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SUPERIOR COURT OF ARIZONA

COUNTY OF MARICOPA

John Doe, Plaintiff, vs. Travis Paul Grant, *et al*., Defendants.	Case No. CV2021-090059 **DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO WAIVE APPEARANCE AT FUTURE PROCEEDINGS AND TO PROCEED UNDER PSEUDONYM** (Assigned to Hon. Tracy Westerhausen)

I. INTRODUCTION

Just stop and consider this – Plaintiff asks the Court for two distinct things:

1.) An order/injunction requiring Travis Grant to remove Plaintiff's name/photo from Travis's website; AND

2.) Plaintiff wants his identity to remain a secret – *even from Defendants*; he is only willing to disclose his name to the Court and to counsel on an "attorney's eyes only" basis.

Seriously—stop and think about that for a second. Plaintiff wants Travis Grant to remove his (Plaintiff's) name/photo from his website, but Plaintiff does not want to disclose his identity to Travis at any time. Bearing in mind the websites in question contain literally *tens of millions* of arrest records and mugshots, how could Travis possibly remove Plaintiff's mugshot *without knowing who Plaintiff is*?

Other problems aside, what Plaintiff wants is quite literally *impossible*. If Plaintiff wants his mugshot removed from Travis's website, at some point Plaintiff would have to disclose his identity to Travis, because only Travis has the ability to remove content from his website. So, what Plaintiff *really* wants is this: he wants this Court to order Travis to remove Plaintiff's mugshot from his website, and he wants the Court to order that Travis can never tell anyone about this case or what occurred.

Make no mistake: this Court cannot lawfully grant such a request. If it did, the Court's order would not just be erroneous, it would be void. That is not the personal view of undersigned counsel; it is the opinion of the Arizona Supreme Court:

> Courts are public institutions. The manner in which justice is administered does not have any private aspects. To permit a hearing held in open court to be kept secret, the order of secrecy being based entirely on [a party's] request, would take from the public its right to be informed of a proceeding to which it is an interested party.

Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 259 (1966) (holding order prohibiting disclosure of details of court hearing violated Arizona constitution and was void; Superior Court has no authority to "foreclose the right of the people and the press from freely discussing and printing the proceedings held in open court.")

In the United States, courts are not privately-owned star chambers, dispensing justice in secret. Courts are funded by the public, and they belong to the public. As owners of the courts, the public has a near-absolute right to know what their courts are doing, who is using them, and for what purpose; "lawsuits are public events and the public has a legitimate interest in knowing the facts involved in them. Among those facts is the identity of the parties." *Doe v. Deschamps*, 64 F.R.D. 652, 653 (D.Mont. 1974) (emphasis added); *see also United States v. Stoterau*, 524 F.3d 988, 1013 (9th Cir. 2008) ("Identifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts.") (emphasis added) (quoting *Doe v. Blue Cross & Blue Shield United of Wis*., 112 F.3d 869, 872 (7th Cir. 1997)).

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To be fair, there are special rare cases, and special limited circumstances, in which parties may be allowed to remain anonymous. One classic example was *Roe v. Wade*, 410 U.S. 113 (1973), because in *Roe*, the only issue was purely a question of law—i.e., does the U.S. Constitution protect a woman's right to abortion? In *Roe*, the outcome of that legal question had nothing whatsoever to do with the plaintiff's individual identity, thus she was allowed to use a pseudonym, "Jane Roe".

As explained further below, this case does not even come close to meeting the standards for allowing Plaintiff to remain anonymous. Unlike *Roe v. Wade*, the Plaintiff in this case accuses Defendants of unlawfully misappropriating his name/photo for commercial purposes, and he seeks to recover tens of thousands of dollars in damages as a result. Thus, unlike *Roe v. Wade*, Plaintiff's name, image, and identity are the central (if not the sole) issues in the case. And to prevail, Plaintiff must carry his burden of proving his name/photo was used unlawfully. His name and photo are thus necessary elements of Plaintiff's *prime facie* case.

Accordingly, unless this entire case is to be tried in secret, the Court must deny Plaintiff's request to proceed via pseudonym, and it must order him to file an Amended Complaint listing his complete true name, as required by the law and the Rules. *See* Ariz. R. Civ. P. 17(a)(1) (providing "An action must be prosecuted in the name of the real party in interest." (emphasis added); Ariz. R. Civ. P. 8(g)(1)(B)(ii) (requiring plaintiff to file a civil cover sheet which includes: "the plaintiff's correct name and mailing address …"); Ariz. R. Civ. P. 10(a) ("The title of the complaint must name all the parties … .")

II. DISCUSSION

a. Preliminary Comments re: *Detroit Free Press*

Before discussing other specific issues, a few general comments are offered about *Detroit Free Press, Inc. v. United States Dept. of Justice*, 829 F.3d 478 (6th Cir. 2016). This is a case Plaintiff's counsel has cited *ad nauseam* in virtually every pleading filed in multiple other cases, but it is clear counsel either misunderstands the holding of *Detroit Free Press* or is intentionally misrepresenting that holding here.

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Detroit Free Press arose from a criminal case against "four Michigan police officers charged with bribery and drug conspiracy …" 829 F.3d at 481. A local newspaper (the Detroit Free Press) submitted a federal Freedom of Information Act (FOIA) request for the defendants' mugshots. The arresting agency—the U.S. Marshals Service—refused to release the mugshots based on a statutory exemption in FOIA which permitted the withholding of records if they "constitute an unwarranted invasion of personal privacy." *See id*. (quoting 5 U.S.C. § 552(b)(7)(C)).

The newspaper sued, arguing *federal* criminal defendants have no personal privacy interest in their mugshots. Among other things, the paper noted each state has adopted different rules for the disclosure of mugshots and, in fact, "*some states statutorily mandate the release of booking photos* …." 829 F.3d at 484 (emphasis added). Ultimately, the Sixth Circuit determined that regardless of any conflicting state laws or policies, federal arresting agencies *may* (but are not required to) withhold mugshots based on FOIA's "personal privacy" exemption in 5 U.S.C. § 552(b)(7)(C).

This narrow holding does not help Plaintiff at all. For one thing, the Plaintiff in this case was arrested by MCSO – a state law enforcement agency, not the FBI or other federal agency. Furthermore, because the federal government does not routinely or automatically release mugshots (unlike MCSO), Travis's websites do not display, and have never displayed, mugshots of federal arrestees.

Detroit Free Press thus establishes a very limited rule—a *federal* law enforcement agency in the Sixth Circuit is not *required* to release the mugshot of a defendant in response to a FOIA request, but it may choose to do so. Plaintiff's counsel has somehow misinterpreted that rule as meaning the publication of mugshots is *always* unlawful in every case, or that "it is the public policy of Arizona that the identities of arrestees only be disclosed to the public on a limited basis, only by law enforcement agencies or bona fide news agencies and only for a brief period of time." Mot. at 9:5–7. But this argument is 100% wrong as a matter of law. Nothing in *Detroit Free Press* suggests individual states are *required* to adopt the same policy as the federal government did in that case.

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Indeed, unlike the federal government policy challenged in *Detroit Free Press*, Arizona has adopted a different policy (as it has the absolute right to do). Under Arizona law, all public records are presumptively open to inspection "by any person at all times during office hours". A.R.S. § 39–121. And unlike the statutory *federal* privacy exemption in FOIA, Arizona law does not contain any statutory[1] exemption permitting or requiring arresting agencies to withhold records based on the "personal privacy" concerns of arrestees.

Instead, many law enforcement agencies in Arizona (including MCSO), have adopted the *opposite* policy—they routinely publish information on the Internet regarding arrests, including the names and mugshots of all individuals arrested. Thus, Plaintiff is just flat wrong when he claims (without any basis), that Arizona has somehow adopted the same policy used by the federal government in *Detroit Free Press*. That is simply not true. In fact, the *opposite* is true.

If Plaintiff disagrees with MCSO's policy, his remedy is not to sue Defendants for lawfully republishing public records. Rather, his remedy is to sue MCSO seeking an order forcing the Sheriff's Office to stop publishing mugshots (obviously a difficult case to win). Unless and until that happens, Plaintiff has no right to complain about anyone publicizing true and accurate information found in matters of public record; this is legally protected speech; "there is no liability for giving publicity to facts about the plaintiff's life which are matters of public record … ." *Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 494 (1975) (emphasis added).

[1] Although Arizona's Open Records Act, A.R.S § 39–121 does not contain any *statutory* exemption based on privacy, the Arizona Supreme Court has recognized government officials have *discretion* to withhold records for reasons including "privacy" and confidentiality. *See Carlson v. Pima County*, 141 Ariz. 487, 491, 687 P.2d 1242, 1246 (1984) (holding, "where the countervailing interests of confidentiality, privacy or the best interests of the state should be appropriately invoked to prevent inspection, we hold that the officer or custodian *may refuse inspection*.") (emphasis added). But that holding does not help Plaintiff's position here, because MCSO has *not* chosen to exercise its discretion to withhold arrest records; it has done exactly the opposite.

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a. Legal Standards For Anonymity

"The normal presumption in litigation is that parties must use their real names." *E.L. v. Scottsdale Healthcare Corp. Health Plan*, 2011 WL 1748548, *1 (D. Ariz. 2011) (emphasis added) (quoting *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036, 1042 (9th Cir. 2010)). That rule is subject to universal judicial agreement; "Plaintiffs' use of fictitious names runs afoul of the public's common law right of access to judicial proceedings." *Does I thru XXIII v. Advanced Textile Corp*., 214 F.3d 1058, 1067 (9th Cir. 2000); *see also Southern Met. Univ. Ass'n of Women Law Students v. Wynne & Jaffe*, 599 F.2d 707, 713 (5th Cir. 1979) ("Basic fairness dictates that … accusers who wish to participate in this suit as individual party plaintiffs must do so under their real names."); *Doe v. Swearingen*, 2019 WL 95548, *1 (S.D. Fla. 2019) ("[T]he use of fictitious names is disfavored, as 'anonymous litigation runs contrary to the rights of the public to have open judicial proceedings and to know who is using court facilities and procedures funded by public taxes'.") (emphasis added) (quoting *Doe v. Village of Deerfield*, 819 F.3d 372, 377 (7th Cir. 2016)).

Although the Arizona and Federal Rules of Civil Procedure require all litigants to use their real names, courts have allowed exceptions in narrow circumstances:

> The Ninth Circuit has identified three situations in which requests for pseudonymity have been granted: (1) when identification creates a risk of retaliatory physical or mental harm; (2) when anonymity is necessary to preserve privacy in a matter of a sensitive and highly personal nature; and (3) when the anonymous party is compelled to admit his or her intention to engage in illegal conduct, thereby risking criminal prosecution.

4 Exotic Dancers v. Spearmint Rhino, 2009 WL 250054, *2 (C.D.Cal. 2009) (denying request to proceed via pseudonym based on plaintiffs' fear of "harassment, termination and blacklisting"; court found these grounds insufficient because these forms of retaliation are common in litigation and "the feared injury is not extraordinary ….") *see also Doe v. Rostker*, 89 F.R.D. 158, 162 (N.D.Cal. 1981) ("embarrassment or economic harm is not enough" to warrant pseudonymity) (emphasis added).

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When a valid basis for anonymity is offered, courts then generally evaluate the request by considering additional factors such as:

> To determine whether to allow a party to proceed anonymously when the opposing party has objected, a district court must balance five factors: "(1) the severity of the threatened harm, (2) the reasonableness of the anonymous party's fears, ... (3) the anonymous party's vulnerability to such retaliation," (4) the prejudice to the opposing party, and (5) the public interest.

Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate, 596 F.3d 1036, 1042 (9th Cir. 2010) (quoting *Advanced Textile Corp*, 214 F.3d at 1068).

b. Plaintiff's Arguments

Here, to support his request to remain anonymous, Plaintiff offers three main arguments:

1.) Plaintiff fears "online retaliation" because Defendants have "harassed" and "targeted" other people who have sued them;

2.) Plaintiff claims, *incredibly*, "Defendants do not need to know Plaintiff's identity in order to establish that Defendants did not violate the Arizona Mugshot Statute." Mot. at 8:20–21; and

3.) Plaintiff claims non-disclosure of his identity is consistent with Arizona policy

Defendants offer a few brief remarks in response to each point.

i. Comments Re: Retaliation/Harassment

Apparently aware that his position is legally and factual groundless, the bulk of Plaintiff's argument is little more than an *emotional* plea for sympathy. Specifically, Plaintiff attacks Defendants as "sleaze ball[s]" who "represent the underbelly of the Internet", simply because Travis Grant operates a website which happens to publish public records which Plaintiff finds embarrassing. Plaintiff also attacks undersigned counsel, suggesting that it is somehow improper for counsel to disagree with or to challenge Plaintiff's counsel's long-running vendetta against Mr. and Mrs. Grant which has now spanned nearly two years and half a dozen lawsuits (and counting).

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If it was necessary or helpful, undersigned counsel would be happy to respond, in detail, to the false and misleading *ad hominem* attacks by Plaintiff's counsel. If this Court was fully apprised of the true facts and history of this dispute, it would not agree with any part of Plaintiff's arguments regarding "retaliation" or "harassment".

But it is not necessary to spend vast amounts of time on this issue because even if Plaintiff's version of events was factually complete and accurate, he has still failed to demonstrate a *compelling* need for anonymity. *See Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (holding, "The mere fact that [disclosure of information] may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.")

Indeed, Plaintiff's alleged concerns about "retaliation" and/or "harassment" is orders of magnitude *less substantial* than the harm found to be insufficient to warrant anonymity in *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 596 F.3d 1036 (9th Cir. 2010). In that case, the plaintiffs were students seeking admission to a private school in Hawaii that allegedly excluded them solely on the basis of their race. The students filed suit and requested permission to proceed anonymously. As support, the students offered numerous examples of clear and specific threats of violence made by other students at the school. These threats included an Internet post stating: "one day they're gonna be targeted by some crazy Hawaiian or group of Hawaiians armed with baseball bats or guns." *Kamehameha Schools*, 596 F.3d at 1040. Other comments were arguably worse.

Despite this, the trial court denied the students' request to proceed anonymously, and the Ninth Circuit affirmed. In short, both courts agreed the plaintiffs did not establish a *reasonable* fear of *severe* harm sufficient to entitle them to proceed anonymously; "To judge the reasonableness of the plaintiffs' fears, we must consider the surrounding context and other listeners' reactions to the threats." *Kamehameha Schools*, 596 F.3d at 1044. Without belaboring the issue, the Court found "many times people say things anonymously on the internet that they would never say in another context and have no

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intention of carrying out." *Id*. at 1045. For that simple reason, the court determined the threats of violence against the students, even if severe, were not sufficient to overcome the "default presumption … that the plaintiffs will use their true names." *Id*.

Another helpful case on the same issue is *4 Exotic Dancers v. Spearmint Rhino*, 2009 WL 250054 (C.D.Cal. 2009). That case involved claims brought by exotic dancers against several nightclubs alleging violations of the Federal Fair Labor Standards Act and California state law. The plaintiffs sought leave to proceed via pseudonym. To support this request, the plaintiffs claimed to "fear retaliation from Defendants in the form of harassment, termination and blacklisting[]", and they also argued "Plaintiffs will be stigmatized if their identities are revealed publicly." *4 Exotic Dancers*, 2009 WL 250054 at *2. These are substantially the same arguments made by Plaintiff in this case.

The District Court found none of these reasons were sufficient to support anonymity. For one thing, the court noted Plaintiffs' primary argument (termination of employment and blacklisting) simply meant "Plaintiffs would make less money than they would otherwise …." *Id*. The court found this alleged loss of future income did not justify the Plaintiffs' request, and that "pseudonymity is not necessary given that the feared injury [lost income] is not extraordinary." *Id*.

The court also found anonymity was not warranted because the Plaintiffs apparently acknowledged full relief was impossible unless Plaintiffs' true identities were disclosed *at some later point*. The Court found this fact contradicted Plaintiffs' alleged need for protection; "Plaintiffs' willingness to be identified publicly at a later point in the litigation is inconsistent with their assertion that they will be stigmatized if the public learns that they are exotic dancers." *Id*. at *3 (emphasis added). This same point is particularly applicable here, and for exactly the same reasons.

This is so because in addition to seeking monetary damages, Plaintiff also seeks *injunctive relief*; i.e., the removal of his mugshots from Travis's website. As already explained above, it would be impossible for this Court to grant injunctive relief requiring Travis to remove Plaintiff's name/mugshot *unless Plaintiff's true name is disclosed*.

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In this way, exactly like in *4 Exotic Dancers*, full relief simply cannot be granted without Plaintiff's identity being disclosed *at some point*. This weighs heavily against his request to proceed via pseudonym.

Another helpful (and more analogous) case is *U.S. v. Stoterau*, 524 F.3d 988 (9th Cir. 2008). *Stoterau* involved an appeal by a defendant convicted of transporting child pornography. As part of his appeal, the defendant asked the Ninth Circuit to either seal its decision, or to use a pseudonym. To support his request, the defendant "argue[d] that he presents an unusual case in which there is a need for anonymity because sex offenders such as Stoterau face an elevated risk of violent abuse in prison." 524 F.3d at 1012.

The Ninth Circuit rejected this argument. In short, the court noted that if mere embarrassment or a threat of *potential* harm could justify anonymity in Mr. Stoterau's case, then "there would be no principled basis for denying pseudonymity to any defendant convicted of a similar sex offense." *Id*. at 1013. Because all defendants in Mr. Stoterau's position face *some* risk of retaliation, the court denied his request for anonymity; "Stoterau's request for anonymity is equally present for all similarly situated sex offenders, and the value of anonymity to Stoterau at this point in the proceedings is outweighed by the public interest 'weighing in favor of open judicial proceedings.'" *Id*.

Again, the same logic applies here. Indeed, as the Ninth Circuit noted in *Stoterau*, the defendant's criminal conviction was *already a matter of public record*; "We question the value that pseudonymity would have for Stoterau at this point. Stoterau's conviction is a matter of public record …. Therefore, the use of a pseudonym in this disposition will have limited effect in concealing the fact that Stoterau was convicted of transporting child pornography." *Id*.

Here, the same logic applies to the mugshot Plaintiff is attempting to hide. In other words, Plaintiff's claims in this case are all based on the fact that Defendants published his mugshots and arrest records on their website. But by definition, just like in *Stoterau*, Plaintiff's mugshot and arrest records are already a matter of public record; no ruling from this Court can change that historical fact.

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In short, Plaintiff cannot overcome the strong presumption requiring him to use his real name in this lawsuit simply by pointing to a vague fear of retaliation of harassment in the future. That is not sufficient, as a matter of law, to justify the extraordinary relief Plaintiff seeks. If it was, *every* one of the *millions* of individuals appearing on Travis's website would be automatically entitled to the same relief.

ii. Plaintiff's Identity Is A Central Issue

To be blunt, many, if not all, of Plaintiff's arguments are not well-taken. But nothing is quite as bad as this—Plaintiff claims Defendants *do not need to know* his identity in order to litigate this action; "Defendants do not need to know Plaintiff's identity in order to establish that Defendants did not violate the Arizona Mugshot Statute." Mot. at 8:20–21. Wait…*HUH*? *WHAT*?

This argument is so bizarre that it warrants only the briefest response. First, it is *not* Defendants' burden to prove they are *not* guilty of unlawful conduct. Rather, Plaintiff bears the burden of proving each and every element of his claims, and there is no question that plaintiff's name/likeness is a mandatory part of his *prima facie* case.

