No. 08-1172

IN THE

Supreme Court of the United States

JOSEPH P. NACCHIO,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

EMERGENCY APPLICATION FOR CONTINUED BAIL PENDING CERTIORARI, AND FOR A TEMPORARY STAY PENDING CONSIDERATION OF THIS APPLICATION

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April 13, 2009

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To the Honorable Stephen G. Breyer, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

The Applicant, Joseph P. Nacchio, hereby applies for an order granting him continued release pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), pending this Court's disposition of his petition for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit. Nacchio also respectfully requests that your Honor briefly stay his surrender deadline (currently set for noon on April 14, 2009) until your Honor has had an opportunity to rule on this application, plus a brief additional interval to permit an orderly surrender. Nacchio has pursued a resolution of the bail pending certiorari issue with great diligence, and the fact that the issue comes to this Court on the eve of his surrender deadline is not his fault. Nacchio filed a substantive application for bail pending certiorari with the courts below only eight (8) days after the *en banc*

decision in this case was issued. He also filed his petition for certiorari with this Court on March 20, 2009, more than two months prior to the deadline, in order to moot the district court's (unwarranted) concern that otherwise his request for bail pending certiorari was premature, and to provide this Court with an opportunity to act on the petition before the summer recess. Nacchio has sought the relief requested herein from the district court (which was denied), and from the Tenth Circuit. A decision from the Tenth Circuit denying the requested relief was not received until approximately 4:33 PM Eastern Time today, April 13, 2009. A copy of that decision is attached as Exhibit J to this application.

A defendant is entitled to bail pending certiorari if he is not a flight risk or danger and his petition is not for the purpose of delay and raises a "substantial question," which courts of appeals have held is "a 'close' question or one that very well could be decided the other way," *United States* v. *Affleck*, 765 F.2d 944, 952 (10th Cir. 1985), that if successful would be likely to produce a new trial or an acquittal. In the context of this Court's certiorari review, a substantial question is one that presents a "reasonable chance"—not a likelihood—that four justices will vote to grant certiorari. *See infra.*

The government concedes that Nacchio, who was convicted of insider trading, is not a flight risk or a danger to anyone's safety. His petition is clearly not for the purpose of delay, as he filed just over three weeks after the sharply divided 5-4 decision

by the *en banc* Tenth Circuit,[1] in order to avoid any delay during this Court's summer recess. His petition also raises several substantial questions of national importance on which the circuits are divided, and will be supported at the certiorari stage by *amicus curiae* briefs from the leading business and criminal defense organizations in this country, including the Chamber of Commerce of the United States, the Washington Legal Foundation, and the National Association of Criminal Defense Lawyers. And the issues he raises, if successful before this Court, are virtually certain to require a new trial or an acquittal as a matter of law.

The government's opposition to certiorari is due on April 22, a matter of days, and only eight days after Nacchio's date of surrender. The petition will be distributed for this Court's May 21 conference. Nacchio has already been out on bail pending appeal for two years without incident, during which time the Tenth Circuit first granted, and then revoked *en banc*, a new trial. The brief additional delay in reporting associated with continuing release pending this Court's disposition of his petition for certiorari would be minimal—and, given the very substantial issues presented, justified. As explained below, a unanimous panel of the Tenth Circuit held that it was "a close question" whether Nacchio is innocent as a matter of law, and four judges of that court

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[1] Nacchio was convicted in April 2007 for his sales of stock in April and May 2001. He was sentenced to six years imprisonment, fined $19 million, and ordered to forfeit $52 million. After the district court denied bail pending appeal, the Tenth Circuit reversed and granted release. A divided panel then reversed Nacchio's conviction and remanded for a new trial before a different district judge. The government sought rehearing *en banc*, which was granted, and a sharply divided 5-4 *en banc* court reinstated Nacchio's conviction, and remanded to the panel the remaining sentencing and forfeiture issues. The procedural history with respect to Nacchio's request for bail pending certiorari is discussed *infra*.

believe that he is entitled to a new trial. The risk of wrongful imprisonment is too great to deny bail. The application should be granted.

