

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

APPEAL NO. 08-12548-AA
DISTRICT COURT NO. 8:07-CR-342-T-23MAP

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

vs.

YOUSSEF SAMIR MEGAHED,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PRINCIPAL BRIEF OF UNITED STATES OF AMERICA
CRIMINAL CASE

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1 and 26.1-3, the undersigned hereby certifies that the following persons and/or entities have an interest in the outcome of this case:

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5. Merryday, Steven D., United States District Judge;
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¹This person is being added to the United States' initial Certificate of Interested Persons and Corporate Disclosure Statement.

**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

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STATEMENT REGARDING ORAL ARGUMENT

The United States requests oral argument.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

The United States certifies that this brief contains 9218 words.

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STATEMENT OF JURISDICTION

This is an appeal from the district court's May 2, 2008, oral orders excluding evidence in a criminal case. See Docs. 231, 232, 251. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Attorney has certified that this appeal is not taken for purpose of delay and that the excluded evidence is a substantial proof of a fact material to the proceeding. See Doc. 231. The United States filed its notice of appeal on May 5, 2008. Doc. 231. This notice of appeal was timely. See Fed. R. App. P. 4(b)(1)(B)(i). This Court has jurisdiction to review the district court's orders pursuant to 18 U.S.C. § 3731.

STATEMENT OF THE ISSUES

- I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING THE EVIDENCE FOUND ON MEGAHEDE'S COMPUTER AS A SANCTION, BOTH BECAUSE THERE WAS NO DISCOVERY VIOLATION AND BECAUSE THE EXTREME SANCTION OF EXCLUSION WAS UNWARRANTED.
- II. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING IN PART MEGAHEDE'S THIRD MOTION IN LIMINE.
- III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING IN PART MEGAHEDE'S FIRST MOTION IN LIMINE.

STATEMENT OF THE CASE

A. COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

In August 2007, a grand jury in the Middle District of Florida returned a one-count indictment charging Youssef Samir Megahed and Ahmed Abdellatif Sherif Mohamed with knowingly transporting explosive materials without a federal license, in violation of 18 U.S.C. §§ 842(a)(3)(A) and 2. Doc. 1. In April 2008, the grand jury returned a superseding indictment, which again charged Megahed and Mohamed with violating sections 842(a)(3)(A) and 2 (count three), charged them with knowingly possessing an unregistered destructive device, in violation of 26 U.S.C. §§ 5861(d) and 5871 and 18 U.S.C. § 2 (count four), and charged Mohamed alone with several other counts. Doc. 198. Mohamed has since pled guilty to count one, which charged him with attempting to provide material support to terrorists, in violation of 18 U.S.C. §§ 2339A and 2. Docs. 268, 283.

In April 2008, Megahed filed three motions in limine to exclude evidence. Docs. 195, 202, 219. On April 28, 2008, he filed a motion for sanctions based on an asserted discovery violation, doc. 217, as well as a motion to suppress evidence, doc. 216. The United States filed responses to those motions. Docs. 218, 223, 226, 229, 230. On May 2, 2008, following a hearing, the district court

granted Megahed's motion for sanctions, granted his first motion in limine, and granted in part his third motion in limine. Docs. 232, 251. The court denied the second motion in limine and denied the suppression motion as moot. Doc. 232. This interlocutory appeal followed. Doc. 231.

B. STATEMENT OF THE FACTS

On the afternoon of August 4, 2007, a sheriff's deputy in South Carolina stopped Mohamed and Megahed's car as they were driving north from Tampa. See Docs. 61, 80, 109. Megahed's brother owned the car, although Mohamed was driving. Doc. 61 at 6. As the deputy approached the car, Megahed unplugged a set of power cords from a laptop computer on his lap and attempted to stow the computer in the rear seat. Doc. 61 at 7. Both men gave inconsistent and somewhat illogical explanations of where they had been and where they were going. See Doc. 150 at 4-5.

Mohamed consented to a search of the car. Doc. 109 at 3. Inside the car the deputy found a box of ammunition, doc. 109 at 3, a plastic container containing two pieces of a potassium nitrate and sugar mixture, doc. 97 at 7, and cigarette lighters, doc. 97 at 8.

Mohamed told the deputy that some fuses, fireworks, and "homemade rockets" were in the car's trunk. Doc. 80 at 11; Doc. 109 at 3; Doc. 150 at 5. Inside the trunk, deputies found a quantity of safety fuse, an electric drill, several

sections of PVC piping that contained an explosive mixture of potassium nitrate, Karo syrup, and cat litter, and a canister containing several gallons of gasoline. Doc. 37 at 3; Doc. 61 at 6; Doc. 97 at 7-8; Doc. 109 at 3-4. Both “potassium nitrate explosive mixtures” and “safety fuse” are listed as explosives by the Attorney General and thus are encompassed by 18 U.S.C. § 841(d). See Doc. 61 at 6; Doc. 97 at 5-6. Furthermore, the combination of the PVC pipe sections, the safety fuse, the cigarette lighters, and the gas canister “could be readily assembled into an improvised incendiary device.” Doc. 97 at 8. Neither defendant had received or applied for a federal license or permit to transport the explosives or registered a destructive device of any kind with ATF. Doc. 69 at 5.

Megahed denied knowledge of the potassium nitrate or other unusual items in the car and its trunk. Doc. 61 at 6. In a patrol-car conversation with Mohamed, however, Megahed discussed the materials’ possible explosion and the gas canister. Doc. 60 at 7. (Further, his fingerprint was on the canister. Doc. 61 at 7.)

Mohamed said that the PVC pipes were “sugar rockets” and insisted that the rockets would merely fire a few feet into the air. See Docs. 71 at 7, 80, 109. Subsequently, Mohamed said that he had made the rockets, that they would not explode and were not dangerous, and that he believed that they were legal. See Docs. 71 at 7, 80, 109. He said that he had been on the way to find a vacant

location to test the rockets and that Megahed had had nothing to do with them.

See Docs. 71 at 7, 80, 109.

