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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 ROBERT ALAN SOLOWAY,)
)
 Defendant.)
 _____)

NO. CR07-187MJP

GOVERNMENT’S RESPONSE IN
OPPOSITION TO MOTION
FOR REVIEW OF
DETENTION ORDER

The United States of America, by and through Jeffrey C. Sullivan, United States Attorney for the Western District of Washington, and Kathryn A. Warma, Assistant United States Attorney for said District, files this Response in Opposition to the Defendant’s Motion for Review of Detention Order.

I. Introduction and Factual Background

On May 23, 2007, Robert Soloway (“Soloway”) was indicted by the Grand Jury on charges of Mail Fraud (ten counts), Wire Fraud (five counts), Electronic Mail Fraud (two counts), Aggravated Identity Theft (five counts), and Money Laundering (thirteen counts). The indictment also seeks forfeiture of four financial accounts, and a money judgment in the amount of \$772,998.54. The charges and forfeitures are based upon a criminal scheme that likely dates back to as early as 1999, but the charges as currently filed pertain only to Soloway’s crimes since November of 2003 - when he first moved to the State of Washington.

Essentially, Soloway’s criminal scheme operated as follows: Soloway would transmit tens of millions of “spam” e-mails to tens of millions of different e-mail

1 addresses to advertise and link to the website of his own company, which has operated
2 under a variety of changing names, but most prominently as “Newport Internet
3 Marketing,” or “NIM.” The websites created and published by Soloway and NIM
4 consisted of commercial advertisements for “broadcast email” services and products
5 (i.e., Soloway was offering, for a price, to either send out high volumes of e-mail
6 messages on behalf of a customer, or to sell a software product to the customer that
7 would enable them to send out their own high volume e-mail messages). The
8 representations Soloway made on his websites were, however, false and fraudulent as
9 to both the “services” and “product” that he offered and sold. Most notably among
10 them: the “product” did not perform as advertised, or at all, and the “broadcast email
11 service” that Soloway sold constituted “spam”; i.e., bulk and high volume commercial
12 e-mail messages that contained false and forged headers and that was relayed using
13 networks of proxy computers (“botnets”). Customers who purchased either the product
14 or “service,” and who complained thereafter or asked for refunds were threatened by
15 Soloway, in electronic mail messages, with further economic harm and damaging credit
16 reports if they did not “pay up.” Many customers with small businesses suffered
17 damages when their businesses were accused of transmitting illegal spam, and were
18 then “blacklisted” on the Internet as a result.

19 As part of his scheme, Soloway took a number of steps to hide his Internet
20 tracks, including the use of a series of at least 50 successive domain names, that
21 included broadcastemailcorporation.com, optinemail.com,
22 theemailbroadcastingcompany.com, broadcastemailinc.com, broadcastemailworld.com,
23 emailbroadcstingcompany.com, and permissionemailcorp.com as the domain names
24 used to “host” his business website. And beginning in 2006, Soloway typically
25 registered the domain names used for hosting the NIM websites through Chinese ISPs,
26 which would not publically reveal that Soloway was the true registrant of these domain
27 names. Soloway rented botnets from which he transmitted his spam, so that he could
28 conceal the true originating Internet Protocol (“IP”) address, and make it appear,

1 instead, that the spam had originated from an ever changing and random population of
2 computers. Even more disturbing, however, was Soloway's practice routinely of
3 forging the "headers" of the tens of millions of spam advertisements he transmitted.
4 Soloway forged domain names and/or e-mail account names that belonged to other real
5 people or organizations into the "from" address in the headers of his spammed
6 advertisements. Besides thereby concealing his identity - and his responsibility - for the
7 illegal spam, he made it appear as though other, innocent parties were responsible for
8 his criminal conduct.

