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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

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CLERK U.S. DISTRICT COURT
ALEXANDRIA, VIRGINIA

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| IN RE 2703(d) ORDER AND 2703(f) PRESERVATION REQUEST RELATING TO GMAIL ACCOUNT [redacted] | Misc. No. 1:11DM3<br>11-DM-2<br>FILED UNDER SEAL |

**GOOGLE INC.'S OBJECTIONS TO MAGISTRATE'S ORDER OF FEBRUARY 9, 2011 AND NOTICE OF APPEAL PURSUANT TO FED. R. CRIM. P. 59 AND MEMORANDUM IN SUPPORT**

## I. INTRODUCTION

This matter involves a grand jury investigation of the Wikileaks publication of State Department cables and related matters. The fact of the investigation has been widely reported in the *New York Times* and other news publications, across the Internet and around the globe.[1] Demands have been made to third party service providers, including Google Inc. ("Google"), seeking compelled disclosure of information such as with whom the subject users of those services communicated and which computers they used to do so. The Google Gmail user [redacted] is the subject of the demand at issue here (the "Order").[2] Because of the already public nature of the Wikileaks investigation, and the fact that a nearly identical order to Twitter involving the same account identifier [redacted] had been unsealed by this Court in the same

[1] *See, e.g.*, Scott Shane and John F. Burns, *U.S. Subpoenas Twitter Over WikiLeaks Supporters*, N.Y. Times, Jan. 8, 2011, http://www.nytimes.com/2011/01/09/world/09wiki.html (last visited Jan. 13, 2011); Anthony Boadle, *U.S. orders Twitter to hand over Wikileaks records*, Reuters, Jan. 8, 2011, http://www.reuters.com/article/idUSTRE70716420110108 (last visited Jan. 14, 2011); Ravi Somaiya, *Release on Bail of WikiLeaks Founder Is Delayed by Appeal*, N.Y. Times, Dec. 14, 2010, *available at* http://www.nytimes.com/2010/12/15/world/europe/15assange.html?src=twrhp (last visited Jan. 3, 2011); *Assange attorney: Secret grand jury meeting in Virginia on WikiLeaks*, CNN Justice, Dec. 13, 2010, http://articles.cnn.com/2010-12-13/justice/wikileaks.investigation_1_julian-assange-wikileaks-case-grand-jury?_s=PM:CRIME (last visited Jan. 3, 2011); Dan Goodin, *Grand jury meets to decide fate of WikiLeaks founder*, The Register, Dec. 13, 2010, *available at* http://www.theregister.co.uk/2010/12/13/assange_grand_jury/ (last visited Jan. 3, 2011).

[2] *See* Declaration of John K. Roche, Ex. 1 ("Roche Decl.").

Grand Jury proceeding ("Twitter Order"),[3] Google filed a motion to modify the Order. Google's motion requested that it be permitted to give notice of the Order to the Gmail user and the user's attorney so they would have a meaningful opportunity to contest the request. Shortly after Google filed its motion, the user identified in the Twitter Order filed his own motion to vacate the Twitter Order.[4] That motion was unsealed by this Court and posted on the Internet by the user's attorneys on February 8, 2011.[5] Despite the publicity surrounding the Twitter Order and the related motions, on February 9, 2011, Magistrate Judge [redacted] denied Google's request to provide immediate notice of the Order to its user.[6] Instead, Magistrate Judge [redacted] authorized Google to provide notice of the Order to the user 90 days after production unless the government obtained a maximum 60-day extension of the non-notification period.[7]

Google respectfully objects to Magistrate Judge [redacted] ruling because the government's investigation of Wikileaks generally, and its interest in the [redacted] user name specifically, is a matter of public record, thus obviating the need for this Order's nondisclosure provision. Furthermore, the Order, like the Twitter Order, may present substantial constitutional and statutory issues that the user may wish to raise before this Court. Additionally, given that the Order's nondisclosure provision is a prior restraint on Google's First Amendment right to communicate with its users, a nondisclosure period of any length is not justified under these circumstances. Finally, Google has preserved the requested records, thus there is no danger of

[3] Roche Decl., Ex. 2

[4] *Id.* Ex. 3.

