U.S. Department of Justice

United States Attorney
Southern District of New York

The Silvio J. Mollo Building
One Saint Andrew's Plaza
New York, New York 10007

January 30, 2023

BY ECF

Honorable Lewis A. Kaplan
United States District Judge
Daniel Patrick Moynihan
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *United States v. Samuel Bankman-Fried*, 22 Cr. 673 (LAK)

Dear Judge Kaplan:

The Government writes in reply to the defendant's opposition to the Government's motion to impose two new conditions of pretrial release, and its request to remove the existing condition prohibiting the defendant from accessing or transferring any FTX or Alameda assets or cryptocurrency. For the reasons below, and those in the Government's motion filed on January 27, 2023 (*see* Dkt. 50), the Court should impose the Government's proposed conditions of pretrial release and maintain the already-imposed conditions.

1. The Proposed No-Contact Condition Is Warranted

The first proposed condition—that the defendant shall not contact or communicate with current or former employees of FTX or Alameda (other than immediate family members), except in the presence of counsel or as approved by the Government—is necessary to prevent witness tampering and obstruction of justice. *See* 18 U.S.C. § 3142(c)(1)(B)(iv) & (v) (providing that a court may impose conditions of bail that restrict personal association and avoid contact with victims and potential witnesses).

The defendant's messages to Witness-1, attached as Exhibit 1, illustrate why such a condition is appropriate. The defense argues that these messages were merely an "innocuous attempt to offer assistance in FTX's bankruptcy process," similar to the defendant's earlier outreach to John Ray, the CEO of the FTX Debtor entities. Dkt. 51 ("Def. Letter") at 5; *see also* Ex. 2 (January 2, 2023 email from the defendant to John Ray). Putting aside that the defendant is trying to participate in FTX asset recovery despite being charged with crimes related to the misuse of FTX customer assets that precipitated FTX's bankruptcy, the defendant's messages to Witness-1 cannot bear his interpretation.

The differences between the defendant's contacts with Witness-1 and John Ray are instructive. First, Witness-1, unlike John Ray, is a witness to the charged crimes and not the steward of FTX's bankruptcy. Second, the messages to Witness-1 are not of the same character as those to John Ray. In reaching out to John Ray, the defendant copied his attorneys and was explicit that he wanted to assist with asset recovery. The defendant's messages to Witness-1 omit both Witness-1's and the defendant's attorneys and are comparatively oblique, making no mention of asset recovery, and referring instead to a "constructive relationship," "us[ing] each other as resources," and "vet[ting] things with each other." Ex. 1. This goes beyond offering "assistance to FTX 'as a resource.'" Def. Letter at 2. The defendant refers to "resources" *plural*; he not only offered himself as a resource, but also asked Witness-1 to be a resource for him in return. Asking a potential witness to be a resource to him, and to "vet things" with him—without any clarification of a supposedly benign intent—shows an effort to improperly influence Witness-1. Tellingly, the defense proffers no permissible or innocuous means by which Witness-1 could be a "resource" to the defendant. Although, as the defense points out, Witness-1 did not respond to the message, Witness-1's attorney promptly alerted the Government to the defendant's concerning overture.

Regardless, a defendant can engage in improper witness contacts even without explicitly seeking to shape the witness's testimony. Improper tampering with a witness can be achieved by both "direct and indirect means," and whether an "overt threat or implied intimidation," the "taint" of such "improper contacts . . . cannot easily be overcome." *United States v. Grisanti*, No. 91 Cr. 299A, 1992 WL 265932, at *6 (W.D.N.Y. 1992). Because "[w]itness tampering by its very nature strikes at the fairness and perverts the integrity of the judicial process," *id.*, the bail statute expressly recognizes that a condition that prohibits "all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense," is among the conditions that may be necessary to protect the safety of the community, 18 U.S.C. § 3142(c)(1)(B)(v). Here, the defendant's position of authority with respect to his former employees, combined with his recent outreach to a former employee about the case, raises a sufficient specter of witness tampering to justify the proposed condition.

