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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

HAWAIIAN KINGDOM

Plaintiff,

vs.

JOSEPH ROBINETTE BIDEN JR., in
his official capacity as President of the
United States; et al.,

Defendants.

CIVIL NO. 1:21:cv-243-LEK-RT

STATEMENT OF INTEREST OF
THE UNITED STATES OF
AMERICA

STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

INTRODUCTION1

BACKGROUND2

DISCUSSION9

A. All Consular Defendants are Consular Officers.....11

B. The Consular Defendants are Immune From Suit For the Exercise of
Their Consular Functions.12

C. The Treaty Obligations of the United States are Applicable in
Determining Whether the Court May Exercise Jurisdiction over the
Foreign Consular Officers.14

CONCLUSION15

TABLE OF AUTHORITIES

CASES

Chuidian v. Philippine Nat’l Bank,
912 F.2d 1095 (9th Cir. 1990)10

Dogan v. Barak,
932 F.3d 888 (9th Cir. 2019)14

Gerritsen v. Consulado Gen. De Mexico,
989 F.2d 340 (9th Cir. 1993) 10-11

Guar. Tr. Co. of N.Y. v. United States,
304 U.S. 126 (1938).....12

In re Estate of Ferdinand Marcos, Hum. Rts. Litig,
25 F.3d 1467 (9th Cir. 1994)10

Joseph v. Off. of Consulate Gen. of Nigeria,
830 F.2d 1018 (9th Cir. 1987) 10, 13

Park v. Shin,
313 F.3d 1138 (9th Cir. 2002) 11, 13

Risk v. Halvorsen,
936 F.2d 393 (9th Cir. 1991)11

Samantar v. Yousuf,
560 U.S. 305 (2010).....10

Sumitomo Shoji Am., Inc. v. Avagliano,
457 U.S. 176 (1982).....13

Swarna v. Al-Awadi,
622 F.3d 123 (2d Cir. 2010).....13

United States v. Al-Hamdi,
356 F.3d 564 (4th Cir. 2004)14

U.S. CONSTITUTION

U.S. Const. art. II, § 312

STATUTES

28 U.S.C. § 517.....1, 8

FEDERAL RULES

Fed. R. Civ. P. 4(c)(1).....7

Fed. R. Civ. P. 55(a).....7, 8

Fed. R. Civ. P. 55(c)..... 11, 15

OTHER AUTHORITIES

Consular Convention,
Jan. 8, 1963, 14 U.S.T. 1637.....9

Consular Convention and Protocol,
Mar. 22, 1963, 15 U.S.T. 7689

Convention between the United States of America and the Republic of the
Philippines respecting consular officers,
Mar. 14, 1947, 62 Stat. 1593, TIAS 17419

Vienna Convention on Consular Relations,
Apr. 24, 1963, 21 U.S.T. 77 9, 10, 11, 13

INTRODUCTION

The United States of America (“United States”) submits this Statement of Interest to set forth its views on the immunity of the thirty consular officers named as defendants in this lawsuit.¹

This lawsuit is brought by a group of individuals who call themselves the “Council of Regency,” which in turn purports to be the government of the Hawaiian Kingdom (“Plaintiff”). Plaintiff requests that the Court declare that the Council of Regency, not the democratically-elected government, is the rightful ruler of Hawaii. Plaintiff originally named fifty-five foreign, federal, state, county, and local government entities and officials as defendants.

The United States submits this Statement of Interest to inform the Court that the United States Department of State (“State” or “State Department”) has

¹ The United States files this Statement of Interest in connection with the claims against foreign consular officers under 28 U.S.C. § 517, which provides that the “Solicitor General, or any other office of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States.” While the United States is named as a defendant in this case, it also has a separate foreign policy interest in whether U.S. courts can properly exercise jurisdiction against officials of foreign governments in the United States. By filing this Statement of Interest to address the claims against consular officers, the United States does not waive any of its own defenses to this suit, including, but not limited to, subject matter jurisdiction, failure to state a claim for which relief may be granted, or sufficiency or timeliness of service.

provided a certification of consular status for the thirty defendant Consuls General and Honorary Consuls (collectively, “Consular Defendants”), who are sued in their official capacity. *See* Certification of the Office of Foreign Missions, U.S. Department of State (“State Cert.”). This certification is conclusive in establishing the Consular Defendants are immune from suit in the courts of the United States for the performance of their consular functions. Accordingly, the Court lacks jurisdiction over these defendants and should dismiss the Consular Defendants and set aside all entries of default against them.

