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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
) 2:05-cr-0240-GEB
Plaintiff,)
) ORDER*
v.)
)
HAMID HAYAT, and)
UMER HAYAT,)
)
Defendants.)
_____)

The Amended Order filed November 4, 2005, ordered Defendant Umer Hayat ("Umer") released subject to six conditions, one of which required the posting of "a bond in the amount of \$1,500,000" collateralized by five real properties. (Amended Order at 20.) Umer moves to modify this bail condition "to allow his release upon the posting of a bond in the amount of \$1,200,000" collateralized by four real properties because Property 2 "is unavailable for use to secure an Appearance

* This motion was determined suitable for decision without oral argument because "the language of the statute [18 U.S.C. § 3145(a)] does not require a detention hearing once the defendant has demonstrated his inability to post a bond determined to be a necessary condition of his release." United States v. Fidler, 419 F.3d 1026, 1028 n.1 (9th Cir. 2005).

1 Bond."¹ (Def.'s Mot. for Modification of Conditions of Release
2 ("Def.'s Mot.") at 2.) The government opposes the motion.

3 BACKGROUND

4 Property 2 was originally proffered by Sher Afzal
5 ("Sher") to secure Umer's Appearance Bond. During an interview
6 with Pretrial Services in October 2005, Sher "advised that he was
7 the owner of Property 2, that it had an estimated value of
8 \$300,000, that it was unencumbered, and that he was willing to
9 use the property to secure an Appearance Bond for Umer Hayat."
10 (Def.'s Mot. at 2.) However, "it has since been determined that
11 Safdar Afzal is the record owner of Property 2, that there is an
12 encumbrance of \$125,000, and the property is unavailable for use
13 to secure an Appearance Bond." (Id.)

14 Safdar Afzal ("Safdar") explains that title to
15 Property 2 was transferred to him by his father, Sher, and
16 recorded on September 30, 2004. (Safdar Decl. ¶ 2; Def.'s Mot.
17 at 2.) Upon transfer, Safdar obtained a loan for \$125,000
18 secured by a first deed of trust on the property. (Safdar Decl.
19 ¶ 3; Def.'s Mot. at 2.) The loan has an adjustable interest
20 rate, which is expected to increase over the next twelve months.
21 (Safdar Decl. ¶¶ 7,9; Def.'s Mot. at 2.) Safdar declares that he
22 "cannot afford higher monthly payments" and "must refinance
23 Property 2 as soon as possible so that [he] can obtain a fixed
24 rate to insure that [his] payments will remain approximately

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26 ¹ Pursuant to Order Re Local Rule 39-140, which was filed
27 November 4, 2005, the proffered properties are referred to as
Property 1, Property 2, Property 3, Property 4, and Property 5.

1 \$500.00 monthly." (Safdar Decl. ¶ 9; Def.'s Mot. at 2-3.)
2 However, Safdar will not be able to refinance Property 2 if it is
3 used to secure an Appearance Bond. (Safdar Decl. ¶ 10; Def.'s
4 Mot. at 3.) Safdar declares that his "decision not to use
5 Property 2 to secure the Appearance Bond is in no way intended to
6 say or imply" that he has "any concerns that Umer Hayat would
7 flee." (Safdar Decl. ¶ 11; Def.'s Motion at 3.) Safdar asserts
8 that if he "had such a concern . . . [he] would not continue to
9 allow Property 3 to be used to secure a bond." (Safdar Decl.
10 ¶ 11; Def.'s Motion at 3.)

