No. 13-50912

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES NEGLEY,
Plaintiff-Appellant

v.

FEDERAL BUREAU OF INVESTIGATION,
Defendant-Appellee

BRIEF FOR DEFENDANT-APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

This appeal can be most economically resolved on the written briefs, the record in this FOIA case, and the proceedings from the "Negley II" litigation in the District of Columbia. See Fed. R. App. P. 34(a)(2)(C). The simple question for this Court to resolve is whether the FBI conducted an adequate search in response to Negley's 2009 Freedom of Information Act ("FOIA") request.

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STATEMENT OF JURISDICTION

The FBI concurs with Negley that this Court has jurisdiction pursuant to 28 U.S.C. § 1291, because this is an appeal from a final judgment by the District Court.

STATEMENT OF THE ISSUES

1. Is the District of Columbia District Court's finding that the FBI did not locate any investigatory records in searches conducted regarding Negley's 2009 FOIA request, that had not been previously released, preclusive in this case? (See Negley v. F.B.I., 825 F. Supp. 2d 63, 68).

2. If not, did the District Court in this case (Negley III) correctly determine on summary judgment that the FBI conducted an adequate search in response to Negley's 2009 FOIA request?

3. Did the District Court abuse its discretion in denying Negley discovery in this case?

STATEMENT OF THE CASE

Statutory Overview

The FOIA was passed in 1966 to provide a statutory mechanism for citizens to obtain access to federal agency records. 5 U.S.C. § 552. The core purpose of FOIA is to "contribut[e] significantly to public understanding of the operations or activities of the government." U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 775 (1989). FOIA is a production statute, not a discovery statute, and for that reason discovery usually is not allowed in FOIA litigation. (See ROA.164, citing, e.g., Cooper Cameron Corp. v. U.S. Dep't of Labor Occupational Serv. & Health Admin., 280 F.3d 539, 543 (5th Cir. 2002)).

The FBI receives a significant volume of FOIA requests every year. In FY 2013, the FBI received 12,463 requests, and processed 11,579 requests. The FBI incurred over $28 million dollars in FOIA processing and litigation related costs in the last fiscal year. Department of Justice Annual Freedom of Information Act Report FY 13, available at http://www.justice.gov/oip/annual_report/2013/sec 5.pdf &sec.9.pdf. At present, the FBI is currently engaged in more than 130 separate FOIA lawsuits in the federal courts.

Mr. David Hardy is the Section Chief of the FBI's Record Information Dissemination Section, and supervises 276 employees whose collective mission is to respond to FOIA requests. (ROA.335). Mr. Hardy submitted the declaration in

this case documenting the FBI's reasonable search efforts in response to Negley's 2009 FOIA request. (See ROA.335-376).

Factual Background

This case began more than 18 years ago. In September of 1995, while visiting his family's almond holdings in California, James Negley went to the Chico State University library. (Negley Brief at 3). He was curious about the Unabomber (id.),[1] and made an urgent request for the Unabomber's entire 35,000 word Manifesto. (ROA.317, 519). That day's Washington Post had not yet arrived, and Negley offered an employee $20 to bring a copy of the newspaper with the published Manifesto to his hotel room that night. (Negley Brief at 2; ROA.510). Mr. Negley was "very firm in his desire to obtain the article as soon as possible," but immediately after making the request he disappeared. (ROA.510, 513). The suspicious library employee contacted the University Police, and alerted the FBI via a hot-line tip. (ROA.317, 339, 514). The FBI then interviewed Negley, and it was apparent that Negley had nothing to do with the Unabomber case. (Negley Brief at 3). After conducting a brief investigation, the FBI ruled out

[1] For a 17-year time period, between 1978 and 1995, the "Unabomber" mailed or placed 16 improvised bombs which killed three people and injured 23 others in the United States. The Unabomber's capture was a high FBI priority in 1995. (See, e.g., ROA.514, 527-528, 784). Ted Kaczynki was eventually apprehended, pled guilty to these crimes, and was sentenced to life in prison without the possibility of parole. Apart from his avid interest in the media coverage about the Unabomber, the FBI is aware of no connection whatsoever between James Negley and Ted Kaczynki.

Negley as a possible suspect the same month as the hot-line tip was received, and dropped the inquiry. (ROA. 929, 317, 339).

The FBI has undertaken no additional investigative activity of Negley since 1995. (ROA.930; 894, Tr. at 63: 6-12). Nevertheless, Negley has engaged the FBI in administrative FOIA requests and FOIA litigation continually for the last 14 years, in addition to a congressional inquiry. (ROA.930, 339). As recently as last April, Negley's counsel requested that the FBI subpoena Negley in a "case" allegedly referenced in a vague handwritten note on an attorney's fax cover sheet in 2002 (ROA.690) because "Mr. Negley … wants to give his testimony." (ROA.331). The FBI responded that it was unaware of any current case involving Negley. (Id.). The handwritten note appears to state: "1/17/02 … case is still pending … 500,000 pp in file … 42,000 misc evidence." (ROA.690).

The relevant portion of this fax cover sheet from the AUSA representing the FBI in Negley I, to the FBI's Chief Division Counsel, is reproduced below:

FACSIMILE TRANSMISSION

DATE: January 22, 2002

FROM: Daniel M. Castillo, Assistant U.S. Attorney
U. S. Attorney's Office
Western District of Texas
816 Congress Avenue, Suite 1000
Austin, Texas 78701
ph: (512) 916-5858
fax: (512) 916-5870

b6 per FBI
b7C

per 1
1/17/02
case is still pending
500,000 pp - image
42,000 misc
evidence

TO: [redacted]
Chief Division Counsel
Sacramento Division
Federal Bureau of Investigation
Sacramento, CA 95841
ph: [redacted]

FAX NO. (916) 971-1629

PAGE NO.: 3

RE: *John Lutcher Negley v. U.S. Dep't of Justice and F.B.I.*
No. A-01-CA-57-JN (W.D. Tex. — Austin Division)

NOTES: (65)

Negley-437-FOIPA

7C, 6 per FBI
65 per Ewert

190A-SC-35435 — 25

13-50912.690

In August of 2012, in this litigation, Negley propounded 20 requests for admission, which asked the FBI, inter alia, to admit or deny that FBI agents or others acting on their behalf at some time since 1995:

- "entered the home of … Negley … [in] Austin, Texas" (ROA.77);

- "seized or removed … personal property including a rare book [entitled] Retired Dallas Police Chief Jesse Curry's 'Limited Collector's Edition' of 'His Personal JFK Assassination File,' [and] a pillow" (ROA.81);

- "entered [Negley's business offices] in Mill Valley, California … and seized or removed property … including business records." (ROA.82-83).

