

JUDGE MARSHA J. PECHMAN

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
ROBERT ALAN SOLOWAY,)
)
Defendant.)

NO. CR07-187MJP
**DEFENDANT'S MOTION FOR
REVIEW OF DETENTION ORDER**
ORAL ARGUMENT REQUESTED
NOTED: September 14, 2007

I. INTRODUCTION.

Robert Alan Soloway ("Robert" herein), was arrested on May 30, 2007. He is charged in a multiple count indictment, alleging violations of 18 U.S.C. §§1341, 1343, 1037(a)(2), 1028A, and 1956. None of the offenses alleged in the indictment raises a rebuttable presumption that Robert, who has no prior criminal history, is a risk of flight or a danger to the community. See 18 U.S.C. §§3142(e) and 3142(f)(1).

A detention hearing was held on June 13, 2007. Despite the fact that Pretrial Services recommended a PR release with conditions, Robert was ordered detained by Magistrate Judge Donohue.

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II. ARGUMENT.

A. A MAGISTRATE'S ORDER OF DETENTION IS REVIEWED BY THE DISTRICT COURT
DE NOVO.

Upon a motion for review of a detention order entered by a Magistrate Judge, the district court reviews the Magistrate Judge's findings and conclusions *de novo*. *United States v. Koenig*, 912 F.2d 1190 (9th Cir. 1990).

[The district court] should review the evidence before the magistrate and make its own independent determination whether the magistrate's findings are correct, with no deference.

* * *

The point is that the district court is to make its own "de novo" determination of facts, whether different from or an adoption of the findings of the magistrate. It also follows ... that the ultimate determination of the propriety of detention is also to be decided without deference to the magistrate's ultimate conclusion.

Id., at 1193 (citations omitted).

B. ROBERT SHOULD BE RELEASED ON HIS PERSONAL RECOGNIZANCE, SUBJECT TO
REASONABLE CONDITIONS.

18 U.S.C. §3142(b) provides, in relevant part, as follows:

The judicial officer *shall* order the release of the person on personal recognizance, or upon an unsecured property appearance bond in an amount specified by the Court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community. (emphasis supplied)

Pursuant to 18 U.S.C. §3142(c), if the Court determines that the release described in §3142(b) will not reasonably assure the appearance of the person as required or will endanger the safety of any person or the community, the Court *shall* order the release of the individual subject to the least restrictive further condition or combination of conditions

1 that will reasonably assure the appearance of the person and the safety of the community.

2 The Ninth Circuit holds that in evaluating the government's motion for detention

3 . . . we bear in mind that federal law has traditionally
4 provided that a person arrested for a non-capital offense shall
5 be admitted to bail [citations omitted]. Only in rare
6 circumstances should release be denied. [Citations omitted.]
7 Doubts regarding the propriety of release should be resolved
8 in favor of the defendant. [Citations omitted.]

9 Release pending trial is governed by the Bail Reform Act of
10 1984 which, like its predecessor, the Bail Reform Act of
11 1966 [citation omitted], mandates release of a person facing
12 trial under the least restrictive condition or combination of
13 conditions that will reasonably assure the appearance of the
14 person as required. [Citations omitted.] The Fifth and
15 Eighth Amendments' prohibitions of deprivation of liberty
16 without due process and of excessive bail require careful
17 review of pretrial detention orders to ensure that the
18 statutory mandate has been respected.

19 *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985).

20 In determining whether there are conditions of release that will reasonably assure
21 the appearance of the person as required, the court is directed by the statute to take into
22 account the available information concerning the factors set forth in 18 U.S.C. § 3142(g).
23 These factors include whether the charged offense is a crime of violence, a Federal crime
24 of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or
25 destructive device. 18 U.S.C. §3142(g)(1). The offenses charged in this indictment do
26 not include any of the offenses enumerated in §3142((g)(1).

27 The legislative history clearly establishes that the drastic remedy of detention is to
28 be reserved to extreme cases.

