



U.S. Department of Justice

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Southern District of New York*

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New York, New York 10007*

January 8, 2009

BY FACSIMILE

Honorable Ronald L. Ellis
U.S. Magistrate Judge
Southern District of New York
500 Pearl Street
Room 1970
New York, New York 10007

Re: United States v. Bernard L. Madoff,
08 Mag. 2735

Dear Judge Ellis:

The Government respectfully submits this letter brief in reply to the defendant's January 7, 2009 opposition brief and in further support of its motion to detain the defendant pending trial, pursuant to Title 18, United States Code, Section 3142(f)(2). Although defendant labors mightily in 15 single-spaced pages to justify his contention that the current conditions of release are adequate to protect the community and to assure the defendant's presence when required, his arguments are unavailing.

Defendant's Recent Actions Warrant Re-examination Of His Bail Conditions

As an initial matter, it is clear that this Court should re-examine the defendant's bail conditions based on changed circumstances. After being arrested, after being subjected to increasingly stringent conditions of release (including home confinement, electronic monitoring, and 24-hour surveillance), and after voluntarily agreeing to be subject to a Court order prohibiting the transfer of assets, the defendant violated that explicit Court order within a few days of its entry. The fact that the defendant would do so, with the eyes of the world, prosecutors, and other regulatory authorities upon him, speaks volumes. This new fact – a fact not present when bail conditions were last set – represents a change in circumstance that warrants reconsideration of the defendant's bail conditions and entry of an order of detention.

The Court Should Consider All Pertinent Facts In Determining New Bail Conditions

The relevant statute requires that the Court, having found the need to conduct a bail hearing, consider all available pertinent information. Title 18, United States Code, Section 3142(g) states:

The judicial officer shall . . . take into account the available information concerning --

- (1) the nature and circumstances of the offense charged . . .
- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including --
 - (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, . . .
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

18 U.S.C. § 3142(g).

First, the nature and circumstances of the offense charged are unprecedented. The defendant has admitted to perpetrating one of the largest, if not the largest, Ponzi schemes in history – a scheme that required the defendant to lie routinely to thousands of people and a scheme which has caused extraordinary damage to individuals, families, and institutions all over the world. *Second*, the weight of the evidence against the defendant is strong and he has admitted his crimes to numerous witnesses, including FBI agents. *Third*, the acts that he has admitted to committing, including his fraudulent scheme and his blatant disregard of a Court order following his arrest and imposition of stringent bail conditions, the defendant has shown that he cannot be relied upon to follow the Court's orders. Defendant's effort to paint his pre-arrest actions in heroic terms should be viewed with great skepticism. What the defendant failed to highlight for the Court in his rendition of events is the fact that, prior to his arrest, he announced his intention to transfer \$200-300 million of the remaining investors' assets to selected family, friends, and employees. (See Complaint ¶ 4(e)). In fact, when the defendant's office desk was searched, investigators found approximately 100 signed checks totaling more than approximately \$173 million, ready to be sent out. The only thing that prevented the defendant from executing his plan to dissipate those assets was his arrest by the FBI on December 11. The defendant's recent distribution of jewelry and watches demonstrates a continuing intention to benefit those close to him to the detriment of his victims. *Fourth*, as the Government has previously argued, the nature and seriousness of the danger to the community – specifically victims – posed by the continued release of the defendant is grave indeed.

Defendant claims that “[t]he terms of Judge Stanton’s December 18 order make it impossible for Mr. Madoff to transfer, assign, dissipate or otherwise dispose of any property, assets, or funds under the direct or indirect control of [the defendant]” Def. Br. at 11. Contrary to defendant’s argument, however, neither Judge Stanton’s order, nor the combination of that order and the current bail conditions, proved sufficient to prevent the defendant from attempting to transfer approximately \$1 million worth of valuable property. Defendant’s reference to that property as being merely “sentimental personal items” shows that he misses the point entirely. What may be merely sentimental baubles to the defendant are, in the posture of this case, valuable assets that may comprise a meaningful part of the assets available to be forfeited and applied to the mandatory restitution order that would be entered, upon a conviction, in an effort to recompense the defendant’s victims. Defendant’s explanation that his actions merely reflected an attempt to “reach out to [his] immediate family and close friends with whom contact had been cut off,” Def. Br. at 3, is beside the point. It is also preposterous. That’s what telephones, e-mails, and personal letters are for. Given the many ruptured relationships of the defendant, and their depth, one only can imagine the value of the items that might have been included in the defendant’s next set of mailings, had he determined that his attempted transfers in late December had failed to achieve their purpose.

