IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. JKB-22-232**
	*	
ALEXANDER BARABASH	*	
	*	
Defendant	*	
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THE GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its undersigned counsel, hereby submits the following memorandum setting forth its position on sentencing of Defendant Alexander Barabash. The sentencing is scheduled to proceed on Monday, June 26, 2023, at 12:00pm. On March 24, 2023, the Court accepted Defendant's guilty plea to Count One of the Indictment, which charged him with wire fraud in violation of 18 U.S.C. § 1349. *See* ECF No. 19.

For the reasons explained below, the Government requests that the Court sentence Defendant to (1) a term of 40 months; (2) restitution of $1,295,000, plus interest accrued at the time of sentencing; and (3) a forfeiture money judgment of $1,295,000 in accordance with the Fourth Circuit's holding in *United States v. Blackman*, 746 F.3d 137 (4th Cir. 2014).

I. Factual Background[1]

Between April 2020 and at least February 2021, Defendant defrauded M&T Bank, and the U.S. Small Business Administration ("SBA") of funds through false and fraudulent representations

[1] A more detailed summary of Defendant's conduct is provided in the Stipulation of Facts, Attachment A to Defendant's Plea Agreement. ECF No. 19 at 11-13. For the sake of relative brevity, a shorter summary is provided here.

and promises. More specifically, Defendant exploited the federal Paycheck Protection Program ("PPP"), a federal assistance program authorized by the March 2020 Coronavirus Aid, Relief, and Economic Security ("CARES") Act.

Congress enacted the CARES Act in March 2020 to provide emergency financial assistance to Americans suffering hardships as a result of the COVID-19 pandemic. Through the PPP, small businesses could apply for and receive forgivable loans issued by participating lenders (such as M&T Bank), which small businesses were required to use for retaining employees and other specified, essential business expenses. PPP loans issued by participating lenders were 100% guaranteed by the SBA.

Defendant applied online for three different PPP loans from M&T Bank behalf of his business, iDesignbuild LLC: (1) an April 9, 2020 PPP loan application; (2) an April 25, 2020 PPP loan application; and (3) a January 20, 2021 PPP loan application. On each application, Defendant electronically initialed a clause stating that he understood that knowingly providing false information to obtain an SBA-guaranteed loan is punishable under federal law.

In the April 9, 2020 application, Defendant stated that iDesignbuild had four employees and an average monthly payroll of $18,750. The PPP authorized borrowers to withdraw loans of approximately 2.5 times their monthly payroll. As a result, Defendant received a loan of $46,800, on or about April 23, 2020. The loan funds were disbursed into an M&T Bank account for which Defendant is the sole authorized signer.

In the April 25, 2020 application, just two days after receiving $46,800, Defendant submitted another application, which declared 7 employees and an average monthly payroll of $38,777.60. Defendant also submitted purported 2019 IRS Forms 940 and 941—which he knew were false and never filed with the IRS—in support of these inflated payroll figures. Defendant's application was denied, however, because he had already received a PPP loan for iDesignbuild just two days prior.

In the January 20, 2021 application, Defendant stated that iDesignbuild at 37 employees and an average monthly payroll of $525,227. To support the fraudulent application, Defendant submitted 2019 IRS Forms 940 and 941 that he knew were fabricated and grossly inflated. As a result of the fraudulent misrepresentations, he received a loan disbursement of $1,295,000 on or about February 26, 2021.

Defendant knew at all times that iDesignbuild's average monthly payroll expenses were nowhere close to $525,227. Moreover, Defendant knew that while iDesignbuild retained independent contractors, the business did not have *any* W-2 employees for whom it paid payroll taxes.

After Defendant received the $1,295,000 PPP loan disbursement, Defendant's M&T Bank account contained commingled funds. Despite promising to use the PPP funds on payroll and other authorized business expenditures (such as rent and utilities for business locations), Defendant used significant portions of the commingled funds for unauthorized purposes, such as purchases of a Chevrolet Corvette and real properties for investment. These large purchases could not have been made without the Defendant's receipt of the PPP funds and thus are traceable to fraud proceeds.

