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Honorable Chief Judge Marsha J. Pechman

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1. UNITED STATES DISTRICT COURT WESTERN DISTRICT OF WASHINGTON
2. AT SEATTLE

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UNITED STATES OF AMERICA,

Plaintiff,

v.

HERMINIO SILVA,

Defendant.

10 No. CR12-0047MJP

1. DEFENDANT SILVA’S RESPONSE

TO GOVERNMENT’S MOTION TO

1. RECONSIDER PORTIONS OF

ORDER REGARDING DISCOVERY

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NOTED: AUGUST 31, 2012

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# INTRODUCTION

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1. The Court should deny the Government’s Motion to Reconsider. Far from
2. demonstrating error in the Court’s order, the Government’s motion simply reargues the issue
3. without presenting new information, new legal authority, or a justification for not supplying
4. the defendant with an index that reveals which discovery relates to **him**. The Government
5. has made no showing that the organization of the discovery allows any of the individual 22

defendants to determine what the evidence is against them. The Government instead

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reiterates how it has organized the documents and asserts that certain documents are

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1. searchable. Rule 16 provides that each of the defendants is entitled to information necessary
2. for their particular defense. Because the Government has not generated an index that

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1. complies with the applicable rules and best practices, its motion to reconsider should be
2. denied.

# II. BACKGROUND

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On July 20, 2012, Defendant Silva moved for a continuation of the trial and pretrial

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motions deadline. That motion was premised, in part, on the difficulty of reviewing the

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1. voluminous discovery and preparing for trial in time for the October 29, 2012 trial date
2. without a usable index that would direct counsel to the materials that were relevant to Mr.
3. Silva. The Government’s Index is attached to Defendant Silva’s Motion to Continue. Dkt.
4. No. 382. After reviewing the discovery index provided by the Government, the Court found
5. that the Government had not met its obligation to provide defense counsel the means to 12

access information relevant to their individual clients. Accordingly, the Court ordered the

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Government to re-work the discovery index in order to comply with the requirements of Fed.

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1. Rule Crim. P. 16, the 2005 Best Practices policies for electronic discovery, and the national
2. ESI Protocols instituted in 2011. The Court found that on the basis of these authorities, the
3. means for defense counsel to access information relevant to their individual clients is not in
4. conformity with the Government’s obligations.

# III. DISCUSSION

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# Motions for reconsideration are disfavored and no material error has

1. **been shown to justify a different result.**
2. Under Local Criminal Rule 12(c)(11)(A), motions for reconsideration are disfavored. 23

The Court ordinarily denies such motions in the absence of a showing of manifest error in the

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prior ruling or a showing of new facts or legal authority which could not have been brought

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26 to its attention earlier with reasonable diligence. Here, the Court’s Order is not erroneous,

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1. nor has the Government shown there are any new facts or legal authority that it could not
2. have brought to the Court’s attention previously.

# B. The Government chose the timing and manner of this prosecution, and

1. **has had adequate time to prepare an adequate discovery index.**
2. The Government has been investigating the alleged Juarez-Santos drug trade
3. organization for the last five years. The investigation has involved DEA agents and local law
4. enforcement in Snohomish, King, and Pierce Counties in the Western District of Washington 8

and elsewhere. The Government made the decision to prosecute Herminio Silva and 28

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others, alleging that they were involved in a large scale conspiracy involving the distribution

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1. of heroin, cocaine, and methamphetamine. Presumably, the Government has determined it
2. has evidence to prove what each individual defendant’s role was in the conspiracy. Prior to
3. filing the indictments, the Government spent over a year reviewing the case and arranging
4. and coordinating the discovery. In contrast, the defense has had since late April to prepare a
5. defense. Although the number of defendants preparing for trial is reduced, the volume of 16

discovery is not, nor has the nature of trial preparation changed. The remaining defendants

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1. who are preparing for the October 29 trial date are faced with an extraordinarily difficult task
2. of reviewing an enormous volume of discovery, much of which is disorganized and poorly
3. indexed. Thus far, the Government has provided ten disks and a 500 gigabit hard drive of
4. electronically stored information (ESI). The Government recognizes the discovery is,
5. “admittedly a significant amount of material.” Dkt. No. 483. A more detailed description of 23

the discovery is attached in Defense Counsel Colette Tvedt’s Declaration, filed separately.