Negley declined to provide a factual basis for these discovery requests, notwithstanding Fed. R. Civ. P. 26(g). (See Negley Brief at p. 37; ROA.140). Negley made similar unsupported allegations of FBI-directed espionage in Negley II (ROA.780), and the District Court concluded that he did not "present any evidence that the FBI has engaged in illegal activity." Negley v. F.B.I., 825 F. Supp. 2d 63, 73 n.7 (D.D.C. 2011) (quoted at ROA.859).

"Negley I" Litigation

Negley filed his first FOIA lawsuit in the Western District of Texas in 1999. The underlying 1999 FOIA request asked for all records concerning him that were maintained at the FBI's Sacramento, California Field Office. (ROA.317). After producing 50 of 51 pages of records located in response to the 1999 request, the FBI moved for summary judgment. The District Court granted summary judgment in favor of the FBI. (ROA.929). Negley did not appeal. Negley v. F.B.I., 658 F. Supp. 2d 50, 53 n.2 (D.D.C. 2009).

"Negley II" Litigation

Negley filed his second FOIA lawsuit in the District of Columbia District Court in 2003, concerning his 2002 FOIA request. This underlying FOIA request asked for: "a copy of any records about [Negley] maintained at and by the FBI in [its San Francisco] field office." Negley v. F.B.I., 825 F. Supp. 2d 63, 66 (D.D.C. 2011). The resulting litigation lasted for ten years, finally concluding in September of 2013.[2] The District Court's docket sheet contains 143 separate entries, and the case traveled to the District of Columbia Court of Appeals on four separate occasions. Negley incurred as much as $233,000.00 in attorney's fees and costs, and was awarded just over $163,000.00, even though the FBI ultimately prevailed on summary judgment. (ROA.772-775). During the District of Columbia litigation, Mr. Negley's lawyers also deposed, for four and one-half hours, the FBI agent involved in the brief 1995 investigation of Negley, (see ROA.879-921), as well as Mr. Hardy on two separate occasions. Negley v. F.B.I., 825 F. Supp. 2d at 67-68.

On September 24, 2009, after a remand from the appellate court and extensive proceedings, the District Court granted Negley's Motion for Partial

[2] Although only portions of Negley II are contained in this record, this Court may take judicial notice of the proceedings from the District of Columbia litigation. See generally Gray ex rel. v. Beverly Enters-Miss., Inc., 390 F.3d 400, 408 n.7
(5th Cir. 2004); Fed. R. Evid. 201(b).

Summary Judgment, denied the FBI's Motion for Summary Judgment, and ordered the FBI to:

> conduct reasonable searches, in response to Negley's FOIA request for **all documents that relate to or reference Negley in any manner** …[3]

Negley v. F.B.I., 825 F. Supp. 2d at 67 (emphasis added).

The FBI conducted the required searches, and submitted its Eighth Declaration from Mr. Hardy on May 2, 2011 (docket no. 117-4).

In his Eighth Declaration, Mr. Hardy verified that:

> [T]he FBI conducted a series of searches in accordance with the Court's September 24, 2009 Order. … The searches … were not limited by date, location or type of document. … [A]ll searches conducted after the Court's … September 24, 2009 … Order were designed to locate and identify records responsive to both plaintiff's 2002 and 2009 FOIA … requests.

(See ROA.785-787; declaration also quoted in greater length at Negley Brief, pp. 6-7, and at ROA.755).

The Hardy Declaration also stated that: "'[t]he searches conducted in response to Plaintiff's 2009 request and the Court's [September 2009] Order did not locate **any** responsive FBI investigative records that had not been previously released to Plaintiff.'" (ROA.755, emphasis added).

[3] At the time of the September 24, 2009 Order, the District Court was not aware of Negley's June 2009 FOIA request. Negley v. F.B.I., 766 F. Supp. 2d 190, 191-92. Ironically, however, the District Court's search directive to the FBI tracked, almost identically, Negley's own June 2009 FOIA request, which asked for: "**all records** in the possession of the [FBI] **relating, in any way**, **to** James Lutcher **Negley** … Austin, Texas … as well as his business … [in] Mill Valley, California." (ROA.17, emphasis added).

By Order dated March 1, 2011 (Negley v. F.B.I., 766 F. Supp. 2d 190 (D.D.C. 2011)), the District Court denied Negley's Motion for Contempt, and adopted the factual representations from the Eighth Hardy Declaration, finding that the FBI had complied with the search and production Order of September 24, 2009:

> - All searches conducted after the issuance of the Court's Order were conducted to locate records responsive to both Plaintiff's 2002 and 2009 requests.
>
> - [E]ven if the Court had intended to expand upon Plaintiff's 2002 FOIA request to include 'all documents that relate to … Negley in any manner,' this expansive language applied only to the provision that related to **searches**. … A separate provision in the Order gave instructions to the FBI as relating to the **production of documents**. The production provision … only addressed documents that were … 'responsive to Negley's [2002] FOIA request.' (original emphasis).
>
> - [A]n agency does not violate its FOIA obligations if it fails to **produce** administrative documents which have been created as a direct result of responding to the request itself. … In fact, the FBI did not impose any geographic restrictions on its searches in response to the September 24, 2009 Order. (emphasis added).

(Negley II, 766 F. Supp. 2d at 192 n.5, 194, & 195 n.7).

By Order dated August 31, 2011, 825 F. Supp. 2d 63, the D.C. District Court granted summary judgment in favor of the FBI, and reaffirmed its reliance on the facts set forth in the Eighth Hardy Declaration:

- [T]he searches conducted pursuant to Plaintiff's 2009 request did not locate any responsive 'investigatory' records that had not been previously released. The searches did locate 'administrative' files, which are not typically produced because most requestors do not want a copy of their own request or want to pay for these files. The FBI subsequently sent Plaintiff two letters inquiring as to whether he would like to receive these files, and [did not] receive … any clear response.

