

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
-----x

3 UNITED STATES OF AMERICA,

4 v.

09 Cr. 764 RJS

5 FRANK DIPASCALI,

6 Defendant.

7 -----x

8 October 28, 2009  
9 4:10 p.m.

9

10

11 Before:

12

HON. RICHARD J. SULLIVAN,

13

District Judge

14

15

APPEARANCES

16

PREET BHARARA,  
United States Attorney for the  
Southern District of New York

17

18

MARC O. LITTE,  
LISA ANNA BARONI,  
BARBARA ANN WARD,  
Assistant United States Attorneys

19

20

BRACEWELL & GIULIANI,  
Attorneys for defendant Dipascali

21

BY: MARC LEE MUKASEY, Esq.

22

CRAIG S. WARKOL, Esq.

JAMES O. RENNER, Esq.

Of counsel

23

Also Present:

24

KEITH D. KELLY, Special Agent FBI

Julia Schulte Hanish, Special Agent FBI

25

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

UNITED STATES OF AMERICA,

v.

09 Cr. 764 RJS

FRANK DIPASCALI,

Defendant.

-----x

October 28, 2009  
4:10 p.m.

Before:

HON. RICHARD J. SULLIVAN,

District Judge

APPEARANCES

PREET BHARARA,  
United States Attorney for the  
Southern District of New York  
MARC O. LITTE,  
LISA ANNA BARONI,  
BARBARA ANN WARD,  
Assistant United States Attorneys

BRACEWELL & GIULIANI,  
Attorneys for defendant Dipascali  
BY: MARC LEE MUKASEY, Esq.  
CRAIG S. WARKOL, Esq.  
JAMES O. RENNER, Esq.  
Of counsel

Also Present:  
KEITH D. KELLY, Special Agent FBI  
Julia Schulte Hanish, Special Agent FBI

9ASJDIPH

## Bail Hearing

1 (In open court)

2 (Case called)

3 THE COURT: Please be seated.

4 All right. Just for the record, we're here for a bail  
5 hearing. Specifically, the parties have made a joint motion  
6 for reconsideration of the detention order I issued back in  
7 August, August 11th specifically.

8 As I stated on the record back in August, the parties  
9 were, of course, free to make a revised bail package, motion  
10 for that. I am not sure this is really a motion for  
11 reconsideration since 60 days or more have passed. In any  
12 event, I think it is a proper motion to be made.

13 I reviewed all of the submissions from the parties,  
14 the government's submission and Mr. Mukasey's submission. I  
15 have also reviewed a letter, an e-mail I received from one of  
16 the victims in this case, Mr. Laurence Leif, and I made that  
17 correspondence a part of the record.

18 I also made arrangements for other victims to advise  
19 the government and, through the government, the court whether  
20 they wish to be heard on this subject, which is specifically  
21 the bail of Mr. Dipascali.

22 As of yesterday, I was advised that no other victims  
23 had expressed a desire to speak, and so I just wanted to see if  
24 that was still the case. Mr. Litt, are you aware of anyone who  
25 wishes to speak?

9ASJDIPH

## Bail Hearing

1 MR. LITT: No, I am not, your Honor.

2 THE COURT: Is there anyone else here who does wish to  
3 speak notwithstanding the fact maybe they didn't tell the  
4 government or the court?

5 I see no one has raised their hands. So that is fine.  
6 I will read it because it is worth reading the letter from Mr.  
7 Leif. It is part of the record. I think I will just because  
8 he is a victim, he did want to heard. It is dated October  
9 22nd.

10 Dear Judge Sullivan: I am not the type of man that  
11 believes in revenge or hurting others in any way. However,  
12 Mr. Dipascali, who I have spoken on the phone with, has  
13 committed a very evil crime. Everybody in my life has lost  
14 everything including myself. I saw 40 years of work go up in  
15 smoke on December 11th (My IRA and my personal money totaling  
16 \$8 million). I was a Madoff client for over 30 years. I put  
17 my trust and my life into them, and they violated that in the  
18 worst possible way.

19 Mr. Dipascali was the instrument for taking my life  
20 away. I have now received a life sentence at 59 years' old and  
21 did nothing wrong. Mr. Dipascali gave me that sentence on  
22 December 11th, 2008. I have no chance to get my life in order  
23 and why should he?

24 It feels like the entire system failed me and the  
25 others so we are hoping that you do not let it fail us in your

1 courtroom. There is absolutely no reason to let him out on  
2 bail. Whatever he was going to tell the authorities, he should  
3 have done so. Why would you let him blackmail the authorities  
4 with information he may have?

5 As far as I am concerned, keeping him in jail next  
6 year before his sentencing should be enough for him to  
7 cooperate. But understand one thing ... whatever he tells the  
8 authorities will not help the victims in any way. Why torment  
9 us any more by letting him out on bail?

10 He committed the crime and now is his time to pay. I  
11 also think he is a terrible flight risk even though his family  
12 put up all their assets for bail. Those assets were purchased  
13 with our money, so why should they be allowed to use them for  
14 bail or even keep them? Please do not let justice fail us once  
15 more. Deny bail and let's move on.

16 Regards, Laurence Leif.

17 That is the letter. It is part of the record. Let me  
18 ask the government or Mr. Mukasey if they wish to respond to  
19 that in any way or have any comments with respect to that  
20 letter?

21 MR. LITT: Only as to that issue or do you want --

22 THE COURT: Just with respect to the letter.

23 MR. LITT: Well, the government would say two things:

24 As the court knows, this is not a sentencing  
25 proceeding; it is a bail proceeding and punishment will come in

1 this case. I don't think anybody in this room either at the  
2 government table or the defense table has any doubt about that.  
3 But this is about bail and not what should happen prior to  
4 sentencing.

