IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

UNITED STATES OF AMERICA	:	
v.	:	No. 1:22-cr-232-JKB
ALEXANDER BARABASH,	:	
Defendant.	:	

DEFENDANT'S SENTENCING MEMORANDUM

Pursuant to 18 U.S.C. § 3553(a), Rule 32 of the Federal Rules of Criminal Procedure, the United States Sentencing Guidelines ("U.S.S.G."), and this Court's Regular Sentencing Order (D.E. 21), Defendant Alexander Barabash, through undersigned counsel, submits his Sentencing Memorandum.

INTRODUCTION

Alexander Barabash was born in Kiev, Ukraine, and his family fled the Soviet Union when he was a child. With a small amount of money and little more than the clothes on their backs, Mr. Barabash's family came to the United States to be free and to give Mr. Barabash and his sister the best opportunity to succeed. Mr. Barabash became a United States citizen in 1984 and through hard work and perseverance, lived the American dream. After working as a carpenter for ten years, he entered the business of constructing and renovating homes and buying and selling real estate. As a result of his hard work, his company, iDesignBuild, was recognized with numerous home design awards and achieved an exceptional customer service rating. Under Mr. Barabash's leadership, iDesignBuild employed numerous independent contractors and its operations indirectly employed numerous subcontractors and suppliers in the industry.

During the COVID-19 pandemic, iDesignBuild — and the home construction industry in general — faced economic ruin. Business came to a complete stop and manufacturing supplies were frequently unavailable or on back order. Financial obligations to independent contractors and suppliers, however, remained constant. To keep iDesignBuild afloat, Mr. Barabash, with a high school degree and a few college credits, applied for a loan from M&T Bank under the Paycheck Protection Program ("PPP"). Shortly thereafter, M&T Bank's Vice President for Business Banking, Peyton Morin, advised Mr. Barabash that his initial loan request was below what he should have requested. Mr. Barabash quickly made an amended request, but it was denied because the prior loan had already been approved and processed.

When the time came for a second draw of funding, Mr. Barabash mistakenly relied on the assistance of his accountant and tax preparer, Stanley Beers of Beers Tax and Accounting, to ensure that his loan request was not lower than it should have been. Mr. Beers provided Mr. Barabash with documents that grossly exaggerated iDesignBuild's yearly earnings and number of workers. Faced with the loss of his business, Mr. Barabash submitted the documentation provided to him, even though he knew full well that the information was inaccurate and that the related documents for W-2 employees were erroneous, particularly with regard to the withholding of employment taxes. This was not the first time that Mr. Barabash submitted forms indicating W-2 employees, when he had independent contractors, in order to obtain funding during the pandemic. As it applied to the second draw, to the extent that iDesignBuild was ever entitled to any PPP loan funds as an employer of independent contractors, the amount would have been significantly lower than the money received.

Notwithstanding the differences in iDesignBuild's applications, the loans were approved and Mr. Barabash used the PPP funds to keep his company afloat and to pay his independent contractors, subcontractors, and suppliers during the economic downturn. He also used the money to grow his business. Given the company's ineligibility and its use of funds for business expenditures outside the very limited authorized purposes, Mr. Barabash was aware that an audit review would not have permitted forgiveness of the loan. Consequently, he considered the funds to be a loan that would have to be paid back in four years. For him, it kept his company afloat and he anticipated that he would be able to pay the loan back in full in four years.

For these actions, Mr. Barabash's life turned into a nightmare. He will be a convicted felon, a mark that he will carry with him for the remainder of his life and that will affect all of his future business dealings in the industry. Mr. Barabash will be forced to give up the civic rights that he and his family fled the Soviet Union to obtain. He has surrendered his Maryland home builder's license and will be subjected to a large restitution/forfeiture judgment, even after agreeing to forfeit certain personal real property to lower his eventual financial obligation. Most importantly, Mr. Barabash faces a lengthy period of incarceration for his first non-traffic related offense, which could remove him from his family and all those he currently supports, including members of his fiancée's family, who were just able to get visas to the United States and leave war-torn Ukraine, and who will be living with and supported by Mr. Barabash at his home in Arizona. Facing this uncertainty, Mr. Barabash has been working around the clock to meet his financial obligations, and to support his partner's actions in rescuing her family from Russian aggression in Ukraine, just as Mr. Barabash and his family did forty-four years ago. As the Court observed at his plea hearing, Mr. Barabash was moved to tears, not because of the fear of incarceration, but because of the shame that he has brought to his father, who did so much to give him the life he has now.

Upon notice of the Government's investigation and the inception of this case, Mr. Barabash has immediately accepted responsibility for his actions. He has been in 100% compliance with his release conditions, and has not requested additional discovery or required the Government to file a single motion during the pendency of this case. Mr. Barabash has also expressed his willingness to be interviewed as to his dealings with Stanley Beers, his accountant who drafted and signed false documents, and his communications with Peyton Morin, the M&T Bank Vice President who encouraged him to apply for a larger loan amount, both of which could easily be the subject of additional investigation by the Government.[1] To date, no such meeting has been scheduled.

The nature of the specific transactions at issue in this case and the significant mitigating facts and circumstances relating to Mr. Barabash, along with the sentences other courts have imposed on similar defendants for far more egregious conduct, highlight why a sentence of more than three years is wholly inconsistent with the statutory factors and the interests of justice. Even a cursory review of the applicable Sentencing Guidelines in this case — such as, the exorbitant enhancement for an offense involving a bank, when the money distribution and loan were approved by the Government and the draconian increase based simply on the amount of the loan — establishes why a three-plus-year prison sentence (in the midst of criminal justice reform seeking to move away from mass incarceration) for a person who made a terrible mistake during a pandemic does not serve the interests of justice.[2]

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[1] As discussed herein, *infra* at 23-26, the Government has prosecuted individuals who have aided others in the preparation and filing of false PPP loan applications based on false supporting financial and tax documents. Similarly, the Department of Justice is beginning to examine the actions of lenders to evaluate their culpability in PPP related fraud. *See* JD Supra, *Up Next: Lenders May Be the Next Government Focus for PPP Fraud* (Feb. 17, 2023), https://www.jdsupra.com/legalnews/up-next-lenders-may-be-the-next-3913257/, last visited June 12, 2023.

[2] The Attorney General, Merrick Garland has promised to work to reform the criminal justice system and end mass incarceration and was quoted in April 2021 as stating that this "means revamping charging policies to give prosecutors discretion to make charges and consequent sentences proportional to the crime and the damage it does." *See* CNN Press Report,

For all these reasons, Mr. Barabash asks this Court to allow him to remain in the community, to continue to repay his financial debts, and to provide for his family and Ukrainian refugees, rather than be subjected to a lengthy period of incarceration with the Federal Bureau of Prisons ("BOP"), which will diminish his ability to meet his financial obligations and remove him from a family who cares deeply for him and depends greatly upon his assistance.

