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8 **UNITED STATES DISTRICT COURT**

9 **DISTRICT OF ARIZONA**

10 Grant, et al.,

No. 21-CV-00108-JJT

11 Plaintiffs

**DEFENDANTS' MOTION TO STRIKE
UNDER FEDERAL RULE OF CIVIL
PROCEDURE 12(f)**

12 vs.

13 Ivchenko, et al.,

(Assigned To Hon. John J Tuchi)

14 Defendants.

15 Defendants Andrew Ivchenko and Renee Ivchenko ("Defendants") hereby move,
16 pursuant to Federal Rules of Civil Procedure 1, 8(a) and 12(f) to strike paragraphs 34-67, 68-
17 90, 96, 98, 109-113, 160-162, 269, 270, and 272-275 of the Verified Amended Complaint
18 ("Complaint"), including Exhibits A and B [Doc. 1-2] on the grounds that they are
19 scandalous, impertinent, and prejudicial. This Motion is based on the Memorandum of Points
20 and Authorities filed and served herewith, and upon the papers, records and pleadings on file
21 herein, and specifically without waiving other defenses under Federal Rule of Civil Procedure
22 12, motions for which are filed concurrently with this Motion.
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MEMORANDUM OF POINTS AND AUTHORITIES

I. PRELIMINARY STATEMENT

Defendants bring this motion pursuant to Federal Rules of Civil Procedure 1, 8(a)¹ and 12(f) to strike paragraphs 34-67, 68-90, 96, 98, 109-113, 160-162, 269, 270, and 272-275 of the Verified Complaint (“Complaint”) filed by Plaintiffs Travis Paul Grant, Mariel Lizette Grant, and Kyle David Grant (“Plaintiffs”).

Generally, this is styled as an action for malicious prosecution arising out of two state court actions litigated against Plaintiffs from December 17, 2019 to November 13, 2021 in the Superior Court of Maricopa County. [Docs 1-3, Exhibit G; 1-4, Exhibit H]. Paragraphs 34-67, 68-90, 96, 98, 109-113, 160-162, 269, 270, and 272-275 contain, among other things, unsubstantiated and prejudicial references to criminal conduct allegedly committed by Defendants. These specific accusations of criminal violations are based on nothing more than what Plaintiff’s attorney, David Gingras, claims in a conclusory manner from the disputed facts at issue in matters that have nothing (emphasis added) to do with the causes of action asserted by Plaintiffs in this case.

Under the circumstances, inclusion of such extreme and personal attacks on the character and reputation of Defendants, prior to adjudication of Plaintiffs’ allegations, is impertinent, scandalous and prejudicial. Defendants have been prejudiced generally by the Plaintiffs’ inclusion of scandalous and impertinent matter as described above. Accordingly, this motion should be granted.

¹ “A complaint having the factual elements of a cause of action present but scattered throughout the Complaint and not organized into a ‘short and plain statement of the claim’ may be dismissed for failure to satisfy Rule 8(a) of the Federal Rules of Civil Procedure.” See *Ortega v. Arpaio*, 2006 U.S. Dist. LEXIS 59018 at *7 (D. Ariz. Aug. 15, 2006); *McHenry v. Renne*, 84 F.3d 1172 (9th Cir. 1996).

II. SUMMARY OF RELEVANT FACTS

A. References to Defendant “Renee Ivchenko’s Arrest” Are Scandalous, Impertinent and Prejudicial.

Paragraphs 34 to 67 of the Complaint allege certain details surrounding the arrest of Defendant Renee Ivchenko, which put into motion the events that led to this action. [Compl. ¶¶ 34-67]. This includes derogatory and conclusory statements concerning her background as well as circumstances surrounding the arrest. [Compl. ¶¶ 34, 37, 43, 44, 45, 49, and 64]. Plaintiffs also attach as exhibits a police report and documentation relating to participation in a deferred prosecution program. [Doc. 1-2, Exhibits A and B). Plaintiffs do not point out that charges were eventually dropped against Defendant Renee Ivchenko. Plaintiffs also gratuitously insert Defendant Renee Ivchenko’s booking photo in three separate sections of the Complaint. [Compl. ¶¶ 55, 66, 265].

