident expressed similar offense, noting that “[VIP] sticks out like a sore thumb. I thought they’d be a better neighbor instead of painting it banana yellow.” Regine Labossiere, “Adult-Business Rules Amended; Regulations Now Define Them, Limit Locations to Industrial Zones,” *Hartford Courant*, p. B3 (September 7, 2006).

Manchester’s experience serves to further underscore Berlin’s well-founded concern that a VIP within 250 feet of a residential neighborhood will decrease property values and negatively impact the quality of life for neighborhood residents.

**III. TOWNS ACROSS THE STATE HAVE ENACTED ORDINANCES SIMILAR TO BERLIN'S IN AN EFFORT TO CONTROL THE SECONDARY EFFECTS OF SEXUALLY-ORIENTED BUSINESSES.**

In seeking to control the adverse secondary effects of SOBs, Berlin is by no means unique. Across the State, cities and towns have enacted ordinances that regulate sexually-oriented businesses and the location of such businesses within their communities.

In many cases, these ordinances require that SOBs be located substantially further from residentially zoned land than Berlin requires. For example, whereas Berlin requires a 250 foot set-back between an SOB and residential property, Bristol, Griswold, Hartford, Meriden, West Hartford, and Wethersfield require a 1,000 foot set-back. See City of Bristol Code of Ordinances, § 13-103(g); Code of the Town of Griswold, §§ 117-2 and 117-4; Hartford Municipal Code, §§ 35-2 and 35-921; Code of the City of Meriden, §§ 213-7.B and 213-20.B(2)(p); Code of the Town of West Hartford, §177-71.B; Code of the Town of Wethersfield, § 46-3.G.<sup>3</sup>

Other towns, such as Rocky Hill and Southington, require a 750 foot set-back, Code of the Town of Rocky Hill §§ 71-2 and 71-3.A(2); Code of the Town of Southington, § 4-53(h), while Ansonia, Branford, Cromwell, Ellington, Enfield, Fairfield, Mansfield, Seymour, and South Windsor require a 500 foot set-back. Code of the City of Ansonia § 17-36(b)(1) and (c); Code of the Town of Branford, § 111-4.G; Code of the Town of Cromwell, §§ 71-2 and 71-4; Code of the Town of Ellington, § 5-4.G; Code of the Town of Enfield § 18-123(g); Code of the Town of Fairfield, §§ 40A-3 and 40A-4.G; Code of the Town of Mansfield, §§99-2 and 99-5; Code of the Town of Seymour § 10-6; Code of the Town of South Windsor § 10-64(g).

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<sup>3</sup> The State has not exhaustively reviewed all municipal codes within the State. Instead, the ordinances listed are drawn from the limited collections available on-line and in the State Library. It is probable that if an exhaustive review of all municipal codes were conducted, additional SOB ordinances would be found with provisions similar to those discussed herein.

In many cases, cities and towns apply their set-back requirements not only to SOBs with on-site entertainment, but also to adult bookstores such as VIP where all merchandise is taken off-site. See, e.g., Hartford Municipal Code, §§ 35-2 and 35-921 (1000 foot set-back required from residential zone); Code of the City of Meriden, §§ 213-7.B and 213-20.B(2)(p) (1000 foot set-back); Code of the Town of Griswold, §§ 117-2 and 117-4 (1000 foot set-back); Code of the Town of Rocky Hill §§ 71-2 and 71-3.A(2) (750 foot set-back); Code of the City of Ansonia § 17-36(b)(1) and (c) (500 foot set-back); Code of the Town of Fairfield, §§ 40A-3 and 40A-4.G (500 foot set-back); Code of the Town of Mansfield, §§99-2 and 99-5 (500 foot set-back); Code of the Town of Orange, §§383-145 and 383-146.B.(2)(400 foot set-back); Code of the Town of Durham, §§ 9-62 and 9-64(2) (300 foot set-back); Code of the Town of Westbrook, §§ 8.18.02(d) and 8.18.03(a) (300 foot set-back); Code of the Town of Old Saybrook, §§ 303-9 and 303-27G(15)(a)[1](250 foot set-back); Code of the Town of Bethel, §§ 118-47.5.B and 118-47.5E(1)(a) (200 foot set-back); Code of the Town of North Branford, §§ 101-2 and 101-3.D(1) (200 foot set-back); Code of the City of Shelton, §§ 9-123 and 9-125(a) (200 foot set-back); City of New Haven Zoning Ordinance, §§ 42.3(a) and 42.3(b)(1)(d) (150 foot set-back).

Like the Town of Berlin, these towns have enacted their SOB ordinances in reliance on many of the studies discussed above that document the serious adverse secondary effects of sexually-oriented businesses. Some towns already have multiple SOBs and are familiar with the problems that they cause. Other towns have none, but have witnessed the proliferation of such establishments in other communities. In each case, however, the town's goal is the same -- to protect its citizens from the adverse secondary effects of sexually-oriented businesses, including increased crime, lowered property values, and a deterioration of the neighborhood.

In sum, it is vitally important that Berlin's SOB ordinance be upheld. Not only is the ordinance fully consistent with the First Amendment, but upholding it ensures that cities and towns statewide will continue to be able to enforce their own SOB ordinances and thereby protect the health, safety and general welfare of their citizens and the quality of life in communities statewide. As the Supreme Court has emphasized, a municipality's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986), quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976)(plurality opinion).

### **CONCLUSION**

For all of the foregoing reasons, the State of Connecticut, as amicus curiae, respectfully requests that this Court deny VIP's motion for a preliminary injunction and uphold the constitutionality of Berlin's SOB Ordinance.

AMICUS CURIAE  
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**CERTIFICATION**

I hereby certify that on March 19, 2007, a copy of the foregoing Amicus Curiae Brief of the State of Connecticut in Support of the Defendants and in Opposition to the Plaintiff's Motion for Preliminary Injunction was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone who is unable to accept electronic filing as indicated on the court's Notice of electronic filing. Parties access this filing through the court's CM/ECF system.

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