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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRENT ROGER WILKES (1), JOHN THOMAS MICHAEL (2), Defendants.	Case No. 07CR0330-LAB GOVERNMENT'S MOTION *IN LIMINE* NO. 1: TO PRECLUDE DURESS, NECESSITY, OR COERCION DEFENSE TO BRIBERY OR HONEST SERVICES FRAUD Date: October 1, 2007 Time: 2:00 p.m. Courtroom: 9, Second Floor The Honorable Larry A. Burns

The United States of America, by and through its counsel, Karen Hewitt, United States Attorney, and Sanjay Bhandari, Valerie H. Chu, Jason A. Forge, and Phillip L. B. Halpern, Assistant United States Attorneys, hereby moves this Court to preclude any evidence or argument on duress, necessity or coercion as a defense to the bribery and honest services fraud charges in the Superseding Indictment. Such a defense is inapplicable to the charges in this case, both as a matter of law, and because no reasonable juror could find for such a defense based upon the facts of this case.

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I

INTRODUCTION

The Superseding Indictment charges defendant Brent Roger Wilkes with numerous bribery-related offenses, including conspiracy to commit honest services fraud and bribery, as well substantive counts of bribery and honest services fraud. According to the Superseding Indictment, from about 1995 through at least 2004, defendant Wilkes bribed former Congressman Randall H. "Duke" Cunningham in assorted, sundry, and indeed tawdry ways, including expensive meals, travel in a private plane, use of jet boats, payments for prostitutes, and over $625,000 in checks and wire transfers. In return for these payments, Cunningham obtained millions of dollars in Congressional appropriations for Wilkes, and pressured Executive Branch officials to direct or release millions of dollars to Wilkes.

In his defense, Wilkes might seek to argue that he was coerced or extorted into bribing Cunningham to get government business. The Court should preclude such a defense, as a matter of law and based upon the facts of this case. First, as a matter of statutory construction and logic, "economic necessity" is no defense to bribery, as several courts have concluded. In its only decision on this issue, the Ninth Circuit strongly suggested as much, though it ultimately decided the case on narrower grounds. Second, as a factual matter, the government's case against Wilkes is based not on one bribe to be explained by exigent circumstances, but a nearly 10-year pattern of bribes. Further, Wilkes has proffered no facts that would support a necessity defense, and in his post-indictment statements, vehemently denied that Cunningham demanded any bribes, or that he (Wilkes) had provided any. Thus, there may not be a dispute on this matter, but in an abundance of caution, the Government moves to preclude defendant Wilkes from presenting irrelevant argument or evidence about duress or necessity, including economic coercion or extortion.

II

ARGUMENT

A. A MOTION *IN LIMINE* IS A PROPER MEANS OF RESOLVING THIS ISSUE

A defendant's right to have facts determined by a jury does not include the right to present evidence which, "even if believed, does not establish all of the elements of a defense." *United States v. Dorrell*, 758 F.2d 427, 430 (9th Cir. 1985); *United States v. Bailey*, 444 U.S. 394, 414-15 (1980)

(despite general rule that jurors judge the credibility of testimony, "it is essential that the testimony given or proffered meet a minimum standard as to each element of the defense so that, if a jury finds it to be true, it would support an affirmative defense–here that of duress or necessity."). A motion *in limine* to preclude a necessity defense should be granted when "the evidence, as described in the defendant's offer of proof, is insufficient as a matter of law to support the proffered defense." *Dorrell*, 758 F.2d at 430 ("The trial court ruled properly in this case" by precluding a necessity defense at the motion *in limine* stage)*; see also United States v. Springer*, 51 F.3d 861, 868 (9th Cir. 1995) (court properly excluded evidence and refused to instruct on proffered uncontrollable circumstances defense)*; United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991) (affirming trial court's preclusion of necessity defense based on proffer).

