UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, -against- JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY, Defendants.	:	02 Cr. 1236 (LBS)

DECLARATION OF BENARD V. PREZIOSI, JR.

1. I am a member of the Bar of this Court and of Curtis, Mallet-Prevost, Colt & Mosle LLP. I was a member of the Curtis trial team, led by Peter Fleming Jr. (who died in 2009), which defended John Rigas at the trial which resulted in his conviction on July 8, 2004.

2. Annexed hereto as Exhibit 1 is a true and correct copy of a July 3, 2007 affidavit of Mr. Fleming, together with its Exhibit A, that was submitted in connection with a motion of John and Timothy Rigas for a new trial. I reviewed this affidavit and its Exhibit with Mr. Fleming and other defense counsel prior to the time that it was submitted and it accords with my recollection of the events in which I was involved.

3. The firm Buchanan Ingersoll, as we understood it, had been lead outside counsel for Adelphia Communications Corporation and its subsidiaries (collectively, "Adelphia") during the period relevant to the events at issue in the criminal case, and Carl Rothenberger had been the lead partner at the Buchanan firm with regard to the Adelphia account. Based upon information that was made available to us during the criminal case, we

understood that Mr. Rothenberger and his firm had been involved in virtually every transaction of significance in which Adelphia engaged, and that Mr. Rothenberger (and/or other attorneys at the Buchanan firm) had attended all of the meetings of the Adelphia Board of Directors. The Curtis trial team, as well as counsel for the other defendants, considered Mr. Rothenberger to be a key witness and in that regard, we sought through his attorney (who was also counsel for the Buchanan firm) to interview him. Counsel informed us on a number of occasions that he would not permit his clients, including Mr. Rothenberger, to speak with defense counsel. Defense counsel were very wary about calling Mr. Rothenberger as a defense witness because he would not speak with us in advance.

4. During jury selection, the prosecution sent a letter to defense counsel dated February 24, 2004 advising that Mr. Rothenberger "may be able to provide information that is favorable to the defense concerning the timber rights transaction discussed in the Government's Bill of Particulars." The timber rights transaction was one of many transactions that were alleged in the Indictment and in the Bill of Particulars. A true and correct copy of the February 24, 2004 letter is annexed hereto as Exhibit 2. It is my recollection that when we received this letter, we understood that Mr. Rothenberger had spoken with the Government and we were of the view that, while he may have had helpful information regarding one of the multitude of transactions alleged in the Indictment and in the Bill of Particulars, other information he provided to the Government would likely have been inculpatory of the Rigases on other issues. As a result, and because of his refusal to speak with us, the defense determined not to call Mr. Rothenberger as a witness in the case.

EXECUTED ON: October 3, 2011

BENARD V. PREZIOSI, JR.

EXHIBIT 1

Patrick M. Northen (PN-3771)
Lawrence G. McMichael (Admission Pro Hac Vice Pending)
DILWORTH PAXSON LLP
3200 Mellon Bank Center
1735 Market Street
Philadelphia, PA 19103-7595
(215) 575-7000
Attorneys for Defendants John J. Rigas and Timothy J. Rigas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
		02 Cr. 1236 (LBS)
Plaintiff,	:	
		AFFIDAVIT OF
-against-	:	PETER FLEMING JR.
JOHN J. RIGAS, TIMOTHY J. RIGAS, MICHAEL J. RIGAS and MICHAEL C. MULCAHEY,	:	
Defendants.	:	

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

PETER FLEMING JR., being duly sworn says:

1. I am a member of the Bar of this Court and of the firm of Curtis, Mallet-Prevost, Colt & Mosle LLP.

2. I served as lead counsel in the defense of John Rigas at the trial which resulted in his conviction on July 8, 2004. I make this affidavit in connection with the motion of John and Timothy Rigas for a new trial based upon testimony provided in the post-conviction litigation.

3. There is attached to this affidavit as Exhibit A a description of events having to do with the potential testimonial composition of the defense case in the criminal trial. It accords with my recollection of all the events in which I was involved, and, to the extent it involves my co-counsel, is based upon their recent communications with me. Co-counsel do agree with the contents of Exhibit A.

Peter Fleming Jr.

Sworn to before me this
3rd day of July, 2007.

