

JENNINGS & FULTON, LTD.
2580 SORREL STREET
LAS VEGAS, NEVADA 89146
TELEPHONE 702.979.3565 ♦ FAX 702.362.2060

1 ANDREW D. PARKER, ESQ. (pro hac vice forthcoming)
Arizona Bar No. 028314
2 E-Mail: parker@parkerdk.com
3 **PARKER DANIELS KIBORT LLC**
888 Colwell Building
4 123 N. Third Street
Minneapolis, MN 55401
5 Telephone: (612) 355-4100
6 Facsimile: (612) 355-4101

7 ADAM R. FULTON, ESQ.
Nevada Bar No. 11572
8 E-mail: afulton@jfnvlaw.com
9 LOGAN G. WILLSON, ESQ.
Nevada Bar No. 14967
10 E-mail: logan@jfnvlaw.com
11 **JENNINGS & FULTON, LTD.**
2580 Sorrel Street
12 Las Vegas, Nevada 89146
Telephone: (702) 979-3565
13 Facsimile: (702) 362-2060

14 *Attorneys for Proposed Intervenor*

15
16 **UNITED STATES DISTRICT COURT**

17 **DISTRICT OF NEVADA**

18 DENNIS MONTGOMERY, an
individual; and MONTGOMERY
19 FAMILY TRUST, a California Trust,

20 Plaintiff,

21 v.

22 ETREPPID TECHNOLOGIES, L.L.C., a
Nevada Limited Liability Company;
23 WARREN TREPP, an individual;
24 DEPARTMENT OF DEFENSE of the
25 UNITED STATES OF AMERICA; and
DOES 1 through 10,

26 Defendants.
27

CASE NO.: 3:06-cv-00056-PMP-VPC
and
3:06-cv-00145-PMP-VPC

28 **AND ALL RELATED CASE(S)**

**MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE
AND TO LIFT PROTECTIVE ORDER**

Oral Argument Requested

Non-party Michael J. Lindell (“Lindell”) hereby seeks to intervene in these actions for the limited purpose of obtaining the lifting of the Court’s protective order entered on August 29, 2007 in case no. 06-cv-00056 as Doc. #253 (“Protective Order”). Lindell possesses data (“Data”) obtained from party Dennis Montgomery (“Montgomery”), which Lindell seeks to use to defend himself against claims asserted in other litigation, and the Data may be covered by the Protective Order.

**I.
Factual Background**

Lindell is a defendant in US Dominion, Inc. et al. v. My Pillow, Inc. et al., case no. 1:21-cv-00445 in the United States District Court for the District of Columbia (“D.C. Litigation”). The plaintiffs’ complaint in that action alleges Lindell defamed them by making various statements about electronic election equipment used in the 2020 presidential election being hacked to manipulate the results of the election. Decl. of Michael Lindell *See Exhibit A* at ¶ 3 & Ex. A ¶ 165 (“Lindell Decl.”). In making these statements, Lindell relied in part upon information that originated with Montgomery. *Id.* ¶ 74; Lindell Decl. ¶ 4. Accordingly, Lindell seeks to use testimony and evidence concerning Montgomery’s background and his work for U.S. intelligence agencies, and the information from Montgomery itself, to defend the reasonability and veracity of his allegedly defamatory statements in the D.C. Litigation. *Id.* ¶ 5.

The information that Lindell in part relied upon, the Data, comprises internet transmissions sent during the 2020 election that were collected by technology Montgomery developed and previously licensed to the US government. Lindell Decl. ¶ 7; Montgomery

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1 *See Exhibit B* at Decl. ¶ 40. Montgomery has gathered extensive data showing that voting
2 machine manufacturers and their employees were hacked several times, and information
3 related to illegal US government surveillance programs that Montgomery worked in.
4 Montgomery Decl. ¶ 38. Lindell agreed to acquire ownership rights to the Data from
5 Montgomery. Lindell Decl. ¶ 6; Montgomery Decl. ¶ 39. The Protective Order entered by
6 this Court prohibits the use or disclosure of information related to Montgomery’s work for
7 or relationship with U.S. intelligence agencies. *See* Doc. #253. Montgomery believes the
8 Protective Order remains in place and precludes disclosure of the Data. Montgomery Decl.
9 ¶ 41. Lindell seeks removal of this barrier to him using the Data, and testimony and
10 evidence concerning Montgomery, to defend himself in the D.C. Litigation. Lindell Decl.
11 ¶ 10.

