

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

JOHN J. RIGAS, TIMOTHY J. RIGAS,  
MICHAEL J. RIGAS, and MICHAEL C. MULCAHEY

02 Cr. 1236 (LBS)

U.S. DISTRICT COURT SDNY

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**DECLARATION OF LAWRENCE G. MCMICHAEL**

1. I am a senior partner in the firm Dilworth Paxson LLP (“Dilworth”). Dilworth was originally retained as the Rigases’ primary civil counsel in July 2002, but also coordinated and assisted with the Rigases’ criminal defense at their trial.

2. I serve as lead counsel in the defense of the John Rigas and Timothy Rigas (the “Rigases”) in this matter and make this declaration in connection with the Rigases’ Motions to Vacate, Set Aside, or Correct a Sentence.

3. Unless otherwise stated in this Declaration, I have personal knowledge of the facts hereinafter set forth.

**History of Efforts to Obtain Criminal Defense Funding**

4. On May 23, 2002, the Rigases entered into an agreement with Adelpia (the “5/23 Agreement”), under which the Rigases agreed to negotiate terms that would relinquish significant rights, including resigning from the Adelpia Board of Directors, in exchange for certain benefits, including indemnification by Adelpia and a severance package for John Rigas. In furtherance of this agreement, the Rigases resigned from Adelpia’s Board of Directors. Adelpia refused to satisfy any of its obligations under the 5/23 Agreement, however, and instead breached numerous provisions and obligations under that Agreement. Most notable for

the instant purposes, Adelphia has refused to advance fees for the Rigases' defense or indemnify the Rigases.

5. When Adelphia breached its indemnity obligation under the 5/23 Preliminary Agreement, the Rigases were forced to begin liquidating certain real estate assets in order to fund their defense.

6. On August 26, 2002, with approximately an hour's notice, and while I was on vacation, Adelphia requested an emergency conference with the Bankruptcy Court seeking to temporarily enjoin the Rigases from selling any of their real property. At the conclusion of the telephone conference, the Bankruptcy Court entered an Order temporarily enjoining the Rigases from disposing of any of their real estate (the "August 26 TRO").

7. Enjoined from selling their real estate, the Rigases began liquidating other assets not subject to the August 26 TRO in order to fund their defense. On November 25, 2002, Adelphia filed an *ex parte* motion requesting an accounting of all income allegedly generated from properties covered by the August 26 TRO and a complete freeze on all of the Rigases' assets. [*In re Adelphia Comm'c Corp.*, No. 02-ap-41729 (Bankr. S.D.N.Y.) Adelphia Emergency Mot. for Enforcement of Automatic Stay & Prior Restraining Order, Further Restraining Order, & Related Relief, at ¶¶ 39-43 (Nov. 25, 2002)]. On November 26, 2002, the Bankruptcy Court entered an oral decision regarding a continued freeze on personal property owned by the Rigases (the "November 26 TRO").

8. In February of 2003, after months of negotiations, counsel for Adelphia and counsel for the Rigases agreed in principle to permit the Rigases to sell certain real estate to fund their criminal and civil defense. Despite the Rigases' best efforts during the next few months, however, only one such property was sold, for a sum of approximately \$500,000.

9. During this same time period, the Rigases also requested that Adelpia consent to the sale of additional pieces of property that were not subject to the original stipulation in order to generate funds to pay criminal counsel. In a May 22, 2003 letter, counsel for Adelpia made clear that it would reject the Rigases' continued efforts to fund their defense through selling properties:

**neither of these properties comes within the scope of our agreement with regard to the sale of certain properties and the placement of funds in escrow. Thus, we cannot consent at this time to the listing of these properties or to the use of the funds for "legal and living expenses." It may be appropriate for us to meet relatively soon to discuss the Rigases' financial status and their budgets going forward. It was not our intent, when we agreed to sell certain properties, that all Rigas assets would be available for sale to fund their ongoing living and legal expenses.**

[Ex. A: Letter, G. Carpinello to M. Weis (May, 22, 2003).]

10. Around the same time, the Rigases also attempted to obtain funds for criminal defense costs through Adelpia's directors' and officers' liability policies. This attempt was ultimately unsuccessful, and the Rigases never obtained any money from these policies for this purpose.