In the early morning hours of the day of the arrests, at about 4:00 a.m., Megahed and Mohamed had stopped at an Ocala, Florida, Wal-Mart, where Megahed had inquired into buying certain high-powered rifles. Doc. 61 at 5. Later that morning, they had stopped at a Wal-Mart in Jacksonville, Florida, where they had bought a .30-caliber rifle cleaning kit. Id. During these stops, Mohamed had bought a power converter (which had been powering the laptop at the time of the stop), an electric drill, and a GPS device. Doc. 61 at 6.

Mohamed consented to a search of the laptop, which belonged to him. Doc. 61 at 7. The laptop's hard drive contained a folder entitled "Bomb Shock," which contained numerous files and information relating to explosives, the ingredients for explosives, the Middle East conflict, Jihadist organizations, and acts of terrorism. Doc. 37 at 5. Among its contents was a "how to" video that Mohamed himself had created and uploaded just days earlier in which he explained and demonstrated to others how to make an explosives detonator out of remote-control toys. Doc. 37 at 4-5. (Mohamed has pled guilty to count one, which charged him with attempting to provide material support to terrorists based on those acts. Docs. 69, 268, 283.) In that video, Mohamed states that, instead of "carry[ing] out martyrdom operations," the "brethren could "use the explosion tools from distance

and preserve his life, God willing, the blessed and exalted, for the real battles.”

Doc. 69 at 3. He further mentions that the toy car has “the same circuit [as] the toy boat.” Id. After the arrests, agents found at Megahed’s house a remote-control toy boat, still in its box, that was capable of being similarly modified. Doc. 61 at 8; Doc. 69 at 4-5.

At about 4:41 p.m. on August 4, shortly before the 5:00 p.m. traffic stop, someone had used the laptop to access and play a 44-minute video related to the use and firing of Qassam rockets in the Middle East. See Doc. 61 at 6-7; Doc. 251 at 16. Qassam rockets are improvised, almost homemade, rockets that insurgents use in the Middle East. Doc. 251 at 17. They usually use a propellant mixture of potassium nitrate and sugar, similar to the ingredients found in the trunk of the defendants’ car. Id. Other sites recently visited on Mohamed’s laptop were “files with information on Hamas fighters, videos of martyrs and discussions of martyrdom, instructional information about the M-16 rifle,” and Mohamed’s “how to” remote control detonator video. Doc. 61 at 7.

Megahed is a mechanical engineering student at the University of South Florida. Doc. 95 at 3-4. Two days after his August 4 arrest, his father consented to a search of the Megahed residence. See Doc. 230. FBI special agents discovered three computers at the Megahed home: two laptops and one desktop. See id. Megahed’s father consented specifically to a search of the computers. See

id. The FBI created mirror images of the computer hard drives and returned the computers to Megahed's father two days later, on August 8. Doc. 223 at 2. On November 15, 2007, the United States gave Megahed's attorney copies of the entire mirror image of the computer hard drives. Id.

The magistrate judge directed the United States to "meet all its Rule 16(a) discovery obligations by January 9, 2008." Doc. 73; see also Doc. 59 (original order establishing discovery deadlines).

The desktop computer, to which all family members, including Megahed, apparently had access, contained thousands of files. See Doc. 223. Beginning in August 2007, that computer and the several others seized in connection with this investigation were analyzed using a forensic software program. Doc. 250 at 20. That analysis broke down the files into searchable categories. Id. Agents then reviewed those files, without reading them, in order to "tag" those files that might be pertinent. Doc. 250 at 21. Agents made a set of 16 discs that contained all of these potentially pertinent files, some but not all of which actually had evidentiary value. Doc. 250 at 22. Agents then began reviewing those discs but were unable to read some of those tagged files, including those video files in the "Zipat" folder of the Megahed home computer. Doc. 223; Doc. 250 at 24. (The FBI computer software did not recognize part of the file path on some of the files. Id.) A technician fixed the problem and, on April 21, 2008, "the videos themselves were

first observed by the agents.” Doc. 250 at 24. Agents advised the prosecutors of the videos’ existence on about April 22. Doc. 223. On April 23, the prosecutors advised defense counsel of their discovery of those nine video files on Megahed’s home computer and, on April 24, turned over copies of those video files and copies of all document files in the Zipat folder. Doc. 223.

The nine video-recordings in the Zipat folder depict the use of Qassam rockets and other weapons and ordnance in the Middle East. Doc. 223. Most of the videos bear the logo of the “Al Rashedeen Army” and extol attacks on coalition forces. Doc. 223. Some depict the use and firing of Qassam rockets. Doc. 223.

On April 28, 2008, Megahed filed a “Motion for Sanctions Based on Government’s Violation of Court’s Pretrial Order.” Doc. 217. He alleged that the United States had failed to provide defense counsel with copies of the video files from the Zipat folder found on his home computer before the January 9, 2008, discovery deadline and sought the files’ exclusion as a sanction. Doc. 217. He also suggested that the United States had misled him into believing that there was nothing of evidentiary value on his home computer. Doc. 217.

In his Motion In Limine to Exclude Evidence, Megahed argued that a wide range of items, including any data from Mohamed’s laptop, was either irrelevant or unduly prejudicial. Doc. 195. In the Third Motion in Limine, he sought to

exclude the contents of the Zipat folder and any other material from his home computer's hard drive as either irrelevant or unduly prejudicial. Doc. 219.

With a May 5, 2008, trial date looming, the district court conducted a hearing on the various motions on May 1 and 2. Docs. 227, 232. The United States explained how the computer's contents had been analyzed and provided to Megahed, as outlined above, and argued that no discovery violation had occurred. Doc. 250 at 18-36. The United States further argued that, in any event, exclusion of evidence was an extreme, unwarranted sanction and suggested that a continuance of the trial would be a more appropriate remedy, in which case the court could revisit whether Megahed should continue to be detained. Doc. 250 at 34-38. The court stated that, if the trial were to be continued, "the government can assume we will have a prompt hearing on the question of whether to release this defendant pending trial. There is going to have to be some strong reason not to do so; i]t's not certain but it's nigh onto it." Doc. 250 at 54.

