IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOSHUA D. ZOLLICOFFER a/k/a PASSION STAR,
Plaintiff,

versus

BRAD LIVINGSTON, personally and in his official capacity as Executive Director of the Texas Department of Criminal Justice ("TDCJ"); *et al.*,
Defendants.

Case No. 4:14-cv-03037

PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION ON HER FIRST CLAIM FOR RELIEF AGAINST DEFENDANTS JONI WHITE AND BRAD LIVINGSTON (COMBINED WITH SUPPORTING MEMORANDUM OF LAW)

MOTION

Plaintiff Joshua Zollicoffer a/k/a Passion Star ("Plaintiff" or "Ms. Star"), moves the Court to enter a Temporary Restraining Order and Preliminary Injunction against Defendants Joni White and Brad Livingston (collectively, "Defendants") ordering them to place Plaintiff in Safekeeping or explain to the Court the specific action they will take to protect Plaintiff from further harm.

This motion is made with notice to Defendants. Pursuant to Local Rule 7.1(D), counsel certifies that Paul D. Castillo, counsel for Movant, has conferred with Kim Coogan, counsel for Respondents, and they are unable to agree on the disposition of this motion. Therefore, the motion is opposed.

In support of this motion, Plaintiff submits the following Memorandum of Law, as well as the accompanying affidavits and exhibits.

MEMORANDUM OF LAW

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I. THE NATURE AND STAGE OF THE PROCEEDING

This is a prisoner civil rights action. Plaintiff is a transgender woman in the custody of the Texas Department of Criminal Justice ("TDCJ"), who has been brutally attacked and raped by men incarcerated with her and continues to be threatened with assault, rape, and murder. She has repeatedly begged TDCJ officials to protect her, but Defendants have refused to place her in a secure housing placement ("safekeeping") or to take other reasonable steps to reduce the acts and threats of harm to her. Defendants' conduct constitutes deliberate indifference in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution. Plaintiff seeks preliminary and permanent injunctive relief, declaratory relief, and damages.

Plaintiff has filed a First Amended Complaint ("FAC"). There are pending motions (to dismiss as to defendant Livingston and to Transfer as to the remaining defendants). No defendant has yet answered the FAC. The parties have filed their Joint Discovery/Case Management Plan. The case has not yet been set for an initial case management conference.

II. ISSUES TO BE RULED UPON AND STANDARD OF REVIEW

Plaintiff seeks a temporary restraining order and preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure. The four elements required for each are identical. *See Clark v. Prichard*, 812 F.2d 991, 993 (5th Cir. 1987). They are

> (1) there is a substantial likelihood that the movant will prevail on the merits;
>
> (2) there is a substantial threat that irreparable harm will result if the injunction is not granted;
>
> (3) the threatened injury outweighs the threatened harm to the defendant; and
>
> (4) the granting of the preliminary injunction will not disserve the public interest.

Karaha Bodas Co. v. Perusahaan, 335 F.3d 357, 363 (5th Cir. 2003).

III. SUMMARY OF ARGUMENT

Plaintiff seeks judicial intervention to prevent grave bodily harm and to protect her life.

Plaintiff has begged and pleaded with TDCJ staff to protect her from sexual assault and violence. Despite the well-established duty of correctional officers to protect people in their custody from violence at the hands of other inmates, Defendants have been deliberately indifferent to Ms. Star's repeated pleas for help and have forced her to remain in the general population in male prisons, where she has been raped, assaulted, and lacerated. In fact, Plaintiff's efforts to request protection from TDCJ staff have caused her to be labeled a "snitch," increasing the danger to her.

By this Motion, Plaintiff seeks to prevent irreparable harm. TDCJ has a system to protect inmates such as Plaintiff—Safekeeping. The Safekeeping program is available to protect incarcerated people who are vulnerable to sexual abuse and violence in the general population, such as transgender women and gay men. The Eighth Amendment requires Defendants to protect Plaintiff—yet they have failed to prevent serious harm despite procedures in place to do so. Given TDCJ's repeated failure to protect Plaintiff, she has been forced to file this Motion to prevent imminent sexual and physical assault.

Plaintiff seeks a temporary restraining order and preliminary injunction requiring Defendants to place Plaintiff in Safekeeping or explain to the Court the specific action they will take to protect her from further harm.[1] Without this protection, Plaintiff faces a substantial likelihood of being raped, attacked, and even murdered. If immediate relief is not granted, Plaintiff faces an imminent risk of irreparable harm.

IV. FACTUAL BACKGROUND

A. Defendants Are Aware that Ms. Star Has Been Raped, Assaulted, and Threatened in the General Population of TDCJ Facilities

Ms. Star is a transgender woman. (Plaintiff's Affidavit ("Star") ¶ 2.) TDCJ has placed

[1] This Motion seeks only injunctive relief against Defendants White and Livingston, both of whom have the power in their official capacities to comply with the requested relief.

Ms. Star in the general population in at least seven sex-segregated male facilities. (*See id.* ¶¶ 3-4.) The men incarcerated in each facility have known that she is not a heterosexual man—recognizing her as a woman or perceiving her to be a gay man. (*Id.* ¶ 6.) In the absence of protection from TDCJ, gay men and transgender women in their custody are forced to comply with sexual demands from powerful, male inmates, often gang members, or face other physical assault.[2] (*Id.* ¶¶ 7.) Upon entering each unit, the men incarcerated with Plaintiff threatened her with physical assault if she did not comply with their sexual demands. (*Id.* ¶ 5.)

By the time Ms. Star arrived at the Clements Unit ("Clements") in November 2014, her history of being threatened with sexual and physical assault as a result of her gender identity and/or her perceived sexual orientation was known and well-documented. (*Id.* ¶¶ 5-63.) Ms. Star had been housed in the general population of other TDCJ Units—the Telford Unit ("Telford"), the Allred Unit ("Allred"), the Smith Unit ("Smith"), the Coffield Unit ("Coffield"), the Hughes Unit ("Hughes"), and the Robertson Unit ("Robertson")—and in each of these units, she was raped, assaulted, and/or threatened with death. (*Id.* ¶¶ 4-5,10-13, 28, 40.)