5 THE COURT: Understood.

6 MR. LITT: That addresses the first half.

7 With respect to the second point about assets, the  
8 government has taken care to ensure that none of the assets  
9 that are being put up as security are forfeitable. Indeed, one  
10 of the co-signers had some funds that came out of the fraud  
11 account at Madoff, and those assets are not being pledged.  
12 There is an agreement being worked out where that money is  
13 going to be returned to the government with interest, and it  
14 will go into the forfeited funds that will eventually be  
15 returned to victims. So that addresses the second point about  
16 any kind of victim money being used to support or secure Mr.  
17 DiPascoli's bail.

18 THE COURT: Okay. Thank you, Mr. Litt.

19 Mr. Mukasey, is there anything you wanted to add?

20 MR. MUKASEY: No, Judge. I will probably make my  
21 comments in the context of my larger argument if it pleases the  
22 court when the court is ready.

23 THE COURT: Look, I have read the submissions. I  
24 think I understand the arguments so I don't know that I need  
25 elaboration much, but I am happy to hear the parties.

1 I think it is clear the standard here is a very  
2 straightforward one. This is a bail hearing. It is not  
3 sentencing. The provision that covers this proceeding is Title  
4 18 of the United States Code, Section 3143. That provision  
5 provides for mandatory detention of a defendant who is awaiting  
6 imposition of a sentence unless the court finds by clear and  
7 convincing evidence that the person is not likely to flee if  
8 released.

9 It creates a rebuttable presumption of detention. It  
10 also creates a statutory right to bail on a finding that the  
11 person is not a flight risk. The statute is straightforward  
12 and simple. Issues of fairness, issues of equity, issues of  
13 punishment and retribution are not part of this statutory  
14 inquiry.

15 I agree with Mr. Litt when he responded to this letter  
16 of Mr. Leif. This inquiry and the statute simply requires a  
17 determination that the defendant has met his burden by proving  
18 by clear and convincing evidence that he is not likely to flee.  
19 I think that is where we should start and that is where we'll  
20 basically end.

21 I don't think there is that much dispute about the  
22 standard here. The parties are in full agreement, as I've said  
23 before. As you know, I was a prosecutor for many years. I  
24 think I understand bail. I think I understand cooperation.

25 I will say this: After leaving the U.S. Attorney's

1 Office, I became general counsel for an insurance broker. We  
2 were in the business of managing risk. That is really the  
3 issue here, whether the bail package proposed manages the risk  
4 of Mr. DiPascali's flight. The key proponents of this bail  
5 package proposed by the parties are the following:

6 First, a PRB of \$10 million to be signed by 9  
7 financially-responsible persons. In addition, that bond is to  
8 be secured by cash and property worth \$2 million.

9 In addition, Mr. Dipascali is to be on home  
10 confinement with an electronic bracelet that has a global  
11 positioning system or tracking system, with permission to leave  
12 his residence only when accompanied by an FBI agent for court  
13 appearances or meetings with the government. He may also leave  
14 for medical emergencies without an agent should such  
15 emergencies arise.

16 The bail proposal also calls for Mr. DiPascali's wife  
17 to surrender her travel documents, calls for strict pretrial  
18 supervision.

19 Finally, and most importantly, I think it is not part  
20 of the package, but a consideration, a valuable important  
21 consideration is the fact that Mr. Dipascali is cooperating  
22 with the government.

23 So the question is: Are these sufficient mechanisms  
24 to manage the risk of Mr. DiPascali's flight?

25 Ultimately the risk of flight I think is a function of

1 both Mr. DiPascali's incentive to flee and his opportunity to  
2 flee, so I want to consider each of those separately.

3 His incentive to flee, as I said last time, I think is  
4 considerable. He is facing an astronomical sentence, what  
5 amounts to I think in essence the largest financial fraud in  
6 United States history. It is certainly among them. He is  
7 facing a maximum sentence of 125 years.

8 But even that is misleading because defendants  
9 frequently will face large maximum penalties based on the  
10 charges in the indictment. The maximum penalties aren't  
11 usually what drives sentencing in this courthouse or in federal  
12 courthouses anywhere. Anybody sophisticated and experienced in  
13 federal criminal matters knows it is the sentencing guidelines  
14 that typically drive sentencing.

15 So although the press may often make much of the fact  
16 a person is facing 65 years or 80 years, in many instances that  
17 is not the reality. The guidelines come out much lower. A  
18 maximum of 65 years or 80 years might actually be accompanied  
19 by a guidelines range of 6 or 7 years, and that is ultimately  
20 what is, I think, crucial to the inquiry before the court. It  
21 is not the only consideration, but it is certainly among the  
22 most important.

23 In this case, however, that is not true. In this  
24 case, the guidelines calculations literally are off the charts.  
25 I think I did a quick review last time. It is worth probably

1 just going through it. Anybody who disagrees can let me know.

2 Under the guidelines, there is a base offense Level 6  
3 pursuant to the fraud provision of the guidelines 2B1.1. That  
4 offense level would then be enhanced by 30 levels since the  
5 fraud exceeded \$400 million. In fact, the government estimates  
6 the loss to be 170 billion, or at least that is the forfeiture  
7 amount. Is that the loss amount, Mr. Litt?

8 MR. LITT: I would say the loss amount is more on the  
9 order of 13 billion, but I think it is over the 400 million,  
10 which gets you to the 30 levels.

11 THE COURT: Why is the forfeiture for 170?

12 MR. LITT: Forfeiture and the loss amount and  
13 restitution amount, for example, can all be different numbers.  
14 They're calculated differently.