II. The U.S.S.G. Guidelines Advise a Sentence of Between 37 and 46 Months for an Individual with Defendant's Final Offense Level and Criminal History Category, and the 18 U.S.C. § 3553(a) Factors Support a Sentence Within that Range.

A. Defendant's Adjusted Offense Level is 21.

The April 26, 2023 Presentence Report ("PSR") correctly calculates Defendant's adjusted offense level under the United States Sentencing Guidelines ("U.S.S.G."), which is **21** for Count

One, Wire Fraud in violation of 18 U.S.C. § 1343, after Defendant's acceptance of responsibility and timely notification of his intention to plead guilty. The base offense level for wire fraud is 7 under U.S.S.G. § 2B1.1(a). Based on the conduct described in the Stipulation of Facts attached to the Plea Agreement, Defendant's fraudulent scheme resulted in a loss of at least $1,295,000 to M&T Bank and the SBA, so the appropriate loss increase is 14 levels under U.S.S.G. § 2B1.1(b)(1)(H). ECF No. 19 at 4. The parties agree that a two-level increase under § 2B1.1(b)(17)(A) is warranted because Defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of his offense; additionally, the PSR correctly states that because the resulting offense level would be 23, under § 2B1.1(b)(17)(D), a further increase to level 24 is warranted.[2] PSR ¶ 26.

According to the PSR, Defendant falls into Criminal History Category I. PSR ¶ 38. Given an offense level of 21, the U.S.S.G. recommends a term of imprisonment between 37 and 46 months.

B. The § 3553(a) Factors Warrant a Significant Sentence Within the Guidelines Range.

Consideration of the factors set forth in 18 U.S.C. § 3553(a) shows that Defendant's sentence should be significant and within the aforementioned guidelines range. Such a sentence would be sufficient, but not greater than necessary, to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). Several relevant factors are discussed below.

i. The nature and circumstances of the offense

There can be no question that Defendant's offense was serious: he enriched himself to the tune of nearly $1.3 million by means of deceitful statements and fabricated documents. What's

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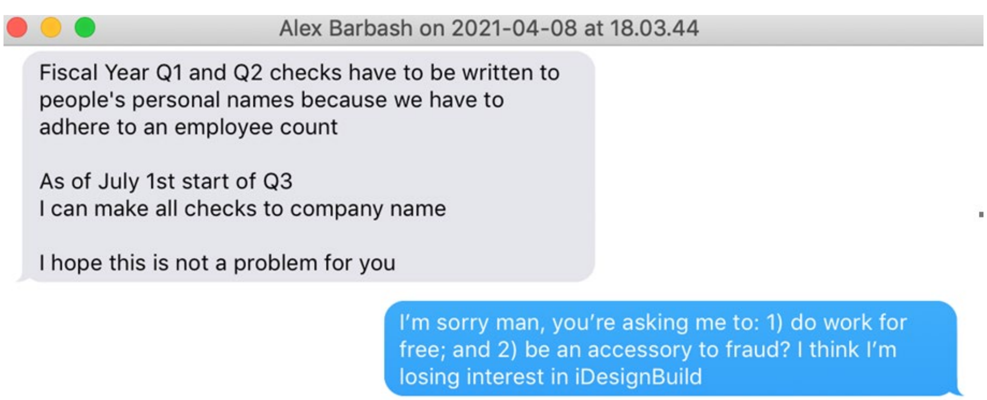
[2] The parties did not account for § 2B1.1(b)(17)(D) in the Advisory Guidelines Stipulation of the Plea Agreement, resulting in an incorrect determination that the adjusted offense level was 20, not 21. ECF No. 19 at 4-5. The Government apologizes for any resulting confusion.

more, Defendant exploited the circumstance of global pandemic in which millions lost their lives, and millions more were thrust into dire economic circumstances. Defendant apparently saw the COVID-19 pandemic as his opportunity to steal more than one million dollars in government funds—funds that were specifically allocated to offset the widespread suffering.