FACTUAL BACKGROUND

Personal Life and Work Experience

Mr. Barabash was born in Kiev, Ukraine in 1970. When he was nine, Mr. Barabash, his parents, his sister, and his paternal grandparents immigrated to the United States. The family sought to begin a new life in this country and specifically in the State of Maryland. Mr. Barabash embraced his new country and became a United States citizen in 1984, and he still recalls receiving a small American flag to hold during his naturalization ceremony. The Barabash family was a traditional, middle-class household, and Mr. Barabash grew up with the support of two loving parents and an older sister (*see* Ex.1). Photographs of Mr. Barbash's family are below:


Although he did not speak English when he first arrived in the United States, Mr. Barabash tested out of the third grade and worked hard in school. Starting at the age of fifteen, Mr. Barabash

https://www.cnn.com/2021/04/14/politics/merrick-garland-justice-police-daunte-wright/index.html, last visited June 12, 2023.

worked several jobs to save money for his education, such as a bartender, waiter, line cook, and night janitor for a bank. After graduating from Towson Catholic High School, he enrolled in classes at the University of Massachusetts at Amherst and Towson University. Eventually, he obtained a three-year carpentry apprenticeship and began working as a general carpenter. Over time, Mr. Barabash developed his craft and formed a successful business that constructed and renovated homes and bought and sold real estate. Through his hard work and dedication, his most recent company, iDesignBuild, was recognized throughout the Baltimore area, winning numerous building design awards and having outstanding customer reviews.

As set forth in the Presentence Report ("PSR"), Mr. Barabash now resides in Scottsdale, Arizona with his fiancée, Mariia Doroshenko, with whom he has been in a relationship for four years. Also residing in the home are Mariia's brother and his girlfriend, who recently were granted visas due to the ongoing war in the Ukraine. Photographs of Mr. Barbash and Ms. Doroshenko are below:


Ms. Doroshenko's mother and father were also just granted visas, and they too will live with Mr. Barabash and Mariia in Scottsdale. Once Mariia's parents are in the United States at the end of the month, Mr. Barabash plans to officially ask Mariia's father for permission to marry her.

Mr. Barabash and Mariia are now raising two Harlequin Great Danes, who are about to turn one year old, which keep them positive and optimistic for the future during this very challenging time in their lives.

The letters of support from Mr. Barabash's sister Marina and fiancée Mariia further attest to the kind of person Mr. Barabash is:

Marina Barabash (Ex. 1)

> I can characterize my brother as a gentleman; a man of his word that always does what he says he is going to do. He is incredibly self-driven, dependable, realizable, and responsible. . . . I am the older sister by eight years and have watched my younger brother develop into an incredible human being that any sister would be proud of. He is an enthusiastic creative designer, a brilliant builder who has devoted almost three decades to his career. Always puts the needs of others before his own. Rehabilitates weaknesses, praises strengths, and motivates individuals to be the best version of themselves. . . . Over the years whenever our parents would go away for a vacation my brother would be at their home the next day installing, repairing, or building something so upon their return they would come home to a pleasant surprise after their vacation. . . .

Mariia Doroshenko (Ex. 2)

> The Pandemic put a great deal of stress on Alex to keep his company running. He was not worried about himself; his primary concern was for the people that worked for him and to make certain that everyone would continue to receive pay while this unprecedented event continued to negatively develop. . . . In February 2021 Russia invaded Ukraine, where my immediate family lives[.] . . . [A] sign of hope came in the implementation of the Uniting for Ukraine program. Alex immediately owned the responsibility to apply to the Department of Homeland Security as a sponsor so that my younger brother and his girlfriend could leave the war crisis. After a long and initiative-taking dedicated unwavering resolve on Alex's part, my brother and his girlfriend were able to safely arrive in the United States[.] . . . Helping my

> mother and father out of the region has been more complicated. Alex has been an integral part of this labyrinthine process. . . . After a very lengthy, grueling, logistically challenging process my mother and father will finally be flying to the United States[.] . . . I am grateful to Alex for his steadfast commitment, to God, and to this great country of the United States of America for creating the opportunity to make this possible, to save the lives of the people that I love dearly and cherish, and to have our family finally reunited. . . . Alex is unlike anyone I have ever met. He is a brilliant mind, one of the hardest-working people I have ever met, and treats everyone with respect and kindness. Amazing friend, supportive brother, loving son, and hopefully soon-to-be husband and father of our children.

In his own words (*see* **Ex. 3**), Mr. Barabash takes full responsibility and is extremely remorseful for his conduct:

> I worked half of my life to build something to be proud of only to see everything cut down. I made a terrible mistake that I sincerely apologize for, a mistake that I take full accountability for, a mistake I have been paying dearly for every day for almost two years now. . . . I take full accountability, and I apologize for my actions. I had a normal life before the pandemic; committed to my career, went out to dinner, met with my family for lunch almost every Sunday, and now my entire world has turned inside out. I was scared, scared for my business, scared for the wonderful people that worked for and with me. Never would I have been in this situation had this pandemic never occurred, but I stand by my word of full accountability. Now, I am ashamed because so many people are counting on me, and I am letting them all down. I am scared to be introduced to a world I know nothing about and people that I have never interacted with in my entire life.

Since March 2023, Mr. Barabash has been employed with ReBath and Kitchens ("ReBath") located in Scottsdale, Arizona. *Se*e PSR, ¶ 60 (D.E. 22). While the home building market is still recovering in Arizona, ReBath considers Mr. Barabash an integral part in the process of growing their kitchen division and Mr. Barabash hopes to generate sufficient business and commissions that will allow him to make timely and complete resolution of his financial obligations following his sentencing in this case.

<u>The Nature and Circumstances of the Charged Offense</u>

As a result of the COVID-19 pandemic, iDesignBuild, and the home construction industry in general, faced economic ruin. Although business halted to a complete stop and manufacturing supplies were frequently unavailable or on back order, payments to independent contractors and invoices from suppliers remained constant. Mr. Barabash, with a high school degree and a few college credits, sought a PPP loan. On or about April 9, 2020, Mr. Barabash submitted to M&T Bank (where he had banked since 2006 and where iDesignBuild's business checking account was located) an online PPP loan application. The loan application represented that iDesignBuild had four employees and an average monthly payroll of $18,750. On April 23, 2020, a PPP loan of $46,800 was credited to iDesignBuild's business checking account, ending in M&T x3819. Because iDesignBuild engaged independent contractors for various work-related matters, none of the individuals who performed work for the company were IRS Form W-2 employees, and iDesignBuild did not withhold payroll taxes for the individuals. These independent contractors, therefore, did not qualify as employees for purposes of the PPP.

During the loan application process, M&T Bank's Vice President for Business Banking, Peyton Morin, advised Mr. Barabash that his initial loan request was below what he should have requested. Believing he had lost out on approximately $50,000 worth of needed aid during the pandemic, Mr. Barabash electronically submitted a corrected PPP loan application to M&T Bank on behalf of iDesignBuild. The second application represented that iDesignBuild had seven employees and an average monthly payroll of $38,777.60, and was for a $96,944 PPP loan. Mr. Barabash submitted IRS forms signed by him and his tax preparer, Stanley Beers, despite knowing that iDesignBuild had never filed 2019 IRS Forms 940 or 941 with the IRS, as iDesignBuild's employees were independent contractors and not W-2 employees. Ultimately, M&T Bank could not process the second application because the initial loan had already been finalized.

