UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

James Merrill's First Supplemental Memorandum In Support of Motion For Release of Funds Necessary For Legal Defense

At the hearing on July 22, 2014, the Court ruled that, prior to ordering an evidentiary hearing, it would hold the defendant to a burden of producing sufficient evidence to demonstrate (1) other than the seized funds, Mr. Merrill does not possess sufficient assets to fund his legal defense and (2) some doubt as to whether the seized funds are traceable to the charged offense. For the reasons discussed *infra* (Sections A and B) and during the hearing, and based on the exhibits submitted herewith as well as those exhibits submitted during the evidentiary hearing convened before Judge Hillman on the issue of pretrial release, Mr. Merrill respectfully submits that he demonstrably satisfies any such burden of production.[1] As noted during the hearing, however, and for the reasons detailed herein (Section C), Mr. Merrill objects to the imposition of any such burden upon the defense.

[1] As noted, in support of his request for an evidentiary hearing, Mr. Merrill respectfully directs the Court's attention to the exhibits submitted by the defense during the bail hearing convened by Judge Hillman, and hereby moves for their admission as exhibits in support of Mr. Merrill's motion for release of funds. They were identified as Exhibits A-N during the bail hearing, *see* 6/5/14 Tr. at 3-4, and will be referred to herein generally as "Bail Hearing Exhibits." To the extent the Court needs additional copies of these exhibits the defendant will provide same upon request by the Court.

A. *Insufficient Assets To Fund Defense*.

The government assertion that approximately $325,000 ("or even a lesser amount") is a sufficient legal retainer (*see, e.g.*, Govt. Opposition at 9) to defend a case of this nature reveals a profound misunderstanding regarding the financial burden imposed upon well-resourced individuals to defend even a complicated white-collar prosecution, much less the unprecedented prosecution the government has promised in this case. At the hearing of July 22, 2014, the Court ruled that the defendant had already produced sufficient evidence to demonstrate that, absent access to the seized funds, he does not have sufficient assets to fund his legal defense. That ruling is legally unassailable.

First, the government has seized ***400 terabytes*** of electronic information, and is in the process of imaging same for production to the defense.[2] This startling figure alone demonstrates that Mr. Merrill needs access to the restrained funds to fully fund his legal defense. Only 10 terabytes of data reportedly could hold the entire printed collection of the Library of Congress. *See, What's a Byte? Megabytes, Gigabytes, Terabytes… What are they?*, 2014, available at www.whatsabyte.com (last viewed July 23, 2014), attached hereto as Exhibit 1. Another article asserts that 12 terabytes of information is the equivalent of more than 5 billion (5,000,000,000) single-spaced typewritten pages of materials. *See* Alex Santoso, *What Do 12 Terabytes-Worth of Data Look Like?*, July 8, 2008, available at http://www.neatorama.com/2008/07/08/terabyte/#!bkxUrL (last viewed July 23, 2014). In a recent article chronicling the acquittal of Rengan Rajaratnam, the author noted that the 2.5 terabytes at issue in that case contained enough information to

[2] At the recent hearing, counsel may have inadvertently asserted that the government seized only four (4) terabytes of electronic material. The government has seized 400 terabytes of information. *See, e.g.*, 6/5/14 Tr. at 21.

store "War and Peace" 330,000 times. *See* Rachel Abrams, *Defense Lawyer Ends Preet Bharara's Streak in Insider Trading Cases*, July 9, 2014, available at http://dealbook.nytimes.com/2014/07/09/daniel-gitner-the-defender-who-ended-prosecutors-winning-streak-in-trading-cases/ (last viewed July 23, 2014) (article attached hereto as Exhibit 2). In a case of this magnitude, a citizen with unlimited financial resources could assuredly spend well more than $500,000.00 on defense-related expenses alone, independent of attorneys' fees. Such expenses include forensic accounting services, electronic discovery services, experts, and investigators.[3] The import of forensic accounting and electronic discovery services is accentuated in this particular case not only because of the massive amount of electronic information seized by the government but also because a critical factor in this case will be the amount of revenue TelexFree derived from sales of its products to actual customers (an issue discussed in greater detail in Section B, *infra*). The parties hold strongly divergent views regarding this revenue figure, and the defense has strenuously opposed the government's premature assertion that revenue from sales of product amounted to less than 1% of the company's total revenues.[4] With unlimited financial resources, a defendant could undertake an extensive forensic accounting effort to review the company's internal financial

[3] The Court has requested and the defense is in the process of acquiring estimates from third-party firms engaged in the business of forensic accounting and electronic discovery. The defense will provide those figures to the Court upon their receipt in a second supplemental pleading.

[4] "Premature" because, as discussed below, the government has not yet even reviewed the company's financial data, but instead has reviewed only credit card and banking activity. As such, the government, by its own concession, has omitted from its preliminary financial review an entire third category of incoming revenue—to wit, the company's internal credit/debit accounting system. This third category of revenue was addressed in further detail during the evidentiary hearing before Judge Hillman. *See generally* Transcript dated June 5, 2014.

accounting system to ascertain precisely how much money is attributable to customer sales.

Second, in cases with a far smaller universe of relevant materials, the cost of the defense has significantly exceeded $500,000.00. A recent example is the prosecution of James Bulger. As detailed in a Boston Globe article, attached hereto as Exhibit 3, the defense in the Bulger matter submitted bills pursuant to the Criminal Justice Act that amounted $2.6 million dollars, a figure that reportedly did not include two months of trial, and a figure that reflects a significantly reduced hourly rate of $125.00. As detailed in a pleading filed by the defense in the Bulger matter, attached hereto as Exhibit 4, the relevant universe of discovery in the Bulger matter was significantly smaller than the 400 terabytes of potentially relevant information in this case.[5]

Third, the Court has received Mr. Merrill's application for Court-appointed counsel, filed prior to undersigned counsel's appearance in this matter. The Court reviewed the original application and a supplemental submission and determined that Mr. Merrill qualified for Court-appointed counsel. *See* May 16, 2014 Tr. at 3-4.

