

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)
)
)
v.) Criminal No. 14-CR-40028-TSH
)
JAMES MERRILL,)
Defendant)

**James Merrill’s Opposition To Government Motion To Use Alternative Procedures
To Notify Potential Victims**

Mr. Merrill respectfully opposes one aspect of the government’s motion to use alternative procedures to notify potential victims. To wit, Mr. Merrill respectfully submits that given all of the other measures proposed in the government’s motion, additional press releases and newspaper notices (*see* Govt. Motion ¶4(d)) is unnecessary and creates an intolerable risk of creating substantial pretrial prejudice to the defendant and thereby compromising his constitutional right to a fair and impartial trial. As the Supreme Court recently observed in *Skilling v. United States*:

The Sixth Amendment right to an impartial jury and the due process right to a fundamentally fair trial guarantee to criminal defendants a trial in which jurors set aside preconceptions, disregard extrajudicial influences, and decide guilt or innocence “based on the evidence presented in court.” Community passions, *often inflamed by adverse pretrial publicity*, can call the integrity of a trial into doubt. In some instances, this Court has observed, the hostility of the community becomes so severe as to give rise to a “presumption of [juror] prejudice.”

Skilling v. United States, 561 U.S. 358, 438 (2010) (emphasis added) (internal citations omitted).

First, the proposed press releases and/or newspaper notices create a real risk of pretrial prejudice to Mr. Merrill. Every press release and/or newspaper notice issued by the government will likely repeat the government’s characterization of TelexFree and Mr.

Merrill. For example, in its motion, the government recounts its now familiar refrain that “TelexFree operated as a pyramid scheme, essentially by inducing new participants to buy into TelexFree’s compensation and sales program and then using that revenue to cover its obligations to existing participants.” Govt. Motion at ¶2. Indeed, the FBI website, cited in the government’s motion, not only repeats the government’s characterization of TelexFree, but it contains an excerpt from the press release issued by the U.S. Attorney’s Office, contains a link to the full press-release, and it repeats allegations contained in the affidavit filed in support of the criminal complaint—an affidavit the defense has proven to be inaccurate and unreliable in several material respects (*i.e.*, at the full detention hearing before Judge Hillman). In fact, the FBI website contains an allegation (taken from the criminal complaint affidavit) that the government has not included in the indictment (*i.e.*, the website alleges that “TelexFree derived only a fraction of its revenue from sales of VOIP service—less than 1 percent of TelexFree’s hundreds of millions of dollars in revenue over the last two years,” yet the indictment (at ¶19) alleges only that *bank and payment processing accounts* show less than 1% of revenue from sales to customers).¹ In short, one-sided press releases and newspaper notices will be unduly prejudicial to Mr. Merrill and they create a real risk of compromising Mr. Merrill’s constitutional rights to an impartial jury and fair trial.

Second, given the other recommended alternatives set forth in the government’s motion (including the FBI website, the MSD website, the SEC “tipline,” the U.S.

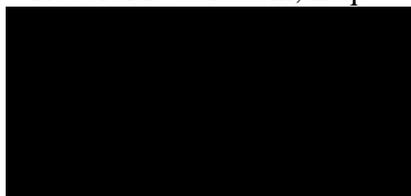
¹ The language of the indictment likely reflects the fact that the government has not yet reviewed the company data and the government therefore cannot definitively state that less than 1% of all revenue (as contrasted with banking and credit card revenue) derived from customer sales. In any event, given the Indictment does not make the same 1% allegation contained in the criminal complaint affidavit, the government should correct the FBI website.

Attorney toll-free number, the U.S. Attorney website, the U.S. attorney email address for victim inquiries, and the localized outreach efforts), the press releases and newspaper notices are wholly unnecessary. Indeed, with the advent of the Internet, we live in a global community. Anyone who truly believes they were victimized by TelexFree can readily learn of the instant proceeding through a very quick Internet search. Indeed, the government avers in its pleading that the FBI's informational website "is the first unpaid site to come up on a Google search using the terms "TelexFree victim." Govt. Motion at ¶4(b). Lastly, and importantly, the government (through seizures of the electronic evidence in this case) should have access to the contact information, including email addresses, of many if not all TelexFree associates and/or customers. This also renders the press releases and/or newspaper notices unnecessary.

Wherefore, Mr. Merrill hereby opposes only that part of the government motion that requests permission to issue repeated press releases and newspaper notices.

Respectfully submitted,
JAMES MERRILL,
By his Attorney,

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



Dated: August 28, 2014

Certificate of Service

I, Robert M. Goldstein, hereby certify that on this date, August 28, 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