The defendant asserts that "many" of the former employees who would fall under the proposed bail condition are the defendant's friends and an "important source of personal support." Def. Letter at 6. While that may be true, it is also true that many of the defendant's former employees are not only potential witnesses, but also his victims. The defendant perpetrated his scheme with the assistance of a few high-level executives, but many of his employees were in the dark until FTX's collapse, and themselves lost money as a result of the defendant's crimes. These employees had assets on FTX.com, including compensation the defendant had paid in the form of FTT, FTX.com's cryptocurrency token that collapsed in value in November 2022 as the defendant's misconduct was exposed. The defense notes that FTX and Alameda had approximately 350 employees. Def. Letter at 6. That merely highlights the Government's informational disadvantage; while the Government has conducted dozens of interviews, it has not communicated with every former FTX and Alameda employee, let alone defined the complete universe of former employees with information relevant to the charged crimes. The defendant, on the other hand, can more readily identify for the Government or the Court the close friends whose support he considers critical to his mental health and wellbeing. *See* Def. Letter at 5.

The Government does not seek to deprive the defendant of personal support—it acquiesced in the defendant's request to live with his parents in California and has already indicated no objection to the defendant communicating with his therapist and several friends (and former employees) identified by the defense as continued close friends of the defendant. In an email on January 27, 2023, at 11:42 a.m., the Government thanked defense counsel for their "engagement" on the proposed bail condition, informed defense counsel of the conditions it intended to seek from the Court, and noted the Government's view that it is "more administrable to approve proposed contacts than to give you a potential witness list, particularly because our investigation is ongoing and we continue to identify former/current employees with relevant information." Notably, while the defendant's proposed bail modification includes a category of witnesses whom the defendant would be prohibited from contacting, even in the presence of his attorneys, the Government seeks no such restriction. Under the Government's proposal, the defendant would remain free to contact and communicate with potential witnesses, as long as his attorneys are present, thereby preserving his constitutional right to participate in and prepare his defense.

The defendant's claims that that the proposed condition would impinge upon his First Amendment right of association and ability to participate in his defense are therefore without merit. *See* Def. Letter at 5. As the cases relied upon by the defendant themselves makes clear, a district court may impose a bail condition that restricts a defendant's right to associate upon a finding that such a condition is necessary. *See United States v. Lillemoe*, No. 15 Cr. 25, 2015 WL 9694385, at *2 (D. Conn. May 28, 2015); *United States v. Arzberger*, 592 F. Supp. 2d 590, 603-04 (S.D.N.Y. 2008). Indeed, Section 3142 specifically contemplates that judges may make such a finding. 18 U.S.C. § 3142(c)(1)(B)(iv) (conditions of release may include "that condition that the person . . . abide by specified restrictions on personal associations"). The defendant makes no persuasive showing that the proposed condition would impede participation in his defense. If anything, the proposed condition ensures that to the extent the defendant participates directly in his own defense, he does so consistent with the rules that require contact through a represented person's attorney and without improperly influencing or intimidating witnesses.

The defense cites several cases that included a bail condition similar to that proposed by the defense. Notably, those cases too imposed restrictions on a defendant's association with others. But to the extent that the defendant advances those cases to support his proposed restrictions as opposed to the Government's, those cases are readily distinguishable. *Ruiz*, for example, involved charges against a drug courier, and the government needed to identify the "witnesses and alleged co-conspirators" to which the no-contact restriction applied because there was not an easily identifiable category of witnesses, such as employees, investors, or victims to use in the restriction. *United States v. Ruiz*, 21 Cr. 596 (LAK) (S.D.N.Y. Jan. 29, 2021). Similarly, *Ospina* involved charges against an individual who helped to move proceeds of an elder fraud scheme, and it was necessary for the government to identify "witnesses and victims" to which the no-contact restriction applied because the defendant did not know the identities of all the witnesses and victims. *United States v. Ospina*, 20 Cr. 102 (VEC) (S.D.N.Y. Jan. 10, 2020).

Courts in this District have routinely imposed a condition like that proposed by the Government here in cases where the defendant perpetrated a fraud in a corporate setting and the defendant's former employees, co-workers, or investors were among the potential witnesses or victims. *See, e.g.*, *United States v. Chastain*, 22 Cr. 305 (JMF) (S.D.N.Y. June 1, 2022)

