United States District Court Southern District of New York

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| United States of America,  *Plaintiff*  *vs*  John J. Rigas, Timothy J. Rigas, Michael J. Rigas, and Michael C. Mulcahey,  *Defendants.* |  | Motion for Bill of Particulars  Indictment m 02-Crim-1236 (LBS) |

The defendant Michael C. Mulcahey, upon the annexed affidavit of Mark J. Mahoney, and upon the Memorandum of Law filed herewith, and upon the motions and supporting papers of the other defendants, in which he joins, hereby move this Court for an order directing the government to file and serve a Bill of Particulars, pursuant to FRCrP 7(f) and the Fifth and Sixth Amendments to the United States Constitution as specified in the annexed Schedule entitled “Bill of Particulars”.

Date: March 10, 2003

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|  |  | Mark J. Mahoney HARRINGTON & MAHONEY  *Counsel for Michael C. Mulcahey*  1620 Statler Towers  Buffalo, New York 14202-3093 716-853-3710  716-853-3700 ext. 216 |

To: Other Defense Counsel

Timothy Coleman, Christopher Clark, AUSAs

**Bill of Particulars**

The defendant joins in the motion for particulars brought by Tim Rigas, and independently moves for a Bill of Particulars, pursuant to FRCrP 7(f) and the Fifth and Sixth Amendments to the United States Constitution, which is necessary to prepare a defense and to avoid prejudicial surprise at trial and to protect him from double jeopardy, as follows:

# Join in Tim Rigas’ Motions

*“Sham” transactions*

1. The defendant joins in the motion by Tim Rigas relating to particularization of each alleged fraudulent or “sham” transaction.(Including ¶¶ 82, 101, 102, 104, 105, 106, 107, 108, 114, 123, 124, 125, 126, 158)

*False, fraudulent statements and representations*

1. The defendant joins in the motion by Tim Rigas for particularization of any statement or representation, alleged to be false or misleading. (Including ¶¶ 63, 64, 68, 73, 74, 88, 88, 92, 92, 93, 93, 96, 96, 149, 150, 151, 157, 157, 190, 197, 204, 204, 207)

*Unspecified allegations*

1. The defendant joins in the motion by Tim Rigas for particularization of any “other things” or other “forms” of the misconduct or misrepresentations alluded to but not specified in the indictment. (Including ¶¶ 62, 63, 69, 70, 82, 93, 96, 100, 102, 105, 163, 204)

*Conspiracy*

1. The defendant joins in the motion by Tim Rigas for particularization of the identify each unnamed co-conspirator. (Including ¶¶ 61, 63, 73, 74, 108, 197- 204.)
2. The defendant intends as part of this motion that for every person described as being "others," or "others known and unknown" in, identify the person or, if his or her

identity is not known, a Bill of Particulars will provide any information available which will identify the person(s) by the actions in which he or she engaged, his or her relationship to any other accused, or the function of the "unknown" person in the conspiracy, or any course of conduct alleged to be in furtherance of the conspiracy. (¶¶198-203)

# Michael Mulcahey’s own motion

*Individual conduct*

1. Except where the individual conduct of an accused is specified, for each count, state the particular conduct of the accused encompassed by the charge that the government intends to prove.

*Employees*

1. For every allegation that other Adelphia employees participated, or were directed to act, state the name of such employees where known, or the best available description by organizational position, geographic location, or otherwise. (¶¶ 82, 96, 97,100, 102, 104, 123-126, 133-142, 147, 149, 150, 154-158, 160, 162, 163)

*Adelphia’s Cash Management System*

1. With respect to the allegations regarding the Cash Management System (“CMS”), does the government assert that the CMS itself or its administration in the regular course of Adelphia’s business was illegal or improper. If so, please state what aspect of the CMS is alleged to be illegal or improper.

*Miscellaneous*

1. Identify the particular “book” or “record” into which the notices and receipts were “inserted.” (¶ 82(a) and (b). )

# Forfeiture

1. Specify the precise property claimed to be subject to forfeiture from

Michael Mulcahey.

1. For each such property, specify the manner in which it is alleged to have been the proceeds, or derived from the proceeds, of charged unlawful activity.