On or about January 20, 2021, Mr. Barabash applied for a second draw of PPP funding for iDesignBuild. The application represented that the company had 37 employees and an average monthly payroll of $525,227, and a PPP loan of $1,295,000 was credited to M&T account x3819 on February 26, 2021. In support of the application, Mr. Barabash submitted additional IRS forms signed by him and Mr. Beers, even though Mr. Barabash knew that his workers were not W-2 employees and the gross earnings had been overstated. As iDesignBuild was ineligible for any PPP funds, the Government contends that any use of the funds in any capacity was inappropriate. Notwithstanding, Mr. Barabash used the funds to pay his independent contractors, suppliers, vendors, and other business expenses, even though many non-salary expenditures were not permitted under the PPP program.

As discussed below, at the time the second PPP loan hit iDesignBuild's bank account, the account already had a balance of $350,000. Additional funds were continuously deposited by iDesignBuild into the account during the period that followed. While there is no dispute that the funds were intermingled and Mr. Barabash would not have been financially comfortable engaging in business transactions without the PPP loans, only one transaction in the Statement of Offense, made on April 30, 2021, included deposited PPP funds. That single transaction resulted in proceeds that were subsequently deposited back into the operating account *five days later*. While not negating criminal liability, it puts into perspective Mr. Barabash's conduct when finding appropriate comparators for sentencing.

In the weeks and months following the disbursement of the loan proceeds to M&T account x3819, Mr. Barabash made several transactions from the account that were not PPP permissible expenditures, such as:

- March 10, 2021, check drawn in the amount of $15,000 to a Title Company for the purchase of real property located at 7 Fila Way, Sparks Glencoe, Maryland 21152;
- March 24, 2021, check drawn in the amount of $25,000 to a Title Company for the purchase of real property located at 14044 Fox Hill Road, Sparks Glencoe, Maryland 21152;

- April 2, 2021, check drawn in the amount of $10,500 to Auto Showroom for the purchase of a 2016 Chevrolet Corvette;
- April 12, 2021, check drawn in the amount of $36,000 to a Title Company for the purchase of real property at 7 Fila Way, Sparks Glencoe, Maryland;
- April 30, 2021, wire transfer in the amount of $435,000 to a Title Company as an advance of funds toward the purchase of real property at 7 Fila Way, Sparks Glencoe, Maryland (paid as security to proceed with the purchase of 7 Fila Way; with the funds later transmitted back to M&T x3819); and
- May 21, 2021, wire transfer in the amount of $170,867.88 to a Title Company for the purchase of real property at 14044 Fox Hill Road, Sparks Glencoe, Maryland.

As part of its business, iDesignBuild bought, renovated, and resold property. The Government claims that the April 2, 2021, check drawn in the amount of $10,500 to Auto Showroom for the purchase of a 2016 Chevrolet Corvette was a gross misappropriation of funds, but the vehicle in question was quickly refinanced, with the valuation above the purchase price, and the proceeds of the refinancing, $83,900, were deposited back into iDesignBuild's business checking account with the PPP funds.

The PPP funds provided to iDesignBuild provided compensation to the various personnel who performed services for the company in 2020 and 2021:

iDesignBuild Personnel — April 1, 2020

Alexander Barabash	Principal
Tivshintugs (Tony) Banzragch	Project Manager (Kitchen and Bath)
Larry Brown	Plumber (Boilers, Steam, Pluming and Gas)
Jeremy Richards	Electrician
Tomas Trojansky	Working Foreman
Filip Braun	Lead Carpenter
Guillermo Moran	Rough Carpentry/Framing
Camillo Williamson	Welding Shop Custom Rail/Stair Fabrication
Oscar Rayes	Painter
Rigeberto Guevara	Painter/Drywall
Saul Hernandez	Hardwood (Installation and Refinishing)
Melissa Williams	Website

iDesignBuild Personnel — January 1, 2021

Alexander Barabash	Principal
Tivshintugs Banzragch	Project Manager (Kitchen and Bath)
Larry Brown	Master Plumber (Boilers, Steamfitter, Plumbing/Gas)
Jonathan Johnson	Master Plumber (Plumbing/Gas)

Henry Hom	Electrician
Jeremy Richards	Electrician
Yee Hyun	Tile and Stone Installer
Tomas Trojansky	Working Foreman
Filip Braun	Lead Carpenter
Mike McGuire	Plumber (Plumbing/Gas)
Charles Redmiles	Lead Carpenter
Ron Baker	Mechanical
Roberto Martinez	Trim Carpenter/Custom Woodworker
Camillo Williamson	Welding Shop (Custom Rail/Stair Fabrication)
Guillermo Moran	Rough Carpentry/Framing
R. George Cochran	Generalist - Home Improvement
Luis Garcia	Generalist - Home Improvement
Dennis Paul Kratz	Carpenter
Rigeberto Guevara	Painter/Drywall
Vlad Risman	Drywall (Hanger/Finisher) and Painter
Oscar Rayes	Painter
Alex Golden	Network/Automation low voltage wiring
Brendon Miles	Lead Carpenter
Peter Sherratt	Wood Shop/Finish Carpentry
Shawn Lee	Exterior Mechanic; Siding and Gutters
Saul Hernandez Hardwood	Installation and Refinishing
Jay Hester	Hardwood and Tile Installation
Joseph Dicarlo	Tile Installation
Clint Lindemer	Generalist - Home Improvement
John Anderson	Hauling, Demolition, Project Clean Up
Raqub Salaam	Hauling, Project Clean Up
Matt Donohue	Carpenter General Helper
Matt Ogle	Carpenter General Helper
Melissa Williams	Website
Glenda Lizeth Reyes	Project Clean Up
Sergei Ivan Randazzo	Demolition/Project Clean Up

The PPP funds provided to iDesignBuild permitted it to meet additional financial obligations to the following vendors, suppliers, and governmental entities in 2020 and 2021:

Amazon Business Prime
Appliances Connection
Atlantic Pest Control
Baltimore County Govt - Permits
Bison Drywall
Bobby's Pottys
Budekes Paints and Stains
Build.com
Cabinet ERA
Capital Pro Lighting
Chesapeake Tile and Marble
Clifton HVAC
Coleman Home Improvement
Computer Kitchen Design
Custom Ink Products
Devere Insulation
eBay
E.L. Façade Masonry
ETSY
Everlong Pest Control
Fast Signs
Granite Bracket Direct
Hajoca Lee Dopkin Supply
Home Depot
Home Systems Appliance Repair
Hunt Valley Tile and Stone

Jones Valley Association
Lowes
Lynn Construction
Maryland Abatement
Maryland Department of Licensing
Michaels Irrigation Services
Mobtown Mechanical Plumbing/Gas
Mirror Crafters
Northwest Refuse Roll-off Services
NW2 Engineers
Ocean Mosaics Tile
Perry Hall Heating and Air Conditioning
Plumb Smart
Preller Properties
Prime Roofing
Property Inspection Pros
Sanitary Landfill
Sherwin Williams Stores
The Roofers of Maryland
Timonium North
TW Perry Lumber Yard
UHAUL
USA Distributor Cabinetry
VistaPrint
Wallace H. Campbell & Co.
Wave Carousel Automation and Integration
Wood Floors Plus

Though Mr. Barabash cannot deny that iDesignBuild received funds it was not entitled to receive, the funds were used primarily to keep workers employed, to keep the business afloat, and to grow the business' property portfolio.[3]

