#### IN THE UNITED STATES DISTRICT COURT

#### FOR THE EASTERN DISTRICT OF VIRGINIA

#### **Alexandria Division**

UNITED STATES OF AMERICA,	)	
	)	
	)	
v.	)	Case No. 1:09-MJ-0023
	)	
STEVEN J. LEVAN,	)	
	)	
Defendant.	)	
	)	

# <u>DEFENDANT'S MOTION FOR REVOCATION OF DETENTION ORDER</u> AND REQUEST FOR EXPEDITED HEARING

COMES NOW the Defendant Steven Levan, by his counsel, Michael S. Nachmanoff and Geremy C. Kamens, and pursuant to 18 U.S.C. § 3145(b), moves this Honorable Court to revoke the order of detention imposed by Magistrate Judge T. Rawles Jones, Jr., on January 13, 2009. Mr. Levan also requests an expedited hearing of this matter pursuant to 18 U.S.C. § 3145(b), which requires that such motions be determined promptly.

#### **Procedural History**

Mr. Levan is a United States citizen employed at the Central Intelligence Agency as a case agent who is charged in a criminal complaint with access device fraud in violation of 18 U.S.C. § 1029(a)(2).

On January 12, 2009, Mr. Levan made his initial appearance before Magistrate Judge Jones.

On January 13, 2009, Magistrate Judge Jones held a detention hearing and determined that there were no conditions that would reasonably assure Mr. Levan's appearance as required.

#### Argument

#### I. The Court Must Consider All Reasonable Alternatives To Detention

#### A. The Court's Review of the Detention Order is *De Novo*

Pursuant to 18 U.S.C. § 3145(a), this Court has the authority to review a release order issued by a magistrate judge upon motion by either the defense or the government. Also according to this section, the motion shall be determined promptly. The district judge's review of a magistrate judge's release order is *de novo*. *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989); *see also United States v. Tortora*, 922 F.2d 880, 883 (1st Cir. 1990); *United States v. Delker*, 757 F.2d 1390, 1392-95 (3d Cir. 1985).

#### B. The Charges in the Indictment Require a Presumption in Favor of Release

"In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Accordingly, the Bail Reform Act of 1984 provides that a defendant must be released on their personal recognizance or an unsecured personal bond "unless the judicial officer determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(b); *accord United States v. Xulam*, 84 F.3d 441, 442 (D.C. Cir. 1996).

Under circumstances in which a personal recognizance bond is insufficient, the officer must choose "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." § 3142(c)(1)(B). *see, e.g., United States v. Infelise*, 934 F.2d 103, 105 (7th Cir. 1991) (holding that under § 3142(e) defendants on racketeering charges were entitled

to further consideration of electronic ankle bracelets, rather than continued detention, as a lesser restrictive condition) (Posner, J.). In other words, the Court must consider all reasonable less restrictive alternatives to detention. *See* § 3142(e). Moreover, conditions set upon release are intended to be preventative and not punitive in nature. *United States v. Salerno*, 481 U.S. 739, 747 (1987) (evaluating the legislative history of § 3142). In sum, the Bail Reform Act does not modify or limit the presumption of innocence. *See* 18 U.S.C. § 3142(j).

Because of the non-violent nature of the charge in this case and because access device fraud is not otherwise listed as an offense for which a presumption exists that no reasonable release conditions are available, the statutory presumption in the Bail Reform Act weighs in favor of release. *See* 18 U.S.C. § 3142(e) ("Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure [appearance or community safety]. . . if the judicial officer finds that there is probable cause to believe that the person committed [a presumption offense]").

#### C. Legal Standard

To support a finding that the defendant should be detained, the government must show: (1) by clear and convincing evidence that no condition or combination of conditions will reasonably assure the safety of the community, § 3142(f); or (2) that no condition or combination of conditions will reasonably assure the appearance of the defendant as required. *United States v. Motamedi*, 767 F.2d 1403, 1407 (9th Cir. 1985).

In determining whether conditions exist that will reasonably assure the appearance of the defendant as required, the Court should take into account:

(1) the nature and circumstances of the offense charged, including

whether the offense is a crime of violence or involves a narcotic drug;

- (2) the weight of the evidence against the person;
- (3) the history and characteristics of the person, including—
- (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
- (B) whether, at the time of the current offense or arrrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
- (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

§ 3142(g).