There is a small but identifiable group of particularly
dangerous defendants as to whom neither the imposition of
stringent release conditions or the prospect of release can

1 reasonably assure the safety of the community or other
2 persons. It is with respect to this limited group of offenders
3 that the courts must be given the power to detain release
pending trial.

4 *Senate Report No. 225, 98th Cong., 1st Sess. 6-7 (1983) printed in 1984 U.S. Code Cong.*
5 *and Ad. News 3182, 3189 (emphasis supplied). "The wide range of release conditions*
6 *available ensures, as Congress intended, that very few defendants will be subject to pretrial*
7 *detention." *United States v. Orta*, 760 F.2d 887 (8th Cir. 1985) (emphasis supplied).*

8
9 **C. PRETRIAL SERVICES HAS RECOMMENDED A PERSONAL RECOGNIZANCE BOND
WITH CONDITIONS.**

10 After conducting an investigation, Pretrial Services has determined that there are
11 conditions of release that will reasonably assure that Robert will appear as directed, and
12 that adequately address the issue of danger to other persons or the community. Thus,
13 Pretrial Services recommended to Magistrate Judge Donohue that Robert be released on
14 a personal recognizance bond, with conditions. Those conditions include, but are not
15 limited to, the following:

- 16
17 1. GPS monitoring;
18 2. Surrender passports;
19 3. Undergo mental health evaluation and follow treatment recommendations;
20 4. Not use or possess a computer, PDA, cell phone, etc., with internet access.
21

22 We agree that these conditions that will reasonably assure Robert's appearance and the
23 safety of other persons and the community. Thus, we concur with Pretrial Service's
24 recommendations in this case.

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26 **D. THE GOVERNMENT'S EVIDENCE DOES NOT ESTABLISH THAT ROBERT IS A
FLIGHT RISK.**

27 The government's detention motion alleges that there is a "serious risk" that Robert

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1 will flee if released. The government must prove that a defendant would flee "by a clear
2 preponderance of the evidence." *United States v. Motamedi*, 767 F.2d 1403, 1406 (9th
3 Cir. 1985). However, the evidence presented by the government did not support the
4 conclusion that Robert is a flight risk, and many of the magistrate judge's findings in this
5 regard are either not supported by evidence, or are not rationally related to the issue of
6 risk of flight.
7

8 First, Magistrate Judge Donohue found that Robert "has dual United States-Sweden
9 citizenship," and that he has family in Sweden. Findings Nos. 1 and 2. While both of
10 those findings are true (Robert's mother is Swedish and thus he has dual citizenship), they
11 have little to do with risk of flight in this case. Robert has an eighty-five year old
12 maternal grandmother who lives in Sweden. She does not speak English. Robert does not
13 speak Swedish. Robert last saw her five years ago when he accompanied his mother to
14 Sweden to celebrate his grandmother's eightieth birthday. Prior to that trip in 2002, he
15 was last in Sweden (with his mother) in 1987, when he was eight years old.¹ Robert also
16 has a few aunts and uncles in Sweden, but he doesn't really know them.
17

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19 Magistrate Judge Donohue also apparently found it significant, and thus made a
20 finding, that Robert "had once boasted that the legal process will not affect him, stating
21 that 'I am a Non-US citizen.'" Finding of Fact No. 1. That comment was made by
22 Robert on an email marketing forum (similar to a chat room) on May 17, 2005, in
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24
25 ¹ Although the magistrate judge made no mention of it, Robert also traveled
26 internationally in 2003, when he accompanied his parents on a cruise in Norway, and in 2006,
27 when he accompanied his parents on a cruise that commenced in Barbados and ended in Puerto
28 Rico. Other than as described above, Robert has not traveled outside the United States since the
age of five, and in all of his international travels, including the trips mentioned above, he traveled
with his parents.