ARGUMENT

I. A SENTENCE BELOW THE GUIDELINES IS WARRANTED IN THIS CASE.

This Court need not send Mr. Barabash to prison, as the statute on which he will be sentenced does not require a mandatory period of incarceration. Based on Mr. Barabash's *de minimis* criminal history, long ties to the community, willingness to forfeit personal property to satisfy any financial judgment in this case, amenability to cooperating in any investigation of bank employees and his former accountant, and demonstrated ability to maintain 100% compliance with his release conditions during the pendency of this case, the Court should vary downward from the Guidelines range and impose a three-year sentence of probation (to include, six months home

[3] The same cannot be said for the thousands of law firms that received PPP funds in a legal market that did not suffer significant declines as a result of the COVID-19 pandemic. *See Law Firms That Received PPP Loans*, https://www.gerbenlaw.com/blog/law-firms-that-received-ppp-loans/, last visited June 12, 2023 (noting that the Small Business Administration and the Treasury Department, "[i]n order to provide transparency," released data that "showcases all the businesses that received more than $150,000 in PPP loans," including a list of "the 14,363 law firms that received PPP Loans, as well as the amount they were given and the jobs they reportedly retained").

confinement and 200 hours of community service) and order a money judgment for the proceeds of the loan received, less the $504,000 already seized by the Government and real property agreed to be forfeited to satisfy any judgment.

A. **Sentencing Discretion and Section 3553(a) Statutory Factors.**

The Guidelines are only advisory despite their mandatory language. *See United States v. Booker*, 543 U.S. 220, 245 (2005). A district court must therefore "consider Guidelines ranges," but is permitted "to tailor the sentence in light of other statutory concerns as well." *Id.* The Supreme Court in *Gall v. United States* outlined the process to follow:

> [A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however. Accordingly, after giving *both parties an opportunity to argue for whatever sentence they deem appropriate*, the district judge should then consider all of the [18 U.S.C.] § 3553(a) factors to determine whether they support the sentence requested by a party. In so doing, he may not presume that the Guidelines range is reasonable. He must *make an individualized assessment based on the facts presented*.

552 U.S. 38, 49-50 (2007) (emphasis added) (citations and punctuation omitted).

Thus, in fashioning an appropriate sentence, this Court must consider the Guidelines along with the other factors set forth in 18 U.S.C. § 3553(a) (*see Booker*, 543 U.S. at 260; *see also*, U.S.S.G.) and treat the Guidelines "as one factor among several" that § 3553(a) requires courts to consider. *See Kimbrough v. United States*, 552 U.S. 85, 90 (2007).

Under 18 U.S.C § 3661, "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence." Further, under 18 U.S.C. § 3582(a), the court, in considering the factors in § 3553(a) and their applicability, should recognize "*that imprisonment is not an appropriate means of promoting correction and* *rehabilitation*." (Emphasis added.)

Although the Guidelines range will generally align with the objectives of the § 3553(a) factors, that is not always the case. As the Supreme Court said in *Kimbrough*:

> [I]n the ordinary case, the Commission's recommendation of a sentencing range will reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives. *The sentencing judge, on the other hand, has greater familiarity with the individual case and the individual defendant before him than the Commission or the appeals court. He is therefore in a superior position to find facts and judge their import under § 3553(a) in each particular case*. In light of these discrete institutional strengths, a district court's decision to vary from the advisory Guidelines may attract greatest respect when the sentencing judge finds a particular case outside the heartland to which the Commission intends individual Guidelines to apply.

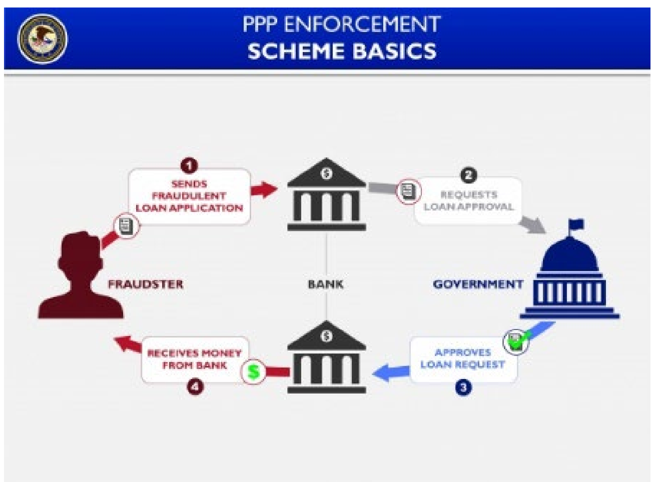
552 U.S. at 109 (emphasis added) (citations and punctuation omitted).

As one district court has framed it, the Guidelines' "most fundamental flaw is the notion that the complexity of human character and conduct can be rationally reduced to some arithmetic formula." *See* Terry Carter, *Rakoff's Stance on the SEC Draws Fire, Praise—and Change: The Judge Who Said No*, ABA Journal, Oct. 2013, at 53.

B. <u>Applicable Sentencing Guidelines Range.</u>

Mr. Barabash entered a guilty plea to Count One of the Indictment, which charges him with wire fraud, in violation of 18 U.S.C § 1343. The parties agree that the Guidelines provision applicable to this offense is U.S.S.G. § 2B1.1(a)(1), which begins with a base offense level of 7 and, with Mr. Barabash being in Criminal History Category I, results in an applicable guidelines range of **0 to 6 months**, with Zone A, being probation eligible. The wire fraud statute is, however, heavily driven by the *actual* loss amount, which indirectly drives the Government's prosecution of offenses for violations of the Payroll Protection Act. Here, even though $504,000 was sitting in Mr. Barabash's corporate checking account following the deposit of PPP funds and was immediately seized by the Government, Mr. Barabash is responsible for the full loan amount under the Guidelines, which raises his offense level fourteen levels to offense level 21, resulting in an advisory guidelines range of **37 to 46 months**.

Mr. Barabash's offense level is subject to an additional upward adjustment and enhancement because the money passed through a financial institution and its total was in excess of $1,000,000 (again, even though $504,000 remained in the bank account and was seized by the Government). As confirmed by DOJ's own website devoted to its nationwide taskforce for the devotion of Justice resources to the prosecution of PPP loan related offenses, it is the Government that approves the loans, and the banks were merely the pass-through mechanism by which Government funds were distributed to loan recipients:[4]



The upward adjustment and additional enhancement raises Mr. Barabash's guidelines range to offense level 23, and subsequently to offense level 24, based on a guidelines provision finding any offense level below 24 insufficient. This is yet another upward adjustment, which is obvious double counting based on the amount at issue and the involvement of a financial institution that was merely a pass-through instrument for Government funds getting to the end recipient quicker.

With these various provisions, and after a three-level reduction for Mr. Barabash's

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[4] DOJ Website, https://www.justice.gov/criminal-fraud/cares-act-fraud, last visited June 12, 2023.

immediate acceptance of responsibility, the final adjusted offense level is 21, with an advisory guidelines range of **37 to 46 months**. A sentence over three years of incarceration is wholly inconsistent with the § 3553 sentencing factors.