Fourth, the government's reliance upon the approximately $300,000 released in the related SEC litigation is seriously misplaced. As noted *supra*, expenses alone in a case of this nature can easily, and vastly, exceed $500,000. Moreover, the accounts containing the approximately $300,000 are largely retirement accounts and, therefore, if accessed by Mr. Merrill would result in far less than $300,000. The table below details the accounts released to date in the SEC matter, the types of accounts, and any expected

[5] Other examples of cases wherein defendants spent millions of dollars to defend federal white-collar prosecutions were included in Mr. Merrill's original pleading. *See* Dkt. 55 at 6-7.

penalties to be incurred if accessed by the account custodian[6]:

Account	**Account Holder**	**Type**	**Balance**	**Penalties**	**Tax Due**
Waddell & Reed, Acct. No. ****6619	James Merrill	IRA	$36,077.08	10%	tax on income generated (balance less basis)
Waddell & Reed, Acct. No. ****4974	James Merrill FBO Jack Merrill	College Savings 529A Plan	$15,637.20	10% (on earnings)	tax on income generated (balance less basis)
Waddell & Reed, Acct. No. ****4976	James Merrill FBO Caroline Merrill	College Savings 529A Plan	$31,489.08	10% (on earnings)	tax on income generated (balance less basis)
Waddell & Reed, Acct. No. ****9562	James Merrill	IRA/SEP	$91,692	10%	tax on entire amount (assumes no basis)
Waddell & Reed, Acct. No. ****8073	Kristin A. Merrill	IRA/ROLLOVER	$158,289	10%	tax on income generated (balance less basis)
Waddell & Reed Acct. No. ****6892[7]	James Merrill	401(k)	$83,705.83 (**SEIZED BY USAO**)		
Middlesex Savings Acct. No. *****9661	Cleaner Image Associates	Business Money Fund Account	$2,488.23		

[6] The information regarding the penalties and tax implications has been provided to the defense by an accountant. The defendant is awaiting a formal letter on this issue and will provide same when received in a second supplemental pleading.

[7] As detailed *infra*, this account has been seized by the U.S. Attorney's Office and is therefore presently unavailable to Mr. Merrill.

Middlesex Savings Acct. No. *****6126			Zero balance		
St. Mary's Credit Union Acct. No. ****6424	Cleaner Image Associates	Business Checking	Approx. $36,000.00		

Fifth, defendants with the available resources routinely hire more than one attorney to defend them in cases of this magnitude. For example, in the presently pending trial of former Probation Commissioner John O'Brien, each of the three defendants have at least three attorneys of record. Docket Sheet (relevant pages) attached hereto as Exhibit 5. Rengan Rajaratnam, the defendant recently acquitted in the Southern District of New York, had five attorneys of record. Docket Sheet (relevant pages) attached hereto as Exhibit 6. Indeed, even in the Bulger prosecution, the Court appointed six attorneys to assist with Bulger's defense. Docket Sheet (relevant pages) attached hereto as Exhibit 7. ***Indeed, the government has three attorneys of record in this very prosecution***.[8]

Sixth, according to the government itself, this case is of unmatched complexity and volume. In seeking Mr. Merrill's detention pending trial, one of the three Assistants assigned to this case argued to the Court:

> I suggest to the Court that this is probably the largest financial fraud being prosecuted in the United States currently, *and it's probably the largest pyramid scheme that's ever been prosecuted by the Department of Justice*.

[8] Of course, government counsel also have supervisors and colleagues within their office available to assist as necessary, and they have at their disposal a team of law enforcement agents, computer forensic personnel at HSI and the FBI, in-house financial auditors such as Thomas Zappala (who often appears as a summary witness for the government in cases of this nature), and the resources to hire outside experts to the extent the government deems that necessary.

May 16, 2014 Tr. at 46 (emphasis added). Judge Hillman, in ordering Mr. Merrill's release, observed that "it is difficult to determine at such an early stage in a case *that involves such complexity and voluminous documentary evidence, much of which the government and defense counsel have yet to investigate*, precisely how strong the case against Merrill is." Dkt. 47 at 9 (emphasis added).[9] The stakes are enormous as well, as the government has asserted that Mr. Merrill is facing an advisory guideline of life imprisonment if convicted. *See, e.g.*, May 16, 2014 Tr. at 47.

In short, as noted *supra*, the government assertion that $325,000 is a sufficient legal retainer in this case, *see* Govt. Opposition at 9, and Mr. Merrill has therefore failed to demonstrate that access to the restrained funds is necessary to fully fund his defense, represents a profound misunderstanding regarding the costs and expenses routinely undertaken by individuals with the resources to do so to defend cases of this nature, and it is manifestly erroneous.[10]

[9] Indeed, to the extent the government has repeatedly stressed that Judge Hillman found the evidence in this case to be strong, any such finding must be considered in the context of Judge Hillman's other observations, including the observation quoted above, as well as his observation that "the evidence may not yet be overwhelming," and his reference to the fact that the defense "also submitted evidence suggesting he may be able to raise 'advice of counsel' or state of mind defenses to the charge against him," with Judge Hillman observing that "the strength of any such defenses is not clear at this time." Dkt. 47 at 9.

[10] Likewise, the government reference to *Wheat v. United States* (a right to counsel/conflict case), and the assertion that a defendant is not entitled to choose counsel he cannot afford, Govt. Opposition at 9, is also wholly misplaced. Mr. Merrill is lawfully entitled to use any and all assets that lawfully belong to him to fund his defense. The issue here is not whether Mr. Merrill can afford to fund the defense he desires, but instead whether the government can establish that the funds it has seized is traceable to criminality. If the government cannot satisfy this burden of proof, Mr. Merrill is entitled to use the restrained assets to fund his defense and assist with his living expenses.

B. *Doubt as to traceability of funds seized by U.S. Attorney's Office*.

As noted during the hearing, the issue is not simply whether the restrained funds are traceable to TelexFree (though, as detailed below, some of the restrained accounts bear little relationship to TelexFree). Instead, the issue is whether the funds at issue are traceable to a crime. For all of the reasons that follow, substantial doubt exists regarding whether the government can establish that the funds at issue are traceable to a crime.

