UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 6:21-cr-16-WWB-DCI

DON V. CISTERNINO

UNITED STATES' SENTENCING MEMORANDUM

As set forth below, a sentence at the high end of the guidelines is necessary to reflect the nature and circumstances of the instant offense and the history and characteristics of the defendant. This sentence is necessary to account for not only the avaricious scope and sophistication of the defendant's scheme—he obtained $7.2 million in emergency funds by counterfeiting hundreds of documents to make it appear that he had a functioning business with 441 employees suffering the effects of the pandemic—but also the defendant's lavish spending of emergency funds on personal luxuries, his flight to Europe in January 2021 upon learning he was under investigation, and his attempt to defeat his extradition after his arrest in Croatia in April 2021. A high-end guidelines sentence will also help promote respect for the law, provide just punishment, and deter others from abusing government emergency relief programs.

I. The Nature and Circumstances of the Offense

The nature and circumstances of the offenses committed by the defendant, which are set forth in the Presentence Report (PSR), weigh in favor of the high-end guidelines sentence requested by the United States. *See* 18 U.S.C. § 3553(a)(1). The pandemic-related loan fraud that the defendant engaged in was particularly serious. First, it was serious because of its scope and sophisticated nature. The defendant, who holds both Bachelors (Political Science) and Juris Doctorate degrees, created and submitted numerous false and fraudulent documents to effectuate the crime, including not only the loan application itself, but the bank statements, quarterly tax records, annual tax records, and W-2 forms set forth below:

1. A Paycheck Protection Program (PPP) Borrower Application Form in which the defendant falsely certified that his company, MagnifiCo, was an active business, had 441 employees, and had an average monthly payroll of $2,880,000.[1] Cisternino further falsely certified in this form that he would use the borrowed funds "to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments." In fact, at this time the defendant's company had no employees and no payroll.
2. Two Wells Fargo bank statements purporting to show that MagnifiCo had a business bank account ending in 7533 from which MagnifiCo made "payroll" withdrawals of $720,000 every week. In fact, this bank account did not exist and the defendant entirely falsified the bank statements.
3. Four IRS Form 941s purporting to show that MagnifiCo paid nearly $9.4 million in wages to its employees during each quarter of 2019. The defendant falsified each of these forms.

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[1] The defendant appears to have chosen numbers that would both maximize the fraud proceeds and avoid unnecessary scrutiny from the Lender and/or SBA. PPP payouts were based on the number of employees employed by an affected business. *See* Doc. 30 at 24–25. Businesses with 500 or more employees were generally ineligible, and a business could not receive funding for employees with salaries of $100,000 or more. *See* Doc. 30 at 24–25. By claiming 441 employees and asserting that many of these employees made $85,000 or $90,000 (as opposed to say, claiming 500 employees all of which made $100,000), the defendant was able to claim $7.2 million of a maximum $10 million application without the additional scrutiny that would surely have resulted from fully maxing out his claim.

4. An IRS Form 1120 purporting to show that during 2019 MagnifiCo paid $37,440,000 in wages and earned $44.9 million. The defendant falsified this form.
5. 441 W-2 forms—one for each of MagnifiCo's purported 441 employees—many of which the defendant submitted using the names, Social Security Numbers, and other PII of identity theft victims. The defendant falsified each of these 441 W-2 forms.
6. Closing paperwork for the loan in which the defendant falsely certified that the loan amount of $7,210,000 would be used for the "Paycheck Protection Program."

PSR ¶¶ 26–31. Thus, in total, during the three-week period between May 5, 2020, and May 27, 2020, Cisternino submitted at least **450** different falsified forms and documents to the Lender to effectuate the fraud. *Id.* The scheme was carefully planned and executed, and utilized the identities of at least 158 identity theft victims to help ensure its success. *Id.* Cisternino presumably used actual stolen identities, instead of fabricating identities, so that he would be more likely to withstand any audit or check of his supporting documentation.