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# C. The discovery has been provided in a manner that does not allow for individual defendants to efficiently determine which evidence is material

* 1. **to their case.**
  2. The Government has provided discovery to the defense in stages, without including a 4

workable index and without labeling or cross-indexing the material to the individual

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defendants. As the Court noted in its Order, the index cannot be successfully and efficiently

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1. used without considerable time and effort and without poring through thousands of folders
2. and files with little or no relevance to an individual defendant. While the discovery relevant
3. to each individual defendant may be contained somewhere within the mass of discovery, the
4. Government has placed the burden on each individual defendant to sort through thousands of
5. pages of un-indexed discovery and hundreds of gigabytes of non-searchable audio, video, 12

and photo files in order to find evidence pertaining to their individual clients. The largest

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aspect of this case includes audio, video, and photograph files. These files are not searchable

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1. through the windows assisted search and optical character recognition search (OCR)
2. described by the Government because those files do not contain text, leaving no search
3. results for the majority of the discovery. A detailed index labeled by defendant is paramount
4. to directing defense counsel to the most important information to their respective client. It is
5. not efficient or cost effective for defense counsel to blindly sift through the estimated 20

hundreds of hours of video to find the limited portions of video that pertain to their clients.

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1. The Government has responded that they have met their obligations by providing all
2. the discovery in “the most accessible text searchable means within the constraints of the
3. resources that this office has available.” Government’s Motion to Reconsider, Dkt. 483, at 4.
4. The Government further states that the files were organized and turned into large text-

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1. searchable PDF files. But the discovery index the Government provided lists only the general
2. document type, the length of the document, and the disk on which the documents are
3. located. For instance, on the index there is an entry for “DEA\_6” documents, but no 4

information as to what is contained in that report or if and where relevant information

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pertaining to a specific client is contained within that document. Thus, the Government’s

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1. statement that it has provided the discovery in a way that a simple search will yield results
2. for each defendant.

# D. Searchable pdf documents, while helpful, are no substitute for an adequate discovery index.

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1. Furthermore, the defense cannot rely on the results of pdf document searches as a
2. substitute for an adequate discovery index. First, many of the documents contain information
3. that is not searchable even after optical character recognition, such as handwritten notes,
4. photographs, tiff images, and native files. For example, a document search using Adobe
5. Acrobat on Disk #1 focused on a 1989 Toyota Camry will not lead to the attached “Consent 16

to Search” form because the handwritten notes are not searchable. See attached, Exhibit B.

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1. Second, text searches are not reliable if the documents are in poor condition. Many of the
2. documents in the Government’s production appear to have been photocopied, faxed,
3. smudged, written upon, or otherwise degraded to a degree that renders search results
4. unreliable.
5. Finally, search results cannot substitute for an adequate index due to issues such as 23

errors introduced by misspelling, typos, the use of nicknames, incorrectly oriented

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documents, and similar issues. Searchable pdfs are a good place to start, but they do not

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26 fulfill the role of an index that provides the necessary links between documents and

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1. individuals. Without a sufficiently detailed index, the defense is left to manually review
2. potentially every document and file for material relevant to his particular case. This process
3. will waste an enormous amount of both time and money. 4

# The wiretap materials are not organized in a manner that permits the

5 **defendant to determine which information is material to his particular case.**

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1. The Government has also failed to provide an appropriate organization or index for
2. the wiretap discovery. The Court’s Order on this issue was entirely appropriate: “At the
3. very least, the Discovery Index in this case should direct defense counsel to the recordings
4. and transcripts of their individual clients by name.” Order re: Motion to Continue Discovery
5. and Case Schedule, Dkt. 452, at 5.) Thousands of phone calls were intercepted over the 12

course of the investigation. The government’s Motion for Reconsideration, rather than

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demonstrating its adherence to best practices, actually demonstrates how difficult it is to

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1. search through this discovery. The Government has submitted a search procedure that
2. requires two and half pages to explain, although it fails to capture how time-consuming and
3. difficult these searches really are. What the Government should provide is simply a folder or
4. file labeled “Silva Wiretap File,” which includes the wire interceptions, audio, and related
5. documents. 20

In addition, the Government has not identified the calls by defendant, but rather by

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1. telephone number. The puts the onus on defense counsel to hunt through multiple files in
2. multiple locations to obtain pertinent information and to exclude material that is irrelevant.
3. Nor are there hyperlinks to tie text to the matching audio file and synopsis. Contrary to the
4. Government’s assertion, it is not possible to “jump” from a line sheet to an audio file. To get 26

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* 1. to the audio, the reviewer must back out of the line sheet file and go into another folder.
  2. Moreover, the linesheets are in two different formats and both must be searched to ensure
  3. that nothing is missed. 4

