

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:09-cv-02802-REB- MEH

JEREMY C. MYERS,

Plaintiff,

v.

BRIAN KOOPMAN, in his individual capacity,

Defendant.

DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS

DEFENDANT Brian Koopman ("Koopman"), by and through his attorneys, the Loveland City Attorney's Office and Wick & Trautwein, LLC, and pursuant to Fed.R.Civ.P. 12(c), respectfully moves that judgment on the pleadings be entered in his favor as to the sole claim for relief asserted against him, as set forth in more detail below, for failure to state a claim upon which relief may be granted and, alternatively, that partial judgment on the pleadings be entered in his favor as to most of the factual allegations against him and that aspect of the sole claim for relief that is barred due to the bar of limitations. In support hereof, Koopman states as follows:

D.C.COLO. LCivR 7.1 CERTIFICATION

Undersigned defense counsel hereby certifies that, before filing this Motion, he has conferred with opposing counsel to resolve the disputed matter. Plaintiff is opposed to the relief requested herein.

I. INTRODUCTION

This Court previously dismissed with prejudice Plaintiff Jeremy C. Myers' ("Myers") first and third claims, finding such claims were barred by the applicable statute of limitations. *Order Concerning Defendants' Motions to Dismiss* [#99, filed 09/27/10]. The first and third claims for relief set forth in the original Complaint attempted to assert claims for excessive force and unlawful search and seizure [#2]. The sole claim for relief set forth in the Amended Complaint is a § 1983 malicious prosecution claim, putatively grounded in the Fourth Amendment and the procedural due process provision of the Due Process Clause of the Fourteenth Amendment.¹ *Plaintiff's Amended Complaint and Jury Demand ("Amended Complaint")* filed 03/02/11 at 12-17 [#127].

However, the United States Supreme Court has never expressly held that a malicious prosecution claim, grounded upon the Fourth Amendment, is cognizable under § 1983. See *Wallace v. Kato*, 549 U.S. 384, 390, 127 S.Ct. 1091, 1096, 166 L.Ed. 2d 973, n.2 (2007) (explaining that it has "never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983," and declined to do so there, also refraining from deciding whether such a claim even exists). The Tenth Circuit Court of Appeals has expressly held that if anything, it's the Fourth Amendment—not the procedural due process protection of the Fourteenth Amendment—that supports a § 1983 malicious prosecution claim, explaining, "under *Albright* and our subsequent cases, the Fourth Amendment adequately protected [plaintiff's] constitutional liberty

¹ The Court previously decided that "Myers has not stated a viable *substantive* due process claim under the Due Process Clause of the Fourteenth Amendment." *Order Concerning Defendants' Motion to Dismiss*, filed 06/17/11 at 7 [#140] (emphasis added).

interests, and [plaintiff] therefore has no *procedural* due process claim based on pre-trial deprivations of physical liberty.”² *Becker v. Kroll*, 494 F.3d 904, 920 (10th Cir. 2007) (emphasis added) (also holding, *id.* at 920-21, that post-deprivation state tort remedies are adequate to satisfy due process requirements, agreeing that a “state tort remedy ‘knocks out any constitutional tort of malicious prosecution’ based on due process”). See *Montgomery Ward & Co. v. Pherson*, 129, Colo. 502, 272 P.2d 643 (1954) (recognizing cause of action under Colorado law for tort of malicious prosecution).

However, as alleged in the Amended Complaint, there was no deprivation of Myers’ liberty sufficient to constitute a seizure that would trigger the Fourth Amendment’s protections after criminal charges were filed against Myers following a weekend detention in jail from which Myers bonded out. See *Amended Complaint* filed 03/02/11, ¶¶24-28 at 10-12 [#127]; *Becker*, 494 F.3d at 914-916 (“A groundless charging decision may abuse the criminal process, but it does not, in and of itself, violate the Fourth Amendment absent a significant restriction on liberty.”) (“standard conditions of pretrial release” are insufficient to constitute a Fourth Amendment “seizure”).

