IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

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| UNITED STATES OF AMERICA<br>*v.*<br>DARRELL THOMAS | Criminal Action No.<br>1:20-CR-296-JPB |

**United States' Sentencing Memorandum**

The United States of America, by Ryan K. Buchanan, United States Attorney, and Tal C. Chaiken and Nathan P. Kitchens, Assistant United States Attorneys for the Northern District of Georgia, and Babasijibomi Moore, Trial Attorney for the United States Department of Justice, respectfully files this Sentencing Memorandum in advance of Defendant Darrell Thomas's sentencing, which is set for May 9, 2022. Defendant pleaded guilty to conspiracy to commit bank fraud and wire fraud in violation of Title 18, United States Code, Section 1349, and money laundering in violation of Title 18, United States Code, Section 1956. As set forth below, the United States submits that a low-end Guidelines sentence of 235 months is sufficient, but not greater than necessary, to comply with the purposes set forth in Title 18, United States Code, Section 3553(a).

**Unresolved Guidelines Issue – Aggravating Role**

For a four-level enhancement to apply, "'section 3B1.1 requires the exercise of some authority in the organization, the exertion of some degree of control, influence, or leadership.'" *United States v. Robaina*, 815 F. App'x 392, 397 (11th Cir. 2020), quoting *United States v. Martinez*, 584 F.3d 1022, 1026 (11th Cir. 2009). Factors that courts consider in analyzing whether a defendant was an organizer or leader include (1) the defendant's exercise of decision-making authority, (2) the nature of the defendant's participation in the commission of the offense, (3) the defendant's recruitment of accomplices, (4) the defendant's claimed right to a larger share of the fruits of the crime, (5) the degree of the defendants' participation in the planning or organization of the offense, (6) the nature and scope of the illegal activity, and (7) the degree of control and authority the defendant exercised over others. *United States v. Shabazz*, 887 F.3d 1204, 1222 (11th Cir. 2018). "The leadership enhancement in § 3B1.1(a) applies even if the defendant led or organized only one person." *United States v. Brackins*, 711 F. App'x 491, 493–94 (11th Cir. 2017).

While Defendant objects to the PSR's *characterization* that he "orchestrated" the Paycheck Protection Program ("PPP") fraud scheme, he does not object to the underlying *facts* that establish his leadership role. Specifically, the undisputed facts in the PSR show that:

(1) Defendant is accountable for fourteen fraudulent loans (PSR, ¶ 147);

(2) Defendant participated in the fabrication of supporting documents for each of the fraudulent PPP loans (*see, e.g.*, PSR ¶¶ 92, 96, 104, 108, 121, 125, 134, 138, 142, 145); and

(3) A significant portion of the proceeds from every fraudulent PPP loan that received funding was sent to accounts that Defendant controlled (*see, e.g.*, PSR, ¶¶ 88, 97, 101, 105, 109, 113–114, 118, 122, 126, 131, 135, 139).

These facts show Defendant's involvement in the planning, organization, and commission of the offense, his claimed right to the largest share of the fruits of the crime, and the scope of his illegal activity.

Indeed, the evidence of Defendant's leadership role is overwhelming. *First*, Defendant directly or indirectly controlled and directed the other participants in the criminal activity. For example, on April 25, 2020, Defendant emailed co-defendant Ricky Dixon with the subject "Re: DParker Holdings Documents" and said "Have the February statement reflect 324k per month payroll." (Ex. 1 at 1.) Dixon responded, "Ok." (*Id*.) Several weeks later, Dixon sent Defendant a fabricated February 2020 bank statement for D Parker Holdings, one of the businesses that obtained a fraudulent PPP loan. (*Id*. at 3.) Per Defendant's instructions, the fabricated bank statement reflected two payroll payments for $162,440.38 each, for a total of $324,880.76 in payroll costs. (*Id*. at 5.) Defendant also directed co-defendant John Gaines to obtain fabricated bank statements for Gaines Reservation and Travel. (*See* Ex. 2 ("I need 6 months states for gaines travel and mrs can you do it just like this one").) Further, Defendant directed an individual who has not been charged to recruit fake employees as part of the scheme. (*See* Ex. 3 at 1 ("I need bodies also doing 1099 for employees and paying 10k once loan closes looking for 100 people they have to be legit.").