- Plaintiff argues that 'the FBI's use of April 2002 as the cut-off date for production of documents is unreasonable.' … It is true, as Plaintiff himself states, [that] 'temporal limitations on FOIA productions are prohibited where the agency is unable to demonstrate that such cut-offs are reasonable **under the circumstances**.' … However, in this particular circumstance, the FBI responded to Plaintiff's 2002 request while also conducting searches in response to a subsequent much broader request. Indeed, 'following searches conducted in response to the June 14, 2009 FOIA … request … and the Court's September 24, 2009 Order, [4] the FBI did not locate any responsive FBI investigatory records related to plaintiff that had not been previously produced. Eighth Hardy Decl. ¶ 16. Simply put, Defendant's search and production in response to the 2002 request were reasonable under the circumstances of this case.

(Negley II, 825 F. Supp. 2d at 68, 70-71).

"Negley III" – The Current Litigation

[4] The District Court's earlier statement on March 1, 2011that the FBI "limited the temporal and geographic scope of its searches because it needed only to search for records responsive to Plaintiff's 2002 FOIA request" (766 F. Supp. 2d at 193) is inaccurate. The August 31, 2011 Order clarified that "the FBI responded to Plaintiff's 2002 FOIA request while also conducting searches in response to a subsequent [2009] much broader [FOIA] request." 825 F. Supp. 2d at 71.

Negley filed suit in the Western District of Texas on April 18, 2012 (ROA.1; Negley Brief at 8). The subject of this lawsuit is Negley's June 2009 FOIA request. (Negley Brief at pp. 4, 6). Since the FBI had already conducted its searches for documents responsive to the 2009 FOIA request in 2009-2010, in conjunction with its response to the D. C. District Court's September 24, 2009 search and production Order in Negley II. (ROA.338-340 & n.6), all that remained to be completed in this lawsuit was the processing of administrative and litigation files, redacting protected material, and explaining the utilization of statutory exemptions through a Vaughn Index and a detailed declaration. In a series of seven rolling releases to Negley, between July 16, 2010 and December 28, 2012, the FBI processed over 7,400 pages of administrative and litigation files.[5] (ROA.930-931; 336-337). Of these pages located and processed, 6,599 pages were released in whole or in part to Negley, and only 828 pages were withheld in full. (ROA.336-337).[6]

[5] Negley devotes considerable space to the FBI's delay in processing his 2009 FOIA request. (See Negley Brief at pp. 7-9). At least nine months of this delay was attributable to Negley's failure to respond to FBI letters, and his failure to pay the $143.00 copying fee, however. (See ROA.338-342; Negley v. F.B.I., 766 F. Supp. 2d at 196 n.9). In any event, any delay by the FBI is immaterial to the decisive issue of whether the agency conducted an adequate search for responsive documents. (See ROA.933) ("'[t]o prove bad faith, a plaintiff must show that the government purposefully withheld documents, not that it merely delayed or was inefficient in producing them.'") (quoting Smith v. United States, 95-CV-1950, 1996 WL 696452, at * 5 (E.D. La. Dec. 4, 1996), aff'd in part, 127 F.3d 35 (5th Cir. 1997)).

[6] The District Court erroneously stated that only 2,288 pages were released to Negley. (ROA.930). This minor error had no effect on the District Court's decisions granting summary judgment or the protective order, however.

On August 30, 2012, Negley propounded 20 requests for admission, and 19 related conditional requests for production. Negley's discovery focused on his unsupported suspicion that the FBI conducted multiple additional investigative (and likely illegal) activities against him after September 1995. None of the discovery sought information regarding the specific searches conducted by the FBI in response to the 2009 FOIA request,[7] and outlined in the Hardy Declarations during the D.C. litigation. (See ROA.72-86). The District Court granted the FBI's Motion for Protective Order on February 14, 2013 (ROA.164-165), and denied Negley's Motion for Reconsideration on July 31, 2013 (ROA.927-928). On the same day, the District Court granted summary judgment in the FBI's favor (ROA.929-939). The District Court found that "the validity of the exemptions was conceded by [Negley] in relation to the documents … known to exist" (ROA. 938), and that the [May 6, 2013] Hardy Declaration supported finding that the FBI conducted an adequate search in response to the 2009 FOIA request. (ROA. 937).

The District Court did not definitively rule on the preclusion issue, stating:

> The court in Negley II held that the FBI had conducted searches that went beyond the 2002 request and held that the 2009 request did not uncover any new investigatory material. … It seems that the court believed the search [for] the 2009 request was reasonable as well.

[7] Negley's Request for Admission No. 20 asked the FBI to admit or deny whether records were withheld pursuant to the "Meese Memorandum." (ROA.86).

(ROA. 936-937).

Negley timely filed his Notice of Appeal on September 27, 2013. (ROA.990).

Rulings To Be Reviewed

1. The Negley II Court's August 31, 2011 ruling that: 'the searches conducted pursuant to Plaintiff's 2009 request did not locate any responsive 'investigatory' records that had not been previously released (825 F. Supp. 2d. 63, 68).

If Negley II is not preclusive, the District Court's rulings in this case that:

2. The FBI conducted an adequate search in response to Negley's 2009 FOIA request (ROA.937, 939); and,

3. The decisions granting the FBI's Motion for Protective Order, and denying Negley's Motion for Reconsideration. (ROA.164-165, 927).

STANDARD OF REVIEW

The standard of review for summary judgments granted by the district court is de novo, and the appellate court applies the same standard as the court below. E.g., Buffalo Marine Servs. Inc. v. United States, 663 F.3d 750, 753 (5th Cir. 2011). This Court may affirm the summary judgment upon any ground which both parties had the opportunity to present evidence. Shepherd v. Comptroller Pub. Accounts State of Tex., 168 F.3d 871, 873 n.1 (5th Cir. 1999); Conkling v. Turner, 18 F.3d 1285, 1296 n.9 (5th Cir. 1994). In order to preserve an argument for

appellate review, it must both be raised in the District Court and in the appellant's opening brief. See, e.g., Stewart Glass & Mirror, Inc. v. U.S. Auto Glass Disc. Ctrs., Inc., 200 F.3d 307, 316-317 (5th Cir. 2000) (claims raised for the first time on appeal will not be considered); Cinel v. Connick, 15 F.3d 1338, 1345 (5th Cir. 1985) (any argument not raised in the opening brief by the appellant on appeal is waived).