11. Because of a complete lack of funding, as of June 30, 2003, the Rigases' criminal and civil and counsel and experts were owed a total of approximately \$2.5 million. Most notably, Navigant Consulting, which had been retained in January, 2003 to assist in document review, with the promise of being funded out of property sales was owed approximately \$800,000.

12. Around this same time, the Rigases' criminal counsel made me aware of the critical need to get funding in place immediately so they could retain expert witnesses, review documents and otherwise prepare for trial, which was then scheduled to begin in January of 2004.

13. With the criminal defense in desperate need of funds, by letter dated May 23, 2003, we sent a letter to counsel for Adelphia noting that no properties had yet been sold pursuant to the Property Stipulation and that the inability of the Rigases to fund defense costs was prejudicing their defense, especially considering that the criminal trial was scheduled for January 2004. [Ex. B: Letter, L. McMichael to P. Korologos (May 23, 2003).] The letter also suggested that defense costs be funded from the cash flow generated by the private cable companies owned by the Rigases. Adelphia, who was managing the privately-owned Rigas cable systems, refused to permit those systems to provide indemnification to the Rigases.

14. Accordingly, on July 18, 2003, the Rigases filed a Motion to Modify the Temporary Restraining Orders to Permit Funding of Criminal and Civil Defense Costs from Cash Generated by Private Cable Companies. The Motion explained the severe funding issue that was facing the Rigases:

The Rigases' inability to adequately defend themselves against the criminal and civil charges against them has now reached a critical stage. The criminal trial starts in a little over five months. There are millions of documents to review, index and assimilate into the defense. This is a labor intensive process, and consequently very expensive. Without defense cost funding, the Rigases ability to defend themselves fully and fairly will be impaired. By way of example only, the tasks required of the Rigases and their counsel include analysis of millions of pages of documents, retention of experts to help understand and articulate the complicated accounting and business issues and, in light of these analyses, develop trial strategy and testimony.

[Ex. C: *In re Adelphia Comm'c Corp.*, No. 02-ap-41728 (Bankr. S.D.N.Y.) Mot. to Modify TRO ¶ 2 (July 18, 2003).]

15. The Motion further explained the difficulties facing the Rigases' trial preparation because of Adelphia's refusal to provide the defense with the same searchable CDs provided to the government unless the Rigases paid Adelphia an

exorbitant amount of money to reimburse it for its costs in scanning the documents onto CDs:

The Rigases' preparation of their defenses has been hampered by Adelpia's refusal to provide the Rigases with access to documents and by the financial constraints associated with the Rigases' inability to fund their defense costs. Specifically, Adelpia refused to provide the Rigases with copies of over 400 compact disks that Adelpia had provided to the government unless the Rigases agreed to reimburse Adelpia for its cost of scanning the Adelpia documents onto the compact disks provided to the government. Because the Rigases did not have sufficient funds, it had to wait several months, until November 2002, to obtain these disks from the government at the cost of duplicating the disks only. Notably, the disks ultimately provided to the Rigases are not word-searchable, thus each and every document must be individually reviewed. Adelpia has once again offered to provide the Rigases with word-searchable disks, but only if the Rigases reimburse its cost. Although word-searchable documents would facilitate the Rigases' review of the millions of documents on the disks, even if Adelpia's reimbursement demand were reasonable, given the present financial situation, the Rigases are not in a position to reimburse Adelpia's costs.

[*Id.* at ¶ 35, n.9.]

16. At the hearing, counsel for John Rigas explained the critical need for funding:

We're at a critical point, where I can represent to this Court that without money we cannot come close to providing an adequate – what I and co-counsel believe would be adequate defense of the Rigases, in a case – and I can represent, Your Honor, in a case which I consider to be highly defensible, where I believe there has been major misunderstandings of relevant facts, and I believe the possibility of the defense are good and strong.

[Ex. D: *In re Adelpia Comm'c Corp.*, No. 02-ap-41729 (Bankr. S.D.N.Y.) Tr. Oral Arg. at 41 (Aug. 1, 2003).]

17. At the conclusion of the hearing, the Bankruptcy Court granted this motion and modified the TROs to permit the private cable companies to pay up to \$15 million of the Rigases' defense costs. The Court acknowledged that while the \$15 million amount sought was substantial in absolute terms, in comparison to the professional fees incurred by the Debtors and the Committees and to the amount at issue in the case, "it was a drop in the bucket." [Ex. D:

Aug. 1, 2003 Tr. at 137-38.; *see also id.* at 160]. The Court's oral ruling was reduced to a written Order dated August 7, 2003.