The district court did not review any of the disputed evidence during the hearing that day. See Doc. 250. That afternoon, however, the court reviewed the contents of Megahed's Zipat folder. See Doc. 251 at 3-4. (Although neither the parties nor the court initially made the videos exhibits for the record, the court has supplemented the record to include a disc containing those videos.)

The following day, the district court reconvened the hearing, and the parties addressed the other motions as well. Doc. 251. The court then stated with respect to the discovery issue that the United States had timely provided Megahed the mirror image of the contents of his home computer but had not been aware until April 23 “of the availability for viewing” of the Zipat videos. Doc. 251 at 63. The court then said:

It is difficult entirely to understand the delay co-existing with due diligence and the odd coincidence of the discovery on the same day as the denial of a continuance. But, on the other hand, it is certainly not clear, the record is not factually developed enough to say with certainty that there was some inexcusable negligence or unjustified deferral of this search. If I had to balance today, I’d say it’s harder to justify the delay.

I guess another way to say it is the reason it wasn’t found is it wasn’t looked for timely. And maybe there were and maybe there weren’t flags that should have suggested that inquiry. But when time got short and energy increased, they were found promptly.

Doc. 251 at 63-64.

The district court then found a “potential for prejudice” because Megahed might “because of the shortness of time [be] unable to mount a thorough evaluation.” Doc. 251 at 64. The court concluded, without explanation, that it is “not safely said here” that Megahed knew what was on his own computer. Doc. 251 at 64. The court concluded, “The feasibility of curing this prejudice by the granting of a continuance is low,” noting that Megahed has “been detained for some time” and that a continuance “means at least three more months of detention,

assuming the status quo.” Doc. 251 at 65. The court did not address the United States’ invitation from the day before that, if a continuance were required, the court revisit whether Megahed should be detained, see Doc. 250 at 34-38. The court concluded:

So without suggesting that the United States is guilty of any intentional or malicious conduct, I think given the factors with respect to these videos and the accompanying so-called newly discovered matter, I would grant this motion considering the length of time the indictment has pended, the detention of the defendant, the unavailability of a sufficient but brief continuance and the unusual and not readily accountable delay in discovery of the newly revealed matter.

Doc. 251 at 65-66.

The district court also granted in part Megahed’s Motion In Limine. The court stated that it would admit the contents of Mohamed’s laptop only “to the extent that the predicate is established that [Megahed] accessed the material essentially simultaneously or imm[i]nently preceding the episode in South Carolina” and that the material “is so congruous or essentially connected with the contraband or pertinent substance in the trunk of the car as to suggest that [Megahed] knowing one would know of the other or knowing the attributes of one would—or understanding the contents would understand the attributes of the other.” Doc. 251 at 66-67. The court noted, however, that it “may be necessary for [the court] to view it at or about the time it’s proffered so that based on the then existing state of the evidence and representations of counsel as to any

evidence to come that [the court] can determine it.” Doc. 251 at 67. The court also excluded the “so-called how to video” (i.e., the remote-control detonator video), stating, “[T]his is not the right trial for that video based on any explanation I’ve heard so far.” Doc. 251 at 68-69.

The district court also largely granted Megahed’s Third Motion In Limine, directed to the contents of Megahed’s home computer. The court ruled that it “would be inclined to exclude it, that is, the videos and the balance . . . of the newly revealed material as well.” Doc. 251 at 68. The court concluded that the videos would be “at least in some respect cumulative and repetitive” of the video on Mohamed’s laptop that the court was likely to admit and “accordingly less probative and rather sharply prejudicial.” Id. The court also stated, “[I]f I were going to admit it, having seen it, . . . I probably wouldn’t allow all nine of them but maybe at the most one if there were respect in which they were distinctive.” Id.

The prosecutor then reiterated to the court the importance of the video evidence found on Megahed’s home computer, the circumstantial evidence showing that it was, in fact, Megahed’s own videos in the Zipat folder, and the availability of a continuance as an alternative remedy. Doc. 251 at 72-75, 76-77.

The district court responded:

I have someone, a young man, detained by my hand, charges that are serious and we have the spirit and intent of a speedy trial rule and I have evidence which appears to me not to be at the heart of the Government’s case and appears to me to be as I’ve said before

somewhat cumulative and secondary in a case where somebody is – well, in a case with very specific charges with very few elements, it’s hard to see why we shouldn’t say enough is enough and go with what we have.

Doc. 251 at 78-79.

The United States filed a notice of appeal, Doc. 237, thereby delaying the impending trial. That same day, the district court released Megahed on bond, without opposition. Docs. 235, 239, 241.

C. STATEMENT OF THE STANDARD OR SCOPE OF REVIEW

I. This Court reviews for abuse of discretion the district court’s discovery rulings, including the sanctions imposed by the district court for discovery violations. See United States v. Smalley, 754 F.2d 944 (11th Cir. 1985). The district court should fashion “the least severe sanction that will accomplish the desired result—prompt and full compliance with the court’s discovery orders.” United States v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir. 1985).

II. and III. This Court reviews for abuse of discretion the district court’s evidentiary rulings. United States v. King, 713 F.2d 627, 631 (11th Cir. 1983). Although the district court has broad discretion in making a Fed. R. Evid. 403 determination, that discretion “depends upon a superior ability to view witnesses and assess the impact of evidence.” King, 713 F.2d at 631. Thus, “the appellate court is freer to perform the Rule 403 balancing ab initio when the issue arises in limine.” Id. Indeed, this Court can affirm the district court’s pretrial exclusion of

testimony “only if [this Court finds] that there exists no possible trial scenario in which the probative value of this testimony would not be ‘substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” United States v. Mitchell, 954 F.2d 663, 666 (11th Cir. 1992) (quoting Fed. R. Evid. 403).