Myers’ sole claim for § 1983 malicious prosecution as pled therefore fails to state a claim upon which relief may be granted under either the Fourth or Fourteenth Amendments. Alternatively, the majority of factual allegations asserted in the Amended Complaint address and serve as the basis for the time-barred excessive force and unlawful search and seizure claims, and might, *arguendo*, also have served as a basis

² This Court has previously ruled that “Myers claim involves only pretrial deprivation of liberty.” *Order Concerning Defendants’ Motion to Dismiss*, filed 06/17/11 at 8 [#140].

for false arrest or false imprisonment claims had they been made. However, any such claims would now also be time-barred and cannot be shoe-horned into a § 1983 malicious prosecution claim.

Such time-barred claims, and the sole claim for § 1983 malicious prosecution, stem from the September 6, 2007 execution of a no-knock search warrant at premises in Loveland, and the arrest of Myers the next day, as well as the subsequent prosecution for charges relating to an alleged operation of a methamphetamine laboratory on those premises, which charges were ultimately dismissed before trial.

As discussed in more detail below, the remaining scope of this litigation—and the supporting factual allegations—consisting of alleged Constitutional violations for which Myers seeks redress under a single § 1983 malicious prosecution claim, must be limited to post-arraignment deprivations of liberty, thereby rendering irrelevant as a matter of law all allegations of misconduct by Koopman prior to the time of Myers' arraignment and after dismissal of criminal charges against him. Accordingly, the Court would be acting properly in dismissing all other factual allegations at this stage of the proceedings.

II. STATEMENT OF FACTS

The factual allegations of this case were well summarized by this Court in its *Order Concerning Defendants' Motion to Dismiss* [#140, entered 06/17/11]:

"Myers alleges that on September 5, 2007, Koopman, a detective with the Loveland Police Department, executed an affidavit in support of a no knock search warrant which later was executed at a property that had been occupied by Myers. Myers alleges that Koopman 'maliciously, intentionally and/or recklessly made false and

misleading statements' in the affidavit, *Plaintiff's Amended Complaint and Jury Demand* [#127], ¶14. Allegedly, Koopman's false and misleading statements in the warrant affidavit included a representation that 'an unnamed confidential informant indicated that a methamphetamine lab existed in the attic' of a building occupied by Myers, and that various other facts indicative of a methamphetamine lab existed on the premises. *Id.*, ¶14(A) through (M). Myers alleges that Koopman knew that 'the information given by his confidential informant . . . was false.' *Id.*, ¶41(a). Koopman allegedly had two video surveillance cameras installed to monitor Meyer's [sic] property. Myers alleges that one camera was installed in late May 2007, and the other was installed in mid-August 2007. *Id.*, ¶¶12, 13. According to Myers, the information captured by those cameras was inconsistent with much of the information contained in Koopman's Affidavit. *Id.*, ¶15.

Myers alleges that on September 5, 2007, Koopman obtained a no-knock search warrant for Myers' property based on the allegedly false and malicious statements in Koopman's affidavit. On Thursday, September 6, 2007, members of the Larimer County Drug Task Force along with the Larimer County and Loveland SWAT teams executed the no-knock warrant at Myers' property. At the time of the search, seven field tests were conducted on suspected drugs found in the course of the search, and each test showed a false positive for the presence of an illegal drug. Myers alleges that Koopman 'fabricated the results maliciously or the [test] strips were intentionally and/or improperly used to achieve a malicious pre-determined goal.' *Id.*, ¶37(h). After the search was completed, Koopman allegedly prepared or endorsed an affidavit in support of a warrant for the arrest of Myers. *Id.*, ¶34. The affidavit allegedly contained false statements to support the issuance of an arrest warrant, and Koopman allegedly 'acted

maliciously, recklessly, knowingly, intentionally, willfully and wantonly' in preparing or endorsing the affidavit.

Myers was arrested on Friday, September 7, 2007, and was detained in the Larimer County Detention Center until Monday, September 10, 2007. Criminal charges were filed against Myers and several hearings were held in his criminal case between September 7, 2007 and November 15, 2007. Ultimately, testing conducted by the Colorado Bureau of Investigation demonstrated that no controlled substances were recovered from Myers' property or from the neighboring buildings that were searched on September 6, 2007. The district attorney dropped all charges against Myers on November 15, 2007."

