IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	DOCKET NO. CR 08-1324 LRR
	:	
vs.	:	**REPLY TO GOVERNMENT'S**
	:	**RESISTANCE TO DEFENDANT**
SHOLOM RUBASHKIN,	:	**RUBASHKIN'S BAIL APPEAL**
	:	
Defendant.	:	

I. INTRODUCTION

Defendant's appeal should be granted. Evidence will show the "facts" proffered by the Government at the initial detention hearing were wrong and presented out of context. The Government's "evidence of flight" is neither "overwhelming" nor persuasive. The extraordinary conditions Defendant has proposed assure both the safety of the community and Defendant's appearance at trial.

II. EVIDENCE

Defendant relies upon the evidentiary proffers of his counsel, exhibits at the November 19 hearing, the briefs and attachments filed, and proffers with this filing. Defendant also submits an evidentiary hearing will further support his appeal and should be granted.[1]

III. LEGAL STANDARDS

A. Introduction

Contrary to the Government's assertion, Defendant has appealed both the revocation of

[1]For example, the defense will show prior to his arrest, Defendant was working endless hours to keep the business open, to obtain financing to support or sell the same. In the face of adversity, his focus was to stay with the business, the community, and his family.

his pretrial release and his order of detention. The Defendant's motion for appeal states he appeals from: "the order of detention (Doc. 17 08-mj-381) and revocation of pretrial release (Doc. 16 08-mj-363) (hereinafter "Detention Order"). *See* Clerk's No. 134 at 1. Appeal of both orders is properly before the Court. Review of the two orders is *de novo*. *United States v. Maull*, 773 F.2d 1479 (8th Cir. 1985). A factual hearing is necessary and appropriate in this case.[2]

B. The Rebuttable Presumption of Section 3148 Is Not Implicated

The Government seeks to invoke the rebuttable presumption of 18 U.S.C. § 3148, claiming he "violated his previous conditions of pretrial release by committing bank fraud, attempting to obstruct justice, and tampering with evidence." *See* Clerk's No. 166 at 2. The Government claim is founded upon only two claimed conversations. The Government alleges Defendant told an employee to delete certain check entries entered into the computer system, but not posted, and to "clean up his/her desk." *Id.* at 16. *See also* (08-mj-381 ¶ 16). The "clean up the desk" comment was an innocent instruction openly given to a number of employees to prepare for the trustee. Likewise, any comment to delete check entries would presumably have no effect on the backup tapes in the computer system. There are no other allegations of relevant post-arrest conduct. If the prosecution seeks to invoke the rebuttable presumption, it must prove that

[2]Courts have recognized that a hearing is mandatory where it is the defense that seeks to introduce additional evidence. *See, e.g., United States v. Ridinger*, 623 F. Supp. 1386 (W.D. Mo. 1985) (suggesting that "the district court judge, on *de novo* review, should be required to exercise his or her discretion to reopen a case" where "a defendant may wish to offer newly discovered evidence"); *United States v. Freitas*, 602 F. Supp. 1283, 1293 (N.D. Cal. 1985) ("[A] defendant seeking review of a magistrate's order is entitled to have the district court consider . . . any newly developed evidence that was not presented at the prior hearing."). Indeed, district courts addressing motions under § 3145(b) routinely grant hearings and allow for the presentation of newly garnered evidence. *See, e.g., United States v. Cisneros*, 328 F.3d 610, 617 (10th Cir. 2003) (noting that district court had "held her own hearing to consider new evidence from the parties, as was her prerogative"); *United States v. Koenig*, 912 F.2d 1190, 1193 (9th Cir. 1990) ("If the performance of [the district court's] function [to make "its own independent determination"] makes it necessary or desirable for the district judge to hold additional evidentiary hearings, it may do so . . . ."); *United States v. Ramey*, 602 F. Supp. 821, 822 (E.D.N.C. 1985) (inviting "such additional evidence and argument of counsel as they might desire"); *United States v. Allen*, 605 F. Supp. 864, 867 (W.D. Pa. 1985) (permitting the parties "to supplement the record with additional 'information'")

Defendant made the comments with the intent to obstruct. Regardless, Defendant will overcome the presumption, as demonstrated below.

IV. DEFENDANT IS NOT A FLIGHT RISK

The Government has not demonstrated "there is no condition or combination of conditions of release that will assure that [Defendant] will not flee." 18 U.S.C. § 3148(b)(2)(A). To the contrary, the evidence when carefully examined and put in proper context shows the Defendant was not "prepared and ready to flee." *Cf.* Clerk's No. 166 at 7. Defendant proffers:

- The amount of "cash" within Defendant's residence was never counted by the Government. Nevertheless, the Government argued the "cash" amounted to $20,000. The true amount totaled much less. Appreciate, the total included: a coin collection, charity money consisting of one dollar bills, and money donated to the Rubashkin family by a member of the community to go to Defendant's legal fees.

- The silver coins were part of a very small coin collection of very limited value. The coins were used in a ritual to honor the Jewish religious holiday of Purim.

- The "cash" was not in a form one would use in flight. It was dispersed in different locations throughout the house. A large amount, $2,700 to be exact, was in single dollar bills. The single dollar bills constituted charity given by members of the Jewish community.

- The "cash" found in an the kitchen was a gift from a member of the community to be put towards Defendant Rubashkin's legal defense.

- The "travel pouch" contained money left over from Defenant's trip to Canada. The "travel pouch," however, was not newly purchased, but rather 15 years old. Moreover, it was a place Defendant always kept cash. It contained an uncashed check from 2007, which demonstrates the pouch was of longstanding use.

- The balance of the money was in a tote bag—not a travel bag. That money was moved from the Defendant's dresser to avoid mischief by his autistic son and placed in the tote bag, which contained other non-travel items in Defendant's closet. In the tote bag was a well worn folder of miscellaneous family records that had been moved from the dresser; noteworthy, it did not contain Defendant's passport or expired driver's license.

- The "cash" the Government relies upon as proof of his intention to flee was for family expenses; the family always kept cash in the house especially when its financial situation deteriorated. Now, nearly two months later, the funds have been used for family expenses, and less than $3,500 remain in the fabric envelope. The "cash," therefore, is no longer

available for flight.

- The "lockboxes" were never locked and were light, portable "Sentry"™ fire boxes to keep items safe from fire, not for storing cash (one had videos of the Lubavitcher Rebbe and family and one had never been used and contained the original purchase papers).

- The Defendant and his wife's vacation to Israel between Christmas and New Years in 2007 predates any of the Defendant's alleged illegal activity. Regardless, Defendant has offered to execute a waiver of extradition eliminating any intention to flee to Israel. The Government's reliance on the Law of Return is as offensive as it is unlawful.

- The Canada trip also predated Defendant's first arrest. It was not the "test-run" that the Government attempts to manufacture. Rather, Defendant made the trip at the behest of his father to comfort Joe Shochet, an ill friend, as wells as request his aid in obtaining financing for Agriprocessors. But, despite discussions, no business transaction was conducted in Canada.[3] Defendant continued to correspond with other employees about business issues while in Canada—specifically, the status of the First Bank discussions.

- Defendant's return to the U.S. after his Canada trip, given the nature of charges he was likely facing and the financial condition of the business, is evidence of Defendant's position—not the Government's.[4]

- The Government's reliance upon the whereabouts of two defendants who have not been arrested and their possible travel is total speculation and without any connection to Defendant, other than Defendant, knowing of possible charges, has not fled.

- There is no evidence he has been involved in obtaining or producing false travel documents.

- Defendant Rubashkin was not on his way out the door when agents arrived at his home. Rather, he was asleep and awoken by their arrival.

Defendant's motivation to flee has not increased since his arrest. Defendant proffers:

- The unrelenting media attention has only served to energize Defendant to face the alleged charges. Defendant would not dishonor those who have expressed their believe in him — through 275 letters and more than 30 bail properties, by doing anything other than appearing at his trial.

- Agriprocessors is only a part of the larger life Defendant has built in Postville.

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[3]The customs form is consistent with what actually took place.

[4]In spite of the Government's assertion regarding what the border agent recorded, Defendant was in Canada for only two days and was unsuccessful in accomplishing business.

He owns Nevel Properties, Inc., a real estate company in Postville. Eight of his 10 children reside in Postville, including his autistic son, Moshie, with whom Defendant is extremely close.

- Defendant has ties to Postville regardless of who operates the plant; many Jewish families and the Jewish schools he has built will remain. He will continue to support the same.

- Defendant also has ties to larger national Orthodox Jewish Community, which has supported him; flight would be antithetical to his faith and their support.[5]

V. DANGER TO THE COMMUNITY AND LIKELIHOOD OF FUTURE VIOLATIONS

Judge Scholes found Defendant does not present a danger to the community. *See* Order for Detention at 11. Moreover, much has changed since Judge Scoles's decision to further reinforce that finding. Defendant proffers:

- Agriprocessors is in bankruptcy and being operated by a trustee. Given the security of the plant and operation by the trustee, Defendant lacks the ability to obstruct justice or access to meddle with evidence.

- Defendant's additional proposed bail conditions, not considered by Judge Scoles, eliminates any danger to the community and the opportunity for future violations.

VI. CONCLUSION

For all the reasons set forth in his filings, Defendant requests he be granted release pending trial.

Respectfully submitted,

By: */s/ Guy R. Cook*
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[5]As Rabbi Yaakov Wasser, Vice President of the Rabbinical Council of America and one of the delegates who has traveled to Dubuque today to support Defendant, wrote: "[The delegation of high profile rabbis have] traveled to Iowa to express our feelings that Sholom Rubashkin should be released on bail, and that he does not represent a flight risk. Sholom is well aware of how many people have advocated on his behalf, and a betrayal of their confidence would cause irrevocable damage to himself, his family, his community, and the many honorable individuals who have shown their support for him."

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by service upon each of the attorneys of record herein disclosed on the pleadings on the 12th day of Janurary, 2009, pursuant to Local Rule 5.3(i)/ECF.

Signature: /s Adam D. Zenor