State of Michigan
In the Court of Claims

GOVERNMENT ACCOUNTABILITY & OVERSIGHT, a Wyoming nonprofit Corporation,

Plaintiff,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF MICHIGAN,

Defendant.

Case No. 24-000060-MZ
Hon. Brock A. Swartzle

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DATE 06/03/2024
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Oral Argument Requested

The Board of Regents of the University of Michigan ("University" or "Defendant") through its counsel, Miller, Canfield, Paddock and Stone, PLC, moves for summary disposition pursuant to MCR 2.116(C)(8) and (10) in lieu of filing an answer to Plaintiff's Complaint. In support of this Motion, as more fully explained in the attached Brief, the University states:

1. On May 1, 2024, Plaintiff filed a three-count complaint alleging that the University violated the Michigan Freedom of Information Act ("FOIA") by failing to produce documents in response to requests seeking information that Plaintiff mistakenly believed was maintained by Rachel Rothschild, an Assistant Professor at the University of Michigan Law School, in her role as an employee of the University.

2. As set forth in the attached Brief, Plaintiff's complaint fails to state a claim for relief and should be dismissed because the documents at issue are not "public records." Alternatively, the records are exempt from disclosure pursuant to the attorney-client privilege. MCL 15.243(1)(g), (h).

3. On May 31, 2024, the University unsuccessfully sought concurrence in the relief sought, thereby necessitating this Motion.

WHEREFORE, the University requests that the Court grant its motion and dismiss Plaintiff's lawsuit in its entirety, with prejudice.

Dated: June 3, 2024

Respectfully submitted,

/s/ Brian M. Schwartz

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DATE 06/03/2024
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION

Oral Argument Requested

I. Introduction

The Freedom of Information Act ("FOIA") provides individuals with the ability to obtain information regarding the "affairs of government." The purpose of requiring disclosure is so that the public is aware of the government's "operations and activities." Importantly, FOIA does not require the production of every document in the possession of a governmental entity or its employees. Instead, a document must only be produced if it meets the statute's definition of a "public record" and is not otherwise exempt from disclosure. In other words, personal records are not subject to disclosure merely because they are possessed by an individual who happens to be a public employee.

Plaintiff Government Accountability & Oversight seeks documents that are not "public records." Specifically, Plaintiff seeks copies of personal communications between Rachel Rothschild, an Assistant Professor at the University of Michigan Law School, and a pro bono client regarding pro bono legal advice. The communications are not made pursuant to Professor Rothschild's job duties at the University of Michigan ("University"). They do not relate to the decisions, actions, or functioning of the University and they have never been "prepared, owned, used, in the possession of, or retained" by the University, let alone in the "performance of an official function." MCL 15.232(i). They are also exempt from disclosure pursuant to the attorney-client privilege. Accordingly, the complaint should be dismissed.

II. Statement of Facts

A. Professor Rachel Rothschild

Rachel Rothschild is an Assistant Professor at the University of Michigan Law School, a position she has held since July 2022. (Ex 1, Rothschild Affidavit, ¶ 3). Before joining the Michigan Law faculty, she was a legal fellow at the Institute for Policy Integrity, where she

remains an affiliated scholar. (*Id.*, ¶ 4). As a legal fellow, Ms. Rothschild worked as an attorney providing legal advice to non-profit organizations regarding climate change legislation. (*Id.*, ¶ 5). One of those non-profit organizations was the Rockefeller Family Fund. (*Id.*)

Ms. Rothschild continues to provide pro bono legal advice to the Rockefeller Family Fund. (*Id.*, ¶ 6). This legal advice is not part of her job duties. (*Id.*) To the extent she uses emails to receive requests for pro bono legal advice and to respond to such requests, Ms. Rothschild uses her personal Gmail account and not her University email account. (*Id.*, ¶¶ 8, 10). Her communications with the Rockefeller Family Fund are done in her personal capacity and not as an employee of the University. (*Id.*)

B. Plaintiff's February 9, 2024 FOIA Request

On February 9, 2024, Plaintiff submitted a FOIA request to the University. Specifically, the request sought:

> … all correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023, through July 31, 2023, inclusive, that was sent to or from or which copies any email address ending in a) @rffund.org, b) @michiganlcv.org, c) @climateintegrity.org, d) @michiganlcv.org, e) @biologicaldiversity.org, and/or e) @pirgim.org.

