

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

-against-

12 Cr. 185 (LAP)

JEREMY HAMMOND

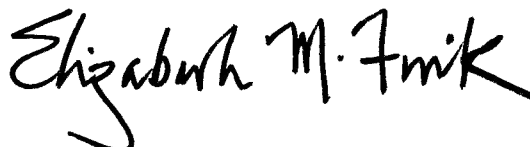
Defendant.

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PLEASE TAKE NOTICE that, upon the attached affirmation of ELIZABETH M. FINK and the attached Memorandum of Law, the undersigned will move this Court on November 19, 2012 at 10 in the morning or as soon thereafter as counsel can be heard for an Order, pursuant to 18 U.S.C. § 3142(g) and the Fifth, Sixth, and Eighth Amendments to the United States Constitution, granting bail, setting reasonable conditions of release for JEREMY HAMMOND, and granting such other and further relief as may be just and proper.

Dated: Brooklyn, New York
November 12, 2012

Yours, etc.,



ELIZABETH M. FINK
Attorney for JEREMY HAMMOND
(718) 783-3682
(718) 783-5853 (fax)

TO: AUSA ROSEMARY NIDIRY, AUSA THOMAS BROWN (VIA ECF)
CLERK OF THE COURT,
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK (VIA ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

12 Cr. 185 (LAP)

-against-

AFFIRMATION IN SUPPPORT

JEREMY HAMMOND,

Defendant.

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STATE OF NEW YORK)
) ss.:
COUNTY OF KINGS)

ELIZABETH M. FINK, an attorney admitted to practice law before this Court, under pain and penalty of perjury, affirms as follows:

1. I represent the above-named defendant pursuant to the Criminal Justice Act, and make this affirmation in support of his motion for bail pursuant to 18 USC § 3142(g) and the Fifth, Sixth, and Eighth Amendments to the United States Constitution.

2. On March 6, 2012, Jeremy Hammond was arrested at his apartment in Chicago on a federal criminal complaint originating from this Court alleging computer hacking crimes targeting entities, both private and governmental, engaged in policing and security activities. At the time of

this arrest, Mr. Hammond, 27 years old, was well known to state and federal authorities as a political activist with a particular expertise in computers. From an early age, Mr. Hammond had chosen a political course. He viewed the world as a place of great injustice that compelled an active resistance. Along with unknown numbers of activists worldwide, he fought for open accountability and progressive movements. In 2006, Mr. Hammond was indicted in the Northern District of Illinois for violation of 18 USC 1030(a)(2)(C) and 2. *United States v. Hammond*, 06 Cr. 380 (N.D. Ill. filed May 23, 2006). The allegations were that he hacked into Patriot Warrior, an extremist right-wing organization known for disrupting peace rallies. He was released on an unsecured \$10,000 bond subject to limitations on his computer usage. Mr. Hammond pled guilty and was sentenced on December 7, 2006, to 24 months imprisonment. He was permitted to self-surrender in January 2007 and served out his term.

3. At the time of Mr. Hammond's arrest herein, his house was searched; his computer was taken, and a large quantity of materials was seized. He was held in MCC-Chicago pending removal to the Southern District and transferred to MCC-NY on March 16, 2012.

4. On March 17, 2012, Mr. Hammond was brought to

Magistrate's Court and arraigned on the Criminal Complaint. I was assigned as counsel pursuant to CJA and the government moved for preventive detention. In addition, press reports revealed the continuous involvement of the government provocateur-cooperator, Hector Monsegur. Ten months after Hector Monsegur began working for the government, Mr. Hammond was charged with being a member of a conspiracy called "Anonymous" to engage in cyber attacks on businesses and governments, including the Arizona Department of Public Safety (DPS) and the global intelligence firm Stratfor (a.k.a. Strategic Forecasting).

5. As outlined in the accompanying memorandum of law, Jeremy Hammond will not pose a risk of flight or danger to any person or community and is an ideal candidate for bail release. However, an additional reason exists for bail in this case. Given the staggering quantity and nature of discovery, Mr. Hammond's continued detention will make it impossible for counsel to adequately prepare for trial.

6. The discovery consists of 5 discs containing over 100,000 Bates-stamped pages - roughly equivalent to 40 file boxes of documents - and a computer hard drive containing over 158 gigabytes of compressed data which requires technical expertise to view and cannot be opened on our computers. According to the government, the hard drive

contains (1) a forensic image of Mr. Hammond's computer, (2) a copy of the contents of an onion server that Mr. Hammond allegedly provided to the CW, and (3) a compressed copy of the contents of a server allegedly provided by the CW to Mr. Hammond onto which data from Stratfor was allegedly loaded.