Defendant's fraud on the U.S. government and American taxpayers was not the result of a fleeting lapse in judgment. He took time to learn and understand the PPP application process, ultimately filing three applications in total. He caused fake IRS filings to be created for his company. He manipulated his figures to extract as much money as he possibly could, all while knowing that he did not have *any* W-2 employees and did not pay payroll taxes. Then, he received that money and spent it lavishly, including on a Corvette. This scheme took place over the span of nearly one year.

Importantly, the SBA and M&T Bank were not the only parties impacted by Defendant's fraud scheme. In recent weeks, the Government has received information from an individual named Mike McGuire, who had business dealings with Defendant. Mr. McGuire's company, Balzino Building Co., was retained by Defendant and iDesignbuild as a subcontractor. Mr. McGuire provided the Government a screenshot of a chat conversation with Defendant from April 2021, which is copied below.



According to Mr. McGuire, the screenshot captures an instance in which Defendant insisted upon paying Mr. McGuire in his "personal name," instead of paying the subcontracting company, "to adhere to an employee count." Mr. McGuire's email correspondence with the Government is attached hereto as **Exhibit 1**.

Not only does the exchange with Mr. McGuire show Defendant's guilty state of mind about misrepresenting his number of employees just weeks earlier in the January 20, 2021 PPP loan application, but it also shows Defendant asked others to help him cover up his fraud. In doing so, Defendant implied: *if you want to work with me and get paid, you must be willing to go along with my fraud*. Meanwhile, less than a week before this interaction with Mr. McGuire, on April 2, 2021, Defendant had purchased a Corvette with the proceeds of his fraud. Defendant's conduct at all relevant times was self-serving and in knowing disregard for the law.

ii. Defendant's history and characteristics

Defendant's history and characteristics warrant a sentence within the applicable U.S.S.G. range. Certainly, Defendant has some promising personal characteristics, and his only documented criminal history appears to be a DUI conviction in 2018. Defendant immigrated to the United States with his parents as a young child and became a naturalized United States citizen nearly 40 years ago. His parents left loved ones in Ukraine in search of a better life and opportunities for themselves and their children, and Defendant appears to be the product of a stable upbringing in Maryland. He reports no history of mental or psychiatric illness and no history of mental, emotional, physical, sexual or other abuse. Defendant graduated from high school and attended some college before working and obtaining a license as a general contractor, which has allowed him to make a stable living by legitimate means.

These characteristics may, on one level, show that Defendant has a clear path toward rehabilitation. But, on the other hand, the same characteristics show that Defendant's criminal conduct did not arise from necessity or extreme hardship. There appear to be no extenuating or mitigating factors that diminish Defendant's culpability for his actions. Instead, Defendant simply saw an opportunity to enrich himself by defrauding the financial system and the United States Government. Defendant's history and personal characteristics do not warrant a downward departure from the U.S.S.G. range.

iii. The need for the sentence to reflect the seriousness of the offense, promote respect for the law and provide just punishment.

Although they are not violent in nature, economic crimes, including fraud crimes involving large losses, are nevertheless serious and socially destructive. Moreover, while Defendant's fraud was committed against M&T Bank, the downstream victim is the United States Government, which stepped in to provide stimulus and relief to American small business owners and employees during an unprecedented time of adversity. Though there may be a tendency among some to characterize Defendant's crime as minor, the Court should be aware of the larger problem: on the whole, fraudsters stole an estimated hundreds of billions of the funds allocated by Congress for COVID-19 relief.[3] A guidelines-range sentence is warranted to reflect the magnitude of the problem and promote respect for the law by showing that deliberate fraud against government assistance programs will not be tolerated.

iv. Adequate deterrence to criminal conduct and protection of the public

The Court should further consider the need "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Of particular relevance here, "[i]n enacting § 3553,

[3] *See* Richard Lardner et al, The Great Grift: How billions in COVID-19 relief aid was stolen or wasted, ASSOCIATED PRESS, June 12, 2023, https://apnews.com/article/pandemic-fraud-waste-billions-small-business-labor-fb1d9a9eb24857efbe4611344311ae78.