SUMMARY OF THE ARGUMENT

I. The district court abused its discretion by concluding that the United States had committed a discovery violation and by imposing the extreme sanction of exclusion as a result. In this case, the disputed evidence was Megahed's own computer file, which derived from Megahed's own home computer. Moreover, the United States returned the computer to him within two days of its seizure, provided Megahed's counsel with a "mirror-image" of the copied hard drive months before the discovery deadline, and provided a copy of the specific folder immediately upon discovering it. Under these circumstances, no discovery violation occurred. Even if there had been a discovery violation, however, exclusion of the evidence was too severe a sanction. This evidence is important to establishing Megahed's intent, and the jury should have an opportunity to see it. Moreover, other, less severe remedies were available. Indeed, one of them, a continuance of the trial to enable Megahed to review the evidence coupled with Megahed's release, has taken place by virtue of this appeal.

II. The district court abused its discretion by excluding the videos depicting the use of explosives, which agents found on Megahed's home computer. That evidence was extremely relevant to establishing Megahed's intent, and the videos' probative value would not be eliminated by the court's possible admission of an arguably similar video found on Mohamed's laptop. Moreover,

the court's decision to exclude the evidence preliminarily, without the context provided by the trial evidence itself, constituted an abuse of discretion.

III. The district court also abused its discretion by excluding evidence found on Mohamed's laptop computer. That evidence—both the Qassam rocket video that had been accessed at about the time of the traffic stop and Mohamed's “how to” video that showed how a remote-control toy could be used to create an explosive detonator—was extremely relevant to establishing Megahed's intent. The court abused its discretion in excluding this evidence at that preliminary stage.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY EXCLUDING THE EVIDENCE FOUND ON MEGAHEH'S COMPUTER AS A SANCTION, BOTH BECAUSE THERE WAS NO DISCOVERY VIOLATION AND BECAUSE THE EXTREME SANCTION OF EXCLUSION WAS UNWARRANTED.

The district court abused its discretion both by concluding that the United States had violated the discovery order and by fashioning a remedy of excluding important, relevant evidence.

A. THE UNITED STATES DID NOT COMMIT A DISCOVERY VIOLATION.

The magistrate judge directed the United States to disclose to Megahed by January 9, 2008, the items identified in Fed. R. Crim. P. 16(a)(1)(A)-(E), that is, all written, recorded, or oral statements made by the defendant; the defendant's prior record; items that are material to the preparation for the defense, that were obtained from or belong to the defendant, or that the United States intends to use in its case-in-chief; as well as test results or reports and information regarding expert testimony. Docs. 59, 73; see Fed. R. Crim. P. 16(a)(1). Megahed claimed that the United States did not timely produce the video contents of a Zipat folder

found on the hard drive of Megahed's own home computer, and the district court has excluded that evidence as a discovery sanction.

No discovery violation occurred here. The United States seized that computer from Megahed's home in August 2007 and returned it unscathed almost immediately, just two days later. Doc. 223 at 2. Moreover, the United States made a mirror copy of the computer's hard drive during those two days, and it provided Megahed a copy of that on November 15, 2007. Id. Both of these productions of Megahed's own items occurred well before the discovery deadline and months before trial. See Doc. 73. The United States later provided Megahed a copy of the complained-of Zipat folder itself immediately upon discovering the videos in April 2008, as the district court found. Docs. 223, 251.

Although the United States did not separately provide within the discovery time frame the specific folder from Megahed's computer that the United States later discovered and determined was material, after the United States had given Megahed a copy of the computer's entire hard drive, the United States had no Rule 16 obligation to winnow out the critical portions of Megahed's documents and alert Megahed to their evidentiary value, particularly given that the documents were Megahed's. Cf. United States v. White, 846 F.2d 678, 692 (11th Cir. 1988) ("In cases involving Brady material, this Court has held that the Government does not violate Rule 16 if it fails to provide the defendant with discovery material that

the defendant could have obtained as easily as the Government.”); United States v. Freedman, 688 F.2d 1364 (11th Cir. 1982) (holding that district court had abused its discretion in ordering government to make copies of discovery documents for defendant; Rule 16 only gives defendants access to documents).

Indeed, the district court concluded that the United States’s return of the entire computer on August 8, 2007, and again in mirror-image form on November 15, 2007, could, “[v]iewed in at least one vantage,” indicate that the United States “was compliant” with Rule 16. Doc. 251 at 19. Moreover, the court admitted that the record was not “developed enough” and it was “certainly not clear” that there was “some inexcusable negligence or unjustified deferral” of the search for the relevant computer files on the part of the United States or its law enforcement client agencies. Doc. 251 at 63.

The district court’s statements notwithstanding, it decided to grant Megahed relief based on the “potential for prejudice” to him if the trial were to be continued. Doc. 251 at 64. The court relied on the length of time that the case had been pending, the court’s inability to try the case before August 2008 if the trial were to be continued, Megahed’s ongoing detention, and the “unusual and not readily accountable delay in discovery.” Doc. 251 at 66. The court based its decision on what it called the “spirit and intent of a speedy trial rule” and its view

that the evidence was not “at the heart of the Government’s case.” Doc. 251 at 78.

The district court’s primary error here was conflating that threshold question of whether, in fact, there had been a discovery violation with the subsidiary question of whether Megahed had been prejudiced as a result of one. As is explained above, no discovery violation occurred here. The court, however, focused on the potential prejudice to Megahed arising from his detention. See, e.g., Doc. 251 at 64. That concern led to the error here, and, as we explain below, also led to the unwarranted sanction imposed.²

²Megahed further suggested that the prosecutor’s failure to respond to his lawyer’s letter asking about further discovery suggested to him that the United States would use no further evidence from the Megahed computer. See Doc. 217 at 9. That misunderstanding, however, is not a discovery violation, i.e., a failure to provide discoverable items. Moreover, the letter, which documented a discovery conference between counsel in December, 2007, sought confirmation that, “at the time of the meeting,” there were only one or two unrelated items of evidentiary value on the Megahed home computers. Doc. 217 (Attachment A); Doc. 250 at 11. At that time, the Megahed computers still were being analyzed, and the prosecution had not yet learned of anything else of evidentiary value, including the Zipat folder’s contents. See Doc. 250 at 21, 27-28. In any event,

**B. THE DISTRICT COURT ABUSED ITS DISCRETION BY
EXCLUDING THE EVIDENCE AS A SANCTION.**

The district court acknowledged that the record was not “developed enough” and that it was “certainly not clear” that there was “some inexcusable negligence or unjustified deferral” of the search for the relevant computer files on the part of the United States or its law enforcement client agencies. Doc. 251 at 63. As mentioned above, the court did not find the United States guilty of “intentional or malicious conduct,” *id.* at 65, and acknowledged that the United States’s return of Megahed’s computer and its mirror image could, “[v]iewed in at least one vantage,” indicate that the United States “was compliant” with Rule 16, *id.* at 19.