Myers further alleges that Koopman was aware of the Colorado Bureau of Investigation's ("CBI") negative test results at the time of Myers' preliminary hearing on November 15, 2007, and lied under oath as to that fact. *Id.*, ¶37(g). Myers further alleges that after the criminal case was dismissed and while this suit was pending, Koopman "fabricated" a second confidential informant with information that Myers was tipped off to the search and hid or destroyed evidence. *Id.*, ¶37(k). Myers alleges Koopman continued a malicious course of action by submitting the same evidence that the CBI determined not to contain a controlled substance to the CSU crime lab using another search warrant in a futile search for illegal explosives. *Id.*, ¶37(l).

Myers did not initiate this action in state court from which this case was removed, alleging claims against Koopman, until November 5, 2009 [*#2, Complaint and Jury Demand*, filed in state court 11/05/09, filed in federal court 12/01/09].

III. ARGUMENT

A. Koopman is Entitled to Judgment on the Pleadings with Respect to the Sole Claim for Relief Alleging a § 1983 Malicious Prosecution Based Upon the Fourth Amendment and the Procedural Due Process Provision of the Due Process Clause of the Fourteenth Amendment.

As outlined above, the United States Supreme Court has never expressly recognized a § 1983 malicious prosecution claim grounded upon the Fourth Amendment. Rather, it specifically left open the question in *Wallace, supra*, whether such a claim is even cognizable under § 1983. *Wallace*, 549 U.S. at 390, 127 S.Ct. at 1096, 166 L.Ed.2d 973, n.2 (“Assuming without deciding that such a claim is cognizable under § 1983, petitioner has not made one”). The Supreme Court reiterated that it has “never explored the contours of a Fourth Amendment malicious-prosecution suit under § 1983,” and declined to do so there. *Id.*

Based upon the Supreme Court’s failure to recognize a Fourth Amendment-based § 1983 malicious prosecution claim, Myers’ sole claim for relief—to the extent it purports to ground itself upon the Fourth Amendment—fails to state a claim upon which relief may be granted, thereby entitling Koopman to judgment on the pleadings. Even if a Fourth Amendment-based § 1983 malicious prosecution claim exists in the abstract, Myers’ failure to plead a physical liberty-restricting “seizure” occurred after he was criminally charged renders the Fourth Amendment unavailable as a ground for his § 1983 malicious prosecution claim. See *Becker*, 494 F.3d at 914-916.

Further, the Tenth Circuit expressly held in *Becker* that a plaintiff who tried to assert a § 1983 malicious prosecution claim in a case, like here, where criminal charges

were brought but dismissed before trial, had no Fourteenth Amendment procedural due process claim based on pre-trial deprivations of physical liberty. *Becker*, 494 F.3d at 919-20 (citing *Albright v. Oliver*, 510 U.S. 266, 114 S.Ct. 807 (1994); *Pierce v. Gilchrist*, 359 F.3d 1279, 1285-86 (10th Cir. 2004) and *Taylor v. Meacham*, 82 F.3d 1556, 1560 (10th Cir. 1996)).³

As noted above, this Court has already determined that Myers' claim involves only pre-trial deprivation of liberty⁴ since, as alleged in the Amended Complaint, the criminal proceedings against him were dismissed prior to trial. Therefore, Myers' attempt to ground a § 1983 malicious prosecution claim on the procedural due process provision of the Fourteenth Amendment Due Process Clause is ineffective as a matter of law and fails to state a claim upon which relief may be granted.

Judgment on the pleadings should therefore be granted Koopman.

³ This Court, relying upon *Mondragon v. Thompson*, 519 F.3d 1078, 1082-83 (10th Cir. 2008), previously ruled that the Amended Complaint has stated a "potentially viable" Fourteenth Amendment procedural due process claim. *Order Concerning Defendants' Motion to Dismiss*, filed 06/17/11 at 9-10 [#140]. However, the Court's analysis there failed to consider the more specific holding in *Becker*, *supra*, regarding the Fourteenth Amendment procedural due process protection's inapplicability to pre-trial deprivations of physical liberty in a case like this where criminal charges were brought but dismissed before trial. To the extent this motion is considered a motion for reconsideration, such a motion is appropriate when the court has misapprehended the controlling law, *Servants of the Paraclete v. Does, I-XVI*, 204 F.3d 1005, 1012 (10th Cir. 2000), or represents the need to correct clear error or prevent manifest injustice. *Id.*; *Brunmark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 948 (10th Cir. 1995).