*Second*, Defendant controlled and used fake email addresses to communicate with lenders regarding the fabricated PPP loans that were part of the scheme. Records provided by Google show that various fake email addresses were linked by cookies to Defendant's email address, meaning that those fake email addresses were accessed by the same device(s) as Defendant's email address. (*See* Ex. 4.) Google records also show that several fake email addresses were "users" of Defendant's Android device. (*See* Ex. 5 at 1.) Email records also show instances where the fake email addresses received communications from lenders and forwarded them to Defendant. (*See, e.g.*, Ex. 6 at 1–2.)

*Third*, each business that obtained a fraudulent PPP loan sent business documentation to Defendant. (*See, e.g.*, Ex. 7 (examples of business-related information sent to Defendant for three business).) Defendant then fabricated documents to be submitted with each business's PPP loan application, working with co-conspirators, including Teldrin Foster and Jesika Blakely, who sent the fabricated documentation to Defendant when it was complete. (*See, e.g.*, Ex. 8 (examples of emails to Defendant that attached fabricated documents for various businesses).)

That is, the evidence shows that Defendant was the mastermind of and central figure in this criminal scheme, which he does not dispute involved at least five participants. He exercised decision-making authority over all aspects of the scheme, including the fabrication of documents, the submission of information to lenders, and the concealment of the proceeds. These are precisely the circumstances to which a four-level enhancement applies. *See, e.g.*, *United States v. Galindo*, 798 F. App'x 524, 527 (11th Cir. 2020) (four-level enhancement applied where the defendant "exercised decision-making authority, recruited accomplices, claimed the largest share of fraud proceeds, and organized the offense"); *United States v. Stinfort*, 749 F. App'x 860, 863 (11th Cir. 2018) (four-level enhancement applied where the defendant recruited co-conspirators, organized their activities, and received a large portion of the fruits of the crime); *Brackins*, 711 F. App'x at 494 (four-level enhancement applied where the defendant recruited individuals into the scheme and ordered individuals to create false affidavits, email accounts, and fake cell phone bills and where the defendant "enjoyed a large share of the illicit gains from the conspiracy"). The evidence flatly contradicts Defendant's position that he was merely a participant in the criminal activity. (*See* DE 462 at 1.)[1]

**A Guidelines Sentence is Necessary and Appropriate Under Section 3553(a)**

Contrary to Defendant's argument, a sentence of 48 months' imprisonment would not serve the purposes of Section 3553(a). It would not reflect the seriousness of the offense or Defendant's history and characteristics; would not provide sufficient specific or general deterrence; and would create unwarranted sentencing disparities. The Court should impose a low-end Guidelines sentence of 235 months' imprisonment.

**1. The Nature and Circumstances of the Offense.**

Defendant's offense was serious, motivated by personal greed during an unprecedented global crisis. In early 2020, the COVID-19 pandemic sent stock markets crashing and unemployment rates skyrocketing, while nationwide lockdowns ground the economy to a halt. Many American businesses – and in particular, small businesses – struggled to stay afloat as consumer demand plummeted, creating daunting uncertainty for the businesses, their employees, and the families who rely on them. Against that backdrop, Congress passed the PPP as one of the mechanisms for providing relief to small businesses and their

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[1] Defendant's argument raises serious concerns as to whether he fully accepts responsibility for his criminal conduct. *See, e.g.*, *United States v. Tejas*, 868 F.3d 1242, 1248 (11th Cir. 2017) ("[A] defendant who falsely denies relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility"); *United States v. Gonzalez*, 524 F. App'x 557, 562–63 (11th Cir. 2013) (district court properly denied reduction for acceptance where the defendant "failed to truthfully admit his role in the . . . scheme").

employees. To obtain a loan, a business had to certify that the loan would be used to pay for payroll, lease or mortgage interest, or utilities, and the loan was forgivable if the business spent a certain percentage of the loan on payroll costs.