15 THE COURT: I am asking.

16 MR. LITT: 177 billion is the amount of money that  
17 moved through the Ponzi account, and so it represents proceeds.  
18 I would just, I don't think it is likely to make a difference  
19 to your Honor's calculation, but the base offense level I think  
20 would be 7 as opposed to 6 because one of the counts would  
21 involve a statutory maximum of 20 years or more.

22 THE COURT: So it is 7?

23 MR. LITT: Base offense of 7.

24 THE COURT: I don't think it will make a difference,  
25 either, but, in any event, there is an enhancement of 30 levels

1 because the loss amount is 13 billion, which is much, much  
2 higher than the maximum under the guidelines, 1400 million.  
3 For 13 billion, there is an enhancement of six levels because  
4 the scheme involved more than 250 victims. The victims in this  
5 case number in the thousands or tens of thousands.

6 There will be an additional two level enhancement  
7 because the fraud involved sophisticated means and arguably  
8 because a substantial part of it was committed from outside of  
9 the United States, at least some part was in London. I think  
10 sophisticated means is sufficient for that two-level  
11 enhancement.

12 There will be an additional two-level enhancement  
13 because the scheme substantially endangered the solvency or  
14 financial security of a hundred or more victims. That is 2B1.1  
15 (b) (1) (4).

16 There will be an additional three-level enhancement  
17 because it appears that the defendant was a manager or  
18 supervisor of criminal activity that involved five or more  
19 persons or was otherwise extensive. I don't know if that is  
20 disputed or not. It seems to me certainly it is extensive and  
21 his role was crucial.

22 Does the government have a view on that role in the  
23 offense?

24 MR. LITT: I think three levels would be appropriate.  
25 I think there is still the fact it occurred to a person

1 associated with a broker-dealer.

2 THE COURT: That is an additional --

3 MR. LITT: Four.

4 THE COURT: -- four levels?

5 There will be another two levels of enhancement for  
6 abuse of position or trust, or no?

7 MR. LITT: No. If you get four levels for being a  
8 broker-dealer, you don't get the two levels.

9 THE COURT: That was my mistake then. It is a net  
10 two. Then two more levels for obstruction of justice in  
11 connection with Mr. DiPascali's false testimony before the SEC.

12 MR. LITT: We are not sure that --

13 THE COURT: Didn't he plead guilty to an obstruction  
14 offense?

15 MR. LITT: Yes, but wouldn't that come in with  
16 grouping with the other offenses, and you wouldn't get the two  
17 levels on top of that. I am not sure. I know in Mr. Madoff's  
18 sentencing he had a similar series of enhancements, and that  
19 was not one of them.

20 THE COURT: All right. We can come back to that, I  
21 suppose, when we get to sentencing.

22 There will be a three-level reduction for acceptance  
23 of responsibility, but that puts his guideline range in the  
24 neighborhood of 50 or more. For the uninitiated, the  
25 guidelines tops out at Level 43, which calls for a term of life

1 in prison. The defendant's guidelines range will be seven or  
2 more levels above the highest contemplated in the range.

3 So I don't think I need a lengthy presentence report  
4 to tell me absent cooperation, Mr. Dipascali will be looking at  
5 a guidelines range of life, so that I would have to come down  
6 to sentencing him to 125 years, which would be the statutory  
7 maximum.

8 That obviously is a crucial potential sentence which  
9 would create an incentive to flee. The parties argue this  
10 incentive to flee is offset by a number of factors, including  
11 the financial consequences of jumping bail, including Mr.  
12 DiPascali's reluctance to harm his co-signers on the bond which  
13 includes friends and family members would be bankrupted if he  
14 were to flee, his reluctance to separate himself from his  
15 family with whom he is so close, and ultimately I think  
16 probably the most important is his desire to cooperate and his  
17 willingness to cooperate in expectation of perhaps a reduced  
18 sentence. I'll take each of those.

19 The reluctance to harm co-signers is one that is  
20 difficult to assess because although the parties propose a \$10  
21 million bond to be co-signed by 9 financially-responsible  
22 persons, there is no indication as to who those persons are.  
23 There is a reference to Mr. DiPascali's sister, I think, but  
24 the others are not before me. I don't know whether these folks  
25 have the wherewithal to shrug off a \$10 million forfeiture

1 split 9 ways or whether they it really would bankrupt them.

2 MR. MUKASEY: I'll give you --

3 THE COURT: I will give you an opportunity to do that  
4 or make a submission, which would be more useful. It is  
5 difficult for me to know whether that would have the deterrent  
6 effect that is proposed here. I just don't know who these  
7 people are or what their financial situation is. I don't know  
8 whether any of their finances are derived from this fraud in  
9 any way.

10 Mr. Litt has indicated that to the extent there was  
11 any connection, the government made inquiries and took steps to  
12 make sure that property was not part of what was posted. I am  
13 glad to hear that, but I don't have details on this. It is not  
14 clear to me whether the properties that are proposed as  
15 security for the bond which is "three family-owned properties  
16 with equity in approximately \$600,000," includes property that  
17 would otherwise be forfeitable. I don't know the answer to  
18 that. You are shaking your head?

19 MR. LITT: None of, as I said, none of the security to  
20 be posted in support of the bond is forfeitable.

21 THE COURT: All right. In any event, it still is  
22 difficult for me to assess the deterrent value of the bond with  
23 those co-signers.

24 Separation from family members is a point Mr. Mukasey  
25 had made. He noted that Mr. Dipascali is extremely close,

1 "indescribably close" is the way he phrased it with his family  
2 and that to flee would separate him from his family, and if he  
3 were to be apprehended, would ensure a life sentence which  
4 would separate him from his family.

5 He is looking at the prospect of a life sentence  
6 whether or not he separates himself from his family. I think  
7 it really takes me to the next consideration, which is  
8 cooperation, because cooperation is the driver for any  
9 incentive Mr. Dipascoli may have to flee.