⁴ More specifically, Myers alleges only pre-charging deprivation of liberty during a weekend stint in jail immediately following his arrest.

B. If Myers has a Fourth Amendment Claim for Malicious Prosecution, Case Law Subsequent to *Albright* suggests it is Limited in Scope and Legally Distinct from any Time-barred Claims Myers May have had for False Arrest, Excessive Force or Unreasonable Search and Seizure. Yet, the Vast Majority of Myers' Allegations Relate to these Time-barred Claims, Thereby Entitling Myers to Partial Judgment on the Pleadings.

- 1. Partial Judgment on the Pleadings is the Appropriate Procedural Mechanism to Address Those Allegations of the Amended Complaint Which Undergird Claims for Relief that are Time-barred.**

The issue of the proper limitations period is primarily a legal question, amenable to analysis and resolution under a motion for judgment on the pleadings. See *EEOC v. W.H. Braum, Inc.*, 347 F.3d 1192, 1195 (10th Cir. 2003). A motion seeking dismissal on grounds of statute of limitations is properly brought as a motion for judgment on the pleadings even where the court is required to consider facts beyond the bare face of the complaint, such as the date the complaint was filed and the contents of an earlier complaint. *Peia v. U.S.*, 152 F.Supp.2d 226, 232 (D. Conn. 2001), *aff'd*, 62 Fed. Appx. 394, 2003 WL 1868481, *cert. denied*, 540 U.S. 875, 124 S.Ct. 223, 157 L.Ed.2d 137 (2003). Where it is apparent on the face of the complaint that a suit is time-barred, it is entirely proper for the district court to grant judgment on the pleadings in favor of the defendant. *Phelps v. McClellan*, 30 F.3d 658, 662 (6th Cir. 1994).

A motion for *partial* judgment on the pleadings has been given tacit approval by the United States Supreme Court in *City of Los Angeles v. Lyons*, 461 U.S. 95, 98-99, 103 S.Ct. 1660, 1663, 75 L.Ed. 675 (1983), when it did not take issue with a partial judgment on the pleadings motion granted by a lower court. Alternatively, the court may convert the motion to one for partial summary judgment under Rule 56(d) and dispose

of the issue that way, *Motown Record Corp. v. George A. Hormel & Co.*, 657 F.Supp. 1236, 1237-38 (C.D. Cal. 1987), inasmuch as the legal standard to be applied in either a motion for summary judgment or judgment on the pleadings is "identical." 5 *C. Wright & A. Miller*, Federal Practice and Procedure § 1369, p. 700 (1969); accord, *Miller v. St. Paul Fire and Marine Ins. Co.*, 480 F.Supp. 32, 33-34 (W.D. Okla. 1979) (defense that claim is barred by limitations may be raised by motion for summary judgment, motion to dismiss, or by motion for judgment on the pleadings).

2. Even Assuming the Accuracy of Myers' Factual Allegations, the Vast Majority of Them Fail to Undergird Myers' Sole Malicious Prosecution Claim Inasmuch as They Instead Support Time-barred Claims for Relief.

While the U.S. Supreme Court has never decided whether a malicious prosecution suit is cognizable under § 1983, *Wallace v. Kato*, 549 U.S. at 390, 127 S.Ct. at 1096, 166 L.Ed.2d 973, n.2, any such claim is legally distinct from a claim for false arrest/imprisonment:

"Reflective of the fact that false imprisonment consists of detention without legal process, a false imprisonment ends once the victim becomes held *pursuant to such process*—when, for example, he is bound over by a magistrate or arraigned on charges. [cites omitted]. Thereafter, unlawful detention forms part of the damages for the 'entirely distinct' tort of malicious prosecution, which remedies detention accompanied, not by absence of legal process, but by *wrongful institution* of legal process. [cites omitted]. 'If there is a false arrest claim, damages for that claim cover the time of detention up until issuance of process or arraignment, but not more. From that point on, any damages recoverable must be based on a malicious prosecution claim and on the wrongful use of judicial process rather than detention itself.'"

