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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

LISA MCALLISTER, an individual; and BRANDOM SUMMERS, an individual, Plaintiffs, vs. CLARK COUNTY, a political subdivision of the state of Nevada. Defendant(s).	Case No: 2:24-cv-00334 **DEFENDANT CLARK COUNTY'S MOTION TO STAY DISCOVERY IN COMPLIANCE WITH LR 26-7(c) AND LR IA 1-3(f)**

Defendant CLARK COUNTY, by and through its counsel of record, hereby files this Motion to Stay Discovery in Compliance with LR 26-7(c) and LR IA 1-3(f).

This Motion is made and based upon the attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and oral arguments permitted by the Court at a hearing on the matter, if any.

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MEMORANDUM OF POINTS AND AUTHORITIES

I.

NATURE OF MOTION

Procedural Posture

Plaintiffs filed their complaint on or around February 16, 2024. [ECF No. 1]. The complaint alleged three facial challenges to Clark County Code section 16.13.030 ("CCC 16.13.030") asserting that the ordinance is unconstitutionally vague, unconstitutionally overbroad, and that the ordinance violates the Americans with Disabilities Act ("ADA"). *See generally id*. Neither named Plaintiff in this suit has been cited under CCC 16.13.030. *Id*. On February 22, 2024, Plaintiffs filed motions for preliminary injunction and for temporary restraining order seeking to enjoin enforcement of the ordinance. [ECF Nos. 4, 5].

Defendant Clark County filed a motion to dismiss [9] Plaintiffs' complaint [1] on or around March 14, 2024. [ECF No. 9]. Clark County also filed a response to Plaintiffs' motions for preliminary injunction and TRO [4, 5] the same day. [ECF No. 10].

The Court has yet to rule on Plaintiffs' motions for preliminary injunction and TRO [4, 5] or Defendant's motion to dismiss [9].

The parties have continued to meet and confer in good faith since March 28, 2024, about the need for discovery in this case. *See* Affidavit in Support of Motion to Stay Discovery in Compliance with LR 26-7(c) and LR IA 1-3(f) and the associated exhibits, attached hereto as **Exhibit A**. As the parties have reached an impasse in their discussions, Defendant Clark County hereby brings the instant motion to stay discovery in compliance with the Court's minute order dated April 30, 2024. [ECF No. 33]; *see also* **Exhibit A**.

Nature of Motion

Plaintiffs LISA MCALLISTER and BRANDON SUMMERS, neither of whom who have ever been cited under CCC 16.13.030, bring this action asserting that CCC 16.13.030 is unconstitutional on its face under the First and Fifth Amendments (and their Nevada State Constitutional equivalents) and that the language of CCC 16.13.030 violates the Americans with Disabilities Act ("ADA") on its face. *See generally* [ECF No. 1].

As if it wasn't already apparent from the language of the complaint [1] and Plaintiffs' facial challenge causes of action contained therein, Plaintiffs also conceded the facial nature of these challenges—both their constitutional and ADA challenges—in their response [17] to Defendant's motion to dismiss [9]. *See*, *e.g.*, [ECF No 17] at 4:9 ("Clark County relies in the wrong standard for facial vagueness challenges."), 5:5-7 ("[Plaintiffs] sufficiently allege a facial vagueness challenge because the Plaintiffs allege adequate facts in their complaint to allege a facial due process violation."), 16:25-26 ("CCC 16.13.030 cannot be rendered facially valid by individual officers refusing to enforce the law to comply with the ADA"), 17:9 ("Plaintiff McAllister brings a facial challenge against CCC 16.13.030, which does not provide exemptions or accommodations for people who must stop or stand due to disability.").

"Facial" challenges are so called because they are decided on the face of the statute or ordinance. The constitutionality of an ordinance and other related facial challenges are pure questions of law to be determined by the Court. Because they are questions of law, as opposed to questions of fact or mixed questions of fact and law, no facts or evidence is necessary to decide their facial validity. Accordingly, Clark County's pending Motion to Dismiss [9] and all the claims in this case can be decided on the face of the ordinance without the need for discovery.

