

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :
 :
 - against - : 09 Cr. 433 (JGK)
 :
 ARTHUR G. NADEL, :
 :
 Defendant. :

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**DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION
FOR MODIFICATION OF BAIL CONDITIONS**

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This Reply memorandum is submitted on behalf of Defendant Arthur Nadel to respond to arguments made by the government in its Memorandum in Opposition to Defendant's Motion to Modify Bail Conditions. Defendant also submits, as Exhibit A, the Receiver's Second Interim Report, which was just filed on June 9, 2009.

INTRODUCTION

Arthur Nadel is a sick, old man who poses no risk of flight and no danger to the community and should be released on reasonable bail conditions. Since Mr. Nadel's January arrest, he has been stripped of all his assets and rendered virtually friendless by the wave of negative publicity generated by the unproved charges against him. He has neither the means nor the desire to do anything but go back to his modest home and prepare to vindicate himself at trial.

The government, however, continues to oppose Mr. Nadel's release on bail on the grounds that he is both an "actual risk of flight" and a "pecuniary danger to the community." G. Mem. at 14. According to the government, Mr. Nadel cannot be released even on the stringent conditions proposed, because he would likely facilitate his "escape" with his purported access to "tens of millions of [hidden] dollars." G. Mem. at 21. The government further claims that Mr. Nadel's age and poor health should lead the Court to deny bail because his shortened life expectancy means that he has little to lose by fleeing. Alternatively, the government argues that bail should be denied because Mr. Nadel supposedly constitutes a "pecuniary" danger to the community who might seek to defraud investors from the confines of his monitored Sarasota home.

The claims that Mr. Nadel is a present risk of flight and/or danger to the community are meritless. As demonstrated in Mr.

Nadel's Memorandum in Support of Modification of Bail Conditions ("Mem.") and below, the unwarranted speculations about risk of flight and danger to the community are based on a distortion of Mr. Nadel's past behavior and a gross mischaracterization of his present circumstances.

I. MR. NADEL IS PRESUMED INNOCENT.

The government asserts that bail must be denied because the evidence against Mr. Nadel is "overwhelming" and a life sentence all but a certainty. G. Mem. at 14, 15. This assessment is premised on a tendentious and myopic view of the facts. G. Mem. at 4-6.

Mr. Nadel is presumed innocent and cannot be expected to try his case in the context of a bail motion. Notably, however, the government's account of the allegedly "overwhelming" evidence against Mr. Nadel virtually omits any reference to Neil and Chris Moody.¹ The Moodys -- not Mr. Nadel -- were the general partners of the Valhalla and Viking Funds. The facts will show that they actively solicited investors for their funds; made many of the investment decisions; and received at least half of the fees and profits generated by the six funds identified in the indictment. See Receiver's Rep. at 8 and 35. Moreover, according to investors,

¹ For example, as evidence of Mr. Nadel's guilt, the government cites a number of purportedly inaccurate letters to investors regarding the performance of the funds. The government neglects to note, however, that Neil and Chris Moody also signed the very same letters. See Exhibits D, E, F, and G to G. Mem.

the Moodys affirmatively represented that they "actively" managed their own funds and that "trading was not going to be sub-contracted to any other entity or individual." See January 19, 2009, letter from Anil B. Deolakiar to Detective Jack Carter, Sarasota Police Department, Exhibit B. Standing alone, the government's bold attempt to edit the Moodys out of the picture suggests that the case against Mr. Nadel is not nearly as strong or simple as the government would have the Court believe.

II. MR. NADEL'S TRAVELS BETWEEN JANUARY 14 AND JANUARY 24, 2009 DO NOT ESTABLISH THAT HE IS A "RISK OF FLIGHT."

The government continues to argue that Mr. Nadel is an "actual risk of flight" because on January 14, 2009, he supposedly "made the premeditated and calculated decision to flee from authorities." G. Mem. at 16. On its face, this argument is baseless. Mr. Nadel could not have been "flee[ing] from authorities" on January 14, 2009 because, at that time, there were no criminal or civil charges pending against him and, therefore, no authorities from which to flee.