9 Soloway was arrested by federal agents at his penthouse apartment in the Harbor
10 Steps complex, in downtown Seattle, on May 30, 2007. At his initial appearance on
11 that same date, Magistrate Judge Donohue reviewed Soloway's financial affidavit and,
12 based on the information Soloway himself had provided, found that he did not qualify
13 for appointed counsel, but appointed a Federal Public Defender for purposes of the
14 initial appearance, only. The United States moved at the initial appearance for an order
15 of detention, but a hearing on detention was continued for three days in order for the
16 defendant to secure retained counsel. Two additional continuances were then granted at
17 the request of the defendant, and his retained counsel, Mr. Troberman.¹

18 At the detention hearing on June 13, 2007, the government presented numerous
19 exhibits in support of its arguments for detention, to which Soloway through his
20 counsel fully responded. At that hearing's conclusion, and based upon his numerous
21 findings of fact, Magistrate Judge Donohue ordered Soloway detained pending trial.
22 Magistrate Judge Donohue's finding of facts, and his reasons for imposing detention,
23 are set forth in his June 13 Detention Order. (Attachment A, at 16-19).²

24 The United States believed on June 13, as it does now, that Magistrate Judge
25 Donohue properly ordered Soloway detained pending trial. On the grounds and for the

27 ¹Shortly after retaining Mr. Troberman, Soloway also retained a second attorney from California, Mr. Tony
28 Capozzola, admitted pro hac vice for purposes of this case.

²References to Attachments will include their Attachment designation, together with their bates stamp number.

1 reasons set forth below, the government respectfully urges this Court to order likewise.

2 **II. Argument**

3 **A. Defendant’s Appeal Was Filed Untimely, in Violation of MJR 12 of the** 4 **Local Rules for the Western District of Washington, and Should Therefore be** 5 **Denied.**

6 The Magistrate Judges’ Rules (“MJR”) of the Western District of Washington
7 specify that “[a]ny ruling by a magistrate judge, which by law is reviewable by a
8 district judge, but as to which no review procedure is otherwise prescribed, shall be
9 subject to review upon a motion filed within ten days of the entry of the ruling.”

10 The ruling that is the subject of this motion for review was entered by Magistrate
11 Judge Donohue on the 13th of June, 2007. The deadline for a motion for review of
12 that order was therefore June 23, 2007. Defendant’s motion for review, however, was
13 not filed until September 6, 2007 - which is 75 days after the expiration of the ten day
14 deadline as specified by local rules.

15 Defendant has offered no justification for this circumvention of local court rules.
16 Absent any, Defendant’s Motion for Review should be denied.

17 **B. Based on the Evidence that the Government Previously Has Presented,** 18 **as well as Evidence It Will Present Herein and at the Upcoming Detention** 19 **Hearing, the Court Should Find that No Condition or Combination of Conditions** 20 **will Reasonably Assure the Appearance of the Defendant as Required.**

21 The Bail Reform Act, codified at 18 U.S.C. §§ 3141-3150, authorizes and sets
22 forth the procedures for a judicial officer to order the release or detention of persons
23 arrested, and pending trial, sentence, and appeal. The Act requires a district court to
24 order a defendant detained pending trial if “no condition or combination of conditions
25 will reasonably assure the appearance of the person as required and the safety of any
26 other person and the community . . .” 18 U.S.C. §3142(e). The burden of proof rests
27 with the government to establish risk of flight by a preponderance of the evidence.
28 United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991). If the court determines
that there is a serious risk the defendant will flee, it must determine whether some set
of conditions will sufficiently vitiate that risk. United States v. Gentry, 455 F.Supp. 2d
1018, 1020 (D. Az. 2006).

1 In making the determination whether conditions exist that would reasonably
2 assure a defendant's appearance, Section 3142(g) requires the court to take into account
3 four statutory factors: 1) the nature and circumstances of the offenses charged, 2) the
4 weight of the evidence against the person; 3) the history and characteristics of the
5 person, including his character, physical and mental condition, family ties,
6 employment, financial resources, length of residence in the community, community
7 ties, past conduct, history relating to drug or alcohol abuse, criminal history, and
8 record concerning court appearance at court proceedings; and 4) the nature and
9 seriousness of the danger to any person or community that would be posed by the
10 person's release.

11 With these statutory factors as a backdrop, the United States asserts that the
12 following facts and circumstances support a conclusion that Soloway is a risk of flight,
13 and that no condition or combination of conditions will reasonably assure his
14 appearance as required, or the safety of any other person and the community if he were
15 to be released, pending trial.

