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10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 OAKLAND DIVISION

13 UNITED STATES OF AMERICA,)	Case No. CR 14-285 JST
)	Case No. 20-MJ-70580 DMR
14 Plaintiff,)	
)	GOVERNMENT'S OPPOSITION TO
15 v.)	DEFENDANT'S MOTION FOR RELEASE
)	
16 JEREMY DONAGAL,)	
)	Date: May 20, 2020
17 Defendant.)	Time: 10:30 a.m.
)	

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1 **I. INTRODUCTION**

2 Dear Judge Tiger [sic]

3 I just wanted to start off by saying thank you for excepting [sic] my plea
4 agreement September the 25th 2015, and giving me another chance at life. This is
a decision you will not regret, as I have truly learned my lesson, and will not ever
repeat my actions.

5 That's what Jeremy DONAGAL wrote to the Court on January 5, 2016. Unfortunately, DONAGAL's
6 sense of regret was short-lived. Even before he was released from prison, he began planning to resurrect
7 the same counterfeit pill business that sent him to prison the first time. And when he did, he carefully
8 concealed his activities from the Court and law enforcement. On May 14, 2020, agents raided his
9 laboratory and seized thousands (possibly tens of thousands) of counterfeit pills, multiple pill presses,
10 packaging and shipping materials, a full laboratory, computers, and evidence linking him to a dark web
11 persona that he had been using to sell drugs across the nation. He did all of this while on supervised
12 release. In his previous case, the Court detained him as a flight risk and a danger. DONAGAL has
13 proven that determination to be true. He has demonstrated that he cannot be supervised.

14 Nonetheless, he seeks temporary release on the ground that he has special health concerns and
15 thus faces increased risk of serious illness if he should contract COVID-19 while in jail. It is not clear
16 that DONAGAL's health concerns are as serious as he represents. First, it has been almost a decade
17 since he last had cancer treatment. The government has seen no evidence that he has a compromised
18 immune system now. Second, DONAGAL's concerns about his health appear to have arisen after he
19 was arrested. Before that, he was associating with others without wearing protective equipment. His
20 own conduct thus shows that he did not view his health issues as significant enough to warrant social
21 distancing before now, and also that he is unlikely to abide social distancing rules if released. In other
22 words, DONAGAL has demonstrated in multiple ways that he cannot follow rules – even rules related
23 to his own health – and thus that releasing him will not significantly decrease his risk of contracting the
24 illness. For all of these reasons, the government asks that the Court detain DONAGAL pending trial.

25
26 **II. FACTS AND PROCEDURAL HISTORY**

27 DONAGAL was formerly the “Xanax King.” He managed an operation that manufactured
28 counterfeit Xanax (alprazolam) tablets and sold them on dark web marketplaces like Silk Road. He was

1 arrested and convicted of drug and money laundering offenses and, on September 25, 2015, the Court
2 sentenced him to 70 months in prison, followed by three years of supervised release. He was released
3 from prison on June 27, 2018 and, it appears, immediately went back to work re-establishing his
4 counterfeit drug business, even though he was on supervised release.

5 Agents arrested DONAGAL on May 14, 2020 after they found him at a warehouse where it
6 appeared he was manufacturing counterfeit generic Xanax tablets. The Court issued an arrest warrant
7 and complaint the next morning charging him with possessing punches and dies designed to produce
8 counterfeit drugs, in violation of 21 U.S.C. § 843(a)(5), and making counterfeit drugs, in violation of 21
9 U.S.C. § 331(i)(3). He faces a maximum of four years in prison on the § 843(a)(5) charge, or up to eight
10 years if the government files an Information under 21 U.S.C. § 851. He faces a maximum of three years
11 on the § 331(i)(3) charge. He made his initial appearance on Friday, May 15, 2020.