7. We have been consulting with Jerry Tritz, the CJA Case-Budgeting Attorney for the Southern District of New York. Mr. Tritz referred us to Emma Greenwood, a Coordinating Discovery Attorney (CDA) in CJA cases. Ms. Greenwood has reviewed the protective order issued by the Court and understands that she is bound by the terms of the order. As the majority of these documents were not provided by the government in a searchable format, Ms. Greenwood utilized OCR text-recognition software to help defense counsel navigate these materials more quickly.

8. As for the inaccessible contents of the computer hard drive, Ms. Greenwood suggested that we contact Access Data to conduct a pre-analysis of the information on the drive. According to a Proposed Statement of Work prepared by Access Data, the original drive contained 158.8 gigabytes of data and 43,305 separate files. Access Data prepared a proposal to De-NIST these files and make them more accessible to defense counsel. "De-NIST"ing is the

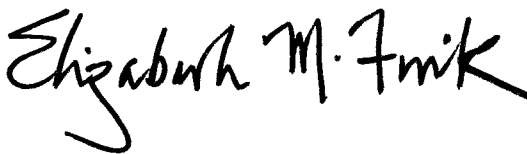
process of identifying these files so that a decision can be made if they should be set aside or removed from a discovery database. The types of files that are removed are application files and other files that are not user-generated. This would reduce the quantity of data to 10 gigabytes and 42,532 separate files, which would eliminate 732 files. Access Data will also host the remaining data on its servers, and can provide it on a hard drive. Review of this material is much easier on Access Data's server, where they provide search assistance, project management, and general expertise in accessing and understanding the various file types.

9. As the Court is aware, under the terms of the protective order, Mr. Hammond may only view the majority of these materials in the presence of defense counsel or paralegals who are members of defense counsel's staff. Moreover, even without the protective order, Mr. Hammond is prohibited by the Bureau of Prisons from using any computers - even those without Internet access - outside of the presence of counsel. Under these conditions, we conservatively estimate that the necessary review of this material with the defendant could take years, with a paralegal visiting the jail five days a week. Further, while we can burn the De-NISTed computer files to disc to

share them with our client, we will not be able to make uses of Access Data's data hosting, organizational systems, or assistance from inside the MCC.

10. In light of the complexity and quantity of discovery materials in this case, and the restrictions placed on their review, Mr. Hammond's right to a fair trial is compromised. Under present conditions, neither Mr. Hammond nor his counsel can conduct meaningful review of the discovery. I cannot provide him with the effective assistance of counsel and cannot adequately prepare for trial. This reality, coupled with the fact that conditions exist that will reasonably assure the safety of the community and the defendant's appearance in court, necessitate bail release in this case.

WHEREFORE it is respectfully requested that this Court grant the defendant's bail motion and grant such other and further relief as may be just and proper.

A handwritten signature in black ink that reads "Elizabeth M. Fink". The signature is written in a cursive, flowing style with a large, sweeping initial 'E'.

Elizabeth M. Fink

Dated: Brooklyn, New York
November 12, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

MEMORANDUM OF LAW IN
SUPPORT OF DEFENDANT'S
MOTION FOR BAIL

-against-

12 Cr. 185 (LAP)

JEREMY HAMMOND,

Defendant

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INTRODUCTION

This memorandum is submitted in support of Jeremy Hammond's motion for bail pursuant to 18 U.S.C. § 3142(g) and the Fifth, Sixth, and Eighth Amendments to the United States Constitution. As addressed herein, these laws require that Mr. Hammond be released on bail. There is a presumption favoring bail release for the offense with which he is charged. Mr. Hammond is a perfect candidate, as he has demonstrated that he will not pose a risk of flight or danger to any person or the community. Furthermore, given the staggering quantity of discovery and complexity of the charged offense, Mr. Hammond's continued detention will make it impossible for counsel to adequately prepare for trial.