10 That really is the principal argument that the parties  
11 have made, is that his incentive to flee is eliminated by the  
12 fact he is cooperating and he recognizes that his best hope for  
13 a reduced sentence and for being reunited with his family is  
14 through his continued cooperation.

15 As Mr. Mukasey put it in his submission,  
16 "Mr. Dipascoli has only one route to avoid a life sentence, and  
17 that is to be a truthful, credible and a tireless cooperating  
18 witness."

19 The fact is that Mr. DiPascoli's incentive to flee  
20 rises and falls with the quality of his cooperation. If the  
21 only people he can cooperate are currently in prison in Butner,  
22 North Carolina or at the bottom of a swimming pool someplace,  
23 it would seem Mr. Dipascoli is going to have a great incentive  
24 to flee because his cooperation isn't under those circumstances  
25 likely to yield much fruit.

1           Now, Mr. Mukasey asserts that Mr. Dipascali has,  
2 "demonstrated to the United States Attorney's Office, to the  
3 SEC and to the FBI that he wants to be and has the potential to  
4 be a remarkable cooperating witness."

5           I simply have no idea or no way of knowing whether  
6 that is true. No one has made any submission to the court,  
7 sealed or otherwise, indicating the quality of Mr. DiPascoli's  
8 cooperation to date or the prospects of his cooperation to  
9 substantially assist the government in future prosecutions, yet  
10 it would seem to me that is a crucial fact for the purposes of  
11 assessing his incentive to flee.

12           That is why I was somewhat surprised at the submission  
13 I received because it doesn't allow me to address that issue.  
14 The parties basically tell me back in August I should trust  
15 them and basically leave it to the professionals. I have great  
16 respect for everybody at both of the tables in this courtroom.  
17 I have worked with them or at least many of them. I think they  
18 are smart and dedicated people. I have a high opinion of each  
19 of them.

20           When people start telling me to trust them, I  
21 generally watch my wallet, and so I am not prepared to defer to  
22 the opinion of the government or to Mr. Mukasey or to the New  
23 York Times or whatever straw poll anybody wants to take.

24           I don't want to mean to cast aspersions on anyone, but  
25 until December of 2008, it seems to me that nobody here and

9ASJDIPH

## Bail Hearing

1 none of the entities they represent had the first clue about  
2 what turned out to be the biggest fraud in U.S. history, a  
3 fraud that was 20 to 30 years in the making.

4 It is true of the U.S. Attorney's Office, the FBI and  
5 SEC which, in fact, although investigated the firm and going so  
6 far as to actually take testimony from Mr. Dipascali, concluded  
7 that there was no problem at least in part based on the  
8 perjured testimony of just Mr. Dipascali. So I am skeptical  
9 and I think I have a right to be.

10 I have never met Mr. Dipascali other than to take his  
11 guilty plea. Perhaps if I spent as much time with him as you  
12 all have, I would want to give him bail. Perhaps I would want  
13 to give him all my money to invest. He seems to have that  
14 effect on people.

15 Without the opportunity to do that, I am limited to  
16 the facts before me. The facts before me are that  
17 Mr. Dipascali was a central figure in the largest financial  
18 fraud in U.S. history. He participated in that fraud for  
19 decades. In 2006, at a time when he could have come clean and  
20 limited the losses to investors in the scheme, at least some,  
21 at least partially, he lied under oath to the SEC, perpetuating  
22 a fraud for another two and a half years and extending the  
23 losses to additional investors and who knows how many  
24 additional billions of dollars.

25 He is now facing a sentence that ensures that he will

1 die in jail unless there is a substantial 5K letter from the  
2 government. So in this regard Mr. Dipascali seems to be  
3 distinguishable or at least different from the cooperating  
4 witnesses identified in the government's submission.

5 It seems to me each of those cooperators had ready  
6 targets against whom they could cooperate. Scott Sullivan was  
7 the CFO of Worldcom. He signed up as a cooperator and  
8 testified against his boss, Mr. Ebbers, who was more culpable.

9 Mr. Madoff has already pleaded guilty in this case.  
10 He has already been sentenced to 150 years in jail, so I don't  
11 think Mr. Dipascali is needed for that prosecution. Mr.  
12 Mukasey asserts, at Page 11 of his submission, that, "although  
13 Mr. Dipascali is likely facing a life sentence today under the  
14 sentencing guidelines, he will not flee because he is confident  
15 that his cooperation will be so substantial that it may afford  
16 him an opportunity, however brief, to return to his family  
17 post-sentence."

18 Now, that may be true, but again I have no way of  
19 assessing how substantial his cooperation may be, no way of  
20 assessing whether there is anybody who will be prosecuted as a  
21 result of his cooperation. While I am happy to give the  
22 parties an opportunity to supplement the record in this regard,  
23 and if there is disclosure of any information that would  
24 conceivably compromise an investigation, I will certainly  
25 entertain a request to seal it. I may want to seal such a

1 submission. I would consider doing that.

2 Without more information, I don't feel that I am in a  
3 position to assess whether Mr. DiPascali's cooperation is part  
4 of a sincere effort to be what Mr. Mukasey says is "a truthful,  
5 credible and tireless cooperating witness," or whether this is  
6 simply the last scam in a decades-long saga of lies, false  
7 statements and schemes designed to defraud clients, investors,  
8 regulators and now the court.

9 I will say this: I thought Mr. DiPascali's endeavor  
10 to portray himself as a kid from Queens with a high school  
11 degree, as a 19-year-old joining the Madoff firm was, I thought  
12 it was a bit of a con. This is not a case about a 19-year-old  
13 kid from Queens. This is a man in his 30s, 40s and 50s who  
14 deliberately lied and cheated for his own personal gain and  
15 enjoyed the fruits of the fraud.

