UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:20-CV-24294-KMM

RAQUEL CAMPS, in her capacity as the personal representative of the ESTATE OF ALBERTO CAMPS,

EDUARDO CAPPELLO, in his individual capacity, and in his capacity as the personal representative of the ESTATE OF EDUARDO CAPPELLO,

ALICIA KRUEGER, in her individual capacity, and in her capacity as the personal representative of the ESTATE OF RUBÉN BONET,

and, MARCELA SANTUCHO, in her individual capacity, and in her capacity as the personal representative of the ESTATE OF ANA MARÍA VILLARREAL DE SANTUCHO,

Plaintiffs,

v.

ROBERTO GUILLERMO BRAVO,

Defendant.

PLAINTIFFS' MOTION *IN LIMINE* TO PRECLUDE REFERENCES TO COMMUNISM AND CUBA, MOTION FOR SUMMARY JUDGMENT TO DISMISS DEFENDANT BRAVO'S SEVENTH AFFIRMATIVE DEFENSE, AND MOTION *IN LIMINE* TO EXCLUDE IMPROPER STATEMENTS RELATED TO SEVENTH AFFIRMATIVE DEFENSE

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I. INTRODUCTION

Pursuant to Federal Rules of Evidence 401, 402, and 403, Plaintiffs Raquel Camps, Eduardo Capello, Alicia Kruger, and Marcela Santucho submit the following three motions to simplify the evidence at trial.

Plaintiffs' first motion is a motion *in limine* to exclude evidence or argument by Defendant Roberto Guillermo Bravo ("Bravo") or his counsel regarding Cuba or communism. Bravo seeks to inflame the jury, invoke anti-communist sentiment, and improperly suggest that Bravo's victims were more likely to act violently because of their purported political views, when: (a) their political views are utterly irrelevant; and (b) there is no admissible evidence about what their views were. Any such argument, evidence, or suggestion should be excluded. FRE 401-403.

The remaining motions filed here are responsive to the Court's statement at the February 15, 2022 pretrial conference expressing concern as to whether the case was in fact trial-ready given that neither party had filed motions *in limine* or motions for summary judgment.[1] Since the pretrial conference, the parties have met and conferred extensively and have mostly resolved by agreement which claims and defenses are triable, largely obviating the need for a motion for summary judgment or motions *in limine*. However, one dispute remains.

Accordingly, Plaintiffs' second and third motions are (1) for summary judgment in Plaintiffs' favor against Bravo's seventh affirmative defense that Bravo was acquitted "by a full military investigation in 1972 and later received full amnesty," and (2) an *in limine* motion to strike and exclude any improper legal statements regarding that defense. While there was a highly suspect Argentine military investigation in 1972 and the Argentine government issued an amnesty for politically motivated crimes the following year (which Bravo contends applies to

[1] *See, e.g.*, ECF No. 66 at 21:1–9 (the Court informing the parties "I don't want to be here if I can avoid it in the midst of trial, trying to rule on these admissibility issues in the middle of trial when if we had a ruling on them prior to trial, either through motions for summary judgment or motions in limine," that would help "the lawyers know how they can present or what they can present and what they can't present.").

him), the investigation's findings and the amnesty have no legal import in the context of Plaintiffs' claims under the Torture Victims Protections Act, ("TVPA"), 28 U.S.C. § 1350 note. They are certainly not a defense to liability. Nor should Bravo be permitted to make false legal statements or suggestions at trial about the significance of the investigation's findings or the amnesty law.

As explained below, the Court should grant Plaintiffs' motions in their entirety.

II. MOTION *IN LIMINE* TO PRECLUDE REFERENCES TO COMMUNISM AND CUBA AT TRIAL

A. Background

In August 1972, twenty-five political prisoners escaped a federal prison in Rawson, Argentina ("Rawson Prison"). Ex. A (Bravo Depo. Tr.) at 65:13-16. Bravo testified at deposition (beyond his personal knowledge) that six of those prisoners thereafter boarded a plane to Chile and successfully fled Argentina. *Id.* at 164:23–165:3.