12 13 **III. DISCUSSION**

14 **A. DONAGAL Has Shown He Is Not Amenable to Supervision.**

15 DONAGAL appears on the Form 12 in his prior case, CR 14-285 JST, and on the complaint in
16 his current case, 20-MJ-70580 DMR. He seeks release. To win release, it is DONAGAL's burden to
17 demonstrate by clear and convincing evidence that he is neither a flight risk nor a danger. Fed. R. Crim.
18 Proc. 32.1(a)(6). The Court considers four factors in determining whether the pretrial detention standard
19 is met: (1) the nature and circumstances of the offense charged; (2) the weight of the evidence against
20 the defendant; (3) the history and characteristics of the defendant, including the defendant's character,
21 physical and mental condition, family and community ties, past conduct, history relating to drug or
22 alcohol abuse, criminal history, and record concerning appearance at court proceedings, as well as
23 whether the crime was committed while the defendant was on probation or parole; and (4) the nature and
24 seriousness of the danger to any person or to the community that would be posed by the defendant's
25 release. 18 U.S.C. § 3142(g); United States v. Winsor, 785 F.2d 755, 757 (9th Cir. 1986). Considering
26 factors outside of those set forth in Section 3142 is disfavored. Diaz-Hernandez, 943 F.3d at 1199.

27 **1. DONAGAL Set Up a Large-Scale Dark Web Drug Distribution Scheme.**

28 So far as the government is aware, the same allegations support both the complaint and the Form

1 12.¹ The complaint alleges that, on May 14, 2020, agents arrested DONAGAL after he stepped outside
2 a warehouse. Inside the warehouse, they found punches and dies designed to manufacture counterfeit
3 pills, and finished counterfeit pills. DONAGAL had leased the warehouse space on behalf of a company
4 of which he was listed as the manager, and agents found documents inside with his name on them.

5 DONAGAL was manufacturing counterfeit benzodiazepines. In this district, drug offenses are
6 often seen as a kind of edgy entrepreneurial activity. But they aren't. Though many benzodiazepines
7 (including alprazolam (Xanax), diazepam (Valium), and clonazepam (Klonopin)) are in Schedule IV,²
8 they are nonetheless dangerous drugs, especially when combined with opioids, as they often are. Both
9 benzodiazepines and opioids are central nervous system depressants. Together, they have a synergistic
10 effect that can result in depressed respiration and death – basically, the drugs slow respiration to such an
11 extent that the victim's internal organs die from lack of oxygen. Between 1999 and 2017, the number of
12 overdose deaths involving benzodiazepines increased more than 10-fold, from 1,135 to 11,537. See
13 Nat'l Inst. on Drug Abuse, "Overdose Death Rates," found at [https://www.drugabuse.gov/related-topics/](https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates)
14 [trends-statistics/overdose-death-rates](https://www.drugabuse.gov/related-topics/trends-statistics/overdose-death-rates) (last visited May 18, 2020). In 2018, the most recent year for
15 which there are data, there were 10,724 deaths involving benzodiazepines.

16 Counterfeit drugs are still more dangerous because there are no controls over dosing or
17 consistency. Yet because they appear to be legitimate pharmaceutical products, they mislead the user
18 into believing the drugs are safer than they actually are. DONAGAL thus was engaged in dangerous
19 conduct that caused real harm in this community and others across the nation. DONAGAL argues that
20 any claim that he represents a danger to the community is "meritless." The Court has rejected that
21 argument before and should reject it here. See, e.g., United States v. Zaragoza, 2008 WL 686825, at *3
22 (N.D. Cal. Mar. 11, 2008) (Spero, J.) ("In assessing danger, physical violence is not the only form of
23 danger contemplated by the statute. Danger to the community can be in the form of continued narcotics
24 activity or even encompass pecuniary or economic harm.")

25
26
27 ¹ The government has not yet seen the Form 12.

28 ² It appears that DONAGAL was using non-scheduled benzodiazepines for his counterfeit pills. That does not mean the drugs he manufactured were weaker than the drugs his pills mimicked. To the contrary, his own online posts indicate that they are every bit as powerful.

1 **2. The Weight of the Evidence Against DONAGAL is Overwhelming.**

2 The Court does not attempt to pre-judge guilt at the bail hearing. But the Court must still
3 consider the weight of the evidence as it can help establish dangerousness, United States v. Hir, 517
4 F.3d 1081, 1090 (9th Cir. 2008) (finding that “the weight of the evidence clearly and convincingly
5 establishe[d]” a likelihood that the defendant would pose a danger if released), and the possibility that
6 the defendant will abscond if released, United States v. Gebro, 948 F.2d 1118, 1122 (9th Cir. 1991).