The parties agree that the District Court's decisions denying discovery are reviewed for abuse of discretion. (See Negley Brief at p. 32, citing Freudensprung v. Offshore Tech. Servs., Inc., 379 F.3d 327, 347 (5th Cir. 2002)).

SUMMARY OF THE ARGUMENT

Negley misapprehends the purpose of the FOIA. The limited purpose of this statute is to allow the public to obtain government documents - it is not to require federal agencies to answer questions about the possible scope of agency investigations. For this reason, discovery is rarely permitted in FOIA cases. When discovery is permitted, it should be limited to whether the agency conducted a reasonable search for responsive documents. FOIA requires the agency's search to be reasonable rather that perfect, and a plaintiff's speculation about the existence of additional documents does not render the search insufficient or entitle the plaintiff to discovery.

The D.C. District Court's decision in Negley II that the FBI's searches – in response to both the 2002 and 2009 FOIA requests -- did not locate any responsive investigatory records that had not been previously released should be preclusive in this case. That is so because Negley is only seeking investigatory records here, and he argued in the District of Columbia that the FBI was required to search beyond 2002 in response to the Court's September 24, 2009 Order.

Even if the District of Columbia litigation is not preclusive, the District Court in this case properly granted summary judgment on the adequacy of the FBI's search. In a detailed 71- paragraph Declaration (ROA.335-376) properly accepted by the District Court, the FBI certified that all responsive documents were located, and either released to Negley, or properly withheld under well-established FOIA exceptions. Ironically, Negley never challenged the FBI's claimed exemptions in the District Court, and this appeal is focused solely on the unsupportable premise that additional investigatory records must exist. Negley's challenges are not addressed to the searches themselves, but are only post-facto speculations about the possible existence of additional documents.

Negley's rank speculation that the FBI has been conducting espionage on him for the last 18 years, and even burglarized his residence in Austin to steal his collection of rare JFK assassination memorabilia, does not render the FBI'S search unreasonable, or entitle Negley to discovery. Likewise, Negley's speculation

about the meaning of one cryptic handwritten note on a fax cover sheet, only generated in response to his first FOIA lawsuit in 2002, does not warrant reversal of the District Court's Summary Judgment. The District Court did not abuse its discretion by denying Negley discovery on speculative issues.

ARGUMENT

I. THIS APPEAL IS BARRED BY COLLATERAL ESTOPPEL.

(See Negley Brief at pp. 30-32).

Although the District Court did not definitively rule on the preclusion[8] question (ROA.936-937), since the argument was raised below by the FBI (ROA.302-303, 855-856), it may serve as an independent ground to affirm. The Negley II court's conclusion -- that "[a]ll searches conducted after the issuance of the Court's [September, 2009] Order were conducted to locate records responsive to both Plaintiff's 2002 and 2009 FOIA requests," and more specifically that "' the only records discovered that had not been previously released to Plaintiff were 'administrative' type files that were deemed unresponsive to Plaintiff's 2002 request…'" -- is preclusive. See Negley v. F.B.I., 766 F. Supp. 2d 190, 192 n.5, 196 (D.D.C. March 1, 2011) (citing Hardy Declaration); see also Negley v. F.B.I.,

[8] The doctrines of res judicata and collateral estoppel frequently overlap. Res judicata is a broader preclusion principle which applies to legal claims, instead of legal issues, and bars an entire suit from being brought again on an event that was the subject of a previous legal cause of action, fully and fairly litigated. See generally Bradberry v. Jefferson County, Tex., 732 F.3d 540, 548 n.6 (5th Cir. 2013) (citation omitted). In the District Court and on appeal, the parties discuss the preclusion issue under the res judicata rubric, but the narrower principle of collateral estoppel is more applicable.

825 F. Supp. 2d 63, 68 (D.D.C. Aug. 31, 2011) ("the searches conducted pursuant to Plaintiff's 2009 [FOIA] request did not locate any responsive 'investigatory' records that had not been previously released.").

Collateral estoppel prevents litigation of an issue when: "1) the identical issue was previously adjudicated; 2) the issue was actually litigated; and 3) the previous determination was necessary to the decision." Pace v. Bogalusa City Sch. Bd., 403 F.3d 272, 290 (5th Cir. 2005).

The specific issue which was actually litigated by the parties in Negley II was whether the FBI had complied with the Court's September 24, 2009 Order, requiring it to "conduct reasonable searches, in response to Negley's FOIA request for all documents that relate to or reference Negley in any manner." 766 F. Supp. 2d at 192. Negley filed a Motion for Contempt in the D.C. litigation, and argued that the FBI was required by the September 2009 Order to both search for and produce responsive documents up until 2009. Id. at 193. The FBI took the position that it had gone beyond the requirements of the Court's September, 2009 Order, and that it was only required to produce documents responsive to the 2002 request. Id.

The Court accepted the FBI's position, and acknowledged that:

> [E]ven if the Court had intended to expand upon Plaintiff's 2002 FOIA request to include 'all documents that relate to or reference Negley in any manner,' this expansive language applied only to the provision of the

> Order that related to **searches**. … A separate provision in the Order gave instructions to the FBI as relating to the **production of documents**. … The production provision of the Order only addressed documents that were … 'responsive to Negley's 2002 FOIA request.'
> 766 F. Supp. 2d at 194 (original emphasis).

In responding to the Court's September, 2009 Order, the FBI conducted searches to locate documents responsive to both the 2002 and 2009 FOIA requests because: "[a]t the time [January 2010] it was unclear whether the Court in [the D.C.] litigation would order the FBI to include these [administrative] records as responsive to the 2002 San Francisco FOIA request given that they were created outside the cut-off date for records responsive to the 2002 request. In an effort to be prepared should the Court rule against it, the FBI chose to begin processing the administrative documents responsive to plaintiff's 2009 FOIA request. The Court subsequently ruled that the administrative records were not responsive to plaintiff's 2002 FOIA request. … The searches conducted to locate records responsive to plaintiff's June 15, 2009 [FOIA] request … identified the same 1995 investigatory information previously provided to [Mr. Negley] in prior [FOIA] requests." (ROA.339-340 and n.6, 338).

On appeal, Negley acknowledges that the District Court in this case "indicate[d] that the court in Negley II 'held that the FBI has conducted searches that went beyond the 2002 request and held that the 2009 request did not uncover any new investigatory material.'" (Negley Brief at p. 31, quoting ROA.937).