("Defendant to have no contact with present or former employees of OpenSea except in presence of counsel"); *United States v. Milton*, 21 Cr. 478 (ER) (S.D.N.Y. July 29, 2021) ("Defendant is not to have contact with any investors except individuals the defendant has an independent relationship with"); *United States v. Wynder*, 20 Cr. 470 (PKC) (S.D.N.Y. July 13, 2020) ("No contact with past or present employees, agents, board members of LEEBA or LEEBA funds, except in presence of counsel"); *United States v. Petit and Taylor*, 19 Cr. 850 (JSR) (S.D.N.Y. Dec. 4, 2019) ("absent the advance written approval of the Government, deft shall have no contact (direct or indirect) outside of the presence of counsel, with (a) current or former Mimedx employees (b) current or former employees/representatives of Mimedx distributors or auditors; (c) current or former Mimedx counsel; except for inadvertent/nonsubstantive social contact"); *United States v. Cole*, 19 Cr. 869 (ER) (S.D.N.Y. Dec. 5, 2019) (defendant "to have no contact, direct or indirect, outside of the presence of counsel, with current or former employees of Iconix Brand Group, GBG, or BDO, except for defendant's family members"); *United States v. Wong*, 18 Cr. 737 (JGK) (S.D.N.Y. May 5, 2018) ("No Contact with Current or Former MCU Employees or Board Members"); *United States v. Abghari*, 14 Cr. 518 (JFK) (S.D.N.Y. Aug. 7, 2014) (defendant "shall have no contact with any current or former employees or representative of Vortex Financial Management, d/b/a Professional Legal Network, Attorneys Legal Network, Attorneys Alliance Union, Legal Exchange Group, and Professional Marketing Group; The Rory M. Alarcon Law Firm, d/b/a RMA Legal Network, National Legal Associates, and R.A. Legal Group and the Brian Butler Law Firm"). The proposed no-contact condition is similarly justified here.

2. The Proposed Prohibition on Using Encrypted and Ephemeral Messaging Is Warranted

In opposing the Government's second proposed condition—that the defendant not use any encrypted or ephemeral call or messaging application—the defense asks the Court to disregard evidence that the defendant used Slack and Signal, and their autodelete functions, to obstruct detection of his underlying crimes, claiming that this is "irrelevant to the bail analysis." Def. Letter at 6. But this evidence is precisely why the Government's concerns about the defendant's continued use of Signal are not "unfounded," as the defense insists. Def. Letter at 6. The Court is expressly directed when determining bail conditions to consider the "nature and circumstances of the offense charged," 18 U.S.C. § 1342(g)(1), and here that includes the defendant's deliberate destruction of inculpatory communications with his coconspirators using Signal and Slack's autodelete function. While the specific messages to Witness-1 were not set to autodelete at the time they were sent, Signal allows either party to unilaterally delete existing messages. The defendant's continued use of Signal to communicate with a former employee about the case, combined with his previous use of Signal to obstruct justice, warrants the proposed condition. Moreover, the proposed condition does not burden the defendant's ability to communicate or to prepare his defense. The defense identifies no compelling need for the defendant to use encrypted and ephemeral messaging applications, as opposed to standard forms of communication, such as unencrypted text messages, emails, and phone calls.

3. The Existing Prohibition on Accessing or Transferring any FTX or Alameda Assets Remains Warranted

In asking the Court to remove the existing bail condition that prohibits the defendant from accessing or transferring any FTX or Alameda assets, the defense relies on a mistaken premise. Contrary to the defense's assertion, this condition does not solely depend on whether the defendant is responsible for the access and transfer of Alameda funds that occurred shortly before the initial conference (a matter that the Government continues to investigate). Instead, that incident highlighted that despite the Government's property seizures and the extensive assets already secured by the bankruptcy estate, there remain FTX and Alameda cryptocurrency assets that are vulnerable to exploitation and in need of protection from the defendant.

Given the "nature and circumstances of the offense charged," 18 U.S.C. § 1342(g)(1), the existing condition is justified because the defendant is charged with defrauding customers of FTX, investors in FTX, and Alameda's lenders—meaning that the very assets that the defendant seeks to access are the potential proceeds of his crimes. The Government continues to identify and trace assets that are potentially forfeitable in this case but that remain at risk of diversion. Because FTX's and Alameda's remaining assets may include stolen customer funds, fraud proceeds, or assets that are otherwise recoverable by FTX's creditors, there is no justifiable basis for the defendant to access these assets, and he identifies none.

Moreover, although the Government has not identified the source of the hack that occurred shortly before the initial conference, the defendant's misuse of FTX and Alameda assets during November 2022 independently justifies the bail condition. As FTX struggled to meet customer withdrawal requests in early November, Bankman-Fried approved halting customer withdrawals from the exchange. Shortly thereafter, however, he reopened withdrawals *only* for customers in the Bahamas. In an email to Ryan Pinder, Attorney General of the Bahamas on November 10, 2022, Bankman-Fried wrote in part, "We are deeply grateful for what The Bahamas has done for us, and deeply committed to it. We are also deeply sorry about this mess. As part of this: we have segregated funds for all Bahamian customers on FTX. And we would be more than happy to open up withdrawals for all Bahamian customers on FTX, so that they can, tomorrow, fully withdraw all of their assets, making them fully whole. It's your call whether you want us to do this--but we are more than happy to and would consider it the very least of our duty to the country, and could open it up immediately if you reply saying you want us to. If we don't hear back from you, we are going to go ahead and do it tomorrow." Opening withdrawals exclusively for Bahamians resulted in millions of dollars being withdrawn from the exchange, while other customers of FTX had no ability to access withdrawals.

