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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

United States of America, Plaintiff, vs. Jeremie Sowerby, Defendant.	**Case No. CR-23-01321-PHX-SMB** **DEFENDANT JEREMIE SOWERBY'S DETENTION HEARING MEMORANDUM**

Defendant Jeremie Sowerby is 45 years old, has no prior criminal history, and has lived in Arizona, in part or in full, for over 15 years. He is a Canadian citizen, but owns a home in Arizona, and is the father of five children and effectively the stepfather of a sixth, all of whom live in the United States, as do his ex-spouse and his fiancée. Mr. Sowerby is currently charged with only two counts of wire fraud that total just over $60,000. Over the past year, he has been in regular contact with his counsel regarding other matters. Mr. Sowerby adamantly disputes the charges and is prepared to defend against them, but needs to be out of custody to do so. He is not a flight risk; he wants to stay to fight the allegations and take care of his family, which requires him to remain in this state. The two financial crimes charged in the indictment do not give rise to any presumption of detention, and no good reason exists for refusing to grant pretrial release. Mr. Sowerby asks the Court to release him, subject to

electronic location monitoring and any other conditions the Court believes are necessary to assure his appearance at trial. He seeks only the opportunity to be on even footing with his codefendant, Luis Ortega, who was released on his own recognizance despite being charged with 53 of the 55 counts in the indictment.

PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

Mr. Sowerby was indicted on September 19, 2023, and arrested on September 22, and has been in custody since then. He faces only two counts, involving a total of $62,100. By contrast, codefendant Ortega, who faces 53 counts of wire fraud and money laundering, totaling over $2.4 million, was served a summons and has been released on his own recognizance.

The parties continued Mr. Sowerby's detention hearing to November 2 but have no agreement regarding his release, namely because the government contends Mr. Sowerby has committed other crimes, which it is investigating and intends to charge in the near future.[1] Towards that end, on October 3, 2023, the government executed a search warrant at Mr. Sowerby's business location. Although the affidavit remains sealed, the latest date any of the alleged victims provided money to Mr. Sowerby was in March 2022, over one and one-half years ago.

During the past year, Mr. Sowerby has been working on revising his business model, which follows his being named a respondent in a securities enforcement proceeding brought by the Securities Division of the Arizona Corporation Commission. It is through that proceeding that Mr. Sowerby first hired undersigned counsel. Since then, he has been committed to restructuring his business to ensure compliance with securities laws, as well as all other relevant laws.

[1] The government filed its detention memorandum as counsel was finalizing this memorandum. Counsel did not want to delay this filing to respond to the government's memorandum in its entirety, as the Court would not have a meaningful opportunity to review such a response ahead of the hearing. Mr. Sowerby reserves the right to supplement this memorandum and/or seek to continue the hearing to have time to investigate the evidence the government has proffered.

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Despite what the government may think, to date Mr. Sowerby faces only two counts. The government is not entitled to a detention order simply because it is continuing its investigation and does not like what it is hearing on recorded jail calls, which were brought on by the chaos created by Mr. Sowerby's arrest. Regardless, none of the concerns the government manufactures rise to the level of requiring continued detention.

IN OUR SOCIETY, LIBERTY IS THE NORM AND DETENTION PRIOR TO TRIAL IS THE CAREFULLY LIMITED EXCEPTION.

The Bail Reform Act of 1984, 18 U.S.C. §§ 3141, *et seq.*, requires that a court release a criminal defendant on personal recognizance or on an unsecured appearance bond before trial, unless there is a determination 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); *see also United States v. Hir*, 517 F.3d 1081, 1086 (9th Cir. 2008). This default requirement accords with the principle that "[i]n our society, liberty is the norm, and detention prior to trial . . . is the carefully limited exception." *United States v. Salerno*, 481 U.S. 739, 755 (1987). Indeed, the Ninth Circuit cautions that "[o]nly in rare cases should release be denied." *United States v. Santos–Flores*, 794 F.3d 1088, 1090 (9th Cir. 2015) (citing *United States v. Motamedi*, 767 F.2d 1403, 1405 (9th Cir. 1985)). Further, "doubts regarding the propriety of release are to be resolved in favor of the defendant." *Id.*