Bravo further testified that, on August 15 or 16, 1972, the remaining nineteen prisoners surrendered to Argentine authorities at an airport in Trelew, Argentina and were taken to the Almirante Zar Naval Base ("Trelew Base"). Ex. A at 165:4–22; 169:5–11. At around 3:00 a.m. on August 22, 1972, Bravo and other members of the Argentine Navy shot the nineteen prisoners at the Trelew Base. *Id.* at 52:2-5; 15:3-10. Sixteen of them died as a result of the gunfire and only three survived. *Id.* at 15:8–22. These shootings are known in Argentina as the "Trelew Massacre."

Plaintiffs are the surviving family members of four of the victims of the Trelew Massacre. Bravo admits that he, along with several other naval officers armed with machine guns, entered the prisoner cell area of the Trelew Base a little after 3:00 a.m. on August 22, 1972 and opened fire on the prisoners. Ex. A at 52:14–19; 83:18–25. Bravo's primary defense is a false narrative—which Plaintiffs dispute—that he acted in self-defense in response to a purported escape attempt by the nineteen prisoners. *Id.* at 83:18-25; 92:10-19; 111:18-112:3.

On March 11, 2022, the parties in this case met and conferred regarding pretrial issues. Bravo's counsel represented that he intends to refer to the nineteen victims of the massacre as "communists" at trial and offer evidence that the six prisoners that safely escaped from Rawson Prison and fled to Chile eventually received "safe passage to Cuba" after fleeing Argentina. When asked to establish the relevance of the purported political views of the nineteen victims of the Trelew Massacre—or, for that matter, those of the six individuals that fled Argentina and were not involved in the massacre—Bravo's counsel could offer nothing more than to say that "it is part of the story."

B. Bravo should not be permitted to inflame the jury through irrelevant references to communism and Cuba

Pursuant to Federal Rules of Evidence 401, 402, and 403, Plaintiffs seek to preclude Bravo—himself or through his counsel—from presenting evidence, argument, or suggestion that the nineteen victims of the Trelew Massacre or anyone potentially related to them, including the six individuals who fled Argentina after escaping Rawson Prison, had ties to communism or Cuba. Such references are irrelevant to the issues in this case, are likely to result in undue prejudice to Plaintiffs, and serve no purpose other than to distract the jury and divert it from resolving the case based on relevant evidence.

To be clear, there is ***no evidence*** in the record establishing that the nineteen victims of the Trelew Massacre had ties to communism or Cuba that are relevant to the issues in the case. When given multiple opportunities during his deposition to support his self-defense claim and explain why he believed the nineteen victims of the Trelew Massacre were dangerous, Bravo never once mentioned ties to communism or Cuba. Ex. A at 157:16-164:12. Nor has Bravo produced evidence that any of the nineteen victims of the Trelew Massacre had plans to travel to Cuba at the time of the massacre or otherwise had ties to communism.

Bravo's sole evidence in support of his plan to refer to the victims of the massacre as "communists" appears to be a newspaper article from August 24, 1972, that states that a group of "10 escapees" from Argentina sought "safe conduct to travel to Cuba" from Chile. Ex. B

(8/24/72 La Opinion Newspaper Article). This article ***post-dates*** the Trelew Massacre and says nothing about the nineteen victims of Trelew Massacre that had remained in Argentina. *Id*. Moreover, there is no factual or permissible basis for Bravo to suggest that the Trelew Massacre victims' purported ties to communism or Cuba impacted his decision to open fire on August 22, 1972. Without such a showing, the references to communism and Cuba have no probative value in this case. *See Evans v. Cernics, Inc.*, 2017 WL 4863207 at *1 (W.D. Pa. 2017) (excluding any evidence concerning parties' political affiliations under Rules 401 and 402 as "irrelevant because it does not make it more or less probable" that Defendants committed the acts alleged).