B. TO PROCEED WITH A DURESS OR NECESSITY DEFENSE, DEFENDANT MUST PROFFER ADEQUATE EVIDENCE OF ALL ELEMENTS OF THE DEFENSE

Before a defendant may present a necessity defense, "his offer of proof must establish that a reasonable jury could conclude: (1) that he was faced with a choice of evils and chose the lesser evil; (2) that he acted to prevent imminent harm; (3) that he reasonably anticipated a causal relationship between his conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law." *United States v. Cervantes-Flores*, 421 F.3d 825, 829 (9th Cir. 2005) (citation and quotation marks omitted). If the "defendant's offer of proof is deficient with regard to any of the four elements, the district judge must grant the motion to preclude evidence of necessity." *Id.*

Similarly, before a defendant may raise a duress defense, he must proffer: "(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) lack of a reasonable opportunity to escape the threatened harm." *United States v. Moreno*, 102 F.3d 994, 997 (9th Cir. 1996). If the defense proffers evidence that "is insufficient as a matter of law to support a duress defense, . . . the trial court should exclude that evidence." *United States v. Contento-Pachon*, 723 F.2d 691, 693 (9th Cir. 1984).

A defendant's proffer must be adequate to meet all elements of the defense – merely making a proffer does not automatically entitle a defendant to proceed to the jury with the defense. *See Moreno*, 102 F.3d at 997 (despite defendant's claims that gang leader threatened his life and lives of family

members if defendant did not transport drugs from California to Hawaii, and that he was under constant surveillance during flight and at airport when he was arrested with cocaine, defendant could not prove absence of legal alternatives where three weeks that passed between initial contact by gang and flight); *United States. v. Karr*, 742 F.2d 493 (9th Cir. 1984) (trial court did not err in refusing requested instructions on defense of duress because defendant failed to establish an immediate threat although evidence was presented that defendant, his daughter, and his mother were threatened at different times and sometimes with a gun, where defendant passed up many opportunities to escape and never notified authorities of threats); *see also Bailey*, 444 U.S. at 415 ("Vague and necessarily self-serving statements of defendants or witnesses as to future good intentions simply do not support" a jury finding that defendant-escapees would have turned themselves in at the earliest moment danger could be avoided.).

C. THE FACTS DO NOT SUPPORT AN EXTORTION DEFENSE

Defendant Wilkes has not proffered any facts that would support an extortion / economic coercion defense to bribery. In fact, in a post-indictment public statement, Wilkes categorically denied that Cunningham had coerced Wilkes' bribes:

> Let me also say loud and clear: I never bribed Duke Cunningham or anyone else. He never 'demanded' or asked for a bribe from me, and neither he nor anyone else in Congress ever helped my companies with projects for any reason other than their merits.

See Exhibit A (Brent Wilkes' Statement, from attorney Mark Geragos' office, 4:30 p.m. Wednesday, Feb. 14, 2007) at 1.

Not only has Defendant Wilkes denied the existence of coercion, but the facts of this case do not permit such a claim to be credibly made. The overt acts in the Superseding Indictment (which the Government proffers that it can support) include a plethora of bribes that defendant Wilkes provided Cunningham over about a decade, including over $100,000 in 2000, and over $500,000 in 2004. The two remained friendly enough throughout this period that they shared numerous vacations, including a vacation in Hawaii in August 2003, during which Wilkes and Cunningham relaxed in a hot tub with prostitutes hired by Wilkes. No reasonable juror could believe that during that long period, despite outward appearances, Wilkes was secretly operating under a imminent threat of serious bodily injury or death, or some other harm sufficient to justify bribery, and could never find a way to inform law enforcement of such threats. *Cf. Bailey*, 444 U.S. at 415 (affirmed trial court's decision to not give a

duress/necessity jury instruction because escape defendants simply had not "surrendered or offered to surrender at the earliest possibility" and so failed to meet this "indispensable element of the defense of duress or necessity.").

D. EXTORTION IS NO DEFENSE TO BRIBERY, AS A MATTER OF LAW

Before even considering a proffer from defendant Wilkes, this Court should consider whether economic coercion / extortion could ever serve as a defense to bribery. The Government submits that it could not, both as a matter of statutory construction, and because it cannot meet the elements of either defense.