16 Until I see an actual forfeiture order, he might still  
17 be enjoying the fruits of that fraud. The suggestion that  
18 Mr. Dipascali believed that -- and this is a quote, from Mr.  
19 Mukasey's submission -- despite the fact that no trades were  
20 being executed, investors would not lose any of their funds  
21 because Mr. Madoff owned a massive portfolio of assets he could  
22 liquidate to satisfy redemption requests if and when clients  
23 requested the return of their funds. That strikes me as if not  
24 ludicrous, surprising.

25 In any event, without additional information I think

1 that enables me to assess the quality of Mr. DiPascali's  
2 potential cooperation, I don't think I can conclude that he has  
3 carried his burden under Section 3143, but I will give the  
4 parties an opportunity to do that.

5 I want to address also opportunity to flee. I have to  
6 talked mostly about incentive to flee. The bail package  
7 proposed by the parties includes additional conditions that  
8 will limit -- though not eliminate -- Mr. DiPascali's ability  
9 to flee. The bail package calls for home detention with  
10 electronic monitoring, including a GPS device to determine  
11 where he is.

12 It also provides that other than for medical  
13 emergency, Mr. Dipascali will not be permitted to leave his  
14 home unless escorted by an FBI agent, then only for the  
15 purposes of meeting with the government or for court  
16 appearances.

17 As Mr. Litt conceded previously, no system is  
18 foolproof and even these restrictions can't eliminate the  
19 ability of a determined defendant to flee. If the technology  
20 were, in fact, foolproof, then I think virtually all defendants  
21 would be entitled to bail pending sentencing. Unfortunately,  
22 that is not yet the case with the technology. While the  
23 current proposal I think is an improvement on the prior  
24 proposal, and it does further restrict Mr. DiPascali's  
25 opportunity to abscond, I think the central inquiry for me

1 turns really on Mr. DiPascali's incentives to flee as I talked  
2 about before.

3 Now, there is a suggestion in the government's paper  
4 that Mr. Dipascali does not have the resources to flee and the  
5 government asserts that he has "neither the experience nor  
6 wherewithal to live abroad." It is at Page 4.

7 It seems to me living abroad is not that difficult if  
8 you have enough money. Unless the government is prepared to  
9 tell me every dollar of this fraud has been accounted for, I  
10 don't think I am prepared to rule out at least the possibility  
11 Mr. Dipascali has access to a large pile of money someplace.  
12 That can also be addressed in a supplemental submission.

13 My principal concern is his incentive to flee which I  
14 think turns largely on the quality of his potential  
15 cooperation. So I am going to reserve my decision to allow the  
16 parties to make that submission. I will also hear from you  
17 now. I won't shut you out.

18 Mr. Litt or Mr. Mukasey, is there anything you want to  
19 add?

20 MR. LITT: We'll consider a sealed submission.

21 THE COURT: Okay.

22 MR. MUKASEY: I want to make a few points, Judge.

23 THE COURT: Certainly.

24 MR. MUKASEY: Now, I am operating a little bit here  
25 with one hand tied behind my back and maybe a little bit of a

1 blindfold on because I would love to be able to stand here and  
2 tell you about the quality of his cooperation, but I can't do  
3 it and I don't want to compromise his ability to be an  
4 effective cooperator.

5 THE COURT: Which is why I think the submission is a  
6 better way to do this.

7 MR. MUKASEY: Right. I can't make the government do  
8 that. I would love the government to do that. There is  
9 nothing I would like more. It would go a long way towards  
10 answering some of the questions and addressing some of the  
11 concerns of the court.

12 I will add a few other thoughts that maybe will color  
13 some of your thinking as you consider the new submissions. We  
14 thought a lot about the presumption in favor of detention after  
15 you addressed it on August 11th and what it means, and I don't  
16 know if a presumption in favor of detention means, you know,  
17 you start with 90 percent of the weight on one side of the  
18 scale, 85 or --

19 THE COURT: I thought the same thing. There is a 30  
20 percent chance it will rain tonight. Is it likely to rain or  
21 does it have to be 51 percent before it is likely to rain?

22 MR. MUKASEY: That is looking at it in a worst-case  
23 scenario, not preponderance. Presumption in favor means a  
24 heavy presumption.

25 The natural question next is what does it take to

1 rebut that presumption? I think these are to a large extent  
2 "feel" issues for prosecutors and judges. There is no right  
3 answer, no case law answer. It is a facts and circumstances of  
4 each case kind of inquiry.

5 In thinking about that, I think of how do you get some  
6 of that 90 percent of the weight onto the good side of the  
7 scale? That is why we tried to lay out for you Mr. DiPascali's  
8 relationship with his family who is here today, his four kids,  
9 Gregory, Frank, Jr., Mike and Dorothy. They are all, except  
10 for the minor child, three of the four co-signers on the bond.  
11 They are not rich people. They are blue collar, working-class  
12 kids, students, recent graduates of university.

13 They are not the kind of people that if a \$10 million  
14 or their share of a \$10 million bond were violated, they would  
15 be able to pay the money and go on with their lives. It would  
16 ruin them and devastate them. For the kids, for Dorothy and  
17 for Gregory and Frank, Jr., it would be a penalty that would  
18 hurt them for the rest of their lives. It would cripple them  
19 financially for the rest of their lives, in all likelihood.

20 Mr. DiPascali's mother is here as well, Josephine. I  
21 don't know how better to describe or how to prove to your Honor  
22 that she has moral suasion over him other than to put it in a  
23 document, put it in a submission that we gave you. I don't  
24 know if your Honor wanted to talk to her. I don't know any  
25 other way to tell you how close this man is with his family and

1 how he would do nothing to hurt them.