1 response to taunts regarding the Microsoft lawsuit. See Government's Exhibit 2 (Bates
2 No. 000049), a copy of which is attached hereto as Exhibit A. In actual fact, the
3 statement about being a non-US citizen was not in the context of the legal process not
4 affecting him. The full paragraph where Robert stated that he is a non-US citizen read as
5 follows:
6

7 I'm a non-US citizen and will not file for bankruptcy, nor
8 will my company, nor have I ever in the past, nor have I
9 ever had any debt to the IRS with the taxes I gladly pay to
10 them every year ... EVER. Feel free to quote me on that
11 one. Quit acting like you have a clue, because you don't.
12 You know absolutely nothing. Like I said, its nice to finally
13 see someone on this board that is truly clueless.

14 More troubling in both its lack of support in the record and its reasoning is Finding
15 of Fact No. 4, in which the magistrate judge found that

16 The grand jury has found that there is probable cause to
17 believe that the defendant has engaged in aggravated identity
18 theft and sophisticated crimes involving the use of a
19 computer and electronic mail. It is apparent that defendant
20 is quite experienced and adept in the use of computers. The
21 creation of new identities and travel documents would be a
22 relatively simple task for the defendant.

23 While it is true that "the grand jury has found probable cause to believe that
24 defendant has engaged in aggravated identity theft," there is no support in the record that
25 Robert committed "sophisticated" crimes involving the use of computers; that Robert is
26 adept in the use of computers; or that the creation of new identities and travel documents
27 would be a relatively simple task for Robert.

28 Count 18 of the indictment charges Robert with aggravated identity theft involving
the alleged unauthorized use of a credit card "to register and pay for the domain name
'colidsilver.com,' which domain was used to host the NIM website. . ." According to

1 the owner of the credit card, there was an unauthorized \$20.00 charge for the foreign
2 purchase of the domain name colidsilver.com. Robert purchased that domain name from
3 another individual, and did not know that the name had originally been purchased with a
4 stolen credit card. It would make no sense for Robert to use a stolen credit card to
5 purchase a domain name that was associated with his business. That would be similar to
6 Robert using a stolen credit card to purchase items and then having the items delivered to
7 his own home, where they could be easily traced to him. It defies reason and common
8 sense to believe that anyone would use a stolen credit card to purchase a domain name that
9 they actually intended to use. Nor would it make sense that Robert would use a stolen
10 credit card to avoid a \$20.00 payment, given the substantial income that the government
11 alleges Robert was earning.
12

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14 Counts 19 through 22 also charge aggravated identity theft, but on a completely
15 different theory. In those counts, Robert is alleged to have sent emails with a header
16 showing the recipient's name as both the sender and the recipient, *e.g.*, from
17 "JohnSmith@yahoo.net" to "JohnSmith@Yahoo.net." It is alleged that by sending emails
18 in this manner, they were less likely to be rejected by a spam filter. It would be the same
19 as sending an envelope through the mail using the addressee's name and address as both
20 the sender and addressee. There is nothing "sophisticated" about sending such an email.
21

22 Even more importantly, it does not follow that based on his ability to send an email
23 in this manner it would also be a relatively simple task for Robert to create new identities
24 and travel documents. Indeed, the government never argued that Robert possesses
25 sophisticated computer skills. On the contrary, the government has communicated to the
26 undersigned that it doesn't believe that Robert's alleged crimes require much computer
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1 knowledge or skill. Nothing in the record supports the conclusion that Robert would be
2 able to create, or have easy access to, identification or travel documents. It should also
3 be noted that the government has Robert's Swedish passport in its possession, and the
4 undersigned has Robert's U.S. passport, which we have offered to surrender to the Clerk's
5 Office.
6

7 Magistrate Donohue also found that

8 Defendant has not been candid about his financial assets. It
9 appears that he has been involved in establishing off-shore
10 accounts, placing funds in others [sic] names, and in setting
up electronic accounts for later access.

