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April 24, 2023

Hon. Mary Kay Vyskocil
United States District Judge
Southern District of New York
500 Pearl St.
New York, New York 10007

Re: *United States v. Ilori,* 21 Cr. 746 (MKV)

Dear Judge Vyskocil:

This letter is respectfully submitted on behalf of Mr. Adedayo Ilori ("Mr. Ilori" or "Adedayo"), whose sentencing in connection with the above-captioned matter is scheduled to take place before Your Honor on May 8, 2023.

Mr. Ilori is a 45-year-old American-born Nigerian man, beloved father of three, and devoted husband. Poverty and violence marked his childhood, resulting in untreated complex post-traumatic stress disorder (PTSD) that has inflicted a deep scar on Adedayo's psyche and left him in constant fear that his life circumstances will return to poverty-stricken conditions he experienced during his childhood in Nigeria. Under these circumstances, as laid out in greater detail herein, there is reason to be optimistic that if given proper mental health treatment, Mr. Ilori will return to being the responsible and productive member of society that he was for the ten-year period prior to the COVID-19 pandemic. It is respectfully submitted that a sentence substantially below the draconian sentence recommended by the advisory sentencing guidelines and even below the lesser sentence recommended by the Probation Department would be sufficient, but not greater than necessary to serve the statutory goals of sentencing set forth in 18 U.S.C. § 3553(a).

I. <u>The Advisory Sentencing Guidelines Range</u>

As the Supreme Court has repeatedly explained, "a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." *Peugh v. United States*, 569 U.S. 530, 536, 133 S. Ct. 2072, 2080 (2013) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). The Probation Department calculated Mr. Ilori's Guidelines range to be 360 months to life, but recommended a slightly lower sentence of 264 months imprisonment. As discussed in detail below, the Probation Department's guidelines calculation is erroneous and therefore, Mr. Ilori's Guidelines range is significantly lower than both the range calculated by the Probation Department and the sentence recommended in the Presentence Investigation Report ("PSR"). Indeed, as explained below, Mr. Ilori's advisory sentencing guideline range should be 135 to 168 months.

A. The Probation Department Erroneously Applied Enhancements to Mr. Ilori's Guideline Calculation

The PSR assigns a 20-point enhancement to Mr. Ilori's Guidelines range because the "intended" loss was more than $9,500,000 but less than $25,000,000 pursuant to USSG § 2B1.1(b)(1) (the "Loss Guideline").[1] The PSR's calculation in this regard is erroneous. The Third Circuit recently clarified the scope of the Loss Guideline in *U.S. v. Banks*, 55 F.4th 246 (3d Cir. 2022) holding that the plain language of the Loss Guideline makes clear that a court should consider *actual* loss only. There, the defendant, Banks, was convicted of wire fraud after attempting fraudulent deposits in the amount of $324,000. In connection with sentencing, the Government assigned a 12-point enhancement pursuant to the Loss Guideline. The District Court sentenced Banks to 104 months' imprisonment based on the Government's sentence calculation. On appeal, Banks argued that the District Court erred in applying the loss enhancement to the fraud guideline because there was no actual loss, and the Third Circuit agreed. The Third Circuit held that the enhancement was erroneously applied because the victim suffered no actual loss, underscoring that the Application Notes to the Loss Guideline impermissibly expands the word "loss" to include both intended loss and actual loss. The Court stated,

> [W]e must decide whether, in the context of a sentence enhancement for basic economic offenses, the ordinary meaning of the word "loss" is the loss the victim actually suffered. We conclude it is. Because the commentary expands the definition of "loss" by explaining that generally "loss is the greater of actual loss or intended loss," we accord the commentary no weight.

Banks, *supra*, at 250. Here, the actual loss is $1,039,625 and thus, Mr. Ilori should be subject to a 14-point enhancement only. Indeed, consistent with *Banks*, Mr. Ilori is entitled to be sentenced on the *actual* loss of the victims. Accordingly, Mr. Ilori respectfully objects to the PSR's sentencing guidelines calculation to the extent that it assigns points based on intended loss instead of actual loss.

