

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

UNITED STATES OF AMERICA

v.

CAUSE NO. 1:02-CR-1144-VEC

BERNARD J. EBBERS

REPLY IN SUPPORT OF MOTION FOR REDUCTION IN SENTENCE

Bernard J. Ebbers, by and through undersigned counsel, hereby files his Reply in support of his Motion for Reduction in Sentence (Docket # 350). In further support of the Motion, Ebbers would show the following:

1. In the Motion, Ebbers demonstrates how he satisfies all requirements of 18 U.S.C. § 3582(c)(1)(A) for a reduction in sentence.

2. As a reminder, those elements are: (1) “exhaustion of administrative rights to appeal a failure of the Bureau of Prisons to bring a motion on the defendant’s behalf or the lapse of 30 days from the receipt of such a request by the warden of the defendant’s facility”; (2) consideration of “the factors set forth in section 3353(a) to the extent that they are applicable”; (3) a finding that “extraordinary and compelling reasons warrant such a reduction”; and (4) a finding that “such a reduction is consistent with applicable policy statements issued by the Sentencing Commission”. 18 U.S.C. § 3582(c)(1)(A).

3. The Government has responded in opposition to Ebbers’ Motion. *See* Docket # 354.

4. In this Reply, Ebbers demonstrates how his medical circumstances have further changed since the Government submitted its Response one week ago and responds

to the arguments that the Government raises in its Response. But first, Ebbers highlights again how the First Step Act expressed Congress's clear intent to use compassionate release more frequently and enacted a sea change with respect to empowering courts to do just that.

I. THE FIRST STEP ACT DRAMATICALLY ALTERS THE AVAILABILITY OF COMPASSIONATE RELEASE IN FEDERAL COURTS

5. In its Response, the Government acts as if very little has changed with regard to compassionate release in federal courts following the First Step Act of 2018. The legislative history of the Act and the state of affairs prior to the passage of that legislation belies that position.

6. Prior to the passage of the First Step Act, which amended 18 U.S.C. § 3582, “a sentencing court could only consider compassionate release upon a motion from the Director of the Bureau of Prisons.” *United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219 at *2 (D. Minn. July 25, 2019). If the BOP decided to not seek that relief on behalf of an inmate, there was no mechanism for review. *Id.* at *2-3.

7. Even before the passage of the First Step Act, in response to criticism that BOP was not using compassionate release procedures frequently enough, the United States Sentencing Commission “passed amendments to the federal sentencing guidelines that strengthened and broadened the criteria for compassionate release.” *Id.* at *3 (internal quotation and citation omitted). That was in 2016. *Id.*

8. In December of 2018, Congress passed the First Step Act, which the President signed into law, “further expanding defendants’ access to relief.” *Id.*

9. The section of the First Step Act that expanded compassionate release was entitled “Increasing the Use and Transparency of Compassionate Release.” The First Step of Act of 2018, 115 P.L. 391, 132 Stat. 5194.

10. Courts across the nation have recognized that it was the specific intent of Congress to expand compassionate release so that it is used more frequently. *See, e.g., United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219 at *3 (D. Minn. July 25, 2019); *United States v. Sotelo*, 2019 U.S. Dist. LEXIS 135051 at *32 (E.D. Pa. Aug. 7, 2019); *United States v. Willis*, 2019 U.S. Dist. LEXIS 95783 at *3 (D.N.M. June 7, 2019); *United States v. Beck*, 2019 U.S. Dist. LEXIS 108542 at *15-16 (M.D.N.C. June 28, 2019); *United States v. Johns*, 2019 U.S. Dist. LEXIS107850 at *2-3 (D. Ariz. June 27, 2019); *United States v. Cantu*, 2019 U.S. Dist. LEXIS 100923 at *10 (S.D. Tex. June 17, 2019); *United States v. Brown*, 2019 U.S. Dist. LEXIS 175424 at *8 (S.D. Iowa Oct. 8, 2019).

11. Several courts have explicitly referenced the title and heading of the changes to compassionate release laws to highlight the sea change created by the First Step Act. *See, e.g., United States v. Brown*, 2019 U.S. Dist. LEXIS 175424 at *7-9 (S.D. Iowa Oct. 8, 2019) (noting that the title “Increasing the Use and Transparency of Compassionate Release” was “especially valuable” in evaluating Congress’s intent, particularly in light of BOP’s long history of rarely granting compassionate release petitions) (internal quotations

and citations omitted); *United States v. Cantu*, 2019 U.S. Dist. LEXIS 100923 at *9-10 (S.D. Tex. June 17, 2019).