[5] *See* Electronic Frontier Foundation, *Legal Battle Over Government Demands for Twitter Records Unsealed by Court*, Feb. 8, 2011, http://www.eff.org/press/archives/2011/02/08 (last visited on Feb. 16, 2011).

[6] *Id.* Ex. 4.

[7] *Id.*

loss or destruction of the information sought. Accordingly, Google requests that the Court modify this Order to permit notice of the Order and preservation request to be given to Google's user and attorney and that the user be given 20 days from the date of the Court's order to seek any relief.

## II. FACTUAL BACKGROUND

### A. Relevant Actors

Google provides electronic mail services to the public through its Gmail service. Google assiduously protects the privacy and free speech rights of its Gmail users, as evidenced by its opposition, with the support of the U.S. State Department, to the Chinese government's attack on the Gmail accounts of Chinese human rights activists.[8]

Google's general practice and preference, when addressing legal demands such as court orders, is to give notice to the account holders, whenever it is permissible and practical to do so. Even where the government asserts that disclosure to the user may have an adverse impact on an investigation, or where an order is sealed but nonetheless raises serious Constitutional concerns, Google may move to unseal the order or seek permission to notify its users.

Google recognizes that such notice is important because its users are better situated to assert their rights under the Constitution or other applicable privileges and articulate their concerns to the Court. It is for those reasons that Google asks the Court to unseal the Order as the Court did for another provider in the same Grand Jury proceeding.

[8] Andrew Jacobs and Miguel Helft, *Google, Citing Attack, Threatens to Exit China*, N.Y. Times, Jan. 13, 2011, http://www.nytimes.com/2010/01/13/world/asia/13beijing.html?_r=1&pagewanted=print (last visited Jan. 13, 2011).

Wikileaks describes itself as a journalistic enterprise for mass document leaking and analysis,[9] and has been described by others as an enterprise that consists of, or works with, journalists and academics.[10] Whether Wikileaks does in fact consist of journalists or academics or engage in journalism is a matter of public debate, and an issue upon which Google does not comment.

Twitter is a real-time information network that has been described by one federal district court as "a social networking and micro-blogging service that invites its users to answer the question: 'What are you doing?'" *U.S. v. Shelnutt*, No. 4:09-CR-14 (CDL), 2009 WL 3681827, at *1 n.1 (M.D. Ga. Nov. 2, 2009) ("Twitter's users can send and read electronic messages known as 'tweets.' A tweet is a short text post (up to 140 characters) delivered through Internet or phone-based text systems to the author's subscribers. Users can send and receive tweets in several ways, including via the Twitter website.").

Although Google does not comment on and could not confirm whether the Twitter account [redacted] is controlled by the same user as the Gmail [redacted] account, it is instructive to

[9] *Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787, 791 n.1 (7th Cir. 2009) ("'[F]ounded by Chinese dissidents, journalists, mathematicians and startup company technologists, from the US, Taiwan, Europe, Australia and South Africa," Wikileaks styles itself as 'an uncensorable version of Wikipedia for untraceable mass document leaking and analysis.' http:// wikileaks. org/ wiki/ Wikileaks: About (last visited July 16, 2009).").

[10] Adam L. Penenberg, *Yes, He's a Journalist, Too*, Washington Post, Jan. 30, 2011, http://www.washingtonpost.com/wp-dyn/content/article/2011/01/28/AR2011012806860.html ("Based on the wording of many of these [press shield] statutes, Assange fits the definition of a journalist, and what WikiLeaks does qualifies as journalism.") (last visited on Jan. 30, 2011); *US soldiers can be demoralized by WikiLeaks docs: Morrell*, Daily Pak Banker, Oct. 25, 2010, 2010 WLNR 21356017 (describing Wikileaks as working with "a group run by academics"); *Activists targeted as secrets exposed*, Australian, Apr. 12, 2010, 2010 WLNR 7507448 (describing Wikileaks as consisting of "computer programmers, academics and activists.").