Wallace, 549 U.S. at 389-90. This distinction was significant in *Wallace* because—like in this case—the plaintiff there failed to timely file his claim for false arrest or imprisonment. *Id.* at 391-92. Because the tort of false imprisonment was legally distinct

from malicious prosecution, the court found the statute of limitations for the false imprisonment claim began to run at the time he was bound over for trial, not at the time the charges were later dropped against him. *Id.*

Subsequent to *Wallace*, the United States Court of Appeals for the Tenth Circuit has also recognized that a claim for malicious prosecution concerns detention only “after the institution of legal process.” *Mondragon v. Thompson*, 519 F.3d 1078, 1083 (10th Cir. 2008); *Wilkins v. DeReyes*, 528 F.3d 790, 798-99 (10th Cir. 2008). See also *Singer v. Fulton County Sheriff*, 63 F.3d 110, 117 (2nd Cir. 1995) (“Typically, a warrantless deprivation of liberty from the moment of arrest to the time of arraignment will find its analog in the tort of false arrest . . . while the tort of malicious prosecution will implicate post-arraignment deprivations of liberty”).

The vast majority of Myers’ allegations in the Amended Complaint, as summarized above, pertain to alleged activities occurring before his arrest and prior to the initiation of legal process. They do not allege any deprivation of liberty following the initiation of legal process by the prosecutor. Instead, they allege a brief weekend of detention just immediately following his arrest, after which Myers was released on bond for the criminal proceedings leading up to the preliminary hearing (when the charges were dismissed). Though Myers argues that Koopman’s alleged malicious activities continued even after the criminal charges were dismissed, the fact of the matter is that Myers was not subject to any restraint on his liberty at that time as alleged in the Amended Complaint.

Accordingly, Myers is trying to “shoehorn” his time-barred claims for excessive force and unreasonable search and seizure, and claims he has never asserted for false

arrest and imprisonment (which are now also time-barred⁵), into a malicious prosecution claim. See *Reed v. City of Chicago*, 77 F.3d 1049 (7th Cir. 1996); *Washington v. Summerville*, 127 F.3d 557 (7th Cir. 1997); and *Sneed v. Rybicki*, 146 F.3d 478 (7th Cir. 1998).

In *Reed*, the plaintiff brought a malicious prosecution claim against the police officers who arrested him on murder charges, for which he was ultimately acquitted after 23 months of incarceration. *Reed*, 77 F.3d at 1050. Reed initially brought claims of unlawful arrest, unreasonable search and seizure, wrongful confinement and detention and malicious prosecution, but failed to timely file the claims arising from his arrest and search and seizure. Thus, the Seventh Circuit Court of Appeals was faced with the “central question” of whether Reed “should be permitted to shoehorn a wrongful arrest claim into a malicious prosecution claim in order to avoid a successful statute of limitations defense.” *Id.* at 1051. The court ultimately concluded he could not do so, because what Reed labeled as malicious prosecution was “nothing more than his time-barred wrongful arrest claim.” *Id.* at 1053.

In *Washington*, a case very analogous to this one, the plaintiff alleged that police officers conspired to fill out false and incomplete statements and reports and to use illegally obtained statements to charge, imprison and prosecute him, and further alleged

⁵ “The statute of limitations [for false arrest and imprisonment claims] is drawn from the personal injury statute of the state in which the federal district court sits. [cite omitted] Federal law, however, determines the date on which the claim accrues and the limitations period starts to run.” *Mondragon v. Thompson*, 519 F.3d 1078, 1082 (10th Cir. 2008). The Colorado statute of limitations is two years. C.R.S. § 13-80-102(1)(a). Myers’ non-asserted claims for false arrest or imprisonment began to run “when the alleged false imprisonment end[ed]” which was either when he was “released,” *Mondragon*, 519 F.3d at 1082—on September 10, 2007 as alleged—or when he was “bound over by a magistrate or arraigned on charges,” *id.*—on or before the November 5, 2007 preliminary hearing as alleged—both of which dates were well over two years before Myers filed his Amended Complaint on March 2, 2011 [#127].”

