

US BANKRUPTCY COURT

2016 FEB 8 AM 9 59

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
CENTRAL DIVISION

IN RE

TELEXPREE, LLC,
TELEXPREE, INC.,
TELEXPREE FINANCIAL, INC.,

Debtors.

Chapter 11

Case No. 14-40987-MSH

Case No. 14-40988-MSH

Case No. 14-40989-MSH

Jointly Administered

**OPPOSITION TO THE TRUSTEE’S MOTION TO COMPEL
JAMES MERRILL TO APPEAR AT
DEBTORS’ SCHEDULED SECTION 341 MEETING**

Now comes James Merrill, by and through undersigned counsel, and hereby objects to the Trustee’s Motion To Compel James Merrill To Appear At Debtors’ Scheduled Section 341 Meeting. As grounds and reasons therefore, Mr. Merrill states the following:

1. Mr. Merrill is scheduled for trial in the related Federal criminal proceeding, styled *United States v. James Merrill*, Case No. 14-40028-TSH, in just eight months, on October 3, 2016. As the Trustee well knows, if Mr. Merrill is compelled to appear at the scheduled Section 341 meeting, he will appropriately, and necessarily, invoke the rights and privileges afforded him by the Fifth Amendment to the United States Constitution and will respectfully decline to answer any questions regarding the Debtors.

2. Mr. Merrill respectfully submits that compelling him to appear, merely to invoke his Fifth Amendment, will seriously complicate the parallel criminal proceeding, if not deprive Mr. Merrill the ability to receive a fair trial in the District of Massachusetts. It is reasonable to conclude that Mr. Merrill’s public appearance and invocation of his Fifth Amendment will be widely disseminated by the local news organizations, as the criminal and related proceedings



have been the subject of significant and ongoing publicity. Mr. Merrill has a constitutional right to a fair and unbiased jury trial. *See, e.g., Skilling v. United States*, 561 U.S. 358, 377 (2010) (“The Sixth Amendment secures to criminal defendants the right to trial by an impartial jury”). Any publicity of him publicly invoking his Fifth Amendment will seriously, if not irremediably, prejudice this fundamental constitutional right, at least in the District of Massachusetts. *Cf. Skilling*, 561 U.S. 358, 382-83 (2010) (noting, *inter alia*, that “news stories about Skilling were not kind, [but] they contained no confession or other blatantly prejudicial information of the type readers or viewers could not reasonably be expected to shut from sight” and “unlike cases in which trial swiftly followed a widely reported crime, over four years elapsed between Enron’s bankruptcy and Skilling’s trial”). Here, there are only months until Mr. Merrill’s criminal trial.

3. The potential injury to Mr. Merrill’s constitutional right to a fair trial is only amplified by the Trustee’s stated plan of holding the 341 meeting at Mechanics Hall in Worcester “to accommodate expected attendees.” Trustee Motion at 6. It is reasonable to conclude from this assertion that the Trustee expects a sizeable attendance, that news organizations will be permitted to photograph, videotape, publish and televise Mr. Merrill’s public invocation, and/or that any other attendees will be permitted to photograph and/or videotape the public invocation (through cell phones or otherwise) and widely disseminate the spectacle on the Internet.

4. The Supreme Court has repeatedly recognized that prejudicial pretrial publicity can defeat a defendant’s right to a fair trial by an impartial jury. *See, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961); *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (“The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”). “To

safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity. And because of the Constitution's pervasive concern for these due process rights, a trial judge may surely take protective measures even when they are not strictly and inescapably necessary.” *Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979).

5. Moreover, as Mr. Merrill understands it, “[t]he purpose of the 341 meeting ‘is to enable creditors and the trustee to determine if assets have improperly been disposed of or concealed or if there are grounds for objection to discharge.’” *In re Cunningham*, 1988 WL 148642, *2 (D.South Dakota, September 30, 1988) (unreported), *quoting* S.Rep. No. 989, 95th Cong., 2d Sess. 43 (1978). As such, there appears to be no genuine need for Mr. Merrill to appear in this particular case (even disregarding, for the moment, the inescapable fact that Mr. Merrill must assert his Fifth Amendment privilege at the 341 meeting).