In Telford, Plaintiff was forced into a coerced sexual relationship with M.M., a Bloods gang member, who forced her to perform sexual acts and choked her when she tried to end the relationship. (*Id.* ¶ 10.) In Allred, Ms. Star notified staff that she did not feel safe around her cellmate, C.X., who had been sexually propositioning her, but the guard left her unsupervised and locked in the cell with C.X. (*Id.* ¶ 11.) In March 2007, brandishing a knife, C.X. held Ms. Star down, and raped her. (*Id.*, Ex. A.) In Smith, Plaintiff was threatened with rape and forced to

[2] Rape is defined to include "(a) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person, forcibly or against that person's will" and "(c) the carnal knowledge, oral sodomy, sexual assault with an object, or sexual fondling of a person **achieved through the exploitation of the fear or threat of physical violence or bodily injury**." 42 U.S.C. § 15609 (emphasis added).

watch her cellmate masturbate. (*Id.* ¶ 12.) In Coffield, Plaintiff was forced into another coerced sexual relationship with an inmate who punched her in the jaw when she resisted, causing her tooth to puncture her lip. (*Id.* ¶ 13.)

In 2011, Ms. Star was transferred to Hughes, where she was once again identified as a transgender woman or perceived as a gay man, and threatened with assault if she did not perform sexual acts or pay for protection. (*Id.* ¶¶ 14-32.) Ms. Star complained to TDCJ staff about threats and assaults that she experienced from C.Y.X., A.X., F.X., J.T. and other inmates who propositioned her for sex and threatened to hurt her if she refused. (*Id.)* Ms. Star submitted numerous grievances related to her lack of safety while housed in Hughes and begged TDCJ staff repeatedly to take her out of the general population and put her in Safekeeping. (*See Id.* ¶ 16, 20-26, Ex. B-C, E.)

On November 13, 2013, J.T. threatened Ms. Star, stating loudly in front of other Crips that Ms. Star "belonged" to him, and told her that refusal was not an option and that since she was gay, she had to "stay in a ho's place." (*Id.* ¶ 22.) On November 19, 2013, Ms. Star appealed to the Unit Classification Committee ("UCC") in Hughes for protection. (*Id.* ¶¶ 24.) Rather than protect her, the UCC denied her request for Safekeeping and moved her from transient status to a cell in the same pod as J.T.—with the effect that her request for protection resulted in her being moved closer to the person threatening her. (*Id.* ¶ 24-26.)

The very next morning, November 20, 2013, the assault that she had been begging to be protected from occurred (the "Razor Attack"). (*Id.* ¶ 28.) J.T. and other Crips gang members brutally attacked Ms. Star from behind. (*Id.)* J.T. called her a "snitching faggot." (*Id.)* As other members of J.T.'s gang watched, J.T. repeatedly slashed Ms. Star's face with a razor while she

struggled; she sustained eight lacerations on her face, leaving raised scars, which are likely permanent. (*Id.*, Ex. D.)

Even after the Razor Attack, Ms. Star was denied Safekeeping. (*See, e.g.*, *id.* ¶¶ 30-32, Exs. C, E.) Deliberately ignoring evidence that moving Ms. Star to the general population in a new unit does not reduce the risk of harm to her, Defendants decided to transfer Ms. Star into the general population of her sixth new unit—Robertson. (*Id.* ¶¶ 33.)

Ms. Star grieved the decision to deny her Safekeeping after the Razor Attack, writing:

> simply recommending that I be transferred off the unit isn't enough to ensure that I am no longer victimized. . . . I followed instruction and was placed back into a position to be hurt – knowingly. So, I request safekeeping away from the general population of offenders that have victimized me and will continue to do so.

(*Id.* ¶ 32, Ex. E.)

B. The Threats against Ms. Star Again Escalate in Robertson

Ms. Star was transferred to Robertson on December 6, 2013, and assigned housing in the general population. It was immediately apparent that Ms. Star would not be safe in the general population in Robertson. As she feared, soon after she arrived in Robertson, inmates identified her as feminine and threatened her with violence if she did not perform sexual acts for them. For example, a Crips gang member known as C.G.X. told her that she had to find a man to protect her or be raped. (Star ¶ 34, 39). T.T., a Crip, spread the word among the Crips in Robertson that Ms. Star was a "snitching faggot" and threatened that the Crips in Robertson would finish what J.T. started. (*Id.* ¶ 34.) In or around March 2014, an inmate known as P.N., also a member of the Crips, sent Ms. Star a letter threatening to kill her. (*Id.* ¶¶ 40.)

In desperation and fear, Ms. Star sent letters to Defendant White at the State Classification Committee ("SCC") and Defendant Bales, the former the Prison Rape Elimination Act ("PREA") Ombudsman, begging for help. (*Id.* ¶ 41, Ex. F.) In her letter to Defendant White,

Ms. Star wrote, "I've been called a 'snitching faggot,' told that [J.T.] should have cut my throat and that if [I] try the same mess over here they will finish what he started. . . ." (*Id.*).

The UCC at Robertson recognized that Ms. Star could not be protected in the general population at Robertson and recommended three times that Ms. Star be transferred away from Robertson, recommending one of these times that she be placed in Safekeeping to protect her. First, on April 7, 2014, the UCC at Robertson recommended that Ms. Star be transferred to a new unit due to the threats against her in Robertson.[3] (*Id.* ¶ 42.) But, on or around May 25, 2014, the SCC denied the UCC's recommendation that Ms. Star be afforded more protection than that available in the general population at Robertson. (*Id.*)

On June 5, 2014, the Robertson UCC recommended to the SCC that Ms. Star be transferred to a unit with Safekeeping and placed in Safekeeping. The recommendation recognized that Ms. Star was in need of this protection and that there was nothing that should preclude her placement in Safekeeping. (*Id.* ¶ 48.) Despite knowledge of Ms. Star's vulnerability, the SCC also rejected this recommendation. (*Id.* ¶ 49, Ex. J.)

