



U.S. Department of Justice

*United States Attorney
Southern District of New York*

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August 20, 2021

By EMAIL & ECF

The Honorable Andrew L. Carter
United States District Court Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, New York 10007

Re: *United States v. Barend Oberholzer, 21 Cr. 475 (ALC)*

Dear Judge Carter:

The Government writes pursuant to the Court's oral order of August 16, 2021, and in response to defendant Oberholzer's request to modify the condition of his bail that requires him "not [to] sell, transfer, or give away any asset valued at \$100,000 or more w/o notifying and obtaining permission of Court." (ECF No. 3, hereinafter, the "Notice of Transfer Condition"). As set forth below, the record amply supports the application of this condition, it promotes the goal of ensuring the defendant's continued appearance, and it comports with law. The Government respectfully requests that the Court deny defendant's motion to modify the Notice of Transfer Condition to exclude payments to counsel.

Background

As set forth in the Complaint (ECF No. 1) and the Indictment (ECF No. 22), Oberholzer is charged with conspiracy to commit mail and wire fraud, as well as aggravated identity theft, in connection with his attempts to solicit investments and loans in his defense technology start-up company ("Start-Up Company-1"). The Government expects the evidence will show that Oberholzer lied to potential investors about Start-Up Company-1's financial solvency, access to cash, and use of investor funds, and even went so far as to impersonate a retired, four-star General in the United States Army ("Retired General-1") to solicit investment from multiple investors. (ECF No. 1, ¶¶ 12 – 14).

The Government also expects the evidence will show that Oberholzer created fictitious identities online to shore up his false claims regarding access to cash. For instance, Oberholzer registered a website domain name misleadingly similarly to that of a large West Coast asset management firm ("Asset Management Firm-1"), used that domain name to create an email account for a fake employee purportedly employed by Asset Management Firm-1, and then used

the fake identity to try to convince a potential lender that Oberholzer and co-defendant Jaromy Pittario had access to millions of dollars. The Government also expects the evidence will show that Oberholzer consistently and serially falsified bank account statements in support of business loan applications in multiple attempts to secure loans for Start-Up Company-1.

Procedural History

Mr. Oberholzer was arrested in the Central District of California (“CDCA”) on February 23, 2021, pursuant to a criminal complaint. He was presented the same day before United States Magistrate Judge Jacqueline Chooljian the same day. (ECF No. 8). Prior to the presentment, the Government and defense counsel reached agreement on a proposed bail package, which Judge Chooljian imposed after reviewing the Pre-Trial Services report and allowing the parties to be heard. (See ECF No. 8, at 5-10). The bail conditions imposed also included conditions recommended by Pre-Trial Services in the Central District of California (“PTS-CDCA”), as set forth below.

The PTS-CDCA report noted that Oberholzer had admitted to an unspecified “criminal history” in South Africa, where he lived for more than 18 years and has extensive family contacts, including his brother and mother. The Government explained to Judge Chooljian that Oberholzer has multiple outstanding warrants for his arrest and for non-appearance in South Africa. At least two different law enforcement agencies (the Directorate for Priority Crimes in the Western Cape Province and the Gauteng South African Police Service) seek Oberholzer in connection with, among other things, schemes to defraud involving the sale of helicopters and other aviation equipment.

Relevant here, the conditions Judge Chooljian imposed included the following: “Do not sell, transfer, or give away any asset valued at \$ 100,000.00 or more without notifying and obtaining permission from the Court, except _____.” (ECF No. 8, at 7). The amount of \$100,000 was filled in by the court but the empty space following the “except” provision was left blank. A checked box preceded this condition to reflect that it applied to Oberholzer. (ECF No. 8, at 7). This condition was among several recommended by PTS-CDCA in its report and imposed by Judge Chooljian. (PTS Report-CDCA at p. 8).

On March 3, 2021, Oberholzer was presented before United States Magistrate Judge Robert W. Lehrburger in the Southern District of New York, who transferred the bond from the CDCA and imposed the same conditions. (ECF No. 3). In connection with his presentment in this district, Pre-Trial Services (“PTS-SDNY”) conducted a follow-up interview with the defendant. At that time, Oberholzer reported an additional bank account, containing approximately \$18,000-\$19,000, that he had failed to report to PTS-CDCA just over a week before.

Discussion

The Court should not modify the Notice of Transfer Condition. As set forth below, Oberholzer presents a substantial risk of flight and the Notice of Transfer Condition squarely supports the goal of ensuring the defendant’s continued appearance. Moreover, the Notice of Transfer Condition comports with the law because the defendant’s assets have not been seized and

his use of funds for legitimate purposes, such as payment of attorney’s fees, is not constrained in any meaningful way. Accordingly, the defendant’s ability to retain or pay counsel of his choice remains intact. The Court should deny defendant’s request to modify the Notice of Transfer Condition.

