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TWITTER, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TWITTER, INC.,

Plaintiff,

v.

KEN PAXTON,
in his official capacity as Attorney General of Texas,

Defendant.

Case No. 3:21-cv-01644-MMC

TWITTER'S NOTICE OF MOTION AND MOTION FOR INJUNCTION PENDING APPEAL

[REQUEST FOR EXPEDITED DECISION]

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NOTICE OF MOTION AND MOTION FOR AN INJUNCTION PENDING APPEAL

PLEASE TAKE NOTICE that Plaintiff Twitter, Inc., pursuant to Federal Rule of Civil Procedure Rule 62(d), hereby moves the Court to enter an injunction requiring that Defendant Ken Paxton maintain the status quo with respect to his Civil Investigative Demand ("CID") to, and related investigation of, Twitter, during the pendency of Twitter's appeal to the Ninth Circuit of this Court's May 11, 2021 Order Granting Defendant's Motion to Dismiss Action, Dkt. 64, and related Judgment, Dkt. 65 (the "May 11 Order and Judgment").

This motion is based on the accompanying memorandum and the filings and pleadings of record in this action. The parties previously agreed to a standstill arrangement relating to this case, *see* Dkt. Nos. 18 and 62, pursuant to which this Court ordered (Dkt. 63) that AG Paxton shall not seek to enforce the CID or file an enforcement lawsuit before this Court's issuance of a ruling denying Twitter's Preliminary Injunction Motion, or granting Defendant's Motion to Dismiss, or May 21, 2021, whichever occurred first. Since the entry of the May 11 Order and Judgment, the parties have engaged in discussions relating to a further extension of their standstill agreement, but on May 26, 2021, AG Paxton advised Twitter that he was not willing to agree to any standstill, leaving Twitter exposed to the threat of enforcement. Under Federal Rule of Appellate Procedure 8a, filing and denial of the present motion would be a prerequisite for Twitter seeking the same interim relief from the Ninth Circuit.

MEMORANDUM OF POINTS AND AUTHORITIES

This Court described this case as presenting an issue that has "not been decided by the Ninth Circuit." Dkt. 64 ("Order") at 5. To preserve the status quo while the Ninth Circuit considers the matter, Twitter respectfully requests that this Court issue an injunction preserving, until resolution of Twitter's pending appeal, the same standstill arrangement that remained in place during this Court's consideration of Twitter's motion for a preliminary injunction. This Court has

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authority to grant such an injunction pending appeal because the Court's May 11 Order and Judgment effectively denied Twitter's then-pending motion for a preliminary injunction. *See* Fed. R. Civ. P. 62(d) ("While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.").

This Court has clear authority to enjoin AG Paxton from upsetting the status quo pending the outcome of an appeal. *See S. Bay United Pentecostal Church v. Newsom*, 959 F.3d 938, 939 (9th Cir. 2020); *Nat. Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (district court retains jurisdiction "to preserve the status quo during the pendency of an appeal"). And the Court need not conclude that it erred in resolving what it described as an open question in order to do so. Although "[t]he standard for evaluating an injunction pending appeal is similar to that employed by district courts in deciding whether to grant a preliminary injunction," *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 367 (9th Cir. 2016) (en banc), in this context "the likelihood of success factor cannot be rigidly applied." *Foster v. Cantil-Sakauye*, No. 17-cv-02122, 2017 WL 8314675 at *2 (N.D. Cal. Oct. 10, 2017) (internal quotation marks omitted). "[I]f it were, an injunction [pending appeal] would seldom, if ever, be granted because the district court would have to conclude that it was probably incorrect in its determination on the merits." *Id.* (internal quotation marks omitted). Instead, courts in this district have concluded that "a district court should stay an order when it has 'ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.'" *Id.* (citation omitted) (collecting cases); *see also Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011) (observing that a plaintiff seeking temporary relief pending appeal "need not demonstrate that it is more likely than not that [it] will win on the merits"). Twitter's retaliation claim presents the kind

of "serious" and "difficult legal question" justifying an injunction pending appeal.

