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UNITED STATES OF AMERICA

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. ANDREW MARNELL, Defendant.	No. 2:20-CR-00319-RGK <u>GOVERNMENT'S SENTENCING POSITION</u>

Plaintiff United States of America, by and through its counsel of record, the United States Attorney and Assistant United States Attorney Kerry L. Quinn, hereby files its sentencing position for defendant ANDREW MARNELL.

This sentencing position is based upon the attached memorandum of points and authorities; the files and record in this case; and

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such further evidence and argument as the Court may permit at the hearing on defendant's sentencing.

Dated: July 3, 2023

Respectfully submitted,

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/s/
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I. INTRODUCTION

On September 14, 2021, defendant ANDREW MARNELL ("defendant") pled guilty pursuant to a plea agreement [docket no. 38] (the "Plea Agreement") to one count of bank fraud in violation of 18 U.S.C. § 1344(2) and one count of money laundering in violation of 18 U.S.C. § 1957. On January 3, 2022, the United States Probation and Pretrial Services Office ("USPO") filed a Presentence Report [docket no. 49] ("PSR"), proposing a total offense level of 29 under the United States Sentencing Guidelines ("USSG") and calculating defendant's criminal history category ("CHC") at level II. The government concurs in the PSR's guideline calculation except it respectfully asks the Court to impose, in addition to the enhancements recommended in the PSR, a +2 enhancement for the use of authentication feature under USSG § 2B1.1(b)(11)(A)(ii). The government is however moving for a 2-level departure for reasons stated in a separate filing, so the government agrees the total offense level is 29 and the recommended guideline range is 97-121 months, and the government is recommending a low-end 97-month sentence. The government is also seeking restitution in the amount of $5,647,176.

II. STATEMENT OF FACTS

As soon as the federal government declared a national emergency and took action to respond to the COVID-19 pandemic, defendant started scheming to steal relief funds intended to save small businesses from going bankrupt and millions of individuals from losing their jobs. Defendant was one of the first people arrested in this district for pandemic-related fraud, and thus he was one of the first out of the proverbial gate to start defrauding programs designed to provide emergency assistance and relief to those impacted by the pandemic, including owners of small businesses. Defendant was not one of those people. Defendant nevertheless falsely claimed he owned companies that employed numerous people, and he used the fake companies with fake employees to seek more than $10,000,000 in loans through the Paycheck Protection Program ("PPP"), and he sought additional emergency business loans under another emergency loan program called the Economic Injury Disaster Loan program.

A. The PPP Loan Program

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was a federal law that was enacted in March 2020 and designed to provide emergency financial assistance to the millions of Americans who were suffering the economic effects caused by the COVID-19 pandemic. One source of relief provided by the CARES Act was the authorization of up to $349 billion in forgivable loans, through the PPP loan program, to small businesses for job retention and certain other expenses. In April 2020, Congress authorized over $300 billion in additional PPP funding.

In order to obtain a PPP loan, a qualifying business was required to submit a PPP loan application signed by an authorized representative of the business. The PPP loan application required the business, through its authorized representative, to acknowledge the program rules and make certain affirmative certifications in order to be eligible to obtain the PPP loan. In the PPP loan application, the applicant (through its authorized representative) was required to state, among other things, its: (a) average monthly payroll expenses; and (b) number of employees. These figures were used to calculate the amount of money the small business was eligible to receive. In addition, the applicant was required to provide documentation showing its payroll expenses. Once a PPP loan application was received and processed, a lender could approve the loan application and fund the loan using its own money. PPP loan proceeds were required to be used by the business on certain permissible expenses: payroll costs, interest on mortgages, rent, and utilities.

B. The EIDL Program

The Economic Injury Disaster Loan Program ("EIDL") is another program administered by the Small Business Administration ("SBA") that provides low-interest financing to small businesses, renters, and homeowners in regions affected by declared disasters. The CARES Act authorized the SBA to provide EIDL loans of up to $2 million to eligible small businesses experiencing substantial financial disruption due to the COVID-19 pandemic. The qualifying business was required to submit an application that provided information about the number of employees a business employed and business's gross revenues for the 12-month period preceding the disaster. EIDL loan funds could be used for payroll expenses (so long as the applicant did not also receive PPP loans for this purpose), sick leave, production costs, and business obligations, i.e., debts, rent, and mortgage payments.

C. The Offense & Related Conduct: Bank & Wire Fraud

From March 2020 until July 16, 2020, defendant knowingly and with intent to defraud, executed a scheme to defraud PPP lenders and the SBA by using false and misleading pretenses, representations and promises to obtain funds owned and controlled by those lenders and the SBA.