B. References to “The Copyright Application” Are Scandalous, Impertinent and Prejudicial.

Paragraphs 68 to 90 of the Complaint allege certain details surrounding a copyright application involving Defendant Renee Ivchenko. [Compl. ¶¶ 68-90]. This includes conclusory statements concerning the application, including claims that Defendants (one of whom is an attorney) violated one or more laws. [Compl. ¶¶ 69-70, 72, 74-77, 79-82, 84-90]. None of the Defendants has ever been prosecuted for or convicted of any crimes associated with the allegations made by Plaintiffs’ counsel, David Gingras. Defendant Andrew Ivchenko, an Arizona attorney, does not have any bar record of disciplinary action, for these allegations or otherwise.

III. LEGAL ARGUMENT

A. Motions Under Rule 12(f).

Rule 12(f) of the Federal Rules of Civil Procedure provides:

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

See Fed. Rule. Civ. Proc. 12(f).

“The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.” See *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983); *Torres v. Goddard*, 2008 U.S. Dist. LEXIS 35291 at *1 (D. Ariz. Apr. 22, 2008). A matter is immaterial if it “has no essential or important relationship to the claim for relief or the defenses being pleaded.” *Torres*, 2008 U.S. Dist. LEXIS 35291 at *2 (citations omitted). The moving party need not show that the material is prejudicial if granting the motion would streamline the ultimate resolution of the action. *Id.*

This Court has inherent authority to strike from any pleading any redundant, immaterial, impertinent or scandalous matter. See *Apolinar v. Baum*, 2008 U.S. Dist. LEXIS 113273 at *17 (D. Ariz. June 4, 2008). Such matter includes any allegations “that unnecessarily or irrelevantly reflect on the moral character of an individual, do not contribute to the substantive claims, or state anything in repulsive language that detracts from the dignity of the court.” See *id.* at *17-18; *Vesecky v. Matthews (Mill Towne Center) Real Estate, LLC*, 2010 U.S. Dist. LEXIS 24928 at *4 (D. Ariz. Mar. 2, 2010).

“A matter is impertinent if it consists of statements that do not pertain and are not necessary to the issues in question.” See *Torres*, 2008 U.S. Dist. LEXIS 35291 at *3 (citations omitted). The decision whether to strike material as scandalous is within the discretion of the district court. See *Talbot v. Robert Matthews Distrib. Co.*, 961 F.2d 654, 664-665 (7th Cir. Ill. 1992) (striking allegation that defendants conspired to cause fatal salmonella outbreak); *Alvarado-Morales v. Digital Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. P.R. 1988).

Improper legal terms should be stricken from pleadings. *See Clark v. Goodwill Indus. of Hawaii*, 2009 U.S. Dist. LEXIS 86453, 30-31 (D. Haw. Sept. 21, 2009).

B. Paragraphs 34 to 67 Should be Stricken From the Complaint.

Plaintiffs have referenced Defendant Renee Ivchenko’s criminal history in their Complaint and have attached a copy of said history as exhibits. [Compl. ¶¶ 34-67; Doc. 1-2, Exhibits A and B]. The allegations and exhibits referencing this incident are immaterial and inappropriate to the proof of the causes of action. *See Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17; [Compl. ¶¶ 179-282]. These matters include allegations that unnecessarily or irrelevantly reflect on Defendants’ moral character. *See Apolinar*, at *17-18. The Plaintiffs included said scandalous and impertinent matter in an effort to cause Defendants prejudice.

Plaintiffs are First Amendment opportunists that exploit arrest information and misappropriate images in booking photos to create misleading advertisements designed to generate substantial advertising revenue from the victims whose images have been misappropriated. [Doc 1-3, Exhibit G, ¶¶ 1-2, 9-13]. The gratuitous insertion of Defendant Renee Ivchenko’s booking photo in three separate sections of the Complaint is impertinent, scandalous and prejudicial. [Compl. ¶¶ 55, 66, 265]. Harassing Defendants in this manner is part and parcel of what Plaintiffs do on a daily basis to “tens of millions” of people nationwide. [Compl. ¶ 16].