Because Congress's intent was to "provide relief to America's small businesses expeditiously," the PPP streamlined the Small Business Administration's typical lending requirements. Business Loan Program Temporary Changes; Paycheck Protection Program, 85 Fed. Reg. 20811-01 (Apr. 15, 2020). For example, the PPP "allow[ed] lenders to rely on certifications of the borrower in order to determine eligibility of the borrower and use of loan proceeds and to rely on specified documents provided by the borrower to determine qualifying loan amount and eligibility for loan forgiveness." *Id*. These procedures were designed to quickly get much-needed funds to small businesses so they could keep their workers employed during an economic and public health crisis that threatened the viability of many small businesses and their ability to keep their employees on the payroll.

Defendant sought to take advantage of the PPP's streamlined procedures to line his own pockets. Defendant was not a small business owner worried about his employees and the mouths they were responsible for feeding. Rather, he saw in the PPP an opportunity to get free money to use for personal expenses. And he did not just do so on behalf of his own business: Defendant convinced nearly two dozen others – most of whom had never been convicted of a crime – to join his fraudulent scheme. While Defendant enabled these individuals to get free funding for themselves, he also required them to pay him significant sums for his "services," further profiting at others' expense. In addition, not only did

Defendant's actions result in the theft of taxpayer funds administered by the SBA, it also deprived legitimate business owners of the opportunity to obtain funding they desperately needed.

There are several other aspects of Defendant's offense that highlight its seriousness. *First*, Defendant's spending of the fraudulent proceeds he obtained reveals that his motive for committing the crime was greed. For example, he used the stolen funds to purchase multiple luxury vehicles and jewelry. (PSR, ¶¶ 81(S), 93.) Though he now claims that his "intent was to build a property" (PSR, ¶ 154), his spending shows otherwise.

*Second*, Defendant's fraud included at least fourteen fraudulent PPP loans submitted over the course of several months, and still other loan applications that were submitted but not approved. Defendant's offense did not result from a momentary lapse in judgment or a split-second decision made in the heat of the moment. Rather, it was a calculated, methodical offense committed over a period of time.

*Third*, Defendant displayed a significant degree of sophistication in executing the scheme. For example, he used a legitimate payroll company – Rapid Pay Card – to launder the proceeds of the fraudulent PPP loans. By doing so, he created the appearance that the businesses were legitimately spending the loan proceeds on payroll (an approved expense) such that they could attempt to obtain forgiveness of the loan.

*Fourth*, Defendant's offense involved the use of personal identifying information (including names, addresses, social security numbers, and dates of birth) of more than 100 individuals who served as purported "employees" of the businesses and whose names were registered to payroll cards used to launder the fraud proceeds. While it is likely that some of these individuals consented to their personal information being used for *some* purpose, the FBI interviewed one such individual who had not provided his personal information to anyone and had not consented to his personal information being used.

**2. The Defendant's History and Characteristics.**

The Defendant's history and characteristics support a Guidelines sentence. This is not the first time Defendant has committed a massive fraud; it is just the first time he was caught. Specifically, before Defendant orchestrated his PPP fraud scheme, he committed a several million-dollar fraud scheme involving automobile loans, for which he has accepted responsibility as part of his plea in this case. Defendant's years-long involvement in different fraud schemes is a significant factor for the Court's consideration.

The evidence in this case and in the PSR also shows that Defendant had every opportunity to avoid committing this offense and to instead choose the straight-and-narrow path. He is educated, was raised in a loving home devoid of any kind of abuse, and had a supportive family. Defendant's background makes his choice to commit this offense – especially at this scale – inexplicable.

Defendant's apparent remorse and acceptance of responsibility do not warrant a downward variance. Indeed, the Eleventh Circuit has recognized genuine remorse and low likelihood of reoffending as factors that "are usually present in most white-collar cases resulting in a guilty plea." *United States v. Hayes*, 762 F.3d 1300, 1308 (11th Cir. 2014). The Circuit warned, however, that those facts "cannot be seen in a vacuum and must be balanced against the other applicable

§ 3553(a) factors." *Id*. (vacating probationary sentence for white-collar offense as substantively unreasonable). When considered in conjunction with the other Section 3553(a) factors – in particular, the nature and circumstances of the offense and the need to provide just punishment and afford adequate deterrence – Defendant's history and characteristics do not support a non-Guidelines sentence.

Defendant's lack of criminal history likewise does not support a downward variance. As the Sentencing Commission explains, "the lower limit of the guideline range for Criminal History Category I is set for a first offender with the lowest risk of recidivism." U.S.S.G. § 4A1.3, comment. (n.3). Thus, a sentence at the low end of the Guidelines range – which is what the United States recommends in this case – *already accounts for* Defendant's lack of criminal history and his lower risk of recidivism. Indeed, for that reason, the Guidelines expressly *prohibit* "[a] departure below the lower limit of the applicable guideline range for Criminal History Category I." U.S.S.G. § 4A1.3(b)(2)(A) & comment. (n.3). While the Court retains discretion to grant a variance (as opposed to a departure), a downward variance based on lack of criminal history is not appropriate for the same reasons that a downward departure is prohibited.

**3. The Need for Adequate Deterrence.**

A sentence within the Guidelines range is necessary to afford adequate deterrence – both specific and general – and to reflect the seriousness of the offense, promote respect for the law, and provide just punishment for the offense. 18 U.S.C. § 3553(a)(2).

Defendant's conduct in this case reflects the need for specific deterrence. As the facts in the PSR establish, Defendant continued engaging in money laundering activities *after* his arrest in this case. Indeed, Defendant laundered more than $2.48 million through the Rapid Pay Card account after he had been released on bond, leading to the revocation of his bond. (PSR, ¶ 151.) That Defendant continued his criminal activities after being charged with very serious federal offenses and while under Court order not to commit additional crimes shows that a significant sentence is needed to deter him from engaging in criminal activity in the future.

Moreover, the Eleventh Circuit has identified general deterrence as "an important goal of sentencing in a white-collar crime prosecution." *United States v. Kuhlman*, 711 F.3d 1321, 1328 (11th Cir. 2013); *see also United States v. Howard*, 28 F.4th 180, 209 (11th Cir. 2022) ("General deterrence is more apt, not less apt, in white collar crime cases."); *United States v. McQueen*, 727 F.3d 1144, 1158 (11th Cir. 2013) (recognizing that general deterrence is one of the "'key purposes of sentencing'") (citation omitted).

A sentence of 48 months would do little to dissuade Defendant or others from committing a similar crime in the future. To the contrary, a lenient sentence would encourage would-be white-collar offenders to view a prison sentence as part of the cost of doing business. This is especially so where, as is the case here, a significant portion of the fraudulent proceeds is unaccounted for and may be waiting for Defendant to enjoy after he completes his sentence. Nor would a lenient sentence reflect the seriousness of fraudulently obtaining for personal gain more than $11 million intended for struggling small businesses and their employees in the midst of a global crisis. *Hayes*, 762 F.3d at 1308 (collecting cases where the Eleventh Circuit has "set aside sentences of little to no imprisonment" in white collar cases "because they do not constitute just punishment for the offense, do not promote respect for the law, and will not do much to deter similar activity by others"); *see also United States v. Shah*, 476 F. Supp. 3d 619, 623 (E.D. Mich. Aug. 4, 2020) (noting the seriousness of an offense that involved "bilk[ing] the government out of . . . funds that were earmarked to pay for the medical expenses of vulnerable and needy individuals").

As the Eleventh Circuit has recognized, deterrence is especially important in the context of crimes, like Defendant's crime in this case, that "may easily go undetected and unpunished." *See McQueen*, 727 F.3d at 1158–59 (reversing the district court's lenient sentence because it "sap[ped] the goal of general deterrence"); *see also United States v. Engle*, 592 F.3d 495, 502 (4th Cir. 2010) (explaining that because tax evasion offenses are infrequently prosecuted, "[w]ithout a real possibility of imprisonment, there would be little incentive for a wavering would-be evader to choose the straight-and-narrow over the wayward path); *United States v. Heffernan*, 43 F.3d 1144, 1149 (7th Cir. 1994) ("Considerations of (general) deterrence argue for punishing more heavily those offenses that either are lucrative or are difficult to detect and punish, since both attributes go to increase the expected benefits of a crime and hence the punishment required to deter it.").