Its statements notwithstanding, the district court decided to grant relief to Megahed based on the “potential for prejudice” to him in continuing the trial. Doc. 251 at 64. The court relied on the length of time that the case had been

even if the misunderstanding could be characterized as creating a discovery violation, it certainly does not rise to a level warranting exclusion as a sanction, particularly given the district court’s finding that the prosecutors were not “guilty of any intentional or malicious conduct.” Doc. 251 at 65. The sanctions issue as a whole is addressed below.

pending, the court's inability to try the case before August 2008 if the court continued the trial, Megahed's incarceration, and the "unusual and not readily accountable delay in discovery" as reasons for excluding the evidence. Doc. 251 at 66. Although the United States had agreed to a continuance to allow Megahed time to evaluate the computer files and had not opposed Megahed's release, doc. 250 at 34-38, the court rejected that offer implicitly, relying instead on what it called the "spirit and intent of a speedy trial rule" in excluding evidence that it did not view as being "at the heart of the Government's case," *id.* at 78.

Notwithstanding its broad discretion over discovery violations, the district court should fashion "the least severe sanction that will accomplish the desired result—prompt and full compliance with the court's discovery orders." United States v. Euceda-Hernandez, 768 F.2d 1307, 1312 (11th Cir. 1985). The "exclusion of relevant evidence is an extreme sanction" for a discovery violation. United States v. Perez, 960 F.2d 1569, 1573 (11th Cir. 1992). Indeed, it is the function of the court to hear all relevant evidence in an attempt to reach a truthful and reliable verdict. United States v. Burkhalter, 735 F.2d 1327 (11th Cir. 1984). Therefore, a court abuses its discretion by excluding relevant evidence if another, less severe sanction could have been imposed. United States v. Sarcinelli, 667 F.2d 5 (5th Cir. Unit B 1982). As this Court has explained, "By suppressing the government's evidence rather than granting a continuance or recess, a trial judge

may achieve a speedier resolution to a criminal case and reduce his docket, but he does so at the expense of sacrificing the fair administration of justice and the accurate determination of guilt and innocence.” Euceda-Hernandez, 768 F.2d at 1312.

Among the factors the district court must weigh are the reasons for the delay in providing the required discovery, the extent of prejudice, if any, that the defendant has suffered because of the delay, and the feasibility of curing any prejudice by granting a continuance. Burkhalter, 735 F.2d at 1329-30. Here, the late discovery of the contents of Megahed’s Zipat folder did not result from dilatory practices or delay on the part of the United States. The investigators’ review of the material had been continuous and ongoing since August 2007, and only through use of an alternative computer methodology were they able to identify the highly relevant evidence in the folder in April 2008. See Doc. 213; Doc. 250 at 20-25.

Moreover, Megahed was not unduly prejudiced by the delay. For one thing, the computer folder at issue was his, and it was on his home computer. That computer had been returned to him almost immediately after its seizure, months earlier. See United States v. Chestang, 849 F.2d 528, 532 (11th Cir. 1988) (no prejudice to defense from Rule 16 violation because defense already knew substance of nondelivered materials); cf. EEOC v. General Dynamics Corp., 999

F.2d 113, 118-19 (5th Cir. 1993) (court abused its discretion by imposing extreme sanction of dismissal of claim for EEOC's discovery violation in part because employer could have discovered information by analyzing its own database). Thus, even if a technical discovery violation occurred, Megahed suffered no prejudice as a result. Indeed, given that the folder was Megahed's, any prejudice to him had derived not from his late discovery that the videos existed but from his dashed hope that his videos had escaped detection by the FBI. (As Megahed's lawyer explained, "When they had searched Mr. Megahed's family computers, they had not found [the video files]. We thought that was a significant issue which we intend to introduce at trial." Doc. 250 at 12.) That does not provide a legitimate basis for excluding the videos, however.³

Furthermore, other, less drastic sanctions were available, namely, a continuance of the trial to enable Megahed to evaluate the videos, along with, if warranted, a concomitant release of Megahed from pretrial detention. (That, indeed, has been the effective result of this interlocutory appeal, because Megahed

³The district court stated, without explanation, that it is "not safely said here" that Megahed knew what was on his own computer. Doc. 251 at 64. This statement may have been based on the court's misconception that the Zipat folder might not be Megahed's. See Doc. 251 at 74-75. This issue is addressed at pages 30-31 below.

was released, the trial has been stayed, and Megahed has had ample opportunity to evaluate that evidence.) As the prosecutor explained when he suggested that alternative remedy, a continuance “would also possibly implicate the need to review the Court’s previous decision with respect to detention and we recognize that.” Doc. 251 at 71-74.

The district court, however, chose not to fashion “the least severe sanction that w[ould] accomplish the desired result,” Euceda-Hernandez, 768 F.2d at 1312, but instead relied on the “extreme sanction” of exclusion, see Perez, 960 F.2d at 1573. (The district court’s stated that it “do[es]n’t like the word ‘sanction,’” doc. 251 at 71, but the exclusion plainly is a sanction, and a severe one at that.) By excluding the evidence, the court unduly interfered with the jury’s ability to hear all relevant evidence in an attempt to reach a truthful and reliable verdict, see Burkhalter, 735 F.2d 1327. As a result, the court abused its discretion. See Sarcinelli, 667 F.2d 5.

In Sarcinelli, 667 F.2d 5, this Court’s predecessor held that the district court had abused its discretion by excluding evidence as a discovery-violation sanction, although the court could have granted the defendant a continuance or employed other sanctions. Similarly, in Burkhalter, 735 F.2d at 1329-30, this Court held that the district court had abused its discretion by precluding the full use of a witness’s

testimony as a sanction for a discovery violation, although a continuance was available. A comparable abuse of discretion occurred here.

Finally, as we explain in Argument II below, the videos found on Megahed's home computer were extremely important to proving Megahed's knowledge of the contents of the trunk of the car and of the nature of those contents, both of which are important, indeed critical, issues in establishing his guilt of the charged offenses. The district court's decision to invoke the extreme sanction of exclusion, based on the court's preliminary view that the evidence was not "at the heart of the Government's case," doc. 250 at 78, was an abuse of discretion.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING IN PART MEGAHED'S THIRD MOTION IN LIMINE.

In addition to excluding Megahed's videos as a discovery sanction, the district court ruled that it "would be inclined to exclude it, that is, the videos and the balance . . . of the newly revealed material as well" because the videos would be "at least in some respect cumulative and repetitive" of the video on Mohamed's laptop that the court was likely to admit and "accordingly less probative and rather sharply prejudicial." Doc. 251 at 68. The court added: "[I]f I were going to admit

it, having seen it, . . . I probably wouldn't allow all nine of the[clips] but maybe at the most one if there were respect in which they were distinctive.” Doc. 251 at 68.

The prosecutor then reiterated to the district court the importance of the video evidence found on Megahed's computer, the circumstantial evidence connecting that evidence to Megahed, and the availability of a continuance as an alternative remedy. Doc. 251 at 72-75, 76-77. The district court responded:

I have someone, a young man, detained by my hand, charges that are serious and we have the spirit and intent of a speedy trial rule and I have evidence which appears to me not to be at the heart of the Government's case and appears to me to be as I've said before somewhat cumulative and secondary in a case where somebody is— well, in a case with very specific charges with very few elements, it's hard to see why we shouldn't say enough is enough and go with what we have.

Doc. 251 at 78-79.

The district court may exclude otherwise admissible evidence if its probative value “is substantially outweighed by the danger of unfair prejudice.”

Fed. R. Evid. 403. “[B]ecause it permits a trial court to exclude concededly probative evidence, Rule 403 is an extraordinary remedy which should be used sparingly.” United States v. Thevis, 665 F.2d 616, 633 (5th Cir. Unit B 1982).

“Not only does this admonition comport with the fact that the federal rules favor admission of evidence over exclusion if the evidence has any probative value, but it takes into account an oft-stated and important observation: in a criminal trial relevant evidence is inherently prejudicial; it is only when unfair prejudice

substantially outweighs probative value that the rule permits exclusion.” United States v. King, 713 F.2d 627, 631 (11th Cir. 1983) (citations omitted). “[W]hile prosecutorial need alone does not mean probative value outweighs prejudice, the more essential the evidence, the greater its probative value, and the less likely that a trial court should order the evidence excluded.” Id. (citation and footnote omitted).

Although the district court has broad discretion in making the Rule 403 determination, that discretion “depends upon a superior ability to view witnesses and assess the impact of evidence.” Id. Thus, “the appellate court is freer to perform the Rule 403 balancing ab initio when the issue arises in limine.” Id. Indeed, this Court can affirm the district court’s pretrial exclusion of the testimony “only if [this Court finds] that there exists no possible trial scenario in which the probative value of this testimony would not be ‘substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.’” United States v. Mitchell, 954 F.2d 663, 666 (11th Cir. 1992) (quoting Fed. R. Evid. 403).

In King, for example, this Court reversed the district court’s pretrial exclusion of a deceased witness’s prior testimony pursuant to Rule 403. Although the district court’s reasons were not insignificant, the government had no case

without the testimony, so “the probative value [wa]s as high as it possibly could be.” 713 F.2d at 632-33. On the pretrial record, the Eleventh Circuit saw no basis for the exclusion.

Here too, the district court was handicapped in its pretrial consideration of the motion in limine. An analysis of probative value requires a grasp of the factual context of the challenged evidence in the context of all of the other evidence available at trial. It is not a type of motion that a court should consider in a vacuum. See Doc. 251 at 73 (prosecutor’s suggestion that the court not consider the evidence in a vacuum). As the Advisory Committee has explained, the relevancy of evidence “is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.” Huddleston v. United States, 485 U.S. 681, 689, 108 S. Ct. 1496, 1501 (1988) (quoting Fed. R. Evid. 401 advisory committee’s notes).

This problem was exacerbated by the district court’s evaluation of these issues on short notice, given the pendency of the trial. (The prosecutor, incidentally, noted that Megahed’s requests for pretrial relief “ha[d] been presented to the Court in a most general manner,” noted that “the Court ha[d] not had the opportunity to more closely exam[ine] the proffered evidence, the documents in detail,” and suggested that the court take additional time so that it could consider the requested exclusion “in a less hurried manner” to enable “a

closer analysis of the individual items of proffered evidence.” Doc. 251 at 73.)

Indeed, the court acknowledged the problem: “I must say that I haven’t heard the evidence in the case and don’t know what it is.” Doc. 251 at 74. The court added: “I don’t know the strength of it or weakness of it. I don’t know how many witnesses will be called or any of that.” Doc. 251 at 74.

The district court abused its discretion by resolving the motion this way. At that juncture, the court could not have reliably determined either the evidence’s probative value or the extent of its unfair prejudice to Megahed, let alone weighed the two. For example, the court seemingly based its view of the evidence’s weak probative value in part on its incorrect understanding that the videos “cannot be definitively connected to [Megahed].” Doc. 251 at 74. The prosecutor, however, then explained some of the strong circumstantial evidence connecting the videos to Megahed, including that other items in the Zipat folder were associated with Megahed, rather than with other family members, and that the folder last had been accessed when Megahed’s father and brother had been out of the country. Doc. 251 at 76-77. (Incidentally, the videos’ relevancy is not dependent on their “definitive[] connect[ion]” to Megahed, as the court stated. The test is whether, considering all evidence presented to jury, jury reasonably could find the conditional fact by preponderance of the evidence. Huddleston, 485 U.S. at 690-91, 108 S. Ct. at 1501-02; cf. Bowden v. McKenna, 600 F.2d 282 (1st Cir. 1979)

(“Weighing probative value against unfair prejudice under Fed. R. Evid. 403 means probative value with respect to a material fact if the evidence is believed, not the degree that the court finds it believable.”) (citing 22 Charles Alan Wright & Kenneth Graham, Federal Practice and Procedure: Evidence § 5214, at 265-66 (1978)).