Indeed, Defendants by their own admission even misappropriate the names of many of their victims who dare threaten their activities through legal process, and subject them to further online predation by setting up separate, dedicated websites that target that individual. This is precisely what has happened to both Defendants and others. [Compl. ¶¶ 265-266]. The obvious purpose of such cyberstalking is to pressure people to drop their legal claims against Plaintiffs, and dissuade others from pursuing their rights under the law.

Plaintiffs do not inform the public; instead, Plaintiffs exploit booking photos and arrest information for purely commercial purposes. [Compl. ¶ 26]. As the Sixth Circuit

1 recently observed, “A disclosed booking photo casts a long, damaging shadow over the
2 depicted individual.” *Detroit Free Press Inc. v. United States Dep't of Justice*, 829 F.3d 478,
3 482 (6th Cir. 2016). These “[b]ooking photos—snapped in the vulnerable and embarrassing
4 moments immediately after an individual is accused, taken into custody, and deprived of most
5 liberties—fit squarely within this realm of embarrassing and humiliating information. More
6 than just vivid symbols of criminal accusation, booking photos convey guilt to the viewer.”
7 *Id.* (citations and quotations omitted).

8
9 Plaintiffs’ business model is to exploit this embarrassing and humiliating information
10 that falsely conveys guilt for their own commercial gain. [Compl. ¶ 27]. Once these images
11 are online, they live on in perpetuity. [Compl. ¶ 22]. They serve as the digital scarlet letter of
12 our times, permanently affecting the reputation of those who have paid their debt to society.

13 In response to the proliferation of mugshot website operators, such as Plaintiffs,
14 numerous states have passed statutes relating to the exploitation of mugshots, most recently
15 Arizona. On August 27, 2019, HB2191 became effective law as Arizona Revised Statute §§
16 44-7901, 7902; Mugshot website operators; prohibited acts; exceptions (the “Arizona
17 Mugshot Statute”). The new law defines mugshot website companies as “mugshot website
18 operators” and prohibits their operation for commercial purposes, which the law defines to
19 include “any purpose in which the [mugshot website operator] can reasonably anticipate the
20 receipt of monetary gain from the direct or indirect use of the public record.” A.R.S. § 39-
21 121.03(D); A.R.S. § 44-7901(2). The Arizona Mugshot Statute also prescribes hefty *minimal*
22 (emphasis added) damages that mugshot website companies will have to pay to those affected
23 if they do not comply with the law.

24
25 This entire lawsuit represents Plaintiffs’ desperate, last gasp effort to salvage their
26 operations in Arizona and escape liability. However, the Arizona Mugshot Statute makes
27 crystal clear that the public policy of Arizona is that arrest information and photos published
28 for a limited time by Arizona law enforcement agencies are not to be “scraped” and then

1 disseminated indefinitely for Defendants' purely commercial purposes. Yet, that is precisely
2 how Plaintiffs operate. [Compl. ¶ 15]. Allowing Plaintiffs to use Defendant Renee Ivchenko's
3 booking photo and arrest information in the Complaint is contrary to the law and public
4 policy of Arizona as reflected by the Arizona Mugshot Statute.

5 Defendant Andrew Ivchenko is actively litigating these issues against Plaintiffs in
6 State court on behalf of his clients. Plaintiffs included this information in the Complaint in an
7 effort to indirectly influence that litigation. If Plaintiffs believe that their rights were
8 somehow violated, they should be required to plead only factual matters that support their
9 causes of action. [Compl. ¶¶ 179-282]. Defendant Renee Ivchenko's arrest did not even need
10 to be mentioned at all, as the litigation between the parties that is germane to this case was
11 outlined in the Complaint. [Compl. ¶¶ 91-178].

12 Defendant Renee Ivchenko's criminal history in paragraphs 34-67 should be stricken
13 under Rule 12(f). This information is not necessary to any of the issues in this action, and was
14 done simply to further harass and intimidate Defendants, and was likely inserted in the
15 Complaint so that they could be used by Plaintiffs as a warning against anyone in the country
16 who threatens them with litigation. Plaintiffs are also attempting to influence the attorney-
17 client relationship Defendant Andrew Ivchenko has with his current clients litigating against
18 them in State court.