Thereafter, on June 17, 2014, Senior Warden Fox moved Ms. Star from transient status into the general population in a new building in Robertson, Building 3. (*Id.* ¶ 50.) Not long after Ms. Star was returned to the general population, she was identified as a "snitch" and threatened with death, including by a Crips gang member in Building 3, known as T.K.X. T.K.X. told Ms. Star that she would be killed. (*Id.* ¶ 51.) He called her a "snitch" and a "faggot" and said that she

[3] Ms. Star appealed this decision to recommend unit transfer, instead of transfer to Safekeeping, on April 9, 2014. (*Id.* ¶ 43, Ex. G.) In her grievance, she wrote that the dangers to her were:

> all rooted in the fact that I am a homosexual housed in the gang influenced general population of offenders. . . Just recommending that I be transferred to another unit will not ensure my safety, just as it did not after the 3-29-07 sexual assault, nor after the 11-20-13 assault with a weapon. I am an offender with a 'potential for victimization', otherwise I wouldn't be constantly victimized and threatened by other offenders.

could not "run forever" but will sooner or later "have to face the consequences" because she rejected J.T. and tried to press charges against him. (*Id.)* Ms. Star filed a related grievance on July 21, 2014, stating that, "I have been told that I will be killed if I remain in population." (*Id.* ¶ 52; Ex. K.)

On August 1, 2014, the Robertson UCC forwarded another recommendation of unit transfer to the SCC. (*Id.* ¶ 55-56.)[4] On August 12, 2014, Ms. Star wrote directly to the SCC again, requesting placement in Safekeeping. She identified herself as a transgender woman and again explained that her "life is in danger." (*Id.* ¶ 58, Ex. M.) However, on or around September 17, 2014, the SCC denied her request as well as the UCC's recommendation and directed that Ms. Star be returned to the general population in Robertson. (*Id.* ¶ 61, *see* Ex. K.)

On or around September 18, 2014, the Robertson UCC appealed the SCC's decision to deny unit transfer—but not to deny Safekeeping—and on or around November 16, 2014, Ms. Star was transferred from Robertson to Clements, a unit known for having some of the highest rates of inmate-on-inmate sexual assault in the nation and where Safekeeping status is not available. (*Id.* ¶ 64; Affidavit of Jael Humphrey-Skomer ("Hum."), Ex. 2.)

C. The Threats against Ms. Star Escalate in Clements

Unsurprisingly, soon after she arrived in Clements, Ms. Star was identified as feminine by incarcerated men, targeted for sexual abuse, and threatened with physical assault, and possibly death, if she resisted or complained. (*Id.* ¶ 67.) Almost immediately, an inmate in her

[4] Ms. Star also appealed this decision to recommend unit transfer instead of Safekeeping submitting and appealing grievance #2014196990, in which she wrote:

> [T]ransferring me from unit to unit in general population does nothing to rectify this problem that is pervasive. . . . I have been threatened with my life as well as threatened with rape. Housing me in general population to repeat the same cycles with different offenders is absurd. . . .

(*Id.* ¶ 57, Ex. L.)

pod, known as T.C., began to aggressively proposition Ms. Star for sex, referring to Ms. Star as a "ho" and telling her that "all of the girls" in the unit were already "accounted for" and that she had "to have a man." (*Id.*). An inmate known as E.T. also aggressively propositioned Ms. Star, grabbed her buttocks, and demanded that she perform sexual acts for him. (*Id.* ¶ 68.)

Ms. Star also recognized people in Clements, who she had been previously housed with at other units. (*Id.* ¶ 69.) J.C., a Crip and a close friend of J.T., was previously incarcerated at Hughes and is now at Clements. J.C. was present when J.T. threatened Ms. Star prior to the Razor Attack. (*Id.*) C.G., a Crip who was housed with Ms. Star at both Coffield and Hughes, is also a close friend of J.T., and is also now in the general population at Clements; Ms. Star received a message from another inmate that C.G. is "looking for her." (*Id.* ¶ 71.)

Ms. Star is also afraid that she will be raped, physically assaulted or possibly killed as a result of threats from K.H., a Crip who was incarcerated with her previously in Coffield and is now in Clements. (*Id.* ¶ 70, 83-84.) In January 2015, K.H. told Ms. Star that he wanted her to be his "bitch" and began telling other inmates, including many Crips, that Ms. Star belonged with him and to watch her. K.H. has aggressively pursued Ms. Star, and she fears he will soon sexually and/or physically assault her. (*Id.* ¶ 70.) Ms. Star has also received threats and demands for sexual acts from other inmates at Clements, including S.B. (*Id.* ¶ 72.)

The danger to Ms. Star at Clements is heightened by the actions of the staff, including staff in the Safe Prisons Programs' Office. Rather than appropriately screen Ms. Star for vulnerability when she arrived at Clements, the UCC ridiculed her female gender identity and assigned her to the general population even though she explained that she was transgender and had a history of being targeted for sexual abuse and assault in the general population of other units. (*Id.* ¶ 65.) During her meeting with the Safe Prisons Program Coordinator at Clements,

Sergeant Mayes, Mayes' assistant, and Officer Garcia, told Ms. Star that they would not tolerate her filing OPIs in Clements like she had done in other units and threatened to cause problems for her, including writing her up and provoking fights between her and her cellmate, if she continued to file OPIs and grievances at Clements. (*Id.* ¶ 66.)

Because of the actions of the staff at Clements, Ms. Star is afraid to complain about the threats to her safety. (*Id.* ¶ 73.) But, even though she is concerned about possible retaliation, by February 19, 2015, her situation had grown so desperate that she filed an OPI and a grievance related to the threats against her. (*Id.* ¶ 74.) In these documents, she described the threats that she received from four Crips gang members–E.T., K.H., C.G. and S.B. (*Id.*). She explained that these men threatened to assault her if she did not perform sex acts for them and begged to be placed in Safekeeping. Ms. Star also wrote and sent letters to Defendant White, head of the SCC, and the PREA Ombudsman, explaining the threats against her and begging to be placed in Safekeeping. (*Id.* ¶ 75; Hum., Ex 10.)