11 Finding No. 7. This, too, has little support in the record. The government argued that
12 it did not know what happened to Robert's money. It alleged that he had gross receipts
13 over the last five years totalling approximately \$1,000,000, but offered no evidence
14 regarding his expenses, even though all of his business records had been seized by the
15 government and were in the government's possession. The government also complained
16 of Robert's "lavish" lifestyle, but refused to concede that this may have been where much
17 of his money went. The defense proffered that Robert had little or no cash on hand or in
18 the bank (he owes American Express over \$100,000), and that his assets consist mainly
19 of his extensive collection of clothing and shoes. Robert does not even own a car.
20 Unfortunately, we could do little more than proffer this information, since all of the actual
21 records have been seized by the government. The government did not carry its burden on
22 this issue.
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25 More importantly, there is not a scintilla of evidence that Robert has established
26 or maintained an offshore bank account, or that he has any assets offshore. The only
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1 evidence relating to anything offshore was a reference to a blank application from an
2 offshore credit card processor that was found in Robert's apartment. See Transcript of
3 Hearing at p. 36. There is no evidence that Robert ever actually used an offshore credit
4 card processor, but even if he did, that wouldn't mean that he had any money offshore.
5 Credit card processors merely process credit card payments for a fee, and then deposit the
6 funds in the merchant's account. That is all done by wire, so the physical location of the
7 processor has nothing to do with where the money ends up.
8

9 There is no mystery to Robert's finances. All of his internet transactions were
10 conducted using credit cards, checks, or secondary payment facilities such as PayPal. No
11 cash payments were involved. All of the funds flowed into Robert's bank accounts, and
12 are easily traceable.
13

14 The only findings made by the magistrate judge that arguably address the actual
15 issue of risk of flight are Findings No. 5 and 6. We do not dispute the fact that the court
16 in Oklahoma entered an injunction, enjoining Robert from conducting certain activities,
17 and that the grand jury has found probable cause to believe that Robert has violated the
18 terms of that injunction. But it does not necessarily follow that because Robert may have
19 violated the terms of a civil injunction, he will not comply with Court orders in this case
20 and will flee the jurisdiction. At best, it is grounds to believe that Robert poses a risk of
21 flight.
22

23 But the Bail Reform Act doesn't stop there. The Act provides that the Court shall
24 release an individual on personal recognizance or an unsecured property bond unless such
25 release will not reasonably assure the appearance of the person as required. Then, and
26 only then, the judicial officer shall order the release of the person subject to the least
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1 restrictive further condition, or combination of conditions, that will reasonably assure the
2 appearance of the person. 18 U.S.C. §1342(a), §1342(b), and §1342(c)(1)(B). We submit
3 that the conditions recommended by Pretrial Services will reasonably assure Robert's
4 future appearances.
5

6 **D. THE GOVERNMENT'S EVIDENCE DOES NOT ESTABLISH THAT ROBERT IS A
7 DANGER TO ANOTHER PERSON OR TO THE COMMUNITY.**

8 Magistrate Judge Donohue also made a curious finding regarding "threats"
9 allegedly made by Robert against people who have filed complaints against him. Finding
10 No. 8. This finding is curious, because after first declaring that he was "making no
11 specific findings regarding witness intimidation," he then observed in the same Finding
12 that "[R]etribution the defendant has previously shown against those who have complained
13 can just as easily be handled through the internet from abroad."
14

15 First, it is important to clarify that no physical threats against anyone have ever
16 been alleged. Nor is it alleged that Robert ever sent out viruses or "spyware." The
17 alleged "threats" involve legitimate responses to actions--actions that in many cases were
18 improper--that were taken against Robert. One example proffered by the government was
19 a broadcast email seeking information on Robert Braver, who was at the time suing
20 Robert. A copy of the email, which was admitted as Exhibit 1-10-2, Bates No. 000015,
21 is attached hereto as Exhibit B. This court can judge for itself whether such an email can
22 legitimately be called a threat making Robert a danger to another person or the safety of
23 the community.
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25 The government also referred to a second allegation in the same pleading from the
26 Braver case (Exhibit 1-10, Bates Nos. 00005-9), this time complaining that Robert's
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1 counsel (not Robert) had sent a letter to Braver's counsel "stating, in essence, that
2 [Soloway] would file a defamation lawsuit in California" against Braver unless Braver
3 agreed to dismiss his lawsuit in Oklahoma. Threats of counterclaims are not at all unusual
4 in litigation, and the actions of Robert's lawyers, who were doing their job and
5 presumably acting within the Code of Professional Responsibility, do not constitute
6 "danger" to anyone.
7