note that in a "tweet," the Twitter user [redacted] indicates that since at least mid-December 2010 [redacted] has been well aware that a government investigation is underway.[11]

**B. Procedural Posture**

The Twitter Order was issued on December 14, 2010 and relates to the ongoing Wikileaks investigation, which is obviously an issue of great public interest.[12] The Twitter Order demanded the production of subscriber information and certain records and other non-content information for a number of Twitter account holders from November 1, 2009 to the present, including an account with the user name [redacted] It also contained a non-disclosure provision. The grand jury investigation underlying the Twitter Order was widely reported in the *New York Times* and other media outlets around the time the Twitter Order was issued.[13] Indeed, prior to issuance of the order, the Attorney General had acknowledged that the government was actively investigating Wikileaks.[14]

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[11] *See* [redacted]" tweet of Dec. 17, 2010 @ 4:22 p.m. ("Unrelated to any travel issues - the FBI is now actively bothering my friends and questioning them inside the United States."), http://twitter.com/[redacted]/status/15879462465835008 (last visited on Dec. 21, 2010); *see also* "[redacted] tweet of Jan. 7, 2011 @ 9:26 p.m. ("Note that we can assume Google & Facebook also have secret US government subpoenas. They make no comment. Did they fold?"), http://twitter.com/[redacted] (last visited Jan. 18, 2011).

[12] Roche Decl., Ex. 2.

[13] Ravi Somaiya, *Release on Bail of WikiLeaks Founder Is Delayed by Appeal*, N.Y. Times, Dec. 14, 2010, http://www.nytimes.com/2010/12/15/world/europe/15assange.html?src=twrhp (last visited Jan. 3, 2011); *see also Assange attorney: Secret grand jury meeting in Virginia on WikiLeaks*, CNN Justice, Dec. 13, 2010, http://articles.cnn.com/2010-12-13/justice/wikileaks.investigation_1_julian-assange-wikileaks-case-grand-jury?_s=PM:CRIME (last visited Jan. 3, 2011); Dan Goodin, *Grand jury meets to decide fate of WikiLeaks founder*, The Register, Dec. 13, 2010, http://www.theregister.co.uk/2010/12/13/assange_grand_jury/ (last visited Jan. 3, 2011).

[14] Ellen Nakashima & Jerry Markon, *WikiLeaks founder could be charged under Espionage Act*, Wash. Post, Nov. 30, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/11/29/AR2010112905973.html (last visited Jan. 3, 2011).

On January 5, 2011, upon motion by the government made at the behest of Twitter,[15] Magistrate Judge Buchanan unsealed the Twitter Order and authorized Twitter to disclose it to its users, including Twitter user [redacted].[16]

In the days following January 5, 2011, the unsealed Twitter Order was posted on the Internet and widely discussed in the media.[17] On January 7, 2011, a "tweet" from Twitter user [redacted] stated that "we can assume Google & Facebook also have secret US government subpoenas."[18]

On January 4, 2011, the day after the government agreed to unseal the Twitter Order, it procured from this Court the Order in this matter, which is substantially identical to the Twitter Order and compels Google to produce the identical information as the Twitter Order for the Google Gmail account [redacted].[19] The perpetual nondisclosure provision in the Order is identical to the Twitter Order nondisclosure provision.

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[15] Perkins Coie LLP represents both Twitter and Google.

[16] Roche Decl., Ex. 5.

[17] *See, e.g.*, Scott Shane and John F. Burns, *U.S. Subpoenas Twitter Over WikiLeaks Supporters*, N.Y. Times, Jan. 8, 2011, http://www.nytimes.com/2011/01/09/world/09wiki.html (last visited Jan. 13, 2011); Anthony Boadle, *U.S. orders Twitter to hand over Wikileaks records*, Reuters, Jan. 8, 2011, http://www.reuters.com/article/idUSTRE70716420110108 (last visited Jan. 14, 2011).