6. First, the Trustee was appointed almost two years ago, on June 6, 2014, *see* Dkt. Entry 623 at p.4, ¶8, and since that time, in the Trustee’s own words, he “has conducted an extensive investigation into the operations of the Debtors’ scheme and Participant involvement therein.” Dkt. Entry 623 at 2. In so doing, the Trustee has spent millions of dollars. “On February 3, 2015, the Trustee submitted a comprehensive Status Report on outstanding matters in the cases. The Status Report set forth, among other things, the background of the Debtors and their affiliates, the breadth and scope of the [alleged] scheme, assets recovered to date and potential additional sources of recovery, as well as efforts at coordination with governmental authorities, both in the United States and in Brazil.” Dkt. Entry 623 at p.4, ¶12. The Trustee has sought information from at least 29 separate entities, including “prepetition and postpetition professionals retained by the Debtors, financial institutions who had prepetition and/or

postpetition relationships with the Debtors, multiple firms who provided payment processing services to facilitate payments between the Debtors and Participants, and firms who provided consulting services to the Debtors or who otherwise were believed to have had business relationships with the Debtor.” *Id.* at ¶14. The Trustee has interviewed former employees and consultants of the Debtors and several participants. *Id.*

7. Moreover, after securing “all of the data from the Debtors’ computers and servers,” the Trustee “and his team ‘virtualized’ (*i.e.*, created a computer environment replicating the original configuration) the [Debtors’ computer] system following a multi-step process....”

Id. at ¶33. As the Trustee explained in a prior pleading:

Extensive testing was performed to determine that the appropriate configurations of the data were achieved. Data from additional servers were later identified that were necessary to operate the network. Once the key components of the system were identified and operating, passwords were obtained through research into document productions received by the Trustee, communications with Federal Authorities, and a variety of investigative tools. *Finally, an intensive analysis was performed to better understand the database structure, table relationships, data fields, and process flow.*

Id. at ¶35 (emphasis added).

8. Indeed, the Trustee’s knowledge of the Debtors’ finances and operations is so vast that the U.S. Attorney has noticed an employee of Horan Consulting Group as their financial expert in the criminal case. *See* November 20, 2015 Letter, attached hereto as Exhibit 1. Of course, the Trustee works for Horan Consulting Group, *see* Huron Consulting Group Press Release, dated April 27, 2015,

<http://ir.huronconsultinggroup.com/phoenix.zhtml?c=180006&p=irol->

[newsArticle_Print&ID=2040198](#) (last viewed February 6, 2016), and the Trustee petitioned this

Court to appoint Huron as successor accounting and financial advisor to the Trustee. *See* Dkt.

Entry 614.

9. Second, Mr. Merrill is not an appropriate person to serve as the Debtors' representative at the 341 meeting (even assuming *arguendo* there was no Fifth Amendment issue). On information and belief, Mr. Merrill has not been an officer of the company since a few days after the petition was filed. Moreover, pre-petition, he was not the "person in control" of the company; his responsibilities were far divorced from the finances of the Debtors, and he did not "control" the company. Lastly, on information and belief, at the time the bankruptcy petition was filed, Stuart MacMillan was the interim CEO (who actually signed the petition, *see* Dkt. Entry 1) and William Runge of Alvarez Marsal was the Debtors' Chief Restructuring Officer (*see, e.g.*, Dkt. Entry 13).

10. In his motion, the Trustee makes no effort to document or support why he needs Mr. Merrill to appear at the 341 meeting. There is no affidavit or other sworn support for the Trustee's stated need for Mr. Merrill to appear at the 341 meeting.

