

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

|    |                           |   |                                    |
|----|---------------------------|---|------------------------------------|
| 9  | UNITED STATES OF AMERICA, | ) |                                    |
|    |                           | ) |                                    |
| 10 | <i>Plaintiff,</i>         | ) | NO. CR07-187MJP                    |
|    |                           | ) |                                    |
| 11 | v.                        | ) | <b>MOTION TO DISMISS COUNTS</b>    |
|    |                           | ) | <b>19 THROUGH 25 OF THE SECOND</b> |
| 12 | ROBERT ALAN SOLOWAY,      | ) | <b>SUPERSEDING INDICTMENT</b>      |
|    |                           | ) |                                    |
| 13 | <i>Defendant.</i>         | ) | NOTED: February 22, 2008           |
| 14 | _____                     | ) | Oral Argument Requested            |

COMES NOW the defendant, ROBERT ALAN SOLOWAY, by and through his counsel of record, Richard J. Troberman, P.S., and moves the Court, pursuant to Fed.R.Crim.Pro. 12(b)(2), for an Order dismissing Counts 19 through 25 of the Second Superseding Indictment. This motion is based on the pleadings, records, and files herein, and is made for the reasons set forth in the subjoined Memorandum of Law.

I. INTRODUCTION.

On May 23, 2007, the grand jury returned a 35 count indictment against Mr. Soloway. The charges included, *inter alia*, five counts of aggravated identity theft, in violation of 18 U.S.C. §1028A.

Mr. Soloway was arrested on May 30, 2007. During a press conference following Mr. Soloway's arrest, then interim United States Attorney Jeffrey Sullivan announced that

1 this was the first time anywhere in the country that a "spammer" had been charged with  
2 aggravated identity theft based on his spamming activity. As will be demonstrated below,  
3 there is good reason why the aggravated identity theft statute has not previously been  
4 applied to spamming activity: it simply does not apply.

5  
6 On October 24, 2007, the grand jury returned a 36 count Superseding Indictment  
7 in this case. Thereafter, on January 3, 2008, the grand jury returned a Second  
8 Superseding Indictment. The Second Superseding Indictment includes seven counts of  
9 aggravated identity theft, all of which are the subject of this motion to dismiss.  
10

11 Each of the seven aggravated identity theft counts is based on emails with "forged"  
12 headers allegedly sent by Mr. Soloway.<sup>1</sup> The government alleges that in those emails,  
13 Mr. Soloway replaced his (the sender's) email address in the header with the recipient's  
14 email address. Thus, for example, if the email was sent to "JaneDoe@hotmail.com", the  
15 header would show "From: JaneDoe@hotmail.com; To: JaneDoe@hotmail.com" instead  
16 of "From: Robert@newportmarketing.com; To: JaneDoe@hotmail.com." This was  
17 typically done in order to try to circumvent a spam filter. The recipient obviously knew  
18 that she did not send the email to herself, and once the email was opened--if it was  
19 opened--the email clearly informed the recipient of the sender's website address. An  
20 example of an email allegedly sent by defendant is attached hereto as Exhibit A. As can  
21 be seen from the exhibit, the header reads "From: Sales@dalem\*\*\*r.com; To:  
22 Sales@dalem\*\*\*r.com." The body of the email contains the following message:  
23

24 email advertise like this to 8,000,000 people... free...  
25  
26

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27 <sup>1</sup> With respect to Count 19, the government may also attempt to prove that Mr. Soloway  
28 used a variation of the recipient's email address to send email to a third party.