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14 **II.**
15 **Lindell May Intervene in This Action for the Limited Purpose**
16 **Modifying the Protective Order.**

17 Fed. R. Civ. P. 24(a)(2) grants the right to intervene in an action under specified
18 circumstances. Rule 24(b)(1)(B) grants the ability to intervene in an action on a permissive
19 basis. Lindell can intervene in this action for his intended limited purpose, both
20 permissively under Rule 24(b)(1)(B) and as of right under Rule 24(a)(2).

21 The “requirements for intervention” are to be “broadly interpreted in favor of
22 intervention,” *Kalbers v. United States DOJ*, 22 F.4th 816, 822 (9th Cir. 2021), and “The
23 courts have widely recognized that the correct procedure for a nonparty to challenge a
24 protective order is through intervention for that purpose.” *United Nuclear Corp. v.*
25 *Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (citing *Public Citizen v. Liggett*
26 *Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988)).

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1 **A. Lindell May Intervene on a Permissive Basis.**

2 “Generally, permissive intervention under Rule 24(b) requires ‘(1) an independent
3 ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact
4 between the movant's claim or defense and the main action.’” *Blum v. Merrill Lynch*
5 *Pierce Fenner & Smith Inc.*, 712 F.3d 1349, 1353 (9th Cir. 2013) (quoting *Beckman*
6 *Indus., Inc. v. Int’l Ins. Co.*, 966 F.2d 470, 473 (9th Cir. 1992)). However, “[T]here is
7 ample support for intervenor’s argument that courts also recognize Rule 24(b) intervention
8 as a proper method to modify a protective order.” *Beckman*, 966 F.2d 470, 472 (9th Cir.
9 1992). Accordingly,

- 10
- 11 • “No independent jurisdictional basis is needed” when an intervenor seeks to modify
12 a protective order rather than litigate a claim on the merits, *Beckman*, 966 F.2d at
13 473; *Pansy*, 23 F.3d at 778, n.3; *EEOC*, 146 F.3d at 1047; *In re “Agent Orange”*
14 *Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987);
 - 15 • “[M]otions to intervene for the purpose of seeking modification of a protective
16 order in long-concluded litigation are not untimely,” *Blum*, 712 F.3d at 1353 (citing
17 “the growing consensus among the courts of appeals that intervention to challenge
18 confidentiality orders may take place long after a case has been terminated”);
19 *United Nuclear Corp.*, 905 F.2d at 1427 (“Rule 24(b)’s timeliness requirement is to
20 prevent prejudice in the adjudication of the rights of the existing parties, a concern
21 not present when the existing parties have settled their dispute and intervention is
22 for a collateral purpose.”); and
 - 23 • “There is no reason to require such a strong nexus of fact or law when a party seeks
24 to intervene only for the purpose of modifying a protective order.” *Beckman*, 966
25 F.2d at 474. The requirement that a claim or defense present “common legal or
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1 factual issues” to the main action is interpreted with “considerable
2 breadth.” *EEOC*, 146 F.2d at 1046; *Pansy*, 23 F.3d at 778. *See also Advance Loc.*
3 *Media*, 918 F.3d at 1173 n.12 (when a party seeks to intervene only for the limited
4 purpose of obtaining access to sealed judicial records, there need not be a “strong
5 nexus of fact or law” to the issues in the original case) (quoting *Flynt*, 782 F.3d at
6 967); *Jessup v. Luther*, 227 F.3d 993, 997-99 (7th Cir. 2000); *Pansy*, 23 F.3d at
7 778; *In re Estelle*, 516 F.2d 480, 485 (5th Cir. 1975).

9 Here, all three requirements for permissive intervention are met. Lindell seeks to
10 intervene for the limited purpose of modifying the Court’s Protective Order. No
11 independent jurisdictional basis is needed, the motion is not untimely, and there is a
12 common question of law and fact between the grounds that considerations that justified the
13 entry of the Protective Order originally, and whether those grounds still justify any
14 restrictions of the Protective Order upon the Data. *Cf. Beckman* 966 F.2d at 474 (“The
15 issue of interpretation of the policy supplies a sufficiently strong nexus between the district
16 court action and the state actions to satisfy the commonality requirement”).