First, as noted during the July 22, 2014 hearing, the government has repeatedly conceded that TelexFree was a real company with a real product. *See*, *e.g*., 6/5/14 Tr. at 15 (AUSA Lelling: "There's no question TelexFree had an actual product. There's no question that people used that product"); 6/5/14 Tr. at 23 (Agent Melican affirming that TelexFree was a real company, with a real product, and real customers); 6/5/14 Tr. at 23-24 (Agent Melican: "Q. There is no doubt people were actually using the product that TelexFree sold, correct? A. Correct").[11]

Second, the government concedes it does not know how much of the company's revenue derived from actual sales to actual customers, as contrasted from fees paid by promoters or agents of the company. That is because the government has not yet even accessed the company's internal corporate data and therefore has no idea how much of the company's revenue actually derives from sales to actual customers. *See, e.g*., 6/5/14 Tr. at 46 (Agent Melican affirming that the government had not yet examined the internal

[11] Agent Melican testified that agents executed a warrant at the company's headquarters and seized a host of servers and computers. 6/5/14 Tr. at 20-21. The premise is approximately 4300 square feet. The defense admitted photographs of the servers as exhibits during the evidentiary hearing before Judge Hillman. *See* Bail Hearing Exhibits A1-A6; 6/5/14 Tr. at 22-23. The point being that TelexFree was a substantial operation utilizing sophisticated computers and technology to provide a real, and valuable, service to customers—a point the government does not dispute.

data of TelexFree); *Id*. at 58-59 (same); *Id*. at 46-48 (Agent Melican affirming that based on figures presented by Stuart MacMillan, a highly experienced business professional hired to serve as interim CEO for TelexFree, the company would have earned $60 million per year in sales to actual customers, independent and distinct from multi-level marketing strategies); *Id*. at 48-54 (records from third party companies admitted as Bail Hearing Exhibits demonstrated that actual customers of TelexFree utilized approximately 11 million minutes of VOIP service in February 2014 alone); *Id*. at 53 (Agent Melican conceding he had not interviewed any employees of the third party company that provided backbone services to TelexFree or any customers of TelexFree).[12]

Third, the government's questioning of Agent Melican during the bail hearing before Judge Hillman confirms the government, at least at that time, did not yet possess an understanding of TelexFree or its operations. The government's questions to Agent Melican concerning Stuart MacMillan's representation to the Bankruptcy Court that TelexFree had 80,000 customers starkly illustrates this point. To wit, government counsel asked Agent Melican the following question: if TelexFree had 1,000,000 promoters, and the company had only 80,000 customers, that proves that 920,000 promoters sold no products. 6/5/14 Tr. at 116. Of course, the government failed to understand that the 80,000 figure ***represented a monthly figure***, of live customers, not a historically, all-encompassing compilation of customers. The government went so far as to ask Agent Melican: "So you'll have to accept my math here. If there are 80,000 users

[12] These first two points, alone, demonstrate sufficient doubt regarding the traceability issue. Given the government concedes that the company had legitimate, lawful sales to authentic customers, and further concedes that it has not yet determined what amount of revenue is attributable to those legitimate sales, real doubt exists as to whether the government can trace the funds at issue to any criminal fraud.

paying 50 bucks a month, isn't that about $4.8 million ***a year***?" *Id*. at 117 (emphasis added). Defense counsel corrected the government, and noted it was 80,000 customers ***per month***, not per year. *Id*. at 117. Government counsel realized his mistake: "Yes, I'm sorry. I apologize. That is true." *Id*. at 117. Agent Melican then offered the answer to the true question: 80,000 monthly customers would produce $4,000,000 in sales to customers ***per month***. *Id*. at 117-118. Government counsel then learned the answer to the true question—a figure of 80,000 customers per month would produce yearly revenues of sales to customers of approximately $48 million. *Id*. at 118. This series of questions illustrates the government's misunderstanding of TelexFree, the numbers, and this case.[13]

Fourth, the Securities and Exchange Commission has already agreed to release numerous accounts that had been frozen in the parallel civil litigation, including one account seized by the U.S. Attorney's Office (Waddell & Reed Account No. ****6892). *Cf. United States v. Farmer*, 274 F.3d 800, 805 (4th Cir.2001) (finding that government agent admission that legitimate assets had been seized "is not a matter we can summarily discount"). In the SEC litigation, the SEC agreed that the accounts did not have a proper and/or sufficient relationship to TelexFree. *See, e.g*, Case No. *14-cv-11858-NMG, Dkt. 177 at 1* (SEC agreeing "that the[] account[] should not be the subject of the Court's Order given [its] lack of proper and/or sufficient relationship to TelexFree"). While the

[13] The government has seized 400 terabytes of information and still has not even imaged the materials, much less begun to review or digest them. 6/5/14 Tr. at 24 (Agent Melican conceding the computer materials have not yet been imaged). Given it has not yet reviewed the corporate data, the government simply does not know how much product was actually sold, or how many customers were actually using TelexFree's product. If the company had substantial sales to retail customers, TelexFree is not a pyramid scheme, plain and simple. At the time of the hearing before Judge Hillman, the government had interviewed only 5 promoters (from a relevant universe of 700,000 to 1,000,000 promoters) and Agent Melican conceded that the hundreds if not thousands of people who wrote letters to Judge Gorton do not feel victimized by the company, *id*. at 31.

Court questioned the persuasiveness of this concession during the July 22, 2014 hearing, the defense respectfully submits that a concession by the SEC that one of the accounts at issue here does not have sufficient relationship to TelexFree generates sufficient doubt as to the traceability of the funds at issue.

Fifth, at least some of the accounts seized by the government in this case bear little to no connection to TelexFree. For example, Middlesex Savings Bank Account Number *****8181 (containing approximately $10,643.00) held money generated from Mr. Merrill's independent commercial cleaning company. To the extent any funds from TelexFree flowed into that account the defense expects the evidence will demonstrate it would have been repayment of TelexFree-related expense money paid from that account.[14] Likewise, the defense expects the evidence to demonstrate that Middlesex Savings Account Number *****6876 (containing approximately $104,988.64) held funds from the commercial cleaning business and/or Mr. Merrill's wife's employment. Lastly, the defense expects the evidence will demonstrate that Waddell & Reed Account Number ***6892 (containing approximately $79,684.28), which is the account released by the SEC (described above), held funds predominantly unrelated to TelexFree, which likely explains why the SEC agreed to its release.[15]

Sixth, the defense has a reasonable basis to believe that Agent Soares' affidavit in support of the criminal complaint is inaccurate in many significant respects, including but not limited to the following:

[14] The defense expects the evidence would demonstrate that Mr. Merrill would pay TelexFree travel-related expenses on an American Express credit card from this account, and would thereafter receive reimbursement from TelexFree for any such expenses.
[15] The defense would request two weeks to file affidavits and/or documents to support the assertions regarding these accounts.