United States District Court Southern District of New York

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| United States of America,  *Plaintiff*  *vs*  John J. Rigas, Timothy J. Rigas, Michael J. Rigas, and Michael C. Mulcahey,  *Defendants.* |  | Affidavit in Support of Motion for Bill of Particulars  Indictment m 02-Crim-1236 (LBS) |

Mark J. Mahoney affirms to be true, and states under penalty of perjury as follows:

1. I am an attorney admitted to practice before all the federal district courts within New York State, and I am the attorney for Michael C. Mulcahey, and I make this affidavit in support the defendant’s motion for a Bill of Particulars.
2. Prefatory to this motion I have participated directly and indirectly through counsel for the other defendants, through meetings and correspondence, in discussions with the attorneys for the government in an effort to informally agree on particularization, in compliance with Local Rule 16.1.
3. All of the particulars sought are necessary for the accused to be able to prepare a defense, to prepare to prove his innocence, to avoid surprise at trial and enable him to enforce his “double jeopardy” rights and to enable the court to confine the government’s proof to the indictment and make appropriate rulings on the sufficiency of the evidence and legality of the charges, and enable the accused to make further appropriate motions requiring fuller understanding of the nature and scope of the charges.
4. The reasons supplied for the granting of particulars contained in the memorandum filed herewith, and in the affidavits and memoranda filed on behalf of the

other defendants are incorporated herein by reference.

# Background

1. Michael C. Mulcahey was not a founder, owner, or director of Adelphia. He did not receive, and he is not alleged to have received, any benefits as a result of any of the alleged wrongdoing in the indictment. He had only been a corporate officer since August of 2001, a matter of months, when the precipitate events occurred in the Spring of 2002. By the allegations, and in reality, his was an extremely minor role in the events encompassed by the indictment.
2. Michael Mulcahey was a salaried employee. His responsibility was primarily in the operation of the “cash management system” (“CMS”) at Adelphia. As such he was necessarily involved in some of the functions involved in the transfers of money, and communications with lenders and note holders, which are encompassed in the indictment. However, such activities involved only a fraction of his official time and responsibility.
3. Mr. Mulcahey was not involved in SEC reporting nor was he involved in communications with investors, analysts or the public.
4. Mr. Mulcahey, who was employed by Adelphia up until the day of his arrest, was the only one to be indicted among several Adelphia managers who had cooperated extensively in the internal and government investigations of Adelphia in the Spring of 2002.
5. Apart from the current indictment, but on account of having been named therein, he has been named in several civil proceedings seeking, literally, billions of dollars in damages. In those in which he has been served, such as the adversary proceeding currently pending in the Bankruptcy Court for the Southern District of New York (*Adelphia v. Rigas, et al.*), he has of necessity appeared *pro se*, being unable to afford counsel for civil representation, as with no reimbursement for such representation is forthcoming from either Adelphia or its “D&O” liability carriers.

# The Indictment

1. The general nature and scope of the indictment are well outlined in the affidavits of counsel for the other accused.
2. As to Michael Mulcahey, of the 214 paragraphs of the indictment, only about a dozen paragraphs (¶¶ 68, 82, 161, 163, 165, 172, 183, 202, 203, 205, 209, 210) describe areas in which he had any responsibility, and only a few paragraphs actually or arguably specify conduct on his part (¶¶ 82, 205(n, p, s, u and v), 209).
3. Those parts of the indictment specifying some conduct on the part of Mr. Mulcahey relate primarily to the wire fraud counts (Counts 18-22) and the bank fraud counts (Counts 23 and 24).

# Need for particularization of individual conduct

1. The factually-oriented parts of the indictment are contained in the 140 paragraphs in the “Scheme to Defraud” section in the indictment, and in the 16 “Overt Acts” paragraphs. Of these, approximately 100 paragraphs are accusatorial with respect to named defendants, such as, for example:

80. In violation of that agreement, Highland 2000 never paid Adelphia for the Rigas Direct Placements, and JOHN J. RIGAS, TIMOTHY J. RIGAS and MICHAEL J. RIGAS, the defendants, failed to disclose that fact to the Outside Directors.