Negley argues that the D.C. litigation is not preclusive because: 1) "[t]he Court did not rule on the adequacy of a search in reference to the 2009 request;" 2) "the FBI was only required to search for and produce records responsive to the 2002 request. Negley v. F.B.I., 766 F. Supp. 2d at 193;" and 3) "The summary judgment also approved the FBI's imposition of a cutoff date for **production of records as of 2002**." (See Negley Brief at pp. 30-32, emphasis added).

Negley's arguments on appeal are incorrect, and contrary to the position he took during the D.C. litigation. In the D.C. litigation, Negley claimed that the FBI violated the September 2009 Order because it did not produce documents beyond the 2002 FOIA request. Negley v. F.B.I., 766 F. Supp. 2d at 194 ("Plaintiff argues that the Order's language, 'for all documents that relate to or reference Negley in any manner,' broadened the scope of the Order beyond the temporal and geographic limitations of his 2002 FOIA request."). Accordingly, given Negley's position, it was necessary for the Negley II court to decide the exact scope of the FBI's search and production requirements in response to the September, 2009 Court Order. Moreover, the Negley II Court also acknowledged that its September 2009 Order could have been reasonably interpreted by the FBI to include a requirement that it search for documents responsive to the 2009 FOIA request. Id. Indeed, this is how the FBI interpreted the Order. (ROA.340 n.6). The Court's determination that there were no additional investigatory records discovered by the

FBI's searches was a necessary component of its holding that the FBI's search for documents responsive to the 2002 FOIA request was adequate. The Court's finding that "the only records discovered that had not been previously released to Plaintiff were 'administrative' type files that were deemed unresponsive to Plaintiff's 2002 request…'" is preclusive. (766 F. Supp. 2d at 196)

Negley's third argument regarding the scope of the FBI's production obligation ignores the critical distinction drawn by the Negley II court between the agency's search obligations and production obligations. See 766 F. Supp. 2d at 194-195. Whether or not the FBI satisfied its production obligations in Negley II – an issue also decided against Negley – is immaterial to whether the agency satisfied its search obligations, and whether the D.C. findings are preclusive here.

The FBI is not claiming that this entire lawsuit is precluded. To the extent Negley desired copies of the administrative and litigation files located as a result of the FBI's searches during the Negley II litigation, that purpose could be met by this case. (See ROA.303 n.47, 859). But to the extent Negley wants to challenge the adequacy of the FBI's searches for documents in response to his 2009 FOIA request, that challenge is foreclosed. The documents at issue in this case were previously searched for and identified during Negley II. The completion of the document processing, and the release of the administrative and litigation files occurred during District Court proceedings in this case. Ironically, however, the

only issues not foreclosed in this proceeding – whether the FBI correctly invoked FOIA exemptions – have been abandoned by Negley. The one claim Negley wishes to pursue (based upon a cryptic handwritten note) -– whether the FBI failed to adequately search for additional alleged investigatory records – has already been decided. For the reasons set forth above, the Court's finding in Negley II should foreclose the issue of whether additional investigative records exist, and whether the FBI conducted an adequate search in response to the 2009 request.

Even if not foreclosed by the Court's findings in the D.C. litigation, Negley has failed to raise any fact issue which precluded summary judgment in this case on the question of whether the FBI conducted an adequate search.

II. THE DISTRICT COURT CORRECTLY DETERMINED ON SUMMARY JUDGMENT THAT THE FBI CONDUCTED AN ADEQUATE SEARCH IN RESPONSE TO NEGLEY'S 2009 FOIA REQUEST.

A. The District Court applied the correct burden of proof. (See Negley Brief at pp. 25-30).

Negley's argument is premised on the erroneous assumption that the FBI failed "to establish through reasonably detailed affidavits that its search was reasonable." (Negley Brief at p. 27). He concedes that "if an agency demonstrates that it has conducted a reasonably thorough search, the FOIA requester can rebut the agency's affidavit only by showing that the agency's search was not made in good faith." (Id., citing Miller v. U.S. Dep't of State, 779 F.2d

1378, 1383 (8th Cir. 1985)). Nor does Negley challenge the District Court's finding that he failed to "overtly assert a bad faith claim" (ROA.934); or that "to prove bad faith, a plaintiff must show that the government purposefully withheld documents, not that it merely delayed or was inefficient in producing them.'" (ROA.933, quoting Smith v. United States, 95-CV-1950, 1996 WL 696452, at * 5 (E.D. La. Dec. 4, 1996), aff'd in part, 127 F.3d 35 (5th Cir. 1997)).

B. Negley has failed to challenge the adequacy of the FBI's search methods.

In this case, the FBI submitted a 42 page, 71 paragraph Declaration which set forth in more than sufficient detail the steps undertaken to search for documents in response to Negley's 2009 FOIA request. (See generally ROA.335-376). Negley acknowledges in his opening brief that the Hardy Declaration describes a "detailed search for documents" (Negley Brief at p. 17), and Negley fails to controvert the District Court's specific findings that:

> [The FBI] provided information of the searches for information in the Hardy Declaration in paragraphs 32-35. [ROA.347-350] These paragraphs explain that the searches conducted of automated, manual, and electronic surveillance indices, utilizing a 6-way phonetic breakdown of plaintiff's name. The searches were conducted at various locations by different personnel, to double-check for accuracy. The affidavit was produced by an official. Defendant has met its burden in providing a detailed affidavit. (ROA.933).

Even more tellingly, Negley agrees with the District Court's next conclusion that "[t]he declarations are awarded a presumption of good faith, which cannot be rebutted by purely speculative claims about the existence or discoverability of other documents." SafeCard Servs., Inc. v. S.E.C., 926 F.2d 1197, 1200 (D.C. Cir. 1991) (ROA.933-934; see also Negley Brief at 27, quoting SafeCard for the identical proposition). Negley also fails to quote additional relevant language from the SafeCard opinion, which provides that "[w]hen a plaintiff questions the adequacy of the search …, the factual question it raises is whether the search was reasonably calculated to discover the requested documents, not whether it actually uncovered every document extant. … Mere speculation that as yet uncovered documents may exist does not undermine the finding that the agency conducted a reasonable search for them." 926 F.2d at 1201.