Courts around the country have routinely held that facial challenges to statutes or ordinances require no discovery and many also have held that where a case involves facial challenges it is prudent to resolve those facial challenges before allowing a case to proceed to discovery on the remaining issues in the interests of judicial economy.

As Plaintiffs' entire complaint is premised on highly disfavored facial challenges to the constitutionality and the validity of an ordinance—ordinances which are presumed constitutional until proven otherwise—there is good cause pursuant to Fed. R. Civ. P 26(c) to stay this case pending a determination by the Court on Defendant's of Motion to Dismiss [9], which is completely dispositive of Plaintiffs' claims.

Furthermore, as a "preliminary peek" at the merits of Defendant's motion to dismiss [9] indicate a strong likelihood of success there is also good cause for granting a stay under

the so-called *Mlenjnecky* standard to further to aims of Fed. R. Civ. P. 1 by securing the just, speedy, and inexpensive determination of this action.

II.

STANDARD OF REVIEW

Rule 26(c) "Good Cause" Test

While the Ninth Circuit has not articulated a bright line rule on how to analyze motions to stay discovery, it has identified scenarios where a stay under Rule 26(c) is either appropriate or inappropriate. *See*, *e.g.*, *Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981); *Alaska Cargo Transp., Inc. v. Alaska R.R. Corp.*, 5 F.3d 378, 383 (9th Cir. 1993).

Based on these cases, this Court has articulated an analytical framework for determining when motions to stay should be granted in other cases involving this defendant. *See*, *e.g.*, Order in Case No. 2:20-cv-02122-RFB-BNW, attached hereto as **Exhibit B**, at 5:15-27. This framework provides that that a motion to stay may be granted where: (1) the dispositive motion can be decided without further discovery; and (2) good cause exists to stay discovery. *Id*; *see also Alaska Cargo Transp.*, 5 F.3d at 383 (district court would have abused its discretion in staying discovery if the discovery was necessary to decide the dispositive motion); Fed. R. Civ. P. 26(c)(1) (the Court "may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense," including forbidding discovery or specifying when it will occur).

Mlenjecky's Preliminary Peek Test

"The purpose of F.R.Civ.P. 12(b)(6) is to enable defendants to challenge the legal sufficiency of complaints without subjecting themselves to discovery." *See Rutman Wine Co. v. E. & J. Gallo Winery*, 829 F.2d 729, 738 (9th Cir. 1987). "The district court has wide discretion in controlling discovery, and its rulings will not be overturned in the absence of a clear abuse of discretion." *Tradebay, LLC v. eBay, Inc.*, 278 F.R.D. 597, 601 (D. Nev. 2011) (citing *Little v. City of Seattle*, 863 F.2d, 681, 685 (9th Cir.1988)). The Court may stay discovery when doing so "furthers the goal of efficiency for the court and the litigants." *Id*.

"Although the Ninth Circuit has not issued a ruling enumerating factors a court should apply in deciding a motion to stay discovery while a dispositive motion is pending, federal district courts in the Northern and Eastern Districts of California have applied a two-part test when evaluating whether discovery should be stayed." *Stephens v. LVNV Funding, LLC*, No. 2:12-CV-01159-GMN, 2013 WL 1069259, at *3 (D. Nev. Mar. 14, 2013); *see also Mlenjnecky v. Olympus Imaging America, Inc.*, 2011 WL 489743 at *6 (E.D.Cal. Feb.7, 2011).

This two-part analysis requires the Court take a "preliminary peek" at the merits of the underlying motion in hopes of accomplishing the objectives of Federal Rule of Civil Procedure 1 which states the rules must "be construed and administered to secure the just, speedy, and inexpensive determination of every action." *Mlenjnecky v. Olympus Imaging America, Inc.*, 2011 WL 489743 at *6 (E.D.Cal. Feb.7, 2011).