In the event a court determines that such release will not reasonably assure the defendant's appearance and the safety of others or the community, the court must impose "the least restrictive further condition, or combination of conditions," that will reasonably assure these goals. 18 U.S.C. § 3142(c)(1)(B). The Bail Reform Act only requires detention where a court finds that no such condition or combination of conditions can do so. 18 U.S.C. § 3142(e)(1); *Hir*, 517 F.3d at 1086. The statute also provides that "[n]othing in this section shall be construed as modifying or limiting the presumption of innocence." 18 U.S.C. § 3142(j).

A district court engages in a two-step inquiry before ordering a defendant either released or detained pending trial. *See United States v. Gentry*, 455 F. Supp. 2d 1018, 1020

(D. Ariz. 2006) (citation omitted). First, a district court must make a finding as to whether there is a "serious risk that [the defendant] will flee," if released from custody. *Id.* (quoting 18 U.S.C. § 3142(f)(2)(A)).[2] The burden of proof rests with the government. *See Motamedi*, 767 F.2d at 1407. Second, if the defendant is likely to flee, the district court must determine whether some set of conditions would sufficiently vitiate that risk. *Id.* (citing 18 U.S.C. § 3142(g)). The government cannot meet its burden under either part of the inquiry.

MR. SOWERBY IS NOT A SERIOUS FLIGHT RISK.

Under § 3142(f), ordinary risk of flight is not a permissible basis for detention; rather, the statute only authorizes detention if there is a "***serious risk*** that [the defendant] will flee." 18 U.S.C. § 3142(f)(2)(A) (emphasis added); *see also United States v. Whitlock*, No. CR–11–0736–PHX–DGC (LOA), 2011 WL 1843007, at *5 (D. Ariz. May 16, 20211) (the government "must point to more than the indictment that a defendant might flee the United States . . . to obtain a defendant's pretrial detention"); *see also Santos-Flores*, 794 F.3d at 1091 (holding that "the risk of nonappearance referenced in 18 U.S.C. § 3142 must involve an element of volition").

Further, data from the Administrative Office of the U.S. Courts shows an exaggerated concern over risk of flight, as barely any released defendants in this district flee. In fact, for the 12-month period ending September 30, 2022, the Administrative Office of the U.S. Courts reported only 5 of the 2,634 defendants granted pretrial release in this district failed to appear, which comes out to approximately one-fifth of one percent.[3] Mr. Sowerby will not be the sixth defendant to fail to appear; he will stay and fight the charges.

[2] Since none of the crimes charged in the indictment are those enumerated in Section 3142(f)(1) and do not meet the statutory definition of "crime of violence" (18 U.S.C. § 3156(a)(4)), there is no presumption of detention and the government cannot seek pretrial detention on the basis of danger alone. *See United States v. Twine*, 344 F.3d 987 (9th Cir. 2003) (government cannot even seek detention hearing on generalized danger grounds unless an offense charged is one of enumerated offenses).

[3] *See* Table H-15—Federal Pretrial Services Judicial Business (Sept. 2022), https://www.uscourts.gov/sites/default/files/data_tables/jb_h15_0930.2022.pdf.

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Because Mr. Sowerby is not charged with a § 3142(f)(1) offense, this is a "non-(f)(1) case" where only a showing of one of the § 3142(f)(2) "serious risk" factors would authorize holding a detention hearing. In this case, the government has not presented sufficient evidence that Mr. Sowerby poses a serious risk of flight. Indeed, at the time Mr. Sowerby submitted this memorandum, the government had yet to provide any discovery, whether in general or as to the risk of flight. Because the government has not and cannot show Mr. Sowerby poses a serious flight risk, as the Bail Reform Act requires, Mr. Sowerby is being detained unlawfully and must be released immediately with appropriate conditions. *See* 18 U.S.C. § 3142(a)–(c).