16 **C. Soloway Has an Established History of Fleeing Jurisdictions in Which
17 He Potentially Faces Criminal Prosecution**

18 Soloway began his fraudulent spamming business in California, as early as
19 1996.³ By mid-1999, complaints about Soloway's spamming had been made by people
20 and companies in several countries, including the Government of Japan and several
21 State Attorneys General, and claims made of losses from the same of over
22 \$500,000.00. (Attach. C, at 69). A criminal investigation was opened, and a search
23 warrant executed on Soloway's California residence/business on 11/2/99. Based on the
24 evidence seized and the attendant investigation (including an interview with Soloway in
25 the presence of counsel), Officer Campbell of the Healdsburg, California Police Dept.
26 requested that the Sonoma County D.A. file criminal charges against Soloway for

27
28 ³Additional details about Soloway's fraudulent spamming business are set forth in the Affidavit in Support of Search Warrant sworn by SA Kenneth Schmutz on May 23, 2007 (MJ07-254), a copy of which is appended as Attachment B, at 21-56.

1 violations of the California spamming law, a request approved by Off. Campbell's
2 supervisor on February 24, 2000.

3 Even before this request was approved, however, Soloway had
4 suddenly departed the State of California and had relocated his business to Medford,
5 Oregon by February 2, 2000. (Attach. D, at 71-73). There, out of the reach of
6 California state authorities, Soloway immediately resumed precisely the same type of
7 fraudulent spamming activity in Oregon.

8 By no later than August, 2003, the Oregon Attorney General's Office had also
9 received "a number of complaints" about Soloway's business, that were conveyed to
10 him. (Attach. E, at 79-87). And despite the fact that the lucrative proceeds Soloway
11 realized in Oregon had enabled him to purchase three vehicles, a home, and amass
12 \$200,000 in money market accounts, (Attach. F, at 89-96), Soloway also then suddenly
13 departed that jurisdiction; relocating his residence/business to Seattle late in 2003.

14 Common sense weighs against the sudden relocation of a going profitable
15 business. Soloway relocated his profitable, on-going business not once, but twice - in
16 each case fleeing a state in which he faced potential criminal prosecution. Given that
17 evidence, it is reasonable to infer that he will even more likely flee in the face of
18 certain prosecution.

19 **D. Soloway Has an Established History of Failing to Appear in United**
20 **States District Court**

21 Late in 2004, Robert Braver, the owner of a small Oklahoma ISP, became so
22 frustrated with the damages his business suffered due to Soloway's relentless spamming
23 that he filed a civil suit against NIM in Oklahoma state court, seeking relief under both
24 Oklahoma and federal law. Soloway successfully initiated removal of the case to U.S.
25 District Court, where it became Case No. CIV-05-210-T, in the W.D. of Oklahoma.

26 Once Soloway succeeded in having the case removed to federal court, however,
27 he proceeded essentially to obstruct the case with a succession of dilatory tactics,
28 culminating with a bald failure to appear for a noticed default judgment hearing.

(Attach. G, at 98-144). Soloway then capped that failure to appear with the submission

1 of an arguably perjurious affidavit in an attempt to have the default judgment set aside.
2 (Id., at 137-142). Indeed, Judge Thompson noted in his order denying that motion that
3 “considerable evidence [had been presented to show]. . . that Mr. Soloway’s [affidavit]
4 testimony is false.” (Id., at 143). He did not consider it necessary to make a specific
5 finding in that regard, however, because “regardless” of whether Soloway “has
6 perjured himself,” he had “wholly failed to justify relief from the default judgment
7 under applicable standards.” (Id., at 144).

8 The government respectfully urges the Court closely to review the attached
9 docketing sheet and pleadings from the Braver case, which evidence Soloway’s clear
10 failure to appear in U.S. District Court, and also his calculated obstructionist tactics.

