IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. NIKISHNA POLEQUAPTEWA, Defendant-Appellant.	C.A. No. 19-50231 D.C. No. 8:16-cr-36-CJC-1 (Central Dist. Cal.) **GOVERNMENT'S OPPOSITION TO APPELLANT'S MOTION FOR BAIL PENDING APPEAL UNDER CIRCUIT RULES 9-1.2 AND 27-3**

Plaintiff-Appellee United States of America, by and through its counsel of record, hereby opposes defendant Nikishna Polequaptewa's ("defendant's") Motion for Bail Pending Appeal.

This opposition is based on the attached Memorandum of Points and Authorities and exhibits, the exhibits previously filed by defendant, the files and records in this case, and such further argument or evidence as may be presented to the Court.

Defendant is in custody.

DATED: September 24, 2020

Respectfully submitted,

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Nikishna Polequaptewa ("defendant") worked at Blue Stone Strategy Group ("Blue Stone"), a consulting firm, where he initially held information technology ("IT") responsibilities. When IT responsibilities were assigned to someone else, he quit. Defendant made his resignation a criminal case by remotely "wiping" a Blue Stone computer and deleting various Blue Stone files held on its server and with third-party providers. When a Blue Stone founder later said to defendant that Blue Stone wanted its "stuff" back, defendant responded, "What stuff? I deleted it. That's the point." A jury convicted defendant of a violation of 18 U.S.C. § 1030.

Without a substantial question of fact or law raised on appeal, defendant's motion for bond pending appeal should be denied.

II. BACKGROUND

A. Defendant Stole a Laptop After Being Terminated by UCI

Before joining Blue Stone, defendant worked for the University of California, Irvine ("UCI"). (ER 146.)[1] In that job, defendant purchased two laptops; the second laptop is referred to as the "UCI laptop." (ER 146, 176.) Both laptops were purchased using UCI funds and to be used for a National Science Foundation-funded project. (ER 176-77.) On March 3, 2014, UCI terminated defendant, and he was required to "return all UC equipment, including . . . laptops . . . in [his] possession." (ER 157.) In August 2014, defendant's wife returned the first laptop. (ER 172.) In January 2015, UCI sent defendant and his wife letters reminding them that the UCI laptop "must be returned." (ER 171-75.) Without a response, UCI turned to its police department for assistance to recover the UCI laptop. (ER 147.) UCI maintained that defendant

[1] "ER" refers to the Excerpts of Record filed by defendant; such references are followed by page numbers. "GEX 21" and "GEX 23" refers to the attached trial exhibits (Government's Trial Exhibits 21 and 23). "Mot." refers to defendant's motion. "Ex." refers to the exhibits attached to defendant's motion; each is followed by the exhibit number and/or page numbers. Appellant's Opening Brief is identified as "Ex. 1."

stole the UCI laptop when he failed to return it following his termination. (ER 147.)

B. Defendant Joined Blue Stone in April 2014 and Then Resigned in November 2014

In April 2014, defendant joined Blue Stone. (ER 279-82, 314-15.) Until November 14, 2014, defendant's responsibilities included managing and setting up Blue Stone's information technology. (ER 590-604.) That day, defendant was relieved of his information technology responsibilities and put on a project in Florida. (ER 605-09.) On November 18, 2014, defendant quit in Florida. (ER 455-60.)

C. Defendant Wiped a Blue Stone Desktop Computer

On November 18, 2014, while in Florida, defendant sent a "wipe" command to a Blue Stone desktop computer in California. (ER 759-69; GEX 21, 23.) On November 19, 2014, the "wipe" command caused the contents of the computer to be deleted. (ER 845-46; GEX 21, 23.)