#### II. Numerous Factors Weigh Against A Finding that No Combination of Conditions Will Reasonably Assure the Defendant's Appearance

#### A. **History and Character of the Defendant**

Mr. Levan has been employed for the past sixteen years as a case agent at the Central Intelligence Agency. He is 48 years old, graduated from the Virginia Military Institute in 1982, and received a Master's degree in national security studies from the Naval War College in 1992. He spent four years in the Army following his graduation from college, and he remains in the Army reserve.

With the exception of several tours overseas, Mr. Levan has lived in Virginia and the Washington metropolitan area since 1987. Mr. Levan is separated from his wife, Theresa Levan, who resides at Mr. Levan's town home with Mr. Levan's two children, ages 12 and 10, in Burke,

Virginia. He is currently residing in an apartment in Arlington that he leased for a thirty day period in January, and he has the option of renewing the lease.

Mr. Levan has no criminal history, and until recently was a highly valued employee at the CIA. In light of the current charges, he has discussed with counsel his efforts to obtain other employment.

#### **B.** The Nature of the Offense

The nature of the offense is relatively mundane: the government alleges that Mr. Levan misused credit cards that were not issued to him. It is undeniable that Mr. Levan recently has suffered from severe financial strain, and as a result the government alleges he took several credit cards that belonged to the CIA. The total amount of loss alleged by the government at this time is approximately \$107,000, in credit charges that were paid by the CIA.

## C. Weight of the Evidence

"[T]he weight of the evidence is the *least* important of the various factors" to be considered by the Court in determining whether conditions exist which will reasonably assure the appearance of Mr. Levan. *Motamedi*, 767 F.2d at 1408 (emphasis added). The weight of the evidence is the least important factor because Mr. Levan is presumed to be innocent. *See* 18 U.S.C. § 3142(j). Moreover, even "evidence of the commission of a serious crime and the fact of a potentially long sentence" alone is insufficient "to support a finding of risk of flight." *United States v. Friedman*, 837 F.2d 48, 50 (2d Cir. 1988). Accordingly, the weight of the evidence does not require Mr. Levan to be detained pending trial.

#### D. Speculation Regarding Misuse of Classified Information

The Magistrate Judge's primary reason for finding that no reasonable bond conditions exist

in this case is because of the danger that Mr. Levan might decide to sell information to foreign states in order to make money. This rank speculation is no basis upon which to deny release in this case. *See United States v. Salerno*, 481 U.S. 739, 751 (1987) (government must prove by clear and convincing evidence that detainee presents a threat of danger to any person or the community).

As an initial matter, the Magistrate Judge's reasoning is based on the possibility that Mr. Levan would commit the crime of treason, a capital offense, to obtain money. Absolutely nothing in this record or Mr. Levan's history suggests in any respect that he would do such a thing. Indeed, nothing about the underlying allegations relate to espionage or the deprivation of honest services. *Cf. United States v. Kyle Dustin Foggo*, Case No. 08-CR-79 (JCC), E.D.Va.

In addition, the Magistrate Judge's ruling would require detention in virtually every case involving a high-level CIA employee because of the risk that the defendant might reveal confidential information. In fact, the third most senior employee at the CIA entered a plea of guilty in a criminal offense on September 29, 2008, and remains on bond under the supervision of this Court. *Id*.

Furthermore, Mr. Levan has been aware of the pending investigation since he was questioned in November 2008. Mr. Levan not only remained in this area after he was informed of the pending investigation, but absolutely no evidence exits that he made any effort to profit from the sale of confidential information.

The mere fact that Mr. Levan previously was trusted with confidential information simply does not satisfy the standard of clear and convincing evidence that he presents a danger to the community or that conditions do not exist that will reasonably protect the safety of the community. Particularly in the context of a case in which a presumption favors release, "[r]equiring that release conditions guarantee the community's safety would fly in the teeth of Congress's clear intent that

only a limited number of defendants be subject to pretrial detention." *United States v. Tortora*, 922 F.2d 880, 884 (1st Cir. 1990) (citing S. Rep. No. 225, supra, 1984 U.S. Code Cong. & Admin. News at 3189). In sum, in the absence of criminal history or charges involving violence or prior statements or other information tending to suggest that Mr. Levan might seek to sell classified information, the Magistrate Judge's ruling has no basis and must be revoked.

WHEREFORE, Mr. Levan respectfully requests that this court set this matter for an expedited hearing, as soon as is practicable, to address the bond determination in this matter, and set appropriate conditions for his release.

Respectfully submitted,

Steven J. Levan

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the 14th day of January, 2009, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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