11 **E. Soloway Has an Established History of Repeatedly Violating a**
12 **Continuing Order of a United States District Court Judge**

13 Aside from entering a statutory damage award against Soloway in the amount of
14 \$10,075,000.00, Judge Thompson also entered a permanent injunction, as part of the
15 default judgment, that permanently enjoined and restrained Soloway from spamming
16 activity, specifically including:

- 17 a. Initiating the transmission of a commercial electronic mail
18 message, to any computer involved in interstate commerce or
19 communication, or a transactional or relationship message, that contains,
20 or is accompanied by, header information that is materially false or
21 misleading; . . . [and]
22 e. Relaying or transmitting a commercial electronic mail message
23 that is unlawful under 15 U.S.C. 7704(a)⁴ from a protected computer or
24 network accessed without authorization.

25 (Id., at 135). That permanent injunction was entered by the U.S. District Court for the
26 W.D. Ok. on September 22, 2005. The government represents that evidence exists to
27 prove that Soloway has violated that standing order of a United States District Court
28 Judge virtually every day since. Indeed, the Grand Jury in returning the Indictment in
this case signaled its finding that there was probable cause to believe Soloway has,
from at least November, 2003, until May 23, 2007, repeatedly carried out precisely the
conduct explicitly prohibited above. (Indictment, at paragraphs 27-30, pages 9-11).

⁴Attachment H.

1 **F. Soloway Has an Established History of Evading Legal Process and**
2 **Abusing Court Ordered Discovery**

3 In a declaration filed in the Braver litigation, Mr. Peter Valente, a Manager at
4 I-5 Legal Support NW, in Seattle, Washington, declared under penalty of perjury that a
5 process server with his company had attempted to serve legal process on Soloway at his
6 apartment residence no less than 15 times between Dec. 22, 2004 and Mar. 16, 2005.
7 (Attach. G, at 109). Soloway would never respond to the repeated knocking on his
8 door, despite the fact that the process server could hear people present inside the unit.

9 In a separate civil action brought against Soloway in Superior Court in King
10 County, Washington, by Microsoft, (also for spamming conduct), the Honorable
11 William Downing, Superior Court Judge, found that Soloway had committed willful
12 discovery violations, causing substantial prejudice to the plaintiffs such that they were
13 entitled to a judgment in that case, by default. (Id., at 114-115). A civil judgment was
14 also thereafter awarded the plaintiffs in that case, against Soloway, in excess of
15 \$7,000,000.00.

16 While the context may thus change, Soloway consistently, in every such context
17 and at every turn, has evidenced clearly his intentional and willful disrespect for the
18 courts, the legal system, and the rule of law, as well as his apparent belief that he
19 uniquely is above them all.⁵ Given that evidence of his established behavioral history,

20
21 ⁵Remarkably, Soloway’s counsel takes issue in his Motion with Magistrate Judge Donohue’s finding in this
22 regard, asserting that the Judge mistakenly found that a statement made by Soloway “about being a non-US citizen was . . .
23 . . . in the context of the legal process not affecting him.” (Defendant’s Motion, at 6). He also attaches a portion of the
24 referenced statement in support thereof. The statement in its entirety, includes the following text:

25 . . . There’s only one winner in the Microsoft suit against me, me. . . and in regards to the braver suit, if
26 he doesn’t drop the case on me shortly, I will bring it all the way to trial costing him a fortune and win,
27 as I always do, not to mention he will have about \$500,000 in legal bills defending himself from some of
28 the best legal firms in 4 states due to his previous abuses in the telemarketing and junk fax arena
regarding previous individuals that used to reside near his location. . . . I always win. . . regardless of the
judgment amount. . . losing is not an option, and I never ever, ever, have to pay a single cent to anyone. . .
:)

Now shoo. . . before I laugh any further at you and your hilarious statements acting like you have
any factual idea of what has and is going on in my life or my business. . .

-Robert Soloway

-Proud Spamhaus TOP 10 Emailer in the World

-Legitimate Email Marketer Since 1996

-Never EVER Paid a Single PENNY to ANY Lawsuit Outcome or Settlement

1 it is reasonable to conclude that he will not appear and will make every attempt to flee
2 or evade the proceedings in a criminal case in which the stakes for Soloway have
3 become now so much higher.

4 **G. Soloway is a Swedish Citizen, who has Family Connections in Sweden,
and Extradition from Sweden Would Not Be Possible**

5 Soloway secured Swedish citizenship in August 2001, which was a date well
6 after he had initiated his fraud and criminal spamming scheme, and after he was aware
7 that at least one jurisdiction (California) had opened a criminal investigation of the
8 same. (Attach. I, at 155).