This two-part test, utilized widely by federal district courts within the Ninth Circuit and other federal jurisdictions, is comprised of the following elements: 1) the pending motion must be potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is aimed; and 2) the court must determine whether the pending, potentially dispositive motion can be decided absent additional discovery. *Mlejnecky v. Olympus Imaging Am., Inc.*, No. 2:10-CV-02630, 2011 WL 489743, at *6 (E.D. Cal. Feb. 7, 2011).

If the Court declines to grant a stay under the "Good Cause" analysis detailed above, it should instead apply the *Mlejnecky* standard and grant the stay as it satisfies the limited guidance provided by the 9th Circuit and finds a balance between the benefits of additional discovery in context of the pleadings on file and the public policy regarding the just, speedy, and inexpensive administration of justice.

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III.

LEGAL ARGUMENT

A. Plaintiffs' Facial Challenges are Highly Disfavored, and the Burden is on Plaintiffs to Prove the Subject Ordinance is Unconstitutional or Invalid and that Discovery is Required to Prove the Same

"Facial challenges are disfavored for several reasons." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450, 128 S. Ct. 1184, 1191, 170 L. Ed. 2d 151 (2008). Facial challenges frequently rely on speculation or interpretation of ordinances "on the basis of factually barebones records." *See Sabri v. United States*, 541 U.S. 600, 609, 124 S.Ct. 1941, 158 L.Ed.2d 891 (2004) (internal quotation marks and brackets omitted); *see also Washington State Grange*, at 450. Declaring ordinances unconstitutional "frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.,* 468 U.S. 641, 652, 104 S.Ct. 3262, 82 L.Ed.2d 487 (1984) (plurality opinion); *see also Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31, 126 S. Ct. 961, 967–69, 163 L. Ed. 2d 812 (2006). The constitutional mandate to the courts encourages judicial restraint such that the courts refrain from "rewrit[ing] state law to conform it to constitutional requirements…." *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 329–31, 126 S. Ct. 961, 967–69, 163 L. Ed. 2d 812 (2006) (citing *Virginia v. American Booksellers Assn., Inc.,* 484 U.S. 383, 397, 108 S.Ct. 636, 98 L.Ed.2d 782 (1988)).

"**Statutes are presumed constitutional**." *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002) (emphasis added); *see also Heller v. Doe*, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). In determining the constitutional validity of a statute or ordinance, the court "**may only look to its terms, to the intent expressed by Members of Congress who voted its passage, and to the existence or nonexistence of legitimate explanations for its apparent effect**." *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 484, 97 S. Ct. 2777, 2811, 53 L. Ed. 2d 867 (1977) (emphasis added); *see also SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 669 (9th Cir. 2002).

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As there is a presumption that ordinances are constitutional and that no discovery is needed to resolve facial challenges to ordinances, Plaintiff, as the party bringing these disfavored challenges, bears the burden of demonstrating what, if any, discovery is necessary in this matter. As they cannot meet this burden and have no causes of action in the complaint to support discovery, they can demonstrate no reason why a stay of discovery is not appropriate.

B. Defendants' Motion to Dismiss can be Decided without Additional Discovery and is Completely Dispositive of the Case

Plaintiffs have asserted that CCC 16.13.030 is unconstitutional on its face under the First and Fifth Amendments (and their Nevada State Constitutional equivalents) and that the language of CCC 16.13.030 violates the Americans with Disabilities Act ("ADA") on its face. *See generally* [ECF No. 1]. Defendant's pending motion to dismiss [9] addresses all of these facial challenge causes of action which means that if the motion is granted, this case will be resolved in its entirety.

Accordingly, the pending motion to dismiss [9] is entirely dispositive of the case.

C. Good Cause Exists to Stay Discovery in Furtherance of Rule 1 of the Federal Rules of Civil Procedure because Facial Challenges are Legal Questions Determined without the Need for Discovery

Plaintiffs' causes of action are facial challenges to the constitutionality and validity of CCC 16.13.030. *See generally* [ECF No. 1].