7 Here, the evidence against DONAGAL is overwhelming. Agents executed a federal search
8 warrant at DONAGAL’s warehouse. He had leased that space in the name of a company (“Extreme
9 Lifestyles”) for which he was the managing member, according to California Secretary of State records.
10 He let himself into the warehouse before he was arrested. Inside, agents found multiple pill presses and
11 thousands (possibly tens of thousands)³ of counterfeit GG249 tablets. The Food & Drug Administration
12 has authorized Sandoz Inc. to manufacture and distribute generic 2 mg alprazolam tablets with that
13 mark. The tablets the agents discovered looked identical to, or nearly identical to, the tablets Sandoz
14 Inc. manufactures and distributes. The agents also found the punch-dies used to manufacture those
15 tablets. Some of the punch-dies were in the pill presses agents seized. DONAGAL also had six tool
16 trays, each with eight compartments. Most of those compartments contained additional punch-dies.
17 DONAGAL had labeled them – about half were labeled “GG249.” His labels indicate he had punch-
18 dies to counterfeit other manufacturers’ benzodiazepines as well.

19 DONAGAL thus faces the certainty of a return to prison both on the Form 12 and the new
20 charges, after less than two years out of custody. And he can expect that whatever lenience he extracted
21 from the Court at his previous sentencing, he will find no such lenience this time. He has every reason
22 to flee or attempt to obstruct justice through the destruction of evidence or intimidation of witnesses.

23 **3. DONAGAL Was Previously Detained as a Flight Risk and Danger; This
24 Time, He Planned His Crime from Prison, and He Had Help.**

25 The Court previously detained DONAGAL as both a flight risk and a danger. See United States

26 ³ Agents found a 5-gallon bucket nearly full of the GG249 counterfeits. They also found
27 hundreds or thousands more of those tablets in a separate machine designed to clean the tablets prior to
28 packaging. It was not possible to count them all during the search warrant execution, but the sheer
volume indicated a large, commercial operation. The tablets have been sent to the DEA’s Western
Laboratory for analysis.

1 v. Donagal, CR 14-285 JST, Dkt #105 (Sept. 8, 2014). After considering the factors set forth in
2 § 3142(g), including DONAGAL's prior drug convictions and the fact that he was on probation when he
3 committed the previous offense, the Court found that DONAGAL was "unlikely to abide by any
4 conditions the Court could fashion under the Bail Reform Act." Id. at 4. The Court also found that
5 DONAGAL's use of fake IDs and cryptocurrency as part of his business were significant because it
6 indicated he was comfortable using assumed identities and had access to additional funds to sustain him
7 if he fled or to stake a new drug trafficking operation. Id. at 6.

8 All of the factors that persuaded the Court to detain him previously are present here. Indeed, the
9 facts that DONAGAL repeated the same crime for which he was previously convicted and sentenced to
10 federal prison, that he apparently planned it from prison, and carried it out while on federal supervision
11 indicate that he cannot be trusted to follow any conditions the Court imposes. DONAGAL set up a
12 large-scale counterfeit pill operation and distributed those pills nationwide through multiple vendor
13 pages on the dark web.⁴ He built a full-scale laboratory where it appears he manufactured and tested the
14 benzodiazepines he created, a press room where he used multiple commercial pill presses capable of
15 pressing thousands of pills per hour, a room where he stored finished products ready to be put in boxes
16 and mailed, and a room with a photo box and special lighting where he could take the photos he posted
17 online to attract buyers. In his laboratory, he had multiple benches with hotplates and mixers, a melt-
18 point tester, a six-foot tall distillery or condenser apparatus, a drying cabinet, and shelves of solvents. In
19 his press room, he had multiple pill presses, including one rotary press capable of producing thousands
20 of counterfeit pills per hour, and industrial mixers and polishers. He installed an industrial air filtration
21 system for both his laboratory and pill press room. He also had a large warehouse space with Costco-
22 style shelves filled with materials he used in his distribution operation, including boxes of empty vitamin
23 bottles, rolls of labels for those bottles (which were meant to give the false impression that the bottles
24 contained vitamins), packaging materials, and business cards (in the name of his dark web persona).⁵

25
26 ⁴ The facts that follow are relevant to the Court's bail decision, but are not within the scope of
27 the preliminary hearing. In his previous case, DONAGAL used alprazolam. In this case, it appears he
used non-scheduled benzodiazepines.