Paragraph 10: The compensation plan awarded VoIP packages for ad placement that a promoter could re-sell for 44.90. If a promoter failed to re-sell that package, the company had the option of "buying back" the awarded package for $20. *See* Exhibit C at 6/5/14 Hearing before Judge Hillman (TelexFree contract). The plan was designed to encourage promoters to sell (because who would take $20 when they could earn $44.90.) The company's goal was to acquire customers.

Paragraph 13: The statements concerning the old compensation plan referred to actions undertaken by promoters by buying multiple AdCentral Packages, placing ads and expecting a payout – which violated the contract between TelexFree and its promoters. The contract was a "click wrap" terms and conditions agreement that promoters were required to agree to by "checking the box" before they could sign up. The agreement was in the language chosen by the promoter during sign up – English, Portuguese, or Spanish.

Paragraph 15: The $38 million worth of checks in the acting CFO's bag when the raid occurred were there only because the lawyers for the bankruptcy and the restructuring firm retained for the bankruptcy told the CFO to take them to a safety deposit box until an account was opened per order of the bankruptcy court. This fact has been attested to, under oath, by those same experts. *See, e.g.,* Exhibits H and I at Judge Hillman Bail Hearing (Affidavits of Runge); Exhibit G at Judge Hillman Bail Hearing (Affidavit of Stuart MacMillan). The bulk of the checks came from banks that had closed TelexFree's accounts unilaterally, and TelexFree had been required to retrieve those funds by way of cashier's checks.

Paragraph 29(a): Customers actually liked the product, which cost $49.90 and allowed unlimited international calls to cells and landlines. *See* Exhibit B at Judge Hillman Bail Hearing (invoices from third party companies). In contrast, Vonage allows unlimited only to landlines, and Skype costs $79.99 for 1000 minutes to cells and landlines in Brazil. As Stuart MacMillan has averred under oath, he believes the company possesses a "uniquely situated product to provide valuable and dependable services to their customers," and that "[b]ased on this preliminary analysis," he believes TelexFree "offer[s] a competitive product that is priced advantageously as compared to their competitors," and TelexFree could "maintain in excess of 140,000 customers world-wide, which would result in yearly revenues in excess of $50 million without regard to any revenues from multi-level marketing or technological innovations." Exhibit G at Judge Hillman Bail Hearing at ¶19. Mr. MacMillan possesses more than 25 years of management experience, and had been hired to serve as Interim Chief Executive of TelexFree in February 2014. *Id.*

Paragraph 29(c), 32: As detailed *supra*, the government's reliance upon "bank and credit card processing accounts" to determine that only 1% of TelexFree's revenues were from VoIP product sales is misplaced. Most of the payments for VoIP were made using internal transfers from a promoter's back office to

TelexFree, either for purchases of the product by the promoter or because the promoter received cash. The payments made by internal transfer were then used to offset amounts due to the promoters. The government suggests that a person would be more likely to set up a credit card payment than use internal transfers or cash payments to promoters. This is inaccurate. Because a promoter's commissions went into their back office account, which could then be transferred to buy VoIP, this is the most logical means that a promoter would purchase the product. In addition, TelexFree drew its customers from large immigrant populations, as well as thousands of people from emerging countries—*i.e.*, a demographic that is not likely to have credit cards.

Paragraph 38: The statement that "nothing prevented a single promoter from buying in multiple times" is not accurate. The promoter contract that all promoters were required to sign expressly forbid this practice.

Paragraphs 41, 44: These paragraphs are inaccurate. Promoters received monetary compensation only if (1) they placed ads for 7 days, (2) were awarded a VoIP package, (3) failed to sell the awarded package for $49.90, (4) elected to sell the package back to the company, and (5) the company decided to buy the package back for $20.

Paragraphs 42, 45: These are also incorrect. The company only repurchased the VoIP products awarded for ad placement. The initial VoIP packages awarded when a promoter bought an AdCentral package for $289 or $1375 (and received either 10 or 50 VoIP packages for re-sale to customers), were for re-sale only.

Paragraph 53: The promoter – Person A – was using the compensation plan in a way not intended by TelexFree, in violation of the contract, as was the UC agent. The purpose of the plan was to sell VoIP – the UC could have earned a lot more money by following the plan as intended.

Paragraph 56: The reason for the difference in the statements – as told to the Massachusetts Securities Division—was that TelexFree changed its revenue recognition between statements. It initially did not recognize internal transfer of revenues as income, but was advised that it needed to. So, its financials changed. Other minor changes occurred to the balance sheets, as is often the case for companies.

Paragraph 62: The statement that the government only located 19 transactions for VoIP services suggests that the government did not review appropriate information. Customers logged over 14 million minutes in February 2014 of TelexFree's VoIP product.

C. *The defendant should not have a burden of production*.

The defendant disputes the proposition that he bears any burden prior to the ordering of an evidentiary hearing regarding the traceability of the funds in question. As noted *supra*, there are three government attorneys who have entered appearances in this case. Government counsel have supervisors and colleagues within their office available to assist as necessary, and they have at their disposal a team of law enforcement agents, computer forensic personnel at HSI and the FBI, in-house financial auditors such as Thomas Zappala, and the resources to hire outside experts to the extent the government deems that necessary. In these circumstances, it is profoundly unfair to require a defendant to satisfy any burden of production before requiring the government to establish probable cause to believe that funds it has seized are traceable to a crime. The defendant does not seek to utilize forfeitable funds to finance his defense, and therefore the government's discussion of the merits of forfeiture laws is inapposite. *See* Govt. Opposition at 4-5. Rather, the defendant simply seeks to have the government demonstrate to the Court probable cause to believe that the seized funds are traceable to a crime.

Moreover, the imposition of a burden of production runs counter to the language of the Supreme Court in *Kaley*, wherein the Court strongly intimated that a defendant is constitutionally entitled to an evidentiary hearing on the issue of traceability, noting that the government conceded that point during oral argument. *Kaley*, 134 S.Ct. at 1095, n.3, citing Tr. of Oral Arg. 45. In fact, the following exchange occurred during oral argument in *Kaley*:

JUSTICE KENNEDY: Do you concede that there must be a traceability hearing?