12. The *Brown* court found that Congress's intent to increase the frequency of compassionate release is also made clear by the fact that the changes enacted by the First Step Act were passed even after BOP began using compassionate release more following complaints from the Inspector General.¹ *United States v. Brown*, 2019 U.S. Dist. LEXIS 175424 at *8 (S.D. Iowa Oct. 8, 2019). "Since Congress still amended the program following this increase, one can infer Congress thought eighty-three [grants of compassionate release over a 13-month period] was still insufficient." *Id.*

13. To implement this desire to increase the use of compassionate release, Congress removed BOP as the sole authority over compassionate release and empowered federal trial court judges across the nation to conduct *de novo* review of such requests. *See United States v. Beck*, 2019 U.S. Dist. LEXIS 108542 at *34 (M.D.N.C. June 28, 2019) ("[T]he terms of the First Step Act give courts independent authority to grant motions for compassionate release and says nothing about deference to BOP, thus establishing that Congress wants courts to take a *de novo* look at compassionate release motions."); *See also United States v. Sotelo*, 2019 U.S. Dist. LEXIS 135051 at *22 (E.D. Pa. Aug. 7, 2019); Erica Zunkel, *18 U.S.C. § 3553(a)'s Undervalued Sentencing Command: Providing a Federal Criminal Defendant with Rehabilitation, Training, and Treatment in "the Most*

¹ The Inspector General's criticisms were noted and cited in Ebbbers' Motion. *See* Docket # 350 at p. 6, ¶ 13.

Effective Manner,” 9 Notre Dame Journal of International Law 49, 61 (2019) (“The First Step Act aims to increase ‘the use and transparency of compassionate release’ by broadening eligibility and removing sole discretion for determining who is eligible for compassionate release from the BOP.”).

14. The Government attempts to deflect from this sea change by noting that the test for compassionate release remains the same under 18 U.S.C. § 3582(c)(1)(A) following the passage of the First Step Act. But those elements are now subject to greater review by the courts, without deference to BOP, and that review must be done in light of the clear Congressional intent to increase the frequency of the release of inmates from federal prison on compassionate grounds.

II. EBBERS’ MEDICAL CONDITION HAS CHANGED IN THE PAST WEEK

15. In the short time since the Government submitted its Response, Mr. Ebbers’ medical condition and conditions of incarceration have changed.

16. On October 10, 2019, Mr. Ebbers was transferred from the “Dallas Unit” of FMC Ft. Worth to the “Lubbock Unit”. The reason for the transfer was that Mr. Ebbers exhibited difficulties with his memory.² The Lubbock Unit at FMC Ft. Worth is an inpatient unit that has 24-hour nursing care. The Dallas Unit is a normal housing unit

² This is among the observations and concerns expressed in Joy Ebbers Bourne’s Declaration (Motion Exhibit “6”), which the Government discounts in its Response.

without such nursing care. At the Lubbock Unit, Mr. Ebbers will not have a work assignment.

17. Given the short timeframe since this transfer, undersigned counsel and Mr. Ebbers' daughter tried to get as much information as possible about this transfer to present to the Court. The information that was provided was sent in a confidential letter that contains certain restrictions on further dissemination. Out of an abundance of caution, and to avoid violating any rules of the Bureau of Prisons or FMC Ft. Worth, the letter that was sent, marked as Reply Exhibit "1", is being submitted under seal.³

18. Ebbers contends that he meets the standards for compassionate release even without regard to this recent transfer to the more restrictive Lubbock Unit, which has 24-hour nursing care. But if the Court is not inclined to rule in Ebbers' favor without consideration of this change in status, Ebbers respectfully requests that the Court permit any necessary factual development needed in light of this recent change in Mr. Ebbers' status.

³ Undersigned counsel will send the sealed exhibit to the Court via electronic mail and copy counsel for the Government on that e-mail.

III. REPLY TO SPECIFIC ARGUMENTS IN GOVERNMENT'S RESPONSE AS TO EACH ELEMENT OF 18 U.S.C. § 3582(c)(1)(A)

A. Exhaustion

19. Ebbers demonstrates in the Motion how he meets the exhaustion requirement. *See* Docket # 350, p. 12, ¶¶ 37-39. The Government has not disputed that contention, so it has been admitted.

