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

UNITED STATES OF AMERICA

v.

DANIEL ERIC JAY

CASE NUMBER
1:20-cr-228-MHC-JKL

Government's Sentencing Memorandum

The United States respectfully files this Sentencing Memorandum in advance of Defendant Jay's sentencing, which is set for June 23, 2023.

Introduction

Defendant Jay was convicted of two crimes: conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349 (the Ponzi scheme), and bank fraud in violation of 18 U.S.C. § 1344 (the PPP loan scheme). In the Plea Agreement, the government agreed to recommend a 3-level role enhancement under USSG § 3B1.1(b) because Defendant Jay managed or supervised criminal activity that involved five or more participants or was otherwise extensive. (Doc. 311-1 ¶ 14). Defendant Jay contends that he should receive only a 2-level role increase under subsection (c). (*Id*.). The PSR recommends 2-levels. (PSR ¶ 134). The government raised a timely objection to that part of the PSR (*id*.) and now offers this brief to explain why it believes that a 3-level increase is appropriate and necessary.

Legal Analysis

The Guidelines call for a 3-level increase "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive." USSG § 3B1.1(b). But the Guidelines permit only a 2-level increase if the criminal activity did not involve five or more participants or was not otherwise extensive. *Id*. § 3B1.1(c). To apply any role enhancement under § 3B1.1, the court must find that the defendant directed at least one other participant. *E.g., United States v. Riveras*, 401 F. App'x 413, 415 (11th Cir. 2010).

Applying the aggravating-role adjustment turns, first, on the *size and scope of the criminal activity* ("five or more participants or was otherwise extensive"), and, second, on the *defendant's particular role in that activity* (defendant was a "manager or supervisor"). By acknowledging that he deserves at least a 2-level role increase, Defendant Jay is conceding that he managed or supervised the criminal activity. (*See* PSR ¶ 134). Thus, the only issue that needs to be resolved is whether the criminal activity involved five or more participants or was otherwise extensive.

A. Determining whether the criminal activity involved five or more participants.

Application Note 1 to §3B1.1 defines a *participant* as "a person who is criminally responsible for the commission of the offense." USSG § 3B1.1, comment. (n.1). Persons who were not convicted or even charged count as participants if they were "aware of the criminal objective" and "knowingly offered their assistance." *United States v. Mitchell*, 295 F. App'x 799, 802 (6th Cir. 2008) (quoting *United States v. Anthony*, 280 F.3d 694, 698 (6th Cir. 2002)); *see also United States v. Hall*, 101 F.3d 1174, 1178 (7th Cir. 1996) ("[J]ust as a party who knowingly assists a criminal enterprise is criminally responsible under principles of accessory liability, a party who gives knowing aid in some part of the criminal enterprise is a 'criminally responsible' participant under the Guidelines.").

In determining whether there were five or more participants, a court may consider all participants (including others who also played a leadership role in the criminal activity), and not just those who were subordinate to the defendant. *United States v. Bingham*, 81 F.3d 617, 629 (6th Cir. 1996). Indeed, "[t]he text of the guideline and its commentary does not require that five of the activity's participants be subordinate to the defendant; it merely requires that the activity involve five or more participants." *Id*.

The defendant, as a criminally responsible person, counts as a participant. *United States v. Walker*, No. 21-14136, 2023 WL 3116545, at *4 (11th Cir. Apr. 27, 2023); *United States v. Marshall*, 976 F.2d 658, 658 (11th Cir. 1992); *see also United States v. Paccione,* 202 F.3d 622, 625 (2d Cir. 2000) ("We note that all of the circuits that have addressed the question have decided that a defendant may be included when determining whether there were five or more participants in the criminal activity in question. . . . We see no reason to depart from this apparent consensus among our sister circuits.").

Courts also count as a participant a person who is deceased at the time of the defendant's sentencing, if that person participated in the criminal activity. *See United States v. Bennett*, 765 F.3d 887, 898 (8th Cir. 2014) ("Clayton participated in the scheme, and his subsequent death simply does not alter that fact. Nor does Clayton's death affect whether [the defendant's] fraudulent scheme was 'otherwise extensive' when perpetrated.").