The PSR also erroneously assigns a 2-point enhancement for sophisticated means under USSG § 2B1.1(b)(10)(C). As explained by the Guidelines commentary, "[f]or purposes of subsection (b)(10)(C), "***sophisticated means***" means especially complex or especially intricate offense conduct pertaining to the execution or concealment of an offense. . . Conduct such as hiding assets or transactions, or both, through the use of fictitious entities, corporate shells, or offshore financial accounts also ordinarily indicates sophisticated means." Significantly, however, "sophistication requires more than the concealment or complexities inherent in fraud." *United States v Adepoju*, 756 F3d 250, 257 (4th Cir. 2014) (holding that the use of forged checks and stolen identity to commit bank fraud was not sufficient for sophisticated means enhancement). Indeed, "[t]he presence of forgeries or stolen identification, and a plan to use such material to wrongfully acquire moneys, does not necessarily amount to sophistication." *Id.* at 259.

[1] USSG § 2B1.1(b)(1)(K) simply states "[i]f the loss exceeded $6,500, increase the offense level as follows" with a chart showing a graduation of loss amounts correlated to increases in offense levels.

Here, as in *Adepoju*, concealment, false identities, and the use of fictitious entities are inherent in the crimes of which Mr. Ilori was convicted, particularly Major Fraud against the United States. These inherent fraud characteristics do not warrant application of the sophisticated means enhancement, which would serve to double count the conduct underlying Mr. Ilori's conviction (for sentencing purposes). Accordingly, Mr. Ilori respectfully objects to the PSR's 2-point enhancement for sophisticated means.

Lastly, the PSR assigns a 2-point enhancement for receiving more than $1,000,000 in gross receipts under USSG § 2B1.1(b)(17)(A).[2] Under the applicable Guidelines commentary, however, the defendant shall be considered to have derived more than $1,000,000 in gross receipts if the gross receipts *to the defendant individually, rather than to all participants*, exceeded $1,000,000." (emphasis added). Here, there is simply no basis to conclude that Mr. Ilori derived more than $1,000,000 in gross receipts.

The gross receipts in this case are $1,039,625, and are attributable to Chris Recamier, Mr. Ilori's co-conspirator—who pleaded guilty under Case Number 1:21-cr-00746-MKV-2— as well as Mr. Ilori. This total does not reflect gross receipts that Mr. Ilori received individually. Indeed, there was no determination, or evidence for that matter, of the gross receipts received personally by Mr. Ilori. If divided equally between Mr. Ilori and Mr. Recamier, the gross receipts would be slightly more than $500,000. Application of the gross receipts enhancement here would punish Mr. Ilori twice for the loss amount already taken into consideration by the loss calculation pursuant to the Loss Guideline. Accordingly, Mr. Ilori respectfully objects to the PSR's 2-point enhancement for gross receipts exceeding $1,000,000.

II. A Below Guidelines Sentence is Sufficient to Achieve the Statutory Purposes of Sentencing

After calculating the appropriate Guidelines range, the Court must apply certain considerations set forth in 18 U.S.C. § 3553(a), make an individualized assessment, and impose a sentence that is "sufficient, but not greater than necessary" to meet the objectives of federal sentencing. *See* 18 U.S.C. § 3553(a); *Gall v. United States*, *supra*. It is respectfully submitted that each of the relevant Section 3553(a) considerations counsels in favor of imposing a sentence on Mr. Ilori that is substantially below the sentences recommended by the advisory Guidelines range and by the Probation Department.

[2] USSG § 2B1.1(b)(17)(A) "[i]f the defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense, increase by 2 levels."

A. The History and Characteristics of Mr. Ilori

To understand how Adedayo Ilori came to stand before the Court for sentencing in this case, it is necessary to understand his poverty-stricken upbringing and the taxing financial pressures placed upon him as an adult. Adedayo was born in California and at the tender age of one, relocated to Nigeria with his mother. He was raised in extreme poverty by a single mother for the first 11 years of his life. As a young child, he experienced several traumatic and violent events and was consistently worried about his physical well-being and the economic survival of his family. At 11 years old, his mother relocated to Saudi Arabia to work in a hospital. Young Adedayo was left with his abusive stepfather and his stepfather's parents. His mother sent money to his stepfather, but the stepfather would squander it, not using any for the welfare of Adedayo or his sibling. [redacted] Adedayo felt that he had no one to speak to about these traumas, because culturally he was expected not to complain and to "deal with it."[3]

At the age of fifteen, Adedayo fled his unstable, abusive home and travelled to New York, where he knew no one. [redacted] Three years later, at the age of 18, Adedayo was arrested for the first time, for depositing counterfeit checks. He served 12 months in jail, during which time he received his GED. After being released, Adedayo tried to turn his life around by enrolling in college courses. He could not afford the tuition costs, however, and was incarcerated for a second time when he used a stolen credit card to purchase a computer.