INTRODUCTION

The facts and argument are explained in detail in the petition itself. In brief, Joseph P. Nacchio was the Chief Executive Officer of Qwest Communications International, and during his tenure he built Qwest into a telecommunications giant and one of Denver's largest employers. During the dot-com bust from 2000-2002, the formerly high-growth telecom industry was hit particularly hard—it underwent "an industry meltdown of historic proportions" and "the value of publicly traded securities throughout the telecommunications sector" was "largely obliterated." *In re Williams Sec. Litig.*, 496 F. Supp. 2d 1195, 1201, 1264 (N.D. Okla. 2007). In the wake of the Enron and WorldCom debacles, and an accounting restatement and downsizing at Qwest, Nacchio became a high-profile target for the public, and for federal prosecutors. The prosecution spent nearly five years looking for some way to blame Nacchio for the collapse in Qwest's share price, without success.

Just before the statute of limitations expired, Nacchio was charged with insider trading for selling Qwest stock in early 2001. Nacchio had announced to the market months before that he would be exercising and selling options that were set to expire. The prosecution's theory was that at some point his motivation changed, and his reason for selling became instead that he had received inside information, in the form of a prediction from his Chief Financial Officer, that there was a "risk" that Qwest *might* fall short of its year-end 2001 revenue projections by up to 4.2%, eleven or twelve months

later, in a highly uncertain economic climate.

That is a legally unprecedented theory of criminality. This is the first time an executive has *ever* been charged with insider trading when the allegedly material "inside" information consisted of internal corporate risk assessments about financial results for future quarters. In other circuits allegations like these would have been dismissed as a matter of law, even in civil cases. Indeed, well aware of the law, the Securities and Exchange Commission has avoided the prosecution's theory like the plague in its ongoing parallel civil case against Nacchio.

A unanimous panel of the Tenth Circuit held that it was "a close question" whether Nacchio was entitled to *acquittal as a matter of law* on the ground that the CFO's concerns were legally immaterial. The panel held that the evidence was barely sufficient for conviction by applying an inappropriately vague and lenient standard for the materiality of forward-looking predictions, and of interim operating results allegedly portending a future result. As explained in the petition, other circuits apply far more rigorous standards to information of this nature—under which Nacchio is clearly innocent as a matter of law. This case therefore directly raises the question this Court recognized but left open in *Basic Inc. v. Levinson*, 485 U.S. 224, 232 n.9 (1988), concerning the proper materiality standard for "forward looking information" such as earnings projections. That issue "has been the most prolific subject of securities fraud litigation" since this Court last addressed it more than twenty years ago, 3 *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* §6:5 (2d ed. 2008).

This case also presents important and unsettled questions, on which the circuits

are divided, concerning the proper administration of Rule 702 and the *Daubert* standard. The district court inexplicably excluded Nacchio's only substantive witness, the expert Professor Daniel Fischel, without a hearing and without actually making any findings that Fischel's methodology was unreliable. Professor Fischel is the former dean of the University of Chicago Law School and the nation's leading expert in securities matters, and he has previously testified more than 200 times (including for the government in securities cases) without ever being excluded. The district court peremptorily excluded Fischel on the ground that the defendant's summary pretrial notice of his testimony under Rule 16 of the Federal Rules of Criminal Procedure did not conclusively establish the admissibility of his testimony under Federal Rule of Evidence 702, and because the court believed that expert testimony on materiality and stock price movements is irrelevant and unnecessary in complex securities cases.

The Tenth Circuit panel divided, and the majority opinion (written by Judge McConnell) explained that Rule 16 simply does not require expert disclosures sufficient to satisfy *Daubert*, and that if the district court had doubts about the reliability of Fischel's methodology then it was obliged to give the defendant a chance to address them—either on *voir dire* or in a separate *Daubert* hearing. The panel majority also explained that the district court was clearly wrong in thinking that testimony of this nature is irrelevant or inappropriate in securities cases, since expert testimony on materiality and stock price movements is specifically endorsed as a "venerable" practice by the commentary to Rule 702. It held that Fischel's exclusion could not possibly be harmless, and that Nacchio was entitled to a new trial.