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21 **C. Paragraphs 68 to 90 Should be Stricken From the Complaint.**

22 Not satisfied with inserting Defendant Renee Ivchenko's booking photo and arrest
23 details in the Complaint, Plaintiffs continue their personal attacks against Defendants by
24 drawing attention to an entirely irrelevant matter involving a copyright application. [Compl.
25 ¶¶ 68-90]. The allegations referencing this application are immaterial and inappropriate to the
26 proof of the causes of action, including those alleged in the Seventh Cause of Action added
27 by Plaintiffs in the Amended Complaint. [Compl. ¶ 264]. *See Apolinar*, 2008 U.S. Dist.
28 LEXIS 113273 at *17. These matters include allegations that unnecessarily or irrelevantly

1 reflect on Defendants' moral character. *See id.* at *17-18. The Plaintiffs included said
 2 scandalous and impertinent matter in an effort to cause Defendants prejudice.

3 The copyright application in question did not involve Plaintiffs or their attorney in any
 4 manner whatsoever, nor were they involved in any of the DMCA takedown requests
 5 mentioned in the Complaint. [Compl. ¶ 78]. The allegations and endless conclusory
 6 statements [See e.g., Compl. ¶¶ 74-76, 82, 84-86, 88] in this entire section of the Complaint
 7 should be stricken under Rule 12(f). They are not necessary to any of the issues in this action
 8 as pleaded, including the seventh cause of action for "False DMCA Notice Liability," as
 9 further discussed, *infra*. [Compl. ¶ 264]. They would be unnecessarily burdensome to answer,
 10 and would unduly prejudice the Defendants. *See Wailua Assocs. v. Aetna Cas. & Sur. Co.*,
 11 183 F.R.D. 550, 556 (D. Haw. 1998) (striking reference to "siege warfare" as scandalous
 12 because plaintiff could communicate same idea in other words).

14 The unfounded allegations of "perjury," "fraud," "false statements" and "crime" in the
 15 Complaint bear an unfortunate resemblance to those in *Nault's Auto. Sales, Inc. v. American*
 16 *Honda Motor Co., Acura Auto. Div.*, 148 F.R.D. 25, 29 (D.N.H. 1993) ("Terms such as
 17 "perjury," "contempt," "liar," and "suborning of perjury" became almost routine in Nault's
 18 pleadings."); [Compl. ¶¶ 81, 87-90]. In Nault, as here, the defendant moved to strike, inter
 19 alia, allegations that the defendant had committed "perjury," and that its counsel had
 20 "suborned perjury " and "pressured" a witness into signing an affidavit which it knew to
 21 contain false information. *See id.*, 148 F.R.D. at 33. The Court struck the allegations of
 22 "perjury," "suborning perjury" and other criminal conduct.

24 In Nault, the Court specifically rejected counsel's claim to have acted in subjective
 25 good faith in alleging "perjury," "subornation of perjury" and criminal conduct:

26 That Nault's counsel are convinced in their own minds that the "facts" point
 27 exclusively to one reasonable conclusion (i.e., that Honda's counsel . . . "suborned
 28 perjury," "committed perjury," and engaged in "criminal conduct") hardly establishes
 either the truth of those charges or even that those charges were objectively reasonable

1 when made. . . . none of that justifies the unsubstantiated and extreme attacks on the
2 personal integrity, ethics and character of defense counsel exhibited in the challenged
3 pleadings. The tone, the language used, and the accusations themselves are
4 unwarranted by the facts, either as they are presently known or as they were known to
5 plaintiffs' counsel when the challenged pleadings were filed.

6 *See Nault's*, 148 F.R.D. at 34-35 (D.N.H. 1993).

7 Without factual evidence, an attorney's subjective belief does not free him to
8 "indiscriminately bludgeon the professional reputations" of other attorneys:

9 [P]laintiffs' counsel . . . are of course free to believe whatever they choose to believe.
10 They are not free to indiscriminately bludgeon the professional reputations of opposing
11 counsel out of frustration, or in angry overreaction, or on mere suspicion alone.

