Bahig Saliba
[redacted]
[redacted]
[redacted]
Email: medoverlook@protonmail.com

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Bahig Saliba,	Case No. CV-22-1025-PHX-DLR
Plaintiff,	
v.	**MOTION FOR**
Allied Pilots Assocition,	**RECONSIDERATION**
Defendant,	**OF DFR CLAIM**

This case and the order of this Court turn on the interpretation and application of 14 CFR §61.53, additionally, and it must be considered, on recent evidence in the position of the Plaintiff supporting his claim of breach of the Duty of Fair Representation (DFR) by APA.

The Plaintiff files this motion for reconsideration of the DFR claim for the following reasons:

Misinterpretation and misapplication of the rule of law by this Court and APA.

Recent communications evidencing APA's refusal to represent Plaintiff because of his "troubling" non-member status.

Statement of position by the President of APA that is in line with the law, rules and regulations of aviation, and the statutory authority of unions under the RLA that is diametrically opposite to the position taken in APA's motion for dismissal.

APA's unlawful position in their motion to dismiss and in the discharge of their duties, and for indications of a disconnect or a rift within the union resulting in bad faith, inability, and failure to represent the Plaintiff.

MISINTERPRETATION AND MISAPPLICATION OF THE RULE OF LAW

A true event will illustrate how 14 CFR §61.53 applies. Scott was once the Plaintiff's co-pilot who, on the descent into Phoenix, declared he could not breath. While he assured the Plaintiff, he was not experiencing a heart attack, Scott, nearing incapacitation, went on crew oxygen and recovered after a few minutes. A physical examination determined that a heavy breakfast Scott consumed earlier caused a disruptive indigestion that prevented Scott from breathing normally.

A two-man crew flight deck was instantly transformed into a one-man crew, increasing the risks, and potentially negatively affecting the safe outcome of the flight. Any mechanical failure or additional emergency that might have arisen would have compounded the risks and jeopardized the safety of the passengers and crew. Armed with that information, Scott, and only Scott, *knows and has a reason to know of a medical condition that* "***would"*** *make him unable to meet FAA medical standards*. Therefore, only Scott can determine the amount of food he consumes to remain in compliance with the safe health standards established by the FAA, further illustrating the fact that §61.53 is extremely personal and mostly forward looking.

The FAA has identified activities that pilots should not undertake, or medications they should not use, if planning on operating aircraft, some of which are scuba diving, blood donation, or alcohol consumption. Additionally, there are many over-the-counter drugs that

are not authorized for use by pilots. These identified activities or medications have future effects on human physiology and are directly subject to FAA and pilot decision making. However, there are many activities that have not been identified or regulated by the FAA, and §61.53 gives the pilot the authority in determining which are acceptable. Restricting breathing by masking is not acceptable and so is the use of an Emergency Use Authorization drug that carries risks, up to and including death and heart complications, causing unexpected incapacitation, both of which were demanded by AA, and unlawfully negotiated for by APA.

As a matter of fact, the FAA has made the statement that although certain jabs may be used, and that the pilot must wait a period of 48 hours before performing any duties after receiving the jab, the pilot must comply with §61.53 and that the FAA will continue to monitor the side effects on the pilot population, which, in and of itself gives the Plaintiff great pause in a safety sensitive environment where pilots carry hundreds and thousands of passengers. It must be noted that roughly 15% or less of the pilots in the United States who hold medical certificates actually work in the airline transport industry, the remainder are general aviation and corporate pilots, and they operate in a completely different environment. Airline pilots are roughly 0.02% of the United States population who move the nation and have much stringent obligations than the general pilot population. Airline pilots contract with the People when providing transportation. Airline pilots do that by signing fitness for duty statements that remain in the record with the agency and their respective airline. APA represents roughly 0.0045% of those pilots, and by holding their position, that a mask does not affect the Plaintiff's medical certification or his rights in any way, APA is assuming authority and responsibility they are not in position to assume, and APA is setting a new health standard. APA is not in a lawful position to make that assessment and has invaded Public Policy.

Captain Steven Dickson, the now retired FAA administrator, declared that the FAA, the agency with authority over the issuance of medial clearances to pilots, and who sets the standards will not regulate masking and that their "space is aviation safety." Here is the link to the story. https://thehill.com/policy/transportation/aviation/503344-faa-says-it-wont-make-masks-on-planes-mandatory/

What does that mean for pilots and the general public? It means that the FAA did not conduct any studies to determine the effects of masking on pilots who operate aircraft at high altitudes, or the time of useful consciousness of crew and passengers in case of a rapid cabin decompression, and their response time to don an oxygen mask. (A rapid decompression is when the cabin altitude goes from around 7500 feet to 39000 feet instantly where partial oxygen pressure cannot sustain life) Such studies are required before issuing any new regulations involving human physiology or aircraft certification.

