UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Criminal No. 14-mj-04172
	)	
JAMES MERRILL,	)	
Defendant		

James Merrill's Motion For Order Releasing Seized Funds Necessary For Legal Defense With Incorporated Memorandum of Law

Now comes the Defendant, James Merrill, by and through undersigned counsel, pursuant to the Fifth and Sixth Amendments to the United States Constitution, and hereby moves the Court for an order releasing funds seized by the government, as (1) access to the seized funds is essential to Mr. Merrill's ability to fund his legal defense, as evidenced by the Court's earlier finding that Mr. Merrill is legally indigent absent access to the seized funds, (2) significant resources are necessary to defend the instant prosecution, which the government asserts carries a sentence of life imprisonment and which has been identified by the government as "probably the largest financial fraud being prosecuted in the United States currently," and "probably the largest pyramid scheme that's ever been prosecuted by the Department of Justice," *see* May 16, 2014 Tr. at 46, and (3) the government cannot establish probable cause to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the criminal complaint. *See generally Kaley v. United States*, 134 S.Ct. 1090, 1095, n.3 (2014) (noting that lower courts "have uniformly allowed the defendant to litigate . . . whether probable cause exists to believe that the assets in dispute are traceable or otherwise

sufficiently related to the crime charged in the indictment," and that the government "agreed that a defendant has a constitutional right to a hearing on that question").

The defendant relies on the memorandum of law incorporated herein.

LOCAL RULE CERTIFICATION

Counsel for Mr. Merrill conferred with the government and the government will not agree to return any seized funds.

REQUEST FOR EVIDENTIARY HARING AND ORAL ARGUMENT

The defendant respectfully requests an evidentiary hearing, as required by *Kaley*, *supra*, and oral argument on the within motion.

Memorandum of Law

I. *Factual and Procedural Background*.

On May 9, 2014, a criminal complaint issued charging Mr. Merrill with conspiring to commit wire fraud. Dkt. 2. The complaint charges a conspiracy period of January 2012 to April 2014. Dkt. 2. Prior to issuance of the criminal complaint, on April 24, 2014, the government executed a series of seizure warrants for numerous bank accounts, including numerous accounts owned or controlled by Mr. Merrill. To wit, pursuant to the seizure warrants, the government has frozen, *inter alia*, all funds contained in the following accounts:

Account	**Account Holder**	**Amount**
Middlesex Savings Bank, Acct. No. *****8181	Cleaner Image Associates	$10,643.00
Middlesex Savings Bank, Acct. No. *****6876	James and Kristin Merrill	$104,988.64

Waddell & Reed, Acct. No. ****5999	James Merrill	No funds
Waddell & Reed, Acct. No. ****1090	James and Kristin Merrill	$3,985,097.33
Waddell & Reed, Acct. No. ****6892	James Merrill	$79,684.28

On May 9, 2014, at his initial appearance, the Court (Hennessey, M.J.) found Mr. Merrill indigent and accordingly appointed counsel to represent him. Dkt. 6. On May 16, 2014, Magistrate Judge Hennessey noted that he had reviewed supplemental financial information requested by the Court and that "[b]ased on the inability of the defendant to access whatever accounts he may have and the like, [the Court] find[s] that the defendant does qualify for appointment of counsel," and therefore ruled that his court-appointed counsel could continue with her representation. May 16, 2014 Tr. at 3-4.

On or about June 18, 2014, with the assent of the Securities and Exchange Commission, Mr. Merrill moved for the release of certain accounts subject to a freeze order issued by Judge Gorton in the SEC litigation. Attorneys for the SEC assented to the release of the accounts, concluding that they did not contain a sufficient nexus to TelexFree. Judge Gorton has since allowed the motion. The following accounts have been ordered released by Judge Gorton, only the last of which is covered by the seizure warrants identified above:

Bank Account No.	**Type of Account**	**Approx. Balance**
Waddell & Reed, Acct. No. ****6619	IRA account	$33,851
Waddell & Reed, Acct. No. ****4974	college savings account (for benefit of son).	$14,719
Waddell & Reed	college savings	$29,641

Acct. No. ****4976	account (for benefit of daughter)	
Waddell & Reed Acct. No. ****9562	IRA	$91,692
Waddell & Reed Acct. No. ****8073	IRA	$158,289
Waddell & Reed Acct. No. ****6892	401K	$80,272

II. *Argument*.

In *United States v. Monsanto*, 491 U. S. 600, 615 (1989), the Court held "a pre-trial asset restraint constitutionally permissible whenever there is probable cause to believe that the property is forfeitable." *Kaley*, 134 S.Ct. at 1095, *citing Monsanto*, 491 U.S. at 615. "That determination has two parts, reflecting the requirements for forfeiture under federal law: There must be probable cause to think (1) that the defendant has committed an offense permitting forfeiture, and (2) that the property at issue has the requisite connection to that crime." *Kaley*, 134 S.Ct. at 1095, *citing* 18 U.S.C. §853(a). As the Court noted in *Kaley*, the Monsanto Court "declined to consider 'whether the Due Process Clause requires a hearing' to establish either or both of those aspects of forfeitability." *Kaley*, 134 S.Ct. at 1095, *citing Monsanto*, 491 U.S. at 615, n. 10.

