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In:	**KSC-BC-2020-06**
	Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi
Before:	**Trial Panel II** Judge Charles L. Smith, III, Presiding Judge Judge Christoph Barthe Judge Guénaël Mettraux Judge Fergal Gaynor, Reserve Judge
Registrar:	Dr Fidelma Donlon
Filing Participant:	Counsel for Kadri Veseli
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Public Redacted Version of Veseli Defence Response to Prosecution Motion for Admission of Accused's Statements

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I. INTRODUCTION

1. The Defence for Mr Kadri Veseli ("Defence") hereby responds to the Specialist Prosecutor's Motion for Admission of the Accused's Statements ("Motion").[1]

2. The SPO seeks to admit into evidence various statements attributed to Mr Veseli and his Co-Accused, including exhibits associated therewith.[2]

3. The Defence does not oppose the admission of the statements attributed to Mr Veseli, the same does not apply in respect of the statements of the other Accused. In this respect, the Defence takes the primary position that, if the Co-Accused's statements are admitted, the Panel's decision should clearly limit the purpose for which admission is granted, such that their use against the Co-Accused is excluded – thus, rendering them admissible *only* against the utterers of those statements.

4. Alternatively, the Defence submits that certain portions of the Co-Accused's statements – specifically those arising from Mr Selimi's interviews with the SPO, as well as those made before other judicial fora – which mention Mr Veseli or otherwise refer to, *inter alia*, his alleged involvement in the supposed intelligence services of the KLA – should be excluded because their prejudicial impact outweighs their probative value. Irrespective of any indicia of relevance and authenticity, some portions of Mr Selimi's statements – in particular – constitute hearsay of a special character, which, if used for the truth of their contents, would be overtly prejudicial to Mr Veseli's fair trial rights.

[1] F01351, *Prosecution motion for admission of Accused's statements with public Annex 1*, 8 March 2023, public. The Defence notes that the deadline for this response was extended to 24 April 2023 pursuant to an oral order of the Trial Panel of 17 April 2023 – *see*, Transcript, 17 April 2023, p. 2955, line 17 – p. 2957, line 4.
[2] *See* generally, F01351/A01, Annex 1 to Prosecution motion for admission of Accused's statements, 8 March 2023, public.

5. Further, the Defence challenges the admissibility of certain exhibits associated with the Co-Accused's statements, as set out below.[3]

II. APPLICABLE LAW

6. Pursuant to Rule 137(2) of the Rules, the "Panel shall assess freely all evidence submitted in order to determine its admissibility and weight."

7. As regards admissibility, Rule 138(1) further clarifies that evidence submitted to the Panel will be admitted "if it is relevant, authentic, has probative value and its probative value is not outweighed by its prejudicial effect."

8. Article 37(1) of the Law specifies in particular that:

> Evidence collected in criminal proceedings or investigations within the subject matter jurisdiction of the Specialist Chambers prior to its establishment by any national or international law enforcement or criminal investigation authority or agency including the Kosovo State Prosecutor, any police authority in Kosovo, the ICTY, EULEX Kosovo or by the SITF may be admissible before the Specialist Chambers. Its admissibility shall be decided by the assigned panels pursuant to international standards on the collection of evidence and Article 22 of the Constitution. The weight to be given to any such evidence shall be determined by the assigned panels.

9. With respect to the type of prejudice that could result in evidence being excluded, the provisions governing the rights of the Accused and the principle of orality provide further guidance. Article 21(4)(f) of the Law states that the accused shall benefit from the right "to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her."

10. Article 37(2) of the Law enshrines the above-mentioned principles of orality and confrontation, ensuring, at least in principle, that:

[3] *See,* Section C below *referring to* 076565-076565-ET and IT-04-84 P00328, pp. U0162150-U0162151.

> all evidence should be produced in the presence of the accused with a view to adversarial argument. Exceptions may be provided in the Rules of Procedure and Evidence adopted pursuant to Article 19 in compliance with human rights standards.

