UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. **Case No. 8:24-cr-317-VMC-AEP**

DAVID ANTONETTI
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DEFENDANT DAVID ANTONETTI'S SENTENCING MEMORANDUM AND MOTION FOR DOWNWARD VARIANCE

David Antonetti pleaded guilty to one charge of wire fraud under 18 U.S.C. Section 1343. Since pleading guilty, Mr. Antonetti has cooperated with the government, provided information on another culpable individual, and accepted responsibility for his actions in this case. Mr. Antonetti has also used the more than seven months he has been incarcerated to reflect, rehabilitate, and prepare for life after incarceration. In light of his cooperation, acceptance of responsibility, personal history, and other circumstances, Mr. Antonetti respectfully files this sentencing memorandum (with accompanying exhibits) and moves for a downward variance from the Sentencing Guidelines.

I. PERSONAL BACKGROUND

A. Early Life and Diagnosis

David Antonetti was born to Vanessa Ortiz and David Antonetti Sr. on September 10, 1996. From a young age, David faced significant challenges. At six years old, he was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) and intellectual behavior issues. These diagnoses made school particularly difficult for David, but with the help of medication, he managed to focus and function well in many aspects of life. Despite being picked on in school because of his disabilities, David remained determined and worked hard to overcome these obstacles.

B. Childhood and Adolescence

David's childhood was marked by perseverance and resilience. He found joy in activities like baseball and dancing, which provided him with a sense of accomplishment and happiness. Although he did not excel in sports, his passion for breakdancing led him to take classes, where he thrived. David's family moved to Hillsborough County from New York when he was 14 years old, which was another significant transition in his life.

David's relationship with his family has been complex. While he has a cordial relationship with his biological father, he is not close with his four siblings on his father's side. Vanessa Ortiz, David's mother, married Luis Morales when David was two years old, and Luis has been David's primary father figure.

C. Education and Early Adulthood

After finishing high school, David pursued his interest in videography at the Art Institute of Tampa. He loved taking photos and creating videos, which allowed him to express his creativity. Unfortunately, a car accident shortly after he got his first car forced him to put college on hold. The burden of car payments led David to work to support himself financially.

David's life took a difficult turn after becoming a father. Despite the challenges, he was overjoyed by the birth of his daughter, Avayah, and has always been there for her. However, his relationship with Avayah's mother ended two years ago, and he has not seen his daughter since she was two years old. This separation has been a source of great pain for David.

D. Mental Health and Personal Struggles

David has faced numerous mental health challenges throughout his life. In addition to ADHD, he was diagnosed with bipolar disorder at the age of seven. He has struggled with depression, high blood pressure, and a hernia. David has been hospitalized under the Baker Act three times due to suicidal behavior, including an attempt to throw himself in front of a moving vehicle and an overdose attempt in 2024. Despite these struggles, David has shown a willingness to seek help. Speaking with a therapist has been beneficial for him, and he is open to counseling. He does not drink or use drugs, and he has never owned any weapons.

E. Community Involvement and Personal Interests

David has always been passionate about helping others. He volunteered with the "Back to School with Susan Valdes" program, providing supplies to public school communities. He also enjoyed participating in activities with the youth group at The Crossing Church. David's strong interest in video production led him to produce music videos successfully, and before his incarceration, he was a productive individual working two jobs.

F. Reflection and Future Aspirations

David's incarceration has provided him with the opportunity to reflect on his actions and the circumstances that led to his involvement in wire fraud. He deeply regrets his actions and is committed to turning his life around. During his time in prison, David has completed multiple assessments and earned certificates of completion, demonstrating his dedication to self-improvement.

Upon his release, David intends to live with his parents and obtain employment in retail. He is determined to rebuild his life and become a positive influence in his daughter's life and the community. With the right support, David is capable of overcoming his past mistakes and contributing positively to society.

David Antonetti's life story is one of resilience and perseverance in the face of significant challenges. His struggles with mental health, family dynamics, and personal setbacks have shaped his journey. Despite these obstacles, David has shown a commitment to self-improvement and a desire to make amends for his past actions. With the Court's understanding and support, David has the potential to turn his life around and become a valuable member of the community. *See also* Ex. A (Letters of Support).

II. MEMORANDUM OF LAW

Mr. Antonetti respectfully objects to paragraphs in the Presentence Report (PSR) that result in unwarranted offense-level increases as well as a higher restitution amount. In addition, Mr. Antonetti moves for a downward variance based on numerous factors under 18 U.S.C. § 3553(a).