Notary Public

LINDA L. FROCCARO
Notary Public, State of New York
No. 31-6241000
Qualified in New York County
Commission Expires May 31, 2010

EXHIBIT A

The case against the Rigases was unique in terms of the breadth of the alleged criminal conduct. The indictment charged fraud in connection with the recording of, and disclosure relating to, the co-borrowed debt, and the reclassification of co-borrowed debt from the books of Adelphia to the books of a Rigas co-borrower in connection with the October 2001 securities purchase by a separate Rigas entity. It also charged EBITDA manipulations based upon the marketing support arrangements between Adelphia and Scientific Atlanta and Motorola. In addition, the indictment charged understatement of capital expenditures in connection with an alleged fraudulent converter box sale from Adelphia to a Rigas entity, misrepresentations to rating agencies concerning de-leveraging and liquidity, fraud in connection with the payments of funds to members of the Rigas family, the payment by Adelphia of Rigas margin loan calls, the undisclosed use of corporate aircraft and the undisclosed development of a golf course on land owned by the Rigases, and bank fraud based upon claimed improper post-closing adjustments designed to impact the leverage ratio reported to lenders.

The large number of charges in the indictment, which themselves raised a myriad of accounting and disclosure issues, were expanded by the Government's Bill of Particulars (which was filed in June 2003) and then by its Preclusive Bill of Particulars (which was filed in January 2004). There, the Government charged:

- Alleged fraud in connection with a variety of securities transactions other the October 2001 securities purchases (BOP ¶ 81. a. 2.)
- The alleged improper allocation of interest associated with the co-borrowing debt and the affiliate receivables (BOP ¶ 81 a. 3.)
- Improper activities in connection with a multitude of real estate transactions (BOP ¶ 81. a. 4.- 10.)

- The improper allocation of the cost associated with the acquisition of the Prestige cable systems (BOP ¶ 81 a. 11.)
- Alleged undisclosed payments to Wending Creek Farm and Eleni's Interiors (BOP ¶ 81 a. 12-13.)
- Alleged improper advances of funds to finance the production of Songcatcher (BOP ¶ 81. a. 14).
- Alleged improper charges to Adelphia for golf club memberships, other personal expenses of the Rigases (e.g., Ellen Rigas's wedding), and charitable donations (BOP ¶ 81. a. 15-16.)
- The alleged improper taking by John Rigas of $30,000,000 in the early 1990s (BOP ¶ 81. a. 17.)
- The alleged misappropriation of treasury stock for use in connection with the acquisition of the Sabres hockey franchise (BOP ¶ 81 a. 18.)
- Alleged EBITDA manipulations resulting from the improper failure to consolidate foreign cable systems (BOP ¶ 82 a. 1.)
- Alleged EBITDA manipulations resulting from the improper recording of placement fees (BOP ¶ 82 a. 3.)
- Alleged misrepresentations concerning the use of margin loans in connection with securities transactions (BOP ¶ 82 a. 4-5.)
- Alleged misrepresentations in the statements of cash flow relating to advances to and from related parties (BOP ¶ 83 a. 6.)
- Alleged EBITDA manipulations resulting from the improper charge to capital expenditures of labor costs (BOP ¶ 89 a.)
- Alleged EBITDA manipulations resulting from the use of misleading subscriber numbers in calculating revenue under programming contracts with HBO/Cinemax and Viacom (BOP ¶ 89 b.)
- The alleged improper recognition of revenue resulting the @Home warrants (BOP ¶ 89 c.)

- Alleged EBITDA manipulations resulting from the over-capitalization of labor costs, subcontractor fees, insurance premiums and system power costs (BOP ¶ 96 a.)[1]

Deloitte & Touche audited Adelphia during all of the years in question and, in each year, issued a clean audit opinion. Buchanan & Ingersol, and its partner, Carl Rotherberger, were Adelphia's main outside counsel during the entire period in question, were involved in virtually every major transaction, including all of the direct placements of securities to the Rigases and all of the co-borrowing credit facilities, and attended all of the Board meetings. The Government did not call any witness from Deloitte or Buchanan. Nor did the Government call any witness from Scientific Atlanta or Motorola, the contra-parties in the marketing support transactions. Further, in addition to those current and former Adelphia employees called by the Government during its case (including Brown), other witnesses with potentially relevant knowledge who remained employed by Adelphia were not called by the Government.