11. Pursuant to Rule 4 of the Rules, the Defence notes that:

> (1) The Rules shall be interpreted in a manner consonant with the framework as set out in Article 3 of the Law and, where appropriate, the Kosovo Criminal Procedure Code.
>
> (2) In the event of conflict between the Law and the Rules, the Law shall prevail.
>
> (3) Any ambiguity not settled in accordance with paragraph (1) shall be resolved by the adoption of the most favourable interpretation to the suspect or the Accused in the given circumstances.

12. According to Rule 5 of the Rules, *lacunae* which arise in the application of the Rules shall be dealt with in accordance with "Article 19(2) and (3) of the Law, and the principles set out in Rule 4."

13. The Defence further observes that Article 19(2) of the Law states that, "in determining its Rules of Procedure and Evidence the Specialist Chambers shall be guided by the Kosovo Criminal Procedure Code 2012, Law No. 04/L-123."

14. In this regard, the Defence highlights Article 123 of the Kosovo Criminal Procedure Code ("KCPC"), which applies to the statements of a Co-Accused:

> [s]tatements provided by a defendant in any context, if given voluntarily and without coercion, are admissible during the main trial against that defendant, but not co-defendants. Such statements may not serve as the sole or as a decisive inculpatory evidence for a conviction.

15. Lastly, the Defence notes that a ruling regarding the purposes for which evidence may be admitted may be made at the point of tendering,[4] although where a matter properly goes to weight, such a decision will be deferred until the end of trial.[5]

[4] *See* Transcript of 12 April 2023, pp 2620-2621, admitting into evidence a statement made by Mr Selimi as Exhibit 1D5, for the limited purpose of credibility as issued, and not for the truth of its contents.
[5] F01433, *Decision on Veseli Defence Submissions Regarding the "Selimi Note,"* 6 April 2023, para. 14, public.

III. SUBMISSIONS

A. Purposes for which the Statements of Co-Accused May be Admitted

16. The Defence maintains that the admission of statements of Mr Veseli's Co-Accused, for the purpose of establishing Mr Veseli's acts and conduct, would be more prejudicial than probative, at least until such time as the makers of the statements provide oral evidence in these proceedings.[6] The Defence submits that Article 123 of the KCPC, when considered in light of the provisions of the KSC Legal Framework set out below, provides compelling grounds for the conclusion that prejudice associated with a Co-Accuseds' statements renders them inadmissible as against the other Accused under Rule 138(1).

17. The Defence acknowledges the Trial Panel's earlier conclusion that Article 123 of the KCPC – which bars the admission of statements of a Co-Accused – does not have direct application at the Specialist Chambers.[7] Be that as it may, the Defence submits that the Court does not operate wholly independently from Kosovo's criminal justice system. Both the Law and the Rules contain provisions which require, *inter alia*, that the Specialist Chambers' Legal Framework be applied "in a manner consonant with […] the [KCPC]."[8] Whilst the Defence acknowledges that these provisions were not put forward or otherwise addressed in previous litigation having to do with the '[REDACTED]', they are, in any event, of paramount importance to the present matter.

18. Firstly, Article 19(2) states – in explicit terms – that, in *determining* the Rules of Procedure and Evidence, the Court shall be *guided* by the KCPC. Secondly, it

[6] F01414, *Veseli Defence Submissions Regarding an Associated Exhibit of W04474*, 31 March 2023, confidential.
[7] F01380, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154*, 16 March 2023, para. 50, confidential.
[8] *See*, Rule 4(1) of the Rules.

follows from Rules 4 and 5 of the Rules that, in situations where an issue material to the case is not addressed by the Legal Framework, it is to be interpreted in consonance with the KCPC, where appropriate. Accordingly, it is the Defence's position that the current matter falls squarely within the confines of what Rules 4 and 5 deem 'appropriate', such that KCPC must be accorded a level of weight commensurate with that envisioned by the above-mentioned Rules. This is particularly true given that:

i. The Rules are silent upon an issue which is otherwise contained in the KCPC; and

ii. The KCPC is not inconsistent with the Rules but rather provides the most favourable interpretation of an issue material to the Accused in the given circumstances – an interpretation from which the Accused is entitled to benefit.