Adedayo met his wife, Wunmi, in 2005 and they had their first child in 2006. With the help of Wunmi, Adedayo pursued a career as a personal trainer. Their second child was born in 2010. They separated for a period of time, from 2012 to 2018, during which Adedayo had a third child with a different partner. In 2020, Adedayo and Wunmi reconnected and reconciled, and he returned to live with her and their two children. Adedayo continues to maintain relationships with all three of his children. As Wunmi wrote in her letter to the Court attached hereto as Exhibit B:

> Adedayo and I have 2 kids together, a boy and girl, ages 12 and 16 respectively and he has been nothing short of a great father in their lives. He is an amazing father and although that may be something you hear frequently, but i wish you could witness their relationship with them. He helps to take them to school and picks them up. He assists them with their homework and as a Personal Trainer makes physical activity his way of bonding with them outside of their academic studies. He's a good husband and friend to me and he extends himself in any capacity that i may require of him.

[3] Attached hereto as Exhibit A is a letter to the Court from Adedayo's mother, Aminat Bakare.

In addition to supporting his wife and children, for years, Mr. Ilori has helped support his mother, father, and other family members who reside in Nigeria. Mr. Ilori's mother, who has physical disabilities, is retired without a pension and his father is paralyzed due to strokes. Several of Mr. Ilori's aunts and uncles have struggled with cancer resulting in expensive medical bills over the past few years.

At age 25, Mr. Ilori was arrested for possession of a forged driver's license. At age 27, he was arrested on various forgery charges for using a fraudulent credit card and possessing fraudulent driver's licenses. He was sentenced to seven years imprisonment but was released to parole in 2010 after four years imprisonment. One year later, he was discharged from parole by merit termination because he did not violate parole and maintained steady employment., Mr. Ilori continued to lead a lawful life for over a decade before his arrest on the case before Judge Liman in this district.

In 2020, Mr. Ilori was making an honest living as a personal trainer and financially supporting his family when the COVID-19 pandemic erupted, turning Mr. Ilori's life upside down. At the time, he had stayed out of trouble for ten years. Due to the in-person nature of personal training, the pandemic caused Mr. Ilori to lose much of his business; and the financial stress affected Mr. Ilori's decision making. The effects of growing up in poverty, as Mr. Ilori did, have drastic effects on decision-making as an adult. "Recent research shows that growing up in poverty affects people's lifelong decision-making style. People living in poverty make decisions focused on coping with present stressful circumstances, often at the expense of future goals." *How Poverty Affects People's Decision-Making Process,* Jennifer Sheehy-Skeffington and Jessica Rae, February 2017). All of these factors combined—Mr. Ilori's trauma from growing up in poverty, the pressure to support his family, and the pandemic that caused his only source of legitimate income to disappear virtually overnight—are no excuse for his participation in the crimes on which the jury found him guilty, but they constitute mitigating factors that deserve consideration in his sentencing.

B. The Statutory Objectives of Sentencing

Having considered the history and characteristics of the defendant and the nature and circumstances of his offense, Section 3553(a) directs the Court to impose a sentence that is no greater than necessary to achieve certain statutory objectives, including the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; the need for general and specific deterrence; the need to provide the defendant with needed training, medical care, and correctional treatment in the most effective manner; and the need to avoid unwarranted sentence disparities among similarly-situated defendants. It is respectfully submitted that the sentence recommended by the Government is significantly greater than necessary to achieve these objectives, and that a below-Guidelines sentence is warranted in this case.

There is no dispute that Mr. Ilori was convicted of serious offenses. However, the crimes of conviction were not violent and the money lost was not taken from any individuals. It is respectfully submitted, therefore, that a sentence below the Government's recommendation would be sufficient to reflect the seriousness of the offense, promote respect for the law, and provide just punishment. A sentence of the length recommended by the Probation Department should be reserved for violent criminals or for fraudsters who steal the life-savings of vulnerable individuals.