18 An additional consideration for motions to intervene is whether intervention will
19 “unduly delay or prejudice the adjudication of the original parties’ rights.” *Blum*, 712 F.3d
20 at 1354. But, again, when the intervention is for the limited purpose of addressing a
21 protective order, this consideration loses force. Where “[t]he existing parties have settled
22 their dispute,” intervention has “has little effect on the original parties’ underlying rights.”
23 *Id.* This action was settled and all claims dismissed in 2009. *See* Order (Feb. 19, 2009)
24 (doc. 100).

1 All elements for permissive intervention are met, and no part would be prejudiced
 2 by Lindell’s limited intervention. Lindell should be permitted to intervene under Rule
 3 24(b).

4 **B. Lindell May Intervene as of Right.**

5 Lindell also can intervene for his limited purpose as of right, pursuant to Fed. R.
 6 Civ. P. 24(a)(2). Under Rule 24(a)(2), a non-party may exercise the right to intervene if it
 7 “claims an interest relating to the property or transaction that is the subject of the action,
 8 and is so situated that disposing of the action may as a practical matter impair or impede
 9 the movant’s ability to protect its interest, unless existing parties adequately represent that
 10 interest.” The Ninth Circuit has interpreted Rule 24(a)(2) as requiring four things of an
 11 intervenor: (1) its intervention motion is “timely”; (2) it “has a significantly protectable
 12 interest relating to . . . the subject of the action”; (3) it “is so situated that the disposition of
 13 the action may as a practical matter impair or impede [its] ability to protect that interest”;
 14 and (4) its “interest is inadequately represented by the parties to the action.” *Kalbers v.*
 15 *United States DOJ*, 22 F.4th 816, 822 (9th Cir. 2021) (quotations omitted). Each of those
 16 requirements is met here.
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19 **Timeliness.** Timeliness of a motion to intervene “hinges on three primary factors:
 20 (1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to
 21 other parties; and (3) the reason for and length of the delay.” *Kalbers*, 22 F.4th at 822
 22 (quotation omitted). As discussed above, considerations of timeliness have a different
 23 meaning in the context of an intervention for the purpose of addressing a protective order,
 24 than in the context of affecting the substantive or procedural resolution of the parties’
 25 claims and defenses. The core consideration underlying the timeliness requirement is “to
 26 prevent prejudice in the adjudication of the rights of the existing parties,” a factor that is
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1 “not present when the existing parties have settled their dispute and intervention is for a
2 collateral purpose.” *United Nuclear Corp.*, 905 F.2d at 1427 (citing *Public Citizen v.*
3 *Liggett Group, Inc.*, 858 F.2d 775, 786-87 (1st Cir. 1988) and *Meyer Goldberg, Inc. v.*
4 *Fisher Foods, Inc.*, 823 F.2d 159, 161-62 (6th Cir. 1987)). “While it is true that an
5 application for intervention must be timely, ‘timeliness is to be determined from all the
6 circumstances,’ and ‘the point to which the suit has progressed . . . is not solely
7 dispositive.’” *United Nuclear Corp.*, 905 F.2d at 1427 (quoting *NAACP v. New York*, 413
8 U.S. 345, 365-66 (1973)); *Kalbers*, 22 F.4th at 826 (“stage of proceeding” factor uses a
9 “nuanced, pragmatic approach” and “substance prevails over form” such that “[n]either the
10 formal “stage” of the litigation” nor the “length of time that has passed since a suit was
11 filed” is dispositive).

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14 In this case, there is no possibility that any of the parties could be prejudiced in the
15 adjudication of their rights, for that adjudication has been completed. “[P]rejudice must be
16 connected in some way to the timing of the intervention motion.” *Kalbers*, 22 F.4th at 825.
17 Lindell has brought his motion to intervene at an appropriate time, seasonably after he
18 became a defendant in the D.C. Litigation, decided to use the Data in his defense in that
19 action, and realized that the Protective Order might lead to the imposition of penalties or
20 harms if he did. This motion satisfies the timeliness requirement because no possibility of
21 prejudice to any party as a result of the timing of the motion exists.