Similarly, the district court considered the videos to be of weak probative value in part because they would be “cumulative” to the longer, similar video found on Mohamed’s laptop. Doc. 251 at 75-76. That conclusion, too, was incorrect. The nine videos that the court excluded were on the desktop computer in Megahed’s home, in a folder that Megahed had both compiled and accessed (according to the circumstantial evidence). See Doc. 251 at 76-77. The other video was on Mohamed’s laptop computer, although Megahed had accessed it the afternoon of the South Carolina traffic stop (according to the circumstantial evidence). See Doc. 251 at 16. Megahed’s activities in compiling a number of videos in a folder on his own home computer is in important ways much more probative of his intent than evidence that he had looked at the video on Mohamed’s laptop.⁴

⁴Furthermore, because the assertedly cumulative videos were in two different devices in two different locations, they must be connected to Megahed via completely different circumstantial evidence. Even if the court admits the

Indeed, even aside from the deliberation involved in Megahed's creation of the Zipat folder on his home computer, the videos' sheer number tends to demonstrate Megahed's intent and knowledge. Although the presence of one video arguably could suggest idle curiosity, general interest, or even an inadvertent download, as the number present and saved increases, the inference to be drawn from them changes. See United States v. Dodds, 347 F.3d 893, 898-99 (11th Cir. 2003) (upholding admission of 66 images of child pornography found on defendant's computer in part to show his intent to collect pornography); United States v. Simpson, 152 F.3d 1241, 1249 (10th Cir. 1998) (upholding admission of additional child pornography images found on defendant's computer "to prove [defendant's] intent and lack of mistake"). For this reason also, these several videos that Megahed had decided to compile on his computer are extremely probative, and their probative value is not superseded by the value of a video on Mohamed's laptop. And, as their probative value derives in part from their number, the district court should not limit the United States to introducing "maybe at the most one," as the court suggested it would do. See Doc. 251 at 68.

Mohamed-laptop video, there is no way of knowing whether the jury will find that Megahed had accessed that video; therefore, it would be wrong to exclude the Megahed videos—which plainly were his—based merely on the possibility that the jury will attribute the Mohamed-laptop video to Megahed.

As to Count Three, the United States has to prove that Megahed knowingly transported explosive materials, or aided and abetted their transport. See 18 U.S.C. §§ 842(a)(3)(A) and 2. As to Count Four, the United States has to prove that Megahed knowingly possessed an unregistered destructive device. See 26 U.S.C. §§ 5861(d) and 5871 and 18 U.S.C. § 2. Thus, at trial, the United States must prove both that Megahed knew about the explosive items in the trunk and, as to Count Four, that they constituted a destructive device. To show that the items were a destructive device, the United States likely must also prove that the items were designed or intended to be a weapon. See United States v. Hammond, 371 F.3d 776, 780 (11th Cir. 2004) (affirming judgment of acquittal on charge of possession of unregistered destructive device (a cardboard tube filled with explosives) because “no explosive can constitute a destructive device within the meaning of the statute unless” there is proof that “it was designed for use as a weapon”); see also United States v. Johnson, 152 F.3d 618, 628 (7th Cir. 1998). In Johnson, the defendant, who had been convicted of planting several home-made bombs at his place of employment, claimed that he had built the devices as a hoax. The trial court held that the defendant’s subjective intent was inadmissible. On appeal, the Seventh Circuit began by noting that a device could be completely assembled, as described in 26 U.S.C. § 5845(f)(1), or be a combination of parts, as described in 26 U.S.C. § 5845(f)(3). The court then noted that subsection (1)

contains no reference to the defendant's intent, while subsection (3) does. If a device was inherently susceptible of use only as a destructive device, the courts generally ruled that no further inquiry into the defendant's intent was necessary. If, however, the parts were susceptible to both a destructive and a constructive use, the courts generally ruled that it was necessary to inquire into the defendant's intent. Johnson, 152 F.3d at 624. The Seventh Circuit went on to recognize that there could be situations in which the nature of the component parts makes clear that the items, when assembled, could be used only for a destructive purpose, i.e., as a weapon. Id. Yet the Court indicated there had been many situations where the nature of the component parts themselves made their purpose ambiguous. In those cases, it is necessary to receive evidence on the defendant's subjective intent in possessing the items. Cf. United States v. Tankersley, 492 F.2d 962, 966 (7th Cir. 1974) (because defendant's bottle, firecracker, tape, and paint remover had social utility when viewed separately, but formed "Molotov cocktail" when combined, defendant's subjective intent was relevant).

In this case, proof could come from an examination of the device itself or through the presentation of circumstantial evidence of the defendant's intent. This burden is even more pronounced in this case, in which the devices had not been fully assembled. Given the ambiguous or at least arguably lawful nature of each

separate component in the car, proof of Megahed's subjective intent may well be necessary to satisfy the Hammond "plus" standard.

Megahed's possession of nine video recordings, which depict the use of rockets very similar in nature and composition to the potassium-nitrate-filled PVC pipes found in the car trunk, is highly relevant of and probative to his knowledge of those PVC pipes in the trunk. Indeed, those PVC pipe sections are smaller versions of the larger, make-shift rockets depicted in the nine Zipat videos. The district court overlooked the significance of this evidence and its extreme relevance to Megahed's knowledge.