Aviation is a known science and AA was flying blind. APA supported that in direct violation of their statutory authority and their constitution and bylaws that call for advancing the professional interests of the Plaintiff, the very same interests imbedded in personal health decisions pilots make that directly affect the safety of the public.

In paragraph (2) I, of Executive Order 13998, the exceptions were included for the heads of agencies to make categorical or case-by-case exceptions to policies developed under this section, consistent with ***applicable law, to the extent that doing so is necessary or required by law.*** That gave birth to exemption F3 in the TSA Security Directives that is specifically and directly applicable to pilots. AA's mask policies relating to pilots were not in line with EO 13998 or the law as the Court stated in Doc. 17 page 2. Respectfully, the Court is incorrect. Additionally, the mask order was ruled unlawful by the Middle District Court of Florida, Tampa Division on April 14, 2022, confirming AA's policies unlawful from their inception as well as the position taken by APA.

The FAA only issued recommendations. Recommendations are not law or regulation. The reason the FAA did not regulate masking is because by doing so, the FAA would be creating a deficiency and assuming risks they cannot assume. Also, they would be infringing on the rights of pilots under the Federal Aviation Act of 1958 (The Act) and the constitutional right to contract. As a result, the Federal Aviation Regulations remain unchanged and applicable, and 14 CFR §61.53 stands and is extremely personal. Similar to the intent of the 9th amendment, §61.53 addresses conditions unforeseen by the agency and the FAA defers to it frequently in FAA medical literature and regulations. See 2023 Aeromedical Guide for AMEs page 471 for example.

What are the idiosyncrasies of this rule that the Plaintiff lives by? While it certainly calls for removing oneself from any flight duty if feeling ill, it is a planning tool and by definition an authorization given to pilots in making health decisions. Should Scott plan on consuming a heavy breakfast prior to operating an aircraft for AA? Only Scott can make that very personal decision backed by his personal experience when at the breakfast table at his hotel.

§61.53 is masterfully written, granting the Administrator's authority unto the pilot. The rule covers anything and everything past, present, and future that may cause a pilot to not meet the standards of an FAA medical clearance, and the pilot must do his utmost to prevent any possible incapacitation, or any deficiencies affecting his health, and ultimately must sign fit for duty statements under the pains of 18 U.S. Code §1001 and in accordance with 14 CFR §117.5.

According to Blacks Law 6th edition, the definition of Sign is, "to affix one's name to a writing or instrument, for the purpose of authenticating or executing it, or to give it effect as one's act. To make any mark, as upon a document, in token of knowledge, approval acceptance, or obligation." All pleadings in this Court must be signed and are given the force and effect of signature, and so is the pilot signature of fitness for duty. It

carries as much, if not more, weight than Court documents do, for it is a life-or-death matter. The Plaintiff signs a fitness for duty statement making it contractual and an obligation to be truthful. For that signature to be lawful and legal, it must be of the pilot's own volition and based solely upon the pilot's own health decisions affecting the outcome of his medical clearance. No one else can assume that risk, and that explains the reason there are no doctors at every departure gate examining pilots prior to each flight departure. §61.53 satisfies the intent of Congress of the United States as authority given to pilots.

Travelers on aircraft, including members of this Court, deserve nothing less than physically and mentally fit pilots. Neither APA, AA, nor the FAA, or even this Court can assume responsibility for Scott's or the Plaintiff's health decisions. With all due respect, this Court's interpretation, and application of §61.53 blurs, if not obliterates the line between the Judicial and Legislative branch and irresponsibly declares that a pilot's health starts at the flight deck door and is measured by some non-contracting party to aviation activity. Plaintiff disagrees and believes that such an opinion is not only wrong but irresponsible, dangerous, and a threat to the health of aviators, the aviation industry, and the United States of America. This Court's interpretation and opinion does not reflect the intent of Congress or that of the FAA.