19. As such, the Defence submits that Article 123 KCPC must be accounted for precisely because it fills a void left unaddressed by the Legal Framework, and forwards an interpretation of the Rules which otherwise protects the rights of the Accused. In this respect, the Defence avers that Article 19(2) of the Law and Rules 4 and 5 of the Rules constitute the central legal provisions underpinning the Rules' establishment, as well as their subsequent interpretation and application by the Panel.

20. In furtherance of the above, the Defence also recalls that the law and practice of a number of other jurisdictions such as the ICC,[9] ICTY,[10] ICTR,[11] the United Kingdom,[12] the United States,[13] the Republic of Ireland,[14] Canada,[15] and Germany[16] similarly accept limitations on the purposes for which the statements of a Co-Accused, in criminal proceedings, may be used. Again, considering that the Rules fail to expressly mention anything in respect of the admissibility and/or use of an Accused's statement(s) against another Accused, the Defence avers that the Panel ought to account for the manner in which other jurisdictions handle the admission and/or use of such statements.

21. Consequently, the Defence submits that none of the statements of the Accused should be admitted for use against their Co-Accused. Given that the KSC Legal Framework does not speak directly to this issue, Article 123 of the KCPC provides instructive guidance for the proper reading of Rule 138(1)'s prejudice test from which the Accused is entitled to benefit. This approach is not only

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[9] ICC, *Prosecutor v. Katanga and Ngudgolo*, ICC-01-/04-01/07-717, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, paras 191-194. *See* also, ICC, *Prosecutor v. Katanga & Ngudjolo Chui*, ICC-01/04-01/07, Trial Chamber II, Decision on the Prosecutor's Bar Table Motions, 17 December 2010, paras. 52-54.

[10] *See*, ICTY, *Prosecutor v. Sainović et al.*, IT-05-87-T, Trial Chamber, Judgement, 26 February 2009, para. 42 where the Trial Chamber found that the statements of the Co-Accused "were considered as evidence in relation to the Accused who gave the interview on any matter affecting that case for or against him, but were taken into account in relation to the Co-Accused only on matters not going to the acts and conduct or state of mind of the Co-Accused."

[11] ICTR, *Prosecutor v. Karamera et al.* ICTR-98-44-T, Trial Chamber III, Decision on the Prosecution Motion for Admission into Evidence of Post-Arrest Interviews with Joseph Nzirorera and Mathieu Ngirumpatse, 2 November 2007, para. 46.

[12] Lord Hailsham of St. Marylebone, *Halsbury's Laws of England* (4 ed, 1990) vol 11(2), para 1131; *R v. Hayter* [2005] UKHL 6, para. 25.

[13] *Bruton v. United States*, 391 U.S. 123 (1968). *See also*, *Crawford v. Washington*, 541 U.S. 36 (2004) (an accused's right to confrontation was violated when his conviction was based upon a testimonial statement of an unavailable witness).

[14] *D.P.P v. Sean Lane* [2022] IECA 263, para. 34; *D.P.P v. Dermot Laide and Desmond Ryan* [2005] IECCA 24.

[15] David M. Paciocco, et al. *The Law of Evidence*. Eighth edition, Irwin Law, 2020, p.202

[16] Michael Bohlander, *Principles of German Criminal Procedure*, Hart 2012, p. 146-147 (while under German criminal law such evidence may be admissible, its probative value will be extremely limited. As Bohlander explains: "[a] defendant cannot be a witness in his own or a co-defendant's cause, because the duty to tell the truth conflicts with the right to silence").

supported by Kosovo domestic law, it is also reflected in a number of other national and international jurisdictions.

22. Should the Trial Panel find, however, that the statements are generally admissible against the Co-Accused of the utterer, the Defence reserves the right to make further submissions on the weight that should be given to these statements at the end of trial.

B. In the Alternative, Portions of Mr Selimi's Statements Should be Excluded

23. If the statements of Mr Veseli's Co-Accused are found to be generally admissible, the Defence argues, in the alternative, that *certain portions* of these statements are clearly more prejudicial than probative and should be excluded from the evidence or, in any event, not admitted as evidence of the truth of their contents as regards Mr Veseli's acts and conduct. It is the Defence's position that any statements made by Mr Selimi in respect of the nature and function of the intelligence service, as well as Mr Veseli's participation therein, or his relationship with his Co-Accused, constitute a particularly dangerous form of hearsay which should not be relied upon by the Court for the truth of their contents.