BACKGROUND

On May 20, 2021, Plaintiff brought suit against fifty-five (55) defendants, including various Hawaiian state, county, and city government entities and officials, the United States, Joseph Biden, Jr. in his official capacity as President of the United States, Kamala Harris, in her official capacity of Vice President of the United States, Charles Rettig, in his official capacity as the Commissioner of the Internal Revenue Service, Admiral John Aquilino, in his official capacity as the Commander of Indo-Pacific Command, Charles Schumer, in his official capacity as the Senate Majority Leader, Nancy Pelosi, in her official capacity as the Speaker of House, and thirty Consular Officers and Honorary Consuls Officers allegedly serving in Hawaii. *See* Compl., ECF No. 1.

On August 5, 2021, the Court granted Plaintiff’s request to voluntarily

dismiss some of the Hawaiian state, county, and local defendants. *See* Court Order, ECF No. 53. On August 11, 2021, Plaintiffs filed an Amended Complaint, leaving forty-three (43) defendants and adding further explanatory paragraphs. *See* Am. Compl. (“FAC”), ECF No. 55. The following Consular and Honorary Consular Officers are named as defendants in the Amended Complaint (collectively, “Consular Defendants”):

1. Jane Hardy, in her official capacity as Australia’s Consul General to Hawaii and the United Kingdom’s Consul to Hawaii;
2. Johann Urschitz, in his official capacity as Austria’s Honorary Consul to Hawaii;
3. M. Jan Rumi, in his official capacity as Bangladesh’s Honorary Consul to Hawaii and Morocco’s Honorary Consul to Hawaii;
4. Jeffrey Daniel Lau, in his official capacity as Belgium’s Honorary Consul to Hawaii;
5. Eric G. Crispin, in his official capacity as Brazil’s Honorary Consul to Hawaii;
6. Gladys Vernoy, in her official capacity as Chile’s Honorary Consul General to Hawaii;
7. Josef Smycek, in his official capacity as the Czech Republic’s Deputy Consul General for Los Angeles that oversees the Honorary Consulate in Hawaii;
8. Benny Madsen, in his official capacity as Denmark’s Honorary Consul to Hawaii;
9. Katja Silveraa, in her official capacity as Finland’s Honorary Consul to Hawaii;
10. Guillaume Maman, in his official capacity as France’s Honorary Consul to Hawaii;

11. Denis Salle, in his official capacity as Germany's Honorary Consul to Hawaii;
12. Katalin Csiszar, in her official capacity as Hungary's Honorary Consul to Hawaii;
13. Sheila Watumull, in her official capacity as India's Honorary Consul to Hawaii;
14. Michele Carbone, in his official capacity as Italy's Honorary Consul to Hawaii;
15. Yutaka Aoki, in his official capacity as Japan's Consul General to Hawaii;
16. Jean-Claude Drui, in his official capacity as Luxembourg's Honorary Consul to Hawaii;
17. Andrew M. Kluger, in his official capacity as Mexico's Honorary Consul to Hawaii;
18. Henk Rogers, in his official capacity as Netherland's Honorary Consul to Hawaii;
19. Kevin Burnett, in his official capacity as New Zealand's Consul General to Hawaii;
20. Nina Hamre Fasi, in her official capacity as Norway's Honorary Consul to Hawaii;
21. Joselito A. Jimeno, in his official capacity as the Philippines's Consul General to Hawaii;
22. Bozena Anna Jarnot, in her official capacity as Poland's Honorary Consul to Hawaii;
23. Tyler Dos Santos-Tam, in his official capacity as Portugal's Honorary Consul to Hawaii;
24. R.J. Zlatoper, in his official capacity as Slovenia's Honorary Consul to Hawaii;
25. Hong, Seok-In, in his official capacity as the Republic of South Korea's Consul General to Hawaii;

26. John Henry Felix, in his official capacity as Spain’s Honorary Consul to Hawaii;
27. Bede Dhammika Cooray, in his official capacity as Sri Lanka’s Honorary Consul to Hawaii;
28. Anders G.O. Nervell, in his official capacity as Sweden’s Honorary Consul to Hawaii;
29. Theres Ryf Desai, in her official capacity as Switzerland’s Honorary Consul to Hawaii; and
30. Colin T. Miyabara, in his official capacity as Thailand’s Honorary Consul to Hawaii.