The federal government got it right and issued two Security Directives, SD 1544 and 1542, targeting both aircraft and airport operators, and both contained an exemption in paragraph F3 applicable to pilots. What this Court is advocating in its interpretation, is for the Plaintiff to not comply with the exemption in the SDs and intentionally create a deficiency while on duty. The SDs complied with 49 U.S. Code §114 (g)(2) where the authority of the TSA shall not supersede that of the FAA "whether or not during a national emergency." F3 targets pilots and is an affirmation that pilots must meet stringent health standards and that they operate under federal regulations. Pilots must walk through terminals to get to their aircraft, they cannot magically appear at their departure gate,

therefore the exemption for airport operators. This Court overlooked the fact that including such an exemption in a document targeting airport operators reaffirms its target audience - the pilots. AA included these documents in their manual and the Plaintiff estimates that less than 0.5 % of the AA pilots bothered reading or comprehending the meaning of the document. The director of flight, Timothy Raynor, who came from Chicago to conduct the hearing on January 6, 2022, admitted to not knowing, or that he was not required to even read the SDs or order. See Doc. 12 exhibit #2.

Also, on page 35 of Doc. 12 exhibit #2, AA was offered, by the Plaintiff, authority over his FAA medical certificate, and his offer was rejected. That should have been the end of it, but AA and APA continued the punishment and lack of representation respectively. A mandatory policy by AA and a non-opposing position by APA fly in the face of the rule issued by the FAA and the law and violate Public Policy.

The language in §61.53 is not simply prohibitive, it is authoritative, giving the person who holds the medical certificate the authority to make health decisions to meet and maintain the health standards for aircraft operations. In other words, §61.53 turns on the decision made by the pilot, and ***this case turns on the interpretation of this rule***.

In contrast, 14 CFR §107.17, addresses a matter-of-fact condition for which a Small Unmanned Aircraft System pilot must comply with, further supporting the fact that §61.53 is a future looking tool and standards dependent. §107.17 in difference to §61.53 states; "…if he or she knows or has a reason to know that he or she ***has*** a physical or mental condition… that would interfere with the safe operation…"

As stated, APA cannot formulate a position that is unlawful and subsequently deny the Plaintiff representation based on their unlawful interpretation of the rule. APA cannot discharge their duty of fair representation by adopting an unlawful position. The Plaintiff has lived under and applied this rule for the last 38 years, and now for political and financial

reasons, AA and APA are violating the meaning of the rule and this Court's misinterpretation plays right into the hands of AA and APA.

The authority is clearly given to the pilot and under 14 CFR §1.1 definitions, "***Administrator means the Federal Aviation Administrator or any person to whom he has delegated his authority in the matter concerned."*** In this matter, the pilot is the administrator of the rules and regulations, and the pilot is the sole authority in deciding what to eat, drink or how to breath, and this Court's incorrect interpretation of the rule calls for a violation of that authority. Will forcing a pilot to restrict his breathing satisfy this Court's interpretation of §61.53, or will it be the type of food he consumes, or the type of drink he drinks or the type of injection he receives? Where will it stop? Respectfully, again, the Court is incorrect it its interpretation and application of §61.53.

It is important to note that a pilot certificate and the accompanying medical certificate that authorize a pilot to operate aircraft are a right of United States Citizens and are Public Policy. The Act affirms that in Sec. 104. Briefly stated, the power that resides with the People is vested in Congress to create the law, Congress passed The Act in 1958; The Act created the FAA, and the FAA granted the authority to pilots to operate aircraft in the navigable airspace provided they meet the medical standards set by the agency. The authority granted to the pilot is Public Policy and pilots may not subsequently grant that authority over their health to any other entity. Simply put, the responsibility falls squarely on the shoulders of pilots. As stated above, and in other documents, 18 U.S. Code §1001 carries harsh penalties for making false statements related to a pilot's fitness for duty, a statement of the pilot's own volition before every flight.

The disagreement is not over scientific evidence but rather over the authority given to the pilot in making health decisions affecting his medical certification and the safety of passengers and crew, and whether APA has the authority to enter into agreements that invade Public Policy in favor of AA. The law does not support APA or AA entering into

agreements that invade Public Policy. *See United States Court of Appeals for the Second Circuit Docket No. 20-3530-cv.* A non-opposing position by APA is just a fancy way of agreeing with AA's unlawful pilot masking policies which renders APA ineffective and lacking any defense in favor of the Plaintiff. By doing so, APA violates its statutory authority to negotiate for rates of pay, work rules and working conditions and strays outside the confines of the RLA. APA has not only failed to fairly represent the Plaintiff but also stepped outside their statutory confines and protections afforded to it.