The United States expects to show through expert testimony at trial that the component parts discovered in the trunk could be readily assembled into an incendiary bomb or device. As in Tankersley, however, Megahed could argue that the device as assembled is nothing more than fireworks or a crude hobby rocket. Therefore, evidence of Megahed's subjective intent likely will become extremely relevant in order to show that Megahed and Mohamed intended to build an incendiary-type device and not just a firecracker or fireworks. (Similarly, if Megahed had compiled on his computer a folder of information on setting up a Fourth of July fireworks display, that evidence presumably would be admissible in an attempt to show a "non-explosive" intent. Indeed, Megahed relied on Mohamed's supposed interest in Fourth of July celebrations in suggesting that

these were mere fireworks. See Doc. 71 at 6 (Megahed’s motion for reconsideration of denial of his severance motion).)⁵

This is not a contrived factual issue. The United States has to prove that Megahed knew about the items in the trunk and that he knew they were destructive devices. Courts of appeals have, in numerous cases, rejected the sufficiency of the evidence of these elements. See, e.g., Hammond, 371 F.3d at 780; United States v. Reed, 726 F.2d 570, 575-76 (9th Cir. 1984); United States v. Posnjak, 457 F.2d 1110 (2d Cir. 1972). It would be an abuse of discretion to keep this evidence from the jury.

As for the video and other computer evidence’s prejudice, it is not “unfair.” “Rule 403 requires a delicate balancing of probative value against certain effects

⁵The evidence—which suggested anti-American and pro-Islamist fervor—also might be relevant to Megahed’s motive. See, e.g., United States v. Baumgarten, 517 F.2d 1020, 1028-30 (8th Cir. 1975) (affirming admission of letter containing “very strong language regarding [defendant’s] feelings of hatred toward police in particular and the governmental system in general [and his] desire to see these institutions destroyed by violence” and admission of “evidence regarding the history, development, and goals of the Students for a Democratic Society (S.D.S.) organization and the radical movement in general”).

that testimony might have on the jury or on the trial proceedings at the moment it is presented.” Mitchell, 954 F.2d at 666-67. “The major function of Rule 403 is ‘limited to excluding matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.’” King, 713 F.2d at 631 (quoting United States v. McRae, 593 F.2d 700, 707 (5th Cir. 1979)).

The evidence is probative, as is described above, for the very same reason it is prejudicial: it tends to show what Megahed and Mohamed intended to do with their explosives. Cf. United States v. Khalil, 214 F.3d 111, 122 (2d Cir. 2000) (district court did not abuse its discretion in admitting photographs of defendant “brandishing a shotgun, wearing garb that is associated with violent militants, and assuming a posture of martyrdom, [as] the photographs were relevant to rebut the defense portrayals of [defendant] as having no destructive objective and posing no real threat”).

This is not a case in which the United States seeks to introduce largely irrelevant evidence, nor is it a case in which the evidence can be replicated in another way. Moreover, the district court retains the ability to edit or curtail the most provocative parts of the evidence, if the court ultimately deems that necessary in the context of the evidence admitted at trial. A wholesale pretrial exclusion, however, based on a general idea that the evidence by its nature is

prejudicial, constituted an abuse of discretion, particularly given the evidence's strong, and needed, probative value on intent and knowledge.

III. THE DISTRICT COURT ABUSED ITS DISCRETION BY GRANTING IN PART MEGAHED'S FIRST MOTION IN LIMINE.

The district court also abused its discretion by granting in part Megahed's first motion in limine. doc. 195. The court excluded the "so-called how to video" (i.e., the video that Mohamed had created and disseminated showing how to make a remote-control detonator), stating, "[T]his is not the right trial for that video based on any explanation I've heard so far." Doc. 251 at 68-69. That statement seems to mean that, even if the United States could prove that Megahed had recently viewed the "how to" video, or even was involved in its creation, the court nevertheless would exclude it because it lacked a sufficient connection to the materials that Megahed was charged with unlawfully possessing. At a minimum, the court abused its discretion in excluding (without any apparent contingency and without any real explanation) that remote-control video before trial.⁶

⁶The district court also ruled that it would admit the other contents of Mohamed's laptop only "to the extent that the predicate is established that [Megahed] accessed the material essentially simultaneously or imm[i]nently preceding the episode in South Carolina" and that the material "is so congruous or

As we explain above, Megahed’s knowledge of the explosives and intent that they be used as weapons is an extremely important part of the United States’ case. The district court erred by excluding the “how to” video without performing an express Rule 403 balancing (and without explicitly holding that the video fails to meet the low Rule 401 relevance threshold). The remote-control video vividly shows Mohamed’s intent. Indeed, Mohamed has pled guilty to count one of the superseding indictment, which charged him (alone) with attempting to provide material support to terrorists, based on those acts. Docs. 268, 283. As Megahed was engaging in the same acts with Mohamed, that is, he was jointly undertaking the explosives road trip, Mohamed’s stated intention may be attributed to Megahed.

essentially connected with the contraband or pertinent substance in the trunk of the car as to suggest that [Megahed] knowing one would know of the other or knowing the attributes of one would—or understanding the contents would understand the attributes of the other.” Doc. 251 at 66-67. The court noted, however, that it “may be necessary for [the court] to view it at or about the time it’s proffered so that based on the then existing state of the evidence and representations of counsel as to any evidence to come that [the court] can determine it.” Doc. 251 at 67.

This is particularly so given that Mohamed allowed Megahed access to the laptop and its videos, which included the how-to video, as they drove the explosives-laden car north, thereby suggesting Megahed's complicity in Mohamed's intentions. Cf. United States v. Lynch, 934 F.2d 1226, 1231 (11th Cir. 1991) ("We think that a jury may conclude that it would be unreasonable for conspirators openly to conduct a drug deal in the home of a someone not part of their conspiracy."). Moreover, Mohamed's references to a toy-boat remote control on that video implicate Megahed as well because Mohamed's cohort Megahed had at his house a remote-control boat. See Doc. 61 at 8; Doc. 69 at 4-5.

For all of these reasons, the district court abused its discretion by excluding pretrial the "how-to" video. At a minimum, the court should have deferred ruling until it had an opportunity to evaluate the evidence in the context of the other evidence admitted at trial.

CONCLUSION

The United States respectfully requests that this Court reverse the orders of the district court.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on the 4th day of September, 2008, via hand delivery, a copy of this document was served on:

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