On the other hand, references to the victims' purported ties to communism and Cuba undoubtably carry a high risk of undue prejudice to Plaintiffs. More than a third of Miami's population is made up of Cuban-Americans,[2] and 28 percent of Miami-Dade residents are Venezuelan-American.[3] These numbers make it inevitable that a representative Miami jury pool will have family or friends who fled communist regimes in Cuba, Venezuela, and other countries in Latin America.[4] Additionally, the Cuban regime was an enemy of the United States during the relevant events, which took place during the Cold War. Accordingly, many potential jurors will likely carry biases towards communism and its alleged sympathizers, which Bravo seeks to exploit. Even in areas of the country where the risk of undue prejudice due to references to political associations are not as high, courts have routinely found that such assertions are unduly prejudicial and must not be allowed at trial. *See United States v. Bagaric*, 706 F.2d 42, 54 (2d Cir. 1983) (rejecting the defendants' attempts to "inject peripheral political. . .considerations into

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[2] *See, e.g.*, Carmen Sesin, "Not Just Cubans: Many Latinos Now Call Miami Home," NBC News, March 4, 2014 (hereinafter "Not Just Cubans Article"), available at https://www.nbcnews.com/news/latino/not-just-cubans-many-latinos-now-call-miami-home-n37241.

[3] "Venezuela's Loss is Miami's Gain," U.S. News, July 13, 2017, available at https://www.usnews.com/news/best-states/articles/2017-07-13/venezuelas-loss-is-miamis-gain; Tom Brown, "Venezuelans, fleeing Chavez, seek U.S. safety net," Reuters (Miami), July 16, 2007, available at https://www.reuters.com/article/us-usa-venezuela-asylum/venezuelans-fleeing-chavez-seek-u-s-safety-net-idUSN1127066720070716

[4] *See* Not Just Cubans Article.

the trial" by implying that "anti-Communism" beliefs justifiably drove them to commit the crimes at issue); *Hong v. St. Louis,* 698 F. Supp. 180, 183 (E.D. Mo. 1988) (granting new trial because repeated references to the plaintiff's Marxist and communist interests and involvement in the Chinese government resulted in undue prejudice); *Am. Heartland Port, Inc. v. Am. Port Holdings, Inc.*, 2014 WL 2931929 at *2 (N.D. W. Va. 2014) (excluding references to plaintiff's political views under Rules 402 and 403 where such evidence is "irrelevant to any fact of consequence in this matter, and further even if it were relevant, such evidence is of the kind that has the potential to create unfair prejudice with the members of the jury"); *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 988 (4th Cir. 2020) (noting that the trial court ruled that at trial, a party "could not mention communism or government control of Chinese corporations" and could not "emphasize the ownership by the Chinese or any foreign entity"); *Vigneulle v. Tahsin Indus. Corp., USA*, 2019 WL 4409220, at *5 (N.D. Ala. 2019) (excluding evidence or argument that the "country of origin" for the product at issue "was China" where such evidence "is not relevant to the issues in this case and would only serve to provide the jury with an improper basis for its decision").

This Court should preclude Bravo and his counsel from introducing evidence, argument, or suggestion that any of the nineteen victims of the Trelew Massacre had ties to communism or Cuba.

III. MOTION FOR SUMMARY JUDGMENT AS TO BRAVO'S SEVENTH AFFIRMATIVE DEFENSE

Bravo's seventh "affirmative defense" states that the complaint against him must be dismissed because Bravo was purportedly "acquitted of all charges by a full military investigation in 1972 and later received full amnesty." ECF No. 21 at 5. Bravo bears the burden to demonstrate that the findings of the 1972 military investigation and the 1973 Amnesty should be given preclusive effect in this litigation. *Cf. Lozman v. City of Riviera Beach, Fla.*, 713 F.3d 1066, 1079 (11th Cir. 2013) (noting that preclusion-based defenses such as res judicata and collateral estoppel are affirmative defenses and the party asserting them "bears the burden to

show that such an issue was formerly determined with sufficient certainty"). Bravo cannot meet this burden.

Indeed, the findings of the 1972 military investigation were by the Argentine military's own admission "preliminary" and have no preclusive effect in this case. Likewise, the amnesty Bravo suggests applies to him has been conclusively determined by Argentine courts not to apply to the Trelew Massacre and, even if it did, would not extend to Plaintiffs' claims in U.S. court under the TVPA. For those reasons, as well as those stated below, Plaintiffs move for partial summary judgment as to Bravo's seventh affirmative defense and move *in limine* to preclude any improper legal statements regarding that defense at trial.