Despite the fact that Mr. Nadel left his home at a time when he was not facing any criminal charges, the government claims that Mr. Nadel's behavior during his journey demonstrates a calculated effort to evade detection. But, the only evidence cited by the government is that at some point during his travel he "dropped his cellphone" and that he stayed in two hotels while in San Francisco. However, during the time he was gone, Mr. Nadel traveled under his

own name, including booking airplane flights and paying for his expenses with his own credit cards. He did not seek to leave the country, but stayed in three major United States cities where he registered at hotels in his own name and paid for his lodgings with his own credit cards. These are not the actions of someone intent on flight from a [non-existent] warrant as the police could simply have checked his credit-card usage or airline records if they wanted to determine his whereabouts.

As further "proof" of Mr. Nadel's supposed attempt at flight, the government observes that Mr. Nadel wrote letters to his family in which he advised them to co-operate with the authorities, but suggested that they first retain a lawyer. G. Mem. at 18. The government does not, however, explain why Mr. Nadel's advising his family to co-operate with law enforcement supports the conclusion that he is a risk of flight.

The government also significantly distorts both the facts and Mr. Nadel's arguments regarding risk of flight. It asserts that "the notion that Nadel did not understand that he was wanted by law enforcement authorities strains belief" because "during the time that Nadel was on the run and in contact with his family, agents of the FBI had repeatedly interviewed members of his family and his associates, and had executed a search warrant on his North Carolina residence." G. Mem. at 18. But, Mr. Nadel does not claim that he didn't come to understand that law enforcement authorities were

looking for him. Rather, as his opening Memorandum makes clear, he retained counsel precisely because he did become aware that he would, at some point, be charged. Def. Mem. at 11.²

Finally, the government's recitation of the "facts" about Mr. Nadel's supposed two-week "flight" from the authorities fails to include the undisputed evidence that Mr. Nadel retained counsel on January 20, 2009 and that between January 21st, 2009 and January 26, 2009, his lawyers made repeated, but unsuccessful, efforts -- including speaking with the Chief Assistant United States Attorney for the Middle District of Florida -- to ascertain if there was a warrant for Mr. Nadel's arrest.³ See Def. Mem. at 11-14. As soon as his lawyers were informed that a warrant had been issued, he surrendered with counsel. The omission of these crucial facts by the government underscores the overall weakness of its claim that Mr. Nadel was seeking to evade detection by law enforcement during his travels between January 14th and January 27th, 2009.

Finally, Mr. Nadel's financial activities in the days before he left Florida demonstrate that he had no intention of becoming a

² Moreover, the police contacts with Mr. Nadel's family and the search of his home had nothing to do with his determination to retain counsel because -- as the government concedes -- both the search and the interviews with family members took place *after* Mr. Nadel first contacted a lawyer on January 20th. G. Mem. at 9.

³ The government's Statement of Facts does not disclose why the arrest warrant for Mr. Nadel was such a secret that even the United States Attorney for the Middle District of Florida did not know of its existence.

fugitive. In the week prior to January 14, 2009, Mr. Nadel made substantial payments, totaling about \$182,000, in maintenance and carrying costs for various properties he owned, including Tradewinds LLC; Laurel Preserve, LLC, Thomasville National Bank and Homefront Homes, LLC. See Exhibit I to G. Mem. If Mr. Nadel had been intent on leading a life as a fugitive, he would have used the money for himself, rather than dissipating his funds to satisfy his debt obligations. Similarly, as evidence of his desire to flee, the government makes much of Mr. Nadel's unsuccessful effort to transfer a \$50,000 check "to a new Bank of America credit card for his use while on the run." G. Mem. at 16. But, as the Criminal Complaint filed against Mr. Nadel demonstrates, Mr. Nadel left a letter for his wife in which he instructed her to use the funds in that credit account for *her* benefit. See Exhibit C, par. 17. Thus, the record shows that, rather than removing a lot of cash for a life on the run, Mr. Nadel paid bills to keep ongoing businesses solvent and tried to provide for his wife.