A recent analysis found that approximately 12.3% of the PPP loans granted to small businesses, totaling $64.2 billion, have at least one indicator of potential fraud. *See* John M. Griffin *et al.*, *Did FinTech Lenders Facilitate PPP Fraud?* (Mar. 15, 2022), available online at https://ssrn.com/abstract=3906395 (last visited May 4, 2022). And because of the sheer number of PPP loans as well as the streamlined documentation necessary to obtain them, the United States is unlikely to detect and/or to prosecute most individuals who obtained fraudulent PPP loans. The need for general deterrence is therefore significant in this case. Simply put, the sentence that Defendant asks the Court to impose would signal to others considering engaging in white-collar crime that there is a significant benefit to be gained and little to be lost by committing the offense. A below-Guidelines sentence would undermine, rather than promote, Section 3553(a)'s purposes.

**4. The Sentencing Commission's Policy Statement.**

"In deciding a sentence, district courts should consider the policies behind the applicable guidelines provision." *United States v. Crisp*, 454 F.3d 1285, 1291 (11th Cir. 2006); *see also* 18 U.S.C. § 3553(a)(5) (directing district courts to consider the Sentencing Commission's policy statements). For fraud-related offenses, the Sentencing Commission has explained that "along with other relevant factors under the guidelines, loss serves as a measure of the seriousness of the offense and the defendant's relative culpability and is a principal factor in determining the offense level under [U.S.S.G. § 2B1.1]." U.S.S.G. § 2B.1.1, comment. backg'd. The Sentencing Commission's policy statement supports imposing a Guidelines sentence in this case, where Defendant's Guidelines are based largely on the amount of loss attributable to his offense and on sentencing enhancements that indisputably apply to his conduct.

**5. Unwarranted Sentencing Disparities.**

A Guidelines sentence would not create unwarranted sentencing disparities. No other defendants who the Court has sentenced were similarly situated to Defendant. Each of the defendants who have been sentenced were individual businessowners who obtained loans for their businesses, or recruiters who recruited a businessowner to participate in the scheme. None of those defendants played the role that Defendant played in the scheme, as described above. While it is true that Defendant's Guidelines range is "drastically higher than any other sentence received thus far by [Defendant's] co-defendants" (*see* DE 462 at 3), those co-defendants were each responsible for participating in *one* fraudulent PPP loan. Defendant, on the other hand, orchestrated the entire scheme and is responsible for *fourteen* fraudulent PPP loans. Where the Court has generally sentenced other defendants to the low-end of their applicable Guidelines ranges,[2] a downward variance of 187 months for Defendant would create unwarranted sentencing disparities.

**6. The Need to Provide Restitution.**

The need to provide restitution does not weigh against imposing a Guidelines sentence. As an initial matter, the Eleventh Circuit has rejected the argument that a large restitution award warrants a shorter custodial sentence. *See Crisp*, 454 F.3d at 1291 (explaining that shortening a defendant's sentence "in order to increase the time for the defendant to earn money to pay restitution" would turn the Sentencing Commission's policy on its head because it would mean that the more loss a defendant inflicts, the shorter their sentence). Moreover, the evidence shows that Defendant is unlikely to pay restitution because Defendant has engaged in a pattern of putting assets in others' names, presumably to avoid their seizure or collection from him. While Defendant's restitution obligation is significant, the need to provide restitution does not outweigh Section 3553(a)'s other considerations – especially when considered in the context of the

[2] Defendant Charles Hill received a sentence of five years' probation, with 27 months of home confinement, because of his rare and incurable medical condition.

unlikelihood that Defendant will pay restitution – and does not warrant a downward variance.

**Conclusion**

For these reasons, the United States respectfully requests that the Court deny Defendant's request for a downward variance and impose a sentence at the low end of the applicable Guidelines range.

Dated: May 4, 2022.

Respectfully submitted,

RYAN K. BUCHANAN
*United States Attorney*

Tal Chaiken
TAL C. CHAIKEN
*Assistant United States Attorney*
Georgia Bar No. 273949

NATHAN P. KITCHENS
*Assistant United States Attorney*
Georgia Bar No. 263930

600 U.S. Courthouse
75 Ted Turner Drive SW
Atlanta, GA 30303
404-581-6000; Fax: 404-581-6181

SIJI MOORE
*Trial Attorney, Fraud Section*
*U.S. Department of Justice*

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May 4, 2022

/s/ TAL C. CHAIKEN

TAL CHAIKEN

*Assistant United States Attorney*