On February 20, 2015, Ms. Star was placed in "lockup," or isolation, as a result of her request for an OPI. (Star ¶ 76.) On February 23, 2015, Ms. Star was taken before the UCC, consisting of Major Haregree, Captain Thomas, and Classification Specialist Grant. Ms. Star told the UCC that she is transgender and explained her history of being assaulted and the threats that she had received at Clements. (*Id*. ¶ 78.) The UCC refused to take any action to protect Ms. Star and ordered her to be returned to the midst of the people from whom she was seeking protection. After Ms. Star stood before him in her underwear, Major Hardegree told her, "I'm going to do absolutely nothing for you and put you back in general population." (*Id*.)

On February 23, Ms. Star was moved to 4 Building, Transient Pod, where she was housed with inmates classified as G4, a significantly higher classification than Ms. Star, who is

classified as G2. (*Id.* ¶ 79.) She was particularly concerned that C.G. and S.B., who are both classified as G4s, are able to communicate easily with Crips classified as G4s on the Transient Pod. Ms. Star was told by people on the Transient Pod that it was only a matter of time before she was "caught" and killed. (*Id.*) Ms. Star believed that she was transferred to this pod in retaliation for her grievance and OPI. Ms. Star wrote a grievance regarding this issue, but it was returned to her, and she was told that she was not allowed to submit it because it was redundant. (*Id.* ¶ 80; Hum., Ex. 9.)

On February 24, 2015, Ms. Star was transferred back to the general population in 7 Building in Clements, where she was housed with I.D., a well-known, high-ranking member of the Crips. (*Id.* ¶ 81.) Ms. Star was assigned to share a cell with a high-ranking Crip, even though she had informed TDCJ staff that she feared for her safety and her life due to threats from Crips gang members. (*Id.* ¶ 82.) Almost immediately, I.D. accused Ms. Star of being a "snitch" and told her that if she told on him, she would not live to "snitch" on anyone else. (*Id.*¶ 81.)

To compound the danger to Ms. Star, even though Ms. Star had alerted TDCJ staff about K.H.'s threats against her, on February 26, 2015, K.H. was moved from 8 Building where he was previously housed into 7 Building where Ms. Star is housed and where K.H. can have easy access to assault her. K.H. has sent word that he is going to "come for" Ms. Star the first chance he gets. (*Id.* ¶ 83.) With a high-ranking Crip as her cellmate, and no help from TDCJ employees, going into the weekend, Ms. Star was certain that she was going to be sexually assaulted, severely hurt, or possibly killed if she remained in general population. (*Id.* ¶ 84.)

Counsel for Ms. Star have been delayed in communicating with Ms. Star. (*See* Hum. ¶¶ 2,6-11; Star ¶ 85.) Counsel for Ms. Star learned late Thursday night of the threat of imminent harm she faced, and the next day, counsel for the parties negotiated an agreement to place Ms.

Star in isolation until Tuesday, March 3, 2015, while they met and conferred.[5] As of today, counsel have not reached an agreement that guarantees Ms. Star's safety and fear that Ms. Star may be placed back in general population without adequate protection. Because counsel for Defendants has not agreed to move Ms. Star to Safekeeping or specify actions to keep her safe during the pendency of this action, Ms. Star asks this Court to grant her temporary and preliminary injunctive relief.

D. Defendants Know that Transgender Women and Gay Men in Male Prisons Are Vulnerable to Sexual and Physical Assault

The risk of harm to transgender women, as well as gay men, while in custody is clearly and widely recognized and acknowledged. (Expert Affidavit of Eldon Vail ("Vail") ¶ 8-9; Expert Affidavit of Valerie Jenness ("Jenness") ¶ 14,18.) In fact, a growing body of literature confirms the differential vulnerability of transgender people on a national scale. (Jenness ¶ 14.) In an important and widely-cited study, Plaintiff's expert, Dr. Valerie Jenness, documented that sexual assault was 13 times more prevalent among transgender women in prisons than men. (Jenness ¶ 12.) TDCJ's own publications, like TDCJ's Safe Prisons/PREA Plan, acknowledge that LGBT

[5] Although Ms. Star's counsel agreed to have Ms. Star placed in isolation until this Motion is filed, detaining vulnerable inmates in isolation is not an appropriate means to protect them. (*See* Star ¶ 53, 60.) The Texas's Safe Prisons/PREA Plan as well as PREA, prohibit the use of involuntary segregated housing unless a determination has been made that there is no available alternative means of separation from likely abusers. Confinement in involuntary segregated housing is permissible only "until an alternative means of separation from likely abusers can be arranged," 28 C.F.R. § 115.43; *see* Hum., Ex. 4; *see also* Lance Lowry, President AFSCME Local 3807, Texas Correctional Employees, *Testimony*, submitted at the February 25, 2014 hearing before the Senate Judicial Subcommittee on the Constitution, Civil Rights and Human Rights, *available at* http://solitarywatch.com/wp-content/uploads/2014/02/Lance-Lowry-Senate-Hearing-Submission.pdf ("Research shows that depriving inmates of human contact for long periods of time may exacerbate mental crisis, assaultive behavior, antisocial behaviors, and acute health disorders."); American Public Health Association, Addressing Solitary Confinement as a Public Health Issue (2013) (noting that the solitary confinement of prisoners and detainees can cause significant mental health problems and create barriers to needed health care, urging correctional officials to discontinue solitary confinement as a punishment, limit solitary confinement to the most extreme cases and include appropriate monitoring for health issues).

people are vulnerable to sexual abuse while incarcerated and may require greater protection. (Hum., Ex 3.) For example, TDCJ's SAFE Prisons/PREA Plan lists "[p]erception of the offender as gay, lesbian, bisexual, transgender, intersex, or gender nonconforming" as a criteria important to assessing an incarcerated individual's risk of sexual victimization in custody. (*Id.*)

Within the correctional community, the American Jail Association has reported that "[m]ore than any other group, male-to-female transgender inmates (trans women) who are housed with men are at risk for sexual victimization and harassment in jails and prisons," and the National Institute of Corrections noted that "men and women with nonheterosexual orientations, transgender individuals, and people with intersex conditions were highly vulnerable to sexual abuse." (Hum., Exs 4-5.) In addition, the Bureau of Justice Statistics has published surveys revealing that incarcerated people who classify their sexual orientation as gay, lesbian, bisexual, or "other" have the highest rates of sexual victimization in custody. (*Id.*, Ex. 2.)