There is a consensus across the various courts that facial challenges to statutes and ordinances are questions of law for which discovery is unnecessary. *See*, *e.g.*, *Shelby County v. Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) ("Because Shelby County **brings only a facial challenge** to the [Voter Registration Act], **discovery into that claim is unwarranted**.") (emphasis added); *Briggs v. Yi*, No. 3:22-CV-00265-SLG, 2023 WL 2914395, at *5 (D. Alaska Apr. 12, 2023) ("Mr. Briggs' **facial challenge to the constitutionality of [statute] is a pure question of law** and Mr. Briggs has not identified any discoverable facts that would be relevant to resolving this question.") (emphasis added); *Doherty v. Wireless Broad. Sys. of*

Sacramento, Inc., 151 F.3d 1129, 1131 (9th Cir. 1998) (recognizing that "[t]he district court concluded that Pacific **did not need to undertake discovery because the issue in this case involved a purely legal question**.") (emphasis added); *Pullman Co. v. Knott*, 235 U.S. 23, 26, 35 S.Ct. 2, 59 L.Ed. 105 (1914) (A statute "is not to be upset upon hypothetical and unreal possibilities, if it would be good upon the facts as they are"); *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 455, 128 S. Ct. 1184, 1193–94, 170 L. Ed. 2d 151 (2008) ("Because respondents brought their suit as a facial challenge, we have no evidentiary record against which to assess their assertions that voters will be confused."); *Shelby Cnty., Ala. v. Holder*, 270 F.R.D. 16, 19 (D.D.C. 2010) ("**Because Shelby County brings only a facial challenge** to the VRA, **discovery into that claim is unwarranted**.") (emphasis added); *Gen. Elec. Co. v. Johnson*, 362 F. Supp. 2d 327, 337 (D.D.C. 2005), aff'd sub nom. *Gen. Elec. Co. v. Jackson*, 610 F.3d 110 (D.C. Cir. 2010) ("**a facial challenge to the text of a statute does not typically require discovery for resolution** because the challenge focuses on the language of the statute itself.") (emphasis added); *Cafe Erotica of Fla., Inc. v. St. Johns Cnty.*, 360 F.3d 1274, 1282 (11th Cir. 2004) ("When analyzing a facial challenge, we must analyze the statute as written."); *New Hampshire Motor Transp. Ass'n v. Rowe*, 324 F. Supp. 2d 231, 232 (D. Me. 2004) ("discovery or an 'evidentiary showing' on the effect of the challenged provisions of [a law] is not necessary to a ruling on a facial preemption challenge."); *Fund Texas Choice v. Deski*, No. 1:22-CV-859-RP, 2023 WL 8856052, at *14 (W.D. Tex. Dec. 21, 2023) ("For this reason, district courts have commonly held that parties do not need discovery to defend a law's facial validity."); *Glynn Env't Coal., Inc. v. Sea Island Acquisition, LLC*, No. 2:19-CV-50, 2019 WL 13020440, at *2 (S.D. Ga. Aug. 5, 2019) ("These remaining arguments represent facial attacks which likely will not require additional discovery to resolve.").

Given the consensus of the various courts that facial challenges involve pure questions of law for which no discovery is necessary, there is good cause to stay discovery in this matter pending a resolution of Defendant's Motion to Dismiss [9] Plaintiffs' complaint [1] currently before the Court.

D. Even if Discovery is Necessary on Some Aspects of this Case there is Still Good Cause to Stay Discovery Pending a Resolution of the Facial Challenges in the Interests of Judicial Economy

Furthermore, many courts have opined that where a facial challenge is at issue in a case, the facial challenges should be resolved prior to moving to discovery in the interests of judicial economy.