MR. DREEBEN: *If the defendant seeks one, yes*.

JUSTICE KENNEDY: *I mean, in the general run case, so you agree that due process does require a traceability hearing*?

MR. DREEBEN: *Yes*. The defendants are entitled to show that the assets that are restrained are not actually the proceeds of the charged criminal offense or another way --

JUSTICE KENNEDY: And the defendants have the burden of proof in that hearing?

MR. DREEBEN: That would be up to this Court's decision.

JUSTICE KENNEDY: What is your view as to what the Constitution requires in that respect?

MR. DREEBEN: I'd be happy to have the defendants bear the burden of proof, but I think the courts, typically, have placed the burden of proof on the government to show traceability, and the government, therefore, presents limited evidence, but it's all against the background of the crime not being called into question.

Tr. Oral Argument at 45-46 (emphasis added), available at

http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-464_5426.pdf

(last viewed July 23, 2014). Given the foregoing, the government assertion that "the United States did *not* take the position that a hearing as to traceability is held as a matter of course when requested by a defendant," Govt. Opposition at 6 (emphasis in original), is not supported by the transcript of the argument. In any event, whatever the national landscape prior to *Kaley*, the Court's language and government concession therein has fundamentally altered that terrain.

Respectfully submitted,
JAMES MERRILL,
By his Attorney,

/s/ Robert M. Goldstein
Robert M. Goldstein, Esq.
[redacted]

Dated: July 23, 2014

Certificate of Service

I, Robert M. Goldstein, hereby certify that on this date, July 23, 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

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Megabytes, Gigabytes, Terabytes... What Are They?

These terms are usually used in the world of computing to describe disk space, or data storage space, and system memory. For instance, just a few years ago we were describing hard drive space using the term Megabytes. Today, Gigabytes is the most common term being used to describe the size of a hard drive. In the not so distant future, Terabyte will be a common term. But what are they? This is where it gets quite confusing because there are at least three accepted definitions of each term.

According to the IBM Dictionary of computing, when used to describe disk storage capacity, a megabyte is 1,000,000 bytes in decimal notation. But when the term megabyte is used for real and virtual storage, and channel volume, 2 to the 20th power or 1,048,576 bytes is the appropriate notation. According to the Microsoft Press Computer Dictionary, a megabyte means either 1,000,000 bytes or 1,048,576 bytes. According to Eric S. Raymond in The New Hacker's Dictionary, a megabyte is always 1,048,576 bytes on the argument that bytes should naturally be computed in powers of two. So which definition do most people conform to?

When referring to a megabyte for disk storage, the hard drive manufacturers use the standard that a megabyte is 1,000,000 bytes. This means that when you buy an 80 Gigabyte Hard drive you will get a total of 80,000,000,000 bytes of available storage. This is where it gets confusing because Windows uses the 1,048,576 byte rule so when you look at the Windows drive properties an 80 Gigabyte drive will report a capacity of 74.56 Gigabytes and a 250 Gigabyte drive will only yield 232 Gigabytes of available storage space and a a 750GB drive only shows 698GB. Anybody confused yet? With three accepted definitions, there will always be some confusion so I will try to simplify the definitions a little.

The 1000 can be replaced with 1024 and still be correct using the other acceptable standards. Both of these standards are correct depending on what type of storage you are referring.

Processor or Virtual Storage	Disk Storage
· 1 Bit = Binary Digit	· 1 Bit = Binary Digit
· 8 Bits = 1 Byte	· 8 Bits = 1 Byte
· 1024 Bytes = 1 Kilobyte	· 1000 Bytes = 1 Kilobyte
· 1024 Kilobytes = 1 Megabyte	· 1000 Kilobytes = 1 Megabyte
· 1024 Megabytes = 1 Gigabyte	· 1000 Megabytes = 1 Gigabyte
· 1024 Gigabytes = 1 Terabyte	· 1000 Gigabytes = 1 Terabyte
· 1024 Terabytes = 1 Petabyte	· 1000 Terabytes = 1 Petabyte
· 1024 Petabytes = 1 Exabyte	· 1000 Petabytes = 1 Exabyte
· 1024 Exabytes = 1 Zettabyte	· 1000 Exabytes = 1 Zettabyte
· 1024 Zettabytes = 1 Yottabyte	· 1000 Zettabytes = 1 Yottabyte
· 1024 Yottabytes = 1 Brontobyte	· 1000 Yottabytes = 1 Brontobyte
· 1024 Brontobytes = 1 Geopbyte	· 1000 Brontobytes = 1 Geopbyte

This is based on the IBM Dictionary of computing method to describe disk storage - the simplest.

Now let's go into a little more detail.

Bit: A Bit is the smallest unit of data that a computer uses. It can be used to represent two states of information, such as Yes or No.

Byte: A Byte is equal to 8 Bits. A Byte can represent 256 states of information, for example, numbers or a combination of numbers and letters. 1 Byte could be equal to one character. 10 Bytes could be equal to a word. 100 Bytes would equal an average sentence.

Kilobyte: A Kilobyte is approximately 1,000 Bytes, actually 1,024 Bytes depending on which definition is used. 1 Kilobyte would be equal to this paragraph you are reading, whereas 100 Kilobytes would equal an entire page.

Megabyte: A Megabyte is approximately 1,000 Kilobytes. In the early days of computing, a Megabyte was considered to be a large amount of data. These days with a 500 Gigabyte hard drive on a computer being common, a Megabyte doesn't seem like much anymore. One of those old 3-1/2 inch floppy disks can hold 1.44 Megabytes or the equivalent of a small book. 100 Megabytes might hold a couple volumes of Encyclopedias. 600 Megabytes is about the amount of data that will fit on a CD-ROM disk.

Gigabyte: A Gigabyte is approximately 1,000 Megabytes. A Gigabyte is still a very common term used these days when referring to disk space or drive storage. 1 Gigabyte of data is almost twice the amount of data that a CD-ROM can hold. But it's about one thousand times the capacity of a 3-1/2 floppy disk. 1 Gigabyte could hold the contents of about 10 yards of books on a shelf. 100 Gigabytes could hold the entire library floor of academic journals.