"Role enhancements are based on all relevant conduct," *United States v. De La Torre*, 621 F. App'x 564, 569 (11th Cir. 2015), "and not solely on the basis of elements and acts cited in the count[s] of conviction," USSG § 3B1.1, intro. comment. "A district court determines the number of participants by tallying the number of individuals involved in the relevant conduct for which the defendant was responsible, including the events surrounding the criminal act." *United States v. Ochoa*, 838 F. App'x 400, 403 (11th Cir. 2020). Relevant conduct includes "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense." USSG § 1B1.3(a)(1)(A); *see also United States v. Lucena-Rivera*, 750 F.3d 43,551 (1st Cir. 2014) (counting as "participants" all individuals who were involved in underlying drug-trafficking activity because that activity "was a necessary precursor to the money-laundering offense of conviction").

B. Here, the criminal activity involved at least 10 participants.

1. Defendant Jay

Defendant Jay was convicted of conspiracy to commit wire fraud in connection with the Ponzi scheme and convicted of bank fraud in connection with the PPP loan scheme. He counts as a participant. *Walker*, 2023 WL 3116545, at *4; *Marshall*, 976 F.2d at 658.

2. Maurice Fayne

Maurice Fayne was convicted of conspiracy to commit wire fraud in connection with the Ponzi scheme and convicted of bank fraud in connection with the PPP loan scheme. Like Defendant Jay, he is criminally responsible for those offenses and counts as a participant. USSG § 3B1.1, comment. (n.1).

3. Mike Sargent

Mike Sargent was convicted of conspiracy to commit wire fraud in connection with the Ponzi scheme. He is criminally responsible for that offense and counts as a participant. *Id*.

4. Mark Sargent

Mark Sargent was charged in the Second Superseding Indictment (Doc. 96) with wire fraud and conspiracy to commit wire fraud in connection with the Ponzi scheme. A grand jury found probable cause to believe that he committed those offenses because it issued a true bill of indictment. *See, e.g., Shaw v. Peach Cnty.,* No. 5:21-CV-00145-TES, 2022 WL 16700385, at *11 (M.D. Ga. Nov. 3, 2022). Mark Sargent counts as a participant even though he died before being convicted of those offenses. *Bennett*, 765 F.3d at 898.

5. Joseph "Joey" Crivelli

and

6. Carrie Capone

Defendant Jay admits that he "recruited Joey Crivilli [sic] and Carrie Capone into this criminal activity and caused them to create phony documents to support his and Fayne's criminal scheme to obtain a fraudulent PPP loan." (PSR ¶ 134). The act of recruiting others to participate in the scheme—by itself—is sufficient for the Court to court to apply a 3-level role enhancement. *United States v. Cunningham*, 537 F. App'x 878, 880 (11th Cir. 2013) ("[T]he 'influence' [defendant] exerted over individuals by recruiting them into the scheme was enough for § 3B1.1(b) to apply."); *see also United States v. Thomas*, 446 F.3d 1348, 1355 n.2 (11th Cir. 2006) (finding no clear error where the defendant received a role enhancement under § 3B1.1(a) based solely on the fact that he recruited others into the conspiracy).

Joey Crivelli is an unindicted coconspirator who was supervised by Defendant Jay in both the Ponzi scheme and the PPP loan scheme. He is a criminally responsible participant. *See* USSG § 3B1.1, comment. (n.1). Text messages and emails recovered from the coconspirators' cell phones and email accounts show the following:

- On October 12, 2019, in furtherance of the Ponzi scheme, Joey Crivelli manufactured fraudulent financial statements for Fayne's sham company, Flame Trucking, and emailed them to Defendant Jay.

- On November 22, 2019, Defendant Jay texted Joey Crivelli's personal bank account information to Fayne, referred to Joey as his "junior partner," and said, "Joey who is going to be working with me."

- On April 4, 2020, Defendant Jay emailed Fayne's signed PPP loan application to Joey Crivelli.