A. Mr. Antonetti's Objections to the Presentence Report (Doc. 56)

1. <u>The Court need not rule on objections that would not affect Mr. Antonetti's Guidelines range.</u>

In his objections to the initial PSR, Mr. Antonetti objected to numerous paragraphs that have no effect on the Court's final calculations of Mr. Antonetti's Guidelines range. *See* (Doc. 56 at 31–35). Under Federal Rule of Criminal Procedure 32(i)(3)(B), the Court may determine that ruling on an objection to the PSR is unnecessary because the objection will not affect sentencing or the Court will not consider the matter at sentencing. Thus, Mr. Antonetti acknowledges that the Court need not rule on his objections to the PSR that would not affect the Court's calculation of Mr. Antonetti's Guidelines range.

2. <u>Mr. Antonetti objects to the PSR's loss calculation.</u>

Paragraph 22 states that the total loss in this matter is $40,407.71. (Doc. 56 at 7). Based on this loss calculation, Paragraph 30 states that a 6-level increase is warranted under Section 2B1.1(b)(1)(D) because the loss was more than $40,000 but less than $95,000. (Doc. 56 at 8). But this loss calculation and corresponding 6-level increase are incorrect.

The indictment charged Mr. Antonetti with two counts of wire fraud under Section 1343. (Doc. 1). The loss amount for each Paycheck Protection Program (PPP) loan charged in the indictment was $20,136. (*Id.* at ¶ 10). Consistent with Mr. Antonetti's plea agreement with the United States, Count Two was dismissed. (Doc. 38 at ¶ 4). In addition, consistent with the plea agreement, the Court entered a forfeiture order for $20,136—which represents Mr. Antonetti's proceeds from Count One. *See* (Doc. 53). What's more, the factual bases to which Mr. Antonetti pleaded guilty stipulates only to the PPP loan charged in Count One. (Doc. 38 at ¶ 11). As a result, the loss amount resulting from Mr. Antonetti's conduct is the PPP loan for $20,136 in Count One.

An instructive decision on this point comes from the Ninth Circuit in *United States v. Igboanugo*, 655 F. App'x 578 (9th Cir. 2016). There, the defendant was indicted on mail and wire fraud charges resulting from a "secret shopper scheme" and a separate "lottery scheme." *Id.* at 579. The defendant pleaded guilty to the "secret shopper" charges, but the "lottery scheme" counts were dismissed. *Id.* At sentencing, the PSR's loss calculation included the loss attributable to the dismissed "lottery scheme" counts. *Id.* The district court adopted the PSR's calculation even though the defendant never admitted to taking part in the "lottery scheme" and those charges were dropped. *Id.* The Ninth Circuit held that the district court erred in adopting the PSR's loss calculation because the district court never found that the defendant participated in the "lottery scheme." *Id.* at 579–80.

Just as in *Igboanugo*, where the defendant did not plead guilty to a separate "lottery scheme" charge, Mr. Antonetti here has not pleaded guilty or admitted any conduct with respect to Count Two. Rather, just as was the case in *Igboanugo*, the separate charge in Mr. Antonetti's case was dismissed consistent with the plea agreement. Without any findings in the record that Mr. Antonetti committed the acts alleged in Count Two, which has been dismissed, the PSR may not include the PPP loan amounts in the loss calculations. *See Igboanugo*, 655 F. App'x at 579–80. Therefore, this Court should sustain Mr. Antonetti's objection to the PSR's loss calculation.

If the Court sustains Mr. Antonetti's objection to the loss calculation, then, using the proper loss amount of $20,136, Mr. Antonetti's Specific Offense Characters under Section 2B1.1(b)(1)(C) should warrant a 4-level increase because the loss was more than $15,000 but less than $40,000.

3. Mr. Antonetti objects to the Stafford Act enhancement.

Paragraph 31 recommends a 2-level increase because the PPP loans at issue were in connection with major disaster or emergency benefits:

> **Specific Offense Characteristics:** If the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels. USSG §2B1.1(b)(12). The conduct described in this federal statute involves fraud in connection with major disaster or emergency benefits. In the instant offense, the defendant knowingly submitted fraudulent applications for the Small Business Administration's Paycheck Protections Program, which was authorized due to the COVID-19 pandemic. Therefore, the offense level was increased by 2 levels.[[1]]

Mr. Antonetti objects to this 2-level increase because it is based on an incorrect application of the Sentencing Guidelines and Section 1040. Tracking the relevant Guidelines and statutory language shows the PSR's error.

Sentencing Guidelines Section 2B1.1(b)(12) states that if the offense involved conduct described in 18 U.S.C. 1040, then the offense level increases by two levels.

[1] (Doc. 56 at 8).