The APA and the Court's position are not supported by law or the regulation. The Plaintiff is providing studies that indicate masks don't work, *exhibit 1,* and contrary to mainstream belief, they cause adverse health effects. The point is that for every study the Court is presented with, or that purports masking is effective, the Plaintiff can produce another that rebuts it. In the end, neither AA, APA nor the agency that regulates pilot medical certification and standards, or the individuals who conduct mask studies, are in a position to make statements attesting to the physical condition of any pilot at any time or, more importantly, make contract on behalf of the Plaintiff.

This Court labeled the Plaintiff's interpretation of §61.53 idiosyncratic but neglected the fact the Plaintiff provided close to 160 other pilot declarations stating they agree with the Plaintiff. These are professional pilots who undertake an endeavor fraught with danger, and the public must be thankful for their interpretation of the rule because a pilot's health is a 24/7 affair. Furthermore, new elections at APA demonstrated that the majority of the pilots, who were under duress and threat of termination and who complied with masking and jabbing, supported a new APA president who campaigned against any mandates, and as the Court can see in *exhibit 2*, stated both his opposition to the mandates and disagreement with APA's previous president's political stance. This is evidence enough the Plaintiff is not alone in his position or is idiosyncratic in his interpretation or

understanding of the regulation. The Plaintiff is not "almost certainly incorrect" in the interpretation of the rule, he is right on.

It is very important to note that Honorable Douglas L. Rays presiding over this case recused himself from the Plaintiff's suit against American Airlines. (CV-22-738). In that suit as well as in his complaint against APA on page 14, the Plaintiff painstakingly detailed the haphazard policies of AA and the fact that AA's mask policy required the pilots on the flight deck to use facial masks when a flight attendant entered the flight deck, or during a lavatory break, where the remaining pilot had to wear a mask because of the presence of a flight attendant, conditions that are very dangerous in the case of a decompression or smoke or fire with only a single pilot in the flight deck. The Plaintiff must believe that Honorable Douglas L. Rays read the complaints, which then makes the last sentence in this Court's decision to dismiss the case, Doc. 17, false or incorrect and not supported by fact.

RIGHT TO CONTRACT

49 U.S. Code §42112 states in part under (b) (1) "….and relations for its pilots and copilots who are providing interstate air transportation…" The Plaintiff provides air transportation, and to do so he must sign a contractual agreement with AA for every flight stating he has complied with his responsibility to maintain a valid FAA medical certificate. He also has a contractual agreement with the FAA and the People declaring his fitness and compliance with Public Policies and the regulations set forth in his medical certificate, to provide a safe flight. Making a statement of fitness for duty before every flight is contractual and is also required under 14 CFR §117.5 (d). Neither AA, APA, nor this Court, is in a position to make that statement or assume the risks and responsibilities undertaken by the pilot, nor are they able to strike the contractual agreement with the People. What this Court is in a position to do however, is protect the right of a pilot to contract and make the determination in accordance with the regulations, not in accordance

with some purported scientific consensus. The scientific data supporting safety in aviation overwhelmingly supports unrestricted breathing at all times while operating aircraft and in preparation for such operations, hence the FAA non-regulatory stance on masking. All aviation studies have been and are conducted without any restriction to the breathing apparatus of a pilot.

AA, APA and now this Court, are interfering in the Plaintiff's contractual obligation with the People to provide safe transportation. By signing fit for duty prior to every flight, the Plaintiff is executing a contractual agreement with the People and this Court is infringing on the Plaintiff's constitutional right to contract. In the event of a calamity, this Court is not in a position to take full responsibility for any action taken by the Plaintiff if he were to follow the Court's interpretation of §61.53. The Plaintiff does not believe this Court is in a position to do so.

The above clarification by the Plaintiff lays the foundation for why APA's position is unlawful, invades Public Policy, and is outside their statutory authority, and must be considered as such by this Court. There could not possibly, nor plausibly be a disagreement in the interpretation of the law between the Plaintiff and APA, for APA's position was and is unlawful. The very core of this Courts rational in support of the order is founded on the wrong interpretation of the rule of law that must be reversed on reconsideration.