Congress was especially concerned that prior to the Sentencing Guidelines, major white collar criminals often were sentenced to small fines and little or no imprisonment." *United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009). In addition, general deterrence is particularly important as a sentencing factor in fraud cases because of the consensus view that it can be effective. *See United States v. Martin*, 455 F.3d 1227, 1240 (11th Cir. 2006) ("Because economic and fraud-based crimes are more rational, cool, and calculated than sudden crimes of passion or opportunity, these crimes are prime candidates for general deterrence."); *United States v. Edwards*, 595 F.3d 1004, 1021 (9th Cir. 2010) ("[B]ank fraud, unlike an assault in a tavern or even domestic abuse, tends to be a planned, deliberate crime, which allows plenty of time for reflection, calculation of the odds of success or failure, and the ultimate decision."). Accordingly, the need for deterrence supports a sentence within the U.S.S.G. range.

v. The need to avoid unwarranted sentence disparities.

A key rationale for using amount of loss to calculate U.S.S.G. range was to "eliminate disparities between white- and blue-collar offenders." *United States v. Prosperi*, 686 F.3d 3d, 38 (1st Cir. 2012); *see also United States v. Davis*, 537 F.3d 611 (6th Cir. 2008) ("One of the central reasons for creating the sentencing guidelines was to ensure stiffer penalties for white-collar crimes and to eliminate disparities between white-collar sentences and sentences for other crimes."). Thus, a guidelines sentence in this "white collar" fraud case directly aligns with Congress's stated policy objective of avoiding unwarranted sentence disparities.

vi. The need to provide restitution to victims.

The need to provide restitution to victims further supports the Government's proposed sentence, which includes $1,295,000 in restitution to M&T Bank, the victim that incurred the loss. Pursuant to 18 U.S.C. § 3663A(b):

> **(b)** The order of restitution shall require that such defendant—
> **(1)** in the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense—
> **(A)** return the property to the owner of the property or someone designated by the owner; or
> **(B)** if return of the property under subparagraph (A) is impossible, impracticable, or inadequate, pay an amount equal to—
> **(i)** the greater of—
> **(I)** the value of the property on the date of the damage, loss, or destruction; or
> **(II)** the value of the property on the date of sentencing, less
> **(ii)** the value (as of the date the property is returned) of any part of the property that is returned;

Because a portion of the lost property was spent by Defendant, it is impossible for Defendant to return the property under § 3663A(b)(1)(A). Thus, the Court's order of restitution "shall require" that Defendant pay an amount equal to the value of the loss of property on the date of sentencing (which includes accrued interest), less the value of any part of the property that is returned, in accordance with § 3663A(b)(1)(B).

In this case, the property lost as a result of the Defendant's offense—*i.e.*, $1,295,000 in funds—was not returned to M&T Bank. Although the Government seized a portion of the fraud proceeds before Defendant could use the funds, that seizure does not offset Defendant's restitution obligation. *See, e.g.*, *United States v. Kinney*, 684 F. App'x 73, 75 (2d Cir. 2017) ("A defendant's restitution obligation is not limited to the amount that she has realized from her crime but, rather, extends to the full loss sustained by victims."); *United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000) ("the plain language of the [Mandatory Victims Restitution Act, including § 3663A] did not grant the district court discretion to reduce the amount of restitution required to be ordered by an amount equal to the value of the property seized from [defendant] and retained by the government in administrative forfeiture."). The value of the $1,295,000 loss has appreciated by the amount of the loan interest. Consequently, an order of restitution equal to $1,295,000, plus accrued interest, is required by § 3663A and consistent with the factors outlined in § 3553(a)(2).