28 ⁵ The government is not using that name here because the investigation of DONAGAL's dark
web activities is ongoing.

1 DONAGAL had established vendor pages in multiple criminal marketplaces, and claimed to have made
2 over 2,000 sales (as of August, 2019).

3 That DONAGAL was able to accomplish so much so soon after getting out of prison indicates
4 that he had substantial assets waiting for him and the help of third parties. Indeed, the equipment in his
5 lab/warehouse alone likely was worth tens or hundreds of thousands of dollars. As before, DONAGAL
6 obtained much of the equipment needed for his operation from manufacturers in China, and he paid for
7 it (at least in part) with Western Union money wires. The government did not seize any currency during
8 its searches. That means that whatever money remains from his nest egg, and the money he earned in
9 thousands of online sales, is unaccounted for. Moreover, as discussed below, DONAGAL's wife helped
10 him set up the company that he used to lease the warehouse space, and he signed the lease less than six
11 months after his release from prison.

12 As he did last time, DONAGAL accepted payment for his counterfeit tablets in cryptocurrency
13 like Bitcoin. He did this because cryptocurrencies are difficult to trace and even harder to seize, and
14 they can be transferred easily and quickly between wallets and over borders to evade law enforcement.
15 Agents examining DONAGAL's wallets saw evidence indicating that someone transferred some of his
16 Bitcoin out of one of his wallets either later in the day of his arrest or the next morning. DONAGAL
17 was in custody, without access to his devices. This "flight" of his drug proceeds confirms undisclosed
18 assets that he can use to facilitate his flight, and the existence of a co-conspirator who is working to help
19 him to obstruct justice, destroy evidence, and help DONAGAL evade prosecution.

20 As he did last time, DONAGAL took significant steps to conceal his identity and hide his
21 activities from Probation. He used fake IDs to open the UPS store mailboxes where he had the
22 equipment from China delivered, and he used fake IDs to wire money to China presumably to pay for
23 that equipment. He operated on the dark web using the anonymizing TOR browser, and used a system
24 (called "Tails") that prevented his computer from storing any traces of his online activities, so that there
25 would be nothing for law enforcement to find if they ever searched his computer. And as noted above,
26 he transacted in cryptocurrency, which helped to hide his identity as the person behind the transactions.

27 DONAGAL may claim that he finally understands and is committed to doing things differently
28 this time. But he already made the promise, in his January 5, 2016 letter to the Court in which he said,

1 “I have truly learned my lesson, and will not ever repeat my actions.” Yet he began planning this crime
2 even before he was released from prison. While still in prison, he wrote a letter to an associate in which
3 he asked, “Are people still talking about me? Good or bad? Good I hope. Lol.” He also said, “I could
4 tell you about some of my business plans upon my release from prison. Obviously, I can no longer do
5 the same thing as I will always be a target to the FEDS.” He signed it, “Jeremy Donagal, AKA The Real
6 Xanax King”. DONAGAL was released to supervision on June 27, 2018. By that time, he had already
7 begun to implement his “business plans.” In January 2018, six months before DONAGAL was released,
8 a filing service filed Articles of Organization for the LLC that would eventually become DONAGAL’s
9 business front. His wife filed a Statement of Information a month later naming herself as the entity’s
10 managing member and declaring that the entity was involved in “Wholesale/Retail – Supplements.”

11 DONAGAL offers his wife and father as sureties. In his previous case, DONAGAL offered his
12 ex-wife and father as proposed sureties. The Court found them unsuitable because intercepted telephone
13 communications “indicate that the proposed sureties had some knowledge of the type of activities in
14 which Defendant was engaging.” CR 14-285 JST, Dkt #105 at 3. “[T]here is a strong inference that
15 they at least had an inkling what Defendant was doing,” the Court wrote. “This precludes them from
16 serving as appropriate sureties.” *Id.* Those same considerations preclude DONAGAL’s father from
17 serving as a surety this time.