In relevant part, Section 1040 (entitled "Fraud in connection with major disaster or emergency benefits") states the following:

> (a) Whoever, in a circumstance described in subsection (b) of this section, knowingly—
>
> (1) falsifies, conceals, or covers up by any trick, scheme, or device any material fact; or
>
> (2) makes any materially false, fictitious, or fraudulent statement or representation, or makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation,
>
> in any matter involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under Section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191) . . . shall be fined under this title, imprisoned not more than 30 years, or both.[2]

Section 1040(a)'s application to Mr. Antonetti's case requires that the PPP loan funds he received to have been a "benefit authorized . . . transmitted, transferred, or paid in connection with a major disaster declaration" under sections 401 or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act. *See* 18 U.S.C. § 1040(a). Thus, contrary to the PSR's recommendation, whether the PPP loans were paid in connection with a major disaster or emergency benefits is not enough: Under Section 1040(a), the PPP loans had to be paid in connection with a disaster declaration

[2] 18 U.S.C. § 1040(a).

under the Stafford Act. This Court has no evidence before it showing that PPP loans were paid in connection with a disaster declaration under the Stafford Act. *See United States v. White*, 663 F.3d 1207, 1216 (11th Cir. 2011) ("When a defendant challenges the factual basis that the PSR sets forth for his sentence, the burden is on the government to prove the disputed facts by a preponderance of the evidence.").

Relevant statutory text demonstrates how PPP loans were not authorized in connection with a Stafford Act declaration. The PPP loans at issue in this case were issued under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), 15 U.S.C. Chapter 116. Nowhere in the CARES Act does it state that PPP loans were authorized or issued in connection with the President's disaster declaration under the Stafford Act. *See* 15 U.S.C. §§ 9001–9141. Instead, a review of Public Law 116–136 shows that Congress used explicit language referencing the Stafford Act with respect to some COVID-related relief (e.g., Economic Injury Disaster Loans (EIDL loans))—but not PPP loans. *Compare* Sec. 1110(f)(5) (referencing Section 501(b) of the Stafford Act in authorizing EIDL loans) *with* Sec. 1102 (containing no language about the Stafford Act in authorizing PPP loans). Thus, this difference in statutory text shows that Congress intentionally did not authorize PPP loans in connection with a major disaster declaration under the Stafford Act. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted) (cleaned up).

In a recent decision, the Fourth Circuit affirmed the district court's conclusion that PPP loans were not issued in connection with the Stafford Act. *See United States v. Redfern*, Nos. 22-4196, 22-4197, 2023 U.S. App. LEXIS 8314 (4th Cir. Apr. 7, 2023). In that case, the defendant pleaded guilty to conspiracy and fraud charges related to a scheme to defraud COVID-19 relief programs: PPP and EIDL loans. *Id.* at *1–2. At sentencing, the district court concluded that EIDL benefits—but not PPP benefits—were authorized "in connection with" a Stafford Act declaration and applied a two-level enhancement under Section 2B1.1(b)(12). *See Redfern*, 2023 U.S. App. LEXIS 8314, at *9–10. Noting that it had no reason to doubt the district court's analysis, the Fourth Circuit affirmed the two-level enhancement because the district court would have imposed the same sentence even without the Stafford Act enhancement. *See id.* at *10–11.

Redfern provides persuasive authority for this Court to conclude—absent evidence to the contrary—that PPP loans were not authorized in connection with a declaration under the Stafford Act. Therefore, this Court should sustain Mr. Antonetti's objection to this two-level enhancement.

If the Court sustains Mr. Antonetti's objections relating to the loss calculation and the Stafford Act enhancement, the Total Offense Level would be calculated as follows:

Base Offense Level: **7**

Specific Offense Characteristics (Based on loss more than $15,000 but less than $40,000): **4**

Victim Related Adjustment: **0**

Adjustment for Role in the Offense: **0**

Adjustment for Obstruction of Justice: **0**

Adjusted Offense Level (Subtotal): **11**

Chapter Four Enhancement: **0**

Acceptance of Responsibility: **-2**

Total Offense Level: 9

With an offense level of 9 with a criminal history category of III, Mr. Antonetti's Guidelines range would be 8 months to 14 months.

4. Mr. Antonetti objects to the PSR's restitution amount.

Paragraph 102 states that, consistent with Section 3663A, the Court should order restitution for $40,407.71. (Doc. 56 at 21). Mr. Antonetti objects to this restitution amount because it is based on an improper loss calculation. *See infra* at 5–7; *see also United States v. Cavallo*, 790 F.3d 1202, 1239 (11th Cir. 2015) ("Proving actual loss for restitution purposes is largely the same as proving actual loss for Guidelines' loss calculation purposes.") (citation omitted).

