

Brian D. Heady
 2600 Denali Street, Suite 460
 Anchorage, AK 99503
 Phone: (907)276-8008
 Fax: (907)278-8571
 E-mail: bheady@dattanlaw.com
 Attorney for Bernadette Wilson, d/b/a Denali Disposal, Inc.

IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
vs.)	<u>BERNADETTE WILSON'S</u>
)	<u>REPLY TO GOVERNMENT'S</u>
)	<u>PALM TREE BRIEF</u>
)	
SUK JOON LEE, and,)	
KYONG TAEK SONG,)	
)	
Defendants.)	
_____)	Case No. 3:14-cr-00107 RRB

Bernadette Wilson, d/b/a Denali Disposal, Inc., by and through her attorney Brian. Heady, hereby submits this Reply to Government’s Palm Tree brief. Ms. Wilson’s affidavit is attached.

In its brief, the government relies upon *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384 (1947), to provide support for the remarkable notion that the U.S. Marshals Service Assets Forfeiture Coordinator (“Coordinator”) had no authority to direct Denali Disposal to remove the Palm Tree from its base and throw it in the trash. The *Merrill* case, however, is not remotely applicable. In *Merrill*, Idaho wheat farmers “applied locally” for insurance under the Federal Crop Insurance Act to cover wheat farming operations in Bonneville County, Idaho. *Id.* at 382. The farmers informed the Bonneville County Agricultural Conservation Committee, who were acting as agents for the Federal Crop Insurance Corporation, of the acreage they were planting in spring and winter wheat. The Committee advised the farmers that the entire crop was insurable and the

Corporation accepted the application for insurance. Subsequently, most of the farmers' crop was destroyed by drought and the farmers reseeded spring wheat on winter wheat acreage. *Id.* The Corporation, upon learning of the reseeded, refused to pay for the loss and litigation ensued. At the trial level, the farmers argued that they had been misled by the Corporation's agent (the Committee) into believing that the reseeded wheat was insurable. A jury found in favor of the farmers. *Id.* at 382-83. The Supreme Court eventually ruled against the farmers, finding that the controlling regulations specifically precluded insurance coverage for spring wheat reseeded on winter wheat acreage. *Id.* at 386. The Court also noted, in *dicta*, "that anyone entering into an arrangement with the Government takes the risk of having accurately ascertained that he who purports to act for the Government stays within the bounds of his authority." *Id.* at 384

Upon this obscure case, the government relies. *Merrill* makes no reference whatsoever to the U.S. Marshal's role in managing forfeited assets. Nor has *Merrill* been cited by any published or unpublished court opinion involving forfeited assets. The U.S. Marshal's Asset Forfeiture Coordinator for the District of Alaska does not *purport* to work for the federal government; he *does* work for the federal government and acted completely within his authority in informing Denali Disposal to dispose of the Palm Tree.

Thus, to the extent that *Merrill* is applicable here, then the authority exercised by the Coordinator is within the definition of authority established. The U.S. Marshals Service's authority is explicitly defined by Congress. As noted in a prior briefing, under civil judicial forfeiture pursuant to 21 U.S.C. § 881, when property is forfeited and the forfeiture is final, the Attorney General can sell the property by public sale or by *any other commercially feasible means*. (Emphasis added.) This authority to execute deeds and warrant title has been delegated to the Director of the U.S. Marshals Service and has been re-delegated to chief deputies or deputy U.S. marshals. 28 C.F.R. §

0.156. Authority is further evidenced by 28 U.S.C. § 510, Delegation of Authority, which states that “The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General. (Added Pub. L. 89-554, § 4(c), Sept. 6, 1966, 80 Stat. 612.)