A. Undisputed Factual Background

The following facts are undisputed and are contained in the accompanying Statement of Material Facts (hereinafter "SMF"). Following the Trelew Massacre, Argentine Navy General Jorge Bautista began investigating the shootings ("1972 military investigation"). SMF ¶ 2. On December 5, 1972, based on the purported findings of that investigation, Argentina's General Auditor of the Armed Forces recommended that the military acquit all members of the Argentine Navy involved in the Trelew Massacre of any wrongdoing. SMF ¶ 3. On January 23, 1973, the head of Argentina's military dictatorship, then-President Alejandro Lanusse, issued a decree ("Lanusse Decree")—purportedly based on the General Auditor's recommendation—that ended the "preliminary proceeding" investigating the Trelew Massacre. SMF ¶ 4.[5] In May 1973, as Argentina transitioned out of Lanusse's dictatorship, the new Argentine government issued an amnesty for crimes "perpetrated for political, social, trade union or student motives" before May 25, 1973 ("1973 Amnesty"). SMF ¶ 5.

In 2012, an Argentine trial court found Bravo's co-perpetrators of the Trelew Massacre, former Argentine Navy Officers Luis Emilio Sosa and Emilio Jorge Del Real, guilty of homicide

[5] Plaintiffs dispute the admissibility of Lanusse's January 23, 1973 decree but will treat the representations in the document as undisputed facts for the purposes of this motion for summary judgment.

(of those killed in the massacre) and attempted homicide (of those who survived the massacre). SMF ¶ 6. In 2014, an Argentine appellate court affirmed. SMF ¶ 10. In reaching those decisions, both courts rejected Sosa and Del Real's arguments that they had been exonerated by the 1972 military investigation. *See* SMF ¶¶ 7–14.

Additionally, Plaintiffs' expert, UCLA Law Professor Maximo Langer, has opined that the Argentine trial and appellate courts conclusively held that the 1973 Amnesty Law does not apply to the shootings and killings during the Trelew Massacre. SMF ¶ 15. While this motion does not strictly rely on Professor Langer's declaration—because the fact that the Amnesty law does not apply to Bravo is also established by the 2012 and 2014 Argentine Court rulings, which held that Bravo's co-perpetrators were not entitled to amnesty, SMF ¶¶ 15–17—Mr. Langer's opinions are undisputed because Bravo has not submitted any contrary expert testimony or other competent evidence to contradict them. Finally, the 1973 Amnesty does not state that it was intended to apply extraterritorially and outside of Argentine. SMF ¶ 18.

B. Memorandum of law in support of Plaintiffs' motion for summary judgment as to Bravo's seventh affirmative defense

"Where affirmative defenses are contested" through a motion for summary judgment, "the defendant bears the initial burden of showing that the affirmative defense is applicable." *United States v. Tubbs*, No. 19-CV-80553-CIV, 2019 WL 7376706, at *2 (S.D. Fla. Nov. 22, 2019). The burden falls to the defendant despite being the nonmoving party because "the defendant bears the burden of proof on his affirmative defenses at trial." *Off. of Thrift Supervision v. Paul*, 985 F. Supp. 1465, 1470 (S.D. Fla. 1997). "The practical import of this legal framework is that the nonmoving party may not simply depend upon the mere allegations or defenses in his answer to counter a motion for summary judgment." *McDonough v. Greer*, No. CV 14-61526-CIV, 2015 WL 12532634, at *4 (S.D. Fla. Sept. 18, 2015); *see also Mendez Fuel Holdings, LLC v. 7-Eleven, Inc.*, No. 20-22984-CV, 2021 WL 4125362, at *23 (S.D. Fla. Sept. 9, 2021) ("[T]he mere assertion of affirmative defenses on which the defendant has the burden, without supporting evidence, is insufficient to withstand the motion for summary judgment.").