"A restitution award under 18 U.S.C. § 3664 must be based on the loss that a victim actually suffers." *Cavallo*, 790 F.3d at 1239 (citations omitted). In this case, the actual loss resulting from the charge to which Mr. Antonetti pleaded guilty is $20,136. Therefore, the Court's restitution order should not exceed $20,136.

B. Mr. Antonetti's Motion for Downward Variance Based on Section 3553(a) Factors

The sentence imposed on a defendant must be sufficient, but not greater than necessary, to comply with purposes set out in 18 U.S.C. Section 3553(a). Mr. Antonetti respectfully moves for a downward variance from the final Sentencing Guidelines range the Court calculates. A concurrent sentence of time served is sufficient must not greater than necessary to achieve the goals set out in Section 3553(a).

1. <u>Nature and circumstances of the offense.</u>

The Court must consider "the nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). The circumstances in which Mr. Antonetti committed PPP fraud as well as his actions to cooperate and assist the government in investigating more culpable individuals counsel in favor of a downward departure.

To begin, Mr. Antonetti was convinced to file PPP loan applications on behalf of his company by an individual who filed applications on behalf of numerous other individuals and their companies. That individual guaranteed Mr. Antonetti that filing a loan would be risk-free: all Mr. Antonetti had to do was allow the individual to take a portion of the PPP loan Mr. Antonetti received. Mr. Antonetti, who has no business training, trusted this individual and agreed to allow that person to submit a PPP loan application on behalf of Mr. Antonetti. Mr. Antonetti has provided information on this individual as part of his cooperation, assistance, and accepting responsibility. Mr. Antonetti takes responsibility for his actions, but the nature of the offense shows that Mr. Antonetti was not the mastermind or initiator of the PPP fraud.

Another mitigating factor that is a part of the nature and circumstances of Mr. Antonetti's offense is the predatory acts done by the company through which Mr. Antonetti's PPP loan applications were filed: Womply. In April 2021—the same time during which Mr. Antontti's PPP loan applications were funded—Womply entered into an agreement with Harvest Small Business Finance to target underserved businesses and workers to access PPP loans using "fast lane" applications. *Womply Partners with Harvest Small Business Finance to Help Underserved Businesses and Workers Access Forgivable Loans Using PPP Fast Lane*, BusinessWire.com (Apr. 20, 2021), https://www.businesswire.com/news/home/20210420005254/en/Womply-Partners-with-Harvest-Small-Business-Finance-to-Help-Underserved-Businesses-and-Workers-Access-Forgivable-Loans-Using-PPP-Fast-Lane.

Using this partnership, Womply targeted small communities, independent contractors, sole proprietors, and self-employed individuals—like Mr. Antonetti, who operated his own music video productions. *See id.* Womply advertised that no credit check was necessary and advised individuals that, if they were unsure whether he or she qualified, to go ahead and start a PPP loan application anyway. *See id.*

Womply's predatory practices finally caught up with them when, in March 2024, the Federal Trade Commission settled a lawsuit against Womply for misrepresentations to small business and individuals like Mr. Antonetti about Womply's PPP loan application and fast-track processes. *Breakdown in the "Fast Lane": FTC challenges Womply's promise to get small businesses PPP loans fast*, FTC.gov (Mar. 18, 2024), https://www.ftc.gov/business-guidance/blog/2024/03/breakdown-fast-lane-ftc-challenges-womplys-promise-get-small-businesses-ppp-loans-fast; *see also* Ex. B (FTC Complaint against Womply). The Court should consider Womply's predatory practice of targeting individuals like Mr. Antonetti a mitigating factor. *See* Ex. C (Application under Womply Letterhead); *see also United States v. Leri*, 849 F. App'x 898, 901 (11th Cir. 2021) (affirming district court's downward variance based on nature and circumstances of the defendant's offense).

2. Mr. Antonetti's history and characteristics.

The Court must consider "the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). For this factor, Mr. Antonetti's mental-health issues as well as childhood troubles counsel in favor of a downward variance.

This memorandum's "Personal Background" section details the struggles Mr. Antonetti experienced because of his mental-health issues. *See infra* at 1–4. Since he was seven years old, Mr. Antonetti has been diagnosed with and treated for various mental-health disorders, including bipolar disorder, ADHD, and depression. Although therapy benefits Mr. Antonetti, he has suffered severely from his mental-health issues. Most notable examples include Mr. Antonetti's three hospitalizations under the Baker Act and overdose attempt just last year. What's more, Mr. Antonetti was bullied and got into fights in school growing up because of other students taunting his disabilities. This history and characteristics of Mr. Antonetti counsel in favor of a downward variance.