Negley's claim that his challenges were directed "toward the adequacy of the search and questioned whether the agency's search was reasonably calculated to discover the requested documents" (Negley Brief at 28) is also erroneous, and conflicts with the above quoted principle from SafeCard. Indeed, it is well-settled that a requestor's mere suggestion that additional documents might have been discovered by a more thorough search does not defeat the adequacy of the search. See, e.g., Negley v. F.B.I., 825 F. Supp. 2d at 70 (D.D.C. 2011) ("'an agency's failure to find a particular document does not undermine the determination that the

search was adequate … adequacy of a search is not determined by its results, but by the **method of the search itself**.'") (emphasis added, citations omitted).

Negley's challenges to the adequacy of the FBI's search say nothing about the method of the searches conducted in this case -- instead they are merely post facto inferential speculations that additional FBI investigations must have occurred. See Negley Brief at pp. 28-29. The FBI was not required to follow Negley's rabbit trails and speculation to demonstrate the adequacy of its search, however. See, e.g., Woods v. U.S. Dep't of Justice, No. 12-1701, 2013 WL 4852297, at * 3 (D.D.C. Sept. 12, 2013) ("FOIA neither requires an agency to answer questions disguised as a FOIA request or to create documents or opinions in response to an individual's request for information."); Ferguson v. U.S. Dep't of Education, No. 09 Civ. 10057(FM), 2011 WL 4089880, at *13 (S.D.N.Y. Sept. 13, 2011) (agency not obligated to interview its employees to attempt to locate records when it has already searched all files likely to contain the relevant information); Saladana v. Fed. Bureau of Prisons, 715 F. Supp. 2d 10, 23 (D.D.C. 2010) ("[A]gency is not required to conduct interviews, to search in places where the requested documents are not likely to be found, or to search exhaustively.").

Negley also fails to make clear how applying a different standard -- allegedly endorsed by the First Circuit in Maynard v. CIA, 986 F.2d 547 (1st Cir. 1993) – would create a fact issue on the adequacy of the FBI's search. Negley

cites (but does not quote) Maynard for the doubtful proposition that "summary judgment would be improper upon a mere showing that the agency might have discovered a responsive document had the agency conducted a reasonable search." (Negley Brief at p. 28). Negley ignores, however, the first premise of the Maynard test which, by his own admission, only applies "**if** an agency fails to establish through reasonably detailed affidavits that its search was reasonable …" (Negley Brief at p. 27, emphasis added). Negley also overlooks the further statement by Maynard, which directly applies to the facts of this case: "[n]or is there any requirement that an agency conduct further searches on the basis of unspecified 'clues' in released documents." 986 F. 2d at 560. Maynard simply does not support Negley's argument.

The District Court applied the correct legal standard in determining the adequacy of the FBI's search in this case. Indeed, many of the cases relied upon by the District Court are also quoted in Negley's Brief for the same propositions. See, e.g., SafeCard, supra; Oglesby v. Dep't of Army, 920 F.2d 57, 68 (D.C. Cir. 1990); Weisberg v. U.S. Dep't of Justice, 705 F.2d 1344, 1351 (D.C. Cir. 1983); Perry v. Block, 684 F.2d 121, 128 (D.C. Cir. 1982). See also Batton v. Evers, 598 F.3d 169, 176 (5th Cir. 2010) ("An agency may demonstrate that it conducted an adequate search by showing that it used 'methods which can be reasonably expected to produce the information requested.' … agency is entitled to

'presumption of legitimacy' unless there is evidence of bad faith in handling the FOIA request.") (quoting Oglesby v. Dep't of Army and U.S. Dep't of State v. Ray, 502 U.S. 164 (1991)).

C. Negley's post hoc challenges raise no fact issue regarding the adequacy of the FBI's searches.

In the proceedings below, Negley raised five challenges[9] to the adequacy of the FBI's searches, two of which have been abandoned on appeal. (See generally ROA.929-939) (also discussing Negley's claims that one erroneous file number created a fact issue, that the representative sample chosen by the FBI should not be accepted, and that a Special Master should have been appointed to review the documents). In this appeal, Negley argues that the searches were not adequate because: 1) the 2002 fax cover sheet raises a fact issue regarding the existence of additional documents; 2) the FBI failed to follow document referral regulations; and, 3) the FBI's withdrawal of the Privacy Act exemption raises a fact issue that additional investigations occurred. (See generally Negley's Brief at pp. 11-25).

1. Negley's claim regarding the 2002 fax cover sheet is groundless. (Negley Brief at pp. 12-18).

Negley's speculation regarding a cryptic handwritten note on a fax cover sheet in 2002 (ROA.690) raises no genuine issue of material fact regarding the adequacy of the FBI's search. After 14 years of litigation, including two

[9] One of Negley's arguments below and on appeal is that the District of Columbia litigation is not preclusive. This is a contested legal issue, not a challenge to the adequacy of the FBI's searches in response to the 2009 FOIA request.

depositions of Mr. Hardy and a lengthy deposition of the FBI Special Agent involved in the Chico library incident, Negley has failed to demonstrate any factual basis for his suspicion that the FBI has conducted additional investigation or surveillance of him. It is already established that the FBI's brief investigation of Mr. Negley in September 1995 was concluded in a matter of weeks, if not days. (See, e.g, ROA.375, 594-595). The District Court in this case correctly determined that the FBI conducted no further investigative activity regarding Negley after the Chico library encounter. (ROA.934). Negley fails to provide any factual basis, or even remote plausibility, to his claim that "**[i]f** the notation on page [ROA.690] is correct, Appellant may reasonably inquire whether in 2002, the file regarding him totaled 42,000 pages, or even 542,000 pages." (Negley Brief at p. 14, emphasis added). While it is true that "the FBI did not indicate what the notation meant" (id.), FOIA does not require the agency to answer such questions. See, e.g., Woods, 2013 WL 4852297, at *3 (D.D.C. Sept. 12, 2013) (FOIA does not require an agency to answer questions disguised as a FOIA request).

