UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-CR-80157-AHS

UNITED STATES OF AMERICA

vs.

DEREK JAMES ACREE,

Defendant.

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S OBJECTION TO THE PRESENTENCE INVESTIGATION REPORT

The United States, by and through the undersigned Assistant United States Attorney, hereby files its response in opposition to Defendant's Objection to Paragraph 45 of the Presentence Investigation Report ("PSR"). (DE 18). The undersigned Assistant United States Attorney states as follows:

In his objection to the PSR, Defendant Acree acknowledges that the executed plea agreement, although not binding on the Court, provides and holds the defendant accountable for the intended loss of $1,612,555, and as such, contemplates an increase of 16-levels from the applicable base offense level, pursuant to Section 2B1.1(b)(1)(I) of the Sentencing Guidelines (2021) (DE 18, 11 at ¶ 6(b)). Notwithstanding the terms of the plea agreement, the Defendant urges this Court to consider a sentence limited to a loss calculation based on actual loss, that is, $1,262,000. (DE 18). The United States submits that the intent of the Defendant was to benefit himself (and others) with ALL the loan proceeds fraudulently obtained and there is no evidence that the Defendant did not intend to utilize ALL the funds disbursed.

In reliance on the Third Circuit's decision in *United States v. Banks*, 55 F 4th 246, 19-3812, 2022 WL 17333797 (Nov. 30, 2022), the Defendant requests that the Court discount the funds recovered by Flagler Bank, that is, $349,955.00, as those funds were recovered by the financial institution. In *Banks*, the Third Circuit assessed whether a "District Court erroneously applied the intended-loss enhancement to [the defendant's] sentence when the victim suffered $0 in actual losses." *Id.* at *5. In this case, the Defendant intended the disbursement of funds to the beneficiary entity's account, over which he had complete control. The government submits that each of the Defendant's fraudulent act to obtain money represents an intended loss for purposes of establishing his base offense level for sentencing for CARES Act wire fraud. The fact that the financial institution was able to recover the funds should not influence and diminish the consequence that should be accorded based on the Defendant's intent and conduct. Furthermore, the Third Circuit's finding in *Banks* is in direct conflict with the case law in this Circuit and cited herein.

The Eleventh Circuit in *United States v. Patterson*, 595 F.3d 1324 (11th Cir. 2010), pointed out that a defendant "pays the price for the ambition of his acts, not their thoroughness." *Id*. 595 F.3d at 1327. Recently, in *United States v. Moss*, 34 F.4th 1176 (11th Cir. May 20, 2022), the Eleventh Circuit addressed the calculation of intended loss under the Sentencing Guidelines. The Court held that the district court did not clearly err by calculating the defendant's intended loss by using "the amount Moss had billed to Medicare, reduced by 10 percent, which was the court's estimate of the value of the legitimate medical services he had provided." In distinguishing *United States v. Moran*, 778 F.3d 942, 974-45 (11th Cir. 2015) —where the Court held the district court did not clearly err when it found that the amount paid by Medicare, instead of the billed amount, was the intended loss—because (1) the defendants in *Moran* submitted evidence demonstrating that they had been aware of Medicare's lower reimbursement rate *and* had projected future revenue in accordance with that rate, which this defendant did not do; and (2) the district court wide had discretion to include within intended loss "even loss and harm that is unlikely to occur." This

Court should reject the Defendant's Objection to the PSR and impose a term of imprisonment within the applicable guideline level.

As a general rule, the amount of loss under the Sentencing Guidelines is the greater of actual loss or intended loss. *See* United States Sentencing Commission, Guidelines Manual, § 2B1.1 cmt. n. 3(A) (Nov. 2021) ("USSG Manual"); *United States v. Grant*, 431 F.3d 760, 762 (11th Cir. 2005). Actual loss is defined as the reasonably foreseeable pecuniary harm that resulted from the offense and intended loss is defined as the pecuniary harm that was *intended* to result from the offense. USSG Manual § 2B1.1 cmt. n. 3(A)(i)-(ii) (*emphasis added*).

The burden of proving the extent of the loss at sentencing falls squarely on the government and proof of the extent of loss must be accomplished by a preponderance of the evidence. *See United States v. Ndiaye*, 434 F.3d 1270, 1300 (11th Cir. 2006); *United States v. Dabbs*, 134 F.3d 1071, 1082 (11th Cir. 1998); *United States v. Sepulveda,* 115 F.3d 882, 890 (11th Cir. 1997). Once the government "support[s] its loss calculation with reliable and specific evidence," *United States v. Liss*, 265 F.3d 1220, 1230 (11th Cir. 2001) (internal citation omitted), the burden shifts to the defendant to rebut the government's loss calculation.

A sentencing court must include in its calculation any losses caused by "relevant conduct." *United States v. Foley*, 508 F.3d 627, 633 (11th Cir. 2007)(citing *United States v. Hamaker,* 455 F.3d 1316, 1336 (11th Cir. 2006)). Relevant conduct under the USSG includes all acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction. *Hamaker*, 455 F.3d at 1336. The record before this Court contains Acree's guilty plea supported by an executed stipulated factual basis, stipulations in Acree's plea agreement wherein the Defendant agreed to the intended loss amount, and the undisputed facts in the

PSR. (DE 11, 12). Taken together, they support a finding of loss in the amount of $1,612,555. *See United States v. Petrie*, 302 F.3d 1280, 1290 (11th Cir. 2002).

To reap the benefits of the CARES Act provision to small businesses impacted by the COVID-19 pandemic, in March and April 2020, Acree, either individually or in concert with another, and on behalf of various entities, submitted six (6) fraudulent loan applications (three Paycheck Protection Program ("PPP") loans, and three Economic Injury Disaster Loans ("EIDL")). Of the six fraudulent applications, four were approved and funded for an aggregate amount of $1,612,555.[1] With respect to the remaining two loan submissions, the Defendant sought an additional $2.2 million in EIDL proceeds. These two fraudulent applications were denied.[2]

The government notes that this matter was resolved by a negotiated plea and the government sought not to pursue the additional intended loss amount of $2.2M. Seeking a resolution outside of the plea agreement could be construed as adverse to such agreement.

1

Application Date and Loan Type	**Beneficiary Entity**	**Amount Funded**	**Victim**
3/31/2020 - (EIDL)	National Financial Holding Inc.	$509,900.00	SBA
4/3/2020 - (PPP)	National Financial Holding Inc.	$376,300.00	First Home Bank
4/17/2020 - (PPP)	NFH Florida, LLC	$376,400.00	Truist Bank/BB&T
4/20/2020 - (PPP)	National Financial Holding Technology, LLC	$349,955.00	Flagler Bank

2

Application Date and Loan Type	**Beneficiary Entity**	**Amount Sought**	**Intended Victim**
4/14/2020 - (EIDL)	National Financial Holding Inc.	$2,000,000 (Declined)	SBA
4/9/2020 - (EIDL)	Acree & Associates	$200,000 (Declined)	SBA

CONCLUSION

WHEREFORE, based on the foregoing, the United States respectfully requests that the Court deny the reject the Defendant's objection to the PSR.

Respectfully submitted,

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By:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 28, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

By: Robin Waugh
ROBIN W. WAUGH
ASSISTANT UNITED STATES ATORNEY