More discussion of the restitution and forfeiture issues present in this case is presented below.

III. The Government Seeks a Forfeiture Money Judgment in the Amount of $1,295,000, Which Constitutes the Proceeds Defendant Obtained from His Offense.

Because the Defendant has pled guilty to wire fraud in violation of 18 U.S.C. § 1343, the Government seeks a forfeiture money judgment of $1,295,000 in accordance with 18 U.S.C. § 982(a)(2)(A). [4]

A. Forfeiture in this Case is Mandatory and Separate from Restitution.

"Forfeiture is mandatory even when restitution is also imposed." *United States v. Blackman*, 746 F.3d 137, 143 (4th Cir. 2014). "These two aspects of a defendant's sentence serve distinct purposes: restitution functions to compensate the victim, whereas forfeiture acts to punish the wrongdoer." *Id.* Moreover, the Fourth Circuit joins several sister circuits in rejecting the notion that orders of forfeiture and restitution imposed on the same defendant constitute a "double recovery." *See, e.g.*, *id.* at 143; *United States v. McGinty*, 610 F.3d 1242, 1247 (10th Cir. 2010) ("Because restitution and forfeiture are distinct remedies, ordering both in the same or similar amounts does not generally amount to a double recovery.").

In *Blackman*, the defendant was convicted of conspiring to commit robbery in violation of 18 U.S.C. § 1951(a) and ordered to pay restitution in an amount of $136,601.03, which was equivalent to the proceeds obtained in the offense. *Id.* at 145. The district court denied the government's request for forfeiture in the same amount pursuant to 18 U.S.C. § 981(a)(1)(C) and

[4] The Plea Agreement contemplates the forfeiture and liquidation of specific assets that are in the Government's custody, including $504,869.54 in funds and an item of real property. ECF No. 19 at 7, ¶ 13-14. Additionally, the parties have agreed that "If specific direct or substitute assets are forfeited and liquidated, any net proceeds of the asset shall be applied to the money judgment." *Id.* at 7, ¶ 14.

28 U.S.C. § 2461(c). The Fourth Circuit reversed, holding that the district court erred in withholding forfeiture on the basis of equitable considerations and citing the language of § 2461(c):

> Notably, § 2461(c) (in conjunction with § 981) provides that the district court "shall order" forfeiture in the amount of the criminal proceeds. . . . "The word 'shall' does not convey discretion. It is not a leeway word, but a word of command." *United States v. Fleet,* 498 F.3d 1225, 1229 (11th Cir.2007) (internal quotation marks omitted). The plain text of the statute thus indicates that forfeiture is not a discretionary element of sentencing. Instead, § 2461 mandates that forfeiture be imposed when the relevant prerequisites are satisfied, as they are here. *United States v. Newman,* 659 F.3d 1235, 1240 (9th Cir.2011); *see also United States v.* Torres, 703 F.3d 194, 204 (2d Cir.2012). ***Insofar as the district court believed that it could withhold forfeiture on the basis of equitable considerations, its reasoning was in error.***

Blackman, 746 F.3d at 143 (emphasis added). The *Blackman* court further held that the defendant's lack of adequate assets to satisfy a judgment was not a basis for withholding forfeiture, and the forfeiture order, even in conjunction with the separate and equal restitution order, did not violate the excessive fines clause of the Eighth Amendment. *Id.* at 144-45.

In the instant case, the Government's request for forfeiture arises from 18 U.S.C. § 982(a)(2)(A), not § 981(a)(1)(C) and § 2461(c), as in *Blackman*. *See* ECF No. 1 at 11 (Forfeiture Allegation). Nevertheless, the Fourth Circuit's reasoning applies with equal force here. The relevant statutory language provides:

> (2) The Court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate—(A) section [1343, among others] . . . ***shall order*** that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation.