D. Defendant Deleted Various Blue Stone Files, as Part of a Related Course of Conduct

On November 18, 2014, defendant deleted various other files of Blue Stone without authorization that were stored on its internal server and on remote servers hosted by third-party providers. (ER 281-82, 304, 471, 542-50, 592-93, 626, 630-31, 679-81, 783-85, 788, 792, 794-95,

816-17, 819, 821, 822, 832, 835, 837, 839-42, 896-97, 931-32, 941, 943-45, 993-96, 1271-77.) Specifically, defendant deleted data from Blue Stone's server (including its website), Blue Stone's marketing campaign materials from MailChimp.com, Blue Stone's website backup and other data stored via a Cox Communications server, data stored on Blue Stone's Google Drive, and Blue Stone's CRM system. (*Id.*)

E. Blue Stone Obtained the UCI Laptop in Florida with the Assistance of Deputy Sheriffs in Florida

In the motion to suppress litigation, the parties agreed on the following facts:

- On November 18, 2014, James Moon, defendant's supervisor at Blue Stone, went to defendant's hotel room in Florida after defendant had resigned.
- That night, Moon called the local sheriff's office.
- Eventually, Moon obtained the UCI laptop from defendant with the assistance of the local sheriff's office.

(*Compare* ER 103-06 with ER 184-90.) The parties contested below the lawfulness of the entry to his hotel room and how Moon came into possession of the UCI laptop. (*Compare* ER 103-06 with ER 184-90.)

F. Defendant Admitted to Deleting Blue Stone Files

On November 19, 2014, defendant returned to the Blue Stone office. (ER 296-306, 1238-41.) When a Blue Stone founder said Blue Stone wanted to make sure that it got all of its "stuff" back, defendant responded, "What stuff? I deleted it. That's the point." (ER 1241.)

G. The FBI's Investigation and Search of the UCI Laptop

It was undisputed below that: (1) the FBI did not open its investigation until at least November 20, 2014 when Blue Stone contacted the FBI, ER 145, and (2) on December 11, 2014, the FBI obtained a search warrant to search the UCI laptop, ER 50-102.

H. First Superseding Indictment

Defendant was charged with a violation of § 1030(a)(5)(A) for sending the "wipe" command to Blue Stone's desktop computer. (ER 237-38.) As part of a "related course of conduct", defendant was also charged with the deletions he executed on Blue Stone's internal server and other remote servers operated by third-parties. (ER 237, 239.) The loss from the "wipe" command and the related course of conduct was alleged as part of the sentencing enhancement stated in 18 U.S.C. §§ 1030(c)(4)(B)(i), (c)(4)(A)(i)(I), because the loss was greater than $5,000. (ER 238-39.)

I. Motion to Suppress

Prior to the first trial that ended in a mistrial, defendant filed a motion to suppress evidence seized from the UCI laptop, arguing that the laptop was unlawfully seized by deputy sheriffs in Florida in November 2014. (ER 30-44.) In opposition, the government argued that: (1) defendant lacked a reasonable expectation of privacy in the laptop because it was stolen from UCI, ER 123-27, (2) the laptop was lawfully seized in Florida, ER 128-31, (3) any illegal action by Blue Stone employees with respect to the laptop had no bearing on the Fourth Amendment as they were not government agents, ER 131-32, and (4) the FBI's search of the laptop should not be suppressed because of the independent source doctrine, inevitable discovery exception, and good faith exception, ER 132-36. Defendant filed a reply without any facts to demonstrate a reasonable expectation of privacy. (ER 191-96.) The district court denied defendant's motion to suppress without an evidentiary hearing, finding that defendant lacked a reasonable expectation of privacy in the UCI laptop. (ER 1-8.)

J. Evidence at Trial of Defendant's Guilt

Following the mistrial, the government searched the UCI laptop pursuant to UCI's consent—not the warrant. (ER 926-27, 972-73, 977.) Defendant did not move to suppress the items seized from that search. At the re-trial, only some of the items admitted were from the search done pursuant to the warrant at issue in defendant's motion to suppress. For example, government exhibits 120-141 were not admitted at the first trial. (ER 1280-81.) In addition to items from the UCI laptop, the government relied on other evidence, including defendant's recorded admission from November 2014, Apple records showing defendant's "wipe" command to the desktop computer, and records from Google and other third-parties showing defendant's deletions. (ER 1241, 1270-77; GEX 21, 23.)