Second, the scheme was serious because the defendant spent the fraud proceeds lavishly on personal luxuries, despite knowing that they were emergency funds designated for the employees of businesses affected by the world-wide pandemic. PSR ¶¶ 34-35. Within five weeks of receiving the funds, the defendant not only purchased the 12+ acre, 12,579 sq. ft., $3.5 million residence pictured below, but paid $251,436 for a Mercedes-Benz S650X, $89,000 for a Lincoln Navigator, and $48,477 to pay off a Maserati. *Id.* The defendant treated the loan like a winning lottery ticket, surely relying on the fact that the full amount of his PPP loan could be forgiven. *See* PSR ¶¶ 19-20; *see also* Section IV.A, *infra*.

The defendant was found living in this luxurious residence with his girlfriend in December 2021 after a fortuitous tip alerted the Government to the defendant's fraud. *See* PSR ¶ 39. Without this tip, the fraud may never have been detected.

Courts routinely find that a defendant's use of fraud proceeds on luxury items is a factor that should be taken into account in fashioning an appropriate sentence. *See, e.g., United States v. Annese*, 656 Fed.Appx. 761, 765 (6th Cir. 2016) (holding that a sentencing court's nine-month upward variance was reasonable because, among other things, "this was not a case of 'theft for survival,' as [the defendant] spent a large portion of the stolen money on luxury items"); *United States v. Stewart*, 2022 WL 1538399, at *2 (7th Cir. 2022) (finding that the sentencing court "reasonably weighed the sentencing factors under 18 U.S.C. § 3553(a)," properly considering, among other things, that the defendant "was not in financial distress and used the money for luxury items"); *United States v. Coleman*, 2021 WL 2285432, at *3 (C.D.Ill. 2021) ("The underlying offense was also serious. Defendant engaged in a sophisticated fraud . . . . He submitted fraudulent loan applications and falsified W-2s and earning statements . . . . He spent these loans on luxury items including a Corvette Stingray, a Porsche Panamera, and a Mercedes."); *see cf. Hall v. United States*, 2019 WL 7293588, at *1 (M.D.Fla. 2019) (discussing the sentencing court's 120-month sentence for a defendant who fraudulently obtained more than $3 million of retirement funds from public school teachers and administrators, nurses, and other victims, and used these funds "to pay personal expenses, purchase commercial property, and buy luxury cars"). Here, Cisternino not only spent a large portion of the proceeds on luxury items, but he did so at a breakneck pace, expending more than $5 million of the funds on non-business purposes in a matter of weeks. PSR ¶¶ 33–35. This included approximately $1.4 million that he wired to his parents—not as the defense hypothesizes because he knew that "they were far more capable and prudent in handling the money than he was" and he wanted to protect the emergency funds (Doc. 42 at 4), but because he "owed them money." (PSR ¶ 67); *see also* Exh. 1 (check from the defendant to his father for $1,440,000 dated June 9, 2020, with "Repayment of Loan" written on the memo line).

II. The History and Characteristics of the Defendant

While the defendant's history and characteristics are a mixed bag, they are not inconsistent with the sentence requested by the United States. *See* 18 U.S.C. § 3553(a)(1). To be sure, the Court should take into account that the defendant has no prior criminal history, a fact that is also reflected in the defendant's Guidelines range. But the Court should also consider the defendant's relatively stable upbringing (*see* PSR ¶ 68: "Cisternino's physical and emotional needs were met. . . . Cisternino denied any physical or verbal abuse in the household."), and that despite this upbringing, the defendant's greed and dishonesty led him to engage in a large-scale fraud and deception. Indeed, as a man who holds a Political Science degree from Tulane and a Juris Doctorate from the Brooklyn Law School (PSR ¶ 80), Cisternino is uniquely situated to understand and/or research the significance of emergency government relief and the laws against obtaining such funding through fraud. This did not deter him.

Tellingly, as of the date of this sentencing memo, the defendant's girlfriend—who shared in the proceeds of the fraud (*see* PSR ¶¶ 34, 39) and assisted the defendant in submitting some of the counterfeit documents for the loan (*see* PSR ¶ 29)—is the only person who has submitted a character letter in support of the defendant.