11 In addition, Sher declares that although "Property 2 is
12 in [his] son's name, as is [their] custom [he] commonly refer[s]
13 to the property as [his] property." (Sher Decl. ¶ 3; Def.'s Mot.
14 at 3.) He states that when he "represented to the Pretrial
15 Services Officer that the property was unencumbered [he] did not
16 recall that [his] son had obtained a loan . . . and used Property
17 2 to secure the loan." (Sher Decl. ¶ 4; Def.'s Mot. at 3.) In
18 addition, Sher declares that his and Sadfar's "decision not to
19 use Property 2 to secure the Appearance Bond is in no way
20 intended to say or imply that [they] have any concerns that Umer
21 Hayat would flee." (Sher Decl. ¶ 7; Def.'s Mot. at 3.) Sher
22 asserts that if he "had such a concern, [he] would not continue
23 to allow Property 1 to be used to secure a bond." (Sher Decl.
24 ¶ 7; Def.'s Mot. at 3.)

25 Upon notification that Property 2 was no longer
26 available to secure Umer's Appearance Bond, Pretrial Services
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1 prepared a Supplemental Report, which was received on November 8,
2 2005.² The Supplemental Report states that when Sher previously
3 spoke to Pretrial Services, he "was confused about [Property 2's]
4 value, and [it's] true ownership." (Supplemental Report ("Supp.
5 Rep.") at 2.) But Pretrial Services states the "lack of
6 availability [of Property 2] clarifies the Afzal family's
7 financial situation and the increased significance of the posting
8 of their [Property 1 and Property 3] with a total equity of
9 \$580,000." (Id.) Pretrial Services concludes that the
10 "confirmed \$1,200,000 in equity from [the remaining] four
11 properties being offered . . . meets the necessary threshold to
12 reasonably assure [Umer's] appearance at future court
13 proceedings. . . ." (Id.)

14 DISCUSSION

15 Once a release order issues, a defendant may file a
16 motion with the district court for amendment of a condition of
17 release. United States v. Fidler, 419 F.3d 1026, 1027 (9th Cir.
18 2005) (discussing the options when a detained defendant is unable
19 to meet a financial condition of release imposed by the district
20 court). Further, if the motion makes known that a condition of
21 release "is unattainable," the court may re-evaluate the need for
22 that condition. United States v. Mantecon-Zayas, 949 F.2d 548,
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25 ² Defense counsel contacted Pretrial Services regarding
26 the unavailability of Property 2, and requested a supplemental
27 report addressing Defendant's proposed modification to the
28 condition of release. (Def.'s Mot. at 2, n.1.)

1 551 (1st Cir. 1991). Therefore, the bond condition of release
2 will be re-evaluated.

3 A. Amount of the Bond

4 In June 2005, Pretrial Services stated that "a large
5 secured bond would be necessary" for Umer's release in view of
6 his "ties to Pakistan and his recent extended overseas travel."
7 (June Rep. at 2.) In September 2005, Magistrate Judge Hollows
8 ordered Umer released subject to certain conditions, including a
9 \$1.2 million bond secured by Property 1, Property 3, Property 4,
10 and Property 5; the order was stayed pending appeal to this
11 Court. In October 2005, at the request of this Court, Pretrial
12 Services interviewed all persons proffering property except
13 Shahana Khatab and co-Defendant Hamid Hayat.³ When Sher was
14 interviewed, he indicated that he was willing to post an
15 additional property, Property 2, as collateral for the bond.
16 Subsequently, Pretrial Services issued a report stating "the bond
17 set by Magistrate Judge Hollows is compelling, however, the
18 addition of . . . [Property 2] adds more of an assurance to the
19 defendant's appearance at future court proceedings." (Pretrial
20 Services Report, October 18, 2005, ("Oct. Rep.") at 4.) But when
21 notified that Property 2 was no longer available as collateral,
22 Pretrial Services issued the Supplemental Report,
23 which concludes "there is now a confirmed \$1,200,000 in equity

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25 ³ The government's Response to Defendant's Motion for
26 Approval of Bail Documents ("Resp. to Mot.") filed November 9,
27 2005, states that Umer Khatab's wife, Shahanu Khatab, "would be
acting as a fifth surety in this case." (Resp. to Mot. at 10
n.4.)

1 from four properties being offered . . . [and] this bond meets
2 the necessary threshold to reasonably assure Mr. Hayat's
3 appearance at future court proceedings." (Supp. Rep. at 2.)