C. A Below-Guidelines Sentence is Appropriate in this Case.

District courts may impose a sentence below the Guidelines range through either a "departure" or "variance." *See United States v. McKinnie*, 21 F.4th 283, 289 (4th Cir. 2021). A "departure" is typically a change from the final sentencing range computed by examining the provisions of the Guidelines themselves. It is frequently "triggered by a prosecution request to reward cooperation . . . or by other factors that take the case 'outside the heartland' contemplated by the Sentencing Commission when it drafted the Guidelines for a typical offense." *United States v. Rangel*, 697 F.3d 795, 801 (9th Cir. 2012) (citation and punctuation omitted). "A 'variance,' by contrast, occurs when a judge imposes a sentence above or below the otherwise properly calculated final sentencing range based on application of the other statutory factors in 18 U.S.C. § 3553(a)." *Id.* (citation omitted); *see also* USSG § 1B1.1(c). Here, through either a departure or variance, Mr. Barabash should receive a sentence significantly below the applicable Guidelines range.

Mr. Barabash is by all accounts a kind-hearted, devoted man, with a family who loves and supports him. *See* Exs. 1-3. He is not a violent person and poses no danger to society, as evidenced by the Government's willingness to let him live in the community for the past eighteen months and to relocate to Arizona. Mr. Barabash's only prior adjudication is for a traffic offense, which resulted in a sentence of probation before judgment.[5]

[5] Mr. Barabash provided records to United States Probation showing all the programs he undertook as part of his probationary sentence for his prior traffic offense. Mr. Barabash completed all requirements, including the Interlock requirement, as he otherwise would not have been able to receive a valid Maryland license, which he did and maintained, up to and including, when he relocated to Arizona. A copy of his valid Maryland license, issued after his traffic case *was*

Contrary to many PPP loan fraud cases, this is not a case where the monies were being funneled to Mr. Barabash's friends and family, unconnected to a legitimate business. Rather, the evidence shows that the funds were used for business purposes, though not for the business purposes contemplated by the PPP statute. Moreover, in this case, Mr. Barabash immediately accepted complete responsibility for his actions, without filing a single motion or requesting additional discovery from the Government. He also offered to debrief with the Government and provide all information relating to his tax preparer's preparation of erroneous financial documents, as well as the specific M&T Bank officer who contacted him to tell him his loan application appeared to be lower than it should be, but the Government has taken no action to schedule any meeting with Mr. Barabash in this regard.

Just punishment has been imposed. Mr. Barabash will be saddled with a felony conviction for the rest of his life. He will remain under supervision with strict conditions with the clear and apparent reality of potential revocation even for the slightest of violations. As discussed below, Mr. Barabash respectfully requests a sentence of three years' probation, with a period of home confinement, a lengthy community service order, and order of restitution, all of which serves the interests of justice and which is sufficient, but not greater than necessary, to comply with the statutory purposes of sentencing. *See* 18 U.S.C. § 3553(a). Given the facts of this case, just punishment and deterrence have been provided for in the recommended sentence.

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resolved, was provided to United States Probation. Additionally, Mr. Barabash previously sent confirmation of completion of his Interlock requirement to the Maryland DMV and sought, although was unsuccessful, to obtain another copy in preparation for sentencing in this case. There is no factual basis to conclude that Mr. Barabash did anything else but fully comply with all the necessary requirements to resolve his Maryland traffic case and his sentence of probation, as he has done for every aspect of this case, and for every request made of him by United States Probation.

1. <u>**Kinds of Sentences Available.**</u>

A sentence of incarceration is not always necessary to satisfy the Sentencing Guidelines or section 3553. Indeed, as observed by the district court in *Gall*, probation (or post-release supervision), "rather than an act of leniency, is a substantial restriction of freedom." 552 U.S. at 44 (punctuation omitted). The *Gall* Court emphasized that the defendant would have to "comply with strict reporting conditions along with a [multi]-year regime of alcohol and drug testing." *Id.* The Court also noted that the defendant would "not be able to change or make decisions about significant circumstances in his life, such as where to live or work, which are prized liberty interests, without first seeking authorization from his Probation Officer or, perhaps, even the Court." *Id.*

This Court may also consider a sentence with a period of home detention, which has been defined by the Guidelines as:

> [A] program of confinement and supervision that restricts the defendant to his place of residence continuously, except for authorized absences, enforced by appropriate means of surveillance by the probation office. When an order of home detention is imposed, the defendant is required to be in his place of residence at all times except for approved absences for gainful employment, community service, religious services, medical care, education or training programs, and such other times as may be specifically authorized. Electronic monitoring is an appropriate means of surveillance and ordinarily should be used in connection with home detention. However, alternative means of surveillance may be used so long as they are as effective as electronic monitoring.

U.S.S.G. § 5F1.2, Commentary, n.1.

Based upon the information contained in this submission, and given the mandate of 18 U.S.C. § 3553(a)(3) for the Court to consider "the kinds of sentences available," a community service order would also satisfy the goals of sentencing. A 2001 publication of the Administrative Office of the United States Courts described community service as "a flexible, personalized, and humane sanction," which "offers a way for the offender to repay or restore the community." *Court*

& Community: An Information Series About U.S. Probation & Pretrial Services: Community Service, Office of Probation and Pretrial Services, Administrative Office of the U.S. Court (Feb. 2001), *available at* https://www.nhp.uscourts.gov/sites/nhp/files/ccservice.pdf, last visited June 12, 2023. It is "practical, cost-effective, and fair — a 'win-win' proposition for everyone involved." *Id.* It is also recognized that "[c]ommunity service addresses the traditional sentencing goals of punishment, reparation, restitution, and rehabilitation. . . . It restricts offenders' personal liberty[,] . . . allows offenders to atone or 'make the victim whole' in a constructive way[, and] . . . may be regarded as . . . a form of symbolic restitution when the community is the victim." *Id.* In selecting an appropriate candidate to perform community service, United States Probation recommends as follows:

> [C]ourts can use community service successfully with a wide spectrum of offenders: corporations and individuals, first offenders and recidivists, the indigent and the affluent, juveniles and senior citizens. Not every offender is a good candidate for community service. . . . Courts look for offenders with personal and social stability, who are willing, motivated, and who have no history of violence.

Id.

2. <u>Avoid Sentencing Disparities.</u>

As discussed below, in this Court, individuals committing similar offenses received significantly lower sentences than will be sought by the Government in this case. Moreover, in a brief cursory review of published sentences nationwide, district court judges have pushed back on Government requests for incarceration for PPP related wire fraud, and have sentenced defendants to lengthy terms of supervision (with periods of home confinement) and appropriate restitution judgments.

As it pertains to this jurisdiction, in *United States v. Brandon Fitzgerald-Holley*, No. 21-cr-00250-GJH, the defendant used a non-operational nonprofit to obtain PPP funds, even though the company had no employees, income, or regular operations. *See* Press Release, https://www.justice.gov/usao-md/pr/nonprofit-ceo-pleads-guilty-wire-fraud-relation-covid-19-loan-fraud, last visited June 12, 2023. After a prior loan application to the SBA had been denied, the defendant created and submitted fraudulent documents, including an IRS Form W-3, which falsely stated that the company had twenty-five (25) employees with total wages of $1,385,000. As stated in his plea agreement, the defendant used the fraudulently obtained funds to purchase personal items, including clothing, a pool table, televisions, electronic equipment, a 2020 Dodge Charger, and various accessories for the vehicle; and to fund a vacation rental. In total, the defendant misappropriated $305,854 in PPP loan funds. As the loan amount was lower than a million dollars, the defendant's advisory sentencing guidelines range was 21 to 27 months, significantly lower than Mr. Barabash's advisory guidelines range in this case, even though Mr. Barabash did not use a defunct company and pocket the proceeds of the PPP funds for his personal use, and did not seek the loan after another attempt for Government funding was futile. Even with this conduct and a guidelines range of 21 to 27 months, the Court sentenced the defendant in *Fitzgerald-Holley* to six months of incarceration.

