U.S. Department of Justice

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June 13, 2023

Via ECF
The Honorable Leda Dunn Wettre
United States Magistrate Judge
District of New Jersey
Martin Luther King, Jr. Building
and U.S. Courthouse
50 Walnut Street
Newark, NJ 07101

Re: *United States v. Arlen Encarnacion*
Mag. No. 21-13425 (LDW)

Dear Judge Wettre:

Please accept this letter in opposition to defendant Arlen Encarnacion's ("Encarnacion") application to modify his bail conditions. Encarnacion seeks to presumably vacation in the Bahamas on a Royal Caribbean cruise. The Court should deny Encarnacion's application for the same reasons it prohibited him from foreign travel in the first place; namely, the risk that he will flee prosecution and remain abroad. Nothing has changed since Encarnacion's initial appearance. He remains a flight risk and he provides no compelling justification for this Court to revisit prior decisions. The application should thus be denied.

Background

Encarnacion was arrested on December 16, 2021 pursuant to a Criminal Complaint charging him with eleven counts of bank fraud, in violation of 18 U.S.C. § 1344(2) and § 2, three counts of wire fraud, each in violation of 18 U.S.C. § 1343 and § 2, and two counts of money laundering, each in violation of 18 U.S.C. § 1957 and § 2. *See Docket Entry ("DE") 1.* During Encarnacion's initial appearance, Your Honor set bail conditions, including a $250,000 unsecured bond; restricting travel to New Jersey unless approved by Pretrial Services; surrendering of all passports and travel

documents; and refraining from contact with co-defendants Kent Encarnacion and Jacquelyn Pena, except in the presence of counsel. *See DE 4, 7, and 8.*

On or about June 2, 2023, counsel for Encarnacion submitted the instant application to modify Encarnacion's bail conditions by seeking permission for him retrieve his passport to travel outside the United States to the Bahamas for a family vacation.

The Request to Travel to the Bahamas Should Be Denied

Encarnacion's application should be denied because there has been no change in circumstances. He is still a flight risk and allowing him to vacation in another country where he could evade prosecution is unwarranted.

Pursuant to 18 U.S.C. § 3142(c), conditions for bail must "reasonably assure the appearance" of the defendant. In making this determination, the Court must take into account, among other things, the nature of the offense, the weight of the evidence against the defendant, the defendant's community ties and his length of residence in the community, and his financial resources. 18 U.S.C. § 3142(g); *see also United States v. Vargas*, 2013 WL 3223419 (D.N.J. 2013). When requesting that an individual be detained prior to trial, the Government's burden differs depending on whether the individual is a risk of flight or danger to the community. *United States v. Himler*, 797 F.2d 156, 160-61 (3d Cir. 1986). To demonstrate risk of flight, the preponderance of the evidence standard is applied, whereas detention based on safety to the community must be clear and convincing. *Id.*

After considering these factors, this Court imposed release conditions on Encarnacion at his initial appearance that it found were appropriate and necessary to "reasonably assure [his] appearance." Prohibiting his foreign travel and requiring the surrender of his passport and travel documents was a key condition that addressed Encarnacion's significant risk of flight.

Though not styled that way, Encarnacion seeks reconsideration of that prior ruling. Local Crim. R. 1.1; L. Civ. R. 7.1(i). To warrant reconsideration, Encarnacion must show that: (1) there has been an intervening change in the controlling law; (2) evidence not previously available has become available; or (3) it is necessary to correct a clear error of law or to prevent manifest injustice. *See North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir.1995). In his application, Encarnacion demonstrates none of these. Rather, he merely indicates a desire to take a cruise this summer without providing justification for a departure from the Court's prior ruling.

Encarnacion has not made any arguments that merit reconsideration of the Court's prior determination that he is a flight risk who should not be permitted to leave the country. Encarnacion was charged with 16 criminal counts, and he potentially faces several years' incarceration relating to his conduct. The offenses with which he is charged constitute serious criminal conduct that he could evade without the travel restrictions imposed by the Court. There has been no change in circumstance that mitigates the potential for flight by Encarnacion, and the Court should thus decline to reconsider its determination and leave the travel restriction in place.

Even if the Court were to reevaluate the § 3142(g) factors anew, they continue to show that restricted Encarnacion's travel to New Jersey are necessary to ensure his appearance. First, the nature and circumstances of his crime are serious. Encarnacion was charged with submitting 14 separate fraudulent loan applications which resulted in the misappropriation of over $1.6 million in COVID relief funds. Second, the evidence against Encarnacion is strong. The loan applications and bank records obtained during the investigation support the charges and provide incontrovertible evidence of Encarnacion's conduct. The weight of the evidence, along with the strong possibility of Encarnacion's incarceration following his conviction weigh against permitting him to travel to a foreign country using his passport, from where he could theoretically travel to any country in the world to evade justice. Third, Encarnacion has at least some financial means to sustain himself while abroad, should he choose not to return to the United States.

In sum, there has been no change in circumstance to justify altering Encarnacion's bail status so he can vacation in a foreign country with his girlfriend and his family. He still faces serious charges that may result in significant punishment should he plead guilty or be convicted. Accordingly, the Court should deny Encarnacion's application.

Respectfully submitted,

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By: *s/ Mark C. Orlowski*
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cc: Lorraine Gauli-Rufo, Esq. (via ECF and e-mail)