[18] *See* "ioerror" tweet of Jan. 7, 2011 @ 9:26 p.m. ("Note that we can assume Google & Facebook also have secret US government subpoenas. They make no comment. Did they fold?"), http://twitter.com/ioerror/ (last visited Jan. 18, 2011).

[19] *See* Roche Decl., Ex. 1.

On January 12, 2011, the government issued a preservation request pursuant to 18 U.S.C. § 2703(f) "for the preservation of all stored communications, records, and other evidence" in Google's possession regarding Gmail user [redacted] for November 2009 to the present.[20]

That same day, Google's counsel notified the government that Google wished to immediately give notice of the Order to its user and requested that the government agree to so modify the Order. The government declined this request, saying only that Google is "a different case" from Twitter.[21] The government did however offer to release Google from the notice constraint 90 days after it produced, with a provision allowing the government to petition for a further extension. Google declined this offer and, pursuant to the parties' agreed schedule, filed its motion to modify the Order on January 18, 2011.

On January 26, 2011, three of the users identified in the Twitter Order, including Twitter's [redacted]" user, filed a motion to vacate that order on statutory and Constitutional grounds.[22]

On January 28, 2011, the government filed its response to Google's motion wherein it admitted that the Order and the unsealed Twitter Order relate to the same investigation.[23] The government's brief also established that the targets of their investigation are already operating under the assumption that the government has sought information related to their Google

[20] *Id.*, Ex. 4.

[21] *Id.*, Ex. 7, at 3 n.1.

[22] *Id.*, Ex. 3.

[23] *Id.* Ex. 7, at 3 n.1.

accounts.[24] These facts alone demonstrate that there is no cause for the Order to have been sealed in the first place or to remain sealed now. Moreover, rather than demonstrating how unsealing the Order would harm its well-publicized investigation, the government listed a parade of horribles that have allegedly occurred since it unsealed the Twitter Order, yet failed to establish how any of these developments could be further exacerbated by unsealing this Order.[25]

On February 9, 2011, Magistrate Judge [redacted] denied Google's request to provide immediate notice of the Order to its user.[26] Instead, Magistrate Judge [redacted] authorized Google to provide notice of the Order to the user 90 days after production unless the government obtained a maximum 60-day extension of the non-notification period.[27]

On February 15, 2011, Magistrate Judge [redacted] heard argument on the motion to vacate the Twitter Order, but to Google's knowledge has not yet rendered a decision on that motion.

## III. ARGUMENT

### A. Standard of Review

Google brings its objections pursuant to Fed. R. Crim. P. 59. *In re U.S. for an Order Directing a Provider of Electronic Communication Service to Disclose Records to the Government*, Magistrate's No. 07-524M, 2008 WL 4191511 (W.D. Pa. Sept. 10, 2008) (objections brought under Rule 59 to magistrate's ruling regarding 2703(d) order)), *vacated on*

[24] *Id.* at Ex. 7 (Exs. 3-4 thereto).

[25] *Id.* at 11-16.

[26] *Id.* Ex. 4.

[27] *Id.*

*other grounds by*, 620 F.3d 304 (3d Cir. 2010). Because Magistrate Judge [redacted] February 9th ruling on Google's motion to modify the Order is directed to a third party, i.e., Google, it is a dispositive final order. *U.S. v. Myers*, 593 F.3d 338, 345 (4th Cir. 2010) (discovery order directed at a third party is "an immediately appealable final order.") (quoting *Church of Scientology of California v. U.S.*, 506 U.S. 9, 18 n.11 (1992)). Accordingly, the district court must consider Google's objections de novo. *See* Fed. R. Crim. P. 59(b)(3).

**B. There is No Need for Secrecy of the Order or the Preservation Request**

Nondisclosure orders are permitted in extraordinary circumstances under 18 U.S.C. § 2705. The Order in this matter relies upon the standard set forth in § 2705(b)(5), which provides for nondisclosure when notification will result in "seriously jeopardizing an investigation." Nondisclosure requests such as this are subject to the most demanding scrutiny:

> If the recipients of [surveillance] orders are forever enjoined from discussing them, the individual targets may never learn that they had been subjected to such surveillance, and this lack of information will inevitably stifle public debate about the proper scope and extent of this important law enforcement tool. By constricting the flow of information at its source, the government dries up the marketplace of ideas just as effectively as a customer-targeted injunction would do. Given the public's intense interest in this area of law, such content-based restrictions are subject to rigorous scrutiny.