The facts of this motion for summary judgment as to Bravo's seventh affirmative defense are undisputed and the motion presents a pure issue of law because it focuses solely on the purported legal effect (or lack thereof) of undisputed facts that took place in Argentina (i.e., the 1972 military investigation, the 1973 Amnesty, and the 2012 and 2014 Argentine court decisions convicting Bravo's co-perpetrators in the Trelew Massacre). Because Bravo cannot meet his burden to show that the 1972 military investigation or the 1973 Amnesty have a preclusive effect on Plaintiffs' TVPA claims, Plaintiffs are entitled to summary judgment as to Bravo's seventh affirmative defense.

Beginning with the 1972 military investigation, Bravo's suggestion that the investigation's findings prevent Plaintiffs from asserting claims against him demonstrates a lack of understanding of the TVPA and how it creates remedies for foreign plaintiffs that lack one in their home nation. The TVPA was enacted specifically for situations like this one, where the home nation has prevented victims from pursuing justice by tolerating human rights abuses and declining to prosecute. As Congress recognized in enacting the TVPA, "[j]udicial protections against flagrant human rights violations are often least effective in those countries where such abuses are most prevalent" as "[a] state that practices torture and summary execution is not one that adheres to the rule of law." H. Rep. No. 102-367 (1991); S. Rep. 102-249, at 3 (1991); *see also Arce v. Garcia*, 434 F.3d 1254, 1263 (11th Cir. 2006) (observing that a military regime in power "would [] use[] its significant power to thwart any efforts to redress the human rights violations that it perpetrated"); *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 106 (2d Cir. 2000) (noting that the legislative history of the TVPA shows that "Congress has expressed a policy of U.S. law favoring the adjudication of [TVPA] suits ***in U.S. courts***" regardless of whether the home nations are "inhospitable" to the claims) (emphasis added); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1287 (N.D. Cal. 2004) (noting that the "TVPA specifically contemplates 'some governmental involvement' in the prohibited acts in order for a claim to lie" and that "many of the world's governments still engage in or tolerate torture of their citizens") (citing H.R. Rep. No. 102–367, at 3–4 (1991)).

Moreover, the 1972 military investigation cannot preclude Plaintiffs' claims in U.S. court because the investigation was incomplete and administrative. Courts have recognized that military investigations where guilt or innocence is not adjudicated, but rather where charges are dismissed or proceedings are otherwise halted, are not acquittals and do not have the collateral effect of a judgment. *See United States v. MacDonald*, 585 F.2d 1211, 1212 (4th Cir. 1978) (finding preclusion did not apply when a proceeding was merely "investigative" and, despite "culminat[ing] in the acceptance of a recommendation" that charges be dismissed, "did not adjudicate [the individual's] guilt or innocence"). The 1972 military investigation was not a judicial proceeding but rather a "preliminary" administrative investigation ended by fiat through the Lanusse Decree. *See* SMF ¶ 4 (Lanusee Decree dismissing the "preliminary proceeding" investigating the Trelew Massacre); SMF ¶ 8 (Argentine court finding that the 1972 investigation was comprised of "administrative proceedings" which had no preclusive effect because those responsible for the Trelew Massacre "were not even charged with a crime," and the investigation was "closed by a decree issued by the *de facto* government"); *see also* SMF ¶ 9.

Argentina's Court of Appeals similarly found that the investigation lacked impartiality and competence. *See* SMF ¶ 11 (finding that "the investigation. . .did not guarantee independence or impartiality" since all authorities involved were members of the Argentine armed forces); *id.* ¶ 12 (noting Bautista's failures to seize and examine the victims' clothes, the weapons used by the military members against the victims, and the bullets found on the walls and floor, as well as Bautista's failure to examine the bodies of the victims or verify the testimony of the survivors); *id.* ¶ 13 (finding that the Lanusse Decree and General Auditor Report were "based on the premise that an attempted escape was actually made and failed to perform a serious and comprehensive analysis of the events and of the statements given by the survivors"). Due to those findings, the appellate court held that the conclusions reached in the Lanusse Decree and General Auditor Report "by no means implies a final judgment in a material sense that may hinder preliminary investigations in criminal proceedings." SMF ¶ 14. There is simply no basis for Bravo to assert that the purported findings of an incomplete foreign

administrative investigation have a preclusive effect to Plaintiffs' TVPA claims in the United States when Argentina's own courts have already rejected the same argument and found Bravo's co-perpetrators criminally liable for their participation in the Trelew Massacre.