I. THERE ARE SERIOUS QUESTIONS GOING TO THE MERITS

A. There Is A Substantial Argument That Twitter's Claim Is Ripe

The Court viewed as an open question in the Ninth Circuit whether "the institution of an allegedly retaliatory investigation, by itself, constitutes a cognizable adverse action" sufficient to create a ripe dispute. Op. at 5.[1] As the Court recognized, the Ninth Circuit has held that retaliatory investigations, "threatened legal sanctions," and "[i]nformal measures" or "other means of coercion, persuasion, and intimidation[] can violate the First Amendment." *Sampson v. Cty. of Los Angeles by & through Los Angeles Cty. Dep't of Children & Family Servs.*, 974 F.3d 1012, 1020 (9th Cir. 2020); *see also White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000). The Court viewed those cases as distinguishable from this one, theorizing that they involved government actions that had more serious consequences, whereas in this case the "the Attorney General has no authority to impose any sanction for a failure to comply with its investigation." Order at 7. Instead, this Court reasoned, "the Attorney General would be required to go to court, where the only possible consequence adverse to Twitter would be a judicial finding that the CID, contrary to Twitter's assertion, is enforceable." *Id.*

There is a serious possibility the Ninth Circuit will not agree with this analysis. The cited Ninth Circuit decisions hold that investigations conducted under the threat of future enforcement proceedings chill the exercise of First Amendment rights, even *before* enforcement proceedings commence, and without regard to whether judicial approval would be required of the threatened sanction. *White v. Lee,* for example, involved officials at the Department of Housing and Urban

[1] Twitter does not agree that this case involves a retaliatory investigation "by itself." The Attorney General accompanied his retaliatory investigation with express threats of enforcement action—vowing to "fight" Twitter with "everything I've got." Dkt. 1 ("Compl.") ¶ 42.

Development who were investigating whether a group of residents opposed to a development project had violated the Fair Housing Act. 227 F.3d at 1220. The Ninth Circuit held there that the investigation "unquestionably chilled the plaintiffs' exercise of their First Amendment rights," *id.* at 1228. The investigatory steps the Ninth Circuit found to chill the plaintiffs' First Amendment rights were, if anything, less likely to chill speech than those at issue here. The investigation there was "voluntary." *Id.* at 1223. No subpoena had been issued, but the Ninth Circuit found that requests for documents "under threat" of a not-yet-issued "subpoena," questioning "under threat of subpoena," a letter asserting "HUD's purported authority to investigate" the residents and the agency's belief that they had violated the law, and a public statement expressing the same "would have chilled or silenced a person of ordinary firmness from engaging in future First Amendment activities." *Id.* at 1223, 1229. All that—and more—is present here, where AG Paxton has actually issued a CID demanding sensitive internal documents, branded Twitter as the "Left's Chinese style thought police," and vowed to "fight" Twitter with "everything I've got." Compl. ¶ 42. Indeed, immediately after this Court's May 11 Order and Judgment, AG Paxton again publicly pledged to "continue to fight" Twitter's "seemingly biased" content-moderation practices. Texas Attorney General, Press Release (May 11, 2021), https://tinyurl.com/38xt7jm2. The Ninth Circuit in *White* imposed no requirement that the threatening officials had to have been able to unilaterally inflict any sanction—to the contrary, those officials were ultimately overruled by their superiors in Washington and "the agency did not ban or seize the plaintiffs' materials," or "pursue either criminal or civil sanctions against them." 227 F.3d at 1228. And any sanction would have required judicial approval. *Id.* at 1222-23. The investigatory steps in *White* were nonetheless sufficiently chilling on their own to be actionable. The Ninth Circuit could well find the same is true here.

This Court also distinguished *White* on the ground that "the potential consequences of the investigation were serious, for example, imposition of a substantial fine." Order at 6. But the

investigation here has the same "potential consequences." If a court validated AG Paxton's claims, it could impose a civil penalty of $10,000 per violation, *see* Tex. Bus. & Com. Code § 17.47(c); *see also Cox v. State*, 448 S.W.3d 497, 500 (Tex. App. 2014) (Texas Attorney General brought suit alleging 15,625 violations of this provision based on individual misrepresentations to Texas consumers, obtaining a jury verdict imposing civil penalties of more than $31 million). That dwarfs the maximum $100,000 fine a court could have imposed as a result of the investigation in *White.* In short, there is a substantial argument that the Attorney General's actions here are *more* actionably adverse, and threaten *more* serious consequences, than those the Ninth Circuit found sufficient in *White*.

Brodheim v. Cry, 584 F.3d 1262, 1270 (9th Cir. 2009), further shows there are at least serious questions as to whether the Attorney General's conduct is actionably adverse now, making Twitter's claim ripe. In that case, the Ninth Circuit explained that "a statement that 'warns' a person to stop doing something" is actionably adverse because, "[b]y its very nature, . . . it carries the implication of some consequence of a failure to heed that warning," regardless of whether that consequence ever comes about. 584 F.3d at 1270. The plaintiff in *Brodheim* was a prisoner who had submitted a form to a prison official contesting how a prior grievance had been characterized. *Id.* at 1255. The official rejected the submission and wrote "I'd also like to warn you to be careful what you write, req[u]est on this form." *Id.* at 1266. The Court held that even this vague warning—which did not even specify any consequence that might be imposed—could be sufficiently adverse to chill the plaintiff's First Amendment right to use the prison grievance system. *Id.* at 1270-1271 (finding dispute of material fact and reversing grant of summary judgment to prison official); *id.* at 1270 (plaintiff "need not need establish that [defendant's] statement contained an explicit, specific threat"). That was because "[t]he power of a threat lies not in any negative actions eventually taken, but in the apprehension it creates in the recipient of

1 the threat." *Id.* at 1271. Critically, the central "punishment or adverse regulatory action" at issue
2 in *Brodheim* could not have been taken by the defendant unilaterally; it was enough that the prison
3 official could *recommend* such negative consequences be imposed by others. *Id.* at 1270 (noting
4 that defendant could "recommend[]" the plaintiff "be transferred"). By that same reasoning, it is
5 immaterial whether AG Paxton must go—or does in fact go—to court to enforce his CID or seek
6 imposition of a civil penalty on Twitter.
7
8 *White* and *Brodheim* both demonstrate that the question of constitutional ripeness does not
9 depend on the power of the individual defendant to impose unilaterally a particular sanction, and
10 that investigations or threats alone can chill a person of ordinary firmness from future exercises of
11 their First Amendment rights. There is thus a substantial possibility that the Ninth Circuit will
12 hold that Twitter's claim is already ripe.
13
14 **B. Twitter's First Amendment Claim Is Substantial**
15 If—as discussed above—the Ninth Circuit agrees that Twitter's claim is ripe, Twitter's
16 likelihood of success follows. As this Court found, personal jurisdiction and venue are proper
17 here, Order at 3, and the Attorney General's abstention objection fails, for the reasons laid out in
18 Twitter's opposition to the motion to dismiss, Dkt. 58 at 22-23. And on the merits, Twitter has
19 more than shown a likelihood of success on the three elements of a retaliation claim: (1) Twitter
20 "was engaged in a constitutionally protected activity" when it decided to suspend President
21 Trump's account and made other content-moderation decisions with which AG Paxton disagreed,
22 (2) AG Paxton's threats of enforcement and investigatory steps "would chill a person of ordinary
23 firmness from continuing to engage in the protected activity," and (3) Twitter's "protected activity
24 was a substantial or motivating factor in the [Attorney General's] conduct." *Pinard v. Clatskanie*
25 *Sch. Dist. 6J*, 467 F.3d 755, 770 (9th Cir. 2006).
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27 *First*, like a newspaper or bookstore, Twitter engages in classic First Amendment activity
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when it makes decisions about the content it carries. The First Amendment protects this "exercise of editorial control and judgment." *Miami Herald v. Tornillo*, 418 U.S. 241, 257-258 (1974); *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 391 (1973) ("[W]e reaffirm unequivocally the protection afforded to editorial judgment … .").

Second, if, as argued above, the case is ripe, that means that AG Paxton's aggressive investigation, threat of legal sanctions, and issuance of a highly burdensome and intrusive CID "would chill or silence a person of ordinary firmness from future First Amendment activities," *Lacey v. Maricopa Cty.*, 693 F.3d 896, 916 (9th Cir. 2012), satisfying the second element of the test.

Third, Twitter will be able to show that its protected editorial judgments were "a substantial or motivating factor in [AG Paxton's] conduct." *Pinard*, 467 F.3d at 770. The CID and accompanying Press Release specifically mention Twitter's protected activities, including its internal content-moderation policies and practices, discussions about those policies and practices, and the decision to permanently suspend President Trump's account. Dkt. 5-1 ("Williams Decl.") Ex. B. This kind of direct evidence of retaliatory motive is strong proof of causation. *See Arizona Students' Ass'n v. Arizona Bd. of Regents*, 824 F.3d 858, 870-871 (9th Cir. 2016). Further, the CID was issued just four days after Twitter permanently suspended President Trump's Twitter account—itself a protected act—which again strongly evinces retaliatory intent. *Id.* at 870 ("[A] plaintiff may rely on evidence of temporal proximity between the protected activity and alleged retaliatory conduct to demonstrate that the defendant's purported reasons for its conduct are pretextual or false.").

Because Twitter has shown that its "protected activity was a substantial or motivating factor in the [retaliatory] conduct," *Pinard*, 467 F.3d at 770, AG Paxton must show that he would have taken the same adverse actions "without respect to retaliation." *Nieves v. Bartlett*, 139 S. Ct.

1715, 1725 (2019). AG Paxton declined to put in an affidavit making that claim, which would not be credible given the timing of his CID and his many public statements about his investigation's focus on Twitter's suspension of President Trump's account. And even if AG Paxton could somehow get past these problems, the supposedly legitimate basis he has offered is unavailing. The purported "professions [by Twitter] of content neutrality and transparency" that AG Paxton asserts he wishes to investigate, Dkt. 38 at 1-3, are "impervious to being 'quantifiable'" and "classic, non-actionable opinions." *Prager Univ. v. Google LLC*, 951 F.3d 991, 1000 (9th Cir. 2020); *see also Murphy v. Twitter*, 274 Cal. Rptr. 3d 360, 382 (Cal. Ct. App. 2021) ("Twitter's general declarations of commitment to free speech principles cannot support a fraud claim … ."). And courts could never hold Twitter liable for supposedly acting inconsistently with such professions without engaging in subjective judgments about Twitter's protected editorial decisions. So as explained in Twitter's earlier briefs, these pretextual justifications should be seen for what they are: thinly veiled efforts at punishing disfavored speech.

II. THE REMAINING FACTORS FAVOR AN INJUNCTION PENDING APPEAL

Because Twitter has "demonstrate[d] there are serious questions going to the merits," an injunction pending appeal should issue if (1) Twitter will suffer irreparable harm absent preliminary relief; (2) the "the balance of hardships tips sharply in [its] favor"; and (3) an injunction is in the public interest. *See Foster,* 2017 WL 8314675, at *1. All three of these considerations favor relief.

First, as noted in Twitter's Reply, AG Paxton's opposition to Twitter's prior motion defaulted on the latter two factors, effectively conceding that the balance of hardships and public interest support an injunction. Dkt. 59 at 15. And concede he must: "Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding First Amendment principles." *Associated Press v. Otter*, 682 F.3d 821, 826 (9th Cir.