Statistical evidence supports that TDCJ in general, and Clements in particular, have a high prevalence of inmate sexual abuse. In 2013, BJS ranked Clements eighth in the nation for the highest prevalence of inmate-on-inmate sexual assault, with 6.8% of inmates reporting that they experienced sexual victimization at the hand of another inmate during the past year. (*Id.*) BJS also ranked Clements as the male unit with the highest number of inmates reporting being forced, coerced, or pressured into sex or sexual contact with prison staff in the country–9.5%. (*Id.*)

As the National Prison Rape Elimination Commission noted, "sexual abuse is not an inevitable feature of incarceration." (Hum., Ex. 6.) In fact, TDCJ established the Safekeeping program to provide additional protection from sexual abuse and other violence to LGBT inmates. Pursuant to TDCJ's Safe Prisons/PREA Plan, "'Safekeeping Status' is a status assigned to

offenders who require separate housing from general population because of threats to their safety due to a history of homosexual behavior, a potential for victimization, or other similar reasons." (*Id.*)[6]

Plaintiff, who is currently classified as G2—a lower custody level—could be classified as P2 in Safekeeping. (*See* Star ¶ 86; Hum., Ex. 8 at 5-6 (acknowledging that offenders in a G2 custody level may be given a Safekeeping status if they need an added level of protection from other offenders)). There is nothing in Ms. Star's record that should preclude her from being placed in Safekeeping. (Vail ¶ 13; Star ¶ 87.) As Plaintiff's expert, former Deputy Secretary for the Washington State Department of Corrections affirmed after reviewing Ms. Star's disciplinary history,

> Many of her disciplinary write-ups are for small and routine misbehaviors such as having unauthorized property, refusing to work or refusing to follow orders. To the extent that there is violence related behavior such as fighting or possession of a weapon, her record is not extensive and somewhat understandable given the danger she faced in the TDCJ on a daily basis for several years and consistent with the lack of help she has received from department officials. If the staff can't or won't defend her, she has been and literally is on her own to protect herself. Even if her behavior were more serious, that would not preclude TDCJ officials from their obligation to act to keep her safe. Fundamental to the obligation of every correctional official is to do all they can to protect inmates when the danger is clearly known, as the record regarding Ms. Star illustrates.

[6]TDCJ's August 2012 Safe Prison Program describes Safekeeping as follows: "Offenders assigned to Safekeeping status are separated from other general population offender by housing assignment. This separation makes it difficult for general population offenders to enter their housing areas. In addition, Safekeeping offenders receive their recreation time and meals apart from the general population." TDCJ, Safe Prisons Program, Fiscal Year 2011, Aug. 2012, https://www.tdcj.state.tx.us/documents/PREA_SPP_Report_2011.pdf

(Vail ¶ 13.) Defendants were aware of the obvious and known risk of sexual abuse to LGBT people in custody and Ms. Star in particular. Safekeeping was designed to protect inmates like Ms. Star and is the safest housing for her during the pendency of this action.

V. ARGUMENT

A. Plaintiff Meets the Legal Standard for a Temporary Restraining Order.

1. Plaintiff Will Suffer Irreparable Injury Absent An Injunction.

To satisfy the irreparable injury requirement, a plaintiff must show that she is likely to suffer irreparable injury for which there is no adequate remedy at law. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013).

Plaintiff faces grave physical harm and possibly death if she remains in the general population of Clements or any other unit. While in the general population in Clements, Plaintiff received credible threats from multiple members of the Crips gang, who view her as a snitch. As evidence that the Crips follow through on their threats, Ms. Star bears scars on her face, the result of the Razor Attack in Hughes that she did not think she would survive.

Transfer from one unit to another has proved insufficient for Plaintiff to escape the label of "snitch," the threats from the Crips, and her vulnerability to sexual and physical assault in the general population as a transgender woman. At each of the seven TDCJ facilities in which Plaintiff has been housed, male inmates have recognized Plaintiff to be a woman or perceived her to be a gay man and demanded that she perform sexual acts for them or pay for protection. (Star ¶¶ 5-7.) Plaintiff has been repeatedly physically and sexually assaulted, even after warning staff of the threats against her. Each of the incidents of violence against Plaintiff has had a snowball effect, increasing Plaintiff's danger by branding her—*physically* as well as by reputation—as a target and, worse, a "snitch." Housing Plaintiff in the general population at *any* unit thus exposes her to an imminent risk of harm.

Courts in the Fifth Circuit recognize that an inmate labeled a "snitch" is at increased risk of physical harm by other inmates and staff, including life-threatening retaliation. *See, e.g.*, *Adames v. Perez*, 331 F.3d 508, 514 (5th Cir. 2003) (noting prison officials agreed that a gang member who divulges secret information about his gang "might be a target of violence" by fellow gang members); *Alberti v. Klevenhagen*, 790 F.2d 1220, 1226 (5th Cir. 1986) (some district courts have acknowledged that prisoners may be reluctant to come forward with information for fear of being labeled a snitch); *Gullatte v. Potts*, 654 F.2d 1007, 1013 (5th Cir. 1981) (reversing and remanding due to failure to consider what the defendant knew or should have known as to "the danger to snitches who are placed into the general prison population"); *David v. Hill*, 401 F. Supp. 2d 749, 756 (S.D. Tex. 2005) ("Courts have long recognized that being labeled a 'snitch' in the prison environment can indeed pose a threat to an inmate's health and safety in violation of the Eighth Amendment."). As the Fifth Circuit has observed, "the life of a 'snitch' in a penitentiary is not very healthy." *United States v. Henderson*, 565 F.2d 900, 905 (5th Cir. 1978). It is to her detriment that, in trying to resist sexual abuse, Plaintiff has been labeled a "snitch" and now bears on her face scars, which mark her status as a victim.

Ms. Star is substantially likely to be assaulted and even murdered if she remains in the general population at Clements, and transferring her to the general population in an eighth unit is not an adequate solution. The fact that she has been repeatedly threatened with violence if she refuses to perform sex acts, and then assaulted when she does refuse, in so many facilities, shows that she is likely to be assaulted again. Defendants are aware that keeping Ms. Star in the general population is not sufficient to protect her.