The *en banc* court granted rehearing limited to the expert issues, and affirmed the district court by a 5-4 vote. The *en banc* majority refused to address the Rule 16 and relevance errors that had led the panel to reverse, and instead recast the district court's decision as one simply "rest[ing] on *Daubert grounds*," App.15a-16a[2], 11a n.6, 19a, despite the district judge's own statement that *Daubert* was *not* "the main bas[is] on which the Court rested its decision," App.350a, and despite the district court's frank acknowledgment that he did not have sufficient information before him to make a proper *Daubert* assessment. The majority then concluded that the government's motion *in limine* to exclude Fischel somehow put Nacchio on notice, without any further warning by the court, that Nacchio was required to muster all his arguments for Fischel's admissibility in a responsive written proffer—and that the district court was entitled to exclude Fischel without *voir dire* or a *Daubert* hearing merely because his methodology was not yet fully disclosed and explained.

Judge McConnell and three other judges dissented, criticizing the *en banc* court's "unprecedented holding" that criminal defendants are entitled to *no* notice about how a district court intends to resolve *Daubert* issues—which "will apply in all future cases, until ... the Supreme Court intercedes." App.74a. They explained that the *en banc* majority mischaracterized the basis of the district court's decision (which rested on Rule 16 and relevance, not *Daubert*), but that even accepting the majority's premises its legal reasoning squarely conflicted with decisions from other circuits that have held

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[2] "App." refers to the Appendix to the Petition for a Writ of Certiorari filed on March 20, 2009 (No. 08-1172).

that district courts must permit *voir dire* or hold a hearing before excluding testimony on *Daubert* grounds, unless the existing record is sufficient to permit the court to properly exercise its gatekeeper function. Judge McConnell's primary dissent concluded that the procedure followed here was so egregiously unfair to the defendant as to violate due process of law, and chastised the majority for ignoring Justice Breyer's admonition that "it is 'essential' in this context that 'the courts administer the Federal Rules of Evidence in order to achieve the 'end[s]' that the Rules themselves set forth, not only so that proceedings may be 'justly determined,' but also so 'that the truth may be ascertained.'" App.84a. Judge Kelly wrote separately to criticize the majority for choosing "expediency over due process," App.93a (Kelly, J., dissenting), and Chief Judge Henry called the district court's ruling a "draconian decision" that "flies in the face of the truth-finding goals of trial, the constitutional safeguards to a full defense, [and] the liberal thrust of the rules of evidence," App.99a (Henry, CJ, dissenting).

The panel and *en banc* decisions conflict on numerous grounds with decisions of other circuits, on questions of national importance. And as the petition explains, summary reversal is appropriate on several bases. Nacchio need only establish a "reasonable chance" of certiorari to be entitled to bail. His petition meets that standard.

PROCEDURAL HISTORY OF BAIL PROCEEDINGS

The *en banc* court issued its decision on February 25, 2009. Only eight days later, on March 5, 2009, Nacchio filed a substantive motion in the Tenth Circuit pursuant to the Bail Reform Act of 1984, 18 U.S.C. §3143(b), seeking bail pending

Supreme Court action on a petition for certiorari. On March 10, the court denied the motion "without prejudice to renewal subject to initial submission of that application to the United States District Court for the District of Colorado."

In a matter of hours, Nacchio filed his motion in the district court. (Exhibit A attached hereto.) On March 11, the district court issued an order denying that motion as premature. (Exhibit B attached hereto.) The district court held that "[b]y its express terms, 18 U.S.C. §3143(b) allows consideration of a bail request only after the petition for certiorari has been filed. ... According to the Motion, no petition has yet been filed. Therefore the Motion must be denied as premature." *Id.* at 1-2.