1. The Bribery Statute Does Not Allow for an Extortion Defense

Unlike in common law, in federal criminal law defenses ordinarily arise from the statute defining the crime. In *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 490 (2001), the Supreme Court cast doubt on whether "whether federal courts ever have authority to recognize a necessity defense not provided by statute." The Court noted that "[e]ven at common law, the defense of necessity was somewhat controversial," and commented that "under our constitutional system, in which federal crimes are defined by statute rather than by common law, it is especially so." *Id.* (citations omitted). In *Oakland Cannabis*, the Court addressed the claim that medical necessity supplied a defense for manufacture and distribution of marijuana, in violation of 21 U.S.C. § 841. The Court declined to decide"whether necessity can ever be a defense when the federal statute does not expressly provide for it," because of its ruling that "a medical necessity exception for marijuana is at odds with the terms of the Controlled Substances Act," even though the statute did not "explicitly abrogate the defense." *Id.* at 491. Thus, as a matter of statutory construction, common law defenses may not be implied in all federal criminal statutes, in particular where they conflict with the terms of the statute.

The plain language of 18 U.S.C. § 201 indicates that there is no extortion or economic coercion defense to bribery. Subsection (b)(1), which covers those who pay bribes, speaks in extremely broad terms of "directly or indirectly" giving, offering, or promising "anything of value" to influence a public official, with no exception allowed for any justifications for such an act.[1/] Subsection (b)(2), which

[1/] 18 U.S.C. § 201 states, in pertinent part: "(b)Whoever--(1) directly or indirectly, corruptly (continued...)

covers those who receive bribes, speaks in similarly broad terms of "directly or indirectly" demanding, seeking, or accepting "anything of value."[2/] Given that section 201 *expressly* considers the situation of a public official who "corruptly demands" a bribe, but provides no defense for that in the broad language applicable to bribers, a court should not infer any defense based on the argument that the bribee "demanded it" (i.e., extortion or coercion). *Oakland Cannabis*, 532 U.S. at 490 (doubtful whether "whether federal courts ever have authority to recognize a necessity defense not provided by statute"); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("[C]ourts must presume that a legislature says in a statute what is means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon [of statutory construction] is also the last: judicial inquiry is complete.") (citation omitted). The legislative history to section 201 indicates that its broad terms were deliberately chosen to strengthen the law and to close prior loopholes, and that Congress carefully considered the drafting of the statute for approximately three years. See H.R. Rep. No. 87-748, at 2-3, 7(1961) (Judiciary Committee report on bill recites the intent to strengthen the criminal laws related to bribery, graft, and conflicts of interest, and for other purposes). Congress expressly considered both parties to a bribe as participating equally, as coconspirators, in the most "corrosive" crime imaginable: "When a bribe is exchanged, the parties have, in effect, conspired to deprive the United States of the honest services of its official. Such conduct is universally condemned. Nothing is more corrosive to the fabric of good government than bribery, and [the revised] laws seek to preserve to the United States the value of the honest services of its officials and employees by severely punishing their sale." *Id.* at 6. Thus, the plain meaning and legislative history of the bribery statute both indicate strongly that Congress did not intend to allow an extortion or economic coercion defense on the part of the briber,

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[1/](...continued)
gives, offers or promises anything of value to any public official ... with intent (A) to influence any official act; or (B) to influence such public official ... to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or (C) to induce such public official ... to do or omit to do any act in violation of the lawful duty of such official or person."

[2/] 18 U.S.C. § 201(b)(2) states in part: "(b)Whoever–...(2) being a public official ...directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value personally or for any other person or entity, in return for: (A) being influenced in the performance of any official act."

whom it viewed as a coconspirator of the public official in an "universally condemned" crime "corrosive" to good government.

In its only discussion of this issue, the Ninth Circuit expressed little tolerance for the economic coercion theory. In *United States v. Lee*, 846 F.2d 531 (9th Cir. 1988), the defendants claimed that "the specific intent necessary to prove the crime of bribery under 18 U.S.C. § 201 was negated by their fears that they would lose their contract with the government if they did not pay off government inspectors," and complained that the court's jury instruction on economic coercion, as read, improperly shifted the burden of proof to the defense. *Id*. at 534. The Government urged the Ninth Circuit to reject the economic coercion theory both as a matter of law, and as unsupported by fact. While the Court declined to do either, instead finding the misreading of the instruction to be harmless error, *id.* at 536, it did comment on the dubiousness of "economic coercion" as a defense to bribery: "We note that a plain reading of 18 U.S.C. § 201(b)(1)(A) and surrounding subsections casts doubt on the [defendants'] economic coercion theory." *Id*. at 534 n.1.

As a matter of statutory construction and logic, several other circuits have rejected the notion that extortion is a defense to bribery. In *United States v. Hall*, 536 F.2d 313 (10th Cir. 1976), for example, former Oklahoma Governor Hall was charged with extortion, while corporate executive Taylor was charged with bribery, for the same $50,000 paid by Taylor to Hall. *Id.* at 316-317. The Tenth Circuit summarily dismissed the argument that it was logically inconsistent to charge Taylor with bribing Hall, while charging Hall with extortion, reasoning as follows:

> We disagree with the argument advanced that bribery and extortion are mutually exclusive. To be sure, they are distinct crimes as shown by [citations omitted]. It cannot be said that in a bribery case there is never an aspect of coercion on the part of the bribee. The Seventh Circuit has said that such conduct (extortion) may also constitute classic bribery. The [Seventh Circuit] also noted that bribery and extortion are not to be considered mutually exclusive nor does the fact that the alleged victims of the extortion were also bribers nullify anything.

So, charging Hall with extortion and Taylor with bribery was not logically inconsistent. *Id.* at 321. The Fifth Circuit stated essentially the same thing in rejecting an extortion defense by proprietors of a gambling operation with respect to their bribes to police officers: "[A]ppellants' insistence that extortion can be a defense to bribery is incorrect. Therefore, even if the appellants were subjected to extortion, they can still be convicted on the bribery charge." *United States v. Colarcurcio*,

659 F.2d 684, 690 (5th Cir. 1981) (citation omitted). Similarly, in *United States v. Kahn*, 472 F.2d 272 (2d Cir. 1973), the Second Circuit refused to read an extortion defense from New York law into Pennsylvania's bribery statutes as a matter of statutory construction, reasoning that "it would be anomalous to read into the Pennsylvania code a [defense] that the New York legislature thought required a separate and explicit section in its state law." *Id.* at 278. Further, as a matter of logic and policy, the court refused to accept artificial distinctions between extortion and bribery: "Almost every bribery case involves at least some coercion by the public official; the instances of honest men being corrupted by 'dirty money,' if not nonexistent, are at least exceedingly rare." *Id.*

As the Ninth Circuit's opinion in *Lee* indicates, a plain reading of section 201 does not support economic coercion as a viable defense to bribery. The legislative history makes it even more unlikely. Moreover, other circuits have uniformly rejected the notion that bribery requires the absence of coercion by the public official. The Court should reject extortion or economic coercion as a defense to bribery.

2. Extortion or Economic Coercion Do Not Amount to Duress or Necessity

Even if the Court were not inclined to reject economic duress or necessity as a matter of statutory construction and logic, the Court should still reject it on the basis that the elements of duress or necessity could not be satisfied by such a defense.

