IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	
	*	
v.	*	**CRIMINAL NO. JKB-22-232**
	*	
ALEXANDER BARABASH	*	
	*	
Defendant	*	
	*	
	*	
	*	
	*****	

THE GOVERNMENT'S SENTENCING MEMORANDUM

The United States of America, by its undersigned counsel, hereby submits the following response to the Defense Sentencing Memorandum, ECF No. 23, in anticipation of the sentencing hearing set to take place on Monday, June 26, 2023, at 12:00pm.

I. Introduction

In his own words, Defendant claims to take "full accountability" for his actions related to this case. ECF No. 23-1. From the Government's perspective, that is an appropriate and laudable posture on its face. The Defense Sentencing Memorandum (ECF No. 23) ("Defense Memo"), however, reads in stark contrast with the Defendant's own words, replete with attempts to blame other individuals and circumstances for the Defendant's own knowing, willful and deliberate criminal conduct. Based largely on this finger-pointing, the Defense asks for a departure of ***37 months*** below the lower bound of the recommended range for the agreed upon offense level of 21.

Defendant is not before this Court, facing a federal criminal sentence, because of the alleged acts of a tax preparer or a vice president from M&T Bank. He is not here because the pandemic put economic pressure on the construction industry or his business. Rather, Defendant is here because he decided to commit an egregious and deliberate fraud that resulted in the deposit of nearly $1.3 million into his account. At all times, Defendant knew he was not entitled to receive these funds and that he could only receive them through strategic and calculated deceit.

The Defense Memo emphasizes that Defendant's business struggled during the pandemic. That is certainly true of many businesses in many industries. Still, that economic pressure was not a justification or excuse to commit fraud, and the Sentencing Commission has clearly expressed that "***economic pressures upon a trade or business do not warrant a downward departure***." U.S.S.G. §5K2.12 (emphasis added). Defendant's economic circumstances therefore do not justify *any* downward departure, much less the extraordinary indulgence sought by the Defense here.

The Defense further claims that Defendant used his ill-gotten PPP funds to "keep his company afloat and to pay his independent contractors, subcontractors, and suppliers during the economic downturn." Def. Mem. (ECF No. 23) at 2-3. The bank records tell a different story, however. Defendant received nearly $1.3 million in fraudulent PPP funds, which he allocated to a wide range of expenses and purchases. Some of the proceeds went to "keeping his company afloat," but a large portion did not. As to Defendant's guilt, the underlying motive for his fraud is immaterial—that is to say, even if all of the money were used to compensate his contractors and vendors (it was not), the theft of funds would still be criminal and subject to consequences such as incarceration, restitution and forfeiture. Nevertheless, because the Defense appears to be relying on a skewed accounting of the fraud proceeds in asking this Court for a downward departure of ***13 levels or more***,[1] the Government will provide some context herein.

Finally, the Defense Memo inundates the Court with three dozen prior cases, spanning more than a decade, in its effort to show that it is the Government's ask for a within-guidelines

[1] The parties agree that Defendant's final offense level is 21, but the zero months of imprisonment sought by the Defense would be consistent with the low end of the guideline range for level 8 or below, which is 0-6 months.

sentence—not the Defense's ask for a 37-month departure entailing zero prison sentence—that is disregarding precedent. In its wide-reaching Google inquiry for comparator cases (*see* Defense Memo at 26), the Defense apparently missed eight criminal sentences issued in COVID-19 related fraud cases, no more than six weeks old at the time of this filing, each of which impose sentences well exceeding that requested by the Government here.

The Government submits this response to address several of the misleading contentions in the Defense Memo.

II. The Sentencing Commission's Policy Statement Regarding Departures from the Sentencing Guidelines

According to U.S.S.G. §5K2.0, entitled "Grounds for Departure (Policy Statement)," a court may depart from the applicable guideline range if it finds an aggravating or mitigating circumstance "of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described." As the Supreme Court acknowledges, "the Commission's expectation that departures based on grounds not mentioned in the [g]uidelines will be 'highly infrequent.'" *Koon v. United States*, 518 U.S. 81, 96 (1996) (citing U.S.S.G. Chapter 1, Introduction at 4(b)); *see also United States v. DeBeir*, 186 F.3d 561, 573 (4th Cir. 1999) (holding district court abused its discretion in ordering a three-level downward departure from the applicable guidelines because "[n]either individually nor in combination are the circumstances, characteristics, or consequences of this case so unique or extraordinary as to bring it outside the heartland of cases sentenced under this guideline").