Much also can be observed about the defendant's characteristics from his reaction once his fraud was discovered. After he learned that he was under investigation and received a subpoena for specified MagnifiCo business records, the defendant fled to Switzerland without complying with the subpoena. PSR ¶¶ 39–40. He lived as a fugitive for several months before he was arrested under an Interpol Red Notice trying to cross the border from Slovenia into Croatia. PSR ¶ 40; *see also* PSR ¶ 73 (Cisternino characterizing his fugitive life as "traveling through Europe . . . stay[ing] in different hotels and Airbnb's"). These are not, as the defense mistakenly argues, the actions of someone who "wanted to be caught." *See* Doc. 42 at 3.

In fact, the defendant even contested his extradition, claiming that he was entitled to asylum "because due to the change in business policy in the United States, his business would encounter difficulties." Exh. 2 ¶¶ 2-3; *see also* Exh. 3. In other words, even after the defendant's arrest, he opportunistically maintained the façade of having an operating business. The Court should take this into account in evaluating the defendant's history and characteristics.

III. Just Punishment, Adequate Deterrence, Respect for the Law, and Protection of the Public

A high-end guidelines sentence is also necessary to meet the sentencing goals of adequate deterrence, respect for the law, protection of the public and just punishment in this case. "The more serious the crime and the greater the defendant's role in it, the more important it is to send a strong and clear message that will deter others." *United States v. Irey*, 612 F.3d 1160, 1212 (11th Cir. 2010). Here, the defendant played a lead role in counterfeiting and submitting numerous fraudulent documents and this conduct resulted in losses of more than $7.2 million in emergency funding related to the COVID-19 pandemic.

The defense suggests that his actions were largely victimless because the government was ultimately able to forfeit some of the purchased property and claw back some of the defendant's cash transfers. As further explained below, this is far from a victimless crime; rather it is the exact type of offense that the public should be protected against. Even if the government was eventually able to recover some of the funds, nationwide PPP funding ran out on multiple occasions, meaning that the funding that the defendant fraudulently obtained was unavailable for other, truly struggling businesses. *See, e.g., The Paycheck Protection Program is out of money*, New York Times articled dated May 4, 2021, located online at https://www.nytimes.com/2021/05/04/business/paycheck-protection-program-closes.html, last accessed Jan. 4, 2023; *PPP is out of money for most businesses ahead of planned May 31 closure,* CNN article dated May 5, 2021, located online at https://www.cnn.com/2021/05/05/politics/paycheck-protection-program/index.html, last accessed on Jan. 4, 2023 (further indicating that existing PPP program funding was similarly exhausted in April and August 2020, "leaving smaller businesses without critical funding").

That the defendant was ultimately caught does not reduce his culpability or the loss amount. "[W]hen a person commits fraud and absconds with no intent to repay, the fact that he is caught and part of the money is recovered does not change calculation of the loss." *U.S. v. Boren*, 172 Fed.Appx. 164, 166, 2006 WL

701937, at *1 (9th Cir. 2006), *citing United States v. Galliano*, 977 F.2d 1350, 1353 (9th Cir. 1992). Moreover, a substantial sentence will deter others from engaging in the same conduct, thereby helping to ensure that sufficient funding exists for true victims during future emergencies.

IV. The PSR Properly Scores the Guidelines and Enhancements

A. The Loss Amount is Property Calculated

The defendant contends that the "loss amount" in his case should be reduced by the value of the properties that the government seized from him—properties that he purchased with the proceeds of his fraud. This is not correct. Section 2B1.1, Application Note 3(E)(ii) applies to cases "involving collateral pledged or otherwise provided by the defendant," *e.g.* a case in which a defendant is able to secure a fraudulent loan only by securing the loan with an asset. That is not the case here. The assets obtained by the defendant were not pledged in advance, but rather were seized by the Government pursuant to forfeiture proceedings after the Government's detection of the defendant's fraud. The defendant did not take measures to ensure that the victim would not suffer losses. Rather, the result of the defendant's fraud, if undetected, would have been to obtain a forgivable loan. *See, e.g.,* Plea Agreement Factual Basis, Doc. 30 at 24 ("The PPP allowed the interest and principal on the loan to be forgiven . . .").[2] Had the government not been tipped off to the defendant's fraud

[2] Although the defense contends that Cisternino may not have gotten his loan forgiven since that requires the submission of additional supporting documentation, he proved himself extremely adept at (and predisposed towards) the submission of fraudulent

it may never have been detected given the great lengths he went to falsify his supporting documentation.