18. The Bankruptcy Court noted, however, that it was not prejudicing the rights of any banks which might have claims to prevent the indemnification.

19. When certain of the banks to whom certain of the private cable companies owed money threatened to sue and Adelphia threatened to appeal the August 1, 2003 ruling, Adelphia, the Rigases and the banks entered into negotiations. In exchange for the Rigases giving up substantial control of its privately owned cable companies to Adelphia, Adelphia and the banks agreed to permit the funding.

20. Although the Bankruptcy Court's Order capped the defense costs to be funded under the Order at the \$15,000,000 sought, the Court noted that the Order was "subject to reconsideration, in the event of a material change in the facts, or to deal with new needs, but subject to fine tuning, with respect to authorized expenses, not for a do-over of the matters I've decided today." [Ex. D: Aug. 1, 2003 Tr. at 156.]

21. The \$15 million figure was an estimated sum the Rigases believed would fully fund criminal and civil defense costs, and was based upon an assumption that the criminal trial would last a total of approximately 8 weeks, commencing January 5, 2004 and concluding in early March 2004.

22. This assumption ultimately proved incorrect after several events dramatically increased the estimated cost of the criminal defense and imposed additional burdens on civil counsel. Among other things, the government's estimate of the length of the prosecution case doubled in length, trial was postponed for approximately two months and the case was expanded

substantially by the government's filing of a Bill of Particulars on the eve of trial. For all these reasons, the original funding was nearly exhausted by the end of January, 2004.

23. Accordingly, the Rigases filed a Motion to Modify the Court's August 7, 2003 to Permit Additional Funding of Defense Costs seeking an additional \$12.8 million for the criminal defense. The \$12.8 million estimate for consulting and testifying experts and for counsel for the defense of the criminal case through June, 2004, was based upon the trial schedule and the information provided by the government and described above concerning the prosecution case.

24. In that Motion, the Rigases explained:

One of the reasons for the postponement of the criminal trial date was the recent production by the Government, Adelpia and Buchanan Ingersoll PC of millions of pages of new documentary evidence. In addition, criminal defense counsel has recently received from the Government 20 boxes of proposed trial exhibits and thousands of pages of 3500 materials, including statements of more than 150 witnesses. The legal and factual issues in the criminal case have also expanded substantially by the Government's filing of a Bill of Particulars and 404(B) notice. Because of this onslaught of additional documents and expansion of the criminal case, the Rigases have incurred substantial unanticipated expenses in the review and analysis of this new evidence and in additional trial preparation.

[Ex. E: *In re Adelpia Comm'c Corp.*, No. 02-ap-41728 (Bankr. S.D.N.Y.) Mot. to Modify TRO ¶ 14 (Jan. 30, 2004).]

25. The Bankruptcy Court held a hearing on February 18, 2004. Although the criminal trial was to start just a few days later, lead counsel from each of the Rigas defendants attended this very important hearing. Each made very compelling arguments regarding why additional funds were needed. [Ex. F: *In re Adelpia Comm'c Corp.*, No. 02-ap-41728 (Bankr. S.D.N.Y.) Tr. Oral Arg. 57-71; 108-15 (Levander); 71-75 (Grand); 75, 115-17 (Fleming) (Feb. 18, 2004); *see also id.* at 94-97 (McMichael).]

26. Based largely on those arguments, the Bankruptcy Court granted an additional \$12.8 million from the private cable companies. In doing so, the Bankruptcy Court stated:

I noted last time that the amount requested by the Rigases, while plainly very large in absolute terms, was a drop in the bucket in the context of the fee requests in these cases, and I believe that even with the incremental amount sought here, that remains true. ... [T]he Rigases, nevertheless, were fair in pointing out that in the context of the total fees the estate is bearing, and understandably so, the amount they are asking *for is still a drop in the bucket. And it is hardly excessive in amount when compared to the fees charged by other professionals, Boies Schiller, Covington & Burling, and PWC, who have been focusing on Rigas-related matters.*

[*Id.* at. 129-131.]

**Comparison of the Rigases' Counsel Fees to Fees Incurred  
by Adelphia to Assist the Government's Prosecution of the Rigases**

27. As the Bankruptcy Court noted, the fees received by defense counsel were merely a drop in the bucket compared to the fees incurred by Adelphia.