Importantly, the Sentencing Commission's Policy Statement set forth in §5K2.0(d) states as follows:

> the court ***may not*** depart from the applicable guideline range based on any of the following circumstances:

> (1) Any circumstance specifically prohibited as a ground for departure in §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), §5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the last sentence of §5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), ***and the last sentence of §5K2.12 (Coercion and Duress)***.
>
> (2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).
>
> (3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.
>
> (4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (*i.e.*, a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. *See* §6B1.2 (Standards for Acceptance of Plea Agreement).
>
> (5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (*i.e.*, a departure may not be based on unexceptional efforts to remedy the harm caused by the offense).
>
> (6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(Emphasis added.) The last sentence of §5K2.12, which is specifically noted in §5K2.0(d)(1) as a circumstance that a court may not rely upon as the basis for a departure from the U.S.S.G. range, reads as follows: "Notwithstanding this policy statement, ***personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure***." (Emphasis added.)

III. Argument

A. The Alleged Actions of an M&T Bank Employee, and/or Defendant's Tax Preparers, are Wholly Irrelevant to Defendant's Culpability and Do Not Warrant Any Downward Departure.

This Court should afford no weight to the Defense's attempts to point the finger at other parties and individuals for Defendant's own crime. *See, e.g.* Def. Mem. (ECF No. 23) at 2 (alleging that a vice president from M&T Bank "advised Mr. Barabash that his initial loan request was below what he should have requested" and "Mr. Barabash mistakenly relied on the assistance of his accountant and tax preparer"); 9 (similar allegations). Each allegation is a red herring. Defendant committed a knowing and intentional fraud, and at all times, Defendant was aware that he was committing fraud. *See, e.g., id.* at 2 (admitting that Defendant "knew full well that the information was inaccurate and that the related documents for W-2 employees were erroneous").

Even assuming the Defense could prove that an M&T Bank employee acted negligently or improperly, such conduct would in no way reduce Defendant's own culpability for committing fraud, nor would it justify his aggressive bid for a downward departure. To conclude otherwise would be analogous to saying that an armed robber should receive a lighter sentence because his victim left property out in the open—that is simply not how it works. When defendants have tried to mount similar defenses at trial in other fraud cases, courts in this District and others have repeatedly excluded evidence of bank negligence. *See, e.g.*, *United States v. Gaver*, Crim. No. RDB-17-640, 2018 WL 3475455, at *2 (D. Md. Jul. 19, 2018) (citing *United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000)) ("The Fourth Circuit has held that evidence of a fraud victim's negligence or lack of diligence is not a defense to bank fraud."); *United States v. Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980) (holding that in a fraud or other criminal case, "[t]he victim's negligence is not a defense to criminal conduct"). Indeed, even if the Defense could establish that the M&T Bank employee was complicit in the scheme to defraud the bank, "knowledge or complicity on the part of any individual bank employee . . . would also not be a defense to [fraud]."

Gaver, 2018 WL 3475455, at *2. The alleged statements of the M&T Bank employee are simply irrelevant.[2]

Defendant also should not receive a downward departure based on the allegation that he "mistakenly relied on the assistance of his accountant and tax preparer." ECF No. 23 at 2. Even if assumed to be true, at most this would implicate the tax preparer, but it would not negate or mitigate any element of Defendant's crime. Despite what he said on his second draw PPP application, Defendant was well aware that he did not have 37 employees on his payroll. He knew that he was not paying in excess of $525,000 in monthly wages or anywhere close to that amount.[3] He knew that the 2019 IRS Forms 940 and 941 that he submitted to M&T Bank were never filed with the IRS.

If anything, Defendant's choice to submit tax preparer-signed documents with his fraudulent PPP application only demonstrates how far he was willing to go in misleading the bank and the SBA. For example, when his funds were frozen by M&T Bank on suspicions of fraud, Defendant sent an email to his tax preparers directing them to take actions on his behalf, including preparing a "reconciliation statement" designed to convince M&T Bank that his PPP loan was not fraudulent, despite submitting documents "with eye watering high numbers in the millions." *See* **Exhibit 1**, November 1, 2021, email from Alexander Barabash to Douglas Davis and Stanley Beers. In the same email, Defendant proposes telling M&T Bank that his fabricated documents

---

[2] What's more, the employee's alleged statements encouraging Defendant to apply for approximately $50,000 more in his failed attempt at a second first draw loan are even more irrelevant with regard to Defendant's application for a second draw PPP loan that was approximately ***$1.25 million more***.