B. Application of Applicable Section 3553(a) Factors

20. Ebbers shows in the Motion how the applicable factors in 18 U.S.C. § 3553(a) favor the requested reduction in sentence. *See* Docket # 350, pp. 28-31, ¶¶ 77-78.

21. In its Response, the Government does not specifically engage all of the Section 3353(a) factors in the manner that Ebbers did. To the extent the Government has not specifically contested any of those factors, Ebbers argues that the Government has conceded that they favor reduction in sentence.

22. The Government argues that “the 3553(a) factors weigh heavily against any reduction in his sentence”. *See* Docket # 354 at p. 8. The Response then immediately turns to contesting that Ebbers has demonstrated “extraordinary and compelling reasons” for a reduction in sentence. This is a separate part of the analysis, and not part of the Section 3553(a) analysis. The Government eventually returns to discussion of Section 3553(a) on page 11, in the final paragraph of its Analysis.

23. In that final paragraph, the Government argues that “a nearly 50% reduction in Ebbers’ sentence would be grossly insufficient to comply with the sentencing goals set forth in Section 3553(a).” *See* Docket # 354 at p. 11. The Government specifically refers to the “severity of the crime”, the need for deterrence that Judge Jones cited at sentencing, and that the 25-year term of imprisonment is “just punishment”. *Id.*

24. In arguing the Section 3553(a) factors, the Government does not argue that continued imprisonment is necessary to protect the public from Ebbers or that there is any characteristic of Ebbers other than the underlying conviction that requires further imprisonment. Those factors weigh in Ebbers’ favor.

25. With respect to the Government’s argument that the Section 3553(a) factors “weigh heavily” against reduction, that is simply not the case. The Government points only to the seriousness of the offense and the need for deterrence. While not downplaying the significance of financial crimes, it must be noted that these offenses were non-violent nature and were Ebbers’ first felony convictions. And Ebbers has been significantly punished by serving over 13 years in prison.

26. Courts across the nation have granted compassionate release to offenders whose offenses were more serious or significant than those of Ebbers. *See United States v. Johns*, 2019 U.S. Dist. LEXIS 126774 (E.D.N.Y. July 30, 2019) (granting release after serving 26 years of life sentence for extortion and racketeering conspiracies, including involvement in murders); *United States v. Johns*, 2019 U.S. Dist. LEXIS 107850 (D. Ariz.

June 27, 2019) (release granted after serving 23 years of sentence of life plus 40 years for multiple serious drug distribution offenses); *United States v. McGraw*, 2019 U.S. Dist. LEXIS 78370 (S.D. Ind. May 9, 2019) (release granted after serving 17 years of life sentence for conspiracy to possess methamphetamine with intent to distribute); *United States v. Gray*, 2019 U.S. Dist. LEXIS 160593 (S.D. Ind. Sept. 20, 2019) (release granted from life sentence for distribution of methamphetamine); *United States v. Sotelo*, 2019 U.S. Dist. LEXIS 135051 (E.D. Pa. Aug. 7, 2019) (release granted after serving 39 months of 210 month sentence for heroin trafficking and money laundering); *United States v. Beck*, 2019 U.S. Dist. LEXIS 108542 (M.D.N.C. June 28, 2019) (granting release after defendant served 76 months of 165 month sentence for distribution of methamphetamine and use of firearm in furtherance of drug distribution); *United States v. Peterson*, 2019 U.S. Dist. LEXIS 93480 (E.D.N.C. June 4, 2019) (released after serving 91 months of 132 month sentence for possession of cocaine base with intent to distribute and discharge of firearm in furtherance of drug trafficking, which the court characterized as a “serious crime of violence”); *United States v. Cantu*, 2019 U.S. Dist. LEXIS 100923 (S.D. Tex. June 17, 2019) (release granted after serving 14 years of 210 month sentence for drug-related racketeering); *United States v. York*, 2019 U.S. Dist. LEXIS 119768 (E.D. Tenn. July 18, 2019) (release granted after serving 73 months of 106 month sentence for 6 drug-related offenses and Social Security fraud); *United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219 (D. Minn. July 25, 2019) (released after serving less than 50% of 60 month

sentence for conspiracy to distribute heroin). Some of the offenses in the above-cited cases were violent in nature, unlike this case. Many of those offenders were sentenced to significant prison terms, including life imprisonment, yet were granted a reduction in sentence.