See FAC ¶¶ 18-47.

Plaintiff argues that the Court should “assume jurisdiction as a *de facto* Article II Court” to hear its suit. FAC ¶ 4. Plaintiff repeatedly admits that the Court lacks Article III jurisdiction over the suit. See Pl.’s Resp. to Defs.’ Mot. to Dismiss Compl. (“Pl.’s Resp. to Def. Kauai’s Motion to Dismiss”) at 1, ECF No. 37; Pl.’s Resp. to Mot. to Dismiss Am. Compl. (“Pl.’s Resp. to Def. Nervell MTD”) at 1, ECF No. 129.

Plaintiff asserts four causes of action (Count I, II, III, and V) based on its argument that the Hawaiian Kingdom is an independent sovereign nation. FAC ¶¶ 149-174. Count V is directed at the Consular Defendants. *Id.* ¶¶ 170-174. In Count V, Plaintiff alleges that the Consular Defendants violated international law and various treaty obligations by failing to recognize the Hawaiian Kingdom as a sovereign nation and by receiving their consular credentials from the United States.

Id. Plaintiff asks the Court to enjoin the Consular Defendants from “serving as foreign consulates within the territorial jurisdiction of the Hawaiian Kingdom until they have presented their credentials to the Hawaiian Kingdom Government and received exequaturs.” FAC Prayer for Relief (d).

On September 12, 2021, Plaintiff filed a notice of voluntary dismissal of Consular Defendant Josef Smycek (Deputy General Consul, Czech Republic). *See* ECF No. 70. On September 24, 2021, undersigned counsel informed Plaintiff’s counsel that, per the State Department’s records of foreign missions, Jane Hardy (Consul General, Commonwealth of Australia), Katja Silveraa (Honorary Consul, Republic of Finland), Sheila Watumull (Honorary Consul, India), and Kevin Burnett (Consul General, New Zealand) were no longer serving in a consular capacity in Hawaii. On October 6, 2021, Plaintiff filed a notice of voluntary dismissal of only Consular Defendants Katja Silveraa, and Sheila Watumull.² *See* ECF No. 100. Additionally, Katalin Csiszar (Honorary Consul, Hungary) and Joselito A. Jimeno (Consul General, Republic of the Philippines) are no longer serving in a consular capacity in Hawaii. *See* State Cert. ¶ 4.

² Plaintiff infers that these officials withdrew from Hawaii because of this suit. *See* Pl.’s Notice of Voluntary Dismissal of Def. Smycek at 2, ECF No. 70; Pl.’s Notice of Voluntary Dismissal of Defs. Silveraa and Watumull at 2, ECF No. 100. There is no evidence to support this inference. For instance, Sheila Watumull’s service as India’s Honorary Consul in Hawaii ended in 2007. *See* State Cert. ¶ 4.

On September 21, 2021, Consular Defendant Anders G.O. Nervell, in his official capacity as Sweden's Honorary Counsel, filed a motion to dismiss asserting his immunity from this Court's jurisdiction. *See* Def. Nervell Mot. to Dismiss Am. Compl. ("Def. Nervell MTD"), ECF No. 74. On October 19, 2021, Plaintiff responded. *See* Pl.'s Resp. to Def. Nervell MTD. On November 3, 2021, Honorary Consul Nervell replied. *See* Def. Nervell's Reply, ECF No. 146.

On September 27, 2021, Plaintiff filed the summons which were purportedly served on six Consular Defendants. ECF Nos. 76-81. On October 7, 2021, Plaintiff filed additional summons which were purportedly served on five more Consular Defendants. ECF Nos. 101-105. On November 3, 2021, Plaintiff filed two more additional summons which were purportedly served on two more Consular Defendants. ECF Nos. 147, 150. Plaintiff has not filed any served summons on the docket for the remaining sixteen Consular Defendants. *See* Fed. R. Civ. P. 4(c)(1) (requirements for proving service).