K. Jury Instructions

The district court instructed the jury on the three elements for a violation of § 1030(a)(5)(A). (ER 1225.) As to the sentencing enhancement for loss, the district court followed the jointly submitted instruction and instructed as follows:

> If you find the defendant guilty of the charge in Count One of the first superseding indictment, you are then to

> determine whether the government proved beyond a reasonable doubt that as a result of such conduct and a related course of conduct affecting one or more other computers used in or affecting interstate or foreign commerce or communication, the defendant caused loss to Blue Stone Strategy Group during any one-year period of an aggregate value of $5,000 or more.

(ER 1229.) The district court provided a verdict form, without any relevant objection, requiring the jury to unanimously find that the government had proven the loss was $5,000 or greater. (ER 1257.)

L. Conviction and Sentencing

In the re-trial, the jury found defendant guilty of the charged conduct, including the sentencing enhancement. (ER 1256-57.) Defendant was sentenced to 27 months of imprisonment and is expected to be released on August 9, 2021. (ER 1285-90; Ex. 3 at 1.)

M. Order Denying Bail Pending Appeal

Based on his opening brief to this Court, defendant moved for bail pending appeal in the district court, arguing (1) the motion to suppress was erroneously denied because no evidentiary hearing occurred, Ex. 1 at 41-65, and (2) there was plain error in the jury instructions as to the sentencing enhancement, *id.* at 65-74. (Ex. 2.) Following briefing, the district court denied the motion, finding defendant's opening brief had not raised a substantial question of law or fact. (Exs. 2-5.)

III. ARGUMENT

A. Standard for Bail Pending Appeal

A defendant is ineligible for bail pending appeal unless: (1) he proves "by clear and convincing evidence that [she] is not likely to flee or pose a danger to the safety of any other person or the community if released"; and (2) her appeal raises "a substantial question . . . likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. § 3143(b)(1).

A "substantial question" refers to an issue that is "fairly debatable" or "fairly doubtful," and is of more substance than would be necessary to a finding that it is not frivolous. *United States v. Handy*, 761 F.2d 1279, 1283 (9th Cir. 1985). "Fairly debatable" questions are those that are novel or not readily answerable, or that pose issues "'debatable among jurists of reason.'" *Id.* at 1281-82. This standard does not require that reversal be more likely than not, *Handy*, 761 F.2d at 1280-81, but neither is it so toothless that it eviscerates Congress' intent to "tighten[] the standards for bail pending appeal," *id.* at 1283.

The district court's legal determinations are reviewed de novo. *United States v. Garcia*, 340 F.3d 1013, 1015 (9th Cir. 2003). Factual findings underlying the denial of bail are reviewed for clear error, *United States v. Townsend*, 897 F.2d 989, 994 (9th Cir. 1990), and the decision to deny bail is entitled to "great deference," *United States v. Maull*, 773 F.2d 1479, 1486-87 (8th Cir. 1985) (en banc).

B. Defendant's Motion For Bail Must Be Denied

Neither issue raised in defendant's opening brief is a "substantial" question of fact or law. His motion should be denied.

1. The District Court's Denial of the Motion to Suppress Was Not Fairly Debatable or Doubtful

The denial of the motion to suppress here was not fairly debatable or doubtful. Defendant could challenge the legality of the search on Fourth Amendment grounds only if he had a "legitimate expectation of privacy" in the laptop searched. *United States v. Zermeno*, 66 F.3d 1058, 1061 (9th Cir. 1995) (citation omitted). Defendant had the burden of establishing his legitimate expectation of privacy in the laptop that the FBI searched. *Id.* (citation omitted). After the government submitted evidence that UCI was the proper owner and possessor of the laptop, defendant never provided any

evidence that he had not stolen the laptop from UCI, that he owned the laptop, or that he had a legitimate possessory interest in the laptop. Defendant, in his reply, effectively conceded the issue, claiming only that, at the time the laptop was obtained in Florida, "there was at least an appearance that Defendant owned and/or possessed the computer." (ER 193.) As the district court recognized in its denial, this case is virtually identical to the Court's decisions in *United States v. Wong*, 334 F.3d 831, 839 (9th Cir. 2003) and *United States v. Caymen*, 404 F.3d 1196, 1200–01 (9th Cir. 2005). Thus, the district court did not abuse its discretion when it denied the motion to suppress without an evidentiary hearing. *United States v. Howell*, 231 F.3d 615, 620 (9th Cir. 2000). Because defendant had no reasonable expectation of privacy in the laptop, the denial is not fairly debatable or doubtful.