APA AND PUBLIC POLICY

Union contracts cannot supersede Public Policy. In the United States, Public Policy refers to the principles and values that are recognized by the government as being in the best interest of the public as a whole. Public Policy is expressed through laws, regulations, and judicial decisions, and it can affect a wide range or areas, including labor relations. A pilot's medical certificate is Public Policy and may not be encroached upon by AA, APA, or this Court in any way. As explained above, §61.53 is directed at pilots who hold a medical certificate and only pilots can make health decisions affecting said certificate. APA

may not supersede Public Policy, nor can it make any agreements with AA that supersede Public Policy. See cited Second Circuit Court of Appeals case above. APA did not only adopt a non-opposing position to AA's policy of masking pilots, but also agreed with and allowed AA to use the disciplinary, grievance and appeal processes of the JCBA that are applicable to disputes specifically arising from the terms of the contract. Masking is not a term in the JCBA. By doing so, APA made agreement with AA that invaded Public Policy and the Plaintiff's right.

While unions and employers are free to negotiate and enter into collective bargaining agreements that govern their relationship, those agreements cannot violate Public Policy. If a union contract contains provisions that conflict with or undermine Public Policy, those provisions are unenforceable, and this Court, under the Public Policy Doctrine, must not allow the enforcement of the agreement between AA and APA no matter their interpretation, that invade Public Policy, to take shape in any way and under any circumstance. APA cannot take a non-opposing position to AA's masking policy of pilots no matter the reason and by doing so, APA not only violated their duty and failed to fairly represent the Plaintiff but also acted in bad faith, outside its statutory authority, and violated his rights under The Act and subjected him to the grievance process jeopardizing his career at AA.

APA NOT INTENT ON REPRESENTING PLAINTIFF

In addition to APA's Public Policy violation, recent communications exchange between the Plaintiff and the new APA president, Captain Ed Sicher, *exhibit 2,* highlight two very important aspects of the case 1) The majority of the pilots opposed the mandates of masking and jabbing indicating a split between the pilots and their legal department, and 2) Captain Sicher's statement evidencing the very reason APA refused to represent the Plaintiff - his "troubling" non-membership status.

The majority of the pilots' opposition to the mandates speaks volumes and is explained by the fact that a new APA president who opposes the mandates and campaigned against them was elected by the majority of AA pilots. That settles the question of where the majority of AA pilots stand on the mandates. Logic dictates that APA would represent the majority of the pilots, but in the Plaintiff's case, in addition to an unlawful agreement with AA, that also did not happen for a specific and different reason - his "troubling" non-membership status.

If there was ever a chance that APA would come around and agree with the Plaintiff on the interpretation of §61.53, the fact that the Plaintiff's non-member status is "troubling", certainly took APA down the no representation road.

The new revelation is in Captain Sicher words. He did not merely make the statement the Plaintiff's non-membership is "troubling" without foundation. It is implausible the fact that the Plaintiff's non-member status is "troubling" to only Captain Sicher, the president of the union, but to the majority of union members, and especially to David Duncan and Brian Ellis, the two Phoenix pilot representatives who refused to represent the Plaintiff during the grievance on February 10, 2022. In the world of unions, a matter such as this permeates the ranks of the membership, and that gives credence and lays the foundation to APA's refusal to represent the Plaintiff. APA simply did not want to represent a pilot with "troubling" non-member status.

The National Labor Relations Board and the law state that a union has a duty to represent all employees, whether members of the union or not, fairly, in good faith, and without discrimination. It is bad faith, unfair, and discriminatory to not represent a non-member of the union and is grounds for a DFR claim.

As the record shows, in an email to Baskaran, the Plaintiff affirmatively asked for APA representation and for the full force of APA. While APA did not agree with Plaintiff's desired defense and chose an unlawful agreement with AA, APA never offered any other

argument it intended on using for a defense, despite the Plaintiff repeatedly asking for one. APA did not have any other plans. In addition to the 'troubling" non-membership status, APA had already made an unlawful agreement with AA that invaded Public Policy. The only plan that Baskaran advanced was that the Plaintiff was wearing a mask but lowered it for identification, which the Plaintiff rejected for it was not true and correct. The pilot has a higher stake in the outcome of a proceeding than the union does, therefore a well-defined defense is essential. APA simply refused to provide the "troubling" non-member Plaintiff with a plan of defense. Instead, APA did not intend on having any defense to provide, and simply delayed action as it drew closer to the hearing date of January 6, 2022, and then gave the Plaintiff an ultimatum for a decision that is void of any plans. The only plan APA had was to not represent the Plaintiff, a non-member of the union, whose status with the union is "troubling."

The evidence in the email exchange (prior to grievance exhibit) with Baskaran shows clearly that Baskaran stated that the Plaintiff will have APA representation for the grievance hearing on February 10, 2022. However, on the day of the hearing, representative David Duncan refused to represent the Plaintiff and confusion ensued.