(Complaint, Ex A).

On February 19, 2024, the University acknowledged receipt of the FOIA request. Due to the volume of requests being processed by the University, the University informed Plaintiff that it would respond to the request on or before March 4, 2024. (Complaint, ¶14; Ex 2, 2/19/24 extension); MCL 15.235(2)(d).

On March 1, 2024, the University denied Plaintiff's request because there were no responsive records. Specifically, the University explained:

> Your request is denied because we have no responsive records. Any records that meet the description you provided, if they were to exist, would not be public records of the

> University of Michigan pursuant to Section 2 (i) of the Michigan Freedom of Information Act, which defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function. . . ."

(Complaint, Ex B).

C. Plaintiff's March 6, 2024 FOIA Request

On March 6, 2024, Plaintiff submitted a second FOIA request, which essentially sought the same information from the first request. Specifically, the request sought:

> … all email correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "American Petroleum Institute Opposition to a Climate Superfund Act" and was sent to or from or includes as a copied party any email address ending in ".edu".

(Complaint, Ex C).

On March 14, 2024, the University acknowledged receipt of the FOIA request. Due to the volume of requests being processed by the University, the University informed Plaintiff that it would respond to the request on or before March 28, 2024. (Complaint, ¶21; Ex 3, 3/14/24 extension); MCL 15.235(2)(d).

On March 26, 2024, the University denied Plaintiff's request because there were no responsive "public records." (Complaint, Ex F).

D. Plaintiff's March 26, 2024 FOIA Request

On March 26, 2024, Plaintiff submitted a third FOIA request again seeking the same records. This request was broken into three separate parts but sought the same described correspondence sought in the March 6, 2024 request:

> … all email correspondence sent to or from (including as cc: and/or bcc:) Rachel Rothschild, Assistant Professor, University of Michigan Law School, which is dated at any time from January 1, 2023 through July 31, 2023, inclusive, that includes, anywhere, whether in an email or an attachment thereto, "American Petroleum Institute Opposition to a Climate Superfund Act" and:

> 1) was sent to or from or includes as a copied party any email address ending in ".org".
> 2) was sent to or from or includes as a copied party any email address ending in ".gov"; and/or
> 3) was sent to or from or includes as a copied party any email address ending in ".com".

(Complaint, Ex G).

On April 3, 2024, the University denied Plaintiff's request because there were no responsive "public records." (Complaint, Ex H).

Plaintiff had the option of pursuing an internal appeal or seeking judicial review for each FOIA denial. On May 1, 2024, it filed the instant lawsuit.

III. Argument

A. Standard of Review

A motion filed under MCR 2.116(C)(8) challenges the legal sufficiency of a complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). Although the court accepts the truth of all factual allegations, *Detroit Int'l Bridge Co v Commodities Export Co*, 279 Mich App 662, 670; 760 NW2d 565 (2008), mere conclusory statements without factual support are insufficient to state a cause of action, *Churella v Pioneer State Mut Ins Co*, 258 Mich App 260, 272; 671 NW2d 125 (2003). Further, the court need not accept legal conclusions as true. *Davis v Detroit*, 269 Mich App 376, 379, n1; 711 NW2d 462 (2005). Summary disposition "must be granted if no factual development could justify the plaintiff's claim for relief." *Bailey v Schaaf*, 494 Mich 595, 603; 835 NW2d 413 (2013). When deciding a motion brought under this section of the court rule, the court considers only the pleadings. See MCR 2.116(G)(5). However, the Court may consider documents referenced in a complaint in considering a summary disposition motion brought under MCR 2.116(C)(8). See *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1; 788 NW2d 679 (2010).