Shortly before trial, the Government produced 3500 material relating to more than 150 Government witnesses. That material, as it related to Deloitte personnel, included transcripts of testimony, including testimony in SEC investigative proceedings relating to Adelphia. To the extent these materials related to certain issues in the criminal case – including the recording of the co-borrowing debt and the netting of affiliate receivables – it was of significant benefit to the defense position.

Attempts were made by the defense to interview relevant personnel from Deloitte, Scientific Atlanta and Motorola, and Buchanan. Deloitte refused interviews. Counsel did have limited contact with individual counsel for Gregory Dearlove, the Deloitte engagement

[1] During trial, the Government was permitted to prove additional transactions, beyond those identified in even an expansive reading of the Bill of Particulars, that were claimed to have been fraudulent and that gave rise to accounting issues. For example, the Government was permitted to show that John Rigas acquired certain local cable systems with funds, paid over time, from the Adelphia concentration account.

partner for the year end 2000 audit, and through counsel received limited information regarding what Mr. Dearlove might say. However, it is uncertain whether a full interview would have been permitted, and Mr. Dearlove received an SEC Wells Notice on October 1, 2003, making any cooperation with the defense in a criminal case extremely remote.[2] While defense counsel believe that Scientific Atlanta and Motorola refused interviews, they cannot support that belief with certainty.

The position of these entities was somewhat unusual, but understandable in light of the fact that the Government, in its Preclusive Bill of Particulars, identified Scientific Atlanta and Motorola as "co-conspirators" and stated:

> The Government hereby gives notice that it reserves the right to add Ivan Hoffmann, William Caswell, and Deloitte & Touche, LLP, to the list of unindicted co-conspirators pending the outcome of ongoing investigative efforts.

The effect of being identified by the Government as a co-conspirator in any case – much less a case of this magnitude – is obvious.

Counsel for Buchanan likewise informed defense counsel that he would not permit his clients to talk with the defense. It was further suggested to defense counsel that individual Buchanan attorneys might assert their Fifth Amendment privileges if called to testify.

Finally, in an October 14, 2002 memorandum, issued shortly after the indictment had been returned and when Adelphia was openly cooperating with the government and under the threat of indictment, Adelphia's Vice President and General Counsel directed all Adelphia employees in no uncertain terms that they should not speak with the Rigases or their counsel and

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[2] Mr. Dearlove was subsequently the subject of an SEC administrative proceeding pursuant to Section 21C of the Securities Exchange Act of 1934 and Rule 102(e) of the Commission's Rules of Practice. In that case, the Administrative Law Judge found that the SEC's own expert had acknowledged that no FAS standard specified how joint and several liability arising under a credit agreement should be treated, and had conceded that "the joint-and-several liability provisions of the credit agreement were not sufficient, on their own and without resort to FAS 5, to support his conclusion that most of the co-borrowing debt should have been booked as Adelphia's liability."

should report to him any efforts that were made by the Rigases or their representatives to contact the employees. In the memorandum, the employees were advised that Adelphia's Legal Department would review any such contact "and may refer the matter to appropriate government agencies." Quite clearly, this memorandum had a chilling effect on personnel who could potentially assist the defense. Aside from the risk of job loss in a community with few employment opportunities, no employee would want the prosecution to be told that he or she was cooperating with the defense. The chilling effect of Adelphia's memorandum was underscored when the Government itself identified a host of Adelphia employees, including Dean Marshall, Joseph Sabol and Jason Woolcock, as co-conspirators and co-schemers in its Bill of Particulars. Michael Brady, an Adelphia employee who was not identified as a co-conspirator, did speak to defense counsel on two or three occasions, but subsequently, when approached by a defense team investigator, refused to say anything without a subpoena. Ann Montgomery refused to return calls from that investigator.

Counsel's diligence is also demonstrated by letters that were sent to a large number of individuals (or, where known, their counsel) identified by the Government as witnesses in the 3500 material, including, among others, Joseph Sabol and Jason Woolcock, as well as many of the senior Deloitte personnel. In the letter, defense counsel asked for an opportunity to meet or speak telephonically with the witness at a time and in a fashion convenient for the witness. The defense received few responses to those letters, and in those few responses, the witnesses declined to be interviewed.