4 Thus far, the amount of the Appearance Bond has been
5 largely determined by the properties offered as security.
6 However, since Property 2 is no longer available, it is necessary
7 to determine whether the \$1.5 million collateralized bond "is an
8 indispensable component of conditions of release." Mantecon-
9 Zayas, 949 F.2d at 551. A bond should be set at "such an amount
10 as is reasonably necessary to assure the appearance of the person
11 as required." United States v. McConnell, 842 F.2d 105, 108
12 (5th. Cir. 1988). Four factors enumerated in 18 U.S.C. § 3142(g)
13 are relevant to determining what bond amount would reasonably
14 assure Umer's appearance at trial: (1) the nature and
15 circumstances of the offense charged, (2) the weight of the
16 evidence against Umer, (3) his history and characteristics, and
17 (4) the nature and seriousness of the danger his release would
18 pose to any person or the community. See Fidler, 419 F.3d at
19 1029 (upholding the district court's determination on the amount
20 of bail because the defendant was a serious flight risk in light
21 of the analysis of the four § 3142(g) factors).

22 Each factor was considered in the Amended Order. As to
23 the first factor, the Order stated that the nature and
24 circumstance of the offense "indicate that Umer is associated
25 with persons hostile to the government of the United
26 States . . . [thus Umer appears to have] disassociated himself
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1 from the United States and is likely to flee if released.”
2 (Amended Order at 5.) As to the second factor, the Order noted
3 that although “the weight of the evidence against the defendant
4 ‘is the least important factor’ . . . this factor does not favor
5 release.” (Id. at 6.) As to the third factor, the Order
6 observed that Umer owns a home in Pakistan, has “familial ties to
7 Pakistan,” and appears to have “access to a significant amount of
8 cash from an unexplained source.” (Id. at 7-8.) It recognized
9 that Umer has some ties to the United States, but concluded that
10 “the nature of his seasonal work indicates his occupational tie
11 to the United States is minimal, and his association with
12 individuals that appear to be engaged in a holy war against the
13 United States suggests his ties to the United States are
14 tenuous.” (Id. at 9.) As to the fourth factor, the Order noted
15 Umer “appears potentially dangerous because of his association
16 with individuals involved in or sympathetic to jihad,” but stated
17 “the government’s proffer against him does not indicate the
18 nature of his association and involvement makes him a danger to
19 the community.” (Id.)

20 Based on consideration of these four factors, the
21 Amended Order concluded that the government “has proved by a
22 preponderance of the evidence that Umer is a serious flight
23 risk.” (Id. at 10.) In light of this determination, a large
24 bond is necessary to reasonably assure Umer’s appearance at
25 trial. See McConnell, 842 F.2d at 109 (“Should the judicial
26 officer conclude that a large bond is an essential part of a
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1 package of conditions designed to secure a reasonable assurance
2 of the defendant's appearance, and the record contains a
3 reasonable basis for that conclusion, the condition would be
4 neither constitutionally nor statutorily infirm."); see also
5 United States v. Bernal, 183 F. Supp. 2d 439, 441 (D.P.R. 2001)
6 (holding that a high bail condition was "an indispensable
7 component of the conditions of release").

8 Umer's Appearance Bond was originally set at \$1.2
9 million, but was increased to \$1.5 million based on consideration
10 of the § 3142(g) factors and the recommendation of Pretrial
11 Services. However, Pretrial Services now states it "has always
12 believed the amount of bond was not as important as the
13 significance of the properties to the people pledging the bond."
14 (Supp. Rep. at 2.) Pretrial Services concludes that a bond of
15 \$1.2 million "meets the necessary threshold to reasonably assure
16 Mr. Hayat's appearance at future court proceedings." (Id.)
17 Based on a reconsideration of the § 3142(g) factors and Pretrial
18 Services' Supplemental Report, a bond in the amount of \$1.2
19 million appears sufficient to reasonably assure Umer's appearance
20 at trial.⁴ Therefore, the first condition of the Amended Order
21 is modified to allow Umer's release upon the posting of a bond in
22 the amount of \$1.2 million.⁵

24 ⁴ This amount is determined sufficient when considered in
25 conjunction with the other five conditions of release.

