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 9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12	UNITED STATES OF AMERICA,)	No. CR 06-319-SVW
)	No. CR 06-591-SVW
13	Plaintiff,)	
)	<u>GOVERNMENT'S MEMORANDUM OF POINTS</u>
14	v.)	<u>AND AUTHORITIES IN OPPOSITION TO</u>
)	<u>DEFENDANT'S "MOTION AND REQUEST</u>
15	KEITH GILABERT,)	<u>FOR EVIDENTIARY HEARING TO</u>
)	<u>RECONSIDER ORDER OF DETENTION";</u>
16	Defendant.)	<u>EXHIBITS</u>
)	
17)	Date: April 23, 2007
)	Time: 11:00 a.m.
18)	Ctrm: Hon. Stephen V. Wilson
)	

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1 Plaintiff United States of America hereby files its
2 memorandum of points and authorities in opposition to defendant
3 Keith Gilabert's "Motion and Request For Evidentiary Hearing to
4 Reconsider Order of Detention" (defendant's "Motion").

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 A. BACKGROUND

7 1. The Fraud Case, CR 05-319

8 The information in CR 05-319 (the "Fraud Case"), filed on
9 April 28, 2006, charges defendant Keith Gilabert with conspiracy
10 to commit securities fraud, mail fraud, and wire fraud, in
11 connection with defendant's operation of a fraudulent hedge fund,
12 the GLT Venture Fund ("GLT"), which he founded and operated
13 through Capital Management Group ("CMG"). (Docket Report
14 ("DR") 1). The information was filed pursuant to a plea
15 agreement, also filed on April 28, 2006. (DR 2). Appearing
16 pursuant to a summons, defendant made his initial appearance on
17 May 22, 2006, at which time the court set an unsecured appearance
18 bond in the amount of \$100,000 and required, among other things,
19 that defendant not commit another federal, state, or local crime.
20 (See DR 12).

21 Defendant's change-of-plea hearing was held on June 26,
22 2006. (DR 17). At the hearing, having recently learned that
23 defendant had engaged in transactions designed to conceal his
24 continuing ownership interest in a valuable undeveloped
25 residential lot in Valencia, California (the "Big Lot" or "Vacant
26 Lot") (see Part A.2., infra), the government stated on the record
27 that it intended to seek a determination that defendant had
28 breached his plea agreement. At defendant's request, the Court

1 allowed him to enter his guilty plea to the one-count information
2 without the benefit of the plea agreement. (DR 17). On August
3 21, 2006, after a hearing, the Court revoked defendant's bond and
4 ordered his detention. (DR 19-22). Defendant's sentencing on
5 the Fraud Case is scheduled for July 23, 2007. (DR 25).

6 2. The Money Laundering Conduct

7 As part his agreement with the government, defendant agreed
8 in 2005 to sell two vacant residential lots he had purchased with
9 proceeds from his fraud scheme: (1) a lot (Lot # 153) located at
10 25674 Oak Meadow Drive in the Westridge area of Valencia,
11 California, which defendant purchased in January 2004 for
12 \$1,095,000 (the "Big Lot" or "Vacant Lot"), using \$361,734 in
13 investor money, see Complaint Affidavit of E. Paul Bertrand
14 ("Bertrand Aff.") ¶¶ 5(b), 7(b) (attached hereto as Exhibit A);
15 and (2) a smaller lot located in the Westridge area of Valencia
16 (Lot # 146) (the "Small Lot"), which defendant purchased in
17 November 2004 for \$525,000, using \$230,818 in investor money.
18 (Id. ¶ 7(c)). In 2005, defendant agreed to sell both properties
19 to a third party, Bradley Gerszt ("Gerszt"), for the same price
20 defendant had paid for them, and to turn the proceeds of the
21 sales over to the government. (Id. ¶¶ 7-8).

22 Gerszt purchased the Small Lot from defendant GILABERT for
23 \$525,000; \$101,917 of the purchase price, representing GILBERT's
24 proceeds from the sale, was paid to the FBI out of escrow. (Id.
25 ¶¶ 8, 9). Gerszt immediately re-sold the Small Lot at a profit
26 of approximately \$200,000. (Id. ¶ 18(a)).