THE SECTION 3142(G) FACTORS SHOW CONDITIONS EXIST TO REASONABLY ASSURE MR. SOWERBY'S APPEARANCE AND, THUS, WEIGH IN FAVOR OF RELEASE.

Even in the presence of flight risk, a defendant must still be released when there are conditions of release that may be imposed to mitigate the flight risk. *See* 18 U.S.C. § 3142(e); *see e.g.*, *United States v. Lynch*, No. 18-cr-00577-CRB-1, 2023 WL 3436091, at *1–3 (N. D. Cal. May 11, 2023) (despite defendant's "lengthy extradition proceedings in the United Kingdom" and finding he "clearly presents a serious risk of flight," the court concluded conditions of release existed that would reasonably assure his appearance at trial). When determining whether a condition or combination of conditions exist that would reasonably assure a defendant's appearance, Section 3142(g) requires that the court consider four statutory factors: (1) the nature and circumstances of the offense; (2) the weight of the evidence; (3) defendant's history and characteristics (including his character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug and alcohol abuse, criminal history, or record concerning appearance at court proceedings); and (4) the nature and seriousness of the danger to any person or the community posed by the defendant's release. *Motamedi*, 767 F.2d at 1407 (citing 18 U.S.C. § 3142(g)).

To justify denial of pretrial release based on flight risk, the government must show by a preponderance of the evidence that no condition or combination of conditions can assure

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that the accused will appear at required court hearings. *Id.* Reminding courts of the presumption of innocence and its corollary right to bail should be denied only for the strongest of reasons, the Ninth Circuit has made plain that "[o]nly in rare circumstances should release be denied," and "[d]oubts regarding the propriety of release should be resolved in favor of the defendant." *Id.* at 1405, 1407. Accordingly, because the government cannot meet this burden and the Section 3142(g) factors weigh against detainment, the Court should grant Mr. Sowerby's release.

Nature and seriousness of the offense charged. Mr. Sowerby is charged with two counts of wire fraud involving just over $60,000, which does not give rise to a presumption in favor of detention. *See* 18 U.S.C. § 3142(e). While not making light of the allegations, the nature and seriousness of the offense weigh in favor of release on conditions.

Weight of the evidence. The Ninth Circuit has repeatedly held that the weight of the evidence is the least important factor to be considered during the pretrial detention hearing because the defendant is presumed innocent prior to trial. *Motamedi*, 767 F.2d at 1408. This guards against the possibility of making a "preliminary determination of guilt" that then leads to punishment in the form of a refusal to grant release. *Id.* This factor "may be considered only in terms of the likelihood that the person will fail to appear or will pose a danger to any person or to the community." *Id.*; *see, e.g., United States. v. Armstrong*, No. 10–0566 MJ, 2010 WL 5102203, at *2 (D. Ariz. Dec. 9, 2010) (granting pretrial release to defendant charged with two separate armed bank robberies while recognizing that the evidence against the defendant was strong because bank surveillance photos show her committing the robberies and because she admitted her participation).

This case has just begun, and the government has yet to provide any discovery on the existing charges, let alone any potential future charges. The Court should not presume the evidence against Mr. Sowerby or the purportedly forthcoming charges are strong because the government says so. When considered in conjunction with the other factors outlined here, the balance weighs in favor of release.

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Defendant's family and community ties, character, physical and mental condition. "When assessing an alien defendant's ties to the United States, factors to be considered include how long the defendant has resided in this country, whether defendant has been employed in the United States, whether defendant owns any property in this country, and whether defendant has any relatives who are United States residents or citizens. *See United States v. Townsend*, 897 F.2d 989, 995–96 (9th Cir. 1990).

Mr. Sowerby is 45 and has extensive ties to Arizona, as he owns a home in Phoenix and has lived here, in part or in full, for over 15 years; he relocated permanently to Arizona in 2017. In addition, his business is located in Tempe. *See United States v. Honeyman*, 470 F.2d 473, 475 (9th Cir. 1972) (the accused's length of residence in the community, steady employment, and financial resources, including real property in the district, weighed in favor of pretrial release).