In *United States v. Dana Hayes*, No. 22-cr-0224-GLR, the defendant made multiple applications for PPP loans and Economic Injury Disaster ("EID") loans for an inactive company, based on false information as to revenue, employees, and activities, and also failed to disclose that he was under supervision for a prior stolen gun possession conviction that made him ineligible for the loan programs. The defendant was also the Chief of Fiscal Services with the Baltimore City Police Department during the time of his conduct, but was fired after being put under supervision for allegedly murdering his stepfather. Because the defendant only obtained $50,036, and even though he transferred all the PPP funds from the corporate account where they were deposited to his personal account, his offense level on the charge of wire fraud was only offense level 11, with an advisory guidelines range of 8 to 14 months. Notwithstanding these facts and the defendant's prior criminal history, the Court sentenced the defendant to three years of supervised probation and four weekends of intermittent confinement.

In *United States v. Sherrie Bryant*, No. 22-cr-00308-DLB, the defendant pled guilty to wire fraud after submitting fraudulent PPP and EID loan applications for a business whose stated purpose was to provide mentorship and education to underserved youth. The defendant repeatedly misrepresented that she had never been convicted of a crime and ultimately obtained $419,100 in fraudulent loans proceeds, which were used in part to pay for a car, a boat, a vacation, and tickets to sporting events. The case represented the defendant's third federal fraud conviction, and the defendant was on federal supervised release at the time of her PPP fraud. Given the loss amount, the defendant's offense level conduct was only level 16, with an advisory guidelines range of 27 to 33 months of incarceration, due to her Category III criminal history score. Notwithstanding the defendant's lengthy criminal history and having committed the offense while on supervision for another federal fraud conviction, the Court sentenced the defendant to twelve months on the current wire fraud to run consecutive to six months for the violation of supervision.

This Court has also imposed non-incarceration sentences for non-dangerous, non-violent theft offenses against the United States Government on numerous prior occasions:

- **Leroy Kamzura**, who engaged in federal employees' compensation fraud and social security fraud by obtaining benefits ($177,132) while failing to report active employment for a period of seven years, was sentenced to one year of probation on home detention (18-cr-0582-CCB);

- **Frederick Kellner**, who for nearly 27 years converted to his own use his father's retirement benefits ($356,577), was sentenced to five years of probation, including six months of home detention (19-cr-0267-DKC);

- **Craig Colbert**, who for ten years converted his deceased father's retirement benefits ($216,290) to his own use was sentenced to four years of probation, including nine months of home detention (19-cr-093-GJH);

- **Gloria Wilson**, who improperly received her stepmother's social security benefits for 17.5 years ($176,874), was sentenced to three years of probation, including eight months of home detention and 100 hours of community service (15-cr-0633-CCB);

- **Keisha Jones**, who engaged in social security fraud by obtaining improper benefits ($145,044) for 20 years, was sentenced to three years of probation, including one year of home detention (18-cr-0590-RDB);

Separate from decisions in this Court, as explained in detail below, district courts nationwide have pushed back on the Government's request for incarceration for offenses relating to PPP fraud as part of DOJ's focused national task force priority on prosecuting these offenses:

In *United States v. Janet Jenison*, Chief United States District Judge Algenon L. Marbley in Columbus, Ohio sentenced the defendant to five years of probation, including six months of home confinement, for multiple counts of wire fraud and making a false statement to law enforcement relating to PPP fraud. The defendant submitted three fraudulent applications and sought nearly $300,000 in federal PPP financing for a marketing business registered under her maiden name. The defendant received approval on two applications totaling $160,247 in funding after she submitted false payroll and other documentation. The defendant also created false bank account statements for her business, showing withdrawals for payroll, tax withholding, and business expenses, even though the business account was not open during the relevant period. Further, the defendant submitted false tax documents, including one classifying her marketing business as a corporation, when the employer tax identification number on the form was not created until four months later. She also submitted documents falsely claiming she had made federal employment tax deposits for employees when she had not. The Government sought a 21-month prison term, plus fines and restitution, but the district court sentenced the defendant to probation and home confinement (No. 2:21-cr-90, S.D. Ohio).

In *United States v. Malik Breckenridge*, the defendant applied for and obtained two PPP loans on behalf of his purported business, which was not a registered business entity and was not engaged in substantial or legitimate business activity. The defendant admitted that he falsely stated that the company was established in 2014 and had been operating at the time the loans were sought. The defendant further admitted that he submitted false IRS forms showing that the company had earned $180,489 in gross income during 2019. The defendant was sentenced to five years of probation, including eight months on home detention, on the sole count of wire fraud (No. 2:22-cr-84, S.D. W.V.) (https://www.justice.gov/usao-sdwv/pr/charleston-man-ordered-pay-restitution-covid-19-relief-fraud-scheme).

In *United States v. Tarshauna Thomas*, the defendant, a BOP correctional guard, claimed to be the sole proprietor of a dog breeding and sitting service, "Shaunas Little Pooches," when applying for two PPP loans. While approved for both PPP loans, she received payment from only one lender. The payment was electronically deposited into the defendant's personal bank account and spent on personal, non-business-related expenses. The defendant was sentenced to three years of federal probation and ordered to pay restitution (No. 3:22-cr-00086-DCB-FKB, S.D. Miss.) (https://oig.justice.gov/news/press-release/former-bop-correctional-officer-pleaded-guilty-wire-fraud-after-submitting-two); (https://www.justice.gov/usao-sdms/pr/former-bop-correctional-officer-sentenced-committing-covid-relief-fraud).

In *United States v. David Andrew Butziger*, the defendant assisted his codefendant in applying for PPP loans for three restaurants that had no employees at all (and one of which his codefendant had no ownership interest in at all). The defendant also submitted a PPP loan application in his own name on behalf of an unincorporated entity that he called Dock Wireless. The loan application was in the amount of $105,381.50 and fraudulently represented that Dock Wireless had seven employees and an average monthly payroll of $42,152.60. In reality, the company had no employees and no wages were ever paid. In total, the defendant and his codefendant submitted four fraudulent PPP loans applications totaling $543,959. While the applications were pending, a concerned citizen aware of their fraudulent nature brought them to the attention of law enforcement, which ultimately led to the denial of their loan applications. The defendant's guidelines range was 21 to 27 months and the Government asked for a sentence of 21 months. The district court placed the defendant on three years of supervised release, the first six months to be served in home confinement with electronic monitoring, and ordered the defendant to pay a fine of $5,000. The defendant was on pretrial release during the entirety of the case and his sentence was more akin to a sentence of probation than supervised release (No. 20-072-MSM, D.R.I., D.E. 35 (Gov't Sentencing Memorandum)) (https://www.justice.gov/usao-ri/pr/rhode-island-man-sentenced-covid-19-related-fraud-scheme).