11. As such, given the foregoing, in particular (a) the Trustee's exhaustive investigation of the Debtors and his self-professed exhaustive knowledge regarding the operations and finances of the Debtors, (b) Mr. Merrill's necessary invocation of his Fifth Amendment privilege, (c) the fact that Mr. Merrill was not the person "in control" of the company or responsible for its finances, (d) the Trustee's failure to support, in any respect, his assertion that he needs Mr. Merrill to appear at the 341 meeting, and (e) the Trustee's firm has been hired by the U.S. Attorney's Office to serve as an expert witness in the criminal case, and the Trustee himself has acknowledged that he has coordinated his efforts with the governmental authorities (Dkt. Entry 623 at p.4, ¶12), Mr. Merrill respectfully submits that any *arguendo* need to compel Mr. Merrill's appearance is substantially outweighed by the grave risk that doing so will irremediably prejudice Mr. Merrill's constitutional right to a fair trial in the related criminal

proceeding.

WHEREFORE, for all of the foregoing reasons, Mr. Merrill respectfully requests that the Court deny the Trustee's motion to compel.

Respectfully submitted,
JAMES MERRILL,
By his Attorney,

/s/ Robert M. Goldstein
Robert M. Goldstein, Esq.
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(617) 742-9015
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Dated: February 8, 2016

Certificate of Service

I, Robert M. Goldstein, hereby certify that on this date, February 8, 2016, a copy of the foregoing document has been served via electronic mail on Charles R. Bennett, Jr., Counsel for the U.S. Trustee and Assistant U.S. Attorneys Andrew Lelling and Cory Flashner.

/s/ Robert M. Goldstein
Robert M. Goldstein



U.S. Department of Justice

Carmen M. Ortiz
United States Attorney
District of Massachusetts

Main Reception: (617) 748-3100

John Joseph Moakley United States Courthouse
1 Courthouse Way
Suite 9200
Boston, Massachusetts 02210

November 20, 2015

By Email & Regular Mail

Robert M. Goldstein, Esq.
The Goldstein Law Firm
20 Park Plaza, Suite 1000
Boston, MA 02116

Re: United States v. James Merrill & Carlos Wanzeler

Dear Mr. Goldstein:

In his order of October 13, 2015, Judge Hennessy provided that if the government intends to call a financial expert to testify about TelexFree's revenue stream the government should identify that expert by November 20, 2015.


This is to confirm that at trial the government intends to call Timothy Martin as an expert for this purpose. Mr. Martin is a Managing Director at Huron Consulting Group, a firm providing financial advisory consulting services for a number of industries. Mr. Martin is based in Huron's Boston office.

The government will provide a Rule 16(a)(1)(G) disclosure for Mr. Martin, along with such disclosures for any other expert witnesses it intends to call, at least 90 days before trial.

Call Cory or me with any questions.

Sincerely,

Carmen M. Ortiz
United States Attorney

By: 
Cory S. Flashner
Andrew E. Lelling
Assistant U.S. Attorneys

Robert M. Goldstein

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February 8, 2016

Via Hand Deliver

Clerk of Court
Honorable Judge Melvin Hoffman
U.S. Bankruptcy Court
Courtroom 2
5 Post Office Square
12th Floor
Boston, MA 02109

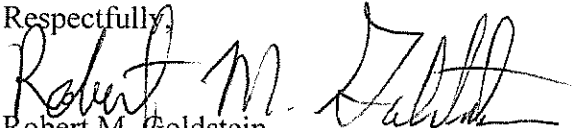
**RE: In Re Telexfree, LLC, Telexfree, Inc., Telexfree Financial, Inc.
14-40987, 14-40988, 14-40989**

Dear Sir or Madam:

Enclosed please find opposition to the trustee's motion to compel James Merrill to appear at debtors' scheduled section 341 meeting for filing in the above captioned matter.

Thank you for your assistance, please call if there are any questions or concerns.

Respectfully,


Robert M. Goldstein