2012). Further, "serious First Amendment questions compel[] a finding that the balance of hardships tips sharply in the plaintiffs' favor," *Cmty. House, Inc. v. City of Boise*, 490 F.3d 1041, 1059 (9th Cir. 2007) (internal quotation marks omitted), and "it is always in the public interest to prevent the violation of a party's constitutional rights," *Melendres v. Arpaio*, 695 F.3d at 990, 1002 (9th Cir. 2012) (internal quotation marks omitted); *see also Doe v. Harris*, 772 F.3d 563, 583 (9th Cir. 2014) (balance of equities favor party "whose First Amendment right are being chilled"); *Klein v. City of San Clemente*, 584 F.3d 1196, 1208 (9th Cir. 2009) (recognizing the "significant public interest" in upholding free speech principles).

Second, Twitter has already suffered irreparable injury as a result of AG Paxton's unlawful retaliation and will suffer additional and immediate, irreparable harm absent an injunction pending appeal. AG Paxton's conduct is chilling Twitter's exercise of its First Amendment right to make content moderation decisions. *See* Williams Decl. ¶12. "[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). For this reason, "under the law of this circuit, a party seeking preliminary injunctive relief in a First Amendment context can establish irreparable injury sufficient to merit the grant of relief by demonstrating the existence of a colorable First Amendment claim." *Warsoldier v. Woodford*, 418 F.3d 989, 1001-1002 (9th Cir. 2005). And as discussed, Twitter's First Amendment claim is not just colorable: it is substantial. AG Paxton transparently retaliated against Twitter's core First Amendment conduct—including its decision to permanently suspend President Trump's account—and did so in a way AG Paxton himself has previously recognized is particularly likely to chill free speech. So long as AG Paxton's investigation continues and his CID remains outstanding, Twitter will be forced to weigh the burdens of facing further intimidation tactics by government actors—including the resource expenditure and other costs that those tactics impose—each time it makes an editorial

determination that fails to meet AG Paxton's preferences. These burdens are particularly acute now: because AG Paxton has refused to agree to any further standstill,[2] Twitter would be exposed—absent an injunction pending appeal from either this Court or the Ninth Circuit—to the threat not only of a proceeding to compel compliance with the CID, but of being sued for alleged violations of Texas law, all for making editorial decisions about which political speech to carry or not carry on its platform.

CONCLUSION

Twitter's First Amendment retaliation claim presents a serious legal question that the Court viewed as not resolved by Ninth Circuit decisions, and the remaining injunction factors strongly favor relief. The Court should, accordingly, grant Twitter's motion for an injunction pending appeal.

Dated: May 27, 2021

Respectfully submitted,

/s/ *Patrick J. Carome*

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[2] After this Court issued its May 11 Order and Judgment, Twitter attempted to negotiate an extension of the standstill agreement between the parties. On May 12, 2021, counsel for Twitter contacted counsel for AG Paxton to discuss next steps. Neiman Decl. ¶6. Counsel for Twitter again contacted counsel for AG Paxton to propose negotiating a further standstill agreement two days later, when Twitter filed its notice of appeal. *Id.* ¶7. On May 17, 2021, counsel for Twitter provided further details on its standstill proposal in response to an inquiry from the counsel for AG Paxton who were assigned to represent AG Paxton on appeal. *Id.* ¶8. The parties discussed a possible standstill on May 18, 2021, and based on that discussion, counsel for Twitter offered a revised standstill proposal on May 20. *Id.* ¶9. Based on feedback from counsel for AG Paxton, counsel for Twitter made a revised proposal on the morning of May 21. *Id.* On the evening of May 21, 2021, counsel for AG Paxton noted their intent to respond to the proposal early the following week. *Id.* ¶10. Having not received the promised early-in-the-week response, on May 26, 2021, counsel for Twitter wrote to counsel for AG Paxton, requesting a decision on the May 21 proposal by the end of the day. *Id.* ¶11. Later on May 26, counsel for AG Paxton advised counsel for Twitter that AG Paxton would not agree to any further standstill agreement to preserve the status quo. *Id.*

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TWITTER, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

TWITTER, INC.,

Plaintiff,

v.

KEN PAXTON,
in his official capacity as Attorney General of Texas,

Defendant.