In *United States v. Jeremy Sanders, et al.*, the defendants — husband and wife — were sentenced to probationary sentences with brief periods of home confinement after they worked with others to prepare and submit loan applications that misrepresented payroll for their purported businesses and sole proprietorships. The businesses, in fact, had no employees and the PPP applications were supported by false tax documents. Jeremy Sanders and an Omaha-based co-conspirator submitted fraudulent applications for loans totaling approximately $41,290, and he personally obtained $20,690. His wife, Lakeda Sanders, and a co-conspirator submitted fraudulent applications for loans totaling approximately $220,000, and she personally obtained $24,166 (No. 21-cr-00253-RFR-SMB, D. Neb.) (https://www.justice.gov/usao-ne/pr/georgia-couple-sentenced-paycheck-protection-program-fraud).

In *United States v. Alexis Ransom*, the defendant was sentenced to five years of probation after fraudulently applying for three PPP loans for her purported business, Alexis Renae Ransom, for which she claimed did business under the tradenames of Renae's Fashion Consulting LLC and Momma & Me Boutique. The defendant admitted that she falsely stated that Renae's Fashion Consulting LLC was established in 2019, and had earned $66,900 in gross income in 2019 and 2020, and that Momma & Me Boutique earned $69,000 in gross income in 2019. The investigation revealed that the defendant's purported business and its tradenames had not engaged in substantial business activity before February 15, 2020. The defendant further admitted that she submitted a false IRS form in connection with the first loan application she submitted for Renae's Fashion Consulting LLC (No. 2:22-cr-122, S.D.W.V.) (https://www.justice.gov/usao-sdwv/pr/logan-county-woman-sentenced-covid-19-relief-fraud-scheme).

In each of these above-referenced cases, located in a quick Google search, the defendants applied for PPP loans for which they were ineligible, for companies that did not exist, and the proceeds were used exclusively for personal purposes. In all instances, the defendants did not serve a day in jail. None of those predicate facts exist in this case and while the loan amount may have been greater for Mr. Barabash, the PPP funds were primarily used for business-related costs and expenditures (regardless of whether they were permissible under the PPP program). For the Government to disregard these facts, and those cases, and ask for multiple years of incarceration simply because the loan amount was higher, runs afoul of the purposes of sentencing and the § 3553 sentencing factors.

Similarly, districts courts throughout the country have not backed down from issuing non-incarceration sentences for non-dangerous, non-violent offenses even when the Government sought jail sentences, merely as a form of deterrence:

- **Leonardo Silva**, who, as a DEA Special Agent in Monterrey, Mexico, was prosecuted for providing false information that caused two Mexican citizens to have their visas revoked in exchange for post-retirement employment, as well as, submitting false financial disclosure reports, was sentenced to two years of probation (No. 16-cr-69-TFH (D.D.C. 2017));

- **Gloria Dickinson**, who, as a FERC employee and elected Treasurer of Local 421 of the American Federation of Government Employees, was prosecuted for embezzling $21,713 of federal-employee union funds and filing false reports with the Department of Labor to cover it up, was sentenced to five years of probation (No. 12-cr-00197-BAH (D.D.C. 2012));

- **Martin Lieb**, who, as a DOD employee, was prosecuted for failing to disclose on his financial disclosure form gifts — including a ticket to the Super Bowl, lodging on a cruise ship, and meals and drinks — from a company that had secured DOD contracts worth hundreds of millions of dollars, was sentenced to two years of probation (No. 1:10-cr-00144-RBW (D.D.C. 2010));

- **Courtney Stadd**, who, as a former NASA Chief of Staff, was prosecuted for steering millions of dollars of earmarked funds for a NASA initiative to benefit a university with which she had a consulting agreement, thereafter, increasing her own consulting fees as a result, was sentenced to three years of probation (No. 09-cr-65-RMC (D.D.C. 2009));

- **Turab Lookman**, who was prosecuted as a former scientist from Los Alamos National Laboratory for making false statements regarding his involvement with a Chinese government technology program — stating he had not been recruited by the Chinese program when he in fact had — was sentenced to five years of probation (No. 1:19-cr-01439-WJ (D.N.M. 2020));

- **Andrew Siemaszko**, who was prosecuted as an employee of a nuclear power station and who made false statements to the Nuclear Regulatory Commission regarding the condition and maintenance of equipment at the power plant, was sentenced to three years of probation (No. 3:06-cr-00712-DAK-3 (N.D. Ohio 2009));

- **Randall Barker**, who was prosecuted for failing to report the full amount of income from his business from 2011 to 2014, admitting to taking direct payments from customers, removing cash from business deposits, and altering invoices to show less income for the business, was sentenced to one year of probation (No. 18-cr-10152 (EFM) (D. Kan. Jul. 31, 2019)) (https://www.justice.gov/usao-ks/pr/flooring-store-owner-sentenced-tax-evasion);

- **Lawrence P. Stephenson**, who was prosecuted for tax evasion, began diverting portions of his practice's business receipts by depositing checks from insurance carriers and patients into a personal bank account, failed to report approximately $1.2 million dollars paid to his dental practice and deposited it elsewhere, thus failing to pay taxes due the IRS, was sentenced to three years of probation and 280 hours per year of community service (No. 18-cr-73 (D.R.I. Nov. 14, 2018)) (https://www.justice.gov/usao-ri/pr/north-providence-dentist-sentenced-tax-evasion-0);

- **Ty Warner**, who was prosecuted for failing to report more than $24.4 million in income, and evading nearly $5.6 million in federal taxes from millions of dollars he hid for more than a decade in secret foreign financial accounts at two banks based in Switzerland, was sentenced to two years of probation (No. 13-cr-731 (CPK) (N.D. Ill. Jan. 14, 2014)) (https://www.justice.gov/usao-ndil/pr/h-ty-warner-sentenced-probation-after-paying-80-million-taxes-and-penalties-tax-evasion);

- **Jacques Wajsfelner**, who worked in real estate and advertising, held a Swiss bank account valued at over $5 million, and owed more than $400,000 in back taxes, interest, and penalties, was sentenced to three months of home detention (No. 12-cr-641 (NRB) (S.D.N.Y. Mar. 8, 2013));

- **Josephine Bhasin**, who had an account at HSBC in India that held a high balance of $8.3 million, and filed a false Report of Foreign Bank and Financial Accounts ("FBAR") after being contacted by the DOJ, was sentenced to two years' probation, the first three months to be served in home confinement, and 150 hours of community service (No. 11-cr-268 (ADS) (E.D.N.Y. Mar. 8, 2013));

- **Arvind Ahuja**, who was convicted in a jury trial of willfully filing a false return and willfully failing to file an FBAR due to a failure to disclose more than $8.5 million held in bank accounts at HSBC India, was sentenced to three years of probation, three months of home detention, a $350,000 fine, and 450 hours of community service, after the court varied from the Guidelines' range of 41 to 51 months (No. 11-cr-135 (CNC) (E.D. Wisc. Feb. 6, 2013));