12 *See id.*, 148 F.R.D. at 36.

13 Exactly the same conviction exists solely in the mind of Plaintiffs' counsel, David
14 Gingras. However convinced Plaintiffs' counsel may be that he will ultimately prevail on the
15 merits of his claims, that conviction does not justify the unfounded accusations in the
16 Complaint of "perjury," "fraud," "false statements" and "crime." Such an "inference" is
17 insufficient to justify scandalous allegations that irrelevantly reflect on the moral character of
18 the Defendants. *See Vesecky*, 2010 U.S. Dist. LEXIS 24928 at *4.

19 Plaintiffs lack evidence supporting the serious allegations of perjury and other serious
20 allegations made in this section of the Complaint. "Perjury" requires not only proof beyond a
21 reasonable doubt, but also consists of willfulness and must pertain to a material fact of the
22 case. *See Chein v. Shumsky*, 373 F.3d 978, 983 (9th Cir. 2004). As no adjudication of
23 "perjury" was ever made, the allegations of Defendants committing "perjury" and other
24 criminal conduct are not only unsubstantiated but without objective factual basis.

25 If the evidence is consistent with two possible interpretations, scandalous allegations
26 of "perjury," "fraud," "false statements" and criminal conduct against opposing counsel
27 should be stricken from a pleading unless they are demonstrated "beyond mere suspicion":
28

1 When presented with evidence which is consistent with two possible and equally
2 plausible, but inconsistent, interpretations of how opposing counsel have conducted
3 themselves, professional courtesy and dignity militate in favor of adopting that which
4 is consistent with ethical and professional conduct, at least until the contrary is
5 demonstrated beyond mere suspicion. . . . In this instance, the Court finds there was
6 and is no reasonable basis well grounded in fact to have warranted Nault's allegations
7 of perjury and subornation of perjury in the first place, and certainly no basis for
8 refusing to strike those allegations now. Those allegations are stricken.

9 *See Nault's*, 148 F.R.D. at 34.

10 Similarly, in *Clark v. Goodwill Indus of Hawaii*, the Court struck references to
11 “perjury” in the complaint in that action:

12 Each of Plaintiff's allegations of perjury are unsubstantiated . . . Perjury is a serious
13 offense, and allegations of perjury are scandalous accusations that may result in
14 prejudice against Defendants. . . . Improper use of legal terms should be stricken.
15 Therefore, the Court strikes all allegations of perjury from paragraphs 27, 28, 31, 32,
16 33, 59, 62, 66, 67, and 82.

17 *Clark*, 2009 U.S. Dist. LEXIS 86453, 30-31. Likewise, improper use of the legal terms
18 “fraud,” “false statements” and “crime” should be stricken from the Complaint. Indeed, the
19 substance of the alleged wrongdoing is itself not even material to any cause of action pleaded
20 in the Complaint. [Compl. ¶¶ 179-282]. As Plaintiffs concede, Defendant Renee Ivchenko is
21 the registered copyright owner of her image. [Compl. ¶ 71]. Plaintiffs do not have standing to
22 even contest this matter, and are essentially asking this Court to litigate this issue on behalf of
23 third parties. It is settled law that a copyright owner may not file an infringement lawsuit until
24 after the Copyright Office has acted on the application by either issuing a copyright
25 registration or refusing to do so. *See Fourth Estate Public Benefit Corp. v. Wall-Street.com*,
26 139 S. Ct. 881; 203 L. Ed. 2d 147 (2019). Plaintiffs simply lack standing to make the legal
27 arguments they are trying to insert into a complaint that purported to be about alleged
28 malicious prosecution and abuse of process. [Compl. ¶ 179]. *See also Silvers v. Sony Pictures
Entertainment, Inc.*, 402 F.3d 881, 890 (9th Cir. 2005).

1 Since allegations referencing the history of the copyright are immaterial and
 2 inappropriate to the proof of the causes of action, this entire section should be stricken from
 3 the Complaint. *See Apolinar*, 2008 U.S. Dist. LEXIS 113273 at *17. As further discussed in
 4 the next section, Plaintiffs' Seventh Cause of Action as pleaded is independent of any of the
 5 issues raised in Plaintiffs' spiteful novella outlined in Paragraphs 68 to 90.

