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BY FACSIMILE

Honorable Lawrence M. McKenna U.S. District Judge Southern District of New York 500 Pearl Street Room 1640 New York, New York 10007 application for detention across + Ludge Ellis' 1/17/09 Openion + Order offirmed, for reasons set forth on record on 1/14/09. So ordered'

6-41-1-109 Port I

Re:

United States v. Bernard L. Madoff,

08 Mag. 2735

Dear Judge McKenna:

The Government respectfully submits this letter brief to the Court, sitting in its Part I capacity, in support of its appeal of the Opinion and Order entered by United States Magistrate Judge Ronald L. Ellis on January 12, 2009 (the "Order"), which denied the Government's motion pursuant to Title 18, United States Code, Section 3142(f)(2), to detain the defendant pending trial.

The Government is seeking detention because the defendant, while under perhaps the most stringent conditions of release short of detention, violated a Court order and attempted to transfer \$1 million of assets to family and friends. The defendant should not be trusted with a second chance to dissipate assets. His continued release represents a danger to the community of further obstruction of justice and economic harm, and, given: (1) his demonstrated willingness to disobey a Court order designed to protect his victims; and (2) the fact that he has little to lose given the lengthy term of incarceration that he likely faces, there are no conditions short of detention that will adequately assure the safety of the community.

Today, the defendant stands in a far different position than he did at the times of the prior bail determinations in this case. By way of background, the Government at the outset was faced with a defendant who had confessed, who had indicated through counsel a willingness to assist the Government in doing whatever possible to make victims whole, and who appeared to have strong ties to the community, and the Government agreed to the initial terms of bail approved by the Court. Within a matter of days, the Government twice returned to Court to seek more stringent conditions to protect against the twin risks of flight and harm. Ultimately, the Court

below imposed a set of conditions which, in conjunction with the asset freeze order of Judge Stanton, appeared to be sufficient to protect the community in accordance with the Bail Reform Act. But, the defendant, as detailed below, proceeded to violate the asset freeze order in late December 2008, by attempting to deliver to family and friends assets with a value of approximately \$1 million. When the various bail terms were proposed and ordered, the Government did not expect that the defendant, with the eyes of prosecutors, regulators and world upon him, would have the audacity blatantly to violate Judge Stanton's order. By doing so, the defendant showed that he would not be deterred in his efforts to pick the winners and losers of his fraudulent scheme. And, by his act, the defendant showed that he could not be trusted to obey the Court's orders, and that no set of conditions could constrain his ability to harm the community. Accordingly, the Government promptly sought detention, and now seeks detention here.

Background

On December 11, 2008, the defendant was arrested and charged in a criminal complaint, and was presented before U.S. Magistrate Judge Douglas F. Eaton. The complaint alleged one count of securities fraud in violation of Title 15, United States Code, Sections 78j(b), 78ff, and 17 C.F.R. § 240.10b-5. Specifically, the complaint alleged that the defendant had admitted to two senior employees of Bernard L. Madoff Investment Securities LLC - the broker-dealer that defendant owned and operated - that the investment advisory business that he ran was, "basically, a giant Ponzi scheme," and that he estimated the losses from his fraud to be approximately \$50 billion. The complaint further alleged that the defendant made similar admissions to FBI agents who spoke to him on the morning of December 11. Specifically, he told the agents that "there is no innocent explanation," and that he expected to go to jail. The breadth and depth of those facts alone distinguish this case from nearly all other white collar crimes.

At presentment, the Government sought, with the consent of defendant: (1) a \$10 million personal recognizance bond to be secured by the defendant's Manhattan apartment (valued at approximately \$7 million), and to be co-signed by four financially responsible persons including the defendant's wife; (2) surrender of the defendant's passport; (3) travel restricted to the Southern and Eastern Districts of New York and the District of Connecticut; and (4) release upon the signature of the defendant and his wife, with the remaining conditions to be fulfilled by December 16 at 2:00 p.m. The Court rejected the Government's additional requests that the defendant be required to report to Pretrial daily by telephone and once per week in person. On December 16, Magistrate Judge Gabriel W. Gorenstein extended from December 16, 2008, to December 17, 2008, at 2:00 p.m., the time within which the defendant would be permitted to

For the Court's convenience, a copy of the Complaint is attached hereto as Exhibit

meet all conditions of his bail.