In sum, any Adelphia employee in a significant accounting role was targeted as a criminal, and all Adelphia employees were gagged under threat of reference to the Government; Motorola and Scientific Atlanta were labeled as corrupt; and Deloitte & Touche and its personnel

were, at a minimum, under suspicion. Indeed, in a pre-indictment meeting in the Summer of 2002, counsel for John Rigas expressed the view that any charge based upon the impropriety of the accounting for and disclosures relating to the co-borrowing debt would be wrong and unfair because Deloitte, as the Government knew, had known about and passed upon these issues based upon a FAS 5 analysis. AUSAs Clark and Coleman responded by stating in words or substance that Deloitte was indictable. Later, during trial, counsel for John Rigas reiterated the view, this time to AUSA Owens, that the co-borrowing fraud charge was wrong in the face of the clear evidence that Deloitte knew the relevant facts and approved the accounting and disclosure. AUSA Owens responded in words or substance that if he had one more piece of evidence establishing criminal intent on the part of Deloitte, he would indict the firm. It is a certainty that the Government's position had been expressed to Deloitte and its counsel. That Deloitte was at serious risk in the event it supported the Rigas defense cannot be questioned.

For whatever reasons, including the foregoing, key witnesses – identified by the Government as potential Government witnesses – were not available for interview by the defense. Had the Government called these witnesses, the defense would have cross-examined. When the Government did not call any of these witnesses, the defense was put to a Hobson's choice – (a) subpoena the witness and take him "cold" not knowing what he might say concerning issues about which the 3500 material was silent or ambiguous, with the obvious risk that the Government, having undoubtedly advised the witness (or the company with which he or she was associated) that the witness or the employer was in peril, could potentially obtain very damaging testimony, true or false, on those issues from a defense witness, or (b) pass on calling the witness. The choice was discussed among counsel and with at least Tim and John Rigas. In the end, counsel, with the concurrence of the Rigas defendants, determined that the appropriate

course in all the circumstances was not to call witnesses who would not speak with the defense given the substantial risk that they might testify adversely for whatever reason as to matters not adequately covered in the 3500 materials, and thereby permit the Government to strengthen its case through defense witnesses. This risk was heightened in the case of witnesses – Deloitte, Scientific Atlanta, Motorola and the Adelphia employees – labeled by the Government as actual or potential co-conspirators – who, quite naturally, would not want to testify in a manner that was contrary to the Government's version of the facts.

In a real sense, many of the key witnesses, including those identified above, were unavailable to the defense before and during the criminal trial. As set forth above, the defense made efforts to overcome this hurdle. But the lawyers for the witnesses would not agree to interviews, the Adelphia witnesses were shackled with a gag order and the threat of prosecution, Motorola and Scientific Atlanta were tarred as co-conspirators, and Deloitte was under investigation and refused to be interviewed. Although the Government listed many charges in the bill of particulars, it ultimately chose not to attempt to prove many of those allegations. Indeed, the Government even chose not to attempt to prove certain of the allegations in the indictment (i.e., the converter box fraud). It seems apparent that the Government, which chose not to call an accounting expert and itself avoided calling Deloitte or the attorneys, knew full well that its multiplicity of charges put the defense in the impossible position described.

We believe that counsel's professional judgment was one with which virtually any competent, experienced criminal defense counsel would agree. This Court should find that the witnesses identified herein, and the testimony they gave at subsequent post-conviction depositions and hearings, were unavailable to the defense during the criminal trial.

EXHIBIT 2

U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

February 24, 2004

To All Counsel
(Distribution List Attached)

Re: United States v. John J. Rigas, et al.,
S1 02 Cr. 1236 (LBS)

Dear Counsel:

The Government writes to inform you that Carl Rothenberger, Esq. may be able to provide information that is favorable to the defense concerning the timber rights transaction discussed in the Government's Bill of Particulars.

Very truly yours,

DAVID N. KELLEY
United States Attorney
Southern District of New York

By: _____
Christopher J. Clark
Richard D. Owens
Judd C. Lawler
Assistant United States Attorneys
(212) 637-2205/2415/2701