24. A failure to exclude certain portions – as outlined below – would be antithetical to the Specialist Chambers Legal Framework which seeks to incorporate inherently adversarial rules of evidence, designed to protect, as a matter of priority, the fair trial rights of the Accused. The Trial Panel has already recognised this fact in Decision F01380, where it stated that whilst hearsay is generally admissible, it would nonetheless approach such evidence with the "necessary caution" and deny its admission where its "probative value is

marginal" or "where its admission would unfairly or disproportionately interfere with the Accused's rights, in particular, their right to confrontation."[17]

25. As such, it is the Defence's understanding that the Panel will deny or otherwise not rely upon hearsay where it is overtly prejudicial to the rights of the Accused, as protected under the Law. In light of this, the Defence submits that portions of Mr Selimi's statements reach the threshold stated by the Panel.

26. The Defence further recalls that during the trial hearing of 12 April 2023, the Presiding Judge averred that, when necessary, statements "would be parsed out" such that certain portions would not be admitted into evidence for the truth of their contents.[18] Accordingly, the Defence submits that the situation envisaged by the Presiding Judge applies to portions of Mr Selimi's statements, where he makes incriminating statements in respect of:

i. [REDACTED];[19]

ii. [REDACTED];[20]

iii. [REDACTED];[21]

iv. [REDACTED];[22] and

[17] F01380, para. 21, fn. 39.
[18] Transcript, 12 April 2023, p. 2621.
[19] 068933-TR-ET-Part 1, p. 16, lines 4-6, 11-19 and 20-25; 068933-TR-ET Part 3, p. 2, line 6 – p. 3, line 3; 068933-TR-ET Part 7, p. 14, line 7 – p. 15, line 24.074459-TR-ET Part 4, p. 10, line 23 – p. 11, lines 10, 17 and 21 – p. 3, line 7; p. 21, lines 21 – p. 22, lines 22; 074459-TR-ET Part 6, p. 4, line 4 – p. 5, line 18.
[20] 068933-TR-ET-Part 8, p. 2, lines 11-18; p. 4, lines 23-25 and p. 5, lines 14-22, p. 8, line 21 – p. 9, line 11, p. 11, lines 2-9; 068933-TR-ET Part 12, p. 23, line 23- p. 4, line 12.
[21] 68933-TR-ET-Part 1, p. 14, line 23 – p. 15, line 2; 068933-TR-ET-Part 7, p. 3, lines 7-12 and p. 10, line 25 – p. 11, lines 15; 074459-TR-ET Part 4, p. 11, line 9 – p. 12, line 4, p. 20, lines 13-25; 074459-TR-ET Part 5, p. 5, lines 9-12, 24-25 – p. 6, lines 1-3, p. 8 line 17 – p. 9, lines 5-10 and line 12, p. 12, lines 2-19, p. 16, lines 14-18, p. 27, lines 1-14. ; SITF00009289-00009298, p. SITF00009290, answer to question 7), SITF00009290 and SITF00009292 (answer to question 20).
[22] 068933-TR-ET-Part 7, p. 11, lines 11-15; 074459-TR-ET Part 5, p. 1, line 14 – p. 3, line 25, p. 7, lines 14-17, p. 8, line 17 – p. 9, line 12, p. 12, lines 20-23 and p. 13, lines 12-18.

v. [REDACTED].[23]

27. Accordingly, the Defence avers that if the identified portions of Mr Selimi's statements were used as evidence of the truth of their contents, Mr Veseli's right to confront Mr Selimi – as guaranteed by the Law – would be irreparably prejudiced.[24] The Defence recalls that Mr Selimi is not a witness in this case and cannot be compelled to testify against Mr Veseli, or at all. As such, the inherent reliability and perceived probative value of any evidence proffered by Mr Selimi, which falls into the categories identified in paragraph 26 above, and which seeks to implicate Mr Veseli in the alleged JCE, is significantly undermined due to Mr Veseli's inability to cross-examine Mr Selimi. To this end, if the abovementioned portions of Mr Selimi's statements were used as evidence of the truth of their contents, their prejudicial effect would cause irreparable harm to Mr Veseli's fair trial rights.