27. In short, the Government's concerns about the seriousness of the offense are not sufficient to disqualify Ebbers from a reduction in sentence.

28. With respect to the Government's argument that the only just and adequate sentence in this case is a 25-year and effective life sentence, Ebbers would again point to the support of this Motion by retired Judge Barbara Jones. Judge Jones issued this sentence. She stated at the time her rationale behind it. But she states now that the purpose of the sentence that she imposed has been wholly achieved. If anyone would know if the purpose of a sentence has been fulfilled, it would be the person who imposed it.⁴

29. Judge Jones' words speak for themselves: "A reduction in sentence now, however, after he has served almost 14 years of his sentence and developed serious medical issues, would not diminish the message that I sought to convey in 2005. It would show compassion. And, to state the obvious, it would not jeopardize public safety. In short, I believe that given his serious health problems, Mr. Ebbers has been punished enough." *See* Docket # 350.1, Motion Exhibit "1," Letter to Judge McMahon dated 09/03/2019.

⁴ "Under 18 U.S.C. § 3553(a), Congress requires we impose sentences sufficient, but not greater than necessary, to comply with the purposes" of the sentencing laws. *United States v. Sotelo*, 2019 U.S. Dist. LEXIS 135051 at *29 (E.D. Pa. Aug. 7, 2019) (internal quotations and citations omitted). It is clear that Judge Jones now regards the 13 years of imprisonment that Mr. Ebbers has served as sufficient to comply with those purposes.

30. In response to the Government's argument that reduction "by nearly 50%" of the sentence imposed is incompatible with the law, Ebbers points to the Sentencing Commission's Policy Statement at U.S.S.G. § 1B1.13. Reduction in Term of Imprisonment Under 18 U.S.C. § 3582(c)(1)(A). In Application Note 1(B), release is favored for those who qualify (like Ebbers) as long as they have served the **lesser** of 10 years or 75% of their sentence.⁵ Clearly, compassionate release that results in release after the length of time that Mr. Ebbers has served is expressly contemplated by the law. And here, release after serving over 13 years in prison while in poor health is still a significant punishment.⁶ This is precisely the reasoning set forth in Judge Jones' letter of support for Mr. Ebbers' release from prison.

31. Finally, if the Court has any lingering concerns about whether there are legitimate sentencing goals left to fulfill regarding Mr. Ebbers, then the Court can fashion appropriate post-release conditions. In *United States v. Gray*, 2019 U.S. Dist. LEXIS 160593 (S.D. Ind. Sept. 20, 2019), the court ordered the release of a 64-year-old inmate who had served approximately 20 years of a life sentence. Noting the significance of the sanction that had already been imposed, the *Gray* court found that post-release supervision

⁵ This Application Note was among the amendments passed by the Sentencing Commission when it sought, even before the First Step Act, to broaden the use of compassionate release. *United States v. Bellamy*, 2019 U.S. Dist. LEXIS 124219 at *3 (D. Minn. July 25, 2019).

⁶ Numerous courts note that those who are imprisoned while in poor health serve sentences "significantly more laborious than [those] served by most inmates." *See, e.g., United States v. Beck*, 2019 U.S. Dist. LEXIS 108542 at *31 (M.D.N.C. June 28, 2019) (internal citations omitted); *United States v. Gray*, 2019 U.S. Dist. LEXIS 160593 at *13 (S.D. Ind. Sept. 20, 2019).

“will continue to serve as a sanction and general deterrent, appropriately recognizing the seriousness of Mr. Gray’s conduct. But further incarceration is not needed to deter Mr. Gray from further offenses.” *Id.* at *12-13.

32. In short, the Section 3553(a) factors weigh in favor of the requested reduction in sentence and release of Mr. Ebbers. Any lingering concerns can be addressed by appropriate conditions of release.

C. Extraordinary and Compelling Reasons Warranting a Reduction in Sentence

33. Ebbers set forth 3 extraordinary and compelling reasons for the reduction in sentence in his Motion. *See* Docket # 350 at pp. 13-25, ¶¶ 40-71.

34. It bears noting again that the Sentencing Commission’s Policy Statement § 1B1.13, Application Note 4 “encourages the Director of the Bureau of Prisons to file such a motion [for reduction of sentence] if the defendant meets **any of the circumstances** set forth in Application Note 1”. Ebbers has presented 3 extraordinary and compelling reasons to reduce his sentence. Any one of them is sufficient, standing alone, for this Court to grant Ebbers’ Motion. The combined effect of the reasons provides even greater support for granting the Motion.