On March 12, Nacchio filed an Emergency Motion for Reconsideration (Exhibit C, attached hereto), urging the district court to consider his bail application on the merits and noting that the Supreme Court and courts of appeal have consistently ruled on the merits of applications for release pending action on a petition for certiorari under §3143(b) prior to the filing of a petition for certiorari. In addition, Nacchio requested that the district court stay its order of surrender pending its consideration of his application for release (and up to 14 days for any necessary appellate review by this Court and the Supreme Court) on the condition that Nacchio file his petition for certiorari on Friday, March 20. March 20 was approximately three weeks after the Tenth Circuit's *en banc* decision rather than the ninety days permitted by this Court's rules. Nacchio further assured the district court that he would seek appellate review in the Tenth Circuit of any denial of the bail application within 48 hours.

The government filed a response (Exhibit D, attached hereto), which notably

declined to defend the district court's initial conclusion that the language of §3143(b) precludes bail until a petition for certiorari has been filed. The government fully briefed the issues and expressly urged the district court to resolve the bail issue on the merits. Nacchio filed his reply brief in support of his emergency motion for reconsideration (Exhibit E, attached hereto) the next day. He reiterated his request for a stay of the district court's surrender order to permit orderly resolution of the bail pending certiorari issue, including some opportunity for review by the Tenth Circuit and this Court, before his surrender date (then set for March 23).

On March 19, the district court held a hearing on the pending motions and issued an order staying Nacchio's surrender date (Exhibit F, attached hereto) to give the court sufficient time to consider the bail application, conditional upon Nacchio filing his petition for certiorari on the following day, March 20.

Nacchio filed his petition with this Court on March 20 (Exhibit G, attached hereto), in order to moot the district court's concern that his application for bail was premature. On March 20, the district court entered an order stating that the condition of its March 19 order was satisfied and staying Nacchio's surrender date until further order of that court. (Exhibit H, attached hereto.)

On April 7, the district court denied Nacchio's request for bail, finding that he did not establish that his petition was not for the purpose of delay and that the petition does not raise a "substantial question" under 18 U.S.C. §3143(b). (Exhibit I, attached hereto.) By separate order, the court refused to stay Nacchio's surrender date during appellate review and ordered him to surrender to the custody of the Bureau of Prisons

by noon on April 14.

The next morning, Nacchio renewed his application for release in the Tenth Circuit. Nacchio further requested that Court stay his April 14 surrender date to give that Court and this Court if necessary sufficient time to review his application for bail. On April 9, the Tenth Circuit issued an order instructing the government to file a response, if it desired, by 5 pm on April 10. At approximately 4:33 PM ET today, April 13, 2009, the Tenth Circuit issued a terse opinion stating that Nacchio had not established a reasonable chance that this Court would grant certiorari, and denying both bail pending certiorari and Nacchio's alternative request for a brief stay in his surrender date to permit your Honor's consideration of the bail issue. The opinion notes that "Judge McConnell dissents."

I. SECTION 3143(B)(1)(B)'S "SUBSTANTIAL QUESTION" STANDARD REQUIRES NACCHIO TO DEMONSTRATE A REASONABLE CHANCE THAT HIS PETITION FOR CERTIORARI WILL BE GRANTED

Section 3143(b)(1)(B) conditions bail on a finding that "the appeal ... raises a substantial question." Courts have interpreted the term "substantial question" to mean "a 'close' question or one that very well could be decided the other way." *United States v. Affleck*, 765 F.2d 944, 952 (10th Cir. 1985) (en banc) (citation omitted).[3] The inquiry at the certiorari stage is, of course, influenced by the discretionary nature of this Court's certiorari jurisdiction, but it is clear that a "substantial question" is a "close"

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[3] *See also, e.g., United States v. Miller*, 753 F.2d 19 (3d Cir. 1985); *United States v. Giancola*, 754 F.2d 898 (11th Cir. 1985); *United States v. Powell*, 761 F.2d 1227 (8th Cir. 1985); *United States v. Handy*, 761 F.2d 1279 (9th Cir. 1985).

question—it does not mean a "likelihood of success."

Nacchio is required only to "demonstrate a *reasonable probability* that four Justices are likely to vote to grant certiorari." *Julian v. United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers). This Court has expressly stated that in understanding what "reasonable probability" means, "the adjective is important" and a "reasonable probability" does *not* mean "more likely than not." *Kyles v. Whitley*, 514 U.S. 419, 434 (1995); *id.* ("reasonable probability" does not require a showing of likelihood of different outcome); *see also John Doe I v. Miller*, 418 F.3d 950, 952 (8th Cir. 2005) ("A 'reasonable probability' is something less than 'more likely than not ....'").