28. Specifically, for the three months between March 27, 2002 and June 26, 2002, Boies, Schiller and Flexner billed Adelphia \$3.1 million; Fried, Frank billed Adelphia \$4.8 million and Covington billed Adelphia \$2.5 million, for a total of \$10.4 million. During this period, PricewaterhouseCoopers billed Adelphia \$1.7 million.

29. For the period July, 2002 through October 31, 2003, Boies billed \$11.9 million, Covington billed \$10 million, Fried, Frank billed \$700,000 and PWC billed \$25 million, for a total of over \$47.5 million. When added to the pre-bankruptcy fees, through October, 2003, these three firms billed Adelphia almost *\$60 million*.

30. According to Boies' lawyer Phil Korologos, the stark decline in the involvement of Fried, Frank was a result of the Independent Directors and Boies' view that Fried, Frank was "too close" to John Rigas and they did not trust that Fried, Frank would look out for the company's interests over those of the Rigases.

31. In contrast, prior to August 2003, when criminal defense finally obtained an order for funding, John Rigas' defense counsel, Curtis, Mallet, Prevost, Colt & Mosle LLP, had only



billed approximately \$1.2 million and Tim Rigas' counsel, Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C., had only billed approximately \$780,000, for a total of just over \$2 million. In addition, Navigant billed approximately \$1 million.

32. Through October 2003, these three firms billed another \$1,256,275.67.

33. Thus, during the same time period, counsel for John and Tim Rigas and Navigant billed \$4,236,275 versus \$60 million billed by Boies, Covington and PWC during the same time period.

34. Of the \$27.8 million in criminal defense funding permitted by the Bankruptcy Court under its August 8, 2003 and March 9, 2004 funding orders, the Rigases' defense counsel and litigation support received the following: Curtis Mallet: \$5,066,221.03; Morvillo: \$4,129,474.22; and Navigant: \$4,663,623.01, for a total of under \$14 million.

35. Notably, since the prosecution case took longer than the government had predicted, the funds authorized by the Bankruptcy Court were exhausted before the end of the prosecution case. In fact, these criminal defense firms were collectively owed approximately over \$1.1 million for work completed through the date of the jury's verdict, after exhausting their retainers.

#### **Prejudice Caused by Lack of Funding**

36. From late 2002 through trial, the Rigases were consistently told that the lack of available funds severely constrained our ability to prepare for trial.

37. In late September 2002, the Rigases began receiving a vast number of documents from, among others, the United States Attorney's Office, Adelphia, Adelphia's lawyers and Adelphia's auditors. From late 2002 through early 2003, the Rigases received approximately 8

million pages of material, all of which needed to be reviewed and analyzed to defend against the criminal and civil charges pending against the Rigases. Due to a lack of money, the Rigases themselves, along with other volunteers, initially undertook the task of reviewing these documents, and a consultant was not retained to assist with document review until January of 2003. Even after this date, the Rigases continued to have the primary responsibility for reviewing documents produced by the United States Attorney's Office.

38. Following the hearing in the Bankruptcy Court on August 1, 2003, I had a conversation with Peter Fleming, counsel for John Rigas. Mr. Fleming was extremely appreciative of the funding that had been granted by the Bankruptcy Court. But, he expressed extreme concern that the Rigas defense would not be able to overcome the prejudice it suffered by a lack of funding during the prior year.

#### **Buchanan Documents Produced Post-Trial**

39. In August, 2004, we received from Buchanan Ingersoll numerous documents relating to Buchanan's advice to the Rigases in connection with John Rigas' estate plan. According to Buchanan, these notes were not produced prior to trial because they had been misplaced.

#### **The Government Interview of Carl Rothenberger**

40. On January 27, 2004, the government sent the Rigases an updated list of witness statements that included over 150 people, including memoranda of interviews of Rothenberger conducted by counsel to Adelpia's Special Committee. [Ex. G.]

41. The government provided the Rigases with notes from interviews that it conducted with over 70 people included on this list. Many of the people included on this list had a very limited involvement with and knowledge of Adelpia and were consequently of minor

importance to the case. For example, the government produced its notes from interviews with Dick Garbarino, who was a self-employed caretaker. The government nevertheless produced the notes of its interviews with these people, including many people whose names were never even mentioned at the trial. It did not produce notes or memoranda from any government interview of Rothenberger.