Upon review of the transcript in the exhibit titled grievance, it is evident that David Duncan refused to represent the Plaintiff, and Baskaran jumped in to attempt a recovery of his refusal to represent the Plaintiff. This was not only because of APA's position over masking, but also because of the fact there was never an intent on representing the non-member Plaintiff. In part, the grievance was to protest the fact AA did not afford the Plaintiff a reschedule of the hearing on January 6, 2022, in accordance with the JCBA, and the Plaintiff was to argue his disagreement with AA over masking separately, but Duncan refused to provide a defense for the violation of the rescheduling process.

In addition, as stated above, considering pilot medical certificates are Public Policy, the statement made by Baskaran that masking does not affect Plaintiff's rights in any way has no legal foundation.

Recently the Plaintiff asked for the union's position regarding AA's actions. He received an email in which APA stated it is their position AA is weaponizing the JCBA Section 20 and 21. *Exhibit 3.* AA did not just decide to weaponize the JCBA on a certain date, the Plaintiff alleges the weaponization of Sections 20 and 21 by AA is a direct result of APA's refusal to represent the Plaintiff, a non-member whose status is "troubling", and allowing AA unfettered application of sections of the JCBA against the Plaintiff. APA cannot draw a demarcating line for events arising out of the Plaintiff position of disagreement over AA and APA's position relating to health decisions he makes; it is all related and connected through various actions by AA and APA. APA has harmed the Plaintiff.

It is rare and maybe never that a union would state in writing a non-member status of an individual is "troubling", and yet here we are with the president of the union, Captain Ed Sicher, spelling it out clearly for the Court to read. APA has failed its duty of fair representation by refusing to represent a non-member pilot in violation of the NLRB rules and regulations. This Court must reverse and find that APA acted outside its statutory authority and is in violation of its DFR.

IN CONCLUSION

A pilot's medical clearance by the FAA is a statement of health and Public Policy. Accordingly, only the pilot has the authority to make health decisions affecting his medical certification and subsequently contract with the airline, the FAA, and the People to provide transportation. Neither AA, APA, nor this Court, or any public health official, may dictate to the pilot any medical procedure in the conduct of his duty.

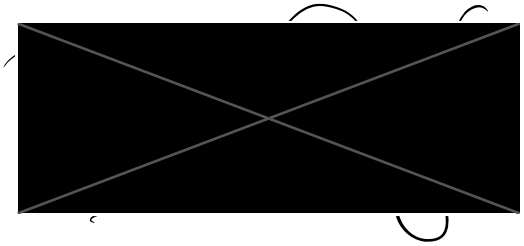
AA and APA may not enter into agreements superseding Public Policy. By entering into such agreement, APA acted in bad faith and failed to represent the Plaintiff fairly, violating its duty of fair representation.

Additionally, APA refused to represent the Plaintiff, because of his "troubling" non-member status in violation of the LMRDA.

This Court rendered a decision based on an "almost certainly incorrect" interpretation of the rule of law by the Plaintiff, did not provide any law or case law supporting its interpretation and understanding beyond the shadow of doubt, and by doing so, is depriving the Plaintiff of his constitutional right to a trial by jury.

For all the reasons above, the Plaintiff respectfully asks the court to reconsider and reverse its opinion, rule in the Plaintiff's favor in his DFR claim against APA and schedule this case for trial by jury.

Dated this 9th day of April 2023.



Bahig Saliba

[redacted]

[redacted]

[redacted]

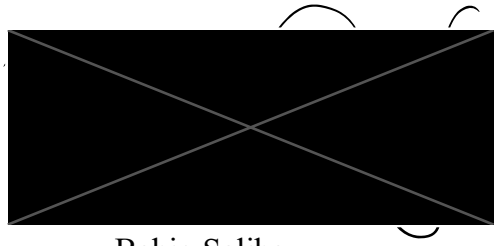
Email: medoverlook@protonmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this day April 9th, 2023, I electronically transmitted the forgoing with the Clerk of the court using the CM/ECF system for filing, with copies submitted electronically to the following recipient:

David l. O'Daniel
GORDON REES SCULLY
MANSUKHANI, LLP
Two North Central Avenue Suite 2200
Phoenix, AZ 85004
602-794-2472
602-265-4716 (fax)
dodaniel@grsm.com

Joshua Shiffrin
Bredhoff & Kaiser, P.L.L.C.
805 15th Street N.W., Suite 1000
Washington, DC 20005
202-842-2600
202-842-1888 (fax)
jshiffrin@bredhoff.com



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