Defendant now raises facts not presented to the district court in his motion to suppress to establish his reasonable expectation of privacy in the laptop, suggesting for the first time on appeal that UCI had abandoned the laptop or had not done enough to take ownership of the laptop. (Ex. 1 at 55-56.) Defendant is using trial testimony to show that defendant had a reasonable expectation of privacy in the laptop.

(*Id.*) No such facts were raised before the district court or relied upon by the district court; thus, these new facts cannot be raised on appeal to be a basis for showing a reasonable expectation of privacy. *United States v. Magdirila*, 962 F.3d 1152, 1156–57 (9th Cir. 2020). If the Court did consider facts from the re-trial, they do not show that defendant had a reasonable expectation of privacy in the laptop. The evidence showed that UCI owned the laptop, and UCI repeatedly asked for the return of the laptop, ultimately turning to the police. (ER 146-83.) Defendant did not establish a reasonable expectation of privacy in the UCI laptop.

For the first time on appeal, defendant attempts to distinguish *Caymen* and *Wong* by citing case law involving the illegal stops of cars where the defendant had no reasonable expectation of privacy in the car. (Ex. 1 at 47-48.) But these cases are distinguishable. Here, unlike those cases, the FBI's search was done pursuant to a warrant. Second, this case is unlike the traffic-stop cases cited where the same law enforcement agency illegally stops a car and then searches the car. Here, it was undisputed that the FBI searched a laptop after receiving a complaint from the victim company. The FBI did not illegally obtain

the laptop from defendant's hotel room so it could obtain a warrant to search it. There are no facts supporting such a chain of events in this case.

While the district court did not reach the government's independent source doctrine, inevitable discovery, and good faith exception arguments when ruling on the motion to suppress, those arguments are also a basis for rejecting defendant's new argument in responding to *Wong* and *Caymen* and establish that defendant has not raised a substantial question about the merits of his appeal. (ER 132-36.) Defendant's request for an evidentiary hearing was limited to the actions of the deputy sheriffs in Florida when Blue Stone first obtained the UCI laptop and entry was made into his hotel room. Defendant did not seek an evidentiary hearing as to the government's independent source doctrine, inevitable discovery, and good faith exception arguments; nor were there any disputed facts as to these arguments. These additional, uncontested grounds in the record are additional reasons for concluding that the district court's denial should be affirmed and defendant has not raised a substantial question on appeal. *See*, *e.g.*, *United States v. Pope*, 686 F.3d 1078, 1080 (9th Cir. 2012) (stating

that the Court may affirm on any basis supported by the record even if the district court did not rely on that basis (quoting *United States v. Washington*, 969 F.2d 752, 755 (9th Cir. 1992)).

Defendant contends that, in its denial of the motion for bail pending appeal, the district court essentially conceded that it misunderstood the fruit of the poisonous tree doctrine. (Mot. at. 7-10.) However, the district court's opinion did not make any such concession when it found no substantial question was presented in defendant's appeal. The district court held that, because defendant failed to show that he had a reasonable expectation of privacy in the UCI laptop, the Court would not find an abuse of discretion with the district court's decision not to hold an evidentiary hearing. (Ex. 5 at 7.) Indeed, the district court also added that the independent source doctrine provided another ground for the Court to affirm the denial of the motion to suppress. (Ex. 5 at 5-7.) That doctrine only further supported the district court's conclusion that no substantial question was raised.

Defendant's argument regarding *United States v. Litwin*, ___ F.3d ___, 2020 WL 5050383, at *15 (9th Cir. Aug. 27, 2020) is a red herring. (Mot. at 8-9.) There, the district court *sua sponte* supplemented the

record while a matter was pending appeal. Here, the district court was evaluating defendant's motion for bond pending appeal that it had to rule on. As part of its analysis of whether there was a substantial question, the district court was permitted to consider if the Court would affirm on alternative grounds like the independent source doctrine. The district court did not impermissibly supplement its prior denial of the motion to suppress, as the court in *Litwin* did.