Terabyte: A Terabyte is approximately one trillion bytes, or 1,000 Gigabytes. There was a time that I never thought I would see a 1 Terabyte hard drive, now one and two terabyte drives are the normal specs for many new computers. To put it in some perspective, a Terabyte could hold about 3.6 million 300 Kilobyte images or maybe about 300 hours of good quality video. A Terabyte could hold

1,000 copies of the Encyclopedia Britannica. Ten Terabytes could hold the printed collection of the Library of Congress. That's a lot of data.

Petabyte: A Petabyte is approximately 1,000 Terabytes or one million Gigabytes. It's hard to visualize what a Petabyte could hold. 1 Petabyte could hold approximately 20 million 4-door filing cabinets full of text. It could hold 500 billion pages of standard printed text. It would take about 500 million floppy disks to store the same amount of data.

Exabyte: An Exabyte is approximately 1,000 Petabytes. Another way to look at it is that an Exabyte is approximately one quintillion bytes or one billion Gigabytes. There is not much to compare an Exabyte to. It has been said that 5 Exabytes would be equal to all of the words ever spoken by mankind.

Zettabyte: A Zettabyte is approximately 1,000 Exabytes. There is nothing to compare a Zettabyte to but to say that it would take a whole lot of ones and zeroes to fill it up.

Yottabyte: A Yottabyte is approximately 1,000 Zettabytes. It would take approximately 11 trillion years to download a Yottabyte file from the Internet using high-power broadband. You can compare it to the World Wide Web as the entire Internet almost takes up about a Yottabyte.

Brontobyte: A Brontobyte is (you guessed it) approximately 1,000 Yottabytes. The only thing there is to say about a Brontobyte is that it is a 1 followed by 27 zeroes!

Geopbyte: A Geopbyte is about 1000 Brontobytes! Not sure why this term was created. I'm doubting that anyone alive today will ever see a Geopbyte hard drive. One way of looking at a geopbyte is **$1_5$267 $650_4$600 $228_3$229 $401_2$496 $703_1$205 376 bytes!**

Now you should have a good understanding of megabytes, gigabytes, terabytes and everything in between. Now if we can just figure out what a WhatsAByte is.....:)

If you find this information useful, you can have it in the palm of your hand along with a byte converter. Check out our Byte Converter App here.

We have a very handy free byte converter tool that you can use to convert Bytes to Megabytes to Kilobytes to Gigabytes, and Vice Versa. We also have a data storage converter that will convert any data unit from a bit through an Exabyte. Check out the new converter here.

There have been some recent inquiries about the differences between the 3G and 4G technologies relating to how many Gigabytes faster is 4G. Well I instantly realized the confusion. There is a big difference between Gigabytes and the Gigabit per second that the 4G claims to be capable of. However, the question sparked my interest and in my ever-increasing thirst for knowledge, What's a G was created. 3G, 4G, 4g LTE and WiMAX explained.

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Don't forget to backup your bytes. Computers do crash and most people cannot afford to lose their valuable data. What is a Hard Drive Crash? It seems that an online backup solution is one the smartest ways to back up your data. It is the perfect solution because

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The New York Times

Defense Lawyer Ends Preet Bharara's Streak in Insider Trading Cases

E|UDFKHO!DEUDPV!

The defense lawyer who spoiled Preet Bharara's perfect record in hedge fund insider trading cases has finally gotten a haircut.

It's not because the lawyer, Daniel M. Gitner, has been busy, although he certainly has been. The insider trading trial of his client, the hedge fund trader Rengan Rajaratnam, which lasted about three weeks, required him and his team to sift through 2.5 terabytes of data, enough to store "War and Peace" about 330,000 times. Until Tuesday night, his wife put their children to bed on her own.

Instead, as the freshly trimmed Mr. Gitner said in an interview on Wednesday: "It's bad luck to get a haircut during trial."

The haircut rule, which Mr. Gitner also imposes on his staff at the law firm Lankler, Siffert & Wohl, is nothing if not thorough, an attribute that associates ascribe to the 43-year-old former federal prosecutor, who, in that job, helped send the rapper Lil' Kim and Omar Portee, a gang leader, to prison.

And it is that thoroughness that helped him rattle the office of Mr. Bharara, the United States attorney for the Southern District of New York.

Tuesday's acquittal of Mr. Rajaratnam by a federal jury in Manhattan, after less than four hours of deliberation, was the first defeat for the office after 85 insider trading convictions and guilty pleas of hedge fund traders, analysts and others, including Mr. Rajaratnam's older brother, Raj Rajatatnam, the founder of the Galleon Group hedge fund.

"There are a lot of great, great lawyers, and nobody had won one of these cases in so long," Mr. Gitner said on Wednesday. "Just showing that you can do it is what the message is."

In the wake of the financial crisis, public anger with Wall Street continues to simmer, and it may be hard for jurors to sympathize much with those who have been accused of insider trading.

The public's lingering resentment, and Mr. Bharara's winning streak, was a cause for concern for Mr. Gitner, who, like other white-collar defense lawyers, worries that negative public opinion about those perceived to be Wall Street insiders, like the younger Mr. Rajaratnam, may be too much to overcome in a trial.

"This case showed, at least in some respect, while that may be present, it's not always going to be," Mr. Gitner said. "Juries will truly weigh the evidence and the lack of evidence."

In 2011, Raj Rajaratnam was sentenced to 11 years in prison, the longest punishment ever meted out for an insider trading case. Rengan Rajaratnam was accused of conspiring with his brother to trade on nonpublic information.

Gregory Morvillo, a criminal defense lawyer, said the verdict could reflect the fact that after nearly 100 insider trading cases, the pipeline of prosecutions stemming from the Galleon hedge fund is nearing an end.

"Eventually you get to the point where the cases get weaker and weaker, and they become harder to prove," Mr. Morvillo said.

Mr. Rajaratnam still faces a civil action brought by the Securities and Exchange Commission. But the verdict on Tuesday was enough to prompt hundreds of congratulatory emails to Mr. Gitner from colleagues, friends and lawyers.

"I stayed up all night responding to every single one of them," he said.

A graduate of Cornell and Columbia Law School, Mr. Gitner clerked two decades ago for Judge Naomi Reice Buchwald, the Manhattan federal judge who

oversaw the trial of Mr. Rajaratnam. That history prompted grumbling among some law enforcement officials.