STATEMENT OF FACTS

Jeremy Hammond is 28 years old and a lifelong resident of Chicago, Illinois. Mr. Hammond graduated from Glenbard East High School in 2003. He has worked consistently since he was 16 years old, and has held jobs as a web developer, a technician at an Apple Computer repair center, a guitar teacher, and a math instructor at a neighborhood community center. Prior to his arrest on March 5, 2012, he had been employed since 2008 as a web developer with Rome & Company, an advertising agency and brand consultancy company based in Chicago. He also volunteered once a week serving food to the needy with the Chicago chapter of Food Not Bombs. His family is aware of the charges against him, and is supportive and willing to sign for him. Mr. Hammond has never owned a passport and has never left the country aside from one trip to Canada with his parents when he was six years old.

In 2006, Mr. Hammond was indicted in the Northern District of Illinois for fraud activity involving computers in violation of 18 USC 1030(a)(2)(C) and 2, *United States v. Hammond*, 06 Cr. 380 (N.D. Ill. filed May 23, 2006), for

hacking into Patriot Warrior, an extremist right-wing organization known for disrupting peace rallies. He was released on an unsecured \$10,000 bond subject to limitations on his computer usage. Mr. Hammond pled guilty and was sentenced on December 7, 2006, to 24 months imprisonment. He self-surrendered in January 2007 and served out his term. Prior to this incarceration, Mr. Hammond worked at Rome & Company for two years - from 2004 through 2006.

Mr. Hammond is charged in the instant indictment with two counts of conspiracy to commit computer hacking, 18 USC 1030(a)(5)(A), 1030(c)(4)(B)(i), and 1030(c)(4)(A)(i)(I), one count of computer hacking, 18 USC 1030(a)(5)(A), 1030(b), 1030(c)(4)(B)(i) and (2), one count of conspiracy to commit to access device fraud, 18 USC 1029(a)(3) and 1029(a)(5), and one count of aggravated identity theft, 18 USC 1028(A) and (2), in connection, *inter alia*, with the release of corporate internet files and emails of the private security firm Stratfor to Wikileaks. These charges arise from Mr. Hammond's alleged participation in the activist hacker group "Anonymous."

LEGAL ARGUMENT

Under the Bail Reform Act of 1984, 18 U.S.C. § 3141 et seq., a court generally "must release a defendant on bail on the least restrictive condition or combination of conditions that will reasonably assure the defendant's appearance when required and the safety of the community." *United States v. Madoff*, 586 F. Supp. 2d 240, 246 (S.D.N.Y. 2009); 18 U.S.C. § 3142(c)(1)(B). It is properly viewed as a permissible regulatory, or preventative, measure for use by the courts, rather than being punitive in nature. See *United States v. Salerno*, 481 U.S. 739, 747, 107 S.Ct. 2095, 2101 (1987). Significantly, in enacting the Bail Reform Act, Congress recognized "the traditional presumption favoring pretrial release 'for the majority of Federal defendants.'" *United States v. Berrios-Berrios*, 791 F.2d 246, 250 (2d Cir. 1986) cert. dismissed 479 U.S. 978, 107 S.Ct. 562 (1986). Accordingly, the Supreme Court has observed that "[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception." *Salerno*, 481 U.S. at 755, 107 S.Ct. at 2105.

"Because the law thus generally favors bail release, the government carries a dual burden in seeking pre-trial

detention. First, it must establish by a preponderance of the evidence that the defendant, if released, presents an actual risk of flight. Assuming it satisfies this burden, the government must then demonstrate by a preponderance of the evidence that no condition or combination of conditions could be imposed on the defendant that would reasonably assure his presence in court." *United States v. Sabhnani*, 493 F.3d 63, 75 (2d Cir. 2007) (internal citations omitted). The government carries an even higher burden if it seeks to prove that the defendant is dangerous, in which case its burden is proof by clear and convincing evidence. *United States v. Vasconcellos*, 519 F. Supp. 2d 311, 316 (N.D.N.Y. 2007).

In determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, the court must consider the following factors:

- (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
- (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 arrest, 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.

18 U.S.C. § 3142(g).

"In applying the factors to any particular case, the court should bear in mind that it is only a 'limited group of offenders' who should be denied bail pending trial."

United States v. Shakur, 817 F.2d 189, 195 (2d Cir. 1987) citing S. Rep. No. 225, 98th Cong., 2d Sess. 7, reprinted in 1984 U.S. Code Cong. & Ad. News 3182, 3189.