1           http://www.emailadvertisinginc.com/  
2

3           have you started christmas advertising yet?  
4

5           the above noncommercial offer is only for noncommercial  
6           charities only. press on charity info on our web site for full  
7           and complete details. this offer is not a commercial service  
8           and is not at all for sale or lease or trade of any kind.  
9

10           As can be seen, the email was directed at non-profit organizations and charities,  
11           and did not offer anything for sale. Instead, it offered to advertise, at no charge, the non-  
12           profit's or charity's message. The email also contained a link to Mr. Soloway's broadcast  
13           email website, which did advertise both broadcast email services and broadcast email  
14           products for sale. A copy of the home page of defendant's website is attached hereto as  
15           Exhibit B. But the recipient of the email went to that site only if they wanted additional  
16           information, and took the additional step of clicking on the link that was contained in the  
17           email. If the recipient did not take the additional step of clicking on the link, then the  
18           recipient never even saw the advertisement for the email services or products. If they did  
19           click on the link, they were directed to the defendant's website, which was clearly  
20           identified as such. Once at the defendant's website, there is simply no way that any  
21           person could have been misled as to the source of the email, and there was no deprivation  
22           of anyone's email address, at least as that term is commonly understood.

23           It is also important to note that the government does not allege that the email or the  
24           website contained any virus, worm, spyware, pornography, or similar malevolent content,  
25           and there was no possibility that a recipient of the email who purchased a service or  
26           product could have been misled with respect to the identity of the website from which they  
27           purchased the service or product.

28           In sum, then, what the government is alleging (and has charged) as aggravated

1 identity theft is the sending of what purported to be an arguably non-commercial email in  
2 which the header identifies the return email address as being the same email address as the  
3 person to whom the email is sent.<sup>2</sup>  
4

## 5 II. ARGUMENT.

### 6 A. COUNTS 19 THROUGH 25 CHARGE DEFENDANT WITH VIOLATIONS OF 18 U.S.C. 7 §1028A.

8 18 U.S.C. §1028A is entitled "Aggravated Identity Theft." The defendant's  
9 conduct was not aggravated in the sense that it was not the type of conduct for which the  
10 statute intended enhanced penalties to apply; it did not involve what can be fairly  
11 characterized as someone's identity (an email address does not identify a person); and it  
12 did not involve the theft or deprivation of anything, including anyone's email address.

13 The aggravated identity theft statute was enacted in 2004 in response to what some  
14 considered to be inappropriately lenient sentences being meted out to identity thieves, and  
15 was intended to provide enhanced penalties for more serious crimes involving identity  
16 theft. The legislative history, Purpose and Summary, provides as follows:  
17

18 H.R. 1731, the "Identity Theft Penalty Enhancement Act,"  
19 addresses the growing problem of identity theft. Currently  
20 under 18 U.S.C. §1028 many identity thieves receive short  
21 terms of imprisonment or probation; after their release,  
22 many of these thieves will go on to use false identities to  
23 commit much more serious crimes. H.R. 1731 provides  
24 enhanced penalties for persons who steal identities to commit  
terrorist acts, immigration violations, firearms offenses, and  
other serious crimes. The bill also amends current law to  
impose a higher maximum penalty for identity theft used to  
facilitate acts of terrorism.

25 H.R. Rep. 108-528 at 3, 2004 (emphasis supplied).

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26  
27 <sup>2</sup> The complete header, which is always available for viewing by the recipient, would  
28 also clearly show that the email was not sent by the recipient. The header visible in the "in-box"  
is merely an abbreviated version of the header.

1 Since the enactment of the statute, there have been only a handful of cases that  
2 have interpreted its meaning and scope, and the Ninth Circuit Court of Appeals has yet  
3 to weigh in on this issue. All of the reported cases have involved the clear theft or  
4 misappropriation and deprivation of someone's identity, or the creation of false identity  
5 documents, typically to obtain goods or services by opening lines of credit or bank  
6 accounts in the name of the stolen identity; to obtain employment through false or stolen  
7 documents (*e.g.*, a fraudulent or stolen social security card); or to obtain illegal entry into  
8 the United States through the use of a false or stolen passport. None of the reported cases  
9 involve the type of attenuated or incidental "use" alleged in the case at bar.  
10  
11

12 Almost all of the cases addressing this statute have dealt with the question of  
13 whether the statute's *mens rea* provision requires the government to prove that a person  
14 accused of violating the statute knew that the identification in question belonged to an  
15 actual person at the time the offense was committed. Consequently, the abbreviated  
16 caselaw is not helpful in resolving the issue presently before the Court, which appears to  
17 be a matter of first impression.  
18