Among the misrepresentations, defendant claimed the fake companies employed numerous people and maintained a large payroll. In fact, as defendant knew, the fake companies were not functioning businesses beyond being registered with the Secretary of State; they did not have employees or any payroll expenses, nor did they conduct any business whatsoever. Rather, they were shell companies whose only purpose was to perpetrate fraud. For all the loans, defendant presented himself as the principal and authorized representative of the fake companies, and at times, he used different names or aliases to apply for PPP loans including: Tyler Lerman, Andrew Maxwell, and Andrew Merrill. Defendant also submitted fake payroll records and identification documents to obtain the loans, including fake passports that included fake seals and other authentication features. An example of a fake passport submitted to a PPP lender as part of the fraud is attached as Exhibit A (redacted in part).

As a result of defendant’s misrepresentations, lenders approved PPP loans to the fake companies and transferred funds via interstate wires to those entities, to accounts defendant controlled. In total, defendant submitted applications for PPP loans in amounts exceeding $10,000,000, and lenders funded nearly $9,000,000 in loans to the fake companies. In addition, Marnell requested EIDL loans from the SBA in the amount of $320,000, and of that amount, $170,000 was funded. Defendant did not use any of the money for authorized payroll expenses or any authorized purpose. Instead, he took the money to Las Vegas and otherwise used it for gambling and gaming activities, as well as for luxury goods.

The government seized numerous items in a search of defendant’s residence on the day of his arrest in July 2020, including a new Land

Rover, a new Ducati motorcycle, Rolex watches, and hundreds of thousands of dollars in cash (defendant was also found in possession of a large amount of methamphetamine, for which he was never charged). The government also seized more than $1.5 million from various accounts defendant maintained, funded with fraud proceeds. In total, after all the seizures and claw backs, a total of $5,647,176 is still outstanding and is the amount the government is seeking in restitution.

III. ARGUMENT

As explained below, the government recommends that defendant be sentenced to a term of 97 months' imprisonment, followed by a five-year period of supervised release, and that the Court order restitution in the amount of $5,647,176 to the entities and in the sub-amounts listed on a schedule to be filed separately under seal.

A. Advisory Sentencing Guidelines

Based on the stipulations in the Plea Agreement and the facts referenced above, the government submits that the following advisory sentencing guidelines apply:

Base Offense Level:	7	USSG § 2B1.1(a)(1)
Fraud loss is greater than $9,500,000 but less than or equal to $25,000,000	+20	USSG § 2B1.1(b)(1)(K)
Sophisticated means	+2	USSG § 2B1.1(b)(10)(C)
Use of authentication feature	+2	USSG § 2B1.1(b)(11)(A)(ii)
$1,000,000 from a financial institution	+2	USSG § 2B1.1(b)(17)
18 U.S.C. § 1957 money laundering	+1	USSG § 2S1.1(a)(1) and (b)(2)(A)

Acceptance of Responsibility	-3	USSG § 3E1.1(a), (b)
Total Offense Level	31	

The government agrees with the USPO in its reasoning for the base offense level and application of the loss and victim enhancements, but the government submits a +2 enhancement for use of an authentication feature should also apply.

Section 2B1.1(b)(11) provides in relevant part that a +2 enhancement should apply "If the offense involved (A) the possession or use of any ... (ii) authentication feature." The Commentary provides: "'Authentication feature'" has the meaning given that term in 18 U.S.C. § 1028(d)(1)," and 18 U.S.C. § 1028(d)(1) further provides: "the term 'authentication feature' means any hologram, watermark, certification, symbol, code, image, sequence of numbers or letters, or other feature that either individually or in combination with another feature is used by the issuing authority on an identification document . . . or means of identification to determine if the document is counterfeit, altered, or otherwise falsified."

Defendant's use of a fake passport to obtain loans in the names of his aliases is a classic example of a case where the "authentication feature" enhancement applies. Defendant used what appears to be an identical copy of his real passport with modifications solely to the name, date of birth, and passport number. He kept every one of the authentication features of the real passport – including the Great Seal of the United States, which is the coat of arms showing a bald eagle bearing an olive branch and arrows, a shield in front of its breast between its outstretched wings, a scroll bearing the motto "E pluribus unum" in its beak, and over its head a cloud-like shape; this seal is used to authenticate documents issued by the United States, including United States passports. The fake passport contained other authentication features as well, including a larger image of a bald eagle in front of a background of an American flag, an excerpt from the United States constitution, logos and insignia of the United States, and other security features.

This is a classic case where defendant used an "authentication feature" as part of the fraud, and the government respectfully submits the +2 enhancement under USSG § 2B1.1(b)(11)(A)(ii) should apply. For reasons set forth in a separate under-seal filing, the government is however recommending a 2-level departure, so the total offense level is still level 29, which is what the PSR recommended, albeit under different reasoning.

