

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

v.

FRANK DIPASCALI, JR.,

Defendant.

09 Cr. 764 (RJS)
ECF Case

GOVERNMENT’S MOTION FOR RECONSIDERATION OF BAIL CONDITIONS

The United States of America, by its attorney, Preet Bharara, United States Attorney for the Southern District of New York, Marc Litt and Lisa A. Baroni, Assistant United States Attorneys, of counsel, respectfully moves this Court to enter an Order, in the form attached, that would release the defendant, Frank DiPascali, Jr., from detention pending sentencing on the following stringent conditions: (1) a personal recognizance bond of \$10 million to be cosigned by nine financially responsible individuals, including immediate family members and other relatives; (2) security in the amount of approximately \$2 million, including three family-owned properties with equity of approximately \$600,000, approximately \$500,000 in retirement savings belonging to the defendant’s sister, and \$1 million from a non-family member’s retirement funds; (3) global positioning satellite and/or home detention with electronic monitoring, with permission to leave his residence under the escort of at least one Special Agent of the Federal Bureau of Investigation (“FBI”) limited to: (a) meetings with federal authorities in connection with his ongoing cooperation; (b) appearances in Court as required; and (c) in the event of a medical emergency (in which case an FBI escort will not be required); (4) the

surrender of his wife's travel documents and no application for new travel documents; and (5) strict pretrial supervision.

The Government believes that this proposed bail package – in light of the defendant's strong ties to the community, his acceptance of responsibility, his extensive cooperation to date, and his strong incentive to continue to cooperate – provides a sufficient basis for the Court to find by clear and convincing evidence that he “is not *likely* to flee or pose a danger to any other person or the community.” 18 U.S.C. § 3143(a)(2)(B) (emphasis added).

As grounds for this motion the Government relies on the following facts and authorities.

Background

On August 11, 2009, DiPascali pleaded guilty to a ten-count criminal information exposing him to maximum statutory sentences totaling 125 years. DiPascali also agreed to forfeit all of his assets. At that time, the parties jointly proposed bail conditions including: (1) a \$2.5 million personal recognizance bond to be both: (a) co-signed by three financially responsible persons, and (b) secured by \$400,000 of equity in the house belonging to the defendant's sister; (2) surrender of all travel documents, with no new applications permitted; (3) travel restricted to the Southern District of New York, Eastern District of New York, and Eastern District of Pennsylvania; and (4) regular pretrial supervision. During oral argument, the parties proposed that home detention and electronic monitoring be added as a condition. The Court found however, that the proposed bail package was not sufficient to overcome the risk of flight. (See Transcript of Plea and Bail Hearing, dated August 11, 2009 (hereinafter “Tr.”), at 91). The Court invited the parties to provide additional information to the Court and to establish a fuller

record in support of their joint application. (Tr. 87, 90, 91). In response to that invitation, the parties jointly propose the significantly strengthened bail package described above.

Applicable Law

Title 18, United States Code, Section 3143(a) provides for mandatory detention of a defendant who is awaiting imposition or execution of sentence pending appeal unless the Court finds “by clear and convincing evidence that the person is not likely to flee or pose a danger to the community if released under section 3142(b) or (c).” 18 U.S.C. § 3143(a). As the Second Circuit held in *United States v. Abuhamra*, 389 F.3d 309 (2d Cir. 2004), “the Bail Reform Act of 1984 creates no general expectation of post-verdict liberty. To the contrary, it establishes a presumption in favor of detention.” *Abuhamra*, 389 F.3d at 319. The Court further noted that the Government had a “strong and obvious countervailing interest in detaining defendants who have been found guilty beyond a reasonable doubt of serious crimes: such detention promotes public safety by removing a presumptively dangerous person from the community; it also encourages general respect for the law by signaling that a guilty person will not be able to avoid or delay imposition and service of the sentence prescribed by law.” *Id.* at 319-20. Indeed, that was a “significant impetus” to the enactment of 18 U.S.C. § 3143. *Id.* at 320 (citing S. Rep. 225, 98th Cong., 1st Sess. 26 (1983), reprinted in 1984 U.S. Code Cong. & Admin. News at 3209 (noting that “release of a criminal defendant into the community after conviction may undermine the deterrent effect of the criminal law”)). The presumption established by 18 U.S.C. § 3143(a) is not, however, insurmountable. Where the Court finds by clear and convincing evidence that the defendant is not likely to flee, the Court must release the defendant. 18 U.S.C. § 3143(a).

Application of 18 U.S.C. § 3143 To Cooperators In Large-Scale Fraud Cases

Notwithstanding the heavy presumption of detention that follows a guilty plea, courts historically have released cooperating defendants¹ facing lengthy terms of incarceration and substantial forfeiture judgments in several of the large fraud cases brought in this District.

A. Refco

On December 19, 2007, Santo Maggio pleaded guilty, pursuant to a cooperation agreement to four felonies carrying a maximum penalty of 65 years' imprisonment in connection

¹ At the plea proceeding, the Court noted the Government's reliance on Section 3143(a)'s presumption of detention in its memorandum supporting its motion to remand Alberto Vilar, a former investment adviser, following his conviction of twelve felonies. (*See* Docket, 05 Cr. 621 (RJS)). Bail determinations are, by their nature, based on fact-intensive inquiries, and depend largely on the Court's assessment of the individual involved, and the likelihood, under all the circumstances, that the individual will flee. Although reference to bail determinations in other cases is instructive, the Government respectfully suggests that there are significant differences between the case of Alberto Vilar and this case.

The Government noted several facts in its December 3, 2008 memorandum in the Vilar case, that distinguish that case from this one. First, Vilar had unexplained sources of financial resources and/or people willing to finance his lavish lifestyle and criminal defense lawyers. (*See* Vilar Mem. at 8). Second, Vilar had a lengthy history of extensive foreign travel, had lived in Kuwait for four years, had lived in London for four years, and as late as April 21, 2005 (just one month prior to his arrest) had testified at a deposition that he had been a permanent resident of the United Kingdom since 1981 and that he intended to move back to England in 2005. (*Id.* at 9). Third, Vilar had no meaningful ties to New York. (*Id.* at 10-11). Fourth, unlike others who had pleaded guilty, accepted responsibility, and had accepted psychologically the prospect of conviction and imprisonment before it became a reality, Vilar had in fact very publicly pronounced that the Government's prosecution was misguided and that he would be vindicated at trial. (*Id.* at 21).

By contrast, DiPascali has no such unexplained available resources, does not have the experience or wherewithal to make it likely that he would attempt to live abroad, has deep ties to the area, has accepted responsibility by pleading guilty, voluntarily turned over assets prior to being charged and has been cooperating with the Government's investigation for months.

with his role in the \$2.4 billion Refco fraud. Maggio also admitted to a \$2.4 billion forfeiture allegation. Maggio was released on his own recognizance. (*See* Docket, 07 Cr. 1196 (SHS)). On February 20, 2008, Robert Trosten pleaded guilty, pursuant to a cooperation agreement, to five felonies carrying a maximum penalty of 85 years' incarceration for his role in the fraud. Trosten also admitted to a \$2.4 billion forfeiture allegation. Trosten was released on a \$10 million personal recognizance bond, cosigned by one financially responsible individual, and secured by a property in Florida. The cooperation of Maggio and Trosten resulted in the convictions of Phillip R. Bennet, the former CEO of Refco (by plea), Tone Grant (after trial), and Joseph Collins, former outside counsel to Refco (after trial). Both Maggio and Trosten remain released on bail, pending sentencing.

B. Bayou

On September 29, 2005, Daniel E. Marino, the former Chief Financial Officer of the Bayou Hedge Fund Group, pleaded guilty, pursuant to a cooperation agreement, to four felonies exposing him to a maximum term of incarceration of 50 years. Marino agreed to forfeit all of his assets, and admitted to a forfeiture allegation totaling \$450 million. Marino was released on a \$500,000 personal recognizance bond to be signed by three financially responsible individuals within two weeks of his release, and was ordered to surrender his passport. (*See* Docket, 05 Cr. 1036 (CM)). Marino was sentenced by the Honorable Colleen McMahan to a sentence of twenty years' incarceration.

C. WorldCom

Scott D. Sullivan, the former Chief Financial Officer of WorldCom, was first presented on August 1, 2002, and was released on conditions including a \$10 million personal

recognizance bond to be cosigned by 2 financially responsible persons, and secured by a \$5 million property lien on property in Boca Raton, Florida. His travel was restricted to the Southern and Eastern Districts of New York, Florida, Mississippi, the District of Columbia, and anywhere in the United States on three days' notice, and the surrender of all travel documents. (*See* Docket, 02 Cr. 1144 (BSJ)). After Sullivan pleaded guilty, pursuant to a cooperation agreement, to a superseding indictment that exposed him to a total of 25 years' incarceration, he was not detained, but rather remained on release, with no change in his bail conditions. Following the completion of his cooperation, which resulted in the conviction of Bernard J. Ebbers, the former Chairman and CEO of WorldCom, Sullivan was sentenced by the Honorable Barbara S. Jones to a sentence of five years' incarceration.

Application of Section 3143(a) to Frank DiPascali

The Government respectfully submits that Frank DiPascali's voluntary acceptance of responsibility for his crimes, his demonstrated willingness to cooperate fully with the Government's ongoing investigation, his very strong incentive not to flee so that he has a chance to obtain some benefit from his cooperation, his strong ties to his family and his community, and the stringent conditions of the proposed bail package – which are significantly greater than any of the bail conditions set on the cooperators described above – are sufficient for the Court to find by clear and convincing evidence that DiPascali is not likely to flee.

Accordingly, the Government respectfully submits that he should be released subject to the proposed conditions.

DiPascali has every incentive to stay in the area where he has spent his entire life and to continue to cooperate with the Government. As a practical matter, the only chance

DiPascali has to significantly reduce his sentence is to do just that. Moreover, DiPascali's family, including a high school aged son, his wife of 25 years, his 77 year-old mother, and his two sisters, all live close by. Were DiPascali to flee, he would effectively bankrupt his family by taking the equity in their homes, and the funds from their retirement accounts. The Government is not aware of any other funds available to him or his family.

DiPascali voluntarily turned over to the U.S. Marshals Service one of his two largest assets – a 61-foot boat that he purchased with fraud proceeds – months before he was even charged, and the Government is in the process of forfeiting his other significant asset, his home. Unlike some cooperators in large-scale fraud cases, DiPascali neither has the resources nor the experience to live abroad for an extended period, let alone to take his family with him. The Government is unaware of any property or assets that DiPascali has in foreign jurisdictions, and likewise has no evidence that DiPascali has ever lived in a foreign country.

The proposed bail conditions reinforce DiPascali's existing incentives. First, as noted above, flight would have serious financial consequences for his family. Second, release would allow him to cooperate far more effectively, by making the contents of one-half floor of an office building containing the equivalent of thousands of boxes of documents more readily available. If allowed controlled access to those materials, DiPascali's ability to cooperate will increase, and the Government expects that as his ability to cooperate increases, his incentive to continue to do so will grow even stronger as the prospect of providing the kind of substantial assistance that may result in a reduction in his sentence grows. Thus, although the ability to cooperate is not an explicit factor to be considered under Section 3143(a), the Government contends that it is a significant factor that should be considered in weighing the likelihood of

flight. Third, DiPascali's knowledge that he will be surveilled by global positioning satellite and/or home detention with electronic monitoring will even further deter any thought that flight would be successful. Finally, the fact that an FBI agent will be with DiPascali whenever he leaves his home to assist with the Government's investigation provides even further assurance that he is unlikely to flee.

DiPascali cooperated for months leading up to his plea. He was aware of the magnitude of the charges to which he pleaded guilty on August 11, and voluntarily appeared to do so. He has no unexplained sources of wealth. He has little experience traveling abroad, and has never lived abroad. Finally, he has accepted responsibility for his crimes and, the Government believes, has strong incentive to live up to his pledge of full cooperation. Given these circumstances, and the terms of the proposed bail package, the Government respectfully submits that there is clear and convincing evidence that DiPascali is not likely to flee.

Conclusion

For all the reasons set forth herein, the Government respectfully submits that the Court should, pursuant to 18 U.S.C. § 3143(a), reconsider the conditions of bail for the defendant and should release him in accordance with the terms set forth in the attached proposed Order.

Dated: New York, New York
October 16, 2009

Respectfully submitted,

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