Mr. Antonetti's strained relationship with this biological father also counsels in favor of a downward variance based on Mr. Antonett's history and characteristics.

Although Mr. Antonetti speaks with his biological father, they are not close. And Mr. Antonetti has no relationship with his half-siblings on his biological father's side. This strained, distant relationship with his biological father naturally results in behavioral issues for Mr. Antonetti. As a result, this Court should grant a downward variance based on Mr. Antonetti's history and characteristics. *See also United States v. Ferguson*, 942 F. Supp. 2d 1186, 1194 (M.D. Ala. 2013) (granting motion for downward variance based, in part, on defendant's mental-health issues where the defendant pleaded guilty to one count of wire fraud under Section 1343).

3. <u>The need to provide correctional treatment in the most effective manner.</u>

The Court must consider the need for the sentence "to provide the defendant with . . . other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). In this case, the most effective manner for providing Mr. Antonetti with correctional treatment is to allow Mr. Antonetti to continue to serve his substantive state-court sentence concurrently with any sentence this Court imposes.

Mr. Antonetti is currently serving a 20-year state-court sentence. *See* Ex. D. Since his arrest on August 6, 2024, Mr. Antonetti has been using his time incarcerated to rehabilitate, reflect on his actions in this case, and prepare for life after incarceration. For example, Mr. Antonetti has completed numerous courses involving basic classes for business owners, adapting to change, business communication, business ethics, problem-solving basics, strategic decision-making, critical thinking, and dealing with anger. *See* Ex. E. What's more, Mr. Antonetti has used his time incarcerated to reengage with his faith by reading the Bible regularly. Thus, the most effective way to provide Mr. Antonetti with effective correctional treatment is to allow him to continue his rehabilitation concurrently with any sentence this Court imposes. *See also United States v. Traylor*, No. 20-1542, 2021 U.S. App. LEXIS 22765, at *3–4 (6th Cir. July, 30, 2021) (affirming district court's downward variance based on the defendant's rehabilitation efforts).

4. The kinds of sentences available.

The Court must consider "the kinds of sentences available." 18 U.S.C. § 3553(a)(3). In this case, the availability of imposing a federal sentence that runs concurrently with Mr. Antonetti's 20-year state court sentences counsels in favor of imposing a concurrent sentence.

Sentencing Guidelines Section 5G1.3(c) allows for a federal sentence to be imposed concurrently with a state-court sentence. Similarly, 18 U.S.C. Section 3584(a), entitled "Imposition of Concurrent or Consecutive Terms," states: "[I]f a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the terms may run concurrently or consecutively." When determining whether to impose a concurrent or consecutive sentence, the Court considers the factors set forth in Section 3553(a). *See* 18 U.S.C. § 3584(b).

Mr. Antonetti is subject to an undischarged 20-year term of imprisonment for his conviction in *State v. Antonetti*, 2023-CF-14794 (Hillsborough County, Florida). The same factors that counsel in favor of a downward variance also counsel in favor of imposing any federal sentence to run concurrently with his state-court sentence.

Namely, Mr. Antonetti's history of mental-health and family issues, the circumstances surrounding the PPP loan fraud in this case, and his efforts to reflect, rehabilitate, and prepare for life after incarceration counsel in favor of imposing a concurrent sentence in this case. After serving his state-court sentence, Mr. Antonetti will come out a better man ready to be a productive member of society. Thus, the kinds of sentences available counsel in favor of a downward variance for Mr. Antonetti. *See generally United States v. Mihaly*, 67 F.3d 894, 897 (10th Cir. 1995).

III. CONCLUSION

Mr. Antonetti accepts responsibility for his actions in this case. This memorandum provides background on Mr. Antonetti's difficult personal and family circumstances. To ensure an individualized sentence that best accounts for all mitigating factors, Mr. Antonetti asks that the Court exercise its discretion when imposing his federal sentence. Namely, Mr. Antonetti asks that the Court grant his motion for downward variance, impose a sentence at the low-end of the Court's Guidelines calculations after accounting for the downward variance, and order that Mr. Antonetti's federal sentence in this case run concurrently with his non-discharged 20-year state-court sentence. With an incarceration state date of August 6, 2024, the Court's sentence would result in time served for Mr. Antonetti for the instant offense. This sentence would be sufficient and no greater than necessary to reflect the seriousness of Mr. Antonetti's actions.

Respectfully submitted,

/s/ Diego M. Pestana

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on March 10, 2025, a copy of this document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

/s/ Diego M. Pestana
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