Regardless, any error by the admission of the UCI laptop evidence was harmless beyond a reasonable doubt because the evidence was merely cumulative. *United States v. Studley*, 783 F.2d 934, 941 (9th Cir. 1986) (citation omitted). The other evidence demonstrating defendant's guilt included defendant's admission on November 19, 2014, records from third-party providers showing the deletions, and testimony from witnesses showing defendant was motivated by revenge and frustration to do the deletions. (ER 1241, 1270-77; GEX 21, 23.) For example, the government introduced records like Government Trial Exhibit 23 from Apple that objectively showed defendant wiping the Blue Stone desktop computer. (GEX 23.) That type of evidence showed defendant did the deletions. Moreover, only a subset of the items used

from the UCI laptop were obtained via the search that defendant moved to suppress; defendant never moved to suppress the consent search done following the mistrial. Accordingly, any error was harmless. [2]

For these reasons, defendant has not raised a substantial question of fact or law with respect to the motion to suppress.

2. Defendant Has Not Raised a Substantial Question of Law as to the Jury Instructions

Defendant contends that the district court improperly instructed as to the sentencing enhancement in this matter. (Ex. 1 at 65-74.) Plain error review applies as the district court used the instruction (ER 1229) and verdict form (ER 1257) as to the sentencing enhancement which the parties jointly submitted. *United States v. Ameline*, 409 F.3d

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[2] Defendant's contention that *United States v. Christian*, 749 F.3d 806, 810-13 (9th Cir. 2014) requires remand and a new trial is incorrect and irrelevant to the determination whether he has raised a substantial question in his appeal. (Ex. 1 at 72-73.) *Christian* addressed: (1) the admissibility of expert testimony, and (2) whether a new trial was required on remand. The first issue is not relevant to the suppression and jury-instruction issues raised in this appeal. The second issue is not relevant to defendant's motion for bond because it addresses which remedy is appropriate if the district court erred, not whether an error took place. Furthermore, the soundness of its ruling on the second issue is now under review by this Court sitting *en banc*. *United States v. Ray*, No. 18-50115, 2020 WL 5269823, at *1 (9th Cir. Sept. 4, 2020).

1073, 1078 (9th Cir. 2005) (citations omitted). Defendant has not raised a fairly debatable or doubtful issue as to the jury instructions.

Defendant argues that the district court's instruction was faulty as to defining "related course of conduct" for three reasons. (Ex. 1 at 68-69.) None of these reasons demonstrates error—let alone plain error. Defendant's three arguments for error are framed as "plain meaning" arguments but they ignore the fact that the jury instructions were written and agreed-upon using the statutory language, 18 U.S.C. §§ 1030(c)(4)(B)(i), (c)(4)(A)(i)(I).

First, defendant contends that the "related course of conduct" must be equivalent to the § 1030(a)(5)(A) offense. (Ex. 1 at 69.) This is not what § 1030 says. To satisfy the $5,000 loss threshold, the government may use loss from the charged § 1030(a)(5)(A) offense and "loss resulting from a related course of conduct affecting 1 or more other protected computers." § 1030(c)(4)(A)(i)(I). "Loss" is defined at § 1030(e)(11). Section 1030(c)(4)(A)(i)(I) does not require that the "loss resulting from a related course of affecting 1 or more other protected computers" be equivalent to a § 1030(a)(5)(A) offense. Defendant is seeking to expand the plain language of § 1030(c)(4)(A)(i)(I). Moreover,

defendant's creative after-the-fact argument is precisely the sort of the type of argument which does not meet the plain-error standard.

Second, defendant argues that the district court needed to instruct that "related" means the transmissions were "so connected that each individual act was part of a single episode with a common purpose." (Ex. 1 at 69.) Defendant comes up with this definition of "related" without any legal support and a failure to include it therefore cannot be plain error. The general rule is that "the district court need not define common terms that are readily understandable by the jury." *United States v. Hicks*, 217 F.3d 1038, 1045 (9th Cir. 2000). Given how the jury was instructed on the elements of § 1030(a)(5)(A) and "loss," and the fact that the jury did not state it was confused as to the instructions, no further instruction was needed.