A different course is required, and this Court need not wait to act until Plaintiff is maimed again or worse. *See Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("It would be odd to

deny an injunction to inmates who plainly proved an unsafe, life-threatening environment in their prison on the ground that nothing yet had happened to them."); *United States v. Emerson*, 270 F.3d 203, 262 (5th Cir. 2001) ("[T]he injury need not have been inflicted when application is made or be certain to occur; a strong threat of irreparable injury before trial is an adequate basis" (quoting 9 Wright et al., Federal Practice and Procedure § 2948.1, at 153–56) (internal quotation marks and emphasis omitted)); *Paz v. Weir*, 137 F. Supp. 2d 782, 806 (S.D. Tex. 2001) ("Prison authorities must protect not only against current threats, but also must guard against 'sufficient imminent dangers' that are likely to cause harm in the 'next week or month or year.'" (quoting *Horton v. Cockrell*, 70 F.3d 397, 401 (5th Cir. 1995))).

Defendants' deliberate indifference to the substantial likelihood that Plaintiff will be harmed again if she remains in the general population of Clements or any other unit, which threatens her most critical constitutional rights, makes this exactly the type of case in which preliminary injunctive relief is appropriate. *See De Leon v. Perry*, 975 F. Supp. 2d 632, 663 (W.D. Tex. 2014) ("Federal courts at all levels have recognized that violation of constitutional rights constitutes irreparable harm as a matter of law.") . "Federal courts have long recognized that, when the threatened harm is more than de minimis, it is not so much the magnitude but the irreparability that counts for purposes of a preliminary injunction." *Shah v. Univ. of Texas Sw. Med. Sch.*, No. 3:13-CV-4834-D, 2014 WL 4105964, at *3 (N.D. Tex. Aug. 21, 2014) (citing *Dennis Melancon, Inc. v. City of New Orleans*, 703 F.3d 262, 279 (5th Cir. 2012)).

For similar reasons, damages plainly could never fully repair the harm Plaintiff will suffer should she be assaulted again or murdered. *See De Leon*, 975 F. Supp. 2d at 664 ("[N]o amount of money can compensate the harm for the denial of [] constitutional rights" (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976))); *see also Pocklington v. O'Leary*, No. 86 C 2676,

1986 WL 5748, *1 (N.D. Ill. May 6, 1986) ("Damages are plainly not an adequate remedy" for the "indignity" of continued sexual and physical abuse following inmate's return to general population to live with gang members who had previously abused him, "[n]or, from the nature of things, [could plaintiff] await the conclusion of the litigation to get injunctive relief. [Plaintiff's] showing reflects both the inadequacy of a remedy at law and the existence of irreparable harm").

Notwithstanding the escalated threats against Plaintiff, Defendants have not adopted a new strategy to protect Plaintiff. This Court should not follow the same path. The risk of irreparable injury to Plaintiff is serious, documented, and imminent. An injunction should issue.

2. Plaintiff Is Likely to Succeed on the Merits of Her Eighth Amendment Deliberate Indifference Claim

Plaintiff has shown that she is substantially likely to succeed on the merits of her claim. "To show a likelihood of success, the plaintiff must present a prima facie case, but need not prove that [s]he is entitled to summary judgment." *Daniels Health Scis., LLC*, 710 F.3d at 582 (5th Cir. 2013); *Lakedreams v. Taylor*, 932 F.2d 1103, 1109 n.11 (5th Cir. 1991) ("In a preliminary injunction context, the movant need not prove his case.").

Defendants violated—and continue to violate—Plaintiff's Eighth Amendment right to be free from cruel and unusual punishment. More than twenty years ago, in a foundational case involving a transgender woman who was assaulted in the general population of a male prison in Indiana—the United States Supreme Court made clear that the Eighth Amendment's proscription against cruel and unusual punishment requires prison officials to protect people in their custody from sexual and other violent assaults by other inmates. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994) ("Being violently assaulted in prison is simply not part of the penalty that criminal offenders pay for their offenses against society."). Since then, the principle established in *Farmer* has been cited with approbation more than 14,000 times, including over 1,500 times by courts in

the Fifth Circuit. *See, e.g.*, *Johnson v. Johnson*, 385 F.3d 503, 527 (5th Cir. 2004) (denying qualified immunity to defendants who denied pleas for help from effeminate male inmate who was sexually assaulted in the general population); *Horton v. Cockrell*, 70 F.3d 397, 400 (5th Cir. 1995) ("Prison officials have a [constitutional] duty . . . to protect inmates from violence at the hands of other prisoners."). Thus, the duty of prison officials to protect people in their custody from violence at the hands of other inmates is well-established.

To establish an Eighth Amendment violation for failure to protect, Plaintiff must show that she is (1) "incarcerated under conditions posing a substantial risk of serious harm" and that (2) the prison officials acted with "deliberate indifference" to the inmate's health or safety. *Farmer*, 511 U.S. at 834; *see also Johnson v. Epps*, 479 F. App'x 583 590 (5th Cir. 2012).

a. Plaintiff is Incarcerated Under Conditions Posing a Substantial Risk of Serious Harm

Plaintiff satisfies the first element in the failure-to-protect test because she "is incarcerated under conditions posing a substantial risk of serious harm." *Farmer*, 511 U.S. at 834. It is beyond dispute that sexual and physical assault constitutes serious harm. *Farmer*, 511 at 834 ("Being violently assaulted in prison is simply not 'part of the penalty that criminal offenders pay for their offenses against society.'"); *accord Howard v. Waide*, 534 F.3d 1227, 1237 (10th Cir. 2008) (claims that gay inmate was threatened, sexually assaulted, and prostituted by other inmates were "sufficiently serious to constitute a violation under the Eighth Amendment"); *Johnson*, 385 F.3d at 527 (observing that it is "abundantly clear that an official may not simply send the inmate into the general population to fight off attackers"). To be sure, "having stripped [prisoners] of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course." *Farmer*, 511 U.S. at 833.