18 DONAGAL’s wife also is not an appropriate surety or custodian. She has not been charged, but
19 she has been involved in his activity throughout. As indicated above, she set up the company he used as
20 a front to run his counterfeit pill operation. She was a co-signor on the entity’s bank account. That
21 account has received multiple cash deposits in ways that appear designed to evade reporting require-
22 ments. Agents also observed her on several occasions at the warehouse. On at least one occasion, she
23 carried a bin full of boxes out of the warehouse and put them in DONAGAL’s car. This is consistent
24 with activity they saw on other occasions: DONAGAL would leave the warehouse with a bin full of
25 boxes and then drive around to different blue U.S. Postal Service collection bins and deposit the boxes
26 for mailing. He did this to make it more difficult to track the packages’ origin. Moreover, in the
27 previous case, it appears DONAGAL’s wife cleaned out a safe deposit box after DONAGAL was
28 arrested. When agents arrested DONAGAL in 2014, his wife left their residence as soon as agents

1 allowed her to and she went straight to the bank and accessed her safe deposit box. Agents arrived at the
2 bank shortly after she had left and served a search warrant for that box. The bank froze the box and
3 arranged for a locksmith to open it. When the locksmith opened the box a couple days later, agents
4 discovered it was empty. These facts indicate that DONAGAL's wife was at least knowledgeable of, if
5 not complicit in, his illegal conduct. She is not a suitable surety or custodian.

6 **4. DONAGAL Has Proven His Determination to Sell Drugs.**

7 DONAGAL claims that any argument that he poses a danger to the community is "meritless."
8 The staggering overdose death numbers prove this false.⁶ Drug dealers kill approximately 70,000
9 people each year. And DONAGAL has demonstrated his firm determination to continue trafficking
10 drugs. As this Court held in DONAGAL's previous case, "[t]he likelihood that Defendant will continue
11 to sell drugs should he be released presents a significant danger to the community. See United States v.
12 Ruben, 974 F.2d 580, 586 (5th Cir. 1992); United States v. Fulgham, Case No. CR 12-0124 CW
13 (KAW), 2012 WL 2792439, at *4 (N.D. Cal. July 9, 2012) ("The Senate Report states: 'The Committee
14 also emphasizes that the risk that a defendant will continue to engage in drug trafficking constitutes a
15 danger to the 'safety of any other person or the community.' Defendant's tendency to repeatedly commit
16 similar crimes shows that he poses an unmitigable danger to the community.") (quoting S. REP. No.
17 225, 98th Cong., 1st Sess. 23, n. 7 at 13)." CR 14-285 JST Dkt #105 at 4. DONAGAL has proven that
18 concern to have been well-founded. He did return to selling drugs after he was released.

19 He also claims that computer monitoring can mitigate any risk to the community he poses. That
20 only works on the computers Pre-Trial is aware of. Agents seized multiple computers from DONAGAL
21 and he can easily obtain more. As noted above, he has had help from others, including his wife, since
22 the beginning. All he needs is access to his dark web accounts to move money and destroy evidence.
23 DONAGAL's business was built on concealment and the use of computers to facilitate his crimes. For
24 almost two years, he managed to hide his activities from Probation. There is no reason to think Pre-Trial
25 will be any better at detecting violations. The risk he poses cannot be mitigated.

26
27
28 ⁶ In addition, it appears that one of the agents involved in the search of DONAGAL's warehouse
experienced medical distress when decontaminating his gear. It is unclear whether this was a result of
powder from the warehouse that got on his clothing and shoes.