Ironically, Negley attacks Mr. Hardy's explanation for why the sketchy notation cannot mean what Mr. Negley would like to think it means as "speculation" (Negley Brief at p. 16), but fails to rebut the Declaration's explanation:

The document in question [ROA.690] … is an EOUSA

> originated document that was sent to a Chief Division Counsel for the Sacramento Field Office and is contained within the Austin litigation file [Negley I] that was handled by the Sacramento … Office … [T]hese notes cannot refer to the size or status of a file related to plaintiff because no such sized file related to plaintiff has ever been discovered as a result of any of the searches for records related to plaintiff … the only time at which plaintiff was of investigative interest to the FBI was in connection with the UNABOMB investigation, and he was quickly dismissed as a potential subject. The records related to the FBI's investigative interest into plaintiff were provided to him and consisted of only approximately 163 pages. … It would be impossible for plaintiff to have any pending investigative file given that [the FBI] found no evidence during its many searches for [responsive records] that plaintiff has ever been or is currently the subject of any FBI investigation [other than the 1995 Sacramento reference above]. (ROA.374-375).

Negley also fails to address the District Court's reliance on Rugiero v. U.S. Dep't of Justice, 257 F.3d 534, 547 (6th Cir. 2001) for the principle that speculative, remote claims about other investigative activity by the agency do not raise a fact issue precluding summary judgment. (See ROA.934-935). In Rugerio, just as in this case, the plaintiff believed that the agency had additional documents beyond what they disclosed in response to his FOIA request. 257 F.3d at 547. In Rugerio, just as in this case, the agency conducted multiple searches but could not locate any additional documents about any other alleged investigations. See also Flowers v. I.R.S., 307 F. Supp. 2d 60, 72 (D.D.C. 2004) (FOIA did not authorize plaintiff to seek discovery regarding agency's rationale for conducting tax audit:

"because the defendant demonstrated that its searches were reasonably calculated to uncover responsive documents, and because the court cannot expand FOIA to suit the plaintiff's investigatory objectives, the court grants the defendant's motion for summary judgment and denies the plaintiff's motion for discovery.").

Instead of addressing Rugerio, Negley relies on Campbell v. U.S. Dep't of Justice, 164 F. 3d 20 (D.C. Cir. 1998) for the proposition that the FBI was required to take further steps to follow-up on leads discovered during the FOIA search, and that the possibility of additional documents could not be ignored. (Negley Brief at pp. 16-17). Campbell is readily distinguishable, however. In Campbell, the FBI had failed to conduct a search in the established ELSUR record system and for a tickler record. 164 F. 3d at 28. To the contrary, in this case, there is no evidence that the FBI failed to search any records system which was likely to contain additional records, and Negley has not even challenged the method of the searches conducted. Even if the cryptic note has the meaning Negley would like to assign to it, he has not identified any additional records systems or locations that the FBI should have searched in this case. The FBI submits that attempting to identify the author of the cryptic note from 12 years ago, and attempting to ascertain what the author meant, is a rabbit trial the FBI is not required to pursue.[10]

[10] Negley complains that the recipient FBI Division Counsel's name was redacted on the document produced (Negley Brief at p. 16), but he did not challenge the exemption claimed in District Court proceedings. Although not asserted by the FBI, the document in question would

2. The alleged failure to follow document referral regulations raises no fact issue precluding summary judgment. (See Negley Brief at pp. 18-20).

Just like Mr. Negley's challenge regarding the fax cover sheet, this challenge has nothing to do with the method of the FBI's searches. It is well after the fact, and completely irrelevant to the issue of whether an adequate search was conducted. It is undisputed that the FBI conducted its searches for documents in response to the 2009 FOIA request in 2009-2010, during the Negley II litigation. (See ROA.338-340 & n.6). The alleged failure to follow 28 C.F.R. §16.4[11] occurred in early 2013. (Negley Brief at p. 18).

The District Court quickly disposed of this groundless argument, as should this Court:

> Plaintiff believes the … March 2013 … notification [of the January 2013 referral was untimely. Plaintiff's counsel, however, admits that the directive for notice is not unconditionally mandatory. The issue does not appear to be relevant to whether [the FBI] conducted an adequate search. Plaintiff is asking why it took [the FBI] so long to refer the documents to EOUSA. The question of why [the FBI] referred the documents at a later time is immaterial because the [regulation] merely deals with notification at the time the document is actually referred. (ROA.935).

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also clearly be covered by the attorney-client privilege. It should come as no surprise that most FOIA requestors (Mr. Negley notwithstanding) have no interest in obtaining administrative or litigation files. (See ROA.338-339).

[11] This regulation provides in pertinent part that "[w]henever a component refers … part of its responsibility for responding to a [FOIA] request to another component or agency, it **ordinarily** shall notify the requestor of the referral …" (quoted at p. 18 of Negley Brief, emphasis added).

On appeal, Negley does not address the District Court's reasoning, or expand upon his generalized complaint that it took the FBI too long to search for, process, and release documents in this case. The FBI is simply not required by FOIA to explain why the processing of the 2009 FOIA request was delayed. See, e.g., Woods, 2013 WL 4852297, at *3 (D.D.C. Sept. 12, 2013) (FOIA does not require an agency to answer questions disguised as a FOIA request). In any event, the FBI has thoroughly explained its processing of the 2009 request (ROA.335-376), and agency delay would not raise a fact issue precluding summary judgment in any event, as the District Court properly concluded. (ROA.933).

The District Court's conclusion that any alleged non-compliance with the referral regulation is clearly correct. See also Whitfield v. Dep't of Treasury, 255 F. App'x 533 (D.C. Cir. 2007) ("Appelleant's challenge to the adequacy of the search ails because he has not provided sufficient evidence to raise 'substantial doubt' concdrning the adequacy of the search. … The agency's delay in producing the sixty pages maintained by a different agency 'is significant only to the extent that evidence shows that the delay resulted from bad faith refusal to cooperate. ' Maynard v. CIA, 986 F.2d 547, 564 (1st Cir.1993) … [N]o evidence of bad faith and the agency accounted for the belated production of the sixty pages. Furthermore, the agency's failure to turn up specific documents does not undermine the determination that the agency conducted an adequate search for the

requested records.") (other citation omitted); Perry v. Block, 684 F.2d 121, 128 (D.C.Cir. 1982) (upholding adequacy of the search notwithstanding production of documents after agency executed affidavits stating that no further responsive records were within the agency's control where delay indicated "neither artifice nor subterfuge but rather, at worse, administrative inefficiency."); Smith v. United States, 95-CV-1950, 1996 WL 696452, at * 5 (E.D. La. Dec. 4, 1996), aff'd in part, 127 F.3d 35 (5th Cir. 1997) ("[t]o prove bad faith, a plaintiff must show that the government purposefully withheld documents, not that it merely delayed or was inefficient in producing them.'" (quoted by District Court at ROA.933).