1. Age

35. Under § 1B1.13, Application Note 1(B), Age of the Defendant, extraordinary and compelling reasons exist where “[t]he defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging

process and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.”

36. Ebbers meets all of these criteria. The Government acknowledges this when it concedes that the “Age of Defendant” ground “is admittedly the most persuasive aspect of Ebbers’ motion.” *See* Docket # 354 at p. 10. Nevertheless, the Government urges denial of this extraordinary and compelling reason.

37. In opposing this reason, the Government argues that Ebbers “has not demonstrated that ‘he is experiencing a serious deterioration in physical or mental health because of the aging process.’” *See* Docket # 354 at p. 9. Respectfully, Ebbers’ Motion does demonstrate that in its discussion of Mr. Ebbers’ medical ailments. But, more importantly, BOP’s own medical review demonstrates that Ebbers meets this standard.

38. In the Reduction in Sentence Medical Review/Summary conducted by BOP in August of 2019 (*see* Docket # 352.1, Exh. “7” to Ebbers Motion and Docket # 354, Exhibit “C” to Government Response), the following appears:

<i>SECTION II: ELDERLY WITH MEDICAL CONDITION</i>	
Does the inmate suffer from a chronic or serious medical condition related to the aging process or is experiencing deteriorating physical (or mental) health that substantially diminishes his/her ability to function in a correctional facility?	
YES <input checked="" type="checkbox"/>	NO <input type="checkbox"/>
Can the BOP provide conventional treatment that can substantially improve the inmate’s mental or physical condition?	
YES <input type="checkbox"/>	NO <input checked="" type="checkbox"/>

39. BOP's answer to the first question definitively demonstrates that Ebbers is experiencing a serious deterioration in physical or mental health because of the aging process. BOP's answer to the second question demonstrates that Mr. Ebbers' condition will not improve, but only worsen. The Government's assertion that Ebbers has not demonstrated satisfaction of Application Note 1(B)'s standards wholly ignores these findings by BOP's medical staff.

40. In light of Ebbers' recent transfer to the "Lubbock Unit", an inpatient unit with 24-hour nursing care, there is even further evidence before the Court that Ebbers is experiencing a serious deterioration in physical or mental health because of the aging process.

41. Importantly, if the Court finds that Ebbers satisfies Application Note 1(B), Age of the Defendant, it does not have to engage in further consideration of whether Mr. Ebbers can adequately provide self-care within a correctional facility. That question only has bearing under Application Note 1(A), discussed below. Again, it is Ebbers' position that he can satisfy both standards, particularly in light of his recent transfer to an inpatient unit with 24-hour nursing care. But he need not satisfy the higher burden of Application Note 1(A) because he has demonstrated an extraordinary and compelling reason under Application Note 1(B).

2. Medical Conditions

42. As shown above, the BOP acknowledges that Ebbers is suffering from a serious deterioration in physical or mental health because of the aging process and that this substantially diminishes his ability to function in a correctional facility. Nevertheless, BOP found that Ebbers is able to perform instrumental activities of daily living. It is on this factor that the Government lodges its chief opposition to the medical grounds Ebbers cites in support of his Motion. *See* Docket # 54 at pp. 8-9.

43. To begin, much of the Government's argument regarding medical issues is undercut by the recent change in Ebbers' status at FMC Forth Worth, recounted above. Ebbers has been moved from a "normal housing unit" without nursing care to an inpatient unit with 24-hour nursing care. Ebbers will not have a work assignment in the new unit. The Government makes much of the fact that Ebbers had a "job" in his former unit. Though the details of what that job actually entailed are lacking, the point has been mooted by his transfer to a more restrictive medical unit where he does not have a job.

44. Even before this change in units, there are many activities that Ebbers could only do with assistance. *See* Docket # 354, Government Exhibit "E". Performing an activity with assistance is not the same as providing self-care, which is the touchstone of the analysis under Application Note 1(A). Further, the more recent encounters demonstrate that Ebbers was not faring well in the custodial setting. Government Exhibit "F" notes that

other inmates recently reported that Ebbers was wearing his shirt as pants, wandering into the wrong room, getting into the wrong bed, and was confused about the time.