1 **B. DONAGAL’s Concern For His Health Arose Only After His Arrest.**

2 DONAGAL also seeks temporary release under 18 U.S.C. § 3142(i), on the ground that special
3 health sensitivities constitute a “compelling reason” to allow him to shelter in place at home for some
4 period of time. Once the Court finds that a defendant should be detained, it is the defendant who must
5 show that temporary release is necessary under Section 3142(i). United States v. Dupree, 833 F. Supp.
6 2d 241, 246 (E.D.N.Y. 2011). Courts around the nation have considered four factors in determining
7 whether the possibility of contracting COVID-19 in jail warrants release: (1) the original grounds for
8 detention; (2) the specificity of the defendant’s COVID-19 concerns; (3) the extent to which the
9 proposed release plan mitigates the COVID-19 risks to the defendant; and, (4) the likelihood that release
10 would increase COVID-19 risks to others. See, e.g., United States v. Cazares, N.D. Cal. Case No. CR
11 18-466 BLF (Dkt #351 Apr. 23, 2020) (granting motion to revoke release where defendant was a danger
12 to the community and not in a high-risk category) (collecting cases). Consideration of those factors does
13 not warrant even temporary release here.

14 The grounds for detaining DONAGAL are set forth above. This factor favors detention.

15 Second, DONAGAL claims that he is at special risk because he previously had cancer and that
16 he has low testosterone. Mot. at 4. He claims he follows a “strict healthy diet” to maintain his health,
17 and that he cannot maintain that diet in jail. Id. DONAGAL’s pre-arrest conduct shows that he did not
18 have these concerns until agents arrested him. First, he did not shelter in place. He was actively
19 involved in his counterfeit pill operation and spent many hours over the past two months working in his
20 warehouse and driving around picking up packages from UPS store boxes and dropping his own boxes
21 in USPS collection bins. Second, he routinely interacted with other people without wearing a mask.
22 DONAGAL employed another man to work in his warehouse with him, filling pill bottles and preparing
23 the boxes for shipping. They spent many hours at a time together in the warehouse, neither of them
24 wearing masks. Agents saw them working together at the warehouse as recently as April 9, 2020. That
25 same day, DONAGAL went to a Safeway store and purchased two Visa gift cards – one for \$500, one
26 for \$200 – and paid with cash. DONAGAL stood in line with other customers, but was not wearing a
27 mask. DONAGAL also routinely visited UPS stores to pick up packages he’d ordered from China and
28 other places. He didn’t wear a mask during those trips either. On May 1, 2020, for example, he went to

1 a UPS store and then to Oakland, where he met with another man in a park. They had a brief interaction
2 and then parted. DONAGAL did not wear a mask during that interaction. And on May 14, 2020, the
3 morning of his arrest, agents found DONAGAL with another person in his warehouse – they were in the
4 warehouse for some time together before they stepped outside and agents contacted both of them.⁷
5 Again, DONAGAL wasn't wearing a mask. Third, the lab and warehouse where DONAGAL worked
6 were so contaminated with powders from his pill operation that the DEA's clandestine lab team used full
7 PPE when they dismantled it – Tyvek suits, full-face respirators, gloves, booties, and all seams taped to
8 prevent any exchange of air. It appears DONAGAL took no such precautions. Fourth, agents watched
9 DONAGAL eat at fast food restaurants and taco trucks. Tasty, maybe. But hardly the "strict healthy
10 diet" he now claims to have maintained. His conduct thus demonstrates that he does not perceive
11 himself to be at special risk of serious illness if he contracts COVID-19.

12 Moreover, his own authorities don't support his claim for heightened risk. The cancer.net site on
13 which he relies states that "[t]he risk of being immune compromised is typically highest during the time
14 of active cancer treatment, such as during treatment with chemotherapy," which in this case was almost
15 a decade ago.⁸ DONAGAL's testosterone levels are another issue. The 2014 PSR noted that he had
16 reported low testosterone levels back then (only a few years after his cancer treatment ended), but he
17 does not claim that he is being prescribed testosterone now to compensate for low levels. He did not
18 report to Pre-Trial that he was taking any medications for low testosterone. And the role of testosterone
19 in fighting COVID-19 infections is, at best, unclear. A German study (to which DONAGAL refers)
20 found that men with low testosterone had a higher incidence of severe illness. A more recent study from
21 Columbia University found that lowering testosterone levels may reduce the severity of COVID-19
22 symptoms. See [https://www.cuimc.columbia.edu/news/lowering-testosterone-may-reduce-severity-](https://www.cuimc.columbia.edu/news/lowering-testosterone-may-reduce-severity-covid-19)
23 [covid-19](https://www.cuimc.columbia.edu/news/lowering-testosterone-may-reduce-severity-covid-19) (last visited May 19, 2020). It is thus unclear whether DONAGAL has a heightened risk. This
24 factor is at best neutral, and does not support release.