*In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 882 (S.D. Tex. 2008) (setting a default 180 day period for sealing and non-disclosure of electronic surveillance orders) (internal citations omitted).

Google is not privy to what showing the government made in the affidavit in support of the application for the Order. Given that the government moved to unseal an order to another provider requesting the identical type of information on an account with an identical identifier, it

is difficult to understand how the government could meet the "seriously jeopardizing" standard in this case. The government's offer to release Google from the notice constraint after 90 days demonstrates that a limited nondisclosure provision could have been requested in the first place, and that this very public investigation is at or near an end, which further obviates the need for confidentiality.

Nor does the Order meet the traditional standard for grand jury confidentiality. Grand jury proceedings are traditionally confidential because

> if preindictment proceedings were made public, many prospective witnesses would be hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony. Moreover, witnesses who appeared before the grand jury would be less likely to testify fully and frankly, as they would be open to retribution as well as to inducements. There also would be the risk that those about to be indicted would flee, or would try to influence individual grand jurors to vote against indictment. Finally, by preserving the secrecy of the proceedings, we assure that persons who are accused but exonerated by the grand jury will not be held up to public ridicule.

*Finn v. Schiller*, 72 F.3d 1182, 1187 n.6 (4th Cir. 1996) (quoting *Douglas Oil Co. v. Petrol Stops N.W.*, 441 U.S. 211, 219 (1979)). Of course, "it is a 'common-sense proposition that secrecy is no longer "necessary" when the contents of grand jury matters have become public.'" *McHan v. C.I.R.*, 558 F.3d 326, 334 (4th Cir. 2009) (quoting *In re Grand Jury Subpoena*, 438 F.3d 1138, 1140 (D.C. Cir. 2006)).

In this case, the grand jury's investigation of the Twitter user [redacted] is public record. Moreover, Google has preserved all records and content related to the Gmail user [redacted] account. Accordingly, there is no risk of destruction evidence, and none of the other interests served by the traditional secrecy of grand jury proceedings would be undermined in any way by disclosure of this Order or the preservation request.

The government claimed in its response brief before Magistrate Judge [redacted] that unsealing the Order may result in "witness intimidation" in the form of encouraging providers "to resist the government's attempts to gather relevant user information." *See* Government Response, at 16.[28] This argument is specious. First, keeping orders in the shadows to prevent witness intimidation is one thing, but doing so to prevent public discourse is not a proper use of the mechanism. Second, providers are corporate entities advised by competent inside and outside counsel, some of whom are former government attorneys. The notion that these companies could be intimidated into resisting otherwise valid legal process is baseless. Google can only speak for itself, but when it resists legal process, it does so because its attorneys have a good faith belief that the process is deficient or unlawful in some respect, not because Google is trying to curry favor with some interest group. Google has no reason to believe that other providers' approach to legal process is any different.

Additionally, there is no risk of destruction of evidence because Google has preserved responsive information and the Order only demands historical records, not prospective data. The government nevertheless argues that unsealing this Order may cause the targets to "alter[] their modes of communication to evade future investigative efforts," but as the government notes in its brief, the Twitter user [redacted] and other targets of the investigation are already working under the assumption that their Google accounts are the subject of legal process from this grand jury investigation. *See* Government Response, at 14; *see also* Government Exhibits 3-4.[29] Therefore, disclosing this Order will do nothing to alter anyone's behavior, and to the extent [redacted] has already destroyed evidence, unsealing the Order will not reverse those actions either.

The government also claims that the Order must remain sealed "because it might cause

[28] Roche Decl., Ex. 7.