In addition, and as noted at the initial conference, after FTX declared bankruptcy, the defendant worked with foreign regulators to transfer FTX assets to foreign regulators, when he knew that FTX's lawyers were seeking to secure those very assets for the U.S. bankruptcy, and he told Gary Wang—FTX's Chief Technology Officer who has pleaded guilty to a cooperation agreement with the Government—in substance and in part, that he wanted to stall with the U.S. bankruptcy in order to assist the foreign regulators, whom he thought would be more lenient with

him and who might permit him to regain control of FTX.[1] Finally, in December, the defendant moved to take control of approximately $500 million of Robinhood shares that were purchased using misappropriated FTX customer funds by a special purpose entity owned primarily by the defendant. The Government has since seized the shares after demonstrating probable cause to believe that they are the proceeds of wire fraud and are property involved in money laundering. Since the Government's seizure, the defendant has claimed that he would direct the majority of these funds toward making customers whole, but the original circumstances of the purchase of these shares, through a foreign special purpose vehicle with no public connection to FTX or Alameda, further indicate the steps the defendant has taken to obscure his criminal misuse of FTX customer property.

For these reasons, the defendant's request to remove this bail condition should be denied.

Respectfully submitted,

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Cc: Defense Counsel (by ECF)

[1] For similar reasons, the Court should reject the defense's request that the defendant be permitted "unlimited contact" with foreign regulators, or "[a]ny person whom an employee or agent of a foreign regulator asks Mr. Bankman-Fried to contact." Def. Letter at 4. This would serve as an end-run around the proposed no-contact bail condition.

EXHIBIT 1

7:44

SB Sam Bankman-Fried

SB

Sam Bankman-Fried

[redacted]

Member of **Stripe Issue - FTX Internal**, **Senator Toomey**, and 8 additional groups

Hey [redacted]

I know it's been a while since we've talked. And I know things have ended up on the wrong foot.

I would really love to reconnect and see if there's a way for us to have a constructive relationship, use each other as resources when possible, or at least vet things with each other.

I'd love to get on a phone call sometime soon and chat.

Sam 54m

Message

7:44

Reconnecting Inbox

Sam Bankman-Fried 6:50 AM

to me

Hey [redacted]

I know it's been a while since we've talked. And I know things have ended up on the wrong foot.

I would really love to reconnect and see if there's a way for us to have a constructive relationship, use each other as resources when possible, or at least vet things with each other.

I'd love to get on a phone call sometime soon and chat.

EXHIBIT 2

From: Sam Bankman-Fried [redacted]
Date: January 2, 2023 at 9:12:26 PM EST
To: John Ray [redacted]
Cc: Christian Everdell [redacted] David Mills [redacted] "Mark S. Cohen [redacted]
Subject: Re: Funds moved

Hi Mr. Ray,

I know things haven't gotten off on the right foot, but I really do want to be helpful—whether on the funds, or on anything else. (Hopefully it's just you guys moving the funds!)

As I'm guessing you've heard, I'm in NYC for the next day. I'd love to meet up while I'm here—even if just to say hi. In case you are available, I'm free before noon EST, or from roughly 4pm-6pm, tomorrow (Tuesday) in the city.

Sam

On Fri, Dec 30, 2022 at 2:53 PM Sam Bankman-Fried [redacted] wrote:

> Mr. Ray,
>
> I've seen these reports (https://cointelegraph.com/news/alameda-wallets-become-active-days-after-sbf-bail-community-mulls-foul-play [cointelegraph.com]).
>
> If this is your team moving the assets to custody, great!
>
> If not, I worry it might be a hacker--possibly the same one as a month and a half ago.

> I can't myself access the funds, but I suspect that your team likely has the ability to move and safeguard these funds; so if it is a hacker, then you could consider moving them to custody ASAP so that they can't be syphoned.
>
> I would be happy to talk about the ways you likely are able to access them if helpful.
>
> --
> Sam Bankman-Fried

--
Sam Bankman-Fried

****This is an external message from: [redacted]****