Duress and necessity both excuse criminal conduct based on exigent circumstances that left the actor with no other reasonable alternative. Duress traditionally covered exigencies caused by other people, while necessity covered exigencies presented by natural causes: "Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity." *Bailey*, 444 U.S. at 410. Under "any definition of these defenses, one principle remains constant: if there was a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the defenses will fail." *Id.* Related to this is another common element under both defenses: that the harm to be averted be *imminent*. *Cervantes-Flores*, 421 F.3d at 829 (necessity requires "imminent harm"); *Moreno*, 102 F.3d at 997 (duress requires "immediate threat of death or serious bodily injury"). Further, the harm to be averted must be such that

"the social benefits of the crime outweigh the social costs of failing to commit the crime," *Schoon*, 971 F.2d at 196; to wit, in the duress context, death or serious bodily injury.

Thus, to amount to duress or necessity, the situation must not have allowed any alternative other than paying bribes, the harm must be imminent, and the likely harm must be so serious that it outweighs the social cost of the unlawful conduct. Extortion and economic coercion fail to satisfy any of these elements.

First, there is always a reasonable legal alternative to bribery of the extortionate public official: dealing with other public officials, and reporting the matter to law enforcement. *Jenrette*, 744 F.2d at 821. "The proper response to coercion by corrupt public officials should be to go to the authorities, not to make the payoff." *United States v. Kahn*, 472 F.2d 272, 278 (2d Cir. 1973). For example, the Fifth Circuit rejected an extortion defense as a matter of law for failure to pursue legal alternatives even where defendant claimed to have unsuccessfully filed a complaint against a police officer's extortionate bribes; the court reasoned that he could have pursued matters through the police department's Internal Affairs division. *Colarcurcio,* 659 F.2d at 690. In *United States v. Schoon,* 971 F.2d 193 (9th Cir. 1991), the Ninth Circuit determined that as a matter of law, "the necessity defense is inapplicable to cases involving indirect civil disobedience." *Id.* at 196. There, the defendants raised the argument that the need to prevent future bloodshed due to U.S. actions in El Salvador served as a defense to charges of obstructing IRS activities and disobeying an order a federal officer's order arising from their protest of U.S. involvement. In relevant part, the Ninth Circuit held that because as a legal alternative to criminal protest activity a citizen can always try to *lawfully* change government policy, "indirect civil disobedience can never meet the necessity defense requirement that there be a lack of legal alternatives." *Id.* at 199. Similarly, as a legal alternative to bribery, a citizen can always try to obtain government benefits through lawful means. Because the alternatives of going to law enforcement, and lawfully seeking government benefits, always exist, providing a bribe is never justified.

Second, extortion or economic coercion will not present the requisite immediacy. "The element of immediacy requires that there be some evidence that the threat of injury was present, immediate, or impending." *Contento-Pachon,* 723 F.2d at 693; *see also United States v. Lewis*, 628 F.2d 1276, 1279 (10th Cir. 1980) (necessity defense requires "a real emergency" and "may be asserted only by a

defendant who was confronted with a crisis as well as a personal danger"). "[A] veiled threat of future unspecified harm will not satisfy this requirement." *Id.*; *see also United States v. Becerra*, 992 F.2d 960, 964 (9th Cir. 1993) (threat of being "taken care of" by someone believed to be connected to the mob created a legitimate fear that defendant or his family would be harmed, but "that is not enough" to show "an immediate threat"). For example, in *United States v. Jenrette*, 744 F.2d 817 (D.C. Cir. 1984), the defendant claimed that alcoholism-induced paranoia made him fear imminent physical harm lest he participated in bribery. Noting that two days had elapsed between the bribe offer and its acceptance, which would have allowed defendant to contact police, and that defendant had suggested bringing another public official into the deal, the Court rejected defendant's duress defense as legally insufficient. *Id.* at 821.

Third, the results of a citizen agreeing to the extortionate demands of a public official would be merely the advancement of the citizen's private economic interest. That cannot be a sufficient social benefit to outweigh the effects of what Congress called most "corrosive" crime imaginable to the fabric of good government. H.R. Rep. No. 87-748, at 6 (1961).

Thus, because an economic coercion or extortion defense can never present the lack of legal alternatives, immediacy, or greater public good required for such defenses, this Court should preclude economic coercion or extortion as a defense to bribery, as a matter of law.