[29] *Id.*

suspects to . . . flee." *See* Government Response, at 13.[30] This argument also fails because if [redacted] is a flight risk, the widespread media coverage of the Twitter Order would have already presumably given him or her and any co-conspirators all the notice they need to start packing their bags, regardless of whether Twitter's [redacted] and Google's [redacted] are one and the same.

Finally, the government asserts that its employees were harassed after the disclosure of the Twitter Order and implies that the same can be expected if this Order is disclosed. *See* Government Response, at 15-16; *see also* Government Exhibit 6.[31] Google condemns any such attacks on government personnel and sympathizes with those forced to endure them. In order to ensure that the same behavior does not occur here, the government should request that the court order any personal identifiers of government personnel redacted before unsealing the Order or preservation letter.

In sum, there is no risk of destruction evidence, and none of the other interests served by the traditional secrecy of grand jury proceedings would be undermined in any way by disclosure of the Order or the preservation request. There is no cause for the Order to remain sealed.

### C. The Order May Raise Significant Constitutional and Statutory Issues

As noted, three of the users identified in the Twitter Order, including Twitter's [redacted] user, filed a motion to vacate that order on Constitutional and statutory grounds.[32] In summary, they argued that because the Twitter Order seeks a vast array of information that has no relation to Wikileaks, it could not meet the "specific and articulable facts" standard set forth in 18 U.S.C.

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[30] *Id.*

[31] *Id.*

[32] Roche Decl., Ex. 3.

§ 2703(d), and that it intrudes upon their First and Fourth Amendment rights for similar reasons.[33] If one assumes for the sake of argument that Twitter's [redacted] and Google's [redacted] are one and the same, it is also reasonable to assume that the user may wish to assert similar objections to this Order. It is therefore within the sound discretion of the Court to modify the Order for the purpose of allowing Google to give notice to its affected user so that the user may decide whether to object to Google's production of the documents and information demanded therein.

**D. The Order is a Prior Restraint on Google's Right to Free Speech**

The non-disclosure provision in the Order prevents Google from communicating with its user and "is fairly characterized as a regulation of pure speech." *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001) (referring to Wiretap Act provision prohibiting disclosure of contents of illegally intercepted communication). The Order's non-disclosure provision also prevents Google from defending itself against public criticism such as that cited in the Government's brief. *See* Government Exhibits 3-4. It is of no moment that the person it restrains from speaking, *i.e.*, Google, is a corporate entity. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual."). Prior restraints on speech "are constitutionally disfavored in this nation nearly to the point of extinction." *United States v. Brown*, 250 F.3d 907, 915 (5th Cir. 2001). Accordingly, such restraints are subject to the most demanding scrutiny. *In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 881-82 (S.D. Tex. 2008) ("Prohibiting a service provider from disclosing the existence of the pen/trap or the investigation means that the first-

[33] *Id.*

hand experiences of the recipients of these orders are completely excluded from the public debate" and "dries up the marketplace of ideas just as effectively as a customer-targeted injunction would do.").

Here, Magistrate Judge [redacted] endorsed the government's offer to limit the nondisclosure requirement in the Order to a period of 90 days. While such nondisclosure requirements of a limited duration are not uncommon in normal investigations, this is not a normal investigation. Because the government's interest in ioerror's electronic communications is already so well-publicized and there is absolutely no risk of destruction of evidence, a nondisclosure period of any length is not justified under these circumstances.

## IV. CONCLUSION

Google takes no position regarding the propriety of Wikileaks' alleged actions or the government's investigation, but given the extraordinary nature of the issues surrounding the very public Wikileaks investigation, Google requests only that the Court modify the Order to permit notice of the Order and preservation request to be given to Google's user and the user's attorneys. Google further requests that it be permitted to discuss the Order with its user and the user's attorneys and that the user be given 20 days from the date of the Court's order to file an appropriate response. In the meantime, Google has preserved responsive information, and will produce that information if its user does not file a motion or other pleading in opposition within 20 days of the Court's order.

DATED this 17th day of February, 2011.

Respectfully submitted,

By _____

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## CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of February, 2011, the foregoing document was sent via hand delivery and email to the following persons:

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