27 After having sold the Small Lot to Gerszt, GILABERT
28 apparently could not bring himself actually to part with the

1 Vacant Lot, so he devised an arrangement by which he would
2 secretly maintain control of the Vacant Lot, using Gerszt
3 essentially as a straw. Specifically, GILABERT agreed that, if
4 Gerszt carried the Vacant Lot in his name, GILABERT would
5 reimburse Gerszt for all of the funds necessary to purchase the
6 property and for all of the carrying costs. (Id. ¶ 20(c)).
7 GILABERT told Gerszt that his mother-in-law, co-defendant Hiromi
8 Seele in CR 06-591, would pay to build a house on the Vacant Lot,
9 and GILABERT would buy the entire property back from Gerszt at a
10 nice profit once the house was completed. (Id.). Gerszt agreed.
11 (Id.). During the escrow on the property, Gerszt put in \$48,000;
12 GILABERT caused this to be reimbursed to Gerszt in the form of a
13 \$71,000 check paid to Budget Real Estate, a company Gerszt worked
14 with. (Id. ¶ 20(d), (e)). GILABERT told Gerszt this payment was
15 to reimburse the \$48,000 and to "cover a little more of the money
16 it would take for Gerszt to close escrow." (Id. ¶ 20(e)).

17 The "sale" to Gerszt closed on February 10, 2006, for
18 \$1,095,000. (See Id. ¶ 20(f)). Of this amount, \$73,465.96 was
19 paid to the government out of escrow. (Id., ¶ 10). After the
20 close, GILABERT stopped calling Gerszt and failed to make a
21 mortgage payment as promised. (Id. ¶ 20(f)). Gerszt, believing
22 that GILABERT had reneged on their deal, decided to list the
23 property for sale. (Id.). Soon after it was listed, Gerszt
24 received offers for \$1.5 million and \$1.3 million. (Id.
25 ¶ 20(g)).

26 Before Gerszt was able to sell the property to one of the
27 buyers, GILABERT called Gerszt and yelled at him, threatening
28 Gerszt if he reneged on the deal with GILABERT. (Id.). Gerszt

1 eventually agreed to sell the Vacant Lot to GILABERT's mother-in-
2 law Seele for less than Gerszt had paid for the property. (Id.
3 ¶ 20(h)). Gerszt explained that he had already gotten \$71,000
4 from GILABERT during escrow on the Vacant Lot, and had made money
5 re-selling the Small Lot, so at the end of the day he was still
6 ahead and just wanted to walk away. (Id.). Gerszt deeded the
7 property to Seele on May 12, 2006. (Id. ¶ 17).

8 3. The Obstruction Case, CR 06-591

9 The government began investigating the foregoing
10 transactions on approximately May 16, 2006. (See id. ¶¶ 11-13).
11 To explain why Gerszt sold the Vacant Lot to Seele for less than
12 what he paid for the property, when he had legitimate competing
13 offers for hundreds of thousands of dollars more, Gerszt and
14 GILABERT needed a cover story. The story they arrived at was
15 that Gerszt sold the Vacant Lot to Seele as part of a "joint
16 development deal" to build a house on the property, after which
17 Gerszt would receive 10% of the profits. (See id. ¶¶ 18, 19).
18 Both Gerszt and GILABERT told a version of this cover story to
19 the FBI when interviewed about the transaction on June 20, 2006
20 and June 23, 2006, respectively. (Id.).

21 On June 28, 2006, Gerszt admitted that he had lied to the
22 FBI on June 20, 2006. (Id. ¶ 20(a)). Gerszt admitted that the
23 "joint venture" story was just a cover story, invented to conceal
24 GILABERT's continuing interest in the Vacant Lot. (Id. ¶¶ 20(i),
25 (l)). Gerszt also reported that, on Sunday, June 25, 2006 (the
26 day before GILABERT was to plead guilty in the Fraud Case, CR 06-
27 319), Gerszt met with GILABERT and Seele at a Starbucks. At the
28 meeting:

1 GILABERT told Gerszt that he had told the FBI several false
2 excuses as to why Gerszt had entered into a joint
3 development deal with [Seele] rather than just selling the
4 property to the buyer Wiggins [the real estate agent] had
5 found. GILABERT then suggested to Gerszt several false
6 excuses Gerszt should tell the FBI if he was questioned.
7 GILABERT then wrote the excuses out on a sheet of scrap
8 paper and gave it to Gerszt. GILABERT also gave Gerszt
9 three originals of the false [joint development] contract,
10 all signed by [Seele], for Gerszt to sign and backdate.
11 GILABERT said that this new contract was to 'cover Gerszt's
12 ass.' Gerszt took the contracts with him and said he would
13 get back to GILABERT."