Given that the defendant did not pledge collateral for the loan in advance, he is not entitled to credit for funds seized once he got caught. *See, e.g., U.S. v. Surles*, 424 Fed.Appx. 834, 836 (11th Cir. 2011) ("Surles cannot be credited under either of these provisions. First, the funds were not returned to [the victim] prior to its detection of the offense. Second, the $5,000,000 cannot be characterized as 'collateral pledged or otherwise provided by the defendant.' Accordingly, any credit-based argument for purposes of calculating intended loss is irrelevant."). Even assuming *arguendo*, moreover, that the Court saw fit to reduce the actual loss amount, the full $7.2 million is at the very least the *intended* loss amount, and thus the loss enhancement should not change.

B. The Defendant's Fraud Involved 10 or More Victims

The defendant also argues that this is not a case that involves 10 or more victims and thus that the enhancement in U.S.S.G. 2B1.1(b)(2) does not apply. More specifically, the defendant argues that to be a victim, one must suffer actual monetary loss. Doc. 42 at 6–7. Pursuant to Application Note 4(E) to Section 2B1.1(b)(2), however, the number of victims should include "any

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supporting documentation to obtain the funds in the first place. He would not likely have changed course when it came time to get the loan forgiven. Indeed, many of the listed supporting documents that could be used for forgiveness were the same types that the defendant falsified in applying for the loan. *See* Doc. 42-1 (listing bank account statements, tax forms, and "individual employee wage reporting" as documentation that could be used in support of a forgiveness application).

individual whose means of identification was used unlawfully or without authority." Here, the defendant used the names and Social Security Numbers of 158 identity theft victims without their authority to do so. PSR ¶¶ 29, 36–37. The enhancement in 2B1.1(b)(2) thus applies. *See, e.g., U.S. v. Roy,* 819 F.3d 998, 1002 (7th Cir. 2016) ("Although the defendants used the Medicare numbers of 168 persons in their fraudulent billing scheme, Roy contends that they weren't victims because they suffered no monetary loss—that the only victims were Medicare and Blue Cross Blue Shield. But 'victims' includes 'any individual whose means of identification was used unlawfully or without authority,' U.S.S.G. § 2B1.1 Application Note 4(E), and names and Medicare numbers are 'means of identification,' 18 U.S.C. § 1028(d)(7), making the individuals whose numbers were used victims.").

The defense's argument that one whose identity is stolen must suffer pecuniary loss before qualifying as a victim fails to account for the myriad of nonmonetizable harms that identity theft victims encounter, which can range from difficulties applying for benefits themselves, to the mental anguish of knowing that their identities have been used and distributed. Indeed, this argument has been flatly rejected by the Eleventh Circuit.[3] This Court should do the same.

[3] *See U.S. v. Ford*, 784 F.3d 1386, 1397 (11th Cir. 2015) ("**Ford first argues that the IRS is the only victim in this case because the individual victims did not suffer pecuniary harm.** *See* U.S.S.G. § 2B1.1, Application Note 1 (defining 'victim,' in part, as 'any person who sustained any part of the actual loss determined under subsection (b)(1)'). **Ford's interpretation is incorrect. Application Note 4(E)(ii) to Section 2B1.1 is clear that 'any individual whose means of identification was used unlawfully or without authority' is a victim under U.S.S.G. § 2B1.1(b)(2)**.") (emphasis added); *see also United States v. Blanc*, 708 Fed.Appx. 576, 579 (11th Cir. 2017) ("Both before and