(1) The Nature and Circumstances of the Offense Charged and the Weight of the Evidence

As addressed above, Mr. Hammond is charged with two counts of conspiracy to commit computer hacking, 18 USC 1030(a)(5)(A), 1030(c)(4)(B)(i), and 1030(c)(4)(A)(i)(I), one count of computer hacking, 18 USC 1030(a)(5)(A), 1030(b), 1030(c)(4)(B)(i) and (2), one count of conspiracy to commit to access device fraud, 18 USC 1029(a)(3) and 1029(a)(5), and one count of aggravated identity theft, 18

USC 1028(A). There is no question that the crimes charged are serious. However, under the Bail Reform Act, these charges do not give rise to a presumption that no conditions of release will reasonably ensure the safety of the community. To support its request for detention, the government must therefore carry its burden of proving first actual risk of flight by preponderance of the evidence, or dangerousness by clear and convincing evidence, and then the absence of any combination of conditions that could reasonably assure Mr. Hammond's appearance when required.

The seriousness of the charges that Mr. Hammond is facing does not place him in that "limited group of offenders" who should be denied bail pending trial. See *Shakur*, 817 F.2d at 195. In fact, in the past year, district courts have approved the pretrial release of defendants facing similar computer hacking charges. As with Mr. Hammond, the charges against these defendants arise from their alleged participation in the Anonymous hacker collective and its offshoots. See, e.g., *United States v. Collins et. al.*, 11 Cr. 471 (C.A.N.D.) (Dkt ## 122 and 237); *United States v. Lance Moore*, 11 Cr. 3561 (D.N.J.) (Dkt # 9); *United States v. Scott Matthew Arciszewski*, 11 Cr. 622 (F.L.M.D) (Dkt # 8 in 11 mj 1359). Furthermore,

after a recent FBI investigation dubbed "Operation Card Shop," a number of defendants charged in a global hacking scheme that involved buying and selling bankcard details, stolen identities, counterfeit documents, and sophisticated hacking tools were granted bail release in the Southern District of New York. *See, e.g., United States v. Christian Cangeopol*, 12 mj 01667 (S.D.N.Y.) (Dkt # 4).

The second factor of § 3142(g)—"the weight of the evidence against the person"—requires the Court to consider evidence proffered by the government that it intends to use at Mr. Hammond's trial. However, even if the government has substantial evidence that Mr. Hammond participated in the offenses outlined in the indictment, there is no reason to conclude, on the basis of such evidence, that he is unlikely to observe his legal obligation to attend a trial that may result in the imposition of a substantial sentence. Rather, Mr. Hammond's history of compliance while on bail release while facing similar charges in the Northern District of Illinois suggests that the opposite is true. In that case he was released on an unsecured \$10,000 bond subject to limitations on his computer usage. He remained free on bail for over six months, appearing at each of his court dates, and voluntarily surrendered

himself following his sentencing.

(2) The History and Characteristics of the Person

Mr. Hammond has lived in the same community for his entire life, maintained consistent employment, and participated in volunteer work. He has been self-sufficient since age 18, and fully responsible for rent and other monthly expenses. He has limited financial resources, and has shown neither the ability nor the inclination to flee. Mr. Hammond has strong family ties; his mother, grandmother and brother are all willing to co-sign his bond, as are a number of close friends. Mr. Hammond has sufficient community support to ensure he abides by the conditions this Court imposes.

There are no factors present in this case that would demonstrate that Mr. Hammond is an irremediable flight risk. Mr. Hammond does not, for example, have significant financial resources with which to finance flight, *cf. Sabhnani*, 493 F.3d at 76, he has never fled in the past, *United States v. Gonzales Claudio*, 806 F.2d 334 (2d Cir. 1984) (14-month pre-trial detention violated due process where, *inter alia*, there was no evidence that defendants had ever fled from lawful authority), he does not have citizenship or family ties in another country, *cf. United*

States v. Kirkaldy, 1999 U.S. App. LEXIS 10782 (2d Cir. May 26, 1999), nor does he have a history of travel and residence in other countries, *cf. United States v. Shelikhov*, 468 Fed. Appx. 54, 56 (2d Cir. 2012).

Mr. Hammond's significant family and community ties, coupled with his demonstrated compliance when granted bail release in his prior federal case weigh strongly in favor of pretrial release in this case. There are clearly conditions that would reasonably assure Mr. Hammond's presence in court.