6 **D. Paragraphs 269, 270, and 272-275 Should be Stricken From the Complaint.**

7 For the reasons stated in Section III.C., *supra*, references in Plaintiffs' Seventh Cause
 8 of Action to "knowingly false material representations" or "falsely representing" [Compl. ¶¶
 9 269-270, 274], "unlawful" [Compl. ¶ 272], "fraud" [Compl. ¶¶ 273], and "intentionally
 10 omitted" or "misleading" [Compl. ¶¶ 275] should be stricken from the Complaint. Plaintiffs
 11 are essentially making arguments over a DMCA takedown notice which has not run its
 12 course, [Compl. ¶ 268], and relying on a "fair use" argument that is without merit. [Compl. ¶
 13 272]. However frivolous, Plaintiffs' Seventh Cause of Action has pleaded issues between the
 14 parties herein, and will be addressed in a subsequent motion to dismiss.

15 **E. Additional Paragraphs Should be Stricken From the Complaint.**

16 Plaintiffs include impertinent, scandalous and prejudicial language throughout the
 17 Complaint, including language such as "attempt to defraud" [Compl. ¶ 161], "fraudulent
 18 conduct" [Compl. ¶ 162], and conclusory statements regarding Defendants' knowledge
 19 [Compl. ¶¶ 96, 98, 109-113, 160]. This Court has inherent authority to strike from any
 20 pleading any redundant, immaterial, impertinent or scandalous matter. *See Apolinar*, 2008
 21 U.S. Dist. LEXIS 113273 at *17. Such matter includes any allegations "that unnecessarily or
 22 irrelevantly reflect on the moral character of an individual, do not contribute to the
 23 substantive claims, or state anything in repulsive language that detracts from the dignity of
 24 the court." *See id.* at *17-18; *Vesecky v. Matthews (Mill Towne Center) Real Estate, LLC*,
 25 2010 U.S. Dist. LEXIS 24928 at *4 (D. Ariz. Mar. 2, 2010); *Alvarado-Morales v. Digital*
 26 *Equipment Corp.*, 843 F.2d 613, 618 (1st Cir. P.R. 1988) (No matter the origin of these
 27
 28

repugnant words replete with tragic historical connotations, they are superfluous descriptions and not substantive elements of the cause of action. As such, they have no place in pleadings before the court.). Plaintiffs included said scandalous and impertinent matter in an effort to cause Defendants prejudice, and as such, should be stricken from pleadings. *See Clark*, 2009 U.S. Dist. LEXIS 86453, 30-31.

IV. CONCLUSION

For the foregoing reasons, the following paragraphs in the Complaint should be stricken under Rule 12(f) as immaterial, impertinent, scandalous, and prejudicial:

- Paragraphs 34-67, including Exhibits A and B [Doc. 1-2];
- Paragraphs 68-90;
- References to “attempt to defraud” [Compl. ¶ 161], “fraudulent conduct” [Compl. ¶ 162], and conclusory statements regarding Defendants’ knowledge [Compl. ¶¶ 96, 98, 109-113, 160]; and
- References to “knowingly false material representations” or “falsely representing” [Compl. ¶¶ 269-270, 274], “unlawful” [Compl. ¶ 272], “fraud” [Compl. ¶¶ 273], and “intentionally omitted,” and “misleading” [Compl. ¶¶ 275].

RESPECTFULLY SUBMITTED this 31th day of March, 2021.

ANDREW IVCHENKO PLLC

By: /s/ Andrew Ivchenko

Andrew Ivchenko, Esq.
Attorney for Defendants

**CERTIFICATE OF GOOD FAITH CONFERENCE; CONFERRED BUT
UNABLE TO RESOLVE ISSUES PRESENTED IN THE MOTION**

Pursuant to this Court's order, I hereby certify that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues but has been unable to resolve the issues.

By: /s/ Andrew Ivchenko
Andrew Ivchenko, Esq.
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on March 31, 2021, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrant:

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