Objectively, the risk that Plaintiff will be seriously harmed again is substantial. To state a valid Eighth Amendment claim, it is sufficient if prison conditions "pose an unreasonable risk of serious damage" to an inmate's future health. *Helling v. McKinney*, 509 U.S. 25, 35 (2012); *Johnson*, 479 F. App'x at 590. A showing of past injury or present symptoms is not required by case law, *id.*, but Plaintiff's history in TDCJ shows a predictable pattern of recurrent abuse and substantiates her fear that she will suffer serious future harm. The violence against Plaintiff and the escalating threats to her safety are well-documented. In the general population of seven TDCJ facilities, she has been raped, assaulted, and/or threatened with violence if she did not perform sexual acts for other inmates. Plaintiff's face was slashed with a razor in Hughes after TDCJ staff refused her pleas for protection and placed her back in the general population. She may be at a new unit now, but the story is the same. Again she has begged TDCJ staff for protection, only to be placed back in general population without adequate protection from the specifically identified people who have threatened her.

As discussed above, since her transfer to Clements, Plaintiff has been threatened with sexual assault, further physical assault, and murder. The risk that Plaintiff will be harmed is compounded by her status as the enemy of J.T. and his gang, the Crips, and her reputation as someone willing to report the threats against her, or in prison parlance, a "snitch." Even though she has been moved to a new unit, the dangers to her stemming from the conflict with J.T. have followed. Because of the Razor Attack, she bears facial scars marking her status as a victim.

Plaintiff is also at risk of sexual and physical assault because of her female gender identity and her perceived sexual orientation. It is well known that transgender individuals, as well as those who are or may be perceived as gay, lesbian, or gender-nonconforming, face a serious risk of sexual and physical assault in custody, especially when housed in the general

population. (Vail ¶ 8-9; Jenness ¶ 14,18.) Since *Farmer*, which was remanded, in part, because the defendant knew that a transsexual woman in a male's prison is "likely to experience a great deal of sexual pressure," 511 U.S. at 848, numerous courts have recognized that a prisoner who is labeled as gay or transgender is likely to have a heightened risk of sexual or physical assault. *See Johnson*, 385 F.3d 505 (gay prisoner alleging that he was sexually assaulted because other prisoners believed him to be more vulnerable); *Name v. Castro*, No. 2:14-CV-4, 2014 WL 2155028, at *11 (S.D. Tex. Mar. 6, 2014) ("Studies have shown that inmates known to be homosexuals are at a greater risk of being sexually attacked in prison" and that "prison officials may conclude that more proactive measures are required to protect homosexuals from bias-motivated attacks."); *Shaw v. D.C.*, 944 F. Supp. 2d 43, 64 (D.D.C. 2013) (concluding that "risk of harm when a female detainee, transgender or not, . . . is housed with male detainees" is obvious). As a transgender woman in the male prison, Plaintiff had a heightened vulnerability to sexual assault.

In sum, Plaintiff is at substantial risk of serious harm if injunctive relief is not granted. Plaintiff's history of assaults show that she is vulnerable and her vulnerability has been compounded by her failed efforts to seek protection from TDCJ staff, as she has now been labeled a "snitch" and returned to general population. Without a change (placement in Safekeeping), Plaintiff's future in TDCJ will resemble her past. There is a substantial risk that if she is not placed in Safekeeping, she will be raped, assaulted again or even murdered.

b. Defendants Have Acted with Deliberate Indifference to Plaintiff's Substantial Risk of Serious Harm

To satisfy the second prong of the failure-to-protect claim, a plaintiff must demonstrate that the officer was "aware of facts from which the inference could be drawn that a substantial risk of serious harm exist[ed]," drew the inference, and nevertheless disregarded the risk. *Farmer*, 511 U.S. at 837; *accord Adames v. Perez*, 331 F.3d at 512. "[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 811 U.S. at 842.

Defendants are not free to ignore dangers to inmates, nor may they pretend that they were unaware of an obvious risk. "[E]vidence showing that a substantial risk of inmate attacks was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and [] circumstances suggest[ing] that the defendant-official being sued had been exposed to information concerning the risk and thus must have known about it . . . could be sufficient to permit a trier of fact to find that the defendant-official had actual knowledge of the risk." *Id.* at 842-43 (internal quotation marks omitted); *see also Gates v. Cook*, 376 F.3d 323, 333 (5th Cir. 2004) ("[A] factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious."); *Adames*, 331 F.3d at 512 ("In order to prove that an official is subjectively aware of a risk to inmate health or safety, a plaintiff inmate need not produce direct evidence of the official's knowledge. A plaintiff can rely on circumstantial evidence indicating that the official must have known about the risk."). An official cannot escape liability "if the evidence showed that he merely refused to verify underlying facts that he strongly suspected to be true, or declined to confirm inferences of risk that he strongly suspected to exist." *Farmer*, 511 U.S. at 843, n.8.

Here, it is plain that Defendants are aware of the risks Plaintiff faces and that notwithstanding, Defendants have acted with deliberate indifference in violation of the Eighth Amendment. As discussed above, twelve years after the passage of the PREA, the risk of serious harm, including sexual and physical assault, to LGBT people in custody is widely known. (*See* Vail ¶ 8-9; Jenness ¶ 14,18.) TDCJ's own policies, as well as the PREA, put Defendants on notice about the differential vulnerability of incarcerated LGBT people and provide mechanisms to protect vulnerable people from sexual assault in custody—including TDCJ Safekeeping program. In fact, Defendant Livingston submitted written and oral testimony in connection with PREA on more than one occasion. (Am. Compl. ¶ 126, 139.)

Defendants cannot claim that they did not know of these previous threats and assaults because, *inter alia*, Plaintiff has informed Defendants on multiple occasions, filing countless grievances, writing letters and verbally requesting protection from TDCJ officials. Plaintiff's 2007 rape and the 2013 Razor Attack, as well as other threats and assaults, are well-documented. (*See* Star. Exs. A-M.) Plaintiff has written directly to Defendant White and the SCC on at least three occasions and notified them about the danger to her. (Star Ex. F; Hum., Ex. 10.) In Robertson and Clements alone, Plaintiff filed at numerous grievances and/or formal requests seeking the same remedy each time—Safekeeping status. (*See, e.g.*, Star, Exs. G, I-L.) She informed Defendants each time of her gender identity or perceived sexual orientation, that she has been assaulted in the past, and that she has been threatened with assault and/or is afraid that she will be assaulted in the future.