"Every judge has clerks who appear before them all the time," Mr. Gitner said. "Any suggestion that any judge in this district would treat a party differently because their clerk represented that party is ridiculous."

Judge's clerks, of course, go on to work for the government, as well as for private practice. The world of white-collar defenders, federal prosecutors and judges can be a small one.

When Gary P. Naftalis represented Rajat Gupta, the former McKinsey & Company chief, in another prominent insider trading case, it was noted that the defense lawyer had close ties to the presiding judge. (Mr. Gupta was convicted.) Mr. Gitner himself lost the previous case he argued in Judge Buchwald's courtroom when he represented Helen Gredd, a trustee who tried to sue Bear Stearns on behalf of investors in 2008.

"I think that's an outrageous criticism," said Harry S. Davis, a partner at Schulte Roth & Zabel who argued against Mr. Gitner in the Gredd case. "I never once thought that she was issuing a ruling designed to help Dan because he was a former clerk."

As a prosecutor and as a defense lawyer, Mr. Gitner has earned a reputation for meticulousness, the kind of exhaustive effort required to pore over thousands of pages of complicated trading data in Mr. Rajaratnam's case.

"He presents as somebody who has a deep sense of both the facts and of the truth," said Steven M. Cohen, the general counsel for Ronald O. Perelman's firm, MacAndrews & Forbes Holdings, who worked with Mr. Gitner at the United States attorney's office. "In many ways, he is very effective because of what he doesn't do. He doesn't bang the table. He doesn't insist he's right. He walks you through a problem."

In Mr. Gitner's recently renovated Midtown Manhattan office, fat case files line the floor and framed posters lean unhung against a wall.

One poster of the "Obey" design from Shepard Fairey came from the artist himself, after Mr. Gitner successfully kept him out of jail in 2012. Mr. Fairey was accused of destroying evidence relating to a civil case involving his use of an Associated Press photograph to create the "Hope" poster from Barack Obama's 2008 presidential campaign.

"I got on the phone, and he was pleasant, but he was immediately trying to feel out every aspect of the situation," Mr. Fairey recalled of their first interaction. "More or less, I felt like I was on the stand from the very beginning."

The case, too, required Mr. Gitner and his team to sort through mountains of information — taking so much time, in fact, that Mr. Fairey bartered some of his original artwork to help ease his legal fees.

"It was very expensive for me to retain him," Mr. Fairey said. "It was definitely worth it."

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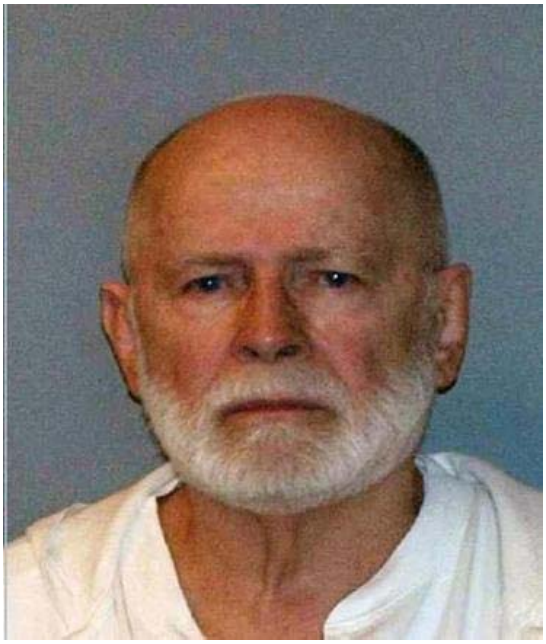
Bulger's defense cost taxpayers $2.6m and counting

By Shelley Murphy | GLOBE STAFF SEPTEMBER 13, 2013

Notorious gangster James "Whitey" Bulger's taxpayer-funded defense team billed the court more than $2.6 million over the past two years, and those costs will climb because they do not include lawyers' fees and expenses from July and August while Bulger's federal racketeering trial was underway, according to court records.

Bulger's lawyers issued a statement Friday saying he offered to plead guilty to all charges in exchange for leniency for the girlfriend who helped him evade capture for more than 16 years, but prosecutors spurned his offer, resulting in the expensive eight-week trial in US District Court in Boston that ended with his conviction last month.



US MARSHALS SERVICE VIA REUTERS/FILE

James "Whitey" Bulger was convicted in federal court in Boston of participating in 11 murders.

CONTINUE READING BELOW ▼

Defense lawyers J.W. Carney Jr. and Hank Brennan said Bulger agreed to plead guilty to all charges, including some he did not commit, and to serve life in prison.

"All he sought in return was mercy toward Catherine Greig, the woman who went with him to Santa Monica solely because she loved him," the lawyers said. He wanted Greig, his loyal companion, to serve only a year in prison.

ANWJ]NMt
- More on James 'Whitey' Bulger

"That was not enough for the United States Attorney's Office," Bulger's lawyers said. "This

decision resulted in the trial, and the enormous expenditure of federal funds for the prosecution, defense, and United States Marshals."

Bulger, 84, was convicted on Aug. 12 of 31 of 32 counts in a sweeping racketeering indictment. Jurors also found he participated in 11 of the 19 murders he was accused of committing.

Assistant US Attorney Brian T. Kelly, part of the team that prosecuted Bulger, fired back, saying that Bulger's "brutal crimes caused this trial, and like any defendant, he could have pled guilty without a plea agreement at any time."

CONTINUE READING BELOW ▼

Kelly declined to comment on Bulger's failed plea negotiations, but said, "It seems to me the defense lawyers should have some mercy on the taxpayers with their billing practices."

Bulger, who faces life in prison, is scheduled to be sentenced in November. Greig, who pleaded guilty to conspiracy to harbor a fugitive and identity fraud charges, was sentenced last year to eight years in prison.

Bulger, who was captured along with Greig in Santa Monica, Calif., in June 2011 after more than 16 years on the run, said he could not afford to pay for a lawyer because the government had seized all his assets, including $822,000 found hidden in the walls of the rent-controlled apartment where he was hiding. The government is seeking to distribute that money among the families of Bulger's victims.