2 I think if you think about that, some of the weight  
3 begins to come off from the presumption of detention and maybe  
4 shift a little bit to the release side of the scale.

5 THE COURT: Look, it is still not clear to me what the  
6 impact of a \$10 million bond forfeiture would be on each of  
7 these people. I don't know whether they're effectively  
8 judgment-proof. If they're blue collar, as you say, I think  
9 they are.

10 MR. MUKASEY: I think each one of them is obviously  
11 deemed by the U.S. Attorney's Office to be a  
12 financially-responsible person. Some are family members, some  
13 are extended family members. Your Honor, you can be a  
14 hard-working person who has saved money in a 401 (k) program  
15 like Mr. DiPascali's sister who lives a very, very moderate  
16 life, but has been working for 25 or 30 years and has built up  
17 a 401 (k). It is her entire life savings. It is about  
18 \$500,000. She has pledged that as security.

19 THE COURT: I want to hear the details of that. I  
20 think that would be important to know those details, probably  
21 not to do it here piecemeal, but in a submission.

22 MR. MUKASEY: I want to give your Honor one example.  
23 These are not people who, you know, are stones that you can't  
24 get blood from and these are not people who can pay off a  
25 million bucks and go on with their lives. These are people who

1 will be crippled, and we'll lay that out for you in our  
2 submission.

3           The other thing I want to address, Judge, is a couple  
4 of your comments. One of the great things about cooperation is  
5 that judges get to know cooperating witnesses over time, and as  
6 your Honor knows very well, you put a cooperating witness on  
7 the stand for a trial and a judge assesses his demeanor and  
8 lets the judge assess the credibility of his testimony, let the  
9 judge hear his story under oath from beginning to end.

10           In some cases, and perhaps Mr. DiPascali's case,  
11 you'll hear that story or another judge will hear that story in  
12 multiple trials. I will let the U.S. Attorney's Office talk  
13 about in a sealed submission who the targets of other  
14 investigations are, if any, and who the subjects are.

15           Over time we're confident that when you understand his  
16 role at the Madoff operation and you understand where he came  
17 from and you understand how effective his testimony is going to  
18 be, maybe your Honor will have a different view of Mr.  
19 DiPascali's entrance into this scheme and his exit from the  
20 scheme on December 11th.

21           THE COURT: That is certainly true. I don't rule that  
22 out. I don't claim to have anything other than a tiny snapshot  
23 I got from the guilty plea and from the limited submission that  
24 have been made in the case. I don't for a moment think that I  
25 know everything.

1 I also for a moment don't doubt your sincerity. I  
2 have known you for a long time. When you make a submission  
3 that you have made, I don't question whether you believe what  
4 you're saying. I have a role to play. I think you acknowledge  
5 that.

6 MR. MUKASEY: Understood. I appreciate what you say  
7 about my credibility because it was me who discussed with Frank  
8 how to present himself to you at the time of his guilty plea,  
9 and he was not coming into the Madoff operation with a Harvard  
10 MBA or with a silver spoon in his mouth. He was coming in as a  
11 19-year-old kid from Queens who said I'll get coffee if you  
12 want me to get coffee. This may be collateral, but I want your  
13 Honor to know that that was something that he we wouldn't have  
14 put forward to the court unless it were true.

15 The last point I want to make here, Judge, and we'll  
16 make a submission, and I know the government will, the one  
17 factor that your Honor has overlooked here I think is hope.

18 THE COURT: Hope?

19 MR. MUKASEY: Hope. Mr. Dipascali does not have the  
20 means to flee. I think between us and the government, we'll be  
21 able to lay that out for you. He doesn't have the desire, the  
22 inclination to flee.

23 He is cooperating in the hopes of getting a lighter  
24 sentence and he knows darned well where hope is living. Hope  
25 is living here with the government and with the FBI in the

1 hopes of getting a 5K letter, be a good enough cooperater that  
2 he may be able to see some time, he may be able to get a  
3 Herculean downward departure under 5K.

4 He knows that hope lies with you or whatever judge  
5 sentences him and the knowledge that your Honor and every judge  
6 in this courthouse appreciates the value of cooperation and  
7 will take into account what I think is going to be  
8 extraordinary cooperation.

9 He knows that hope resides with his family because  
10 that is all he has got now. He doesn't have a penny. He  
11 doesn't have any of the fancy things he used to have. He  
12 doesn't have anything except the clothes on his back in the  
13 prison, and when he gets home by the end of this case, every  
14 penny that he has essentially will be forfeited.

15 The same way I think that he knows that hope is with  
16 the government and with the court and on the witness stand and  
17 with his family, he knows where ruination is. He knows where  
18 absolute ruin, absolute loss is. Absolute loss is trying to  
19 run from this. Absolute loss is flight. He knows that he may  
20 never get out of prison. He may get a life sentence.

21 When you're adding that in the balance, what do you  
22 pick? Certain ruination, fleeing, having your family and your  
23 friends impoverished, getting chased down by a bunch of federal  
24 agents who are going to lock you up and make life miserable and  
25 absolutely get a life sentence, or are you going to choose the

1 thing that gives you a little bit of hope?

2 Are you going to choose the thing -- you know what, it  
3 is not a definite. Maybe Judge Sullivan is not going to give  
4 you credit or judge whoever is not going to give you the  
5 credit. Maybe I won't earn the credit to get back to my family  
6 for a couple of years, but you might as well choose hope over  
7 definite destruction.

8 I hope he understands very well that flight is  
9 definite destruction, personal and familial and to his friends.  
10 That is why he is not going to flee. We'll address the other  
11 things that I think will be useful to your Honor in a following  
12 submission.

13 THE COURT: It goes up to the bottom line, there is  
14 nothing in the tank, there may not be much reason to hope and  
15 flight might be worthy the gamble. If there really is  
16 cooperation that he can provide that would be substantial, then  
17 he has incentives to stick around and disincentives to flee.