- **Lothar Hoess**, the owner of a company that sold office supplies and equipment, who had a tax loss of between $400,000 and $1,000,000, and faced a Guidelines' range of 30 to 37 months, was sentenced to three years of probation (No. 11-cr-154 (SM) (D.N.H. Mar. 30, 2012));

- **Arthur Joel Eisenberg**, who was prosecuted for filing a false income tax return and failing to report that he had an interest in or signature authority over financial accounts at UBS AG, where at the end of 2004, the total balance of Eisenberg's various UBS financial accounts exceeded $3.1 million, was sentenced to three years of probation (No. 10-cr-00369-JCC (W.D. Wash. Mar. 4, 2011));

- **Harry Abrahamsen**, who was prosecuted for failing to file a FBAR and concealing more than $1 million in Swiss bank accounts, was sentenced to three years of probation, including twelve months of home confinement with electronic monitoring (No. 10-cr-254 (D.N.J. May 24, 2011)) (https://www.justice.gov/opa/pr/new-jersey-ubs-client-sentenced-failing-report-more-1-million-swiss-bank-account);

- **Michael Reiss**, who moved his offshore account to various institutions and countries, failed to participate in the IRS's offshore voluntary disclosure program, and filed false FBARs, and faced a Guidelines' range of 30 to 37 months, was sentenced to three years of probation, the first eight months to be served in a community confinement center, and 30 hours of community service a week for three years (No. 11-cr-668 (RMB) (S.D.N.Y. Jan. 1, 2011));

- **Ernest Vogliano**, who opened UBS accounts in the names of Liechtenstein and Hong Kong shell corporations, and actively used funds and transferred some after learning of the criminal investigation, was sentenced to two years of probation (No. 10-cr-327 (TPG) (S.D.N.Y. Apr. 26, 2011));

- **Jules Robbins**, who created a sham Hong Kong corporation to be listed as the nominal holder of his UBS accounts that held nearly $42 million was sentenced to twelve months of probation because the court took into consideration his "otherwise unblemished life" (No. 10-cr-333 (RJH) (S.D.N.Y. Oct. 8, 2010));

- **Paul Zabczuk**, who instructed clients to make payments to him through undisclosed accounts in Switzerland and the Bahamas was sentenced to three years of probation, twelve months of home detention, and community service (No. 10-cr-60112 (WPD) (S.D. Fla. July 26, 2010));

- **John McCarthy**, who transferred over $1,000,000 to an unreported Swiss bank account and communicated with bank representatives to orchestrate various transactions, was sentenced to three years of probation with six months of home detention and 300 hours of community service (No. 09-cr-784 (VBF) (C.D. Cal. Mar. 22, 2010));

- **Juergen Homman**, who failed to disclose a Swiss account holding approximately $5 million, was sentenced to five years of probation and community service (No. 09-cr-724 (SRC) (D.N.J. Jan. 6, 2010));

- **Steven Rubinstein**, who hid approximately $7 million in unreported Swiss accounts that he used to invest in real estate, was sentenced to three years of probation with twelve months of home detention (No. 09-cr-60166 (MGC) (S.D. Fl. Oct. 28, 2009)); and

- **Igor Olenicoff**, a businessman and investor, who held more than $200 million in undisclosed offshore bank accounts and owed $52 million in back taxes, interest, and penalties, was sentenced to two years of probation (No. 07-cr-227 (CJC) (C.D. Cal. Apr. 16, 2008)).

II. RESTITUTION, FORFEITURE, AND FINES.

At the plea hearing, the Government made clear that it was seeking a windfall in this case, a money judgment for the remainder of the loan proceeds, and a separate forfeiture order for the full amount of the loan, $1,295,000. Notwithstanding this Court's admonitions that no such multiple orders would be forthcoming as a matter of fundamental fairness and due process, the

Government's press release for this matter following the plea hearing (https://www.justice.gov/usao-md/pr/baltimore-man-pleads-guilty-federal-charge-fraudulently-obtaining-more-12-million-covid), and Mr. Barabash's notice from the U.S. Treasury (which appears to include both amounts) (attached hereto as **Exhibit 4**), appear to imply that the Government is moving forward as if this Court had already issued both a restitution and a forfeiture order. To avoid a windfall for the Government and consistent with other PPP fraud sentences throughout the country, Mr. Barabash requests that he only be required to pay back the difference in the loan amount after subtraction of the $504,869.54 already seized and with a credit afforded for his agreement to forfeit his interest in property located at 14044 Fox Hill Road in Sparks Glencoe, Maryland.[6]

III. SENTENCING REQUEST AND RECOMMENDATION.

A term of probation or supervised release is determined by reviewing many of the same § 3553(a) factors already considered above, including, as relevant here: (i) the nature and circumstances of the offense and the history and characteristics of the defendant; (ii) the need for deterrence, to protect the public, and provide treatment to the defendant; (iii) the available sentences and sentencing range; (iv) relevant policy statements by the Sentencing Commission; and (v) the need to avoid sentencing disparities. *See* 18 U.S.C. § 3583(c). Accounting for these factors, as addressed above, Mr. Barabash recommends a three-year period of supervision

[6] Mr. Barabash, consistent with the Government's agreement in its plea agreement not to ask for the imposition of a fine in this case, also requests that the Court not impose upon him the obligation to pay a fine, when he will have a large money judgement to satisfy in the years ahead, just had to forfeit real property to satisfy the anticipated judgment, and will no longer be able to have rental income from that property to subsidize his current intake as a consultant in the home development field (especially after the forfeiting of his Maryland home improvement license). Contrary to U.S. Probation's conclusion, and consistent with the Government's position, Mr. Barabash does not have the ability to pay a fine in this case and a fine should not be imposed.

including the “standard” conditions recommended by the Guidelines (*see* USSG § 5D1.3(c)). The conditions of supervised release will significantly restrict Mr. Barabash’s liberty and provide a daily reminder of his criminal conduct by requiring that he, among other things:

- regularly report to his probation officer;
- seek permission from the Court or his probation officer to leave Arizona;
- respond truthfully to questioning by his probation officer;
- live in an approved residence and notify his probation officer or any address change;
- allow his probation officer access to his residence;
- work fulltime and notify his probation officer of any job change;
- refrain from knowingly communicating with criminals;
- notify his probation officer if he is arrested;
- refrain from possessing a firearm or other dangerous weapons; and
- refrain from possessing illegal drugs or alcohol.

A three-year period of supervision, subject to these conditions, will serve the interests of punishment and deterrence while allowing Mr. Barabash to remain a productive member of society and giving him appropriate credit for his immediate acceptance of responsibility.[7]

[7] To the extent that the Court believes incarceration is essential in this case and will not consider home confinement or a sentence of numerous weekends at a local facility, Mr. Barabash respectfully requests that he be permitted to self-surrender, which would allow the BOP to appropriately designate him for assignment, thereby reducing his danger classification (which is non-existent), and to do so in accordance with BOP’s facility availability. Mr. Barabash also asks that he be designated at the lowest security classification facility near Scottsdale, Arizona so he can be as close to family as possible.

CONCLUSION

For the foregoing reasons and any others that may appear to the Court or that may develop at the sentencing hearing, Mr. Barabash respectfully requests that this Court impose a sentence of three years of probation, with a term of home confinement and community service.

Dated: June 12, 2023

Respectfully submitted,

/s/

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