- On April 24, 2020, Defendant Jay again told Fayne that Joey Crivelli was his "junior partner." In addition, Defendant Jay said to Fayne: "Check your Flame Inc email. That's a sample 2 page biz financial statement. I just need the numbers that match w your guy doing their bank statements and Joey can make a final document to sign."

- On April 28, 2020, Defendant Jay emailed Fayne's fraudulent payroll records to Joey Crivelli.

Carrie Capone is an unindicted coconspirator who was supervised by Defendant Jay. (PSR ¶¶ 110-119). Defendant Jay caused and directed Capone to manufacture false documents to support Fayne's fraudulent PPP loan application. (*Id*. ¶¶ 115-118). Capone also falsely represented to United Community Bank that she was a certified public accountant. (*Id*. ¶ 118). She is a criminally responsible participant. *See* USSG § 3B1.1, comment. (n.1).

7. Darron Brown

As part of the Ponzi scheme, the Sargent brothers victimized women that they met through online dating sites such as Match.com and Plenty of Fish.com, betraying the victims' hopes and causing them to suffer emotional harm as well as significant financial losses. (*Id*. ¶ 34). One of those women, E.L., spoke at Mike Sargent's sentencing. Her gut-wrenching story is also detailed in Defendant Jay's PSR. (*Id*. ¶¶ 99-104).

Unindicted coconspirator Darron Brown met with E.L. while Sargent was "dating" her. Brown told federal agents that the purpose of the meeting was "to get money from E.L. for the Fayne Trucking deal." Brown also told federal agents that "[E.L.] gave him approximately $6,000-$7,000 in cash . . . to deposit into Sargent's Bank of America account." Thus, Darren Brown is a criminally responsible participant. *See* USSG § 3B1.1, comment. (n.1).

Brown's participation in the Ponzi scheme is also demonstrated by the following text message that Defendant Jay sent to convicted coconspirator Mike Sargent on November 5, 2017: "I got Darron using Kristian's bond as story for 6k. Any luck for u?" This also shows that Defendant Jay supervised Darron Brown on at least that one occasion.

On May 10, 2019 and June 12, 2019, Defendant Jay forwarded to Ponzi victim S.B. a series of lulling text messages from Darron Brown concerning the Walmart scam. Defendant Jay falsely represented to S.B. that Darron Brown was directly affiliated with Walmart.

Brown's knowledge that "the Fayne Trucking deal" was a Ponzi scheme is demonstrated by the following three text messages that coconspirator Mark Sargent sent to Brown on June 20, 2018:

> **Message #1**
> All you m*****f***ers can rote in hell, after you do 25 to life in prison.
>
> **Message #2**
> "Conspiracy[.]" 15 years fed time. We will die in prison[.]
>
> **Message #3**
> There is NO Walmart[.] Everytime we get to pay day. A problem develops. Truck stolen, wreck, taxes, child support, cousin shot, drugs in Truck, impounded Truck, tax lien that I pay and never gets to state. Mo arrested for other mans guns in Uber.!!! Every week for 4 years we are funding, everytime there's a problem. Everytime more money, we'll fund tomorrow. Every week. Same scam every few days and you and Mike fall for it. No one demands to see proof of anything. Nothing.!!! Just steel more an more money. It's conspiracy, Money laundering, Wire fraud.!!!! God know what else the feds are going to charge all of us with.!!!! Because there is no Walmart deal.!!!!

8. Ganell Tubbs

Ganell Tubbs, a/k/a "Aunt G," is an unindicted coconspirator. She is Fayne's aunt. Fayne caused and directed her to manufacture fraudulent documents for his use in both the Ponzi scheme and the PPP loan scheme. Tubbs is a criminally responsible participant. *See* USSG § 3B1.1, comment. (n.1). Text messages and emails recovered from Fayne's cell phone show the following:

- Tubbs was aware that Fayne had a fake Texas driver's license in the name of Duron Porter.
- On September 9, 2018, Fayne directed Tubbs to tell Ponzi investors to call his cell and ask for Duron Porter.
- On January 22, 2019, Fayne told Tubbs to fill out and submit to NETS Trailer Leasing a fraudulent credit application in the name Duron Porter.
- On March 28, 2019, Fayne sent this text message to Tubbs: "Send me Duron Id the real one."
- On April 4, 2019, Fayne caused and directed Tubbs to manufacture fake financial documents to support a wire transfer.
- On April 22, 2019, Fayne and Tubbs talked about manufacturing fake bank documents. Tubbs said, "Bank statements take time. I have to change each line."
- On April 22, 2019, Fayne directed Tubbs to deposit $10,000 cash into his account at Arvest Bank.
- On May 3, 2019, Tubbs told Fayne that she had been paying $49.95 per month for contract/forms/editing software, but she suggested that Fayne pay it and write it off as business expense.

- On July 17, 2019, Fayne and Tubbs used the "Duron Porter" alias in fraudulent communications with the Federal Motor Carrier Safety Administration, a government agency that regulates the trucking industry.

- On July 22, 2019, Fayne instructed Tubbs on how to create fraudulent trucking documents.

- On August 5, 2019, Fayne told Tubbs to manufacture temporary tags for vehicles using fake VINS and a fake driver's license that he supplied.

- On August 29, 2019, Fayne told Tubbs to prepare a contract for Ponzi investor KTH.

- On April 24, 2020, Tubbs emailed phony Arvest Bank statements to Fayne, and Fayne submitted them to United Community Bank in support of his fraudulent PPP loan application. Fayne represented to United Community Bank that these were the October, November, and December 2019 statements for Flame Trucking's account at Arvest Bank (account # 6977). In truth, however, that account was closed by Arvest Bank on September 17, 2019.

Ganell Tubbs fraudulently obtained a $414,375 PPP loan of her own and was convicted of bank fraud in the Eastern District of Arkansas on December 10, 2020 (Case Number 4:20-cr-193).

9. Tyriece Vaughan

Tyriece Vaughan is an unindicted coconspirator. Fayne used him to distribute the stolen PPP funds to people who were involved in the Ponzi scheme. He is a criminally responsible participant. *See* USSG § 3B1.1, comment. (n.1).

On April 15, 2020, Fayne sent this text message Vaughan: "Hope all is well. Need an account info going to send you 60k for Patrick. 65k for Victor 15k your nfl guy 15k to you, 175k to Jimia if she will sign a cease and desist. No later than a week from today. Oh and 10k for Pablo." Vaughan responded by texting Fayne the information that Fayne needed to send a wire transfer to Vaughan's account at Navy Federal Credit Union. On April 23, 2020, Fayne wire transferred $175,000 of the stolen PPP funds to Tyriece Vaughan's account at Navy Federal Credit Union.

10. Cawanza Wilkins

Cawanza Wilkins is an unindicted coconspirator. Fayne used her to distribute the stolen PPP funds. She is a criminally responsible participant. *See* USSG § 3B1.1, comment. (n.1).

Fayne caused and directed Wilkins to create a sham company called C.R. WILKINS TRUCKING, LLC and register it with the Arkansas Secretary of State on April 22, 2020. That same day, Fayne wired $350,000 of the stolen PPP funds from the account of another sham company, Flame Trucking, to an account controlled by Wilkins. Fayne directed Wilkins to use the money for his personal benefit. Wilkins used approximately $84,000 to purchase custom jewelry for Fayne and $40,000 to pay Fayne's past-due child support. (*See* affidavit in support of seizure warrant, ¶¶ 27-34, Case Number 1:20-mj-361). Wilkins lied to federal agents when they interviewed her on May 11, 2020, falsely claiming that all the money she received from Flame Trucking "was used for the company's payroll."

On April 23, 2020—at Fayne's direction and acting in the name of C.R. Wilkins Trucking, LLC—Wilkins signed contracts to purchase eight trucks from TransAm Trucking for $368,000 and six trailers from Great Dane, LLC for $189,000. Fayne then wire transferred $368,000 of the stolen PPP loan proceeds to TransAm Trucking and wire transferred $189,000 of the stolen PPP loan proceeds to Great Dane LLC.