For example, Plaintiff's second cause of action is "Misappropriation of Name and Likeness". The elements of this claim are:

> (1) the defendant's use of the plaintiff's identity;
> (2) the appropriation of plaintiff's name or likeness to the defendant's advantage, commercially or otherwise;
> (3) lack of consent; and
> (4) resulting injury.

Pooley v. Nat'l Hole-In-One Ass'n, 89 F.Supp.2d 1108, 1111 (D.Ariz. 2000).

Clearly, to establish this claim, Plaintiff MUST show Defendants used his name/likeness in some unlawful manner. Similarly, Plaintiff's Mugshot Act claim also necessarily requires proof that Defendants unlawfully used a "criminal justice record" which the law defines as "a booking photograph and the name, address and description of and the charges filed against a subject individual." A.R.S. § 44–7901(3).

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There is no question (and no remotely good faith basis to argue) that Plaintiff's claims do not necessarily require the Court, the jury (and Defendants) to know Plaintiff's true identity. Without disclosing his name and identity, and proving their misuse, Plaintiff cannot prevail on the merits of any of his claims. Further, because Plaintiff is surely a witness, his name is subject to the compulsory disclosure obligations of Ariz. R. Civ. P. 26(a)(3) (requiring parties to disclose "the name, address, and telephone number of each witness whom the disclosing party expects to call at trial ….")

iii. Plaintiff's Position Is Directly Contrary to Arizona Policy

Contrary to Plaintiff's arguments, in the State of Arizona mugshots and arrest records are public records that are *not* confidential in any way, nor are they "disclosed to the public on a limited basis, only by law enforcement agencies or *bona fide* news agencies, and only for a brief period of time." In fact, it is difficult to understand how Plaintiff can make this argument with a straight face.

The Arizona Supreme Court's records retention policy (set forth in Ariz. Code of Jud. Admin., § 4-302) provides that criminal records in Arizona are preserved for a period of fifty (50) years for cases filed after 1959. *See* https://www.superiorcourt.maricopa.gov/docket/docs/RetentionRules.pdf. Of course, the Superior Court does not restrict access only to law enforcement agencies or *bona fide* news agencies. On the contrary, as required by Arizona's Public Records statute, A.R.S. § 39–121, all public records including police reports, mugshots, and similar records are "open to inspection by any person at all times during office hours." (emphasis added).

Contrary to Plaintiffs' position, Arizona has long recognized that any privacy interest in criminal records is, as a general rule, outweighed by the public interest in "the safety and welfare of the community as a whole. The individual's interest is outweighed by the public's interest in the possession of information concerning persons who may again be charged with some activity which requires the making of records." *Beasley v. Glenn*, 110 Ariz. 438, 440, 520 P.2d 310, 312 (Ariz. 1974) (in banc). There is simply no merit to Plaintiff's argument that "public policy" supports his position.

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III. CONCLUSION

Beyond the arguments set forth above, there is *a lot* more that could be said regarding Plaintiff's request to proceed anonymously. However, by now it should be clear enough this request is groundless and it must be denied, so the point will not be belabored any further.

In sum, Plaintiff's counsel has now filed FIVE (5) separate lawsuits against Defendants, and he has threatened to keep filing more cases on behalf of additional unknown "Doe" plaintiffs. This conduct has continued only because Plaintiff's counsel has chosen to ignore the rules of this Court which require litigants to use their real names.

Enough is enough. Litigants may proceed anonymously in appropriate cases, but this is not such a case. Plaintiff's counsel should not be given further license to continue harassing Mr. and Mrs. Grant by filing groundless/baseless actions wasting this Court's time and resources on behalf of phantom litigants who may or may not actually exist.

Plaintiff's motion should be denied.

DATED: March 1, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on March 1, 2021 I transmitted the attached document to the Clerk's Office for filing via ECF, and emailed a copy of the foregoing to:

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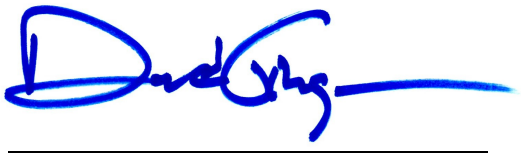

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