9 A copy of the Treaty between the United States and Sweden governing
10 extradition has been obtained from the U.S. Dept. of Justice, Office of International
11 Affairs (“OIA”). (*Id.*, at 156-177). Article 7 speaks to extradition of citizens. A
12 Senior Trial Attorney with OIA has further informally advised that, “according to the
13 Swedish Ministry of Justice, the Swedes will not extradite their nationals. Swedish law
14 prohibits it.”⁶

15 As noted in his own motion, Soloway has close family relations in Sweden. As
16 noted below, and will be further developed at the hearing on this matter, Soloway’s
17 criminal enterprise has been extremely lucrative, and he has acted quite deliberately to
18 conceal his financial assets. Also clearly evidenced in this case is Soloway’s history of
19 stealing and using the identities of other real people to further his crimes, and his
20 sophistication in the use of computers and the Internet. Given all of the established
21 facts and circumstances, it is reasonable to conclude that, if released, Soloway could
22 well flee to Sweden, and once there, the United States would not be able to extradite.
23 He would not only escape from justice, but would be capable immediately of resuming
24 his Internet based criminal conduct from abroad.

25 **H. Soloway Has No Significant Ties to the Local Community, and
26 Has Defied and Evaded State Legal Requirements and the Directives of Local Law
27 Enforcement with Respect to Those Ties**

28 _____
⁶e-mail communication dated June 28, 2007, from L. Holliday, OIA.

1 Soloway took up residence and began operating his fraudulent spamming
2 business in Seattle in November of 2003. In July of 2005, Soloway was issued a traffic
3 citation at approximately 4:00 am, on a Sunday morning, in Pioneer Square for the
4 “extremely loud car stereo” he was playing in his convertible Mercedes. (Attach. J, at
5 180). As part of that citation, it was noted that Soloway had neither a valid
6 Washington vehicle nor driver’s license, even though other documents showed
7 Washington residence for at least five months prior. (Id., at 180). Soloway was cited
8 for Public Disturbance, as well as for an improper vehicle license, and also explicitly
9 warned about the failure to obtain a Washington driver’s license. Despite his continued
10 residence, and “business” operations in Washington thereafter until his arrest in May of
11 2007, however, Soloway defied the explicit warning of a Seattle Police Officer
12 regarding the need for a valid Washington driver’s license. He has failed, as well, to
13 register his “business” with the State of Washington, as required. (Id., 179, 182, 183).

14 And although he previously owned a home in Oregon, and has apparently earned
15 approximately \$1,000,000.00 in proceeds since residing in Washington, Soloway has
16 spurned home ownership in this community in favor of the more “liquid” option of
17 renting an expensive penthouse apartment.⁷ He likewise leases, rather than owns, his
18 current high-end Mercedes convertible. He has no immediate family in the area, and
19 the only “employment” he has had while in Washington is the fraud and criminal
20 spamming activity that he has engaged in, “solo,” from his penthouse apartment.

21 **I. Soloway Has Earned Substantial Profits from His Illegal and Fraudulent**
22 **Activities, and has Acted Deliberately to Conceal Those Profits and Funds By**
23 **Moving Them Through a Multitude of Online, Credit, and Banking Accounts**

24 Soloway’s devious financial machinations are outlined in the May 23, 2007
25 Affidavit of SA Silvia Reyes in Support of Seizure Warrants. (Attachment K, at 185).
26 The government expects to call SA Reyes as a witness at the hearing, to provide further
27 detail regarding the same.

28 _____
⁷Soloway’s annual rent for this apartment was \$35,000.00. (Attach. K, at 197).

1 In his Motion for Review of Detention Order, counsel for Soloway
2 represents that, “Robert does not even own a car.” Defendant’s Motion, at 8. While
3 it may be true that Soloway does not currently “even own a car,” the photos and
4 documents at Attachment L (201-213), depict and document the Mercedes convertible
5 he has most recently been leasing, as well as both a BMW and Porsche that were also
6 in his possession, if not “ownership,” in 2006. The fact that Soloway has “divested”
7 himself of ownership/possession of at least two of these three expensive automobiles is
8 yet another indication of liquidating assets in a way that would facilitate quick flight.