Moreover, Bravo has entirely failed to satisfy ***any*** of the elements of claim preclusion with respect to the 1972 military investigation. A party seeking to invoke res judicata must establish that (1) the prior decision was rendered by a court of competent jurisdiction; (2) there was a final judgment on the merits; (3) both cases involved the same parties or their privies; and (4) both cases involved the same causes of action. *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001). By the plain terms of the Lanusse Decree, the investigation was "preliminary," SMF ¶ 4, and there is no evidence in the record to suggest that the investigation involved "a court of competent jurisdiction," Plaintiffs here as legal parties, or causes of action under the TVPA. For all of those reasons, Bravo has failed to meet his burden to show the 1972 military investigation precludes Plaintiffs' claims in this lawsuit.

Bravo's attempt to rely on the 1973 Amnesty to excuse his heinous acts likewise fails. First, in the decisions against Bravo's co-perpetrators, the Argentine trial and appellate courts conclusively held that the 1973 Amnesty was inapplicable to the Trelew Massacre. SMF ¶ 15. But even if the Argentine courts had not made clear that the amnesty is inapplicable to the killings and attempted killings at issue in this case, U.S. federal courts have held that a foreign nation's amnesty law does not apply extraterritorially unless it is clear from the face of the law that it was intended to do so. *See Chavez v. Carranza*, 559 F.3d 486, 495 (6th Cir. 2009) (in the context of a TVPA case, holding that, under a comity analysis, the amnesty law in El Salvador would only apply if on its face it applied extraterritorially). The 1973 Amnesty contains no such statement. *See* SMF ¶ 18.

For all the reasons stated above, this Court should grant summary judgment in Plaintiffs' favor as to Bravo's seventh affirmative defense and bar Bravo from advancing arguments that the 1972 military investigation and 1973 Amnesty preclude Plaintiffs' TVPA claims.

IV. MOTION *IN LIMINE* TO EXCLUDE IMPROPER STATEMENTS RELATED TO BRAVO'S SEVENTH AFFIRMATIVE DEFENSE

Plaintiffs also move *in limine* for an order precluding Bravo from improperly suggesting at trial that he was legally acquitted of wrongdoing or that he received amnesty for his role in the Trelew Massacre due to the high likelihood that such suggestions will confuse and mislead the jury. *Capitol Records, Inc. v. MP3tunes, LLC*, 2014 WL 503959, at *7, *16 (S.D.N.Y. 2014) (barring party from introducing argument that is incorrect as a matter of law because it was "likely to confuse the jury"); *Baxter Diagnostics, Inc. v. Novatek Med., Inc.*, 1998 WL 665138, at *3 (S.D.N.Y. 1998) (barring plaintiffs from introducing or relying at trial on legally incorrect arguments regarding punitive damages); *Great Earth Int'l Franchising Corp. v. Milks Dev.*, 311 F. Supp. 2d 419, 425 (S.D.N.Y. 2004) (granting motion *in limine* to preclude defendants from pursuing lost profit theory or presenting "any evidence relating to their claims of lost profit" at trial because claim failed as a matter of law). As explained above, there is no legal basis for Bravo to make either claim. First, the 1972 military investigation was "preliminary," lacked impartiality, was incomplete, and did not result in a legal acquittal as evident by the fact that Bravo's co-perpetrators were convicted of homicide with malice and attempted homicide with malice in 2012. Second, the 1973 Amnesty does not apply to Bravo under Argentine or U.S. law. Accordingly, this Court should prohibit: (1) any characterization that the 1972 military investigation resulted in an "acquittal" or "exoneration," and (2) any suggestion that the 1973 Amnesty applied to Bravo.

V. CONCLUSION

For the foregoing reasons, Plaintiffs request that the Court grant their motions in their entirety.

Certification Pursuant to Local Rule 7.1(a)(3)

Counsel for Plaintiffs certifies that they have met and conferred with defense counsel in a good faith effort to resolve the issues raised above and have been unable to do so.

Dated: March 15, 2022 By:

/s/ A. Margot Moss

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on March 15, 2022, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF. We also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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