8 In yet another paragraph from the same pleading, which the government offers as
9 another example of threats of intimidation (See Transcript at 17), it is alleged that Robert
10 sent out a broadcast email attempting to intimidate Microsoft in the wake of Microsoft's
11 lawsuit against Robert. A copy of the first and last pages, which were all that were
12 offered in evidence (Exhibit 1-10-2, Bates No. 000019-20) is attached hereto as Exhibit
13 C. Clearly, this is not an improper threat, but merely a legitimate exercise in free speech.
14

15 Another example of alleged threats and intimidation is found in Exhibit 1-10-2,
16 Bates No. 000013-14. A copy is attached hereto as Exhibit D. In that matter,
17 MagikMyth, International, Inc., sent a collection notice to Robert in the sum of \$10,000.
18 The problem was, there was no legitimate debt owed to MagikMyth. MagikMyth had
19 never commenced a legal action against Robert, and thus had never obtained a judgment
20 against him. Instead, they simply sent him a bill for \$10,000, claiming that that was the
21 penalty for sending them an unlawful spam. When Robert didn't pay, they sent a
22 collection notice, in an effort to intimidate Robert into paying this illegitimate invoice.
23 There does not appear to be anything unlawful in Robert's response to this "shake-down"
24 attempt by MagikMyth, and certainly nothing in his response that would justify finding
25 Robert a danger to any person or to the safety of the community.
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1 The only other alleged "threats" by Robert involved his responses to customers who
2 had obtained charge-backs through their credit card company without following NIM's
3 return policy, who then apparently wanted a refund from NIM as well. Robert responded
4 by explaining the refund policy, and further explained that if the customer didn't pay for
5 the product, they would be turned over to collection. See, Exhibit 3.
6

7 Where the government requests that an individual is to be held without bail due to
8 that person's dangerousness to the community, the government must prove by clear and
9 convincing evidence that the defendant is one of those rare individuals who pose such a
10 danger to the community that they must be detained. See, *United States v. Motamedi*,
11 *supra*; *United States v. Walker*, 808 F.2d 1309, 1310 (9th Cir. 1986). In fashioning
12 conditions to assure the safety of the community, the courts are not to attempt to guarantee
13 the safety of others in the community. *United States v. Orta*, 760 F.2d 887, 891 (8th Cir.
14 1985). Rather the courts are to consider what will reasonably assure such safety. One
15 need look no further than the legislative history of the Bail Reform Act quoted above (at
16 p. 4) to see that the evidence in this case does not rise to the level of dangerousness
17 contemplated by the Act (certainly not by clear and convincing evidence). But even if it
18 did, there are conditions that will reasonably ensure the safety of other persons and the
19 safety of the community (*e.g.*, a condition denying Robert access to the internet).
20
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22 **E. THE FDC IS UNABLE TO TAKE CARE OF ROBERT'S MEDICAL NEEDS.**

23 Prior to his arrest, Robert was suffering from anxiety, depression, and Tourette's
24 Disorder. A variety of medications was keeping these afflictions under control. The
25 primary medications Robert was receiving were clonazepam (Klonopin), which he has been
26 taking in small dosages for six years, and venlafaxine (Effexor). Unfortunately, Klonopin
27

1 is not on the BOP formulary. During the first 45 days of his incarceration at the FDC,
2 the medical staff weaned him off of the Klonopin (which is an addictive drug). The results
3 were predictable. On August 1, 2007, Robert was seen by the medical staff, who noted:
4

5 "[Robert] appears miserable, c/o shaking, cold sweats,
6 vomiting, trembling, racing heart, twitching, runny nose."