26 ⁵ This release condition includes a court certified
27 interpreter's certification that the bond paperwork has been
translated into each surety's native language.

1 Pretrial Services "he feels a strong blood relationship with
2 Umer," but that during an interview with the FBI, Safdar said
3 "while he and his father are related to the Hayats, they are not
4 particularly close with them." (Id.) The Amended Order resolved
5 this doubt in favor of Umer's release because "doubts regarding
6 the propriety of release should be resolved in favor of the
7 defendant." United States v. Motamedi, 767 F.2d 1403, 1406 (9th
8 Cir. 1985).

9 The government argues that the additional inconsistent
10 statements by Sher and Safdar about Property 2 undermine their
11 credibility and their conclusory assurances about their
12 relationship with Umer. (Gov't Opp'n at 7-11.) The government
13 notes Sher originally told Pretrial Services that he was the
14 owner of Property 2, that it had an estimated value of \$300,000,
15 and that it was unencumbered, when in fact Safdar is the record
16 owner of Property 2, there is an encumbrance of \$125,000, and the
17 property is unavailable for use to secure an Appearance Bond.
18 (Id. at 10-11.) In addition, the government observes Safdar
19 represented to Pretrial Services that Property 3 was his "only
20 asset," when in fact Safdar owns both Property 3 and Property 2.
21 (Id. at 7.)

22 Defense counsel argues that Safdar's misrepresentation
23 about the ownership of Property 2 is "understandable when viewed
24 in context of his culture."⁶ (Def.'s Reply at 2.) However, his
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26 ⁶ Although defense counsel attempts to explain why Safdar
27 would not consider Property 2 as his "asset," neither Safdar's
28 declaration nor Pretrial Services' report discuss any cultural

1 misrepresentation hardly appears "understandable" because when he
2 spoke with Pretrial Services in October he had owned Property 2
3 for over a year, he had been making loan payments on the
4 property, and was monitoring the adjustable interest rate on the
5 loan to assure that the payments did not become overly
6 burdensome. (See Safdar Decl. ¶¶ 2,3,7,8,9.) In light of his
7 frequent attention to matters involving the property, it is hard
8 to imagine that Safdar innocently misspoke about his property
9 ownership interest when he was interviewed by Pretrial Services.

10 As to Sher's misrepresentations about the ownership of
11 Property 2, Pretrial Services states "it appears Sher Afzal was
12 confused" when he spoke with Pretrial Services in October 2005.
13 (Supp. Rep. at 2.) However, it taxes credulity to believe that
14 when Sher unequivocally told Pretrial Services that he owned
15 Property 2 "free and clear" and that the property has "a value of
16 \$300,000" that he forgot he had transferred Property 2 to his son
17 only one year ago. (Oct. Rep. at 3.) Even if he did forget,
18 then his ability to recall is questioned, including whether he
19 remembers the true nature of his relationship with Umer.

20 The inconsistent statements by Safdar and Sher about
21 Property 2 raise serious credibility concerns. In light of these
22 concerns, Safdar's and Sher's earlier conclusory statements
23 indicating they have a close relationship with Umer lack
24 sufficient support in the record. Accordingly, what Safdar
25 previously told the government - that even though "he and his
26 _____
27 differences in the use of the term.

1 father are related to the Hayats, they are not particularly close
2 to them" - is now given more weight. (See Amended Order at 11.)
3 In light of all their inconsistent statements made to date,
4 "there is reason to believe that [Umer's] relationship with [Sher
5 and Safdar] is not a close one and that the bond would not
6 [reasonably] assure his appearance." See Koenig, 912 F.2d at
7 1193.