Mr. Sowerby has five biological children, ranging in age from 5 to 20 years old. His 20-year old daughter is a freshman at a small college in California. Mr. Sowerby's 16-year old son lives primarily with him. Mr. Sowerby shares custody of his 12-year old son and 10-year old daughter, who are currently living in Prescott with their mother, Mr. Sowerby's ex-spouse. He also has a 5-year old son with his current fiancée, who until recently lived with him in Phoenix along with her 12-year old daughter, for whom Mr. Sowerby has assumed responsibility for several years. Mr. Sowerby's fiancée and her children are currently in Indiana, but are willing to return to Arizona if he is released. As a father of a young family, Mr. Sowerby has no incentive to flee; to the contrary, he needs to stay in Arizona to work and continue supporting and providing financially for his family.

Mr. Sowerby's parents, fiancée, and two of his children have written letters of support, which have been submitted under seal as Exhibit A to protect their privacy. In addition, the following non-family members have submitted letters:

- Bill Markley (Exhibit B): Mr. Markley is a Phoenix-area pastor.
- Jeff Cox (Exhibit C): Mr. Cox is a local businessman.

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The attached letters share a common theme. Mr. Sowerby is a dedicated father and good friend with a big heart who often helps strangers in need. He is a good man who wants to have the best possible opportunity to defend himself, which will not be the case if he is in custody.

Mr. Sowerby's personal and business connections to this state and his family obligations all weigh heavily in favor of release, as they support finding his presence can be reasonably assured. *See, e.g, United States v. Treselyan*, No. CR-20-00549-001-PHX-DWL, 2021 WL 3055040, at *3 (D. Ariz. July 20, 2021) (in concluding certain conditions of release mitigated any flight risk, the court found that defendant's living in the United States for several years, working continuously up until his arrest, and his personal and professional connections, though no familial ties, to the United States weighed in favor of release); *United States v. Mendez*, No. 1:21-cr-00095-ADA-BAM-4, 2023 WL 5103906, at *6 (E.D. Cal. Aug. 9, 2023) (in ordering defendant's pretrial release, the court found that her "strong connections to the area" and record of appearing to court outweighed her "history of dishonesty" and determined certain conditions would mitigate the risk she would participate in drug trafficking while awaiting trial).

Defendant's past conduct, history relating to drug and alcohol abuse, criminal history. Mr. Sowerby does not drink or take drugs, and at age 45 has never previously been in contact with the criminal justice system. These factors all support his release. *See, e.g., Armstrong*, 2010 WL 5102203, at *2 (finding the defendant's lack of a criminal record and absence of any drug or alcohol addictions, *inter alia*, supported granting her motion for release pending trial); *United States v. Nichols*, (D. Ariz. Mar. 17, 2011) ("While [defendant], age 35, certainly has not been an altar boy during the last six years of his life, his criminal history does not reflect any crimes of violence, charges or convictions, firearms offenses, and his criminal history is mostly petty theft offenses and abuse of substances (alcohol and illicit drugs)," the court still granted release of the material witness).

The nature and seriousness of danger to any person or community that would be posed by defendant's release. For this Section 3142(g) factor, the relevant inquiry is

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whether the government has proven by clear and convincing evidence that Mr. Sowerby poses a future risk of harm or danger to the community. *See Salerno*, 481 U.S. at 751 ("Under the [Act] ... a judicial officer evaluates the likelihood of future dangerousness . . ."). While not making light of the charges, they involve non-violent financial crimes.[4] Any concerns regarding the risk that Mr. Sowerby will commit new crimes while on release can be adequately addressed through the imposition of certain conditions including electronic monitoring and/or tracking and any other condition the Court deems necessary.