Moreover, Plaintiff filed this lawsuit against Defendants in October 2014 and FAC in January 2014—the pleading puts them on notice of Plaintiff's claims. On February 26, 2015, Plaintiff's counsel emailed and called Defendants' counsel requesting that she notify her clients

of the threats to Plaintiff's life and her fear that she would not survive the weekend. Thus, Defendants clearly know of Plaintiff's history of victimization, vulnerability, and death threats.

Despite this knowledge, Defendants have failed to protect Plaintiff and have placed Plaintiff in further danger. In the past twelve years, Plaintiff has been shuffled between at least seven different units, where the same pattern of threats and actual assaults has been repeated. Even after the brutal Razor Attack at the Hughes Unit, TCDJ officials have continued to deny Plaintiff's requests for Safekeeping, placing her in the general population of Robertson and Clements despite the clear evidence that she would be subject to the same (if not worse) level of victimization that she had faced at Hughes. *See Jacobs v. Angelone*, 107 F.3d 877 (9th Cir. 1997) (unpublished) ("[T]ransfers made with deliberate indifference to an inmate's safety violate the Eighth Amendment."); *Taylor v. Mich. Dep't of Corr.*, 69 F .3d 76, 80-81 (6th Cir. 1995). Defendants know that maintaining Plaintiff in the general population is not sufficient to protect her from the risk of serious harm. Yet, despite this knowledge, Defendants continue to deny Plaintiff placement in Safekeeping.

Defendants at the SCC have placed Ms. Star at a great risk of serious harm by housing her in Clements without the protection of Safekeeping. Defendants have not acted reasonably given their knowledge of the risk of harm to Plaintiff. In sum, the evidence shows that Defendants knew of the serious risk of harm to Plaintiff and failed to protect her from such harm.

3. Threatened Harm to Plaintiff Outweighs Any Harm to Defendants

To establish that the balance of equities tips in her favor, Plaintiff must show that her irreparable harm is greater than the hardship that the preliminary injunction would cause the defendant. *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1056 (5th Cir. 1997). Thus, a "court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Prod. Co. v. Village of Gambell,*

Alaska, 480 U.S. 531, 541 (1987).

As discussed above, Plaintiff is at imminent risk of future, potentially life-threatening, assault. In contrast, enjoining Defendants from denying Plaintiff protection will not result in any harm to defendants. Defendants have a mechanism available to protect people in custody who need protection from other inmates in the general population, such as Plaintiff—placement in Safekeeping. The Safekeeping program is designed to protect all custody levels of general population inmates. (Hum., Ex. 8). Moving Plaintiff to Safekeeping during the pendency of this action will cause little, if, any hardship to Defendants because Plaintiff can be reclassified from her current general population security status, G2, to a Safekeeping level two—P2, effectively maintaining the status quo. The UCC at Robertson has previously recommended that the SCC do just that. (*See* Star ¶ J.) Therefore, the hardship on Defendants, if any, is solely logistical. Plaintiff's risk of continued assault and potential death far outweigh any cognizable harm to Defendants. Given the lack of harm to Defendants from the requested injunctive relief, the balance of harm weighs strongly in favor of Plaintiff.

4. A Preliminary Injunction Will Serve the Public Interest

Plaintiff has also shown that an injunction is in the public interest. As the Fifth Circuit has stated, "the public interest always is served when public officials act within the bounds of the law and respect the rights of the citizens they serve." *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82, 93 (5th Cir. 1992); *see also De Leon v. Perry*, 975 F. Supp. 2d 632, 665 (W.D. Tex. 2014) ("[T]he public interest is promoted by the robust enforcement of constitutional rights."). There can be no dispute that this factor favors an injunction. There can be no public interest that favors sexual assault, violence, and constant threats of assault against people in custody. Because the public interest favors protecting constitutional rights and prison officials' deliberate

indifference to the rape and physical assault of those in their custody violates the Eighth Amendment of the U.S. Constitution, an injunction should issue.

B. Plaintiff's Proposed Preliminary Injunctive Relief is Consistent with Fifth Circuit Precedent and Narrow, Necessary, and Non-intrusive

In civil suits regarding prison conditions, preliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm. 18 U.S.C. § 3626(a). Here, Plaintiff seeks only the relief necessary to safeguard her person while her claims are adjudicated.

C. The Bond Requirement Should Be Waived

The amount of security "is a matter for the discretion of the trial court," and "the court may elect to require no security at all." *Corrigan Dispatch Co. v. Casa Guzman*, 569 F. 2d 300, 303 (5th Cir. 1978); *accord Allied Home Mortg. Corp. v. Donovan*, 830 F. Supp. 2d 223 (S.D. Tex. 2011); *see also Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977) (inadequate resources can *never* be a justification for depriving an inmate of his constitutional rights). Plaintiff is indigent. In contrast, Defendants will suffer no financial harm by fulfilling their constitutional responsibilities. The Safekeeping program is already in existence and in use to protect vulnerable people from abuse. The Court should waive the bond requirement.

VI. CONCLUSION

The Court should enjoin Defendants from moving Plaintiff into the general population and require them to place her in Safekeeping, or otherwise explain the specific actions they will take to guarantee her safety during this action.

Dated: March 3, 2015.

Respectfully submitted,

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NOTICE OF ELECTRONIC FILING

I, CHRISTINA N. GOODRICH, certify that I have electronically submitted for filing, a true copy of the foregoing Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction on her First Claim for Relief Against Defendants Joni White and Brad Livingston (combined with supporting Memorandum of Law) on Behalf of Plaintiff Joshua D. Zollicoffer a/k/a Passion Star in accordance with the Electronic Case Filing System of the Southern District of Texas, on March 3, 2015.

/s/ Christina N. Goodrich
CHRISTINA N. GOODRICH

CERTIFICATE OF SERVICE

On March 3, 2015, I electronically submitted the foregoing document to the clerk of court for the U.S. District Court, Southern District of Texas, using the electronic case filing system of the Court. I hereby certify that I have served the following counsel of record electronically through the Court's ECF system.

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