[3] Further discussion of the Defense claims that Defendant used the illicitly obtained funds to "pay his independent contractors, suppliers, and other business expenses," ECF No. 23 at 10, is provided in Section III.B, *infra*.

were "a forecast as business saw immediate opportunity for growth and to hire given the status of pandemic[.]" *Id.* Defendant's email makes clear that he wished to employ his tax preparers in his retroactive explanation of his fraud after his lies were discovered. Now, he seeks to rely on the tax preparer in his bid to insulate himself from consequences of his actions. He should not be allowed to do so.

B. Defendant Should Not Receive a Downward Departure Due to His Company's Financial Issues or the Dubious Claim that He Used the PPP Fraud Proceeds For "Keeping His Company Afloat."

The Defense Memo contends that Defendant should receive leniency because he used his fraud proceeds to "keep his company afloat and to pay his independent contractors, subcontractors, and suppliers during the economic downturn." ECF No. 23 at 2-3. There are at least two clear reasons why this contention lacks merit.

First, the Sentencing Commission has made clear that "personal financial difficulties and economic pressures upon a trade or business do not warrant a downward departure." U.S.S.G. §5K2.12. The Defense Memo focuses heavily on the economic circumstances caused by the COVID-19 pandemic, presumably to paint the picture that Defendant had no choice but to commit fraud to keep his business running. The Government asks the Court to disregard that lengthy discussion in determining Defendant's sentence. The Sentencing Commission anticipated this precise line of allocution, and it specifically set forth a policy to prohibit downward departure on that basis.

Second, to the extent this Court is inclined to consider Defendant's spending of the fraudulent PPP funds for any purpose, a more complete review of the bank records and other relevant documents is warranted. The Defense Memo offers only a skewed and narrow view. The Government undertook a more complete review and analysis of Defendant's transactions reflected in the bank records for M&T Bank x3819, the account tainted by the $1,295,000 of fraud proceeds.

The following are some insights gleaned from review of Defendant's transaction activities using M&T x3819 between February 26, 2021 (when the $1,295,000 PPP deposit posted) and October 29, 2021 (when M&T Bank froze the account on suspicion of fraud):

- Defendant made total of approximately **$229,355** in payments from M&T x3819, mostly by check, to the individuals listed on page 11-13 of the Defense Memo (ECF No. 23).[4] On a monthly basis, this "personnel" spending ranged between $19,938 in September 2021 and $58,286 in June 2021 (excluding October 2021, when the account was frozen on the 29th of the month). This monthly personnel spending was only slightly higher than the 2020 personnel spending, which ranged between approximately $13,751 in December 2020 and $43,704 in August 2020.

- Defendant paid a net amount of approximately **$344,126** to MiCasa Title in connection with the purchase of new real estate holdings at 7 Fila Way, Sparks, Maryland and 14044 Fox Hill Road, Sparks, Maryland.[5]

- Defendant paid approximately **$158,919** to stock trading companies such as Robinhood ($100,000) and TD Ameritrade ($58,919).

- Defendant paid approximately **$166,456** to credit cards held with American Express, Capital One and Chase Bank.

- Defendant paid approximately **$132,458** to Goldman Sachs account in the name of Alexander Barabash.

- Defendant paid approximately **$117,575** toward the balance of a line of credit held in the name of iDesignBuild held with M&T Bank. Notably, Defendant used $65,000 of this line of credit to finance the 2016 Chevrolet Corvette that he purchased in his personal name on or about March 27, 2021.

  As of March 1, 2021, when Defendant received the fraudulent PPP disbursement of $1,295,000, the line of credit had a balance of $92,165.08, close to the $100,000 limit. During the month of March 2021, Defendant paid approximately $73,721 toward the balance of the line of credit. In connection with the Corvette purchase, Defendant wrote a $65,000 check from the line of credit—funds which would not have been available had he not paid down the balance with funds tainted funds from

---

[4] Of the approximately $229,355 in "personnel payments," Defendant paid approximately $44,231 in checks to himself.

[5] This net amount accounts for the fact that Defendant wired $435,000 to MiCasa as an "advance" for the purchase of 7 Fila Way on or about April 30, 2021, then MiCasa wired $337,742 back to Defendant on or about May 5, 2021, leaving a net spend of $97,258 for the two-part transaction.

M&T x3819. Defendant made an additional **$10,500** down payment toward the Corvette purchase with a check directly from M&T x3819. In the next several months, Defendant made approximately $44,035 in payments toward the same line of credit from M&T x3819, excluding the $73,721 in payments made during March 2021.