Summary disposition pursuant to MCR 2.116(C)(10) is appropriate when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). In reviewing a motion to dismiss brought under MCR 2.116(C)(10), this Court considers all the documentary evidence in the light most favorable to the non-moving party, to determine whether the absence of a genuine issue of material fact entitles the moving party to judgment as a matter of law. *Coblentz v City of Novi*, 475 Mich 558, 567-68; 719 NW2d 73 (2006).

B. Governing Principles of Statutory Construction

The Michigan Supreme Court has reiterated the ground rules that apply where, as here, the case involves a question of statutory interpretation:

> When interpreting a statute, we follow the established rules of statutory construction, the foremost of which is to discern and give effect to the intent of the Legislature. To do so, we begin by examining the most reliable evidence of that intent, the language of the statute itself. If the language of a statute is clear and unambiguous, the statute must be enforced as written and no further judicial construction is permitted. Effect should be given to every phrase, clause, and word in the statute and, whenever possible, no word should be treated as *surplusage* or rendered nugatory. Only when an ambiguity exists in the language of the statute is it proper for a court to go beyond the statutory text to ascertain legislative intent.

Whitman v City of Burton, 493 Mich 303, 311-12; 831 NW2d 223 (2013).

To determine whether language is clear and unambiguous, "the contested provision must be read in relation to the statute as a whole and work in mutual agreement." *United States Fidelity Insurance & Guaranty Co v Mich Catastrophic Claims Association*, 484 Mich 1, 13; 795 NW2d 101 (2009) (citation omitted). "Individual words and phrases . . . should be read in the context of the entire legislative scheme." *Michigan Properties, LLC v Meridian Township*, 491 Mich 518, 528; 817 NW2d 548 (2012); *see also* ANTONIN SCALIA AND BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 140 (Thomson/West 2012)

(discussing the "Grammar Canon," which provides, "Words are to be given the meaning that proper grammar and usage would assign them").

C. The Freedom of Information Act

"The purpose of FOIA is to provide to the people of Michigan 'full and complete information ***regarding the affairs of government*** and the official acts of those who represent them as public officials and public employees,' thereby allowing them to 'fully participate in the democratic process.'" *Amberg v City of Dearborn*, 497 Mich 28, 30; 859 NW2d 674, 675 (2014) (quoting MCL 15.231(2)) (emphasis added). *See also Detroit Free Press v Dep't of Consumer & Indus Servs*, 246 Mich App 311, 315; 631 NW2d 769, 772 (2001) ("By mandating the disclosure of information relating to the affairs of government and ***the official acts*** of public officials and employees, the FOIA facilitates the public's understanding of the ***operations and activities of government***.") (emphasis added); *Kocher v Dep't of Treasury*, 241 Mich App 378, 380–81; 615 NW2d 767 (2000) ("By requiring the public disclosure of information regarding the affairs of government and the ***official acts*** of public officials and employees, the act enhances the public's understanding of the ***operations or activities of the government***.") (emphasis added); *Manning v City of E Tawas*, 234 Mich App 244, 247; 593 NW2d 649, 652 (1999) ("The FOIA is a manifestation of this state's public policy favoring public access ***to government information***, recognizing the need that citizens be informed ***as they participate in democratic governance***, and the need that public officials be held accountable for the manner ***in which they perform their duties***.") (emphasis added).

Additionally, although courts have described FOIA as broadly written and pro-disclosure, "the stated purpose of the act relates to government affairs and official acts, not the actions of private organizations." *Sclafani v Domestic Violence Escape*, 255 Mich App 260, 269; 660 NW2d

97 (2003). This is because "[o]ne of the reasons prompting the legislation was concern over abuses in the operation of government." *Swickard v Wayne Co Medical Examiner*, 438 Mich 536, 543; 475 NW2d 304 (1991). As discussed below, the documents at issue in this lawsuit were not sent or received pursuant to Professor Rothschild's job duties as an Assistant Professor at the University of Michigan Law School and are not "public records." Thus, requiring their production would not fulfill the purposes of FOIA.