In *Kaley*, the Court resolved the first issue, holding that a defendant seeking access to restrained funds is not constitutionally entitled to a post-indictment, pretrial hearing to challenge a grand jury's determination of probable cause that they committed the crimes charged. *Kaley*, 134 S.Ct. 1090. In so ruling, however, the Court was careful to note that since *Monsanto*, the lower courts "have uniformly allowed the defendant to litigate the second issue stated above: whether probable cause exists to believe that the

assets in dispute are traceable or otherwise sufficiently related to the crime charged in the indictment." *Kaley*, 134 S.Ct. at 1095.[1] The Court then immediately noted, in a footnote, that "[a]t oral argument, the Government agreed that a defendant has a constitutional right to a hearing on that question," and the Court would not there opine on the issue. *Kaley*, 134 S.Ct. at 1095, n.3.

Here, at the very least, Mr. Merrill seeks an adversarial hearing to determine whether the government can sustain its burden of demonstrating that "probable cause exists to believe that the assets in dispute are traceable or otherwise sufficiently related to the crime charged in the [complaint]."[2] *Kaley*, 134 S.Ct. at 1095. Clearly, having agreed at the Supreme Court that a defendant possesses a constitutional right to such a hearing,

[1] *See, e.g.*, *United States v. Monsanto*, 924 F.2d 1186, 1203 (2d Cir.1991) ("the Fifth and Sixth amendments, considered in combination, require an adversary, post-restraint pretrial hearing as to probable cause that (a) the defendant committed the crimes that provide a basis for forfeiture, and (b) the properties specified as forfeitable in the indictment are properly forfeitable, to continue a restraint of assets (i) needed to retain counsel of choice and (ii) ordered *ex parte* pursuant to 21 U.S.C. §853(e)(1)(A)); *U.S. v. All Funds on Deposit in Account Nos. 94660869, 9948199297, 80007487*, 2012 WL 2900487, *1 (S.D.N.Y.2012) (internal citations omitted); *United States v. Moya-Gomez*, 860 F.2d 706, 731 (7th Cir.1988), *cert. denied*, 492 U.S. 908, 109 S.Ct. 3221, 106 L.Ed.2d 571 (1989); *United States v. Harvey*, 814 F.2d 905, 928 (4th Cir.1987), *superceded as to other issues*; *In re Forfeiture Hearing as to Caplin & Drysdale*, 837 F.2d 637 (4th Cir.1988) (en banc), aff'd, 491 U.S. 617, 109 S.Ct. 2646, 105 L.Ed.2d 528 (1989); *United States v. Their*, 801 F.2d 1463, 1466-70 (5th Cir.1986) (hearing required as a matter of statutory interpretation), *modified*, 809 F.2d 249 (5th Cir.1987); *United States v. Crozier*, 777 F.2d 1376, 1383-84 (9th Cir.1985); *United States v. Lewis*, 759 F.2d 1316, 1324-25 (8th Cir.), *cert. denied*, 474 U.S. 994, 106 S.Ct. 406, 88 L.Ed.2d 357 (1985); *United States v. Spilotro*, 680 F.2d 612, 616-19 (9th Cir.1982); *United States v. Long*, 654 F.2d 911, 915-16 (3d Cir.1981); *United States v. E-Gold, LTD, et al.*, 521 F.3d 411, 419 (D.C.C.A.2008) ("holding that defendants have a right to an adversary post-restraint, pretrial hearing for the purpose of establishing whether there was probable cause 'as to the defendant[s'] guilt and the forfeitability of the specified assets' needed for a meaningful exercise of their rights to counsel").