From this analysis, it is clear that while Defendant did pay some contractors and/or vendors with his fraud proceeds, he also spent large portions of the stolen government funds on real estate and stock investments, debt payments and the purchase of a luxurious vehicle for himself. Consequently, if the Court is inclined to consider the Defendant's use of funds in determining an appropriate sentence, the Court should understand that the funds were used for much more than simply "keeping the company afloat." Simply put, neither the economic pressure faced by Defendant's company nor the Defendant's purported use of fraudulent PPP funds warrants any downward departure from the U.S.S.G. range.

C. The Defense's Hand-Picked List of the Most Lenient Sentences, Which Were Determined Based on Completely Different Defendants and Facts, Does Not Justify a Downward Departure.

The Government submits that all criminal cases and defendants are unique, and each sentence should be determined based on the appropriate U.S.S.G. range and § 3553(a) factors particular to the case. Yet, in effort to convince the Court that a radical downward departure is warranted, the Defense has cited no fewer than three dozen cases from federal courts throughout the United States. The cases span the last fifteen years, dating back to cases commenced in 2008. They feature a wide range of facts and circumstances, some of which are likely sealed or otherwise unavailable to the Court.[6] Frankly, the only thing these cases have in common is that they resulted in criminal sentences with little or no imprisonment, which is the same result Defendant prays here.

[6] For example, possible motions by the government under U.S.S.G. § 5K1.1 during sealed proceedings.

The Defense asserts that the Government's request for a within-guidelines sentence "runs afoul of the purposes of sentencing and the § 3553(a) sentencing factors." ECF No. 23 at 26. To be clear, the Government only asks this Court to consider the guidelines-recommended range and relevant § 3553(a) factors in fashioning a sentence in this case, not to concern itself with what other courts and jurisdictions throughout the country have done with other defendants convicted of different crimes. *See generally* Gov's Sentencing Mem., ECF No. 24.

Nevertheless, if the Court is inclined to consider precedent in fashioning its sentence, the Government yet again asks this Court to consider the full picture as opposed to the skewed picture painted by the Defense. Perhaps unsurprisingly, the Defense's handpicked list of cases appears to ignore several recent sentences for fraud and other non-violent "white collar" offenses involving COVID-19 related government assistance.[7] These cases make clear that courts routinely order substantial terms of imprisonment for conduct similar to Defendant's, including sentences well beyond what the Government seeks. Below is a list of cases, all involving illicitly obtained COVID-19 related government benefits and all sentenced within the past six weeks.

- ***United States v. Olaolu Alabi*, SAG-21-413 (D. Md.):** Alabi pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349, conspiracy to commit access device fraud in violation of 18 U.S.C. § 1029 and aggravated identity theft in violation of 18 U.S.C. § 1028A. The conspiracy obtained more than $1.5 million in fraudulent funds, and Alabi himself obtained at least $500,000 in COVID-19 related unemployment insurance ("UI") benefits. On June 5, 2023, Alabi was sentenced to 66 months of imprisonment.

- ***United States v. Nhan Hoang Pham*, 22-cr-140 (C.D. Cal.):** Pham pleaded guilty to wire fraud, 18 U.S.C. § 1343, in relation to benefits connected to a presidentially declared emergency. Pham fraudulently applied for over $1.25 million in COVID-related UI benefits from the State of California, causing a loss of approximately $408,496. On May 22, 2023, Pham was sentenced to 84 months of imprisonment.

[7] Frequent press updates regarding federal criminal cases involving COVID-19 related fraud may be found on Coronavirus Fraud News page on the United States Department of Justice's website: https://www.justice.gov/coronavirus/news.

- ***United States v. Eric Michael Jaklitsch*, 22-cr-15 & 22-cr-239 (E.D. Cal.):** Jaklitsch pleaded guilty to wire fraud and aggravated identity theft. Jaklitsch applied for over $7,500,000 in fraudulent COVID-19-related UI benefits, receiving at least $3,403,656. In addition, Jaklitsch pled guilty to wire fraud in connection with COVID-19 related Economic Injury Disaster Loan ("EIDL") applications in which he sought a total of $1.28 million. On May 30, 2023, Jaklitsch was sentenced to a total term of 81 months for his offenses.