25
26 ⁷ Agents arrested DONAGAL. They detained the woman but later released her. DONAGAL
27 told the agents that she didn't know anything about what was going on.

28 ⁸ That site also notes a study that reported patients with a history of cancer had a higher
incidence of severe illness, but stated that the small number of patients in that study made it difficult to
draw any general conclusions about a history of cancer resulting in higher risk of severe illness.

1 Third, DONAGAL's release plan will not necessarily mitigate his risk of exposure. DONAGAL
2 has demonstrated, repeatedly, that he does not view himself as being at heightened risk and that he will
3 not abide by shelter-in-place or social distancing rules if released. This is significant because without
4 the confidence that he will abide those rules scrupulously, any argument that he is safer out of custody
5 than in falls apart completely. He claims that he can be placed on home confinement, and that Pre-Trial
6 Services can monitor his compliance. This is mistaken. So far as the government is aware, Pre-Trial
7 Services is not presently installing electronic monitoring in defendants' homes due to the shelter-in-
8 place order and the need to avoid unnecessary risks. That means relying on DONAGAL to install it.
9 Further, it does not prevent him from meeting with other people, including co-conspirators, who are
10 willing to come to his house.

11 DONAGAL treats unproven allegations in pending civil actions and newspaper articles as fact in
12 order to argue that the jail cannot provide him adequate medical care. Mot. at 6-8. There is no way to
13 respond to such allegations except to say that they are unproven. In making bail decisions, this Court
14 regularly disregards information about prior arrests that do not result in convictions. The data about
15 COVID-19 cases in the jail (which DONAGAL does not dispute) seem to undercut the dire conclusion
16 he asks the Court to draw. There have been a total of 54 cases over the past two months, though never
17 more than 16 at any one time and generally fewer than that. See [https://www.alamedacountysheriff.org/
18 admin_covid19.php](https://www.alamedacountysheriff.org/admin_covid19.php) (last visited May 19, 2020). Thirty-five inmates have recovered completely and
19 none have died.⁹ This indicates that the jail is more than capable of providing DONAGAL adequate
20 medical care if he contracts the virus while in custody. And as DONAGAL knows, if his case becomes
21 more serious than the jail's clinic can manage, he will be transferred to a community hospital to receive
22 care. DONAGAL's answer to this is an unwarranted slap at the jail's health care provider, as if the jail
23 were the only place in our society with for-profit healthcare.¹⁰ He also claims that he would have
24

25 ⁹ By way of comparison, there have been 11,253 cases and 392 deaths in the Bay Area over
26 approximately the same period. See [https://abc7news.com/health/coronavirus-updated-number-of-
covid-19-cases-deaths-in-bay-area/6008027/](https://abc7news.com/health/coronavirus-updated-number-of-covid-19-cases-deaths-in-bay-area/6008027/) (last visited May 19, 2020).

27 ¹⁰ DONAGAL claims that he has not yet received a specific medication and claims this shows
28 that the jail cannot provide him adequate care. Mot. at 8. He has been in jail less than five days. The
jail should confirm prescriptions and dosages before handing out psychotropic medications. There is no
indication the jail has refused him that medication. DONAGAL's mental health issues may undercut his
arguments about complying with shelter-in-place orders, especially since he wasn't doing that even
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1 greater access to healthcare if he contracted COVID-19 while out of custody. This is also untrue.
2 According to the CDC, most cases of COVID-19 are mild, see [https://www.cdc.gov/coronavirus/2019-](https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html)
3 [ncov/if-you-are-sick/steps-when-sick.html](https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/steps-when-sick.html) (“Most people with COVID-19 have mild illness and can
4 recover at home without medical care.”), and the CDC and county public health agencies advise those
5 who contract COVID-19 to stay home and recover on their own, and only to seek medical help if they
6 develop serious complications. See, e.g., id. (CDC) (“Stay home except to get medical care”);
7 <http://www.acphd.org/media/562537/sick-factsheet-english.pdf> (Alameda County) (“Unless your doctor
8 directs you to go obtain medical care, remain at home.”). DONAGAL’s custodial status would not
9 prevent him from following exactly the course of treatment the CDC and county public health
10 authorities recommend.