On December 17, when the defendant failed to obtain two of the required four cosigners on his bond, the Government, with the consent of the defendant, requested that the defendant's bail conditions be modified to include: (a) home detention at the defendant's Manhattan apartment, with electronic monitoring; (b) the entry of confessions of judgment with respect to the defendant's wife's properties in Montauk, New York, and Palm Beach, Florida by December 22; (c) surrender of the defendant's wife's passport by noon on December 18; (d) imposition on defendant of a curfew of 7 p.m. through 9 a.m.; and (e) reduction of the number of required cosigners on the bond from four to two. Judge Gorenstein approved the requested modifications.

On December 19, the Government, with the consent of the defendant, requested that the defendant's bail conditions again be stiffened, pursuant to Title 18, United States Code, Section 3142, to further ameliorate the risks of harm or flight. Magistrate Judge Theodore H. Katz approved the proposed changes to defendant's bail conditions, which: (i) required the defendant to be subject to home detention at his Manhattan apartment, 24 hours per day, with electronic monitoring, other than for scheduled court appearances; (ii) required the defendant to employ by December 20, 2008, at his wife's expense, a security firm acceptable to the Government, to provide the following services to prevent harm or flight: (a) round-the-clock monitoring at the defendant's building, 24 hours per day, including video monitoring of the defendant's apartment door(s), and communications devices and services permitting it to send a direct signal from an observation post to the Federal Bureau of Investigation in the event of the appearance of harm or flight; and (b) additional guards on request if necessary to prevent harm or flight.

The Defendant's Attempted Dissipation Of Assets In Violation Of Court Order

On December 18, 2008, United States District Judge Louis L. Stanton issued an order in a parallel civil proceeding, SEC v. Bernard L. Madoff, et. al., 08 Civ. 10791 (LLS), barring the defendant from, among other things, dissipating, concealing, or disposing of any money, real or personal property in the defendant's direct or indirect control, the defendant and his wife sent multiple packages containing valuables to relatives and others. The defendant consented to the entry of that order. On December 24, 2008, the defendant and his wife mailed several packages to family and to friends. (Order at 4.) Specifically, the defendant sent a package containing a total of approximately 13 watches, one diamond necklace, an emerald ring, and two sets of cufflinks. The Government has been informed that the value of those items could exceed \$1 million, and as noted by the Court below, defendant does not take issue with that valuation. (See Order at 4.) Two other packages -- containing a diamond bracelet, a gold watch, a diamond Cartier watch, a diamond Tiffany watch, four diamond brooches, a jade necklace, and other assorted jewelry -- also were sent to relatives. The contents of those packages have been recovered by the Government. In addition, the defendant and/or his wife sent at least two additional packages to the defendant's brother and to an unidentified couple in Florida.

Procedural History

On January 5, 2009, after learning of the defendant's violation of Judge Stanton's order, the Government moved for detention pursuant 18 U.S.C. § 3142(f)(2). Following a hearing on the Government's application, the Court below requested additional briefing on the issues raised.² The Government submitted a brief on January 6. Defense counsel filed opposition papers on January 7, and the Government filed its reply on January 8. On January 12, Judge Ellis issued the Order denying the Government's motion.

Applicable Law

Standard Of Review A.

"A district court undertakes a de novo review of a magistrate judge's decision to release or detain a defendant." United States v. Jones, 566 F. Supp. 2d 288, 289 (S.D.N.Y. 2008) (citing United States v. Leon, 766 F.2d 77, 80 (2d Cir.1985)); United States v. Gotti, 358 F. Supp. 2d 280, 282 (S.D.N.Y. 2005); United States v. Smith, No. 02 Cr. 1399 (LAK), 2002 WL 31521159, at *1 (S.D.N.Y. Nov.13, 2002).

B. The Bail Statute

The Government may move for detention in a case that involves either "(A) a serious risk that the defendant will flee; or (B) a serious risk that [the defendant] will obstruct or attempt to obstruct justice " 18 U.S.C. § 3142(f)(2). The relevant statute requires that, should the Court conduct a detention hearing, it must consider all available pertinent information. Specifically, Title18, 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.

A copy of the hearing transcript is attached hereto as Exhibit B.

18 U.S.C. § 3142(g).

Under 18 U.S.C. § 3142(b),

The judicial officer shall order the pretrial release of the person [charged with an offense] on personal recognizance, or upon the execution of an unsecured appearance bond in an amount specified by the court . . . unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

Id

The legislative history of the Bail Reform Act of 1984 makes clear that Congress intended that the "safety of any other person or the community" language in Section 3142 was expected to be given a broad construction. See S. Rep. No. 225, 98th Cong., 1st Sess. 12 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3195 ("The reference to safety of any other person is intended to cover the situation in which the safety of a particular identifiable individual, perhaps a victim or witness, is of concern, while the language referring to the safety of the community refers to the danger that the defendant might engage in criminal activity to the detriment of the community. The Committee intends that the concern about safety be given a broader construction than merely danger of harm involving physical violence.") (emphasis added). Courts have appropriately construed the statute to find that protection of the community from economic harm is a valid objective of bail conditions. See United States v. Schenberger, 498 F. Supp. 2d 738, 742 (D.N.J. 2007) (holding that "[a] danger to the community does not only include physical harm or violent behavior" and citing the Senate Committee Report language reproduced above); United States v. Persaud, No. 05 Cr. 368, 2007 WL 1074906, at *1 (N.D.N.Y. Apr. 5, 2007) (concurring with the Magistrate Judge that "economic harm qualifies as a danger within the contemplation of the Bail Reform Act"); United States v. LeClercq, No. 07-80050-cr, 2007 WL 4365601, at *4 (S.D. Fla. Dec. 13, 2007) (finding that a large bond was necessary to, among other things, "protect the community from additional economic harm"); United States v. Gentry, 455 F. Supp. 2d 1018, 1032 (D. Ariz. 2006) (in a fraud and money laundering case, in determining whether pretrial detention was appropriate, the court held that danger to the community under Section 3142(g) "may be assessed in terms other than the use of force or violence . . . [including] economic danger to the community"); see also United States v. Reynolds, 956 F.2d 192, 193 (9th Cir. 1992) (post-conviction for mail fraud and witness tampering, the Court held that "danger may, at least in some cases, encompass pecuniary or economic harm."); United States v. Provenzano, 605 F.2d 85, 95 (3rd Cir. 1979) (in a pre-1984 Bail Reform Act case, post-conviction, the Court rejected an application for bail finding that

"danger to the community" is not limited to harms involving violence).3 Judge Ellis agreed, concluding that, "there is jurisprudence to support the consideration of economic harm in the context of detention to protect the safety of the community." Order at 19.

Argument

In engaging in the de novo review required under the law, this Court should consider the totality of the information now available to the Court to make an appropriate determination concerning bail.

This is a case that involves both a serious risk of obstruction or attempted obstruction of justice, and a serious risk of flight. See 18 U.S.C. § 3142(f)(2). The risk of obstruction is real, not hypothetical, and is demonstrated by three salient facts: (1) immediately prior to his arrest, and after acknowledging to employees that he had committed crimes against his investors, the defendant announced his intent to distribute the remaining investor assets (about \$200-300 million) to certain selected employees, family, and friends (see Complaint ¶ 4(e)); (2) following the defendant's arrest, the Government found in the defendant's office desk approximately 100 signed checks totaling more than approximately \$173 million, ready to be sent out; and (3) the defendant attempted to redistribute his wealth, in violation of Judge Stanton's order, when he sent packages of valuable items to family and friends. Restitution and forfeiture, are an important part of justice and will, in the event of a conviction, be part of any sentence in this case. See 18 U.S.C. § 3663A (mandatory restitution provisions apply to cases in which an identifiable victim or victims has suffered a pecuniary loss). Dissipation of the defendant's assets through transfers to third parties obstructs justice within the meaning of the bail statute, see 18 U.S.C. § 3142(f)(2)(B), because such transfers make it more difficult, if not impossible, to recover all available forfeitable assets to recompense victims.4