Third, defendant argues that the jury was required to find that defendant intentionally caused a loss of $5,000 or more. (Ex. 1 at 69.) Section 1030(a)(5)(A) requires that defendant "intentionally cause[d] damage." But, that "intentionally" language is not present in the language of the statute and the government is not aware of any case that holds otherwise. The government is not aware of any authority

finding that that the intent requirement applies to the loss. *See*, *e.g.*, *United States v. Goodyear*, 795 F. App'x 555, 559 (10th Cir. 2019) (describing elements of § 1030(a)(5)(A) and not including an intent requirement for the loss amount). The district court correctly did not include an intent requirement for the loss amount.

Defendant argues that, because of the alleged error, the jury could not have found that someone else issued the commands or that defendant accidently did it. (Ex. 1 at 72.) But this argument ignores that the central issue at trial was whether defendant sent the commands and whether he did it intentionally. This was an issue he fully was able to argue, and did argue, under the district court's instructions. Similarly, defendant's convoluted "intent" arguments raised for the first time on appeal ignore the evidence at trial, where defendant admitted in a recording to Blue Stone employees that he intentionally deleted their files. The evidence at trial did show that defendant intended to cause a loss of $5,000 or more to Blue Stone.

Finally, defendant contends that the rule of lenity and constitutional avoidance supported defendant's claims of plain error. (Ex. 1 at 69-71.) The rule of lenity and constitutional avoidance do not

apply here because § 1030 is not vague. These arguments can be summarily rejected.

Even if the Court were to find error, any error was not plain. Defendant's jury-instruction argument does not raise a substantial question of fact or law.

IV. CONCLUSION

Defendant's motion for bail pending appeal should be denied.

DATED: September 24, 2020

Respectfully submitted,

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May 11, 2015

VIA FACSIMILE

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Re: Subpoena
Comcast File #: 648486

Dear SA Munoz:

The Subpoena received on 4/29/2015 with respect to the above-referenced matter has been forwarded to the Legal Response Center for a reply. The Subpoena requests Comcast to produce certain subscriber records pertaining to the following IP address: **50.205.50.98 assigned at various times on 11/18/2014 between 04:12:51 PST and 11:58:29 PST, per the attachment to the Subpoena.**

Based on the information provided pursuant to the Subpoena, the subscriber information obtained has been provided below:

Subscriber Name:	APPLE TEN HOSPITALITY INC, DBA RESIDENCE INN DANIA BEACH
Service Address:	4801 ANGLERS AVENUE FORT LAUDERDALE, FL 33312
Billing Address:	1 EARLY STREET SUITE A ELLPORT, PA 16117
Type of Service:	High Speed Internet Service
Account Number:	930610952
Start of Service:	Unknown
Account Status:	Active
IP Assignment:	Statically Assigned
Current IP:	See Attached
Method of Payment:	Statement sent to above address

If you have any questions regarding this matter, please feel free to call 866-947-8572.

Very Truly Yours,

Comcast Legal Response Center

Find My iPhone Actions FMiP actions requested and acknowledged for this account

Date	**Action/Date/Time**
11/20/14 10:19 AM	User nikishna@yahoo.com initiated a lock on device Nikishna’s Mac Mini Server at Thu Nov 20 10:19:18 PST 2014 from 174.251.209.131.
11/19/14 3:55 PM	Device Nikishna’s Mac Pro started the wipe at Wed Nov 19 15:55:34 PST 2014.
11/19/14 3:55 PM	Device Nikishna’s Mac Pro acknowledged the wipe command with status successfully started at Wed Nov 19 15:55:34 PST 2014. An e-mail was successfully sent to nikishna@yahoo.com at Wed Nov 19 15:55:34 PST 2014.
11/18/14 9:52 PM	User nikishna@yahoo.com initiated a wipe on device Nikishna’s MacBook Pro Retina (4) at Tue Nov 18 21:52:30 PST 2014 from 50.205.50.98.
11/18/14 9:50 PM	User nikishna@yahoo.com initiated a wipe on device Nikishna’s Mac Pro at Tue Nov 18 21:50:06 PST 2014 from 50.205.50.98.

Case: 19-50231, 09/24/2020, ID: 11836261, DktEntry: 30, Page 25 of 25