45. The change in units was foreseen by staff of FMC Ft. Worth as something that would drastically affect Ebbers' ability to function in a custodial setting and provide self-care. In Government Exhibit "G", the Warden wrote: "[I]f the inmate was put into an unfamiliar area and his ADL assessment was redone he would be **more dependent if not totally dependent on someone else.**" (emphasis added). That has now happened. To the extent that Mr. Ebbers was able to perform some aspects of self-care in custody, the change in his unit will, in the estimation of those in charge of his daily care, make him more dependent or totally dependent on the assistance of others. Again, this is not providing self-care as contemplated by Application Note 1(A).

46. The circumstances of Mr. Ebbers' medical conditions and his resulting ability to provide self-care are similar to those in other cases where courts have granted compassionate release. *See United States v. Johns*, 2019 U.S. Dist. LEXIS107850 (D. Ariz. June 27, 2019) (81 year old suffering from severe heart disease, including 35% ejection fraction, along with other conditions granted release after serving 23 years of life sentence for multiple serious drug offenses); *United States v. McGraw*, 2019 U.S. Dist. LEXIS 78370 (S.D. Ind. May 9, 2019) (72 year old inmate with limited mobility, diabetes, kidney disease, Hepatitis C, and other issues released after serving 17 years of life sentence for conspiracy to possess with intent to distribute methamphetamine); *United States v.*

Peterson, 2019 U.S. Dist. LEXIS 93480 (E.D.N.C. June 4, 2019) (80 year old inmate with dementia, leg amputation, glaucoma, coronary artery disease, and other conditions granted reduction of 132 month sentence following service of 91 months for conviction of possession with cocaine base with intent to distribute and discharge of firearm in furtherance of drug trafficking, a serious crime of violence); *United States v. York*, 2019 U.S. Dist. LEXIS 119768 (E.D. Tenn. July 18, 2019) (60 year old wheelchair bound inmate with congestive heart failure, kidney failure, diabetes, and other conditions released following 73 months of 106 month sentence for multiple drug offenses and Social Security fraud).

47. In summary, based upon the record before the Court even before the transfer to the new unit that occurred this week, Ebbers demonstrated extraordinary and compelling reasons for release under Application Note 1(A). With his recent change in status to a new unit with which he is not familiar—an inpatient unit with 24-hour nursing care—Ebbers can make that demonstration more forcefully. Ebbers’ medical conditions and their impact on his ability to provide self-care warrant the reduction in sentence requested in the Motion.

3. Judge Barbara Jones’ Support of Ebbers’ Release from Prison

48. As noted in the Motion, Hon. Barbara Jones, the retired federal judge who sentenced Ebbers, supports his Motion and his release from prison. Ebbers cites this nearly unprecedented fact as another extraordinary and compelling reason in support of his Motion.

49. In conclusory fashion, the Government declares that Judge Jones' letter is not an extraordinary and compelling reason that this Court can consider. *See* Docket # 354 at p. 11. The Government does not respond to Ebbers' comparison of this unique scenario to the similarly unique scenario in the *Cantu* case, where the Court found that the Government's support of the inmate's release was extraordinary and compelling.

50. Instead, the Government chiefly complains that Judge Jones' letter should be given no weight because "she was well aware of and considered Ebbers' cardiac-health related issues" when she imposed the sentence. *See* Docket # 354 at p. 11. But this position conflicts with Sentencing Commission Policy Statement § 1B1.13, Application Note 2, which provides that "an extraordinary and compelling reason need not have to be unforeseen at the time of sentencing in order to warrant a reduction in the term of imprisonment." Simply put, just because Judge Jones was aware of some (though not all) of the medical conditions that support Mr. Ebbers' Motion does not make them irrelevant to Judge Jones' or this Court's assessment of the request for compassionate release.

51. Courts analyzing these types of cases have ruled consistently with Application Note 2 regarding foreseeability of certain medical issues at sentencing. *See United States v. Sotelo*, 2019 U.S. Dist. LEXIS 135051 at *23 (E.D. Pa. Aug. 7, 2019) ("We also follow the Sentencing Commission's guidance we should not be deterred from compassionate release because we sentenced Mr. Sotelo knowing of his cancer."); *United States v. Peterson*, 2019 U.S. Dist. LEXIS 93480 at *5 (E.D.N.C. June 4, 2019).

52. The Government's reliance on the fact that Judge Jones knew of Ebbers' heart condition (which has worsened with time) is misplaced.