On October 14, 2021, Plaintiff filed affidavits of service and Requests for Entry of Default by the Clerk for Consular Defendants Joselito A. Jimeno (Consul General, Philippines), Seok-In Hong (Consul General, South Korea), Henk Rogers (Honorary Consul, Netherlands), Yutaka Aoki (Consul General, Japan), and Jeffrey Daniel Lau (Honorary Consul, Belgium), for failing to respond to the Amended Complaint. *See* ECF Nos. 106-110 (citing Fed. R. Civ. P. 55(a)). On

October 18, 2021, Plaintiff filed affidavits of service and Requests for Entry of Default by the Clerk for Consular Defendants Gladys Vernoy (Honorary Consul, Chile) and Denis Salle (Honorary Consul, Germany). ECF Nos. 118-119 (citing Fed. R. Civ. P. 55(a)). On October 18, 2021, the Clerk of the Court entered defaults in response to Plaintiff's seven requests. ECF Nos. 122-128.

On November 1, 2021, Plaintiff filed affidavits of service and Requests for Entry of Default by the Clerk for Consular Defendants Nina Fasi (Honorary Consul, Norway), Jean-Claude Drui (Honorary Consul, Luxembourg), and John Felix (Honorary Consul Spain). ECF Nos. 135-137 (citing Fed. R. Civ. P. 55(a)). On November 3, 2021, Plaintiff filed affidavits of service and Requests for Entry of Default by the Clerk for Consular Defendants Johann Urshitz (Honorary Consul, Austria) and Colin Miyabara (Honorary Consul, Thailand). ECF Nos. 148, 151 (citing Fed. R. Civ. P. 55(a)). On November 1 and November 4, the Clerk of the Court entered defaults in response to Plaintiff's five additional requests. ECF Nos. 141-143, 160-161.

The United States now respectfully submits this Statement of Interest to set forth its views with respect to the immunity of the consular officers named as defendants in this lawsuit. *See* 28 U.S.C. § 517. Along with this Statement of Interest, the State Department also provides this Court a certification from Clifton C. Seagroves, the Acting Director of the Office of Foreign Missions. *See* State

Cert. The Office of Foreign Missions is “responsible for overseeing the registration and maintaining the official records of . . . consular officers.” *See* State Cert. ¶ 1.

The certification establishes that all the Consular Defendants either are or were consular officers with immunity from suit for actions taken in performance of their consular functions.³ *See* State Cert. ¶¶ 3, 5.

DISCUSSION

Any exercise of the Court’s jurisdiction in this case over the consular officers would be inconsistent with the United States’ obligations under the Vienna Convention on Consular Relations (VCCR), to which the United States and the foreign states represented by the named consular officers are parties.⁴ VCCR, Apr. 24, 1963, 21 U.S.T. 77. Under the VCCR, “[c]onsular officers . . . shall not be

³ To the extent that Plaintiff may seek to substitute current consular officers as defendants in place of the consular officers named in this suit who are no longer serving in that capacity, the immunities provided under the VCCR as described in this Statement of Interest would apply equally to accredited consular officers from those foreign states.

⁴ In addition to the immunities provided under the VCCR, the United States has bilateral consular agreements with several foreign states that also provide for immunities for consular officers. Of relevance to this suit, the United States has entered into agreements with Japan (Mar. 22, 1963, 15 U.S.T. 768), Philippines (Mar. 14, 1947, 62 Stat. 1593, TIAS 1741), and South Korea (Jan. 8, 1963, 14 U.S.T. 1637) that would provide an additional basis for the immunity of the consular officers of those foreign states. With respect to the Philippines, the bilateral agreement between the United States and the Philippines provides for broader immunity from civil jurisdiction that is not limited to the official acts of the consular officer.