(4) The Nature and Seriousness of the Danger to Any Person or the Community

Mr. Hammond's release would not result in any danger to any person or to the community. In the computer hacking cases cited above, district courts have militated against any potential danger posed by pretrial release by either imposing special restrictions on the defendants' computer use, or by permitting unrestricted computer use subject to monitoring by pretrial services. Such monitoring would ensure that Mr. Hammond would not pose a danger to the community through repetition of his alleged offenses, and would make the government instantly aware of any attempt to do so.

(5) Due Process Considerations

Although the Speedy Trial Act, 18 U.S.C. § 3161 et seq., is designed to ensure that criminal matters are brought to trial expeditiously, in reality, it often takes many months before a complex case can be tried. Preventive detention for many months, without a finding of guilt, raises a serious constitutional question, and the length of the defendant's detention must be considered in a bail application such as the present one. Given the voluminous amount of discovery in this case and Mr. Hammond's intention to go to trial, there is a very high risk that continued pre-trial detention would result in a due process violation.

Pretrial detention constitutes punishment in violation of the Fifth Amendment's Due Process Clause when it is excessive in relation to non-punitive purposes of detention, such as "preventing danger to the community," *Salerno*, 481 U.S. at 746-47, or "ensur[ing] [a defendant's] presence at trial," *Bell v. Wolfish*, 441 U.S. 520, 536, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). Due process sets no bright-line limit on the length of pre-trial confinement, but courts have found prolonged pre-trial detention to

violate due process when insufficiently justified by other factors. See, e.g., *United States v. Ojeda Rios*, 846 F.2d 167, 168-69 (2d Cir. 1988) (holding unconstitutional pretrial detention for thirty-two months without trial date); *United States v. Gatto*, 750 F. Supp. 664, 665 (D.N.J. 1990) (although court still considered defendants dangerous to community, 15-month detention had become punitive under due process clause and required release on conditions pending trial); *United States v. Khashoggi*, 717 F. Supp. 1048, 1051 (S.D.N.Y. 1989) (finding that likelihood of a somewhat prolonged pretrial detention weighed in favor of defendant's bail application); *United States v. Lofranco*, 620 F. Supp. 1324, 1326 (N.D.N.Y. 1985) (while releasing defendant would create potential dangers to the public and to the integrity of his trial, danger was outweighed by liberty interest of defendant who had already been held for six months); *Gonzales Claudio*, 806 F.2d at 341.

Mr. Hammond has been detained for over eight months, since March 5, 2012, the date of his arrest. To date, the discovery in this case consists of 5 discs containing over 100,000 Bates-stamped pages - roughly equivalent to 40 file boxes of documents - and a computer hard drive with over

40,000 separate user-generated files. The vast majority of this discovery is governed by the Court's protective order, which prohibits defense counsel from leaving these materials with Mr. Hammond at the Metropolitan Correctional Center. As addressed more fully in counsel's Affirmation, under these conditions, a full review of this material could take years, preventing Mr. Hammond from participating meaningfully in his own defense and depriving him of his right to the effective assistance of counsel and a fair trial.

A consideration of the factors set forth at 18 U.S.C. § 3142(g) therefore demonstrates that the conditions proposed herein would assure Mr. Hammond's appearance and the safety of the community.

THE PROPOSED CONDITIONS

We propose that the following combination of conditions will assure both the safety of the community and Mr. Hammond's appearance in court:

1. A \$200,000 bond, secured by the signatures of five financially responsible parties including family members, close friends, and attorneys not associated with this case, and two properties belonging to family

friends with equity in excess of \$30,000. This is twenty times the amount of Mr. Hammond's unsecured bond in his previous federal case, in which he appeared at each of his court dates, and voluntarily surrendered to serve his sentence.

2. Residence in New York City, and pre-trial supervision.

Mr. Hammond would reside in the home of a New York City attorney and financially responsible person who would also be a signatory to his bond. Mr. Hammond would be proximate to the Southern District Courthouse and pre-trial services, as well as readily accessible to his attorneys and available to review the discovery in this case.

3. Monitoring of Mr. Hammond's computer usage by pre-trial services.

CONCLUSION

For the reasons set forth above, and in the attached Affirmation, we respectfully submit that this Court should grant bail to Mr. Hammond under the terms set forth herein and grant such other and further relief as may be just and proper.

Respectfully Submitted,

A handwritten signature in black ink that reads "Elizabeth M. Fink". The signature is written in a cursive style with a large, sweeping initial "E".

ELIZABETH M. FINK
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