8 C. Adequacy of the Proffered Properties

9 In addition, the government argues that the four
10 remaining pledged properties are not adequate collateral for
11 bail. (Gov't Opp'n at 12-13.) The nature of the pledged
12 properties must be evaluated for purposes of determining whether
13 they provide "a reliable assurance of [Umer's] appearance at
14 trial." Townsend, 897 F.2d at 996. The sureties' connection to
15 the remaining four properties must be such that the loss of these
16 properties would inflict a hurt "so severe that [Umer] will
17 return for trial rather than flee." Id.

18 The government contends that "the net result [of
19 withdrawal of Property 2] is that a major disincentive for flight
20 has been removed." (Gov't Opp'n at 12, n.5.) The government
21 contends that Property 2 was the best collateral for bail
22 purposes since Sher "resides [on it] as well as three of his sons
23 (including Safdar), two of his daughter-in-laws [sic]; and nine
24 of his grandchildren." (Id. at 12.) The government asserts
25 "[l]oss of this property would have imposed a genuine 'hurt'
26 . . . on these sureties, likely more so than any other property."
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1 (Id.) The government concludes that "the removal of Property 2
2 severely undercuts a key condition of defendant's bail
3 and . . . shift[s] the scales against release." (Id. at 13.)

4 The Amended Order noted that while the loss of
5 Property 5 "would have some impact on Umer and his immediate
6 family [because they reside at Property 5] . . . there is doubt
7 regarding the extent of this impact given his [newly renovated]
8 second home in Pakistan." (Amended Order at 18.) The Amended
9 Order also observed that Property 5 and Property 4 are owned and
10 part-owned by Umer Khatab, who prior to Umer's indictment was
11 "planning on building a house and living in Pakistan" but
12 returned to the United States solely to assist Umer. (Id. at
13 14.) Thus it appears Umer Khatab would not be hurt by the loss
14 of these properties because he would simply return to Pakistan
15 should Umer flee. Furthermore, the loss of Property 5 would have
16 little impact on co-defendant Hamid Hayat because Umer exercises
17 control over it. (See id. at 15.)

18 In addition, Property 1, Property 3, and Property 4
19 appear to be disposable rental properties, which as the Amended
20 Order recognized "somewhat undermine . . . [their] effectiveness
21 as security." (Amended Order at 13.) Although Pretrial Services
22 characterizes Property 1 and Property 3 as having "increased
23 significance" because of "the Afzal family's financial
24 situation," the loss of Property 1 and Property 3 would not leave
25 Sher or Safdar without their primary residence. (Supp. Rep. at
26 2.) Consequently, it does not appear that the loss of the four
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1 remaining properties would inflict a hurt "so severe that [Umer]
2 will return for trial rather than flee." Townsend, 897 F.2d at
3 996.

4 CONCLUSION

5 Although the amount of bail has been reduced from \$1.5
6 million to \$1.2 million, the proposed sureties and proffered
7 property do not appear adequate because the "purpose of bail is
8 not served unless losing . . . [the properties] would be a deeply
9 felt hurt to the defendant and his family." Townsend, 897 F.2d
10 at 996.⁷ Therefore, condition 1 of the Amended Order is modified
11 as follows:

12 A bond in the amount of \$1,200,000 must be
13 posted and secured with adequate security.
14 Defendant may proffer property or properties
15 to secure the bond. The United States may
16 object to the adequacy and value of the
17 property proffered; such objection must be
18 formally made before the duty Magistrate
19 Judge no longer than three (3) days after the
20 property has been proffered by Defendant.

21 IT IS SO ORDERED

22 DATED: November 14, 2005

23 /s/ Garland E. Burrell, Jr.
24 GARLAND E. BURRELL, JR.
25 United States District Judge

26 ⁷ The purpose of a bail is not to provide funds to the
27 government should the defendant flee, but rather to reasonably
28 assure his appearance at trial. See United States v. Melville,
309 F. Supp. 824, 828-27 (S.D.N.Y. 1970).