9 **J. Soloway Has an Established History of Threatening and Retaliating**
10 **Against Victims Who Have Questioned His Fraudulent and Spamming Activities,**
11 **and also of Concealing His Own Identity, Stealing the Identities of Other Real**
12 **People, and Moving Money Through the Accounts of Others**

13 Numerous complaints evidence Soloway’s practice of routinely stealing the
14 online identities of other real people, and forging them into his spamming headers. A
15 representative sample is at Attachment N, at 219. The government expects to call two
16 witnesses at the hearing, who will provide testimony regarding other examples of
17 Soloway’s retaliatory actions, and also his actions in co-opting others to use financial
18 accounts under their names to move his criminal proceeds.

19 **K. The Evidence Against Soloway is Overwhelming, and the Sentencing**
20 **Potential is Significant**

21 While the courts have held that, as among the §3142(g) factors, the “weight of
22 the evidence” is “least important,” it remains a factor to be considered. Gentry, 455
23 F.Supp. 2d at 1020. The government represents that the evidence, including hundreds
24 of complaints, as well as corroborating electronic data, is without doubt nothing short
25 of “overwhelming” in this case.

26 The courts have also held that the prospect of a lengthy sentence is legitimately
27 considered as a factor that will increase the likelihood of flight. United States v.
28 Gebro, 948 F.2d 1118, 1122 (9th Cir. 1991). The government has made a good faith
computation of the Sentencing Guideline outcome should Soloway be convicted after a
trial. Attachment P, at 226. The sentencing range that results, taking into account all

1 applicable enhancements, is for a term of imprisonment of from 192-234 months, (16-
2 19 years). That is of course a “lengthy” sentence, and yet one more factor, in addition
3 to the other myriad factors itemized above, that combine to exceed the “preponderance
4 of evidence” needed to establish that Soloway is a risk of flight, and that there are no
5 conditions that will reasonably assure his appearance as required, in this case.

6 **L. Soloway’s Medication Issue Has Been Resolved, and Soloway Can Have**
7 **Reasonable Access to Discovery Materials, Both Paper and Electronic, at FDC**

8 Ms. Maggie Ogden, Attorney Advisor, BOP, informed the undersigned by
9 telephone on this date that further collaboration among BOP personnel has resulted in a
10 decision to uniquely allow Soloway to have Klonopin prescribed and made available to
11 him, although it is not routinely allowed for BOP inmates. Ms. Ogden further advised
12 that the FDC can make a laptop computer, that is not connected to the Internet,
13 available to Soloway for use, if needed, to review electronic discovery materials.⁸ He
14 will also be allowed to keep up to two boxes of paper discovery records, at a time, in
15 his own cell, with the ability to “swap out” those boxes for others, as required.

16 **III. Conclusion**

17 On the grounds and for the reasons set forth above, the defendant’s Motion to
18 Review the Detention Order should be denied, and this Court should order that
19 Soloway continue to be detained, pending trial.

20 DATED this 13th day of September, 2007.

21 Respectfully submitted,

22 JEFFREY C. SULLIVAN
23 United States Attorney

24 /s/ Kathryn A. Warma
25 Assistant United States Attorney
26 United States Attorney’s Office - WDWA
27 700 Stewart Street, Suite 5220
28 Seattle, Washington 98101-1271
Tel.: (206) 553-8786
Fax: (206) 553-2502
Email: Kathryn.Warma@usdoj.gov

⁸Such an arrangement was recently made for two of the “Hell’s Angels” defendants.

CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2007, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the attorney(s) of record for the defendant(s). I hereby certify that I have served the attorney(s) of record for the defendant(s) that are non CM/ECF participants via telefax.

/s/ Lissette Duran-Leutz
Lissette Duran-Leutz
Legal Assistant
United States Attorney's Office
Western District of Washington
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
Tel.: (206) 553-7234
Fax: (206) 553-2502
E-mail: Lissette.I.Duran-Leutz@usdoj.gov