[2] Here, because the government has not yet secured an indictment, the defense contends that an evidentiary hearing is warranted on both probable cause that a crime has been committed and traceability.

the government cannot now change course here. The doctrine of judicial estoppel would preclude the government from taking an inconsistent position in this litigation. *See, e.g., Boston Gas Co. v. Century Indem. Co.*, 708 F.3d 254, 261 (1st Cir.2013) ("Judicial estoppel is an equitable doctrine that 'prevents a litigant from pressing a claim that is inconsistent with a position taken by that litigant either in a prior legal proceeding or in an earlier phase of the same legal proceeding'") (*quoting InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir.2003)). The "primary purpose" of the doctrine of judicial estoppel "is 'to protect the integrity of the judicial process.'" *Id., quoting New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also Alternative Sys. Concepts, Inc. v. Synopsis, Inc.*, 374 F.3d 23, 33 (1st Cir.2004) ("The doctrine's primary utility is to safeguard the integrity of the courts by preventing parties from improperly manipulating the machinery of the justice system.").

Certainly, the government is in no position to challenge the contention that extraordinary funds are necessary to defend the instant prosecution. Indeed, at the original bail hearing, the government not only argued this was not "a typical white-collar case," but it proceeded to argue that it "***is probably the largest financial fraud being prosecuted in the United States currently***…." May 16, 2014 Tr. at 46 (emphasis added). In fact, the government went so far as to assert that this case is "***probably the largest pyramid scheme that's ever been prosecuted by the Department of Justice***." May 16, 2014 Tr. at 46 (emphasis added). The defense of white-collar cases often costs millions of dollars. *See, e.g.*, Ashby Jones, *Raj's $40 Million Defense: A Postgame Breakdown*, Wall Street Journal, May 13, 2011, available at http://blogs.wsj.com/law/2011/05/13/rajs-40-million-defense-a-postgame-breakdown/ (last viewed June 26, 2014); Peter Lattman,

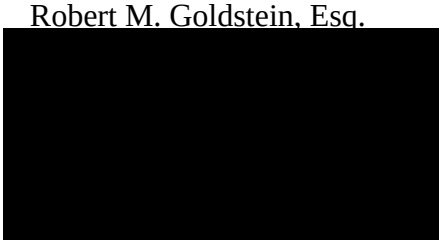
Goldman Stuck With A Defense Tab, And Awaiting a Payback, New York Times, June 18, 2012, available at http://dealbook.nytimes.com/2012/06/18/gupta-legal-bills/?_php=true&_type=blogs&_r=0 (last viewed June 26, 2014) (noting that Gupta's defense cost nearly $30 million); Peter Lattman, *Convicted Fund Manager Ordered To Pay Morgan Stanley $10.2 Million*, New York Times, March 21, 2012, available at http://dealbook.nytimes.com/2012/03/21/convicted-frontpoint-manager-to-pay-10-2-million-to-morgan-stanley/ (last viewed June 26, 2014) (noting defendant owed the bank $3.8 million in advanced legal fees); Sarah Ribstein, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, Duke Law Journal, Vol. 58, 857 (2009) (discussing significant costs associated with defending white-collar prosecutions). Here, the government estimates it has seized 400 terabytes of potentially relevant electronic materials, the geographic scope of the instant prosecution spans several continents, and the stakes are enormous as the government has also asserted that if convicted Mr. Merrill will face life imprisonment. *See* May 16, 2014 Tr. at 46 (government asserting Mr. Merrill faces a life sentence). Even without coming close to matching the amounts spent in the Gupta and Raj cases, the scope of the necessary defense in this matter is enormous, and includes (but is not limited to) accessing and reviewing electronic discovery (here, 400 terabytes worth of information), retaining forensic and trial experts, challenging both charged and potentially relevant conduct (and/or 404(b) allegations), contesting forfeiture allegations, and amassing and confronting evidence that spans continents and languages. In short, defending a case of this nature creates a virtually limitless challenge for a sole defendant facing gravely serious charges. Clearly, given the government's statements to the Court regarding the scope and magnitude of the instant prosecution, Mr. Merrill needs

access to the seized accounts to fully and properly defend himself in this matter.

III. *Conclusion*.

Wherefore, the defendant requests an evidentiary hearing pursuant to *Kaley* and *Monsanto*, and ultimately an order returning the identified funds to the defendant, such that he can secure the rights and privileges afforded him by the Fifth and Sixth Amendments.

Respectfully submitted,
JAMES MERRILL,
By his Attorney,

/s/ Robert M. Goldstein
Robert M. Goldstein, Esq.


Dated: June 30, 2014

Certificate of Service

I, Robert M. Goldstein, hereby certify that on this date, June 30, 2014, a copy of the foregoing document has been served via the Electronic Court Filing system on all registered participants, including Assistant U.S. Attorneys Andrew Lelling and Cory Flashner.

/s/ Robert M. Goldstein
Robert M. Goldstein