A sentence below the Probation Department's recommendation also would be sufficient, but not greater than necessary, to provide for general and specific deterrence. As to general deterrence, there can be no doubt that any term of years of incarceration in the federal system is a very substantial penalty. It is highly unlikely that imposing a 22-year sentence would have any additional deterrent effect over and beyond the deterrence to be achieved through imposition of a significantly shorter term of imprisonment, especially in light of social science research suggesting that the prospect of a long term of imprisonment does not generally provide a substantially greater deterrent effect than does the prospect of imprisonment in general.[4] As Judge Rakoff explained in refusing to impose a guidelines sentence of life imprisonment in a securities fraud case in which the actual loss exceeded $260 million, "there is a considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' offenders." *U.S. v. Adelson* 441 F.Supp 2d 506, 514 (SDNY 2006) (citing Richard Frase, *Punishment Purposes,* 58 Stanford L.Rev. 67, 80 (2005); Elizabeth Szockyj, *Imprisoning White Collar Criminals?,* 23 S. Ill. U. L.J. 485, 492 (1998). Judge Rakoff further cited United States Sentencing Commission, ***Fifteen Years of Guidelines Sentencing*** 56 (2004), which stated that the Sentencing Guidelines were written, in part, to "ensure a short but definite period of confinement for a larger proportion of these `white collar' cases, both to ensure proportionate punishment and to achieve deterrence."[5] In this case, any additional time added to the already stiff sentence imposed by Judge Liman will be more than sufficient to achieve the goal of general deterrence. Imposing the draconian sentences recommended by the Sentencing Guidelines or even the lesser sentence recommended by the Probation Department, is not necessary to serve the goal of general deterrence.

A below-Guidelines sentence would also be adequate to ensure that no further crimes are committed by Mr. Ilori. Now that the pandemic has subsided and in-person activities, such as personal training, can be conducted again, Mr. Ilori can return to the stable, productive and law-abiding life that he lived for a decade before his recent arrests. If designated to a facility where he can receive appropriate mental health treatment for his complex PTSD, Mr. Ilori will be far better prepared for a law-abiding and productive life than ever before, and thus unlikely to reoffend. Moreover, when he completes his sentence in this case, he will likely be past the age of fifty, an age at which the likelihood of recidivism decreases significantly. (See The Effects of Aging on Recidivism Among Federal Offenders, U.S. Sentencing Commission, December 2017). Thus, the

[4] *See, e.g.*, Steven F. Durflauf and Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced?*, 10 CRIMINOLOGY & PUBLIC POLICY 13 (Feb. 2011).

[5] In *Adelson*, Judge Rakoff also rejected the comparison to sentences ranging from 15-30 years imposed on the likes of Bernard Ebbers, the CEO of World.com, John and Timothy Rigas of Adelphia, and Steven Hoffenberg, all of whom were convicted of fraud schemes that involved losses ranging from the hundreds of millions to over two billion dollars, far exceeding the actual and even intended loss in this case.

sentences recommended by the Sentencing Guidelines and the Probation Department would be greater than necessary to achieve the objective of specific deterrence.

Lastly, it is respectfully submitted that imposing the Probation Department's recommended sentence would result in an unwarranted sentence disparity. Imposing a below-recommended sentence on Mr. Ilori would promote respect for the law by demonstrating that this Court is capable of a fine-grained analysis of the social and psychological factors at hand and treats similarly situated defendants in the same manner.