28. As such, the identified portions of Mr Selimi's statements should be excluded in their entirety.

C. Inadmissible Associated Exhibits

29. The Defence observes that two KLA Communiqués – namely, a Military Police Communiqué and Communiqué 47 – form part of the proposed associated exhibits of Mr Thaçi and Mr Krasniqi respectively.[25] Both documents purportedly stem, at least in part, from information collated by the KLA Information/Intelligence Service.[26]

30. It is well known, at this stage in the proceedings, that the SPO's case against Mr Veseli boils down to the contested allegation that he oversaw a centralised

[23] 074459-TR-ET Part 4, p. 5, lines 15-25; 074459-TR-ET Part 6, p. 1, line 19 – p. 3, line 5.
[24] *See*, Article 21(4)(f) of the Law.
[25] *See*, 076565-076565-ET and IT-04-84 P00328.
[26] 076565-076565-ET and IT-04-84 P00328, pp. U0162150-U0162151.

military intelligence directorate that operated as an organ of the General Staff, and which – according to the SPO – must have been directly complicit in the commission of the crimes listed in the Indictment. Notwithstanding the perceived relevance of both Communiqués to the SPO's case, the Defence submits that they nonetheless fall short of the admissibility requirements in Rule 138(1) of the Rules and, more generally, form part of a wider category of KLA literature which has been disposed of as material akin to propaganda by the *Limaj* and *Haradinaj* Trial Chambers at the ICTY.[27] As such, and in accordance with the submissions made in F01387,[28] the Defence objects to their admission into evidence as associated exhibits of the Co-Accused.[29] Due to their lack of authenticity and reliability, they ought to be tendered through a witness who can speak to the veracity of their contents – something which Mr Thaçi and Mr Krasniqi cannot be compelled to do.

i. Communiqué Associated with Mr Thaci

31. As part of Mr Thaçi's SPO suspect interview from July 2020, the SPO seeks to admit a Communiqué from 23 September 1998, which purportedly originated from the KLA Military Police Department.[30] Substantively, the Communiqué attributes the detention of 13 LDK members to information gather by the "KLA information service."[31]

[27] ICTY, *Prosecutor v. Haradinaj et al.*, IT-04-84bis-T, Trial Chamber II, Public Judgement with Confidential Annex, 29 November 2012, paras 630, 635. *See* also, ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, Judgement, 30 November 2005, para. 216.
[28] F01387, *Joint Defence Response to Prosecution Application for Admission of Material Through the Bar Table with confidential Annexes 1-8*, 21 March 2023, paras 14-24, confidential.
[29] In this regard, the Defence notes that the Panel has yet to pronounce upon the admissibility of KLA Communiqués. *See* for instance, F01409, *Decision on Specialist Prosecutor's Bar Table Motion*, 31 March 2023, para. 20, confidential, where the Panel "prioritised the items which the SPO [had] identified and linked to the first 6 witnesses" – which did not contain any KLA Communiqués.
[30] 076565-076565-ET.
[31] 076565-076565-ET.

32. At the outset, the Defence takes particular note of the clear lack of authorship and other indicators of provenance. It is wholly unclear (i) who wrote the Communiqué; (ii) if it was written by more than one individual; (iii) what was the *specific* source of the information contained therein; and (iv) whether there was a process of approval and/or review before the Communiqué was published in *Zëri I Kosovës*.[32] Furthermore, on the basis of Mr Thaçi's SPO interview, it is clear that he is not the Communiqué's author. In fact, when confronted with the Communiqué in question, Mr Thaçi considered it to be "fake" given that, in September 1998, "[REDACTED]."[33]

33. To this end, the Defence avers that the Communiqué is inherently unreliable. Pursuant to the findings in *Prosecutor v. Limaj et al*., the ICTY Trial Chamber found that whilst the General Staff had "formally moved to introduce military police within the KLA" by May 1998, it was "not apparent on the evidence before the Chamber that disciplinary rules were then consistently enforced in KLA units."[34] In the absence of new evidence to the contrary, the Defence reiterates that the implementation of a military police directorate was theoretical; its practical implementation and functioning in the manner envisaged could not be convincingly established during the early and middle stages of 1998.