D. The Communications Sought Are Not Public Records

A public body is not required to produce a document pursuant to FOIA unless it is a "public record." MCL 15.233(1). FOIA defines a "public record" as "a writing prepared, owned, used, in the possession of, or retained by a public body in the performance of an official function, from the time it is created." MCL 15.232(e). Additionally, the Michigan Court of Appeals has held that to further the purpose of the statute, "we must construe the FOIA in such a manner as to require disclosure of records of public bodies used or possessed in their decisions to act, as well as of similar records pertaining to decisions of the body not to act." *Walloon Lake Water Sys v Melrose Twp*, 163 Mich App 726, 730–31; 415 NW2d 292, 294–95 (1987). "Under this holding, not every communication received by a public body will be subject to disclosure." *Id.* When a document does not relate to a decision to act (or not act), it is not subject to disclosure.

Cases finding that a record was utilized "in the performance of an official function" have focused on the record actively being used, or relied upon, by the public body. For example, in *Amberg*, a surveillance video created by a third party was a public record because the city "received copies of the recordings as relevant evidence in a pending misdemeanor criminal matter." *Amberg*, 497 Mich at 32. The court explained that "even if the recordings did not factor into defendants' decision to issue a citation, they were nevertheless collected as evidence by defendants to support

that decision." *Id.* at 33. Similarly, in *Walloon Lake Water System*, "once the letter was read aloud and incorporated into the minutes of the meeting where the township conducted its business, it became a public record 'used … in the performance of an official function.'" 163 Mich App at 729. The court explained that "the content of the document *served as the basis for a decision* to refrain from taking official affirmative action," and therefore the document became a "public record." *Id.* at 731 (emphasis added). In other words, the letter was a public record because (a) it was made a part of the public body's official minutes and (b) it served as the basis for official action. *Id.* at 731. *See also Rataj v City of Romulus,* 306 Mich App 735, 750-51; 858 NW2d 116 (2014) (video recording of police officer's alleged assault of an individual who had been arrested and handcuffed was a public record because it was used "in the performance of an official function" and "would shed light on the operations of the [police department]"); *MacKenzie v Wales Twp*, 247 Mich App 124, 131; 635 NW2d 335 (2001) (computer tax rolls were public records "because the tapes containing the tax information … existed and were used in performing defendants' official function of property tax billing … those tapes were subject to the FOIA"); *Ellison v Dep't of State*, 320 Mich App 169, 177; 906 NW2d 221 (2017) (insurance database maintained by Department of State was a public record "that defendant used to perform an official function"). In each of these cases, the documents were "public records" precisely because they related directly to the affairs of the government, were *utilized* by the government (or governmental actor) in performing its official functions and would shed light on the government's operations.

Addressing the possession of "purely personal documents," the Court of Appeals has explained that such private "documents can become public documents based on how they are utilized by public bodies." *Howell Ed Ass'n, MEA/NEA v Howell Bd of Ed*, 287 Mich App 228, 243; 789 NW2d 495 (2010). This is because "it is their subsequent use or retention 'in the

performance of an official function' that rendered them so." *Id.* In *Howell*, personal emails between teachers were not public records, even though the board of education had complete control of the emails, because the board did nothing more than perform a blanket saving of information of the entire email system. *Id.* at 239-40. *Howell* explained that its "holding is consistent with the underlying policy of FOIA, which is to inform the public 'regarding the affairs of government and the official acts of ... public employees...." *Id.* at 246 (quoting MCL 15.231(2)). Because the emails were never used "in the performance of an official function," they remained outside the scope of FOIA notwithstanding that the board of education possessed the documents. *See also Blackwell v City of Livonia*, 339 Mich App 495, 508; 984 NW2d 780 (2021) ("private direct messages sent or received by Mayor Brosnan through an unofficial Facebook profile are not subject to public disclosure merely because Mayor Brosnan is an administrative officer for the city of Livonia. Instead, such direct messages would be subject to disclosure under FOIA only if such messages were utilized by the city of Livonia mayor's office in the performance of an official function."); *Hopkins v Duncan Twp*, 294 Mich App 401, 417; 812 NW2d 27 (2011) ("individual notes taken by a decision-maker on a governmental issue are only a public record when the notes are taken in furtherance of an official function"); *US Dep't of Justice v Tax Analysts*, 492 US 136, 145-46 (1989) ("the term 'agency records' is not so broad as to include personal materials in an employee's possession, even though the materials may be physically located at the agency").[1]