7 He was also complaining of severe anxiety, with suicidal thoughts, and involuntary body
8 twitching that was keeping him up at night. It was noted that his Tourette's had previously
9 been successfully treated with Klonopin, and the Tourette's symptoms were once again
10 prominent in the absence of the Klonopin. A copy of the BOP, Psychological Data
11 System, Consultation Sheet is attached hereto as Exhibit E-1. Dr. Grant Haven, the
12 contract psychiatrist at the FDC put in a request for non-formulary drug authorization,
13 providing as reasons:
14

15 Patient has extensive treatment history with many failures for
16 his Tourette's and anxiety. Clonopin helps both. Tics
17 prevent him from sleeping. Now 72 hours without sleep.
18 No substance abuse history.

19 Dr. Haven also listed the other drugs that are on the BOP formulary that were tried
20 without effect. These included Prozac, Paxil, Zoloft, Luvox, Effexor, Buspar, Haldol,
21 Orap, and others. See copy of Non-Formulary Drug Authorization, attached hereto as
22 Exhibit E-2. On August 17, a chart note confirms that the BOP denied the non-formulary
23 request. A copy is attached hereto as Exhibit E-3.

24 Upon receiving notice that the BOP had denied the doctor's request for non-
25 formulary drug authorization, the undersigned contacted Robert J. Palmquist, the warden
26 at FDC SeaTac. Warden Palmquist then personally contacted the appropriate individuals
27 at BOP headquarters in Washington, DC, with a request that the FDC be allowed to
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1 provide Robert with Klonopin. That request was also denied, without explanation.

2 As a result of the BOP's unjustified refusal to prescribe Klonopin, or any other
3 generic drug from the same family of drugs, Robert's Tourette's symptoms have returned
4 with a vengeance, particularly the uncontrollable body tics. His anxiety level has also
5 increased dramatically, even reaching the point where he is experiencing suicidal ideation.
6 Despite the fact that Robert has not been convicted of anything, and that he is presumed
7 innocent, he is being treated by the Bureau of Prisons as though he is a convicted felon,
8 not a pretrial detainee. Unless his medical conditions are brought under control, Robert
9 will not be able to assist his counsel in his defense.
10

11 **F. THE FDC WILL NOT ALLOW ROBERT TO HAVE ACCESS TO A COMPUTER.**

12 Robert has been notified by the staff at the FDC that due to the nature of the
13 charges in this case, he will not be allowed access to the computer room to review
14 discovery in this case. The discovery consists of tens of thousands of pages. We have
15 also been told that there is no place to keep paper copies of the discovery in this case at
16 the FDC. While the legal staff and warden have confirmed to the undersigned that they
17 will attempt to comply with any court order, they have also stated that it will create a
18 severe hardship on the FDC, and will put a strain on their resources.
19

20 The Assistant United States Attorney and the undersigned have agreed not to
21 reproduce the discovery until we know whether Robert will be released or detained.
22 Clearly, we would prefer to have a copy of the discovery in an electronic format.
23 However, if Robert remains detained and will not have access to a computer, then it will
24 have to be done in paper form. That will be very expensive, and Robert does not have
25 funds available to pay for copying the vast amount of documents in this case.
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III. CONCLUSION.

For all of the reasons hereinabove set forth, there are conditions that will reasonably assure Robert's appearance at all future hearings in this case, and that will also assure the safety of other persons and the community. Accordingly, we concur with Pretrial Services' recommendation for release, and further concur with the conditions they have recommended. Robert is also willing to abide by any other condition the Court may deem appropriate.

DATED this 6th day of September, 2007.

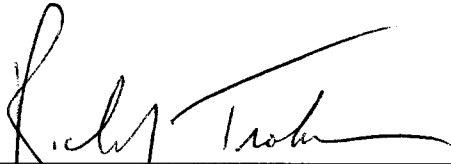
RICHARD J. TROBERMAN, P.S.

By: 

RICHARD J. TROBERMAN
WSB #6379
Attorney for Defendant
Robert Allen Soloway

CERTIFICATE OF SERVICE

I hereby certify that on September 6th, 2007, I electronically filed the foregoing "Defendant's Motion for review of Detention Order" with the Clerk of Court, using the CM/ECF system which will send notification of such filing to the attorneys of record in this case.



RICHARD J. TROBERMAN

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