As an initial matter, the express terms of the bond imposed by Judge Chooljian make clear that the Notice of Transfer Condition applies to *all* transfers or payments, including to counsel. On the bond sheet from CDCA, the Notice of Transfer Condition contains two customizable fields: one for the threshold amount that triggers the notice requirement and another for any “exception” to the Notice of Transfer. (ECF No. 8 at 7). The threshold amount is filled in—\$100,000—but the “exception” field is left blank, indicating no exceptions. *Id.* If Judge Chooljian—or Judge Lehrburger—intended to exempt transfers or payments to counsel from the Notice of Transfer Condition, the bond sheet provided space to do so. Both magistrate judges declined to make any such exception, and for good reason: the Notice of Transfer Condition is intended to ensure that any large transfers of assets by Oberholzer are not used in furtherance of a scheme to flee.

The defendant presents a substantial flight risk. First and foremost, he has fled court supervision before; the defendant has long known of two outstanding warrants for his arrest in South Africa, based on fraudulent schemes involving the sale of helicopters. Second, based on his purported past work as an international intelligence operative and “smuggl[er],” (ECF No. 1, p. 11 at n. 6), Oberholzer boasts a large network of international contacts as well as close family members who reside abroad, which provide him with a greater ability to flee than most. Third, Oberholzer owns and operates a business that charters, re-sells, and supplies helicopters, and he is an experienced aviator, so it stands to reason that he has the means to flee in ways that would be more difficult to prevent in this case than in others. Fourth, the offense conduct in this case includes aggravated identity theft and the use and abuse of online accounts to create false identities (or assume real ones). Taken together, Oberholzer has shown the willingness, ability, and means to flee and the Notice of Transfer Condition is meant to ensure that he cannot hide from the Court the transfer of large sums meant to enable that flight; transfers alleging to cover attorney’s fees could conceivably serve that purpose, especially if the defendant resorted to his past practice of impersonating individuals or entities. Unless the Court is notified of such transfers, the already substantial risk of flight would increase. These facts and considerations amply support PTS-CDCA’s recommendation and Judge Chooljian’s decision to impose the Notice of Transfer Condition without exception.

On this record, the defendant’s requested modification would create a loophole in the financial monitoring of the defendant that would *not* “reasonably ensure the appearance of the defendant.” 18 U.S.C. § 3142(c)(1)(B). To mitigate that risk, the Notice of Transfer Condition requires notice to and permission of the Court—*not* the Government—for transfers over \$100,000. This leaves intact the defendant’s ability to retain and compensate the counsel of his choice because retention of counsel is a legitimate expenditure. Moreover, it is in the Court’s discretion to determine in what form and detail such notice is required¹ and nothing in the Notice of Transfer

¹ Defendant’s concern that the Notice of Transfer Condition somehow permits the Government to “track the pace and intensity of the defense team’s efforts” is unjustified because notice is not provided to the Government. Moreover, the defendant inexplicably presumes that “actual bills”

Condition suggests that the Court would question or restrict the transfer of a retainer or other legitimate payment of attorney's fees.

The defendant misses the mark when he urges that the Notice of Transfer Condition would somehow empower "them [the Government] to restrain any assets or monies in the possession of the defendant" without first seeking forfeiture. (*See*, ECF No. 26, at 2). The notice required is to the Court, not the Government, and hardly constitutes a restraint on the defendant's legitimate use of funds (such as attorney's fees), much less a seizure. Defendant's reliance on *United States v. Monsanto* and *Luis v. United States*—which both address pre-trial seizures of assets by the Government—is misplaced.² *See, United States v. Monsanto*, 491 U.S. 600, 614 (1989) (holding there is "no exemption from § 853's forfeiture or pretrial restraining order provisions for assets which a defendant wishes to use to retain an attorney"); *see also Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 109 (1989) (holding "neither the Fifth nor the Sixth Amendment to the Constitution requires Congress to permit a defendant to use assets adjudged to be forfeitable to pay that defendant's legal fees"); *but see Luis v. United States*, 136 S.Ct. 1083, 1086 (2016) (holding Government motion to convert temporary restraining order into a preliminary injunction against defendant's "innocent" assets violates Sixth Amendment).

The essence of defendant's motion is that the Notice of Transfer Condition "poses additional and unwarranted costs" on him, somehow "hindering" his defense. (ECF No. 26, at 2). This claim is both unsupported and unpersuasive because it fails to contend with the substantial risk of flight presented by the defendant and the need for conditions that "reasonably assure the appearance of the defendant as required," which is precisely what the Notice of Transfer Condition accomplishes. 18 U.S.C. § 3142(c)(1)(B). On this record, the Government respectfully submits that the defendant's request to modify the Notice of Transfer Condition be denied.

Respectfully submitted,

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would need to be submitted to maintain compliance. These concerns are far-fetched and could be easily addressed.

² To be sure, the Government may seek forfeiture of moneys, assets, or specific property pursuant to a post-indictment restraining order or other seizure warrant in future. It has not done so to date.