22
23 **Significantly Protectable Interest.** The significantly protectable interest factor is
24 met because a non-party may intervene in an action for the purpose of litigating the
25 substance of a protective order. *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 354
26 (11th Cir. 1987) (“[A]ppellants have standing to intervene in this action and challenge the
27 propriety of the district court’s protective order.”). *See also In re Midland Nat. Life Ins.*
28

1 *Co. Annuity Sales Pracs. Litig.*, 686 F.3d 1115, 1120 (9th Cir. 2012) (limited purpose
 2 intervenor successfully appealed district court order ruling concerning sealing order).
 3 Lindell also meets this factor by application of the ordinary test governing application of
 4 the factor. A “significantly protectable interest” must be an interest “protectable under
 5 some law” and there must be a “relationship between the legally protected interest and the
 6 claims at issue.” *Kalbers*, 22 F.4th at 827; *Nw. Forest Res. Council v. Glickman*, 82 F.3d
 7 825, 837 (9th Cir. 1996). Here, Lindell has a strong interest in using the Data to defend
 8 himself against defamation claims, and a First Amendment interest in being free from prior
 9 restraint concerning the publication and use of the Data. There is an obvious relationship
 10 between Lindell’s interests and the Protective Order which may forbid him from using or
 11 publishing the Data.
 12

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 14 **Impair or Impede the Interest.** The third factor is met because the Protective
 15 Order may impair or impede Lindell’s ability to publish or use the Data without incurring
 16 liability for contempt of court.

17 **Interest Not Adequately Protected.** The fourth factor is met because no other
 18 party to this action has any interest in the Data or in vindicating Lindell’s ability to publish
 19 or use the data. This factor imposes a “minimal” burden, and is met if the intervenor shows
 20 that “representation of his interest *may* be inadequate.” *Kalbers*, 22 F.4th at 828.
 21

22 Lindell satisfies all four requirements for intervention as of right under Rule
 23 24(a)(2).

24 **III.**
 25 **The Court Should Lift the Protective Order**

26 After permitting Lindell to intervene in this action, the Court should lift the
 27 Protective Order, for three reasons.

28 ///

1 **A. Lindell Needs to Use the Data to Defend Himself.**

2 Lindell will use the Data to defend the reasonability and veracity of his statements
3 regarding the 2020 election at issue in the D.C. Litigation. Lindell Decl. ¶ 5. The
4 statements were based on information received from Montgomery. *Id.* ¶ 4. The substance
5 of the Data will show Lindell’s reliance upon it to be reasonable and that the statements
6 were truthful, both points which are defenses to a defamation claim.
7

8 **B. The Protective Order Is Stale.**

9 The Protective Order was entered on August 29, 2007, fifteen years ago. It was
10 based on an assertion that secrecy was needed to protect “national security interests” of the
11 United States. Protective Order at 1-2. The affidavit on which the Protective Order was
12 based stated that disclosure of “particular intelligence sources and methods” or the
13 “classified contracting process” could harm U.S. national security. Decl. of John D.
14 Negroponte ¶ 12 (Doc. 83-2). Those sources, methods, and contracts are now at least
15 fifteen years out of date. Computer capabilities and software – the substance of
16 Montgomery’s work for eTrepid at issue in this action, *see* case no. 06-cv-00056 doc. 1
17 ¶¶ 1,7, 15-19 – that in 2007 were cutting-edge are now obsolete. Any need for secrecy to
18 protect these matters has faded, and the Protective Order is no longer necessary. When the
19 government invokes the state secrets privilege, it is the courts’ “obligation to review the
20 [government’s claims] with a very careful, indeed a skeptical, eye, and not to accept at face
21 value the government’s claim or justification of privilege.” *Abilt v. CIA*, 848 F.3d 305, 312
22 (4th Cir. 2017) (quoting *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d 1190, 1203
23 (9th Cir. 2007)). At this time, after such a long period of time has passed, any initial
24 justification for the Protective Order no longer justifies its restrictions on Montgomery or
25 his Data.
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C. The Government’s State Secrets Claim Should Be Viewed with a Critical Eye, Where, as Here, It Conceals Constitutional Violations.