18 U.S.C. § 982(a) (emphasis added). The words "***shall order***" reflect Congress's intent to negate the Court's discretion to withhold an order of forfeiture when the Government establishes that property constitutes, or is derived from, proceeds of a violation of 18 U.S.C. § 1343. Indeed,

"Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases were the statute applied." *United States v. Monsanto*, 491 U.S. 600, 607 (1989).

The Government has met its burden to show that Defendant derived $1,295,000 from his violation of 18 U.S.C. § 1343, and accordingly, the Government requests a forfeiture order of $1,295,000.

Defendant may argue that because the SBA fully guaranteed the loan issued by M&T Bank, ordering Defendant to pay restitution and a forfeiture money judgment would be duplicative. The SBA's guarantee of the funds does not change the result, however. Defendant defrauded M&T Bank into giving him funds, and consequently, Defendant owes those funds to M&T Bank in restitution. Separately, Defendant must forfeit the proceeds of his fraud to the Government. These are two separate obligations that do not overlap. *See Blackman*, 743 F.3d at 143.

B. Only the Attorney General of the United States has the Authority to Apply Forfeited Assets to Reduce Defendant's Restitution Judgment.

Congress has made clear that only the Attorney General has the authority to determine the disposition of forfeited property—not the United States Attorney's Office or the Court. Forfeited assets are deposited into the Department of Justice's Asset Forfeiture Fund, which serves as the repository for "all amounts from the forfeiture of property under any law enforced or administered by the Department of Justice." 28 U.S.C. § 524(c)(4)(A). According to 18 U.S.C. § 981(d), "[t]he Attorney General shall have sole responsibility for disposing of petitions for remission or mitigation with respect to property involved in a judicial forfeiture proceeding." "A district court has no power to expend the funds of the United States without statutory authority." *United States v. Trotter*, 912 F.2d 964, 966 (8th Cir. 1990).

To be sure, there is a process to request that the Attorney General apply property seized and forfeited from Defendant to the compensation of the victim, namely the restoration process.

In the Plea Agreement, the United States Attorney's Office agreed to recommend such remission and restoration of forfeited assets:

> This Office will recommend to the Attorney General that any net proceeds derived from the sale of any forfeited assets be remitted or restored to eligible victims of the offense, pursuant to 18 U.S.C. § 981(e), 28 C.F.R. Pt. 9, and other applicable law, it being understood that this Office has authority only to recommend such relief and that the final decision of whether to grant relief rests with the Department of Justice, which will make its decision in accordance with applicable law.

ECF No. 19 at 8, ¶ 19. This language represents the extent of the USAO's authority to facilitate application of forfeited assets to compensate victims.

If, in the future, a petition for restoration is granted, the Attorney General will arrange "transfer [of] the net forfeited proceeds of all assets in the case . . . to the clerk of court for distribution pursuant to the restitution order." Dep't of Justice, Asset Forfeiture Policy Manual (2021) at 170. Any such distributions would, in turn, reduce Defendant's outstanding restitution obligations. But Defendant is not entitled to a reduced restitution order based on that future possibility. *See Alalade*, 204 F.3d at 540 (holding that "the plain language of the MVRA did not grant the discretion to reduce the amount of restitution required to be ordered by an amount equal to the value of the property seized from [defendant] and retained by the government in administrative forfeiture."). Consequently, the appropriate restitution order in this case is $1,295,000, plus accrued interest at the time of sentencing, which represents the loss to M&T Bank caused by Defendant's offense.

IV. Conclusion

In conclusion, and for the reasons explained in the above Memorandum, the Government respectfully requests that the Court sentence Defendant to (1) a term of 40 months; (2) restitution of $1,295,000, plus interest accrued at the time of sentencing; and (3) a forfeiture money judgment of $1,295,000.

Respectfully submitted,

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