42. Prior to the criminal trial, Rothenberger consistently refused to speak with me or the Rigases' criminal defense counsel. Through his counsel, Rothenberger advised me that, if he was subpoenaed to testify at trial, he would invoke his Fifth Amendment rights. I was also advised that Rothenberger took a similar view with respect to the government: he would not talk to government investigators or lawyers and would assert a Fifth Amendment privilege if subpoenaed.

43. On September 12, 2007, I, along with two of my partners, met with Bill Johnson, the Assistant U.S. Attorney then in charge of the Rigases' case, to discuss the government's case against the Rigases and the Rigases' motion for a new trial.

44. Chris Clark and Richard Owens, who prosecuted the case and are now in private practice, also attended this meeting. During the meeting, counsel for the Rigases summarized testimony that Rothenberger had given in the subsequent civil depositions and highlighted portions of documents used in those depositions that were exculpatory to the Rigases.

45. Included among the documents mentioned were a January 9, 1998 memorandum from Bruce Bookin of Buchanan Ingersoll to Carl Rothenberger and Paula Zawadzki, also of Buchanan. The memorandum discussed ways in which Adelphia could provide liquidity to the Rigas family so that they could participate in future stock offerings without directly lending the money to Highland Holdings.

46. Also mentioned during my September 12 meeting was a 1999 memorandum from James Brown to the Adelphia board that specifically mentions that the initial use of proceeds from the co-borrowing facility entered into in 1999 was to make a distribution to the Rigas family so that they could purchase equity securities from Adelphia.

47. Clark indicated that the information that was presented was not new and stated that he had interviewed Rothenberger prior to the criminal trial. According to Clark, the government would have indicted Buchanan if it had one more shred of evidence against it.

48. I sought confirmation that there were notes from the meeting and asked the government to produce the notes. On September 21, 2007, Assistant U.S. Attorney Johnson called me and advised that Clark and Postal Inspector Feeney had interviewed Rothenberger on February 20 and 21, 2004. He confirmed that Feeney took notes, which were not produced to the Rigases. The government refused to produce those notes to the Rigases.

#### **October 26, 2010 Meeting with Adelphia's Counsel**

49. On October 26, 2010, I spoke with counsel for Adelphia, attorney Phil Korologos of the firm Boies Schiller & Flexner.

50. According to Mr. Korologos, after the May 17, 2002 meeting between Adelphia, its counsel and representatives, and the government regarding Adelphia's cooperation with the government and the possible indictment of Adelphia, it was clear the only way Adelphia could avoid indictment was for the Independent Directors to take control of Adelphia from the Rigases. Further, the government advised that, prior to the May 17, 2002 meeting, the government was on the verge of shutting Adelphia down and had trailers ready to be sent to Coudersport to seize control of the Company.

51. Because the Rigas Family held a majority of seats on the Adelphia Board of Directors and also controlled a majority of Adelphia's voting stock, the only way to eliminate Rigas control of Adelphia without time consuming litigation was to convince the Rigases to resign.

52. In late 2004, the government informed counsel for Adelphia that if the Rigas Managed Entities ("RMEs") continued to indemnify and advance attorney's fees and defense costs for the Rigases, the government would indict the RMEs. Counsel for Adelphia, Alan Vinegrad, advised me of the threat.

53. Vinegrad emphasized the importance of the Thompson Memorandum and its nine factors in the USAO's determination whether to charge the RMEs. Vinegrad emailed me a copy of the Thompson Memorandum so that I could be familiar with the factors the USAO would consider in determining whether to charge the RMEs.

54. Consistent with the preview from Adelphia's counsel, during the December 17, 2004 conversation between Assistant U.S. Attorney Christopher Clark and me regarding the threat to indict the RMEs, Clark emphasized the overarching importance of the Thompson Memorandum. Specifically, Clark indicated he would give the RMEs until January 4, 2005 to make a presentation regarding the Thompson factors. Clark also noted that most of the factors related to the corporation's response to the alleged wrongdoing rather than substantive defenses to the charges that might be brought.

I declare under penalty of perjury that the foregoing is true and correct under 28 U.S.C. § 1746.

EXECUTED ON: October 3, 2011

  
Lawrence G. McMichael