- ***United States v. Yunior Barrera Almaguer*, 22-cr-80118 (S.D. Fla.):** Barrera Almaguer pleaded guilty to conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h). Barrera Almaguer conspired with several individuals to cause the issuance of over $9 million in fraudulent PPP loans to the members of the conspiracy. On May 19, 2023, Barrera Almaguer was sentenced to 87 months of imprisonment.

- ***United States v. Oluwagbemiga Otufale*, 22-cr-00224 (N.D. Ga.):** Otufale pleaded guilty to money laundering conspiracy in violation of 18 U.S.C. § 1956(h). Otufale opened up numerous bank accounts in the names of shell companies, then used the accounts to launder more than $2.6 million in fraudulent COVID-19 related UI benefits. On June 15, 2023, Otufale was sentenced to imprisonment for a term of 84 months.

- ***United States v. Arman Grigoryan*, 21-cr-368 (C.D. Cal.):** Grigoryan pleaded guilty to conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349. Grigoryan applied for and received nearly $3 million in fraudulent COVID-19 related UI benefits. On June 7, 2023, Grigoryan was sentenced to 63 months of imprisonment.

- ***United States v. Elie Floradin*, 22-cr-20361 (S.D. Fla.):** Floradin pleaded guilty to wire fraud in violation of 18 U.S.C. § 1343. Floradin applied for more than $1 million in fraudulent PPP loans from which he received approximately $534,000 in illicitly obtained funds. On May 23, 2023, Floradin was sentenced to 48 months of imprisonment.

- ***United States v. Bryan Alan Sparks*, 22-cr-189 (W.D. Wash.):** Sparks pleaded guilty to wire fraud in violation of 18 U.S.C. § 1343, and aggravated identity theft in violation of 18 U.S.C. § 1028A. Sparks and a co-conspirator used the stolen identities of Washington residents to apply for fraudulent COVID-19 related EIDL loans and UI benefits totaling nearly $2 million, of which they received approximately $1.4 million. On May 23, 2023, Sparks was sentenced to 100 months of imprisonment for his offenses.

Although no case is factually identical to the instant case, the above cases demonstrate that COVID-19 related fraud involving government assistance programs has routinely led to several-year prison sentences for federal criminal defendants. Indeed, some recent defendants have received prison sentences much longer than the 40-month term the Government seeks here, despite causing similar or lesser losses compared to Defendant. *See, e.g.*, *United States v. Alabi*, SAG-21-413 (D. Md.) (66 months for conspiracy to commit wire fraud and aggravated identity theft; approx. $1.5M foreseeable loss attributable to the conspiracy; approx. $500K obtained by defendant);[8] *United States v. Pham*, 22-cr-140 (C.D. Cal.) (84 months for wire fraud and aggravated identity theft; approx. $1.25M in intended loss; approx. $408K in actual loss); *United States v. Floradin*, 22-cr-20361 (S.D. Fla.) (48 months for wire fraud; approx. $1M in intended loss; approx. $534K in actual loss). Notwithstanding the Defense's focus on some of the most lenient white collar sentences to occur over more than a decade, it is quite common for courts to order substantial prison sentences for fraudulent PPP loans and other fraud in connection with COVID-19 related government benefits. Such sentences are amply supported by the U.S.S.G. and § 3553(a) factors.

IV. Conclusion

Particularly when considered in the context of the legal framework and the totality of evidence in this case, the arguments and contentions in the Defense Memo simply do not warrant a downward departure or variance from the U.S.S.G. recommended range, let alone a departure of 37 months (or the equivalent of 13 levels) from the low end of the stipulated guidelines range. The Government therefore respectfully asks the Court to order the Government's proposed sentence—40 months of imprisonment, $1,295,000 in restitution plus interest to M&T Bank, and $1,295,000 in a forfeiture money judgment (with credit for property forfeited), *see* ECF No. 23—which is

[8] Congress imposed a 24-month statutory minimum imprisonment for aggravated identity theft in violation of 18 U.S.C. § 1028A, which is to run consecutively with any other term of imprisonment. § 1028A(b)(2). Here, Defendant has not been convicted of aggravated identity theft. Still, even excluding the 24-month consecutive term from sentences of 66 and 84 months, the defendants still received more than the 40 months sought by the Government here.

well-grounded in the sentencing guidelines, 18 U.S.C. § 3553(a) factors, recent precedents and the totality of evidence.

Respectfully submitted,

Erek L. Barron
United States Attorney

By: /s/____________________
Darryl L. Tarver
Assistant United States Attorney
Office of the United States Attorney
36 S. Charles Street, 4th Floor
Baltimore, MD 21201