amenable to the jurisdiction of the judicial or administrative authorities of the receiving State in respect of acts performed in the exercise of consular functions.” VCCR, art. 43(1). This limited immunity from jurisdiction for acts performed in the exercise of consular functions extends to honorary consular officers, *id.* art. 58(2), and to consular officers who are nationals or permanent residents of the receiving state, *id.* art. 71(1). Residual immunity applies to acts performed in exercise of consular functions even after they cease performing the functions. *Id.* art. 53(4). The United States’ obligation to afford consular immunity consistent with the provisions of the VCCR has been widely recognized by courts and is incorporated into federal common law. *See Samantar v. Yousuf*, 560 U.S. 305, 321, 324 (2010) (confirming that the common law regime of immunity is applicable to foreign officials); *In re Estate of Ferdinand Marcos, Hum. Rts. Litig.*, 25 F.3d 1467, 1472 (9th Cir. 1994) (immunity is extended to a consular official “when acting on behalf of the state because actions against those individuals are the practical equivalent of a suit against the sovereign directly”) (quoting *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1101 (9th Cir. 1990)). “[T]he district court does not have jurisdiction over [a consular official] if he is protected by consular immunity.” *Joseph v. Off. of Consulate Gen. of Nigeria*, 830 F.2d 1018, 1027 (9th Cir. 1987) (citing the VCCR); *see also Gerritsen v. Consulado Gen. De Mexico*, 989 F.2d 340, 345 (9th Cir. 1993) (same); *Risk v. Halvorsen*, 936 F.2d 393, 398

(9th Cir. 1991) (same).

Because all the Consular Defendants are consular officers, and are being sued in their official capacities for the exercise of their consular functions, they are not subject to this Court’s jurisdiction and should be dismissed from the case.⁵ For this reason, all entries of default against the Consular Defendants, ECF Nos. 122-128, 141-143, 160-161, should also be set aside for good cause shown. *See* Fed. R. Civ. P. 55(c).

A. All Consular Defendants are Consular Officers.

The Consular Defendants are unquestionably consular officers. A “consular officer” is “any person, including the head of a consular post, entrusted in that capacity with the exercise of consular functions.” VCCR arts. 1(1)(d), 1(2). *See, e.g., Park v. Shin*, 313 F.3d 1138, 1141 (9th Cir. 2002) (using VCCR arts. 1, 9 to conclude a Deputy Consul is a “consular officer.”). Plaintiff identifies all Consular Defendants by their official titles and associated foreign mission. *See* FAC ¶¶ 18-47; *see also* Pl.’s Resp. to Def. Nervell MTD at 2 (Plaintiff “does not contest Mr. Nervell’s commission by the Swedish Government as an Honorary Consul.”).

⁵ The United States limits this Statement of Interest to the accreditation of the Consular Defendants and their immunity from suit for the exercise of their consular functions, which is dispositive to the Court’s jurisdiction. If the Court allows the case to proceed against the Consular Defendants, the United States reserves its right to further state its interests regarding potential additional issues of jurisdiction and/or sufficiency and timeliness of service with respect to the Consular Defendants.

The State Department certifies that 24 of the Consular Defendants are currently accredited consular officers, including honorary and career officers, and the remaining six officers were previously accredited to consular missions in Hawaii. State Cert. ¶¶ 2, 4. Even if there was any question of their consular status, the State Department’s certification of each Consular Defendants’ consular status is conclusive. *See generally* State Cert. ¶¶ 1-4. Article II, Section 3 of the Constitution, the Reception Clause, expressly grants the President the authority to “receive Ambassadors and other public Ministers,” And the President’s “action in receiving diplomatic representatives is conclusive on all domestic courts.” *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 138 (1938).

B. The Consular Defendants are Immune From Suit For the Exercise of Their Consular Functions.

Likewise, it is plain that the Consular Defendants are being sued for the exercise of their consular functions. Plaintiff specifies that its suit is brought against the Consular Defendants in their “official capacity” as representatives of foreign sovereigns and Plaintiff alleges that the Consular Defendants have failed to honor their sending government’s treaty obligations. *See* FAC ¶¶ 18-47; FAC Prayer for Relief. Plaintiff also asks the Court to enjoin them from serving as “foreign consulates.” FAC Prayer for Relief (d). Plaintiff’s allegations make it clear that this suit is about the Consular Defendants’ exercise of their consular functions.

To the extent further analysis is required, the VCCR provides an enumerated list of “consular functions.” *See Joseph*, 830 F.2d at 1027 (citing VCCR art. 5); *accord Park*, 313 F.3d at 1141-42 (explaining the court’s “two-part test” using the VCCR to determine first if the suit is about a “legitimate consular function[.]” and then “decid[ing] whether the [consular officials’] acts . . . were performed in the exercise of the consular functions in question.”) (citation omitted). VCCR art. 5(a) defines one “consular function” as “protecting in the receiving State the interests of the sending State.” Unquestionably, this function encompasses the Consular Defendants service as their sending state’s consulate and honoring their sending state’s position on its relationship with the United States.