E. ANY CLAIMED EXTORTION IS ALSO NOT RELEVANT TO SPECIFIC INTENT

Some out-of-circuit cases have suggested that because bribery is a specific intent crime, requiring the intent to *influence* official action, extortion may be relevant to intent where all the citizen seeks is "his due" – *i.e.,* that to which he is "legally entitled," but which a public official is withholding until paid a bribe. *See United States v. Barash*, 365 F.2d 395, 401-02 (2d Cir. 1966); *United States v. McPartlin*, 595 F.2d 1321, 1341-42 (7th Cir. 1979). In *Lee*, however, the Ninth Circuit noted that not only had "[s]everal circuits" rejected this "that to which [the briber] is entitled anyway" exception, but also that the theory was likely at odds with an early Ninth Circuit case. *Lee*, 534 n.1 (*citing Daniels v. United States*, 17 F.2d 339, 343 (9th Cir. 1927)).

More significantly, those limited cases that allow an entitlement exception apply it strictly to situations in which the official act was non-discretionary and therefore could be viewed as a "legal

entitlement" of the defendant. *See, e.g., McPartlin*, 595 F.2d at 1340-41 (addressing the availability of extortion defense where government entity allegedly threatened to refuse to purchase a pipeline which defendant had already constructed pursuant to an agreement, and to invoke the liquidated damages portion of the agreement, unless defendant paid bribes). Thus, as the Seventh Circuit stated in *United States v. Peskin*, 527 F.2d 71, 84 (7th Cir. 1976), "in a case . . . where a discretionary or legislative decision . . . has been requested, the withholding of such action until a money demand is met could not negate the intent to influence the performance of an official act." *See also City of Chicago Heights v. Lobue*, No. 92-7410, 1995 WL 290389 at *6 (N.D. Ill. May 10, 1995) ("[I]f a person pays a bribe in hope of influencing a governmental decision that is discretionary in nature, extortion can never be a defense to a claim of bribery.").

Because the benefits (including Congressional appropriations) that Wilkes sought from former Congressman Cunningham were legislative in nature and were granted at the discretion of Cunningham and Congress, Wilkes may not raise extortion or economic duress as a defense to specific intent.

III.

CONCLUSION

Both as a matter of statutory construction and logic, economic duress caused by a public official cannot be defense to a private citizen's decision to advance his individual interests through bribery. Such self-interested behavior could also never satisfy the greater social good, immediacy, and lack of reasonable alternatives requirements of the defenses of duress and necessity.

As a factual matter, Wilkes' nearly 10-year pattern of bribes to Cunningham does not permit a reasonable jury finding of economic duress as an excuse. Finally, because Cunningham's alleged official actions for Wilkes were discretionary, legislative acts, Wilkes cannot raise extortion or economic duress as relevant to specific intent, even if Ninth Circuit precedent were to be disregarded to entertain such an argument.

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For these reasons, this Court should preclude any evidence or argument on duress, necessity or coercion as a defense to the bribery and honest services fraud charges in the Superseding Indictment.

DATED: September 24, 2007

Respectfully submitted,

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. BRENT ROGER WILKES (1), JOHN THOMAS MICHAEL (2), Defendants.	Criminal Case No. 07CR0330-LAB CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED THAT:

I, Sanjay Bhandari, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of the government's GOVERNMENT'S MOTION IN LIMINE NO. 1: TO PRECLUDE DURESS, NECESSITY, OR COERCION DEFENSE TO BRIBERY OR HONEST SERVICES FRAUD on the following parties by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Mark Geragos (Counsel for Defendant Wilkes)

2. Raymond Granger (Counsel for Defendant Michael)

I hereby certify that I shall cause to be mailed the foregoing, by the United States Postal Service, to the following non-ECF participants on this case:

NONE

the last known address, at which place there is delivery service of mail from the United States Postal Service.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on September 24, 2007

/s/ Sanjay Bhandari
SANJAY BHANDARI