18 I just don't feel I am really in a position to gauge  
19 that right now. This is a high stakes game.

20 MR. MUKASEY: I think we can get you that.

21 THE COURT: Mr. Litt, was there something you wanted  
22 to say?

23 MR. LITT: No, your Honor.

24 THE COURT: All right. Well, as I said, I think the  
25 inquiry is a pretty simple one. I am not looking to go outside

1 of 3143. I am not looking to address or consider issues that  
2 are not part of that analysis. I don't think it is proper for  
3 a judge to do that. This a straight statutory analysis.

4 I do want to address a couple of other points just  
5 because, frankly, they have come up in this proceeding and in  
6 prior proceedings or in submissions. Because of the nature of  
7 this case and potential for confusion of victims and the public  
8 at large, I want to address this.

9 It has been suggested that my decision to deny bail in  
10 the first instance to Mr. Dipascali has undermined the ability  
11 to investigate or prosecute others. I guess that argument  
12 turns on two sole arguments:

13 The first is by denying bail, Mr. Dipascali no longer  
14 has the will to cooperate and will, in essence, sort of sulk in  
15 his cell and deprive the government and everybody else of the  
16 benefits of his cooperation. That is the first I guess  
17 subtle argument.

18 The other is even if the spirit is willing, there is  
19 no ability to assist because he can't possibly assist while he  
20 is in custody. Mr. Mukasey, you have talked about how your  
21 client is determined to cooperate, he is at a life-changing  
22 turnaround, he is determined to make amends and try to set  
23 things right. Do you want to qualify that in any way?

24 Does it turn on whether or not he is on bail?

25 MR. MUKASEY: What I would address, your Honor, is the

1 first inquiry. Mr. Dipascali, I can never know exactly how his  
2 information is helping the government, whether it is useful. I  
3 fully believe that it is extremely useful to their  
4 investigation.

5 But I can tell you, and I think the government would  
6 confirm, that his enthusiasm and his forthrightness and his  
7 spirit and his energy being devoted to cooperating is as strong  
8 now if not stronger than it was when he was at large.

9 THE COURT: Good. All right. I am glad to hear that.  
10 That is exactly what I expected.

11 MR. MUKASEY: In a way you can say, hearing some of  
12 your Honor's comments, he may have redoubled his efforts at  
13 which I think were a hundred percent at the outset of this  
14 thing. But we are not going to stand here and say we're taking  
15 our ball and going home because he is locked up.

16 He is going to stay and cooperate until they tell him  
17 he doesn't have to cooperate any more.

18 THE COURT: Good. I am glad to hear that. The next  
19 subtle argument was the one that basically goes like this:

20 Even though the spirit is willing, the flesh is not  
21 able to carry through on the desires because being detained  
22 will make it impossible to effectively cooperate. The  
23 government seems to have stoked that argument with its most  
24 recent submission which says, "release will allow Mr. Dipascali  
25 to cooperate far more effectively, making the contents of one

1 half floor of an office building containing the equivalent of  
2 thousands of documents more readily available." That is a  
3 quote.

4 Mr. Litt, I have to address that head-on. The fact  
5 Mr. Dipascali is in custody at MCC doesn't prevent the  
6 government from taking Mr. Dipascali out to look at documents,  
7 your ability to send an e-mail to the Marshal Service to have  
8 him produced on a day's notice or less.

9 In addition, you have the ability to get a court order  
10 that authorizes FBI agents to take Mr. Dipascali out of the MCC  
11 to take him up to the Madoff offices, to look at documents as  
12 long as you see fit, 24 hours a day if necessary, 7 days a  
13 week, and bring him back to Lower Manhattan, the MCC or MDC if  
14 it is in Brooklyn.

15 All of that would seem to be doable. In fact, maybe  
16 it is being done as we speak. The proposed bail package would  
17 require FBI agents to travel to Bridgewater, New Jersey to pick  
18 up Mr. Dipascali and travel to Manhattan to go to the offices  
19 of the Madoff firm and then return back to Bridgewater, New  
20 Jersey.

21 If anything, it would seem to me it would be easier to  
22 take out and drop off Mr. Dipascali at the MCC or MDC which is  
23 across the street from the FBI or U.S. Attorney's Office.

24 MR. MUKASEY: There is an FBI agent who lives within a  
25 short distance of Mr. Dipascali who has volunteered to escort

1 him back and forth as necessary.

2 THE COURT: There are several hundred at 26 Federal  
3 Plaza who can easily just walk or drive a block and a half. I  
4 found that to be somewhat disingenuous, frankly. It seems to  
5 me there is nothing that would prevent Mr. Dipascali from  
6 cooperating.

7 I want to say a few words about cooperation. I have  
8 known Mr. Mukasey and Mr. Litt and Ms. Baroni for a long time.  
9 Mr. Mukasey and I were prosecutors together for about a decade.  
10 I supervised him until he became a supervisor in his own right.  
11 We tried cases together.

12 Mr. Mukasey, do you think I don't understand how  
13 cooperation works?

14 MR. MUKASEY: I know you know, Judge.

15 THE COURT: Do you think I need to seek out some of  
16 the senior judges on this Bench and ask them to explain it to  
17 me real slow?

18 MR. MUKASEY: Probably not.

19 THE COURT: Mr. Litt, do you think I need to read,  
20 "Cooperation for Dummies"?

21 Do you think I need to use my mellifluous baritone  
22 voice to ask long questions of people?

23 MR. LITT: No, your Honor. I don't think the  
24 government has suggested that.

25 THE COURT: I don't think you have, either. I don't

1 mean to give anybody a hard time. The fact is I get it. I  
2 want to make sure the victims and the public get it.