# The volume of discovery makes manual review by each defendant

1. **extremely wasteful of time and resources.**
2. To fully comprehend the magnitude of difficulty defense counsel has had reviewing
3. the discovery without a workable index, in order to find relevant evidence pertaining to Mr.
4. Silva, one only need look to the hard drive that was provided to the defense on May 11,
5. 2012. The hard drive contains 19,112 files in 1,249 folders. See attached map of hard drive,
6. Exhibit A. When you access the hard drive, you see two folders: “Audio, Video and
7. Related” and “Cell Phone Information.” A screen shot of this view is attached, Exhibit C-1.
8. When you click onto the Audio, Video and Related Folder, you are met with another screen
9. that contains three subfolders: “Misc, Photo and Video,” “Non Drug DEA Exhibits (Audio,
10. Video, Misc.)” and “Other Agency Photo and Video.” See Exhibit C-2. When you click on
11. the “Non Drug DEA Exhibits (Audio, Video, Misc)” it brings up 1,156 subfolders labeled N-
12. 001 through N-2507. See attached screen shot, Exhibit C-3. Two specific examples of the
13. contents of these N-documents are N-0001 and N-0021. If you click onto N-001, it brings up
14. five audio tracks. See attached screen shot, Exhibit C-4. Given the lack of an index, defense
15. counsel has no way of knowing the identity of the speakers on the audio tracks. If you click
16. on N-0021 it brings you to a subfolder entitled “IPHONE NO SIM CARD.” See attached
17. screen shot C-5. When you click on that subfolder it brings you to another screen containing
18. two subfolders “BackupReportDetails” and “Images” (along with several unidentifiable
19. files). See attached screen shot, Exhibit C-6. When you click on “Images” it brings you to a
20. screen containing 92 pictures. See attached screenshot, Exhibit C-7. Similarly, without an
21. index, defense counsel has no way of knowing the relevance of the photos in this exhibit.
22. These two examples further illustrate additional electronic files that are not searchable; and

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without a proper index, defense counsel has no basis to determine if material contained

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within these “N” Exhibits are relevant to Mr. Silva.

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Putting the hard drive aside, the disks also represents barriers to counsel’s review of

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discovery absent a more detailed index. One of several examples of the multiple folder trees

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and the ineffective description in the current index is on Disk 7. Disk 7 represents a disk

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with various types of data (audio, video, pdfs, etc.) and counsel’s inability to search through

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that information with a windows assisted search. A windows assisted search will most

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effectively allow counsel to search terms in a file name, not the secondary important task of

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searching for the name in the documents on that disk. Even if a windows search allowed you

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to find some file with a search term, an OCR search will only yield results from documents

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that are searchable. The Government’s memo focuses in large part on the usefulness of a

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windows assisted or OCR search. This type of search is very limited, marginally accurate,

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and the majority of files on Disk 7 are not searchable in either of these ways.

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The Government also represented in its motion for reconsideration that, “during the

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course of the investigation, DEA agents intercepted thousands of communications from six

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cellular telephones. Docket 483 pp. 4-5. The agents may have intercepted calls from six

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phones, however, counsel has been provided discovery on more than 30 target telephones. It

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is misleading to leave this court with the impression that defense counsel’s review of

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discovery involves reviewing only six target telephones. For the above named counsel, their

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two defendants are allegedly associated with approximately 6 phones each. For these two

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defendants alone, twice the number of target telephones require review, not just the six

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described by the Government.

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The Government has offered to demonstrate to the court the “ease” of searching the

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discovery they provided. Docket 483 at 13. Counsel welcomes a demonstration, however,

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the Government should have to demonstrate these searches in a manner equivalent to the

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capacity limitations encountered by the majority of defense counsel in this case. An

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equivalent search to that of defense counsel would involve several searches across each disk,

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or across an external hard drive. This is an overly burdensome process that is inefficient,

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costly and is only the beginning of the type of review defense counsel would have to conduct

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to effectively represent its clients.

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# IV. ARGUMENT

7 **A. Rule 16(d)(1) Provides the Court with the Discretion to Order ESI Discovery in a Manner that is Effective, Efficient and Fundamentally Fair**

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9 Rule 16(d)(1) states: “At any time the court may, for good cause, deny, restrict, or

1. defer discovery or inspection, or grant other appropriate relief.” This provides the Court with
2. the flexibility to order the Government to provide ESI Discovery in this case in a manner that
3. is effective, efficient and fundamentally fair. The index ordered by the Court is a minimal
4. requirement to meet those objectives. The court in *United States v. Salyer*, No. S-10-0061, 14

2010 US Gov. Works WL 3036444 (E.D. Cal. Aug. 2, 2010), ordered the Government to

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identify Rule 16, *Brady*, and *Giglio* materials contained in the ESI production to the defense

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1. as a “matter of case management (and fairness).” (*Id.* at \*2.) *Salyer* involved the
2. Government's large-scale “open file” production to a defendant detained in jail awaiting trial,
3. who was represented by a small firm with limited resources. (*Id.* at \*7.)
4. With the exception of one defendant, all the defendants in this case are represented by
5. solo practitioners or mid to small sized firms with limited resources. The Federal Rules of 22