B. Analysis of the § 3553(a) factors

The Court should impose a sentence sufficient, but not greater than necessary, to reflect the purposes of sentencing identified in 18 U.S.C. § 3553(a). United States v. Carty, 520 F.3d 984, 991 (9th Cir. 2008). The advisory Guidelines range provides the "starting point and . . . initial benchmark" for this Court's consideration of an appropriate sentence. Molina-Martinez v. United States, 578 U.S. 189, 198 (2016) (quoting Gall v. United States, 552 U.S. 38, 49 (2007)). Although the Guidelines are not binding, they "reflect a rough approximation of sentences that might achieve section 3553(a)'s objectives." United States v. Rita, 551 U.S. 338, 350 (2007).

The government submits that a sentence of 97 months is sufficient but not greater than necessary to comply with the sentencing goals set forth in 18 U.S.C. § 3553(a).

The factors to be considered when imposing sentence, as set forth in 18 U.S.C. § 3553(a), include:

> (1) The nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) The need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct; [and]
>
> (C) to protect the public from further crimes of the defendant . . .
>
> (3) The kinds of sentences available;
>
> (4) [the applicable sentencing guidelines];
>
> (5) [the applicable sentencing guidelines policy statement];
>
> (6) The need to avoid unwarranted sentence disparities among defendants who have been found guilty of similar conduct; and
>
> (7) The need to provide restitution to the victims of the offense.

18 U.S.C. § 3553(a). The factors most relevant to the sentence in this case are as follows:

1. <u>Nature and Circumstances of the Offense</u>

The offense conduct in this case was serious. Defendant began stealing disaster relief funds as soon as the money became available, when the country was grappling with a public health crisis and faced the very real prospect of an economic collapse. Defendant was one of the first people in this district arrested for pandemic-related fraud, and he should be punished commensurate with the zeal he showed in committing fraud and his brazenness in what he did. Put simply, everything in the PPP applications he submitted was fabricated; it was all made up, and he used the stolen money to go to Vegas and gamble it away, and he otherwise entered into risky and ultimately unsuccessful stock market trades – all for his personal gain and amusement. He took advantage of a vulnerable government program in a situation where benefits needed to be pushed out quickly to keep businesses afloat and people working and getting paid, so they could put food on the table and otherwise continue to provide for their families. Defendant stole this money and went to Vegas.

2. Need for Deterrence

For similar reasons the sentence needs to send a deterrent message both to defendant himself and to others who might engage in this type of criminal conduct, whether in this pandemic or another emergency. A significant prison sentence will send a message to people who think about stealing from government benefit programs particularly those that provide emergency aid and are therefore more vulnerable to fraud.

3. Defendant's History and Characteristics

Defendant deserves a sentence of 97 months. This is not a first-time or low-level offender. Defendant has a long history of criminal behavior endangering others. He has numerous arrests and convictions for drunken driving (which appear to be related to both alcohol and drug consumption), hit-and-run accidents he caused while drunk driving, bouncing a check, forging an opioid prescription, and cruelty to animals. As just one example of his callous and cruel behavior, he left a pet German Shepard in a cage to die without water or food – it was found during a welfare check conducted at defendant's apartment after he failed to pay rent or to respond to calls. As the PSR described it, when officers arrived at defendant's apartment: "The open windows revealed a German Shepherd in a small cage; it smelled of feces, and feces was on the floor near the cage. There was no food or water in the dog cage. . . . The dog rattled the cage and whimpered; the outline of the dog's rib bones was visible. Officers let the dog out, and it ran to a bedroom that had two bowls of water, before he drank from a pot of water. The dog was later weighed to be 48 pounds, when it should average 60-75 pounds. Marnell later responded on the phone that he was out of town for four to five days and would be back several days later; he did not want to speak to the officer until then." Defendant has shown no compassion or remorse for the victims of his past crimes, as he repeatedly endangered and harmed other people with his reckless and criminal behavior – drunk driving and otherwise – and he continued to show a lack of compassion and empathy in targeting and victimizing a vulnerable government program designed for victims of a catastrophic pandemic. He deserves a sentence of 97 months.

IV. RESTITUTION

In addition to the period of incarceration, defendant should be ordered to pay restitution to victims. The Mandatory Victim Restitution Act ("MVRA"), 18 U.S.C. § 3663A and § 3664, applies to "an offense against property under this title . . . including any offense committed by fraud or deceit." 18 U.S.C. § 3663A(c)(1)(A)(ii). Under the MVRA, a district court must order restitution in such a case where "an identifiable victim or victims has suffered a . . . pecuniary loss." 18 U.S.C. § 3663A(c)(1)(B). With this statutory background, this Court is required to impose an order of restitution in this case in favor of the victims for the full amount of their losses, without consideration of the defendant's ability to pay. 18 U.S.C. § 3664(f)(1)(A); USSG § 5E1.1. The government is attempting to reach an agreement with defense to the restitution amount, which the government submits is $5,647,176.

V. CONCLUSION

For the reasons set forth above, the government recommends that defendant be sentenced to a 97-month term of imprisonment, a five-year period of supervised release, and ordered to pay restitution in the amount of $5,647,176.

EXHIBIT A

CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER