UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-20290-CR-BLOOM(s)

UNITED STATES OF AMERICA

vs.

ERIC DEAN SHEPPARD

Defendant.
________________________________/

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S RENEWED MOTION FOR RELEASE PENDING APPEAL

The United States of America, through the undersigned Assistant United States Attorney, hereby opposes the defendant's renewed motion for bond pending appeal, and in support thereof states as follows:

The defendant raises two arguments to request for a second time that he be allowed to remain on bond pending appeal: (1) that the Supreme Court's granting of certiorari in the appeal of *United States v. Kousisis*, 82 F.4th 230 (3d Cir. 2023), raises a substantial question as to the viability of the defendant's wire fraud convictions; and (2) that the Court committed a "debatable" sentencing error in the loss calculation that forms the basis of the sentencing guideline range. Neither issue presents a substantial question for the Court to reverse its prior decision to deny bond pending the defendant's appeal.

The Third Circuit in *Kousisis* rejected the appellants' challenge to their wire fraud convictions that involved a scheme in which they made material misrepresentations about the involvement of "disadvantaged business enterprises" (DBEs) in the construction projects that were funded by a Department of Transportation contracts they were awarded. The Third Circuit rejected the Appellants' argument that the absence of a "true" DBE was not a pecuniary loss to the DOT, explaining that "obtaining the government's money or property was precisely the object of Appellants' fraudulent scheme." *Id.* at 240.

The petition for certiorari posed several questions centered around government contracts. The questions posed included: "[w]hether all contract rights are 'property'" and "[w]hether a sovereign's statutory, regulatory, or policy interest is a property interest when compliance [with such governmental interests] is a material term of payment for goods or services." 2024 WL 750795.

The Supreme Court's review of the *Kousisis* decision does not call into question the Eleventh Circuit's decision in *United States v. Watkins*, 42 F4th 1278 (11th Cir. 2022), or the many cases in which loan fraud, and CARES Act loan fraud in particular, have been prosecuted using the wire fraud statute. The defendant has cited no case that calls into question the applicability of the wire fraud statute in a loan fraud context – where the object of the fraud was to obtain money from the lender, and the defendant fundamentally lied about his businesses' qualifications to receive that money.

The defendant also argues that the Court *debatably* erred in calculating the intended loss under Section 2B1.1 of the U.S. Sentencing Guidelines because it misinterpreted what "intended loss" means under the guidelines. The Court determined the loss amount at sentencing based on the *actual* loss amount, not the *intended* loss. For the purpose of the sentencing guidelines calculation, the Court determined the loss amount to be the amount of the three Paycheck Protection Program loans that the defendant was in fact awarded: the PayPal loan awarded to HM-UP Development Alafaya Trails, LLC ($146,587); the Northeast Bank second draw loan awarded to the same company ($148,397); and the Cross River Bank loan awarded to HM Management and Development, LLC ($148,591). As a result, the total loss amount was in the range of $250,000 to $550,000 and added 12 offense levels to the guidelines calculation, pursuant to U.S.S.G. § 2B1.1(b)(1)(G). There can be no "debatable" error regarding the Court's interpretation of the "intended" loss because the Court did not base the loss amount on any intended loss.

For the reasons set forth here and in the government's response in opposition to the defendant's motion for release from custody pending appeal (DE 245), the Court should deny the defendant's second motion for bond pending appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 11, 2024, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Aimee Jimenez
Aimee C. Jimenez
Assistant United States Attorney