The government's argument that Mr. Sowerby poses an economic danger to the community does not overcome the long-held belief that release before trial is the norm in this society, not the exception. *See Salerno*, 481 U.S. at 755. In several cases involving serious allegations, even ones with violent behavior by the defendant—unlike the allegations here—courts have found that conditions could be fashioned that would ensure the safety of the community while the defendant was on release. *See United States v. Tolutau*, No. 2:12–CR–13 TS, 2012 WL 113819, (D. Utah Jan. 13, 2012) (granting release to a 22-year-old defendant charged Hobbs Act Robbery and Brandishing a Firearm); *United States v. Youngblood*, No. CR 09–0170 SBA, 2009 WL 773539 (N.D. Cal. Mar. 23, 2009) (granting pretrial release to defendant charged with bank robbery despite previous convictions for possession/sale of cocaine base, reckless driving and theft); *United States v. Conway*, No. 4–11–70756 MAG (DMR), 2011 WL 3421321 (N.D. Cal. Aug. 3, 2011) (granting release to a 21-year-old defendant with no steady employment history and who had a history of using marijuana). The defendant in *Conway* had what the court described as "a significant criminal record," which included a conviction for felony accessory to robbery. The court noted that "the ultimate question is not whether he presents a danger to the community, but rather, whether such a risk is mitigable through the imposition of conditions of release." *Id.* at *3. The government

[4] Although the government seized a firearm when it arrested Mr. Sowerby, there are no allegations that he brandished the weapon or otherwise resisted arrest. Moreover, Mr. Sowerby is not charged with any weapon-related offenses, and there are no allegations that he has engaged in any crimes or activities involving violence.

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has not shown by clear and convincing evidence that Mr. Sowerby poses any future danger to the community.

Under these circumstances, the Bail Reform Act authorizes detention only upon a showing that the defendant poses a serious flight risk or a serious risk of obstruction of justice. *See* 18 U.S.C. § 3142(f)(2). The government does not allege any claim of obstruction of justice. As such, the government is left with the option of seeking to detain Mr. Sowerby based on flight risk. As noted above, the government cannot show Mr. Sowerby poses a serious flight risk. Although they are out-of-circuit district court cases, *United States v. Hanson,* 613 F. Supp. 2d 85 (D.D.C. 2009), and *United States v. Karni,* 298 F. Supp. 2d 129 (D.D.C. 2004), are instructive on this point.

In both *Hanson* and *Karni,* the courts held that conditions for release could be fashioned to ensure the appearance of defendants who had no significant ties to the United States and who appeared to pose a serious danger to the United States. The community ties were far more attenuated and risk of flight in *Karni* far greater than the concerns in this case. There, the defendant was an Israeli national who had been residing in South Africa for the last eighteen years. *Karni*, 298 F. Supp. 2d at 132. He was charged with violating federal law by allegedly acquiring "products that are capable of triggering nuclear weapons and [exporting] them to Pakistan, via South Africa, avoiding the requirement of obtaining an export license for the devices." *Id.* at 130. Despite the serious nature of his crime and the fact that he "had no ties to the United States or to the Washington, D.C. area," the court determined that the defendant should be released subject to certain conditions including release into third party custody, home detention, and electronic monitoring. *Id.* at 133.

In *Hanson,* the defendant was a Chinese citizen who had become a naturalized citizen of the United States. 613 F. Supp. 2d at 87. She was alleged to have illegally exported unmanned aerial vehicle ("UAV") autopilot components to the People's Republic of China. *Id.* According to the government, Ms. Hanson carried these UAV components to Germany and handed them to an acquaintance who took them to China. *Id.* The government represented that these sophisticated components enable UAVs to perform certain tasks

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without the aid of human pilots, including autonomous take offs, bungee launches, and hand launches and landings, and that they have other tactical military uses. *Id.*

Moreover, according to the government's expert, UAVs equipped with these components could be used to simulate stealth planes and cruise missiles to test air defense detection systems, and potentially could be armed. *Id.* The government argued that she was a tremendous flight risk because 1) she had closer ties to China than to the United States; 2) her marital relationship in the United States was faltering, and she had no other family ties here; 3) she faced a steep jail sentence and the government had strong evidence against her; 4) it would have been easy for her to get a new Chinese passport and depart to China; and 5) she had strong business interests, family ties, and property in China. *Id.* at 88–89. After hearing the evidence, the court found that conditions could be fashioned that would reasonably assure the defendant's presence at trial. *Id.* at 91.