34. Accordingly, the request to admit the military police Communiqué as an associated exhibit of Mr Thaçi ought to be rejected. He is not its author and, therefore, cannot speak to its contents. Furthermore, from a formal and substantive point of view, the Communiqué lacks the requisite indicia of authenticity and reliability to be admitted into evidence pursuant to Rule 138 of the Rules.

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[32] *See* generally, 076565-076565 and 076565-076565-ET.
[33] 076563-TR-ET Part 4, p. 9, lines 5, 18 and 24-25.
[34] ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, Judgement, 30 November 2005, para. 117.

ii. Communiqué Associated with Mr Krasniqi

35. With respect to Mr Krasniqi, the Defence notes that the SPO seeks to have Mr Krasniqi's ICTY interview from May 2007 admitted into evidence. Whereas the Defence does not take issue with the majority of the interview, it nonetheless takes issue with the proposed admission of Communiqué 47 as an associated exhibit of Mr Krasniqi.[35] The Defence notes that Communiqué 47 was published on 13 May 1998 by the newspaper *Koha Ditore* and attributes a nascent KLA's knowledge of enemy movements to an alleged "intelligence service."[36]

36. In similar fashion to the abovementioned Military Police Communiqué, the Defence considers Communiqué 47 to be lacking in authenticity. It bears no apparent indicia of authorship and Mr Krasniqi cannot be compelled or otherwise expected to testify as to its contents. Whereas Mr Krasniqi told Prosecution investigators at the ICTY that the contents of the *Koha Ditore* article containing Communiqué 47 was "[REDACTED]", it nonetheless remains unclear if Mr Krasniqi was referring to the entirety of the Communiqué or just certain portions. In any event, the Defence reiterates its position that a centralised intelligence function did not exist until November 1998, at the earliest.[37] In fact, at the time when Communiqué 47 was published, the KLA was a fledgling organisation comprised of village defences that came together spontaneously to defend the civilian population from Serbian military action.[38] The proposition that an intelligence service existed at that time and was capable

[35] IT-04-84 P00328, U0162151.
[36] IT-04-84 P00328, U0162151.
[37] F01052, C*orrected Version of the Pre-Trial Brief on Behalf of Kadri Veseli, With Confidential Annexes 1-3 (dated 21 October 2022, F01052)*, 25 October 2022, para. 40, confidential. A public redacted version was issued on 13 March 2023.
[38] ICTY, *Prosecutor v. Limaj et al.*, IT-03-66-T, Trial Chamber II, Judgement, 30 November 2005,paras 45, 53-65, 123-124. See also, ICTY, *Prosecutor v. Milutinovic et al.*, IT-05- 87-T, Trial Chamber, Judgement (Volume I), 26 February 2009, paras 795, 822, 824, 840 886, 894; ICTY, *Prosecutor v. Đorđević*, IT-05- 87-A, Appeals Chamber, Appeal Judgement, 27 January 2014, paras 107, 189, 307; ICTY, *Prosecutor v. Đorđević*, IT-05-87/1-T, Trial Chamber II, Trial Judgement (Vollume II), 23 February 2011, paras 1615-1616, 1701-1704.

of assessing enemy troop movements in the manner alluded to by Communiqué 47 calls into question its reliability.

37. Accordingly, the Defence motions for its exclusion from the evidence. It lacks the requisite authenticity and reliability to satisfy the requirements contained in Rule 138(1) of the Rules.

IV. CONCLUSION

38. In light of the foregoing, the Defence requests that the Panel:

i. Reject, in their entirety, the admission of the statements of Mr Veseli's Co-Accused as evidence against him;

ii. Exclude, or limit the use of, the portions of those statements that are more prejudicial than probative as identified in paragraph 26; and

iii. Reject the admission into evidence of the associated exhibits identified in paragraphs 29-37.

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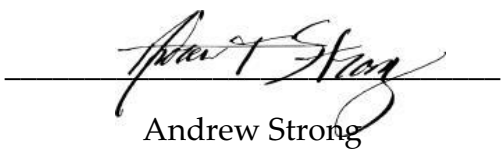

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