The State Department agrees that the functions of serving as a foreign consulate in the state of Hawaii, which are the functions that are the subject of this suit, are consular functions for which consular officers are entitled to immunity under the VCCR. *See State Cert.* ¶¶ 3, 5. Courts must accord the Government’s views “great weight” when determining the scope of immunity conferred by any relevant treaty or statute. *See Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184-5 (1982) (“Although not conclusive, the meaning attributed to treaty provisions by the Government agencies charged with their negotiation and enforcement is entitled to great weight.”); *accord Swarna v. Al-Awadi*, 622 F.3d 123, 135 (2d Cir. 2010) (“It is well settled that the Executive Branch’s

interpretation of a treaty is entitled to great weight.” (cleaned up)); *United States v. Al-Hamdi*, 356 F.3d 564, 570 (4th Cir. 2004) (giving “[s]ubstantial deference” to the State Departments interpretation of a provision of the Vienna Conventions) (citation omitted); *cf. Dogan v. Barak*, 932 F.3d 888, 893 (9th Cir. 2019) (holding that a court should give at least “substantial weight,” and possibly “absolute deference” to the State Department’s “suggestion of immunity” provided for a foreign official.). State’s interpretation that the alleged activity here would be considered consular functions under the VCCR is entitled to “great weight.”

For each of these reasons, the Consular Defendants are immune from the jurisdiction of this Court for suits against them for the exercise of their consular functions.

C. The Treaty Obligations of the United States are Applicable in Determining Whether the Court May Exercise Jurisdiction over the Foreign Consular Officers.

Plaintiff acknowledges the possibility that consular immunity could apply to this suit. *See* Pl.’s Resp. to Def. Nervell MTD at 3. Plaintiff attempts to avoid its jurisdictional infirmity by arguing that the Hawaiian Kingdom is not party to the VCCR and “the Hawaiian Kingdom [does] not recognize foreign consulates as being privileged from suit according to customary international law.” *Id.* at 2-3. This baseless assertion does not relieve the Court of the need to consider immunity under the VCCR. *See id.* at 18-19. Even under Plaintiff’s theory, the Court’s

authority is derived from the United States Constitution, and the Court is bound to exercise judicial power under the Constitution and apply the law of the United States. Plaintiffs' contention that it is the true sovereign in Hawaii, and that this Court is not an Article III court, does not relieve the Court of the obligation to afford consular immunity to foreign consular officers consistent with the obligations of the United States under the VCCR.⁶

CONCLUSION

For the foregoing reasons, the Court should accept State's certification of the Consular Defendants' status and its determination regarding their immunity. Because the Consular Defendants enjoy immunity from suit for acts conducted in their official capacity, the Court should dismiss them from the suit for lack of jurisdiction and set aside any entries of default against them under Federal Rule of Civil Procedure 55(c) for good cause shown.

⁶ Even if, for the sake of argument, this Court were to accept Plaintiff's fringe theory that this Court derives its power from Article II rather than Article III, the Court's authority is nonetheless still derived from the United States Constitution. *See* P. Resp. to Nervell MTD at 18-19 (describing it as an "executive court[]"). Thus, even if this Court derived its authority under Article II –which it obviously does not – it is still a United States District Court, and nothing about this part of the Constitution relieves the Court of its obligation to afford consular immunity to the foreign consular defendants as set forth herein.

DATED: November 5, 2021, at Washington, D.C.

Respectfully submitted,

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CERTIFICATE OF CONFERENCE

This Statement of Interest is made following the conference of counsel pursuant to LR7.8 which took place on October 27, 2021.

DATED: November 5, 2021 , at Washington, D.C.

/s/ Rebecca Cutri-Kohart
REBECCA CUTRI-KOHART

CERTIFICATE OF SERVICE

I hereby certify that, on the dates noted below, a true and correct copy of the foregoing was served electronically through CM/ECF.

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DATED: November 5, 2021 , at Washington, D.C.

/s/ Rebecca Cutri-Kohart
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