These cases illustrate the type of conditions that could be fashioned to ensure Mr. Sowerby's appearance and the safety of the community. Given the number and types of pretrial release conditions that can be imposed by this Court, any concerns can be adequately addressed without the need for pretrial detention.

THE GOVERNMENT CANNOT USE ITS ONGOING INVESTIGATION OF OTHER ALLEGED ACTIVITIES AS A PRETEXT TO SUPPORT ITS REQUEST FOR DETENTION.

Mr. Sowerby has no prior criminal convictions or charges, but the government has proffered evidence regarding its ongoing investigation into other alleged conduct, most specifically in the form of an affidavit in support of a search warrant the government executed at Mr. Sowerby's business location on October 3, 2023. Although the affidavit remains sealed, the government shared a copy with Mr. Sowerby, who understands that the core allegations are that his business selling hardware to mine cryptocurrency[5] and hosting services was a ruse.

[5] Cryptocurrency 'mining' is the use of specialized computer hardware to verify the transactions in a particular cryptocurrency and add them to its cryptographically secured digital ledger, or 'blockchain,' in exchange for payment in the form of newly-minted units of the cryptocurrency." *Pogodin v. Cryptorion Inc.*, No. 18-CV-791 (ENV)(SMG), 2019 WL 8165040, at *1 n.3 (E.D.N.Y. May 14, 2019).

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Namely, the government contends that the mining machines held in the business's Tempe facility were just a front and, instead, customers received worthless tokens generated by a simple computer program. As noted above, the sealed search warrant affidavit states that the latest date any of the alleged victims provided money to Sowerby was in March 2022, over one and one-half years ago.

Undersigned counsel is unaware of Ninth Circuit precedent regarding the consideration of uncharged conduct during a detention hearing, but recognizes that other jurisdictions have permitted such proffered evidence while affording it less weight in evaluating whether a defendant poses a danger to the community. *See, e.g., United States v. Sanders*, 466 F. Supp. 3d 779, 786 (E.D. Mich. 2020) ("Uncharged conduct should be accorded comparatively less weight in assessing dangerousness."); *United States v. Gaston*, No. 2:21-CR-36-JD-JPK, 2021 WL 1170201, at *5 (N.D. Ind. Mar. 26, 2021) (when considering "the government's proffer, including uncharged conduct, [courts] must carefully weigh the reliability of such evidence in a manner that is usually not required when criminal convictions are used to argue for detention. . . . [T]he Court 'retains the responsibility for assessing the reliability and accuracy' " of the government's proffered information or other evidence (quoting *United States v. Martir*, 782 F.2d 1141, 1145 (2d Cir. 1986)).

The government's proffers do not amount to clear and convincing evidence that Mr. Sowerby poses a danger to others or the community if released and that no conditions of release would mitigate this danger. The information is speculative and in large part stale, and does not change the fact that Mr. Sowerby is not a flight risk. Such information should be afforded little to no weight in evaluating whether to order Mr. Sowerby's release, subject to appropriate conditions. Even if the Court finds such uncharged conduct indicates any presence of risk, which it should not, the law still requires that Mr. Sowerby be released if there are conditions of release that may be imposed to mitigate the flight risk or risk to the community. *See* 18 U.S.C. § 3142(e). Any doubts about the propriety of release should be resolved in Mr. Sowerby's favor. *Motamedi*, 767 F.2d at 1405.

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MR. SOWERBY'S RESIDENCY STATUS SHOULD NOT HAVE ANY IMPACT ON THE COURT'S DETERMINATION WHETHER TO DETAIN HIM.

Mr. Sowerby is a Canadian citizen, who entered the United States properly on dozens of occasions until he moved here permanently in 2017. Mr. Sowerby, however, did not renew his visa, and is in the process of retaining an immigration attorney to address these issues. In addition, his Canadian passport, which is in the possession of counsel, who will bring it to the detention hearing, has expired. Mr. Sowerby cannot go anywhere if he is released, nor does he plan on doing anything but preparing his defense and attempting to support his family.