14 (Id. ¶ 20(1)).

15 Gerszt provided to the FBI the fraudulent contract prepared
16 by GILABERT and the notes GILABERT gave to Gerszt. (Id.). As
17 detailed in Agent Bertrand's affidavit, Gerszt's account of
18 GILABERT and Seele's obstructive conduct has been corroborated
19 by, among other things, surveillance video from the Starbucks; by
20 a consensually monitored telephone call between Gerszt and Seele;
21 and by electronic meta-data accompanying an e-mail sent by Seele,
22 confirming that GILABERT had created the "joint venture" contract
23 after the fact. (Ex. A, ¶¶ 22-25).

24 Based on this information, the government obtained a
25 complaint and arrest warrant for GILABERT on July 11, 2006.
26 GILABERT was arrested and made his initial appearance on July 12,
27 2006 before the Hon. Margaret A. Nagle. (CR 06-591, DR 4). On
28 July 13, 2006, Judge Nagle ordered GILABERT "permanently
detained." (DR 7). A grand jury indicted GILABERT and Seele on
July 25, 2006, charging them with corruptly endeavoring to
obstruct the FBI's investigation, in violation of 18 U.S.C.
§ 1505. (DR 9). Trial is currently set for June 26, 2007.
(DR 44).

/ / /

1 B. ARGUMENT

2 Pursuant to 18 U.S.C. § 3142(f), a detention hearing may be
3 reopened only "if the judicial officer finds that information
4 exists that was not known to the movant at the time of the
5 hearing and that has a material bearing on the issue whether
6 there are conditions of release that will reasonably assure the
7 appearance of the person as required and the safety of any person
8 and the community." 18 U.S.C. § 3142(f)(2)(B). Defendant argues
9 that the orders of detention in these matters should be
10 reconsidered because defendant's new counsel, by reading the
11 discovery the government produced in the Obstruction Case (CR 06-
12 319), "has learned" of several allegedly incorrect statements
13 made by the prosecutor at the detention hearing in the Fraud Case
14 (CR 05-319) held on August 21, 2006 and at a status conference in
15 the Obstruction Case (CR 06-591) held on December 18, 2006.
16 Defendant also submits a letter from a friend of GILABERT, in
17 which she offers "to serve as a third party custodian" for
18 Gilabert. (Motion Ex. A). For the following reasons,
19 defendant's Motion should be denied.

20 First, the factual issues raised in defendant's Motion
21 concern, at most, immaterial details surrounding Gerszt's
22 acquisition of the Vacant Lot from defendant GILABERT and his
23 subsequent transfer of the property to Seele. Defendant GILABERT
24 was detained, however, not because he engaged in these
25 transactions, but because he corruptly endeavored to obstruct the
26 FBI's investigation into these transactions by creating false
27 documents and a false cover story for Gerszt to provide the FBI.
28 See CR 06-319, DR 22 (Findings Re: Revocation of Defendant

1 Gilabert's Bail Pending Sentencing) (Aug. 24, 2006) (ordering
2 detention because "the Grand Jury's return of an indictment in
3 Case Number CR 06-591-SVW conclusively established probable cause
4 to believe that defendant Gilabert has committed a federal
5 offense while on pretrial release" and because defendant did not
6 "show by clear and convincing evidence evidence that he is not
7 likely to flee or pose a danger to the safety of the community if
8 he were to be released").

9 None of the facts raised in defendant's Motion even remotely
10 undermines the Court's written findings supporting defendant's
11 detention in the Fraud Case. Defendant's supposedly new facts,
12 even if they were newly discovered (which they were not, see
13 infra), and even if they were all accurate (which they are not,
14 see infra), would fail to warrant reconsideration of the
15 detention orders in these cases because they have no "material
16 bearing" on whether defendant did in fact endeavor to obstruct
17 justice while on pretrial release. See 18 U.S.C. § 3142(f)(2)(B)
18 (to warrant reconsideration, new information must have "material
19 bearing on the issue whether there are conditions of release that
20 will reasonably assure the appearance of the person as required
21 and the safety of any person and the community").