Like the Bail Reform Act, Federal Rule of Appellate Procedure 41, governing a stay of a court of appeals' mandate, requires a showing that "the certiorari petition would present *a substantial question.*" The advisory committee notes on the 1994 amendments explain that Rule 41(d)(2)(A) "is intended to alert the parties to the fact that a stay of mandate is not granted automatically and to the type of showing that needs to be made. The Supreme Court has established conditions that must be met before it will stay a mandate. *See* Robert L. Stern et al., *Supreme Court Practice* §17.19 (6th ed. 1986)." Section 17.19 of Stern, *Supreme Court Practice*, states that the standard adopted by the advisory committee requires a showing of "*a reasonable chance* that at least four Justices will vote for the Court to review the decision below and that, if the case is taken, a majority of the Court will vote to reverse," *not* a showing of a likelihood of success. Of course, when "likelihood of success" is the standard, this Court says so. *See, e.g., Munaf v. Geren*, 128 S. Ct. 2207, 2219 (2008) (noting that a

preliminary injunction requires a showing of "a likelihood of success on the merits").[4]

The statute also requires that the "substantial question" raised by the defendant's appeal or petition must be "likely to result in (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. §3143(b)(1)(B). The government suggested below that that language requires the defendant to establish a likelihood (i.e., more likely than not) that certiorari will be granted and that he will prevail. That interpretation is incorrect and would render the "substantial question" language superfluous. As the courts of appeals have recognized, "substantial question" is the standard for assessing the defendant's odds of prevailing, and the "likely to result in" language describes a *separate* requirement that the issues raised must be of a character that justifies bail pending appeal. If the issues raised by the defendant would not result in acquittal, a new trial, or a sentence without imprisonment *even if*

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[4] Contrary to the government's argument below, the petition is not subject to the standards governing certiorari before judgment. Because the panel reversed Nacchio's conviction it did not reach the sentencing and forfeiture issues raised in the appeal. The *en banc* court chose not to address those issues and remanded them to the panel to be resolved. The fact that separate sentencing and forfeiture issues remain for this Court's resolution has no bearing on the standard to be applied to Nacchio's petition for certiorari. Rather, this case presents the routine circumstance where "a court of appeals [has] entered a nonfinal or interlocutory order at some point prior to rendition of the court's final judgment." Eugene Gressman et al., *Supreme Court Practice* 81 (9th ed. 2007). Such cases are governed by the ordinary Rule 10 standards, with due allowance for whether the interlocutory posture would affect the Court's resolution of the issues or the appropriateness of its intervention. Nacchio is entitled to wait for the Tenth Circuit to resolve those issues before seeking certiorari, but the fact that he is not simply underscores that he has no interest in delay and does not impact the standard this Court will apply in determining whether to grant certiorari.

successful, then there is no reason for him not to begin serving his sentence while the appellate process continues.

II. NACCHIO'S PETITION ESTABLISHES A REASONABLE CHANCE THAT THIS COURT WILL GRANT CERTIORARI AND ORDER ACQUITTAL OR A NEW TRIAL

The issues raised in Nacchio's petition for certiorari meet the statutory standard. There is a reasonable chance this Court will grant review. Nacchio has identified several issues of national importance on which the circuits are in conflict, as well as several respects in which the Tenth Circuit's decision departed from the usual course of judicial proceedings in a manner calling for an exercise of this Court's supervisory power. *Amicus curiae* briefs supporting certiorari are being prepared, and will be filed, by the Chamber of Commerce of the United States of America, the Washington Legal Foundation, and the National Association of Criminal Defense Lawyers, further highlighting the substantial and important questions at issue.