The same result applies here with respect to personal records maintained by Professor Rothschild. The emails are not maintained by the University and instead reside solely in Professor Rothschild's personal Gmail email amount because they relate to activities she takes in her

[1] "Federal court decisions regarding whether an item is an 'agency record' under the federal FOIA are persuasive in determining whether a record is a 'public record' under the Michigan FOIA." *MacKenzie v Wales Twp*, 247 Mich App 124, 129; 635 NW2d 335 (2001).

personal capacity and not as a University professor. (Ex 1, Rothschild Affidavit, ¶¶ 6, 8, 10). More specifically, the pro bono legal advice that Professor Rothschild provides is not part of her duties as a law professor. (*Id.*) Consequently, the documents have never been used by the University in the performance of an official function.

Even if the University somehow controlled or had possession of Professor Rothschild's personal emails – it does not – they would still not be "public records" subject to FOIA. As the Michigan Supreme Court has explained, FOIA's "purpose … is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct." *Mager v Dep't of State Police*, 460 Mich 134, 148; 595 NW2d 142 (1999) (quotations omitted). *See also Kocher*, 241 Mich App at 382-83 ("Plaintiff's request for information concerning private citizens is unrelated to how well defendant is complying with its statutory functions").

Plaintiff's belief that the records might shed light on the influence that certain private organizations might play in shaping public policy decisions does not justify disclosure. *Judicial Watch v Federal Housing Finance Agency*, 646 F3d 924 (DC Cir 2011). In *Judicial Watch*, the court rejected the requestor's attempt under the federal FOIA to obtain information about how much money Fannie Mae and Freddie Mac gave to politicians leading up to the recent financial crisis. Affirming the denial of the request, the court explained that "satisfying curiosity about the internal decisions of private companies is not the aim of FOIA, and there is no question that disclosure of the requested records would reveal nothing about decisionmaking at the [Federal Housing Finance Authority]," the federal agency which possessed the private records. *Id.* at 928. Because the agency did not create or reference the documents while performing "official duties," they were outside the scope of FOIA. *Id.* The same result applies here and prevents Plaintiff from

obtaining communications related to pro bono legal advice between an individual who happens to be a public employee and a non-profit organization.

The Court of Appeals has explained that "[a]bsent specific legislative direction to do so, we are unwilling to judicially convert every e-mail ever sent or received by public body employees into a public record subject to FOIA." *Howell,* 287 Mich App at 237. Plaintiff cannot overcome this hurdle. Overall, because the three FOIA requests seek personal records and not "public records," the requests were deficient and the complaint should be dismissed.

E. The Communications Are Exempt from Disclosure Pursuant to the Attorney-Client Privilege

Even if Plaintiff could establish that the documents it seeks are "public records"—it cannot—the complaint should still be dismissed because the records are exempt from disclosure. FOIA provides for the disclosure of "public records" that are in the possession of a "public body." MCL 15.233. "However, by expressly codifying exemptions to the FOIA, the Legislature shielded some 'affairs of government' from public view." *Herald Co*, 475 Mich at 472. Accordingly, if a public body establishes that an exemption applies, then the records need not be produced. This is because the "exemptions signal particular instances where the policy of offering the public full and complete information about government operations is overcome by a more significant policy interest favoring nondisclosure." *Id.* As recognized by the Supreme Court, with these exemptions "the Legislature has made a policy determination that full disclosure of certain public records could prove harmful to the proper functioning of the public body." *Id.* Thus, courts "should remain cognizant of the special consideration that the Legislature has accorded an exemptible class of records." *Id.* at 473 (quotation omitted).