The harm to the community by the risk of further attempted dissipation of assets is obvious. Notwithstanding defendant’s arguments to the contrary, the risk of economic harm to the community is a valid concern under the Bail Reform Act, as demonstrated by the cases cited in the Government’s prior submission. It is a logical extension of that principle that protection of assets from being liquidated or secreted so that they are available to be forfeited as proceeds of fraud or as substitute assets, and used in an effort to make victims whole, is a valid factor for the Court to consider in determining bail. Defendant has failed to cite any case to the contrary.

Defendant’s efforts to undermine the legal principles set forth in the Government’s opening brief are without merit. Defendant’s claim that the principles established in post-conviction detention cases (decided under 18 U.S.C. § 3143) are inapplicable to pre-trial cases (decided under 18 U.S.C. § 3142), because the standards for imposing detention are different in those two circumstances, is a red herring. (*See* Def. Br. at 7). It is true that the Government’s burden pre-trial under Section 3142 shifts to the convicted defendant under Section 3143; however, there is no case law to suggest that the meaning of the terms of the bail statute differ depending upon which party bears the burden, and the defendant has cited none. Likewise, the Court should reject defendant’s suggestion that the Government is precluded from arguing danger to the community under Section 3142(f)(2) unless the charged crime falls into one of the five categories set forth in Section 3142(f)(1). (*See* Def. Br. at 13, discussing *United States v. Schenberger*, 498 F. Supp. 2d 738 (D.N.J. 2007)). Defendant’s argument misstates the plain structure of the statute. Sections 3142(f)(1) and 3142(f)(2) are separated by the word “or” and describe two distinct prerequisites, either of which, if fulfilled, require the Court to conduct a detention hearing. The Government always has clearly stated that it is proceeding pursuant to

Section 3142(f)(2), and defendant's effort to drag Section 3142(f)(1) into the calculus is a distraction from the issue before the Court.

Finally, defendant's suggestion that additional conditions could be crafted to prevent the defendant from visiting additional harm upon his victims is misplaced. Determination of appropriate bail conditions must be based, fundamentally, on the trustworthiness of the defendant before the Court. This defendant has shown that, at this point, he cannot be trusted. From the massive fraudulent scheme that the defendant perpetrated, to the defendant's stated plan to steal hundreds of millions of dollars of investor funds and use them as he sought fit (*i.e.*, distributing them to selected family, employees and friends, rather than to his victims), to his blatant flouting of a Court order expressly designed to prevent the dissipation of defendant's assets (by sending valuable jewelry to selected family and friends), this defendant has lost any claim on the trust of this Court. Defendant's proposed bail modifications are insufficient because they are either demonstrably ineffective given the defendant's actions to date (*e.g.*, defendant's suggestion to incorporate the terms of the SEC order in his bail conditions and/or incorporate Mrs. Madoff's voluntary restraint agreement), meaningless (creating an inventory that only will alert the Government to missing assets after they are missing and will do little if anything to chill defendant's inclination to dissipate additional assets), or rely on trusting the defendant to identify and produce his valuable assets.

Today, the defendant stands in a different position than he did at the times of the prior bail determinations in this case. The Government has learned far more now about the nature and extent of the defendant's crimes, and the case against the defendant has grown even stronger. The Government and the Court also know more about the defendant, namely that he was willing to violate an express Court order designed to protect his victims. Moreover, it is now apparently the case that defendant is so lacking in support in the community that only his wife and brother are willing to vouch for him and sign his bond, further calling into question his ties to the community for purposes of this Court's "risk-of-flight" analysis.


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In light of all the facts and circumstances now available to the Court, it is clear that there is no combination of conditions that reasonably will assure the presence of the defendant and the safety of the community. Accordingly, the defendant should be detained.

Respectfully submitted,

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