In Friday's statement responding to the defense's legal fees, Bulger's laywers said: "The greater cost was to the families of the victims. They had to wait additional years for the case to be resolved and see that the prosecution could not even prove eight of the 19 murders."

Tim Connors, whose father Eddie Connors was gunned down by Bulger in a Dorchester telephone booth in 1975, said it was absurd for the defense to suggest that they were concerned about Bulger's victims.

"If [Bulger] was that concerned about putting us through the delays, he should have came back sooner, he should have turned himself in," Connors said.

Connors said he was unaware that Bulger had offered to plead guilty to the charges in exchange for leniency for Greig, but said he would have opposed a shorter prison term for her.

"Even though she never killed anybody, she's just as much as a criminal as he was," Connors

said. "She knew what he was wanted for, and she knew what he did."

A court memorandum to US District Judge Denise J. Casper, who presided over Bulger's trial, indicates that between June 24, 2011, and June 30, 2013, the "grand total cost" of Bulger's representation was $2,671,331.77. Most of the money was paid to Bulger's attorneys, who were paid the court-appointed rate of $125 an hour.

Carney billed the court $44,650 for representing Bulger in 2011, $1.1 million in 2012, and $976,162 between January and June this year. Those fees cover the costs of Carney and other attorneys in his firm who worked on the case. Brennan billed the court $109,500 for 2011 and 2012 and $205,437 between January and June of this year.

Other costs included $139,098 for paralegal services, $62,135 for investigative services, $36,159 for transcripts, $3,373 for computer forensics, $1,851 for computer hardware and software, $2,798 for experts, and $1,510 for duplication services.

The memo said Carney and Brennan have yet to submit bills for July and August. Bulger's lawyers said their bills "reflect the number of hours it took the defense team to review and digest over 400,000 pages of evidence."

Shelley Murphy can be reached at Shelley.Murphy@globe.com. Follow her on Twitter @shelleymurph.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	)	
V.	)	Crim. No. 99-10371-RGS
JAMES J. BULGER	)	

DEFENDANT'S MEMORANDUM REGARDING ESTIMATED TIME REQUIRED TO REVIEW AND ANALYZE DISCOVERY

Counsel for the defendant, James Bulger, estimates that the review and analysis of discovery produced to date in this case will take at least one year from today's date. The discovery provided by the prosecution consists of approximately 580,000 pages of documents. In addition, the prosecution has given defense counsel 921 tapes of wiretaps, with only a few transcribed. Further, the Government is expected to provide the "FBI Civil Discovery CD" noted in their discovery letter dated August 30, 2011. This CD has not been provided to date.

In addition, the defense will be seeking numerous documents containing thousands of pages of information which are relevant and material to this case, including prior statements of

potential witnesses. Some of these documents include[1]: exhibits in the *United States v. Salemme* hearings; Congressional hearing testimony of all pertinent witnesses who testified at the 2002 Congressional hearings relative to informants and the FBI; copies of all files and documents relative to the Office of Professional Responsibility's investigation into the Boston FBI office relative to the defendant; all depositions related to the *Florida v. John Connolly* trial; hearing and trial transcripts and exhibits from the *United States v. John Connolly* Boston proceedings; all civil depositions and transcripts from lawsuits related to the FBI's handling of informants, including the defendant, e.g., *Litif v. United States*, *Donahue and Estate of Halloran v. United States*, *Limone v. United States*, *Rakes v. United States*, and *Callahan v. United States*. The defendant's discovery requests and the documents the defendant will obtain independently are expected to number in the hundreds of thousands of pages.

Based on the initial review of the 580,000 pages presently produced is estimated to require 14,500 hours of review.[2] The

[1] Some of these documents may be included in the Government's 580,000 pages produced; however, they have not been found to date.

[2] The defendant estimates that it will take 90 seconds to review, annotate, and index each individual page of discovery. 580,000 pages of discovery would then take 870,000 minutes to annotate (580,000 pages x 1.5 min per page = 870,000 minutes), or 14,500 hours (870,000 minutes / 60 minutes = 14,500 hours).

defendant intends to seek authorization from the court to employ additional attorneys to work fulltime on the case. Defense counsel estimates that the discovery review would be finished in not less than one year if the attorneys are engaged in forty hours per week of review and analysis. This estimate does not include review of any of the 921 wiretap transcripts, any additional discovery that has yet to be produced by the prosecution, any discovery the defendant will obtain independently, strategy meetings of the defense team, and legal research and writing to prepare discovery and substantive motions.

The defendant submits that counsel's estimate is reasonable. For comparison purposes, the co-defendant, Stephen Flemmi, made his initial appearance on October 4, 2000, and the case was resolved on January 27, 2004. There are tens of thousands of pages of relevant proceedings that have taken place in related matters since 2004. In addition, the major witnesses have authored or co-authored books concerning their roles in this case. Moreover, there is evidence that has been uncovered since 2004 that calls into question the earlier assertions of the FBI regarding its relationship with the defendant.

The allotment of a reasonable amount of time to review a tsunami's worth of discovery does not depend on the age of the defendant, nor on his notoriety. It instead is based on his

constitutional right to due process and the effective assistance of counsel. The prosecution's discovery dates back to 1976, and it returned the instant indictment in 1999. The prosecution provided the initial discovery to defense counsel on August 30, 2011, less than six months ago.[3] For the prosecution to suggest that the case is ready to be sent to the District Judge to set a trial date is so unreasonable that it is frivolous.

Defense counsel, who is appointed by the Court, and his team of lawyers, paralegals, investigators, and support staff require the estimated time to review and analyze the discovery, acquire further relevant information, and draft discovery and substantive motions. There *will* be a trial in this case, and the defense must be fully prepared to contest the government's evidence. Defense counsel assures the Court that he will diligently prepare the case for trial, and suggests regular status conferences to permit him to update the Court.

Respectfully submitted,
JAMES J. BULGER
By His Attorneys,

CARNEY & BASSIL

[redacted]

J. W. Carney, Jr.
[redacted]

[3] Defense counsel was on trial in this Court from October 23 to December 20, 2011. See *United States v. Mehanna*. No. 09-10017-GAO.

[redacted]

Henry B. Brennan

[redacted]

Dated: February 13, 2012

Certificate of Service

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on or before the above date.

[redacted]

J. W. Carney, Jr.