53. The Government also highlights that Judge Jones acknowledged at Ebbers' sentencing that she was imposing a *de facto* life sentence. This fact has no bearing on the importance to be placed on Judge Jones' letter or the questions before this Court. As demonstrated above, multiple inmates have been relieved of life sentences or lengthy prison terms under the compassionate release laws. To the extent that this statement of Judge Jones has any bearing, it should be in consideration of whether the objectives of the sentence she imposed have been met. Judge Jones finds that they have. *See* Docket # 350.1, Motion Exh. "1," Letter to Judge McMahon dated 09/03/2019.

54. Another reason why Judge Jones' support for this Motion is extraordinary and compelling is that this Motion would have been assigned to Judge Jones if she was still on the federal bench. *See* Local Criminal Rule 34.1 & Rule 9, Local Rules for the Division of Business Among District Judges, Southern District. In *Cantu*, the court found that the inmate would suffer irreparable harm if he was denied compassionate release despite the extraordinary and compelling fact that the Government did not oppose his release. *United States v. Cantu*, 2019 U.S. Dist. LEXIS 100923 at *13 (S.D. Tex. June 17, 2019). Similarly, Ebbers would suffer irreparable harm if his Motion was not granted under these circumstances, where it is clear that Judge Jones would grant the requested relief if she was still a federal judge.

55. Judge Jones' support of this Motion is both extraordinary and compelling, and perhaps completely unprecedented. It is a truly unique and rare occurrence and cannot be dismissed as easily as the Government wishes. Standing alone or in conjunction with the other grounds cited, it warrants the relief requested in the Motion.

D. Reduction in Sentence Consistent With Policy Statements of the Sentencing Commission

56. Ebbers shows in the Motion how granting the Motion would be consistent with the Policy Statements of the Sentencing Commission. *See* Docket # 350, pp. 25-28, ¶¶ 72-76.

57. With respect to this factor, the Government's only specific opposition is to whether Ebbers' satisfies the Sentencing Commission's Policy Statement § 1B1.13 as to "extraordinary and compelling reasons" to warrant a reduction in sentence. Those arguments are addressed in the section immediately above and will not be repeated here.

58. However, Ebbers notes again that a finding that any one of the extraordinary and compelling reasons is satisfied makes release consistent with the Sentencing Commission's Policy Statement (under Application Note 4). The Government does not dispute the impact of Application Note 4 on the Court's analysis.

59. The only other consideration under the Sentencing Commission's Policy Statement § 1B1.13 is whether Ebbers poses a danger to another person or the community. That question is evaluated under 18 U.S.C. § 3142(g) factors. Ebbers notes in his Motion how those factors show he is not a danger to any person or the public. *See* Docket # 350

at pp. 25-28, ¶ 75. In its Response, the Government does not argue that Ebbers is a danger to any person or the public. So, this factor is conceded by the Government and satisfied by Ebbers.

IV. CONCLUSION

60. As shown in both the original Motion and this Reply, Ebbers satisfies all requirements for relief under 18 U.S.C. § 3582(c)(1)(A). The Motion for Reduction in Sentence should be granted.

For the reasons set forth in the original Motion for Reduction in Sentence and in this Reply, Bernard J. Ebbers respectfully requests that this Court GRANT the Motion and order his immediate release from imprisonment under the least restrictive conditions available under law. Mr. Ebbers prays for any further or additional relief to which he may be entitled in the premises.

RESPECTFULLY SUBMITTED this the 11th day of October, 2019.

BERNARD J. EBBERS

BY: /s/ Graham P. Carner
GRAHAM P. CARNER

OF COUNSEL:

GRAHAM P. CARNER (MSBN 101523)
Graham P. Carner, PLLC
775 N. Congress Street
Jackson, Miss. 39202
T: 601.949.9456
F: 601.354.7854
E: graham.carner@gmail.com
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I, Graham P. Carner, do hereby certify that I served a true and correct copy of the above and foregoing document by electronically filing same in accordance with this Court's electronic filing procedures, resulting in notice to ALL COUNSEL OF RECORD.

So certified this the 11th day of October, 2019.

/s/ Graham P. Carner
GRAHAM P. CARNER

REPLY
EXHIBIT “1”
CORRESPONDENCE
FROM FMC FT.
WORTH 10/11/2019

SUBMITTED UNDER
SEAL