Montgomery has reported to the FBI illegal domestic surveillance of Americans by the government in government programs that Montgomery worked in. Montgomery Decl. ¶¶ 30, 34, 38. The Data that Lindell seeks to use is related to Montgomery’s work.¹ *Id.* ¶ 40. The government cannot be allowed to conceal its deprivations of constitutional rights through domestic surveillance by invoking the state secrets doctrine. The Court should review the government’s professed need for the Protective Order critically to determine whether it is asserting state secrets for on a legitimate basis or whether it is attempting to cover up unconstitutional activities.

**IV.
CONCLUSION**

Lindell should be granted leave to intervene in this action for the limited purpose of obtaining the lifting or modification of the Protective Order, and the Protective Order should be lifted.

DATED: August 20th, 2022

JENNINGS & FULTON, LTD.

By: /s/ Adam R. Fulton, Esq.
ADAM R. FULTON, ESQ.
Nevada Bar 11572
E-mail: afulton@jfnvlaw.com
LOGAN G. WILSON, ESQ.
Nevada Bar No. 14967
E-mail: logan@jfnvlaw.com
Attorneys Michael J. Lindell

¹ Members of Congress have stated that the CIA ran a bulk surveillance program that raises serious concerns about “warrantless backdoor searches of Americans.” Senator Ron Wyden Press Release, February 10, 2022, available at <https://www.wyden.senate.gov/news/press-releases/wyden-and-heinrich-newly-declassified-documents-reveal-previously-secret-cia-bulk-collection-problems-with-cia-handling-of-americans-information>. See also Dustin Volz, *Secret CIA Bulk Surveillance Program Includes Some Americans’ Records, Senators Say*, Wall St. J. (Feb. 10, 2022), available at <https://www.wsj.com/articles/secret-cia-bulk-surveillance-program-includes-some-americans-records-senators-say-11644549582>.

JENNINGS & FULTON, LTD.
2580 SORREL STREET
LAS VEGAS, NEVADA 89146
TELEPHONE 702.979.3565 ♦ FAX 702.362.2060

CERTIFICATE OF SERVICE

Pursuant to N.R.C.P. 5(b), I hereby certify that I am an employee of JENNINGS & FULTON, LTD., and that on the 20th day of August 2022, I caused a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE AND TO LIFT PROTECTIVE ORDER** to be served as follows:

- _____ by depositing in the United States Mail, first-class postage prepaid, at Las Vegas, Nevada, enclosed in a sealed envelope; or
- _____ by facsimile transmission, pursuant to E.D.C.R. 7.26, as indicated below; or
- X by electronic service, pursuant to N.E.F.C.R. 9 and Administrative Order 14-2, as indicated below:

Edmond “Buddy” Miller, Esq.
Bar No. 3116
STEPTOE & JOHNSON LLP
1610 Montclair Avenue, Suite C
Reno, NV 89509
bmiller@buddymillerlaw.com
Telephone: (775) 828-9898

Attorney for
ETREPPID TECHNOLOGIES, L.L.C. and
WARREN TREPP

Dennis L. Kennedy, Esq.
Bailey Kennedy
8984 Spanish Ridge Avenue
Las Vegas, Nevada 89148-1302
dkennedv@baileykennedv.com
Facsimile: 702-562-8821

J. Stephen Peek, Esq.
HOLLAND & HART LLP
5441 Kietzke Lane, Second Floor
Reno, NV 89511
speek@hollandhart.com

Reid H. Weingarten, Esq.
Brian M. Heberlig, Esq.
Robert A. Ayers, Esq.
STEPTOE & JOHNSON LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036-1795
rweingarten@steptoe.com
bheberlig@steptoe.com
rayers@steptoe.com

Carlotta P. Wells, Esq.
Senior Trial Counsel
Federal Programs Branch
Civil Division – Room 7150
U.S. Department of Justice
20 Massachusetts Ave., NW
P.O. Box 883
Washington, DC 20044
Carlotta.Wells@usdoj.gov
Fax No. 202-616-8470

Greg Addington, Esq.
Assistant U.S. Attorney
100 W. Liberty Street, Suite 600
Reno, Nevada 89501
Greg.Addington@usdoj.gov
Facsimile: 784-5181