"Facial challenges to the legal sufficiency of a claim or defense, such as a motion to dismiss based on failure to state a claim for relief, should […] be resolved before discovery begins." *See Mitchell v. Duval County Sch. Bd.,* 107 F.3d 837, 838 n. 1 (11th Cir.1997) (per curiam). In such cases, "neither the parties nor the court have any need for discovery before the court rules on the motion." *Id*. (citing *Kaylor v. Fields,* 661 F.2d 1177, 1184 (8th Cir.1981)); *see also Cotton v. Mass. Mut. Life Ins. Co.*, 402 F.3d 1267, 1292 (11th Cir. 2005) (noting the importance of resolving facial challenges before discovery begins, "especially when the challenged claim will significantly expand the scope of allowable discovery."); *Taylor v. Serv. Corp. Int'l*, No. 20-CIV-60709, 2020 WL 6118779, at *3 (S.D. Fla. Oct. 16, 2020).

While it is Defendant's contention that all of Plaintiffs' causes of action constitute facial challenges to CCC 16.13.030 which require no discovery, to the extent that any discovery is necessary, allowing the Court to rule on the pending Motion to Dismiss will significantly reduce any discovery needed, if any. Accordingly, there is good cause to stay discovery in this matter even if all of Plaintiffs' causes of action fail to be addressed by the pending Motion to Dismiss [9].

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E. There is Good Cause to Stay because the Discovery Plaintiffs Seek is Overly Burdensome and not Reasonably Calculated to lead to the Discovery of Admissible Evidence and Plaintiffs Suffer no Harm by a Delay

The following is a list of the discovery sought by Plaintiff in this matter:

- Facts concerning Plaintiffs' standing (unless Clark County stipulates to it);[1]
- The purposes behind CCC 16.13.030;
- Facts regarding whether CCC 16.13.030 achieves its ends without restricting substantially more speech than necessary;
- Facts regarding whether CCC 16.13.030 leaves ample alternatives;
- All facts referenced in filings by Clark County;
- All facts referenced in the Nevada Resort Association's brief and the attached exhibit (the report of Dr. Thomas Sousa) regarding *inter alia* the safety;
- Data provided from the LVMPD Research & Analysis Unit and the Clark County Public Works Department (cited by Dr. Sousa) and other data concerning calls for service; and
- The impact of the County's "no stopping" ordinance on people on the disabled.

See [ECF No. 35] at 3:25-4:11.

In this regard, Plaintiffs demonstrate that they want to go beyond the traditional facial challenge to delve into the facts and evidence underlying the reports and statements presented to the County Commission when passing CCC 16.13.030—asking the Court to review material that wasn't even available to the legislative body when it voted to pass the ordinance. Plaintiffs also demonstrate that they want to investigate the efficacy of the subject ordinance and to seek evidence to have the Court supplant its wisdom with that of the legislative body to see if the ordinance was necessary or effective. But this sort of analysis exceeds the judicial mandate

[1] First, it should be noted that standing is an issue of subject matter jurisdiction. *In re Palmdale Hills Prop., LLC*, 654 F.3d 868, 873 (9th Cir. 2011). Defendant is not capable of stipulating away the justiciability requirements for Article III standing even if it wanted to—which it doesn't. Furthermore, as Plaintiffs' counsel has full access to the Plaintiffs and can communicate with them freely, they do not require discovery to ascertain facts that may be necessary to establish their own standing in this matter.

for reviewing the validity of statutes and is precisely the reason why facial challenges are so disfavored.

"Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." *Ferguson v. Skrupa*, 372 U.S. 726, 729, 83 S. Ct. 1028, 1030, 10 L. Ed. 2d 93 (1963); *see also Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469, 101 S. Ct. 715, 726, 66 L. Ed. 2d 659 (1981) ("the Minnesota Supreme Court erred in substituting its judgment for that of the legislature."); *Pac. Nw. Venison Producers v. Smitch*, 20 F.3d 1008, 1017 (9th Cir. 1994) ("[…], the Supreme Court has frequently admonished that courts should not 'second-guess the empirical judgments of lawmakers concerning the utility of legislation.'") (citing *CTS Corp. v. Dynamics Corp. of America*, 481 U.S. 69, 92, 107 S.Ct. 1637, 1651, 95 L.Ed.2d 67 (1987)). The courts "do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare." *Day-Brite Lighting Inc. v. State of Mo.*, 342 U.S. 421, 423, 72 S. Ct. 405, 407, 96 L. Ed. 469 (1952). Local legislative bodies "have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare." *Id*.