III. MR. NADEL IS NOT A DANGER TO THE COMMUNITY

The government alleges that Mr. Nadel would pose a "danger to the community" if released, but offers no evidence-or even a hypothesis-to support its claim. Rather, the government's entire argument on "danger to the community" merely reiterates its view Mr. Nadel defrauded investors and that the loss of money "caused massive harm and destruction." G. Mem. at 20.

There is no presumption that a defendant charged with fraud constitutes a "danger to the community." To the contrary, the government must show by clear and convincing evidence that there are no conditions of release for such a defendant which will "reasonably assure" that he or she will not "endanger the safety or any other person or the community." United States v. Sahbnani, 493 F.3d 63, 75 (2d Cir. 2007). Here, the government does not even offer an hypothesis, let alone any facts, which would satisfy this high burden. Mr. Nadel has been publicly reviled and convicted by the media, abandoned by most of his friends, and will be confined to his home and monitored by pre-trial services once released. The unsupported suggestion that he will attempt to defraud or otherwise harm anyone under such circumstances is ludicrous and does not warrant further discussion.

IV. MR. NADEL'S AGE AND ILL HEALTH SHOULD NOT BE HELD AGAINST HIM ON BAIL.

Mr. Nadel is a 76 year-old man who suffers from multiple medical problems, including a serious and disabling heart condition. Mr. Nadel's age, infirmities and need for medical treatment obviously limit his ability to escape and/or live as a fugitive and, therefore diminish any concern that he would be a "risk of flight." Mem. at 16-17.

The government, however, asserts that Mr. Nadel's poor health "is another factor that militates against modifying his bail conditions," and "is only relevant in so far as it makes any

potential sentence he receives a likely life sentence, diminishes the practical effect of a bail jumping charge, and thus, gives Nadel an even stronger incentive to flee." G. Mem at 13. This novel⁴ argument is without merit. On its face, the notion that Mr. Nadel should be denied bail simply because the government adjudges his life expectancy insufficient to survive a potential sentence or to give "practical effect" to a prospective bail jumping charge is repellent. Moreover, the same specious logic could be applied to a defendant of any age. For example, if Mr. Nadel were young and healthy, the government might assert that he has a "stronger incentive to flee" because he has more years of potential freedom ahead of him should he jump bail.

V. MR. NADEL'S INABILITY TO PREPARE HIS DEFENSE WHILE INCARCERATED SUPPORTS THE GRANT OF REASONABLE BAIL.

The huge amount of paper and computer discovery involved in this case coupled with Mr. Nadel's poor health and the limited ability to communicate with counsel make it all but impossible for him to effectively help prepare his own defense while confined in jail. Mem. at 22-26. The government, however, dismisses these concerns as mere "speculation" and actually insists that any consideration of Mr. Nadel's ability to prepare his defense based on the amount of discovery would "offend the notion of justice"

⁴ Counsel has been able to locate any case, and the government cites none, in which a defendant's poor health or short life expectancy has been cited as a reason for denying bail.

because it would create an unwarranted presumption of release in document-intensive cases. G. Mem. at 14.

The government's argument is without foundation. The traditional right to freedom before trial is specifically designed to "permit the unhampered preparation of a defense." Stack v. Boyle, 342 U.S. 1, 4 (1951) United States v. Speed Jovero, S.A., 204 F.Supp. 2d 412, 434 (E.D.N.Y. 2002). Given this basic principle, it can scarcely "offend justice" for the Court to take into account the fact that, in this case, pre-trial incarceration will especially "hamper" Mr. Nadel's personal preparation of an effective defense. See Kinney v. Lenon, 425 F.2d 209, 210 (9th Cir. 1970) (release from detention was warranted where defendant made "strong showing" that his release was necessary so that he could personally identify potential defense witnesses).

Mr. Nadel's continued detention also erects a significant obstacle to his ability to assist the S.E.C. and Receiver in tracing all of his assets. This is a condition of both the present and proposed conditions of release and Mr. Nadel has, even while incarcerated, offered his assistance. However, his limited ability to communicate and/or receive and review voluminous records because of his incarceration obviously limits the amount of help he can provide. Mr. Nadel is representing himself pro se in the SEC action and his detention impedes his ability to respond to the charges or to cooperate, or to even make decisions about how to proceed. An