In sum, the record shows that Crivelli, Capone, Brown, Tubbs, Vaughan, and Wilkins were aware of the criminal objective and knowingly offered their assistance, making them criminally responsible participants under the Guidelines. *See Mitchell*, 295 F. App'x at 802; *Hall*, 101 F.3d at 1178.

C. Determining whether the criminal activity was "otherwise extensive."

If the court finds that the criminal activity involved five or more participants, it would not be necessary for the court to determine whether the criminal activity was also "otherwise extensive." *Walker*, 2023 WL 3116545, at *5 ("[I]n light of the number of participants, establishing that the criminal activity was otherwise extensive [is] unnecessary.").

If, however, this Court determines that the criminal activity did not involve five or more participants, it should, nevertheless, find that a 3-level increase is warranted under § 3B1.1(b) because (1) Defendant Jay admits that he played a leadership role, and (2) the record shows that the criminal activity was otherwise extensive.

"The Sentencing Guidelines do not offer much guidance as to what the words 'otherwise extensive' mean." *United States v. Tomko*, No. CR 04-108, 2005 WL 8161324, at *2 (W.D. Pa. Oct. 7, 2005). Therefore, some judges have turned to the dictionary for guidance:

> The use of the word "otherwise" indicates that the second category, "otherwise extensive," includes factors that are different in kind than the first category, "five or more participants." Webster's Third New Int'l Dictionary 1598 (1986) (defining "otherwise" as "in a different way or manner"). Moreover, the use of the open-ended word "extensive" evinces the Commission's intention that the "otherwise extensive" prong should include a wide-ranging consideration of factors such as geographic scope, duration, and complexity of the criminal enterprise. The relevant definition of this word indicates that numerosity is merely one, but by no means the primary, factor that is commonly considered in determining extensiveness:
>
> > **3a:** widely extended in scope or application: broad in range . . . very complete . . . **b:** widely extended in area . . . extending over a large surface or space . . . **c:** marked by considerable length . . . **d:** large in amount . . . **e:** considerable in number. . . .
>
> *Id.* at 805.

United States v. Anthony, 280 F.3d 694, 702-03 (6th Cir. 2002) (Moore, J., dissenting).

In determining whether the criminal activity was otherwise extensive, the Eleventh Circuit has said that courts should look at "the length and scope of the criminal activity as well as the number of persons involved." *United States v. Holland*, 22 F.3d 1040, 1046 (11th Cir. 1994).

D. Here, the criminal activity was "otherwise extensive."

Here, the length and scope of the criminal activity, the number of criminally responsible participants, and the number of victims all support a finding that the criminal activity was otherwise extensive. The criminal activity lasted over seven years (from March 2013 through May 2020) and resulted in a total loss of more than $4.4 million to the victims, including 19 individual investors who resided in seven different states, a federally insured bank, and the United States Small Business Administration. (PSR ¶¶ 33, 128; Doc. 230 at 7-9).

The Eleventh Circuit has affirmed the "otherwise extensive" finding in cases that involved smaller financial losses to fewer people over shorter periods of time than are involved here. *See, e.g., United States v. Guardarrama-Suarez*, 797 F. App'x 469, 471 (11th Cir. 2019) (finding that the scheme was otherwise extensive because it lasted for over four years, involved approximately $1.7 million in actual losses, and was concealed through cash kickbacks and a shell company); *United States v. Mangano*, 749 F. App'x 910, 913 (11th Cir. 2018) (finding that the scheme was otherwise extensive because it lasted at least three years, resulted in losses exceeding $1 million, involved at least five other criminal participants, and involved the services, either knowing or unknowing, of numerous individuals); *United States v. Sosa*, 777 F.3d 1279, 1301-02 (11th Cir.

2015) (finding that the scheme was otherwise extensive because the defendants recruited patients, falsified medical records, used an outside billing company to submit more than $1 million in false Medicare Part C claims in just over three months, and received tens of thousands of dollars from the fraud).

Conclusion

For these reasons, the government respectfully requests that its objection to PSR ¶ 134 be sustained, and that the Court apply a 3-level role increase.

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CERTIFICATE OF SERVICE

I hereby certify that, on June 6, 2023, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system.

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