C. The Defendant Employed Sophisticated Means

The defense further contends that this is not a case involving sophisticated means. The Government disagrees and believes the probation office has appropriately scored this enhancement. As provided in U.S.S.G. § 2B1.1, Application Note 9(B), sophisticated means includes especially complex or intricate offense conduct "pertaining to the execution **or** concealment" of the offense (emphasis added). Here, the defendant went to great lengths to execute the fraudulent scheme and conceal the fact that his company did not have employees or a payroll. This included not only submitting a fraudulent PPP loan application, but also (1) creating two different fake Wells Fargo bank statements for a non-existent bank account; (2) creating four fake IRS Form 941s for four different tax quarters; (3) creating a fake IRS Form 1120; and (4) creating 441 falsified W-2s using stolen identities. Doc. 30 at 28–29; PSR ¶¶ 25–31. Most of the 450 counterfeit documents created and submitted by the defendant were intricate financial or tax documents. *Id.* The defendant thus employed sophisticated means to both execute and conceal his fraud. *See, e.g., U.S. v. Pierce,* 643 Fed.Appx. 500, 503 (6th Cir. 2016) (affirming the sentencing court's finding that the sophisticated means enhancement applied because "[a]s the government noted, Mr. Pierce created fictitious jobs and W–2 forms which

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after Amendment 792, the term 'victim' for purposes of § 2B1.1(b)(2) included not only an individual who 'sustained any part of the actual loss,' but also 'any individual whose means of identification was used unlawfully or without authority.'").

ultimately resulted in over $600,000 in illegal gain"); *U.S. v. McCloskey*, 2013 WL 6185147, at *3, 13–14 (W.D.Pa. 2013) (finding that the sophisticated mean enhancement applied where the defendant participated in misrepresentations of borrowers financial conditions "by providing fraudulent documents in support of loan applications, including false bank statements, 401K statements, checks, W–2 statements, and paystubs"); *United States v. Kennedy*, 2014 WL 2742798, at *3 (N.D.Ill. 2014) (determining that the sophisticated means enhancement applied where the defendant "created fictitious corporations and fake W–2s for her clients stating that they had been employed at those fictitious corporations").

V. Restitution and Forfeiture Should Both be Ordered in this Case

A. Restitution is Mandatory

The Mandatory Victims Restitution Act (MVRA), 18 U.S.C. § 3663A, requires that a court imposing a sentence for most federal crimes "shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense." 18 U.S.C. § 3663A(a)(1). As the Eleventh Circuit has held, "for designated offenses, including those … where an identifiable victim has sustained a pecuniary loss, the [Act] requires a district court to 'order restitution to each victim in the *full amount of each victim's losses* as determined by the court and without consideration of the economic circumstances of the defendant.'" *United States v. Joseph*, 743 F.3d 1350, 1353–54 (11th Cir. 2014) (quoting 18 U.S.C. § 3664(f)(1)(A) and adding emphasis); *see* 18 U.S.C. § 3663A(c)(1)(B).

B. Forfeiture is Mandatory

Forfeiture too is mandatory in this case. 18 U.S.C. § 981(a)(1)(C) provides that the government may seek civil forfeiture of any property that constitutes or is derived from proceeds traceable to, among other things, any offense that constitutes a "specified unlawful activity" as defined by 18 U.S.C. § 1956(c)(7). Included in the definition of "specified unlawful activity," which incorporates by reference Section 1961, are offenses under 18 U.S.C. § 1343 and 18 U.S.C. § 1957. *See* 18 U.S.C. §§ 1956(c)(7), 1961. Although section 981(a)(1)(C) is a civil forfeiture statute, 28 U.S.C. § 2461(c) authorizes the criminal forfeiture of any property that can be forfeited civilly by using the procedures for the criminal forfeiture and disposition of property set forth in 21 U.S.C. § 853. Therefore, the United States included in the indictment a notice of its intent to seek forfeiture of the proceeds of the wire fraud and unlawful monetary transactions offenses. Doc. 1 at 11–12.

Upon the defendant's conviction of these offenses, the Court is required to order the forfeiture as part of his sentence. *See* 28 U.S.C. 2461(c) ("If the defendant is convicted of the offense giving rise to the forfeiture, the court *shall* order the forfeiture of the property as part of the sentence in the criminal case") (emphasis added). Indeed, it is well-established that criminal forfeiture constitutes an aspect of punishment that the court must impose as an element of the sentence. *See Libretti v. United States*, 516 U.S. 29, 39–40 (1995); *see also United States v. Monsanto*, 491 U.S. 600, 607 (1989) ("Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *United States v. Fleet*, 498 F.3d 1225, 1229 (11th Cir. 2007) ("The word 'shall' does not convey discretion. It is not a leeway word, but a word of command."); *United States v. Brummer*, 598 F.3d 1248, 1250-51 (11th Cir. 2010) (when criminal forfeiture is authorized under section 2461(c), the district court has no discretion and must order forfeiture).