First, Mr. Ilori's co-conspirator and the primary offender in the case, Chris Recamier, was sentenced to 9 years imprisonment. The Probation Department's recommendation more than doubles this sentence for Mr. Ilori, despite the trial evidence which showed that Mr. Recamier was more culpable than Mr. Ilori. It is important to note that Mr. Recamier is white, while Mr. Ilori is Black. Black defendants consistently receive harsher sentences than white defendants.[6] A research study of almost 400,000 criminal cases in federal district courts from 2006 to 2019 found that "[w]ith respect to Black-white disparities, Black defendants on average receive 13% longer sentences than observationally equivalent white defendants receive, and a judge one standard deviation above average in Black-white disparities gives 39% longer sentences to Black defendants."[7] Here, Mr. Ilori's recommended sentence is a whopping 144% longer than the sentence imposed on Mr. Recamier. It is also significant that Mr. Recamier accepted a plea deal while Mr. Ilori chose to go to trial. Although the right to a trial and the presumption of innocence are the cornerstones of the American criminal legal system, those who exercise their right to go to trial tend to receive significantly harsher punishments.[8] It is respectfully submitted that it would be inappropriate for Mr. Ilori to be punished excessively for exercising his constitutional right to a trial by jury. Imposing the draconian sentence recommended by the Sentencing Guidelines or by the Probation Department will send the message that exercising one's right to a trial will result in severe penalties. This Court should not send that message.

Finally, other similarly situated defendants, and defendants having fraudulently obtained significantly larger amounts of money, have repeatedly received lesser sentences than that recommended for Mr. Ilori. In a recent case in the Eastern District of New York, the defendant, convicted on multiple counts of fraud resulting in more than $16,000,000 in losses, was sentenced to only 3 years imprisonment. *U.S. v. Josephberg*, No. 14-CR-399 (ENV). Also in the Eastern District of New York, a defendant in a COVID-19 relief fraud case with losses totaling over $1,900,000, was sentenced to six years imprisonment. *U.S. v. Miles*, No. 21-CR-221 (BMC). In another case in the

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[6] *See* Feldmeyer, B. and J. T. Ulmer, *Racial/Ethnic Threat and Federal Sentencing*, J. RES. CRIME DELINQ. 48(2), 238–270 (2011); see, also, Rachlinski, J. J. and A. J. Wistrich, *Judging the Judiciary By the Numbers: Empirical Research on Judges*, ANN. REV. LAW SOC. SCI. 13, 203–229 (2017).

[7] Christian Michael Smith, et al., *Racial Disparities in Criminal Sentencing Vary Considerably Across Federal Judges*, Institute for the Quantitative Study of Inclusion, Diversity, and Equity, Inc. (Aug. 17, 2021).

[8] Brian D. Johnson, *Trials and Tribulations: The Trial Tax and the Process of Punishment*, The University of Chicago (Feb. 13, 2019).

Southern District of Florida, the defendant received less than 4 years imprisonment for a similar COVID-19 relief fraud scheme with losses totaling over $1,600,000. *U.S. v. Joseph*, Case No. 22-CR-6016. There are countless examples of defendants committing similar crimes yet sentenced to terms of imprisonment significantly below the Probation Department's recommended sentence for Mr. Ilori. Additionally, Mr. Ilori was already punished for this crime in the case before Judge Liman in this district. Judge Liman imposed upon Mr. Ilori a sentence that was at the top of the Guidelines recommended by the Government in that case, which Guidelines range was enhanced by the conduct in this case, and therefore, the Court should not amplify his already harsh punishment with another draconian sentence here. Sentencing Mr. Ilori to twenty-two years, as recommended, would result in an unwarranted sentencing disparity between Mr. Ilori and Mr. Recamier and between Mr. Ilori and others who have committed similar crimes. The appropriate sentence in this case is one that recognizes these disparities and chooses not to perpetuate them.

III. CONCLUSION

Adedayo Ilori has been convicted of serious crimes, but the Court now has the opportunity to serve justice with a sentence that balances fair punishment with a recognition of the difficult life he has lived and his need for mental health treatment. With the sentence recommended by the Probation Department, Mr. Ilori likely will never see his parents again and will miss integral parts of all three of his children's lives. If sentenced to twenty-two years, Mr. Ilori will be in his sixties when he is released. His parents, if they survive, will be well into their 90s. All three of his children will be fully-grown adults, and his oldest will be almost the age he is now. The Court has the opportunity to impose a sentence that ensures his children do not go without a father, his wife of almost 20 years does not go without a partner, and his family in Nigeria does not go unsupported for longer than absolutely necessary. It is therefore respectfully requested that the Court temper justice with mercy and impose a sentence on Mr. Ilori that is substantially below the sentence recommended by the Probation Department.

Respectfully submitted,

/s/Avraham Moskowitz
Avaraham Moskowitz, Esq.

Counsel for Mr. Ilori

/s/Christopher DeGennaro
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