22 Second, the facts defendant raises were largely known to
23 defendant at the time of the detention hearings. When
24 interpreting § 3142(f)(2)(B), courts have consistently held that
25 detention hearings should not be reopened based on evidence or
26 information that was available to the movant at the time of the
27 initial hearing. E.g. United States v. Dillon, 938 F.2d 1412,
28 1415 (1st Cir. 1991) (refusal to reopen hearing based on

1 affidavits and letters that could have been presented at original
2 hearing).¹ The facts "at issue" in the Motion mostly concern
3 GILABERT's relationship with Gerszt and the nature of GILABERT's
4 sale of the Vacant Lot to Gerszt in February 2006. These facts
5 were personally known to GILABERT and therefore available to the
6 defense at the time of the detention hearings. Therefore, as a
7 matter of law, they cannot support a reconsideration of the
8 Court's detention orders.

9 Third, the facts defendant raises are inaccurate in
10 significant respects.² For example, defendant in his Motion
11 emphasizes a statement from Lou Fricke, the real estate agent for
12 the third-party buyer who offered Gerszt \$1.3 million for the
13 Vacant Lot, that "Gerszt was calling the shots on the [Vacant
14 Lot]." (See Motion at 3; see also Ex. B hereto). In fact,
15 however, Fricke stated only that he believed, based on his
16 conversations with defendant GILABERT, that Gerszt was calling
17 the shots. (Ex. B at 2 (Bates-stamped page 148)). In context,
18 this statement and the other information identified in the Motion

19
20 ¹ See also United States v. Hare, 873 F.2d 796, 799 (5th
21 Cir. 1989) (proffered testimony from family and friends was not
22 new evidence warranting reopening detention hearing); United
23 States v. Bradshaw, 2000 WL 1371517 (D.Kan. July 20, 2000)
(information known to and available to moving party at time of
original detention hearing is deemed insufficient to motion to
reopen)

24 ² Defendant asserts that the prosecutor made several
25 incorrect statements concerning certain facts during an
26 August 21, 2006 hearing in the Fraud Case and a December 18, 2006
27 status conference in the Obstruction Case. (Motion at 2-4). It
28 is unclear what the prosecutor actually said at these hearings,
because defendant has submitted no transcript and alleges the
misstatements only on "inform[ation] and belie[f]." See Motion
at 3. The government has ordered the transcripts of these
proceedings and intends to have them available at the hearing on
the Motion.

1 do nothing to undermine the evidence submitted by the government,
2 establishing that Gerszt acquired the Vacant Lot from GILABERT
3 pursuant to an agreement that GILABERT would repay Gerszt for all
4 of his carrying costs and would repurchase the Vacant Lot from
5 Gerszt once a house was built on the property. (See Ex. A ¶ 20).

6 Finally, the letter from Carla Ortega does not warrant
7 reconsideration of the detention orders in this case. Ms. Ortega
8 has not established by clear and convincing evidence that she is
9 in a position to be able to ensure that GILABERT would not commit
10 additional crimes while on release. Cf. 18 U.S.C. § 3148(b)
11 (rebuttable presumption exists that no condition or combination
12 of conditions will assure that GILABERT will not pose a danger to
13 the community); id. § 3143 (person awaiting sentencing shall be
14 detained unless judicial officer finds by clear and convincing
15 evidence that nor a flight risk or a danger to the community).
16 In any event, defendant could have proffered Ms. Ortega as a
17 surety at the time of the initial detention hearings, and so is
18 now barred from relying on her as a ground to seek a
19 reconsideration of the detention orders. Dillon, 938 F.2d at
20 1415 (proper to deny motion to reopen detention hearing despite
21 proffer of "18 affidavits" and "seven letters" attesting to
22 defendant's character and ensuring his future compliance with
23 conditions of release; court held that defendant could have
24 submitted these letters at original detention hearing and so they
25 could not support a motion to reopen); Hare, 873 F.2d at 799
26 (affirming denial of motion to reopen to present testimony from
27 defendant's sister, mother, and friend that defendant "appeared
28 whenever required to do so during prior prosecutions"; holding