When a forfeiture money judgment is sought, Fed. R. Crim. P. 32.2(b)(2) requires the Court to "determine the amount of money that the defendant [would] be ordered to pay" and to "promptly enter a preliminary order of forfeiture setting forth the amount of any money judgment". Here, there is no dispute about the amount of proceeds the defendant obtained as a result of his offense, $7,210,000. Therefore, as part of the defendant's sentence, the Court is required to enter a forfeiture money judgment for $7,210,000.[4]

C. Restitution and Forfeiture Serve Different Purposes

Restitution and forfeiture are not mutually exclusive because they serve different purposes. As the Eleventh Circuit explained in *Joseph*, both are required:

> [A] defendant is not entitled to offset the amount of restitution owed to a victim by the value of property forfeited to the government, or vice versa, because restitution and forfeiture serve distinct purposes. …

[4] As set forth in the United States' Motion for Preliminary Order of Forfeiture, the net proceeds from the forfeiture of the directly forfeitable assets will be credited to and reduce the amount the United States shall be entitled to forfeit as substitute assets pursuant to 21 U.S.C. § 853(p). Doc. 36 at 4 n. 2.

> While restitution seeks to make victims whole by reimbursing them for their losses, forfeiture is meant to punish the defendant by transferring his ill-gotten gains to the United States Department of Justice (DOJ).

United States v. Joseph, 743 F.3d 1350, 1354 (11th Cir. 2014); *accord United States v. Hoffman-Vaile*, 568 F.3d 1335, 1344–45 (11th Cir. 2009). The two payments represent different types of funds: punitive and compensatory. They are different in nature, kind, and purpose. *United States v. Davis*, 706 F.3d 1081, 1984 (9th Cir. 2013).

Because the statutory requirements for both restitution and forfeiture are mandatory, one cannot be used to offset the other. *Joseph*, 743 F.3d at 1354; *United States v. Torres*, 703 F.3d 194, 204 (2d Cir. 2012) (collecting cases rejecting double-recovery challenges to forfeiture and restitution orders), *cert. denied*, 133 S. Ct. 2782 (2013).

D. Here the SBA is Entitled to both Forfeiture and Restitution

The victim that suffered monetary losses in this case is the SBA. But the fact that the SBA is a government entity does not alter the mandatory nature of both restitution and forfeiture. The Eleventh Circuit Court of Appeals weighed in on this issue in *United States v. Hernandez*, where there was a government entity victim, and confirmed that both forfeiture and restitution were mandatory and that the district court erred by not ordering both. 803 F.3d 1341, 1342 (11th Cir. 2015) (holding that the district court was required to order restitution for the full loss suffered by the SSA and could not offset the amount of restitution by the amount subject to forfeiture).

In this case, the restitution claimed by the SBA includes interest and a processing fee charged to them by the lender, which values the SBA is entitled to recover. The MVRA requires sentencing courts to order restitution of the lost property's value "on the date of sentencing" if that figure is greater than the property's value on the date of loss. 18 U.S.C. § 3663A(b)(1)(B). Courts have held that even where "the property lost is cash . . there is no reason to exclude losses that result from the deprivation of the victim's ability to put its money to productive use." *United States v. Qurashi*, 634 F.3d 699, 703 (2d Cir. 2011); *accord United States v. Alexander*, 679 F.3d 721, 731 (8th Cir. 2012) ("we have previously affirmed a district court's restitution amount that included interest"); *United States v. Corey*, 77 Fed. Appx. 7, 12 (1st Cir. 2003) (awarding prejudgment interest in restitution for defendant convicted of bank fraud). In *Qurashi*, which concerned fraudulently obtained insurance proceeds, the Second Circuit reasoned that "prejudgment interest stands in to provide a rough but fair approximation" of "the time-value of money," and thereby serves the MVRA's purpose of fully compensating victims for their losses. 634 F.3d at 703.

The United States therefore requests that the Court sentence the defendant at or near the high end of the guidelines.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2023, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to the following:

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