As relevant here, FOIA states that "[a] public body may exempt from disclosure as a public record under this act any of the following…. (g) [i]nformation or records subject to the attorney-

client privilege.[2] MCL 15.243(1)(g). "The attorney–client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co v United States*, 449 US 383, 389 (1981). It "attaches to communications made by a client to an attorney acting as a legal adviser and made for the purpose of obtaining legal advice." *Est of Nash by Nash v City of Grand Haven*, 321 Mich App 587, 593; 909 NW2d 862 (2017) (quotation omitted). "The attorney-client privilege is designed to permit a client to confide in his attorney, knowing that his communications are safe from disclosure." *McCartney v Att'y Gen*, 231 Mich App 722, 730–31; 587 NW2d 824 (1998).

Here, as set forth in Professor Rothschild's Affidavit, communications to and from the Rockefeller Family Fund – the only potentially responsive documents sought – are indisputably protected by the attorney-client privilege. (Ex 1, Rothschild Affidavit). The communications relate to legal advice sought and provided regarding climate change legislation. They contain the back-and-forth communications between the attorney (Professor Rothschild) and the client (the Rockefeller Family Fund) and reflect Professor Rothschild's thinking after being requested to provide legal advice in the same manner that back-and-forth discussions between Plaintiff's attorneys and Plaintiff regarding drafts of the underlying complaint here would be protected from disclosure in civil litigation. Accordingly, the emails are exempt from disclosure.

F. Plaintiff Is Not Entitled to Cost And Fees

Plaintiff's Complaint also seeks various damages, costs, and fees. But Plaintiff is not entitled to any such recovery.

[2] It is irrelevant that the FOIA denial letters do not cite the attorney-client privilege exemption. "[A] public body may assert for the first time in the circuit court defenses not originally raised at the administrative level." *Bitterman v Vill of Oakley*, 309 Mich App 53, 61; 868 NW2d 642 (2015) (citations omitted).

Initially, Plaintiff is not entitled to an award of attorney fees and costs because, as noted above, it cannot prevail. *Est of Nash by Nash*, 321 Mich App at 606 ("[I]f a plaintiff prevails completely in an action to compel disclosure under the FOIA, the circuit court must award reasonable attorney fees," however, a trial court is not required to order the fees and costs unless the "party prevails completely.") (quotation marks and citation omitted). To the contrary, because Plaintiff's claim is deficient, the Court may award fees to the University in its discretion. MCL 15.240(6).

Plaintiff also asks the Court to award damages, fines, and punitive damages for the "arbitrary and capricious withholding of records pursuant to MCL 15.240(7)." (Complaint, ¶42). However, fines and punitive damages are only potentially available if Plaintiff "prevails" in this action. MCL 15.240(6). Under MCL 15.240(7), "'[t]he prerequisites to an award of punitive damages are ... a court-ordered disclosure *and* a finding that the defendant acted arbitrarily and capriciously in refusing to provide the requested information.'" *Local Area Watch v Grand Rapids*, 262 Mich App 136, 153; 683 N.W.2d 745 (2004) (emphasis added) (quoting *Bredemeier v Kentwood Bd of Ed*, 95 Mich App 767, 773; 291 NW2d 199 (1980)). Punitive damages, fines, fees, and other costs associated with a FOIA action are not appropriate merely because there were violations of the FOIA. *Scharret v City of Berkley*, 249 Mich App 405, 414-416; 642 NW2d 685 (2002); *Bredemeier*, *supra*. Here, the University acted reasonably in accordance with the procedures set forth by the statute. Because Plaintiff is unable to establish that the University acted "arbitrarily and capriciously," Plaintiff's request for an award of punitive damages should be denied.

IV. Conclusion

For the foregoing reasons, the University of Michigan requests that the Court grant its motion and dismiss Plaintiff's lawsuit in its entirety, with prejudice.

Dated: June 3, 2024

Respectfully submitted,

/s/ Brian M. Schwartz
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CERTIFICATE OF SERVICE

I hereby certify that June 3, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the MiFile system which will send notification of such filing to the attorneys of record.

/s/ Brian M. Schwartz
Brian M. Schwartz (P69018)