19 One of the few cases that has interpreted this statute was decided by this Court in  
20 what was then only the second published opinion addressing §1028A. See, *United States*  
21 *v. Beachem*, 399 F.Supp.2d 1156 (W.D.Wash. 2005). While the issue there (the *mens rea*  
22 requirement) is not the precise issue before the Court here, this Court's methodology in  
23 that case should apply with equal or more force here:  
24

25 In reaching this decision, this Court was also persuaded by  
26 the facts that the title of 18 U.S.C. §1028A is "Aggravated  
27 Identity Theft" and that the legislative history of the statute  
28 speaks directly about, "provid[ing] enhanced penalties for  
persons who *steal* identities. . . *H.R. Rep. 108-528* at 3,  
2004 (emphasis added). As the *Montejo* court noted, an

1 intent to deprive another person of property is traditionally  
2 an element of the crime of theft. *Montejo*, at 353 F.Supp.2d  
3 at 654.

4 *Id.*, 399 F.Supp.2d at 1158.

5 This Court also recognized in *Beachem* "the somewhat absurd level of punishment  
6 reached under [this] statute." *Id.*, at 1158. There, the defendant was alleged to have used  
7 social security numbers that did not belong to her in order to open bank accounts under  
8 false identities. The defendant used multiple false identities and false documents to open  
9 at least three separate bank accounts, on which she wrote a total of 81 NSF checks,  
10 thereby defrauding banks, merchants, and individuals out of over \$30,000.00. Here, by  
11 contrast, the defendant merely included the recipient's email address in an email header  
12 as both the "To" and the "From." The email itself offered free advertising for charities  
13 and non-profits. Only in the cramped view of a federal prosecutor could anyone  
14 reasonably try to shoehorn Mr. Soloway's conduct into a violation of a statute dealing with  
15 aggravated identity theft.  
16

17  
18 Although this Court's decision in *Beachem* is the minority view, it does not stand  
19 alone.<sup>3</sup> Rejecting the Fourth Circuit's view in *Montejo*, and distinguishing the Eighth  
20 Circuit's opinion in *Hines*, the district court for the Northern District of Iowa recently  
21 adopted this Court's reasoning and methodology in *Beachem*. In so holding, that court  
22 recognized that the interpretation of a statute is not limited to the meaning of a statute's  
23 individual words.  
24

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25  
26 <sup>3</sup> At least two appellate courts have decided the *mens rea* issue the other way. See,  
27 *United States v. Montejo*, 442 F.3d 213 (4th Cir. 2006) and *United States v. Hines*, 508 F.3d 603  
28 (11th Cir. 2007). One other appellate decision addresses the *mens rea* issue, but its ruling is more  
narrow, and was recently distinguished by a district court within the same circuit. *United States*  
*v. Salazar-Montero*, 520 F.Supp. 1079 (N.D. Iowa 2007).

1 This "plain language" or "plain meaning" rule of  
2 interpretation is not limited to the meaning of individual  
3 terms; rather "[s]uch an inquiry requires examining the text  
4 of the statute as a whole by considering its context, 'object  
5 and policy.'" *Harmon Indus., Inc. v. Browner*, 191 F.3d  
6 894, 899 (8th Cir. 1999) (quoting *Pelofsky v. Wallace*, 102  
7 F.3d 350, 353 (8th Cir. 1996)). Thus, the court must  
8 "effectuate the intent reflected in the language of the  
9 enactment and the legislative process." *Colorado v. Idarado  
10 Mining Co.*, 916 F.2d 1426, 1494 (10th Cir. 1990), *cert.  
11 denied* 499 U.S. 960, 111 S.Ct. 1584, 113 L.Ed.2d 648  
12 (1991), and it is not required to "produce a result  
13 demonstrably at odds with the intentions of [the statute's]  
14 drafters." *Ron Pair Enters. Inc.*, 489 U.S. at 242 (internal  
15 quotation marks omitted).

16 *United States v. Salazar-Montero*, 520 F.Supp.2d 1079, 1088 (N.D.Iowa 2007).

17 Clarity and understanding of the scope of conduct intended to be subject to  
18 enhanced penalties by this statute is even more important where, as here, the statute  
19 imposes a mandatory minimum sentence (two years imprisonment that must be consecutive  
20 to any other penalty imposed).

21 **B. THE CONDUCT ALLEGED IN COUNTS 19 THROUGH 25 IS ALREADY COVERED  
22 IN COUNT 18.**

23 What the government is alleging to be aggravated identity theft in Counts 19  
24 through 25 is covered by a more specific statute, Fraud and Related Activity in Connection  
25 with Electronic Mail, 18 U.S.C. §1037, as charged in Count 18. That statute provides,  
26 in relevant part, as follows:

27 (a) **In general.** -- Whoever, in or affecting interstate  
28 commerce, knowingly--

(3) materially falsifies header information in multiple  
commercial electronic mail messages and intentionally  
initiates the transmission of such messages,

\* \* \*

1 shall be punished as provided in subsection (b).

2  
3 18 U.S.C. §1037.

4 Clearly, Congress knew how to punish the offense of materially falsifying  
5 information in an email header when it enacted 18 U.S.C. §1037(a)(3). The statute  
6 defines "materially" as follows:

7 (d) Definitions.--In this section:

8 \* \* \*

9 (2) Materially.--For purposes of paragraphs (3) and (4) of  
10 subsection (a), header information or registration information  
11 is materially falsified if it is altered or concealed in a manner  
12 that would impair the ability of a recipient of the message,  
13 an Internet access service processing the message on behalf  
14 of a recipient, a person alleging a violation of this section,  
15 or a law enforcement agency to identify, locate, or respond  
16 to a person who initiated the electronic mail message or to  
17 investigate the alleged violation.

18 18 U.S.C. §1037(d)(2). That is the statute under which conduct similar to that allegedly  
19 committed by the defendant in this case is typically prosecuted. See, e.g., *United States*  
20 *v. Twombly*, 475 F.Supp.2d 1019 (S.D.Cal.2007). There, the defendants, who were  
21 prosecuted only for violating §1037, argued that a header does not necessarily identify the  
22 sender, and that a lay person has little or no ability to trace a sender's location based on  
23 the sender's email address. The court rejected this argument, holding that

24 While it is true that email addresses do not necessarily on  
25 their face identify the sender by name, that is beside the  
26 point. An email address may not identify who a sender is,  
27 but it does tell a recipient where to send replies to the  
28 sender, much in the same way a return address on an  
envelope identifies the sender of a letter and tells the  
recipient where to send replies to. A material falsification  
of header or registration information can violate this  
provision by hindering a recipient's ability to respind to the  
sender of an email, which is one of the provisions of  
§1037(d)(2).

1 Defendants also argue that because laypeople's ability to  
2 identify senders is inherently impaired, the statute is  
3 meaningless. This is a straw man argument: the statute at  
4 issue does not assume senders are personally identifiable  
5 from header information, nor does it purport to require easy  
6 and perfect identification; it merely forbids fraudulent  
7 interference with the user's ability to locate senders. The  
8 fact that individuals' ability to identify senders is already  
9 limited does not necessarily mean that it cannot be impaired  
10 further.

11 *Id.*, at 1023. While it is unclear from the facts recited in *Twombly* what type of  
12 falsification was used in the header, the end result is the same as what is alleged here--the  
13 recipients of the emails were unable to identify, locate or respond directly to the person  
14 who sent the email. No greater harm was caused by falsifying the header with the  
15 recipient's name than would have been caused by falsifying it with an entirely made up  
16 name.<sup>4</sup> Thus, there is no reasonable basis to apply an enhanced penalty, especially one  
17 as severe as that contained in 18 U.S.C. §1028A, to the defendant's conduct in this case.  
18 This is made even more clear by the fact that, as discussed by the court in *Twombly*, an  
19 email address does not *identify* either the sender or the recipient, so it cannot be said that  
20 the recipient's identity or means of identification was stolen or misappropriated in any  
21 event.

22 See also *United States v. Kilbride*, 507 F.Supp.2d 1051 (D.Ariz.2007). That case,  
23 decided in August of 2007, is reportedly one of, if not the, first criminal trials under the  
24 CAN-SPAM Act. *Kilbride*, at 1054. That case was prosecuted under 18 U.S.C. §1037,  
25 rather than 18 U.S.C. §1028A, as has been charged here, even though the conduct in

---

26 <sup>4</sup> Had the defendant simply used in the "From" portion of the header a purely fictional  
27 name, such as anonymous@aol.com, the effect on the recipient of the email would have been  
28 exactly the same: the recipient would not be able to determine the originator of the email, and  
would be unable to locate or respond to that person or entity.

1 *Kilbride* was far more egregious than has been alleged in the case at bar. There, *Kilbride*  
2 and his co-defendant Schaffer sent millions of spam messages that contained pornographic  
3 images that would instantly appear on the recipients' computer screen upon opening the  
4 email. *Kilbride* and Schaffer sent the emails by using headers that were materially  
5 falsified by using a variant of the recipient's email address. Nevertheless, *Kilbride* and  
6 Schaffer faced far less severe penalties for their conduct than is faced by the defendant  
7 here, since unlike the instant case, they were correctly charged under 18 U.S.C. §1037,  
8 and not under 18 U.S.C. §1028A.  
9

10  
11 **III. CONCLUSION.**

12 For all of the reasons hereinabove set forth, 18 U.S.C. §1028A does not apply, as  
13 a matter of law, to the facts alleged in Counts 19 through 25 of the second superseding  
14 indictment. Defendant allegedly falsified headers in email messages by substituting the  
15 intended recipient's email address for his own in the "from" portion of the header. That  
16 conduct is properly charged under 18 U.S.C. §1037(a)(3), a specific statute dealing with  
17 fraud in connection with electronic mail. Defendant did not steal or deprive anyone of  
18 their email address or identity. Accordingly, Counts 19 through 25 of the second  
19 superseding indictment should be dismissed.  
20

21 DATED this 8<sup>th</sup> day of February, 2008.

22 RICHARD J. TROBERMAN, P.S.

23  
24 By: 

RICHARD J. TROBERMAN

WSBA #6379

Attorney for Defendant

Robert Alan Soloway

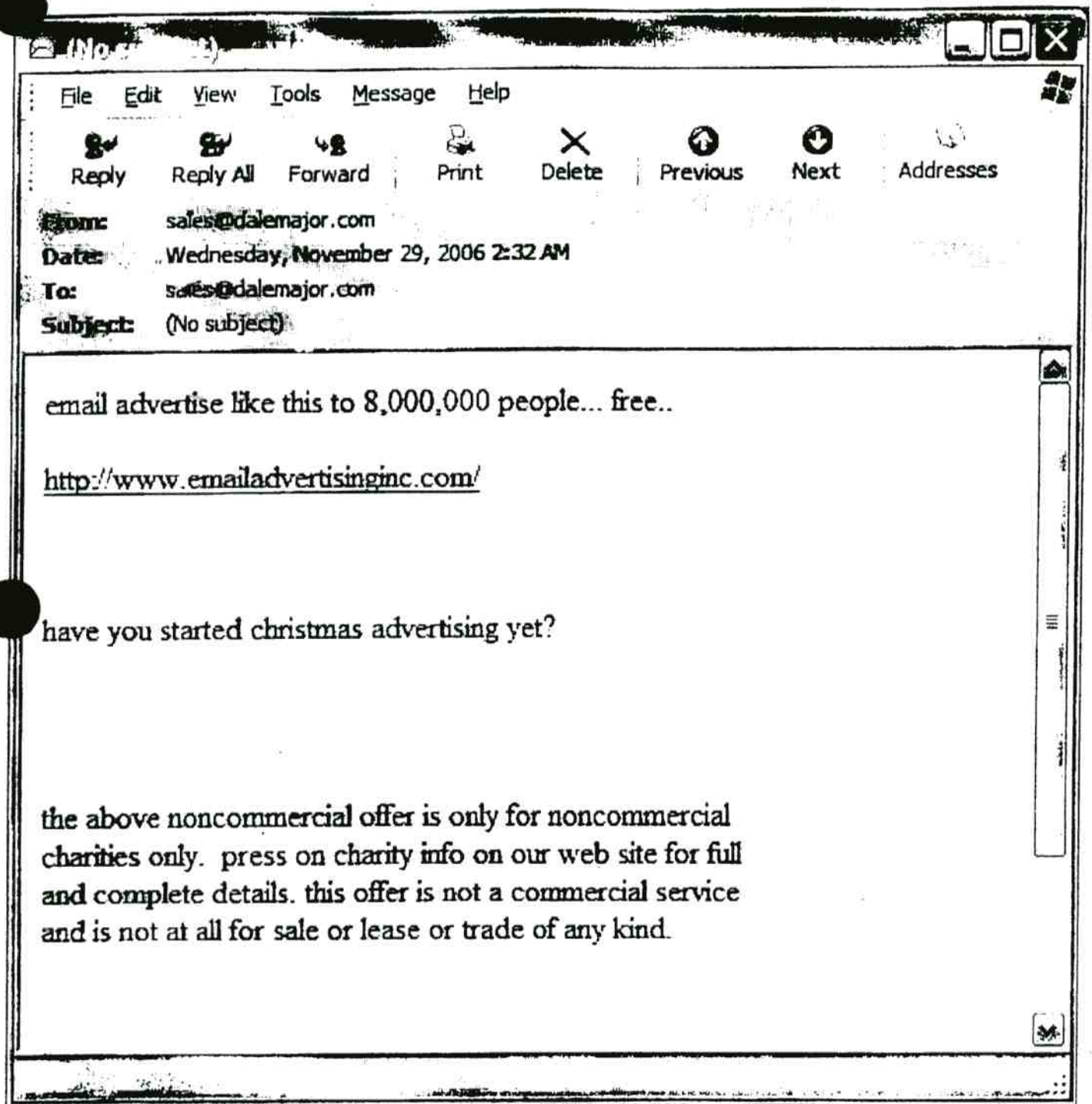
25  
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27  
28 **MOTION TO DISMISS COUNTS 19  
THROUGH 25; CR07-187MJP - 10**

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**EXHIBIT A**

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**EXHIBIT B**

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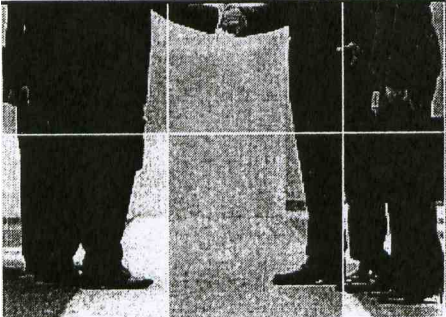
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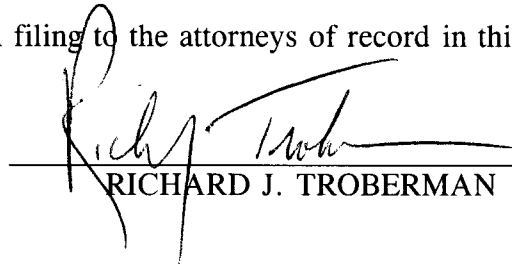


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CERTIFICATE OF SERVICE

I hereby certify that on February 8, 2008, I electronically filed the foregoing "MOTION TO DISMISS COUNTS 19 THROUGH 25 OF THE SECOND SUPERSEDING INDICTMENT" 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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