Not only did the Coordinator exercise explicit authority in directing Denali Disposal to dispose of the tree, his direction constituted an implied-in-fact contract “founded upon a meeting of minds, which, although not embodied in an express contract, is inferred, as a fact, from conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding.” *Baltimore & Ohio R. Co. v. United States*, 261 U.S. 592, 597, (1923). To prove an implied contract, a party must show (1) mutuality of intent to contract, (2) consideration, and (3) unambiguous offer and acceptance. *City of El Centro*, 922 F.2d 816, 820 (Fed.Cir.1990). When the United States is a party, a fourth requirement is added: The government representative whose conduct is relied upon must have actual authority to bind the government in contract. *Id.* at 820. *See also Silverman v. United States*, 230 Ct. Cl. 701, 679 F.2d 865 (1982) (permitting a finding of institutional ratification of an implied-in-fact contract ratified by an FTC official’s promise of payment)

Clearly, under 21 U.S.C. § 881 and 28 C.F.R. § 0.156, the Marshals Service is statutorily authorized to manage and sell seized and forfeited assets. Here, the Marshals Service Coordinator exercised his proper authority when he directed Ms. Wilson to remove the designated items by “any other commercially feasible means.” In doing so, the Coordinator did, in fact, exercise the management of forfeited assets within the bounds of his authority. The Coordinator’s authority cannot be questioned and he acted within the bounds of his authority, unlike the agent in *Merrill*.

Respectfully, the government seems to take the position that *Merrill* represents a sweeping caveat over all government decisions and that any one of its decisions are protected by *Merrill's* “just kidding” clause.

At the hearing held on February 26, 2018, the Court specifically asked the government’s attorney if he accepted as true the statements made in Ms. Wilson’s Affidavit in Support of the Opposition to the Ancillary Motion. The attorney responded in the affirmative. Accordingly, the government has conceded the factual statements made in the Opposition brief and cannot dispute that Ms. Wilson was specifically directed by the Coordinator to dispose of hundreds of junk items, including a “non-functioning neon sign in disrepair.”

The pictures attached to both of Ms. Wilson’s previous filings clearly show that the Palm Tree was not “attached” to the Paradise Inn but stood separately, several feet away. Only four bolts held the Palm Tree in place. Despite the remarkable ease in which Denali Disposal removed the four bolts and laid the Palm Tree on the flat bed, the government compares it to a drilling rig, mine tailings, industrial lighting with circuit breakers, and a French-made range installed in a permanent manner. Whatever may have been the intent when the Palm Tree was originally bolted outside the Paradise Inn, it became rusted junk, no longer a “fixture” but a hazardous liability.

The government argues that the Palm Tree was “forfeited” property, yet everything in and around the Paradise Inn was forfeited property. Every single item, and there were thousands of items, that the Coordinator told Ms. Wilson to dispose of constituted forfeited property. Ms. Wilson was essentially told to get rid of every item of forfeited property except for the building itself.

Ms. Wilson agrees that she did not purchase the Palm Tree, but that is not the issue. She was told to throw it in the trash by a person with authority to do so. Once the Coordinator told Ms. Wilson to dispose of the tree, the government lost its ownership interest and 21 U.S.C. § 853 became

irrelevant. Additionally, the government did not act quickly to reclaim the Palm Tree but waited three weeks after its removal to take any action; and the entirety of the government's "action" was and has been based on the puzzling premise that the Coordinator exercised his authority correctly with respect to every single piece of junk except for the Palm Tree. The Palm Tree was not given away by mistake. Ms. Wilson received clear and explicit instructions. Throughout the entire relevant time period, the Coordinator has never told Ms. Wilson that he had made a mistake.

The government criticizes Ms. Wilson for hiring an attorney, yet she cannot be expected to bear the entire weight of the federal government alone. Ms. Wilson, like anyone else in this country, is entitled to legal representation.

We live in a world of alternative facts, but the facts in this case are crystal clear: The Coordinator, based on his specific authority as provided by Congress, directed Ms. Wilson to dispose of the Palm Tree. In so doing the government lost its interest, and the Palm Tree belongs to Ms. Wilson.

Dated this 20th day of March, 2018 at Anchorage, Alaska.

s/Brian D. Heady
Attorney for Bernadette Wilson; dba Denali Disposal, Inc.
E-mail: bheady@dattanlaw.com
Alaska Bar No. 0709051

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2018,
a copy of the foregoing was served electronically on:

AUSA, Kelly Cavanaugh

s/ Brian D. Heady