1. Of these 100 paragraphs, only 24 accuse Michael Mulcahey of culpable activity, only one of which (¶ 82(a)) mentions him alone. These paragraphs charge him in the most conclusory terms with general wrongdoing without specifying any particular conduct on his part, except in the few paragraphs mentioned above in paragraph 11.
2. It is likely, based on my own investigation and understanding of the facts, that the grand jury heard no evidence of any involvement by Mr. Mulcahey in many of the allegations which simply mention him, and it is equally likely that the government has no evidence of any such involvement.
3. We are not prepared, and I feel no way Mr. Mulcahey can possibly be prepared, on the one hand, to confront mistaken, confabulated or false testimony which might be used to try to implicate Mr. Mulcahey in conduct of which the indictment gives

him no notice, or, on the other hand, to prepare to adduce evidence disproving such testimony.

1. In essence, except for a few areas in which the indictment can be interpreted, with the benefit of other information we know of, to implicate Mr. Mulcahey directly, such as paragraphs 82 and 163 (documents and entries related to loan compliance reporting and Rigas stock purchases) and the various wire transfers, from the cash management system, Mr. Mulcahey has no notice of other conduct on his part the government intends to prove to be criminal.
2. Generally familiar historically with the documentary trail in his areas of concern at Adelphia, Mr. Mulcahey also has no hope that full review of the discovery in this case—entirely derived from Adelphia third parties—would give him any insight into what additional conduct on his part was thought by the grand jury to be criminal. His belief is that there is no such additional conduct and therefore that any evidence or testimony suggesting otherwise would be both (1) a surprise to him and (2) unreliable or

(3) connected by the most attenuated theories of causation to the charged conduct.

1. For example, although Mr. Mulcahey had nothing to do with SEC reporting, he does not know if he charged in the securities counts because someone has mistakenly asserted or assumed that he *was* involved in SEC reporting, or because is argued that, by supervising the cash management system Mr. Mulcahey became liable for false SEC filings which depended in part on such records, or whether there some other reason, or no reason? In the first case we would need to prepare to demonstrate the falseness of the testimony; in the second we would focus on the legal viability of such an attenuated *sine qua non* theory of liability. But without notice of the conduct he is charged with we can prepare nothing. If there is *no reason* the government can now articulate, the count is subject to being dismissed as to Mr. Mulcahey.
2. Thus, Michael Mulcahey is similarly situated to Michael Rigas as his situation is described in the affidavit of his attorney Andrew J. Levander and his memorandum of law. However of the 100 paragraphs referred to in paragraph 11, above, more than twice as many refer to Michael Rigas than to Michael Mulcahey.

*Employees*

1. Similar to Mike Rigas, we seek particularization of those “employees” who are alleged to have participated in the conduct giving rise to the accusation or who are alleged to have acted at the direction of the accused.
2. The factual basis for this and the reasons for granting the particularization as set forth in Mike Rigas’ motion and memorandum are incorporated here.

*Adelphia’s Cash Management System*

1. The numerous allegations in the indictment relating to the cash management system, and to the reference to “commingling” of funds and supposed lack of approval by the Board for this accounting system, seem designed to imply that there is something illegal about the cash management system itself. For example, ¶ 21 of the indictment:

21. Adelphia's Board of Directors did not approve the commingling of Adelphia's funds and the funds of the RFEs under the CMS, and the Outside Directors were not advised of this commingling.

1. It is necessary to know whether the government maintains that this arrangement alone is illegal or not, so that the defense can be prepared to address the legal viability of such a theory, and prove its falseness, if necessary.

*Miscellaneous*

1. One isolated, and yet critical allegation against Michael Mulcahey relates to the claim that he or Tim Rigas “inserted” “fictitious notices and receipts into the books and records” of Adelphia. (¶ 82(a) and (b) For the defense to prepare to answer this allegation it is necessary to know the particular “book” or “record” into which the notices and receipts were supposed to have been inserted.

WHEREFORE the undersigned requests that the Court grant the relief sought in the foregoing motion.

Dated: March 10, 2003

Buffalo, New York

Mark J. Mahoney