JENNINGS & FULTON, LTD.
2580 SORREL STREET
LAS VEGAS, NEVADA 89146
TELEPHONE 702.979.3565 ♦ FAX 702.362.2060

JENNINGS & FULTON, LTD.
2580 SORREL STREET
LAS VEGAS, NEVADA 89146
TELEPHONE 702.979.3565 ♦ FAX 702.362.2060

1 Raphael O. Gomez, Esq.
Senior Trial Counsel
2 Federal Programs Branch
3 Civil Division – Room 6144
U.S. Department of Justice
4 20 Massachusetts Ave., N.W.
P.O. Box 883
5 Washington, DC 20044
Raphael.Gomez@usdoj.gov
6 Facsimile: 202-616-8470

7 Robert E. Rohde, Esq.
8 Gregory G. Schwartz, Esq.
Rohde & Van Kampen
9 1001 Fourth Avenue, Suite 4050
Seattle, Washington 98154
10 brohde@rohdelaw.com
11 gschwartz@rohdelaw.com
Facsimile: 206-405-2825

12 Amanda J. Cowley, Esq.
13 Bradley Scott Schrage, Esq.
14 Gary R. Goodheart, Esq.
Jones Vargas
15 3773 Howard Hughes Parkway
Third Floor South
16 Las Vegas, Nevada 89169
acowley@jonesvargas.com
17 bschrager@jonesvargas.com
grg@jonesvargas.com

18 Michael James Flynn, Esq.
19 Flynn & Stillman
20 P.O. Box 690
Rancho Santa Fe, CA
21 mjfb@msn.com

22
23
24 Ellyn S. Garofalo, Esq.
25 Liner Yankelevitz Sunshine &
Regenstreif LLP
26 1100 Glendon Avenue
Los Angeles, California 90024-3503
27 egarofalo@linerlaw.com
28

Roland Tellis, Esq.
Marshall B. Grossman, Esq.
Bingham McCutchen LLP
The Water Garden
1620 26th Street, 4th Floor, North Tower
Santa Monica, CA 90404
rolland.tellis@bingham.com
marshall.grossman@bingham.com
Facsimile: 310-907-2000

Ronald J. Logar, Esq.
Law Office of Logar & Pulver, PC
225 S. Arlington Avenue, Suite A
Reno, Nevada 89501
Zachary@logarpulver.com

Bridget Robb Peck, Esq.
Lewis and Roca, LLP
50 W. Liberty Street, Suite 410
Reno, Nevada 89501
bpeck@lrlaw.com
Facsimile: 775-823-2929

Debbie Leonard, Esq.
Leigh T. Goddard, Esq.
John J. Frankovich, Esq.
McDonald Carano Wilson LLP
P.O. Box 2670
Reno, Nevada 89505-2670
dleonard@mcdonaldcarano.com
lgoddard@mcdonaldcarano.com
jfrankovich@mcdonaldcarano.com

Thomas H. Casey, Esq.
The Law Office of Thomas H. Casey, Inc.
22342 Avenida Empresa, Suite 260
Rancho Santa Margarita, California 92688
msilva@tomcaseylaw.com

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2
3
4
5
6
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8
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11
12
13
14
15
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17
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19
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21
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23
24
25
26
27
28

Timothy Ryan O'Reilly, Esq.
O'Reilly Law Group
325 S. Maryland Parkway
Las Vegas, Nevada 89101
tor@oreillylawgroup.com

Via U.S. Mail
Dennis Montgomery
6 Toscana Way W.
Rancho Mirage, CA 92770

Via U.S. Mail
The Montgomery Family Trust
6 Toscana Way W.
Rancho Mirage, CA 92770

Via U.S. Mail
Blxware LLC
600 106th Avenue NE, Suite 210
Bellevue, WA 98004-5045

Via U.S. Mail
Offspring LLC
600 106th Avenue NE, Suite 210
Bellevue, WA 98004-5045

/s/ Norma Richter
An Employee of
JENNINGS & FULTON, LTD.

JENNINGS & FULTON, LTD.
2580 SORREL STREET
LAS VEGAS, NEVADA 89146
TELEPHONE 702.979.3565 ♦ FAX 702.362.2060