As the discovery Plaintiffs seek is both overbroad and would be used for an impermissible purpose—asking the Court to exceed its judicial mandate by supplanting its wisdom for that of the legislature—the discovery they seek is both spurious and irrelevant.

Furthermore, as neither Plaintiff has been cited under the subject ordinance and the Court will undoubtedly provide a quick turnaround on the pending motions due to the motions for TRO and preliminary injunction, Plaintiffs suffer no harm by being momentarily denied discovery at this preliminary juncture, irrelevant or otherwise. Accordingly, the Court should find that good cause exists and grant a stay of discovery pending a determination by the Court of Defendant Clark County's motion to dismiss [9].

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F. A Preliminary Peek at the Merits of Defendants' Motion Indicates a Significant Likelihood of Success on the Merits

A preliminary peek of the merits supports that Defendant is likely to prevail on the motion to dismiss [9] Plaintiffs' misplaced facial challenges to the constitutionality and validity of CCC 16.13.030. *See generally* [ECF No. 9].

Plaintiffs cannot show that they are likely to succeed on the merits here. First, Plaintiffs have not actually been cited under the ordinance which makes their challenge a disfavored facial challenge as opposed to an "as applied" challenge. On that basis alone, they are unlikely to succeed.

But even an analysis of the merits demonstrates that CCC 16.13.030 is a content-neutral ordinance which serves the substantial government interests of securing the free flow of pedestrian traffic and public safety on pedestrian bridges. It also leaves ample room—94% of the Las Vegas Strip sidewalk system—open to expressive conduct while stopping or standing. Furthermore, the subject ordinance allows expressive conduct on 100% of the sidewalk system, including the pedestrian bridges, so long as the person engaged in expressive conduct is not stopped or standing while doing so. Accordingly, CCC 16.13.030 withstands intermediate scrutiny. The "stop" and "stand" language in CCC 16.13.030 also has its ordinary meaning so there is no vagueness inherent in the ordinance and it will not result in arbitrary or discriminatory enforcement by LVMPD—so Plaintiffs' due process challenge to the ordinance must also fail as a matter of law.

Plaintiffs' ADA claims also fail because the subject ordinance does not have a discriminatory impact as the legislation applies equally to all people. Even if CCC 16.13.030 did have a discriminatory impact, Ninth Circuit case law precludes enforcement of criminal statutes or ordinances where the purported criminal conduct was the result of a person's disability and, accordingly, the ordinance cannot be read unconstitutionally on that basis alone. Accordingly, it is exceedingly likely that Plaintiffs' claims will not prevail on their merits and the Court should grant the instant Motion to Stay Discovery in this case.

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IV.

CONCLUSION

Based on the foregoing, Defendant humbly requests the Honorable Court grant the instant Motion to Stay Discovery pending a determination by the Court of Defendant's Motion to Dismiss [9].

DATED this 14th day of May, 2024.

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CERTIFICATE OF ELECTRONIC SERVICE

I hereby certify that I am an employee of the Office of the Clark County District Attorney and that on this 14th day of May, 2024, I served a true and correct copy of the foregoing **DEFENDANT CLARK COUNTY'S MOTION TO STAY DISCOVERY IN COMPLIANCE WITH LR 26-7(c) AND LR IA 1-3(f)** (United States District Court Pacer System or the Eighth Judicial District Wiznet), by e-mailing the same to the following recipients. Service of the foregoing document by e-mail is in place of service via the United States Postal Service.

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