UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. Case No. 8:10-cr-00501-T-27MAP

DAVID R. LEWALSKI

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S SECOND MOTION FOR BOND

The United States of America, by Robert E. O'Neill, United States Attorney for the Middle District of Florida, files this response in opposition to the defendant's Second Motion to Set Bond and urges this Court to continue the defendant's order of detention. In support thereof, the government states as follows:

I. Procedural History

On or about November 2, 2010, the Honorable Thomas B. McCoun, III authorized an arrest warrant for David R. Lewalski based upon a complaint that charged Lewalski with wire fraud. The complaint alleges that the defendant, in complicity with others, engaged in a Ponzi scheme wherein he told investors that through foreign currency trading ("forex"), he could generate returns of more than 10% per month. Lewalski falsely told individuals that he earned more than 10% per month trading, but paid them 10% returns compounded monthly and kept the remainder for himself. Lewalski promised investors that their investment was secure and that they could withdraw their funds at any time upon written notice.

In reality, Lewalski paid his investors their supposed accrued returns with the other investors' funds. Lewalski also lavishly spent investor funds on himself and gave

investor money to his girlfriend, friends, and relatives. During the instant scheme to defraud, Lewalski took in nearly $30 million from investors, $15 million of which he used to pay "returns" to other investors.

On or about November 4, 2010, the defendant was arrested in the Southern District of New York. On the same date, the defendant had his initial appearance, was detained, and was ordered transported to the Middle District of Florida. On or about November 29, 2010, Lewalski arrived in the Middle District of Florida. On or about December 1, 2010, a grand jury returned a four count indictment charging Lewalski with conspiracy, mail fraud, and wire fraud.

On or about December 10, 2010, Lewalski filed a motion for bond and a bond hearing (Doc. 17) and, on or about December 20, 2010, the defendant argued again for bond at a hearing before the Honorable United States Magistrate Judge Mark A. Pizzo. Following the hearing, the Court denied the defendant's Motion for Bond by Order dated the same date (Doc. 24).

On or about March 30, 2011, the Grand Jury returned a Superseding Indictment against the defendant, charging him with 17 counts of mail and wire fraud. (Doc. 49). Although the conspiracy charge was removed from the indictment, the government added 13 counts of wire fraud in the superseding indictment and alleged a scheme to defraud that is identical in breadth and scope to the manner and means of the conspiracy originally alleged. On or about May 18, 2011, the defendant filed his Second Motion to Set Bond and Incorporated Memorandum of Law (Doc. 63) which, for the third time, requests bond for the defendant.

II. Risk of Flight

The defendant has presented no new facts or circumstances that mitigate his risk of flight. In response to the defendant's Second Motion for Bond, the government relies on and incorporates by reference all of the arguments contained in its Response in Opposition to Defendant's (first) Motion for Bond. (Doc. 21). The defendant's own words indicating his desire to flee, his flight from the related civil case and fear of arrest on criminal charges, and his access to offshore funds remain the same. In addition, since his incarceration, the defendant has observed on numerous occasions in recorded jail calls that had he known he was going to be arrested, he would have never returned to the United States.

Although the government does not believe that any of the reasons put forth in the defendant's Second Motion in support of bond raise any new arguments that warrant his release, it will address each of the defendant's assertions.

A. The defendant's argument that somehow the new charges in the superseding indictment weigh in favor of bond is without merit. The critical analysis for the Court is whether the defendant faces a substantial jail sentence if convicted that would incentivize him to flee. In the first indictment, the defendant faced four counts, each of which carried a statutory maximum sentence of twenty years. In the superseding indictment, the defendant faces 17 counts, each with a twenty year statutory maximum. If anything, the maximum penalties have increased because the defendant could theoretically face life in prison if the terms were stacked. Regardless, the loss amount of approximately $30 million, which will drive the Guidelines calculation, remains the same. Therefore, the additional counts in the superseding indictment make

it just as likely, if not more likely, that the defendant is a risk of flight in light of the penalties he faces if convicted.

B. The defendant's ties to the Middle District of Florida are no different now than they were the first two times he argued for bail. Although the government's initial Response in Opposition Defendant's Motion for Bond covers this issue in more detail, it should be noted that when the defendant came back to the United States (on a round trip ticket from France with a scheduled return flight a few weeks later), he neither came to the Middle District of Florida nor alerted the same people he claims constitute his substantial ties to the area that he was back in the country.

Morever, the individuals that the defendant lists in his Second Motion for Bond are all unindicted coconspirators[1] or, at best, lived off the largesse of Lewalski's Ponzi scheme. Kathleen Lewalski received checks, wire transfers, and cash deposits into her bank accounts from Botfly's corporate accounts totaling approximately $94,570. As noted in prior filings, Botfly's only source of income was investor money. As for the defendant's cousins, aunts and uncles, Bobby Stead received approximately $373,500, Robert Stead received approximately $98,500, Tom and his wife Diane Stead received approximately $521,050, and Patty Stead received approximately $197,224.92, all as a result of the fraud. Despite this windfall of funds, the defendant indicates that he and his close relations, all of whom constitute his strong ties to the community, have no assets they could post for bond.

[1] The actions and statements of unindicted coconspirators are admissible against the defendant even in cases where no conspiracy is charged in the indictment. FRE 801(d)(2)(E); United States v. Bowe, 221 F.3d 1183, 1193-94 (11th Cir. 2000); United States v. DeVillio, 983 F.2d 1185, 1193 (2d Cir. 1993).

C. The defendant further argues that his fiancee, Melinda Colbeth, could provide an apartment for him. Colbeth, however, fled the country with Lewalski when the Florida Attorney General filed its lawsuit against him and Botfly, and remained on the run for nearly seven months. Ms. Colbeth received a salary from Botfly, made up entirely of defrauded victim investors' money, for doing no work whatsoever. Colbeth's salary, taken together with cash withdrawals and checks written to her from Botfly's corporate accounts, totaled approximately $115,652 over the life of the scheme. She lived in an apartment overlooking Central Park in New York's Essex House rent free because her lodging, which cost $136,565.12 for nine months, was paid for by Botfly investors. Lewalski further diverted approximately $325,000 in victim investor funds into a Fifth Third bank account on which Colbeth was a co-signer for her living expenses. Lewalski even used victims' monies to purchase Colbeth's Cartier engagement ring, which cost $37,665.63.

Finally, Colbeth is currently the co-signer and therefore co-owner of a Swiss Dukascopy / UBS forex trading account into which Lewalski transferred over $1 million in Botfly victim investor funds. It is believed that this account has a current balance of $600,000 to $700,000. Ms. Colbeth has refused repeated requests to cooperate with law enforcement in the criminal case. This means that Colbeth has neither given permission to the government to review the foreign account trading records and trace the disposition of victim-investors' funds, nor consented to have these funds repatriated to the United States for disbursement to the victims. Although the funds are currently frozen by the Swiss, they are not under the control of any state or U.S. authority.

D. The existence of the state civil action against Mr. Lewalski and his company, Botfly, is nothing new. In fact, as detailed in the government's earlier response, it was the filing of this lawsuit that prompted the defendant to stay in Europe at various undisclosed locations for seven months. While the defendant was in hiding, he had no interest in coming back to the United States to respond to the charges in the State's civil suit. It is hypocritical and disingenuous for Lewalski to now say that he is prejudiced because his incarceration deprives him of the opportunity to participate in the same proceeding. Morever, the government has received copies of *pro se* filings and letters written to the judge in the civil case by Mr. Lewalski. Thus, he is aware of the proceedings and responding to them while incarcerated.

III. Dangerousness

The government relies on its arguments in its earlier Response with respect to the defendant's risk of danger to the community as a basis for his pretrial detention.

IV. Conclusion

There exist no conditions or combination of conditions that could assure the defendant's appearance in this case and that could protect the community from David Lewalski. Accordingly, he should remain detained.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2011, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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