that police detectives conspired to give false testimony to the grand jury and at his motion to suppress hearing. *Washington*, 127 F.3d at 559. The Seventh Circuit Court of Appeals rejected the plaintiff's § 1983 malicious prosecution claim, finding "[t]he detectives' role in this case was in effectuating and maintaining a seizure, not in initiating and pursuing a criminal prosecution." *Id.* at 559-60. According to the court, the plaintiff had done nothing more than "refashion his [untimely] false arrest and excessive force claims under the guise of a federal malicious prosecution claim," and thus his claim could not proceed. *Id.* at 560; *cf. Becker*, 494 F.3d at 914 ("we have repeatedly recognized in this circuit that, at least prior to trial, the relevant constitutional underpinning for a claim of malicious prosecution under § 1983 must be 'the Fourth Amendment's right to be free from unreasonable *seizures*.'" [emphasis added]).

Similarly, in *Sneed*, the Seventh Circuit found the plaintiff had done nothing more than restate his untimely claim for false arrest when alleging that various Chicago police officers coerced his confession. *Sneed*, 146 F.3d at 480. There, unlike here and in *Washington*, *Sneed* did not initially allege any post-arrest misconduct on the part of the police, but he did try to later bolster his complaint with such allegations. The court still rejected his claim of malicious prosecution, stating: "Prosecutors prosecute; police and detectives may participate in the prosecution, but they do not engineer the proceedings." *Id.* at 481.

The Tenth Circuit Court of Appeals has specifically cited the Seventh Circuit case of *Reed*, *supra*, on more than one occasion. See *Wilkins*, 528 F.3d at 798-99; *Taylor*, 82 F.3d at 564. It has thus apparently found the Seventh Circuit's reasoning on this issue persuasive in the past.

Thus, in addressing the issue before this Court, it clearly must focus on those limited acts alleged to have been taken by Koopman with regard to the initiation of legal process that resulted in a wrongful post-arraignment deprivation of liberty (if any), notwithstanding Myers' continuing efforts to roll all of his other allegations into the claim for malicious prosecution.

Accordingly, for these reasons, all of the allegations of the Amended Complaint that assert actions of Koopman which are said to have occurred before criminal charges were filed against Myers and after criminal charges were dismissed must be stricken and partial judgment on the pleadings granted in Koopman's favor as to all such allegations which constitute an effort by Myers to shoehorn time-barred claims into his sole malicious prosecution claim.

IV. CONCLUSION

The United States Supreme Court has never expressly held that a malicious prosecution claim, grounded upon the Fourth Amendment, is cognizable under § 1983, and, in any event, the Amended Complaint fails to allege a deprivation of physical liberty constituting a "seizure" occurred after criminal prosecution against Myers was initiated, such that the Fourth Amendment may not be used to undergird Myers' § 1983 malicious prosecution claim. The United States Court of Appeals for the Tenth Circuit has expressly held that no procedural due process claim under the Due Process Clause of the Fourteenth Amendment exists as a remedy for pre-trial deprivations of physical liberty. Myers' sole claim for § 1983 malicious prosecution therefore fails to state a claim upon which relief may be granted under either the Fourth or Fourteenth Amendment, thereby entitling Koopman to judgment on the pleadings.

Alternatively, because the vast majority of Myers' allegations in the Amended Complaint pertain to alleged activities occurring before his arrest and prior to the initiation of legal process, they fail to support a claim for malicious prosecution as a matter of law. Similarly, those allegations of Koopman's alleged malicious activities, even after the criminal charges were dismissed, fail to legally support the claim for malicious prosecution—as a Constitutionally-based malicious prosecution claim is defined—and must also be stricken. Thus, in addressing the sole claim before this Court, it clearly must focus on those limited actions alleged to have been taken by Koopman with regard to the initiation and pursuit of legal process that resulted in a wrongful post-arraignment deprivation of liberty (if any), notwithstanding Myers' continuing efforts to roll all of his other allegations into the claim for malicious prosecution. The Court would therefore do well to grant Koopman partial judgment on the pleadings.

WHEREFORE, Koopman respectfully requests the Court grant him judgment on the pleadings or, alternatively, partial judgment on the pleadings as requested hereinabove, and for whatever further relief the Court deems just and proper.

DATED this 8th day of March, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2012, I electronically filed the foregoing DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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