A positive outcome in this Court is also likely to produce either acquittal or, at least, a new trial. His challenge to the sufficiency of the evidence on materiality would, if accepted, require acquittal as a matter of law. His challenge to the adequacy of the jury instructions would require a new trial, since even the panel recognized that this was an exceedingly close case on materiality and the government's evidence was far from overwhelming. And, as the panel correctly recognized, the exclusion of Professor Fischel could not possibly have been harmless. Fischel was Nacchio's only substantive witness, and was (along with classified information also excluded by the district court) to have been essentially Nacchio's entire defense.

The government suggested below that the district court's error in excluding Fischel might not produce a new trial because this Court could remand for a *Daubert* hearing, and after a proper hearing a new district judge might again exclude Fischel on *Daubert* grounds. With respect, that is completely fanciful. The four *en banc* dissenters unanimously concluded that in the circumstances of this case a new trial is necessary if Professor Fischel's exclusion was error. The district judge who presided over Nacchio's original trial has since been forced to resign from the bench in the midst of an investigation for prostitution and obstruction of justice, so a remand to the original trial court is no longer possible. Regardless, Professor Fischel is the nation's eminent authority on the functioning of financial markets, has testified hundreds of times without exclusion, is frequently cited by this Court, and was proposing to give testimony of a nature specifically endorsed by the commentary to Rule 702. It is at least "likely" that his testimony would survive a proper *Daubert* hearing on remand, if one were ordered.

It bears repeating that even applying a materiality standard far less stringent than other circuits, a unanimous panel (including the author of the *en banc* majority) held that it was "a close question" whether Nacchio is innocent as a matter of law. Four judges of the *en banc* court, Judges McConnell, Kelly, and Murphy, and Chief Judge Henry, believe it is a great injustice that Nacchio was not granted a new trial, and called the decision "unprecedented" and "draconian." Bail pending this Court's action will only be for approximately 1 month if certiorari is denied, unless the government requests an extension—which it should not need, since a Deputy Solicitor General

argued this case in the Tenth Circuit and the government has been on notice of Nacchio's certiorari arguments since at least March 5 (and effectively much longer, since these issues were fully explored in Nacchio's briefing to the panel and *en banc* court). The issues here are substantial and of national importance and the risk of wrongful imprisonment is far to great to deny bail.

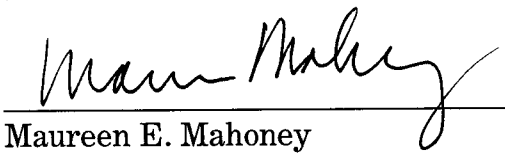
III. AT A MINIMUM, THIS COURT SHOULD STAY NACCHIO'S REPORTING DATE UNTIL IT HAS HAD AN OPPORTUNITY TO RULE ON THIS APPLICATION

If your Honor is not able to fully evaluate and rule on this application for bail pending certiorari prior to Nacchio's April 14, 2009 surrender date, we respectfully request a stay of the order of surrender until your Honor rules on this application. This Court's Rules indicate that interim relief should be sought from the courts below prior to presenting a request to this Court. Nacchio has pursued his right to seek bail pending certiorari with great diligence, and did not obtain a ruling from the courts below until 4:33 PM today. He should not be forced to surrender to prison before the Circuit Justice has had an opportunity to give serious consideration to this application, and to rule on its merits. It would not serve any coherent public interest for Mr. Nacchio to be forced to report to prison if he might still be granted bail pending certiorari, and released, a day or two later.

CONCLUSION

The application for bail should be granted, and at a minimum Nacchio's surrender date should be stayed until your Honor has had a full opportunity to evaluate and rule on this application.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Maureen E. Mahoney, a member of the Bar of this Court, hereby certify that on April 13, 2009, I caused copies of this Emergency Application for Continued Bail Pending Certiorari in the above-captioned case to served by e-mail and mail, first-class postage prepaid, to counsel for respondent as listed below, on April 13, 2009:

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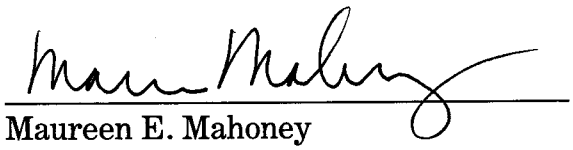
I further certify that all parties required to be served have been served.



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