Although he is not the subject of an ICE hold, the government may contend that if Mr. Sowerby is here unlawfully it should further support detention. The law, however, provides to the contrary. *See United States v. Sanchez-Rivas*, 752 F. App'x 601, 604 (10th Cir. 2018) (holding that defendant "cannot be detained solely because he is a removable alien"); *United States v. Trujillo-Alvarez*, 900 F. Supp. 2d 1167, 1179 (D. Or. 2012) (no ICE detainer exception to the Bail Reform Act); *United States v. Barrera-Omana*, 638 F. Supp. 2d 1108, 1111 (D. Minn. 2009) (concluding that the mere presence of an ICE detainer does not override Congress' detention plan set forth in Section 3142).

While the Court may consider Mr. Sowerby's residency status in determining whether he will flee, that status is not dispositive. *Trujillo-Alvarez*, 900 F. Supp. 2d at 1173 (citing *U.S. v. Chavez-Rivas,* 536 F. Supp. 2d 962, 964 n.3 (E.D. Wis. 2008); *United States v. Ailon-Ailon*, 875 F.3d 1334, 1339 (10th Cir. 2017) ("We hold that, in the context of § 3142(f)(2), the risk that a defendant will 'flee' does not include the risk that ICE will involuntarily remove the defendant."); *see also United States v. Rembao-Renteria*, No. 07mj399 (JNE/AJB), 2007 WL 2908137, at *3 (D. Minn. Oct. 2, 2007) ("the certainty of deportation does not translate to the certainty of flight"). Indeed, the Ninth Circuit has clarified alienage alone does not show a serious risk of flight. *See Motamedi*, 767 F.2d at 1408; *Santos-Flores*, 794 F. 3d at 1092 ("We conclude that the district court erred in relying on the existence of an ICE detainer and the probability of Santos–Flores's immigration detention and removal from the U.S. to find that no condition or combination of conditions will reasonably assure Santos-Flores's appearance pursuant to 18 U.S.C. § 3142(e).").

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Finally, according to the Department of Justice, statistical evidence shows that undocumented non-U.S. citizens have a lower rate of non-appearance than U.S. citizens released pretrial: 0.5% compared to 0.9%.[6] Compared to U.S. citizens, undocumented non-citizens were dramatically more likely to comply with other conditions of release (2% compared to 21.8%) and roughly twelve times less likely to have their release revoked. (1.1% vs. 12.1%).[7] As discussed above, Mr. Sowerby's significant familial, personal, and professional ties to Arizona and lack of criminal history establish that he is not a flight risk. And since he has no passport, Mr. Sowerby has no means or method to return to Canada, or flee to any other country.

CONCLUSION.

No good reason exists to lock up Mr. Sowerby pending trial while his codefendant, who is charged with 51 more counts than he is, roams the streets. Because the government does not carry its burden to show Mr. Sowerby is a flight risk and that no conditions or combination of conditions of release would reasonably assure his appearance, the Bail Reform Act requires his release pending trial. As detailed above, Mr. Sowerby's lack of criminal history, along with his community and family ties and support, and other characteristics warrant release on his own recognizance or on bond, with electronic monitoring and any other least restrictive conditions that will reasonably assure his appearance. *See Motamedi*, 767 F.2d at 1405.

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[6] *See* George E. Browne, Ph.D., et al., U.S. Dept. of Justice, Bur. of Statistics, *Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011-2018*, at 11 (Mar. 2022), https://bjs.ojp.gov/content/pub/pdf/prmfdcfy1118.pdf.

[7] *Id.* (at least one release condition violated by 21.8% of released citizens versus 2% of undocumented aliens, and bond revoked for 12.1% of citizens compared to 1.1% of undocumented non-citizens).

RESPECTFULLY SUBMITTED this 31st day of October, 2023.

WEISS BROWN

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CERTIFICATE OF SERVICE

I hereby certify that on October 31, 2023, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF system for filing.

/s/ Cristina McDonald

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