3 Look, if Mr. Dipascali can provide substantial  
4 assistance in the prosecution of others and recovering, God  
5 willing, assets that can be used to at least defray or provide  
6 restitution, defray the losses or provide restitution to  
7 victims, he will receive the benefit from that.

8 That is how the system works. It is a recognition we  
9 need to provide incentives for defendants to cooperate so that  
10 in the interests of justice, others who are culpable can be  
11 prosecuted and so that information that might allow for the  
12 recovery of other assets can be obtained.

13 If Mr. Dipascali can provide that kind of cooperation,  
14 he will benefit. Now, on some level that may be galling to  
15 victims, I understand that, but it is done and it is encouraged  
16 so that justice in a broader sense can be realized.

17 That is how the system works. It has over the years  
18 worked pretty well, and there should be no doubt that is what  
19 Mr. Dipascali is hoping for, that is what Mr. Mukasey is hoping  
20 for and the government is hoping for -- frankly, I'm hoping  
21 for -- hoping that we will be able to give more information, to  
22 get to the truth of what happened and also to recover whatever  
23 assets may be left and at this point unrecovered.

24 So no one should have any illusions about that. With  
25 that in mind, I want to raise one other issue with the parties.

1 Typically in this district at least, defendants who cooperate  
2 have their sentencings deferred for quite some time while their  
3 cooperation is ongoing. In some cases that can take years, and  
4 so the cooperation examples that were provided in the  
5 government's submission talked about four individual  
6 cooperators who got bail. That was the point of mentioning  
7 them. In each case, those cooperators were not sentenced for  
8 many years after they pled guilty. So some have not been  
9 sentenced yet, although they pled some time ago.

10 That is not the only way cooperation will work. There  
11 is a provision under federal law, and some districts it is the  
12 norm, that a defendant would be sentenced relatively quickly  
13 for the crimes they've pled guilty to and then later the  
14 government could make a motion pursuant to Rule 35 (b) of the  
15 Federal Rules of Criminal Procedure, advising the court of the  
16 cooperation they provided and making a motion for reduced  
17 sentence at that time.

18 That is certainly an option, and in light of the  
19 considerations contained in the letter of Mr. Leif and others,  
20 I would ask the parties here to consider whether that would be  
21 a way to proceed in this case. If there is going to be a  
22 submission, I would like you to consider that and address that  
23 as well.

24 My goal is not to mess with Mr. Dipascali, but at the  
25 same time I am very mindful of the objectives of sentencing

1 that are set forth in Title 18 of the United States Code,  
2 Section 3553 (a), which talks about restitution for victims.  
3 Certainly I don't know if forfeiture will happen faster if  
4 there is a sentencing that will happen sooner rather than  
5 later, but also promoting respect for the law and just  
6 punishment.

7 These are things that to delay sentencing for a period  
8 of years has to have an impact on the victims in this case in  
9 some way. That is not the only consideration, but I do think  
10 it is a consideration that needs to be thought about long and  
11 hard. So I would ask the parties to consider that. I haven't  
12 made up my mind on it, but I don't see that there is any real  
13 down-side to doing it. I think there may be some advantages.

14 You don't have to address it now. Mr. Litt, if there  
15 is something you want to say, feel free to.

16 MR. LITT: T-'ø ."-)-È

17 THE COURT: All right. That's what I wanted to say  
18 today. Is there anything else that anybody else would like to  
19 add? The government?

20 MR. LITT: No, your Honor.

21 THE COURT: Mr. Mukasey?

22 MR. MUKASEY: No, your Honor. We are going address  
23 these concerns in a submission.

24 THE COURT: All right. I want to thank everyone who  
25 came. I thank Mr. DiPascali's family members. This can't be

1 easy on you. I am sensitive to that. I am sure he appreciates  
2 your being here. I have no doubt he does.

3 I want to thank the victims. This can be a jarring  
4 experience to have to relive it for every court appearance is  
5 probably not easy, either. I want to thank you for your  
6 patience. Thank you for being here and taking the time to be  
7 here.

8 I think I will probably give you a date by which to  
9 make a submission. I am not ordering you to make a  
10 supplemental submission, but if you're going to make one, could  
11 I ask you to make it by a week from Friday, all right?

12 MR. LITT: Yes, your Honor.

13 THE COURT: Mr. Mukasey, all right?

14 MR. MUKASEY: That is fine. I think the government  
15 will have to take the laboring oar on this.

16 THE COURT: I don't want to put a timetable on it. I  
17 am not ordering anything. I am saying it would be useful. I  
18 am reserving on the motion. I have expressed what I think  
19 would be useful to have. It is not my place to tell the  
20 government what they need to include in a submission or to tell  
21 them they have to make a submission.

22 MR. LITT: My reflex, of course, is always to agree  
23 with the court on time constraints such as those you suggested.

24 THE COURT: I will leave it to you.

25 MR. LITT: What your Honor has raised today, your

9ASJDIPH

## Bail Hearing

1 Honor has raised a whole series of issues that are going to  
2 take some considerable thought, I think, by multiple people in  
3 my office as to how to address them most effectively.

4 So we will endeavor to do it as promptly as we can. I  
5 hope that your Honor will accept a submission if it is after a  
6 week from Friday.

7 THE COURT: That is fine. I withdraw that. I won't  
8 give you a date by which to do it. Mr. Dipascali has an  
9 iinterest in getting this resolved quickly as do you, the  
10 government. I don't doubt the sincerity of anybody who has  
11 made motions and made arguments. As I said before, I have  
12 nothing but the greatest respect for the lawyers in this room.

13 So if and when you want to make a submission, you can  
14 do that, just let me know.

15 (Court adjourned)

16

17

18

19

20

21

22

23

24

25