Pretrial detention cases in which bail is determined pursuant to Section 3142 routinely cite the principle set forth in post-conviction cases, in which bail is determined pursuant to 18 U.S.C. § 3143, that economic harm may be considered a danger to the community. See, e.g., United States v. Zaragoza, No. Cr-08-0083 (PJH), 2008 WL 686825, at * 3 (N.D.Cal. Mar. 11, 2008) (citing the principle regarding "pecuniary or economic harm" from Reynolds in the context of a pretrial detention analysis); Gentry, 455 F. Supp. 2d at 1032 (same).

The risk of flight stems principally from three facts: (1) the strength of the case against the defendant including his admission of guilt; (2) the defendant's demonstrated willingness to disregard Court orders with which he apparently does not agree; and (3) the scope of the defendant's admitted conduct (years of lying to investors to whom the defendant owed a fiduciary duty and billions of dollars of losses) that likely will result in a lengthy prison sentence. Given defendant's age, and his ruptured relationships with family, friends, and the community, the defendant has substantial reason to flee.

The harm to the community by the risk that defendant will further attempt to dissipate assets is obvious. The risk of economic harm to the community is a valid concern under the Bail Reform Act. 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. This risk is especially pertinent in the circumstances presented here. No matter the loss amount determined by the sentencing court, it appears that defendant will not be able to come remotely close to having the resources necessary to make his victims whole. Accordingly, every possible penny of the defendant's assets must be protected from dissipation.

In light of all the circumstances, there are simply no set of conditions, including those adopted by the Court below, that can reasonably assure the safety of the community.

At the time the defendant violated Judge Stanton's order, the defendant was under house arrest supervised by a private security firm. To address the Government's legitimate concerns about further economic harm to the community, the Court below added three additional conditions to the defendant's conditions of release:

- (1) The restrictions set forth in the preliminary injunction entered on December 18, 2008, in the civil case brought by the SEC before District Judge Louis L. Stanton, including restrictions on transfer of all property whatsoever, wherever located, in the possession or under the control of Madoff, SHALL be incorporated into the current bail conditions;
- (2) The restrictions set forth in the voluntary restraint agreement signed by Mrs. Madoff on December 26, 2008, SHALL be incorporated into the current bail conditions; and
- (3) Madoff **SHALL** compile an inventory of all valuable portable items in his Manhattan home. In addition to providing this inventory to the Government, Casale Associates, or another security company approved by the Government, SHALL check the inventory once every two weeks. Casale Associates, or another security company approved by the Government, SHALL search all outgoing physical mail to ensure that no property has been transferred. The Government and Madoff shall agree on a threshold value for inventory items within one week of this Order.

Order at 22.

First, there is no reason to think that the defendant will be any more likely to abide by

Judge Stanton's order if it is made part of the bail conditions than he was when it was an order of a U.S. District Judge in a civil case to which the defendant is a party. Moreover, the defendant, based on his prior actions, should not be given yet another chance to harm the victims in this case

Second, Mrs. Madoff is not a party in this criminal proceeding, and it is not clear that defendant could be held to account for his spouse's unilateral conduct in dissipating assets. Accordingly, it is doubtful that this second additional condition would have a practical or deterrent effect on the defendant.

Third, permitting the defendant -- whose actions show that he cannot be trusted to abide by Court orders -- to compile an inventory of the valuables in his Manhattan home does little to protect against the harm identified. This condition covers only one of his several real properties. Moreover, checking the contents of his apartment against that inventory every two weeks would only mean that the Government would learn after the fact that assets had been dissipated. The best way to prevent the defendant from transferring valuable assets to third parties and to severely impede his ability to do so with respect to his other properties is to detain him.

* * *

This defendant has abused the trust and discretion of the Magistrate Judge who approved his release on bail. 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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