11 Moreover, the jail has implemented numerous measures to enforce a form of social distancing. It
12 has decreased the jail population by almost a third, it has issued the inmates masks and sanitizing sprays
13 and soap, and it has enhanced its cleaning schedule. This is more than DONAGAL was doing when he
14 was out of custody. Further, the inmates live in separate housing units. The jail quarantines an entire
15 unit when one inmate in a unit tests positive, and implements extra controls around movements into and
16 out of quarantined units to prevent the spread of the illness from one unit to the next. It is simply untrue,
17 as DONAGAL argues, that the jail “has been unable to limit the spread of COVID-19 in the jail.” Mot.
18 at 8. If that were true, the number of cases would be doubling every two to three days. That has not
19 happened. It is proving difficult to eliminate the virus from the jail completely, but the same is true in
20 the community generally. Indeed, the Court cannot guaranty that DONAGAL will not contract COVID-
21 19, whether he is in or out of custody. Any suggestion to the contrary is false. Thus this factor is also,
22 at most, neutral, and does not favor release.

23 Fourth, releasing DONAGAL may actually increase the risk of exposure to others in his family.
24 His pre-arrest conduct demonstrates that he will not abide social distancing rules. Even if the Court
25 could ensure that he does not leave the house – and there is no way to guaranty that – there is no way to
26 ensure that he will not have others come to him to carry on his business. This puts his family at risk.

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when he was on the medications.

1 For all of these reasons, DONAGAL has not shown a “compelling reason” warranting temporary
2 release from custody.

3 **C. The Restrictions on Face-to Face Visits Do Not Infringe Donagal’s Right to Counsel.**

4 DONAGAL does not argue that being in custody will interfere with his right to counsel, though
5 his attorney makes statements possibly to that effect in her declaration. A defendant has constitutional
6 rights to assistance of counsel and meaningful access to courts. United States v. Wilson, 690 F.2d 1267,
7 1271 (9th Cir. 1982). But there are many permissible means of achieving those objectives. See id. at
8 1271. “While prisoners have a general right to consult with their legal counsel, that right is not absolute
9” McMaster v. Pung, 984 F.2d 948, 953 (8th Cir. 1993) (finding ban on contact visits with one of
10 defendant’s attorney, and limitation to “telephonic contact and consultation through the mails” did not
11 violate defendant’s Sixth Amendment rights). A defendant’s access to his or her attorney may be
12 burdened by regulation or practice of his penal institution, if justified by legitimate interests of penal
13 administration. Johnson-El v. Schoemehl, 878 F.2d 1043, 1052 (8th Cir. 1989). Courts considering
14 whether release is necessary for a person’s defense under § 3142(i) have considered: “(1) the time and
15 opportunity the defendant has to prepare for the trial and participate in his defense, (2) the complexity of
16 the case and volume of information, and (3) expense and inconvenience associated with preparing while
17 incarcerated.” United States v. Cecrle, 2014 WL 31674, at *4 (D. Nev. Jan. 3, 2014).

18 DONAGAL doesn’t cite a single case where a court said that temporary suspension of contact
19 visits infringes on the right to counsel. Even if he is released, social distancing rules would preclude
20 contact visits with his attorney. And he would not enjoy unlimited access to her – she has other clients
21 and professional and personal obligations. If it is difficult to build rapport, that is because of the current
22 pandemic, not because of he is fighting his case from jail. Further, this case is in its earliest stages.
23 There is not even an indictment yet, and no trial date. The current restrictions – including the
24 restrictions on contact visits at the jail – will not last forever. Thus, there is at most a modest delay in
25 that rapport-building, and DONAGAL does not even attempt to articulate any prejudice to his ability to
26 prepare his defense due to this short delay. To the contrary, until the jail resumes contact visits,
27 DONAGAL’s attorney may request and review discovery and communicate with him by phone or
28 videoconference. DONAGAL has not identified any significant infringement on his right to counsel that