3. The FBI's withdrawal of the Privacy Act exemption is also completely immaterial to whether it conducted an adequate search. (See Negley Brief at pp. 20-25).

The FBI's withdrawal of its reliance on the Privacy Act to justify some of its withholdings and redactions occurred **after** the FBI had already conducted its searches for responsive documents in 2009-2010. Accordingly, Negley's after-the-fact questioning about the FBI's exemption claims raises no issue of fact regarding the adequacy of the prior searches. The District Court correctly concluded that:

> The former use and later withdrawal of the [Privacy Act] exemption do not seem to be relevant to whether the defendant conducted an adequate search. On April 23, 2013 EOUSA released information to Plaintiff after being informed that the Privacy Act exemption was no longer being invoked. Plaintiff's concern and the issue are moot. (ROA.936).

Negley's argument on the Privacy Act exemption is just another after-the-fact supposition that the FBI must have conducted additional investigations of him. But Negley's suppositions and speculations raise no fact issue regarding the adequacy of the FBI searches. (See also ROA.745-746 & n.2, 355-358). Negley has failed to make a showing of bad faith on the part of the FBI.

III. IF THE COURT DETERMINES THAT THE FBI CONDUCTED AN ADEQUATE SEARCH FOR DOCUMENTS, ALL DISCOVERY ISSUES RAISED BY NEGLEY ARE MOOT. (See Negley Brief at pp. 32-42).

Negley concedes that "[d]iscovery relating to the agency's search and the exemptions it claims… generally is unnecessary if the agency's submissions are adequate on their face, and a district court may forgo discovery and award summary judgment on the basis of submitted … declarations." (Negley Brief at pp. 35-36). Negley has consistently failed to demonstrate how the FBI's Vaughn Index and Declaration were inadequate. Thus, if there is no issue regarding the adequacy of the FBI's searches, the discovery issue is moot. Accordingly, the Court need not address Negley's discovery arguments on appeal, which mostly rehash his post hoc arguments regarding the adequacy of the FBI's search in any event.

The District Court correctly concluded that since "the Plaintiff's discovery requests are directed at whether investigations were conducted and – assuming that they were – whether they produced any records, Plaintiff's discovery requests

'exceed … the limited scope of discovery usually allowed in a FOIA case concerning factual disputes surrounding the adequacy of the search for documents." (ROA.165, quoting Schiller v. I.N.S., 205 F. Supp. 2d 648, 654 (W.D. Tex. 2002)). This finding was not an abuse of discretion. See also Taylor v. Babbitt, 673 F. Supp. 2d 20, 23 (D.D.C. 2009) ("In the exceptional case in which a court permits discovery in a FOIA action, such discovery should only occur after the government has moved for summary judgment. … Even if an agency's affidavits regarding its search are deficient, courts generally do not grant discovery, but instead direct the agency to supplement its affidavits."); Schrecker v. U.S. Dep't of Justice, 217 F. Supp. 2d 29, 35 (D.D.C. 2002) ("Discovery in FOIA is rare and should be denied where an agency's declarations are reasonably detailed, submitted in good faith and the court is satisfied that no factual dispute remains."), aff'd, 349 F. 3d 657 (D.C. Cir. 2003).

In this case, Negley moved for discovery before the FBI filed its Motion for Summary Judgment, and did not even specify or propound the allegedly "narrowly tailored" discovery he sought regarding the fax cover sheet and the Privacy Act exemptions. (See, e.g., ROA.233, 745; Negley Brief at p. 34).

Negley does not contest that his discovery requests lack any factual basis. Instead, he again asserts without any authority that providing a factual basis for discovery requests is unnecessary. (Negley Brief at p. 37). The law is to the

contrary. See, e.g., Collens v. City of New York, 222 F.R.D. 249, 253 (S.D.N.Y. 2004) ("While Rule 26(b)(1) … provides for broad discovery, courts should not grant discovery requests based on pure speculation …"); 1983 adv. committee note to Rule 26(g) ("The rule simply requires that the attorney make a reasonable inquiry into the factual basis of his … [discovery] request. …" (quoted at ROA.140 n.13).

Negley's reliance on Weisberg v. U.S. Dep't of Justice, 543 F.2d 308 (D.C. Cir. 1976) is misplaced. (See Negley Brief at pp. 34-35). Weisberg is readily distinguishable because it involved the Kennedy Assassination, which was a "matter … of interest not only to [the requestor] but to the nation" (543 F.2d at 311), and because the affidavits originally submitted by the Government provided no detail regarding "which files were searched," and did not provide information specific enough to allow the procedures to be challenged. Weisberg v. U.S. Dept of Justice, 627 F. 2d 365, 371 (D.C. Cir. 1980). No such challenge has been made to the Hardy Declaration in this case. Finally, the Weisberg Court reaffirmed the general principle which completely supports the FBI's position in this case: "[the] issue is not whether any further documents might conceivably exist but whether the government's search for responsive documents was adequate." Weisberg, 705 F. 2d 1344, 1351 (D. C. Cir. 1983) (citation omitted).

Negley's suggestion that the FBI could not answer the requests for admission (Negley Brief at p. 37) is not accurate. Defendant's counsel did not investigate this issue (ROA.140), but the possibility of additional surveillance and investigations by the FBI was put to rest by the Negley II Court, and by the Hardy Declaration. (See, e.g., ROA.339, 375).

The Meese Memorandum also raises no issue of material fact. Negley was only investigated by the FBI for a period of weeks in September, 1995, and then dropped as a person of interest. In any event, the FBI was not required to answer discovery requests regarding the Meese Memorandum, and Negley did not perfect this issue in the District Court.

CONCLUSION

The FBI agrees with Negley that this is an unusual FOIA case. But what makes it unusual is that the agency has completed extensive searches for responsive records on several occasions, and the only investigatory records located were previously disclosed in earlier FOIA litigation. And with respect to the administrative and litigation files produced in this case, Negley has never challenged the FBI's claimed statutory exemptions. The judgment of the District Court should be AFFIRMED.

DATED: February 20, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2014, a true and correct copy of the foregoing Brief for Defendant-Appellee was electronically filed with the Fifth Circuit Court of Appeals using the CM/ECF filing system and was served via certified mail, return receipt requested, addressed as follows:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

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/s/ Robert Shaw-Meadow
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