Case No. 3:21-cv-01644-MMC

DECLARATION OF PETER G. NEIMAN IN SUPPORT OF TWITTER'S MOTION FOR INJUNCTION PENDING APPEAL

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DECLARATION OF PETER G. NEIMAN

I, Peter G. Neiman, declare as follows:

1. I am an attorney at WilmerHale and represent Plaintiff Twitter, Inc. ("Twitter") in this case. I have personal knowledge of the matters stated herein and, if called upon, I could and would competently testify thereto.

2. The parties previously submitted stipulations outlining the terms of a standstill agreement to govern during the pendency of this case. Dkt 17; Dkt. 62.

3. Pursuant to those stipulations, this Court ordered (*see* Dkt. 63) that Defendant AG Paxton shall not seek to enforce the civil investigative demand issued to Twitter in his investigation of Twitter's potential violations of sections 17.46 (a) and (b) of the Texas Deceptive Trade Practices Act—Consumer Protection Act, relating to the subjects of the civil investigative demand issued on January 13, 2021, or file an enforcement lawsuit against Twitter regarding those subjects, before this Court's issuance of a ruling denying Twitter's Preliminary Injunction Motion, or granting Defendant's Motion to Dismiss, or May 21, 2021, whichever occurred first.

4. On May 11, 2021, this Court issued an order granting AG Paxton's Motion to Dismiss. Dkt. 64.

5. Following entry of the order granting AG Paxton's Motion to Dismiss, the parties engaged in discussions relating to a further extension of the standstill during either the pendency of Twitter's pending appeal or at least during the pendency of applications by Twitter to this Court and/or the Ninth Circuit for an injunction pending appeal.

6. On May 12, 2021, the day after this Court issued an order granting AG Paxton's Motion to Dismiss, counsel for Twitter contacted counsel for AG Paxton to discuss next steps in the case.

7. On May 14, 2021, Twitter filed its notice of appeal in this case. *See* Dkt. 66. That same day, counsel for Twitter again contacted counsel for AG Paxton to propose negotiating a further standstill agreement to govern during the pendency of Twitter's appeal.
8. On May 17, 2021, counsel for Twitter provided further details on its standstill proposal in response to an inquiry from the counsel for AG Paxton who were assigned to represent AG Paxton on appeal.
9. The parties discussed a possible standstill on May 18, 2021, and based on that discussion, counsel for Twitter offered a revised standstill proposal on May 20. Based on feedback from counsel for AG Paxton, counsel for Twitter made a revised proposal on the morning of May 21.
10. On the evening of May 21, 2021, counsel for AG Paxton stated their intent to respond to the proposals early the following week.
11. Having not received the promised early-in-the-week response, on May 26, 2021, counsel for Twitter wrote to counsel for AG Paxton, requesting a decision on the May 21 proposal by the end of the day. Later on May 26, counsel for AG Paxton advised counsel for Twitter that AG Paxton would not agree to any further standstill agreement to preserve the status quo—even one limited to the several weeks needed for this Court (and if necessary the Ninth Circuit) to resolve a motion for injunction pending appeal in an orderly fashion.
12. As a result of AG Paxton's refusal to agree to any standstill, Twitter is currently exposed to the threat (a) that AG Paxton will seek to compel Twitter to respond to the pending CID or (b) that AG Paxton will file an enforcement proceeding against Twitter, accusing it of violating the Texas Deceptive Trade Practices Act—Consumer Protection Act before the Ninth Circuit has a chance to rule on the merits of Twitter's appeal.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on this 27th day of May 2021 in New York, New York.

By: /s/ *Peter G. Neiman*
Peter G. Neiman

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SIGNATURE ATTESTATION

I am the ECF User whose identification and password are being used to file the foregoing. Pursuant to Civil Local Rule 5-1(i), I hereby attest that the other signatories have concurred in this filing.

Dated: May 27th, 2021

By: *<u>/s/ Patrick J. Carome</u>*
Patrick J. Carome