Criminal Procedure have a glaring omission when it comes to the modern practice of the

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1. Government providing high volumes of electronic information in criminal cases. The mere
2. management of these cases (let alone the necessary legal analysis) results in an evisceration
3. of constitutional rights when the case involves voluminous data. The volume of data can

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1. pose barriers to a defendant’s constitutional right to the effective assistance of counsel, a
2. speedy trial, and the ability to make a knowing, intelligent, and voluntary decision to plea
3. guilty or go to trial. A high volume case like this one can result in defendants relying too 4

heavily on the Government’s identification and view of the evidence against them.

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The Government asserts it does not have the obligation or resources to comply with the

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1. court’s order. The resources of Panel Attorneys are even worse than the limited resources the
2. Government describes. Many CJA appointed attorneys, like counsel for Mr. Silva do not
3. have the capacity and resources to identify, process, and analyze ESI discovery in a cost
4. effective and timely manner. The Court’s order is a reasonable request to the Government to
5. at least identify the discovery in a useable index. Requiring the Government to index the 12

discovery is a fair task when the Court must use its discretion to recognize and balance the

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limited resources for both parties.

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1. In discussing *Brady* material, the *Salyer* court said, “[A]t some point (long since
2. passed in this case) a duty to disclose may be unfulfilled by disclosing too much; at some
3. point, ‘disclosure,’ in order to be meaningful, requires ‘identification’ as well.” (*Id at \*6.*)
4. While the *Salyer* court was addressing *Brady* material, the same can be said about
5. voluminous discovery of any kind. For those representing indigent clients, or clients of 20

limited financial means, clear *identification* of discovery is a minimum requirement

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1. considering the difficulties associated with tackling the Government’s production of
2. voluminous data with limited resources, no technical support, and limited access to your
3. client who is likely incarcerated. To further complicate matters, most of the defendants,
4. including Mr. Silva, require a Spanish interpreter as well. Under circumstances such as

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1. these, compliance with rule 16(d)(1) and fundamental fairness to a defendant requires not
2. only production of material but also identification of material.
3. Although undersigned defense counsel was not present on the call, the substance of 4

that call was shared with counsel. Specifically, that on August 6, 2012, Ms. Stephens had a

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telephone conference, “meet and confer,” with Assistant United States Attorney Matthew

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1. Pittman and one of co-defendant’s counsel, Kim Gordon. The parties specifically discussed
2. the ESI protocols applied in this case. The parties disagreed whether ESI best practices have
3. been followed in providing a “useable” index to discovery. The parties were unable to agree
4. on what would be appropriate to make the index “useable” and what level of detail the
5. Government is willing to provide to meet that definition. Having discussed different 12

expectations, the parties could not resolve this issue. Because the parties have been unable to

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agree on a “useable” index, it is appropriate for the court to get involved and issue the type of

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1. order it issued defining a useable index for this case. The most current index, as provided
2. with Disk 10 on July 13, 2012, has minimal utility and is nothing more than a very general
3. production log that shifts the burden on the defense to find its defendant and other various
4. haystack buried needles.

# V. CONCLUSION

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The Court’s Order correctly identified both the problem with and the solution for the

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1. discovery in this case. The discovery, despite the Government’s explanations, is not
2. organized or indexed in a way that permits individual defendants to efficiently determine
3. which evidence is material to their case. FRCrP 16 requires production to the individual
4. defendant of material relevant to that defendant’s case. Production to a group of 29 alleged

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1. co-conspirators of every document relevant to any one of them will not suffice without an
2. adequate and individualized index. As the Court noted, the discovery in its current state fails
3. to meet the requirements of Rule 16, the 2005 “Best Practices,” and the 2011 ESI Protocols. 4

Forcing the defendants to prepare for trial with the discovery in its current state will waste

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substantial time and resources. The solution is for the Government to prepare an adequate

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1. and individualized discovery index. The Government’s Motion for Reconsideration should
2. therefore be denied.
3. DATED this 31st day of August, 2012.
4. Respectfully submitted,
5. SCHROETER, GOLDMARK & BENDER

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*s/ Colette Tvedt*

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* 1. CERTIFICATE OF SERVICE
  2. I hereby certify that on August 31, 2012, I electronically filed the foregoing with the
  3. Clerk of the Court using the CM/ECF system, which will send notification of such filing to
  4. Matthew Pittman, Assistant United States Attorney. 5

*s/ Andrea Crabtree*

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RESPONSE TO GOVERNMENT’S MOTION TO RECONSIDER - 13 (Case No. CR12-0047MJP)

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