UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v.

RAFAEL MARTINEZ,

Defendant.

Case No. S1 22 Cr. 251 (LJL)

- x

SENTENCING SUBMISSION ON BEHALF OF RAFAEL MARTINEZ

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Defendant Rafael Martinez respectfully submits this memorandum to aid the Court in his sentencing, currently scheduled for July 11, 2023.

INTRODUCTION

The conviction in this case represents an utter aberration in the life of the man before the Court—a man whose "personal history and characteristics" are dramatically different from most who appear for sentencing. Rafael Martinez fully accepts responsibility for his conduct, has pled guilty without burdening this Court with a trial, and will stand before Your Honor on July 11 in acknowledgement that it was his serious lapse in judgment, and nothing else, that has led him to this moment. This memorandum seeks to make no excuses for Rafael's conduct: he submitted false documentation to both the Small Business Administration (the "SBA") and Bank of America in connection with applications related to the federal Paycheck Protection Program ("PPP"), and in doing so, he broke the law. Instead, we write, alongside the many letters submitted to Your Honor by those in Rafael's life, in an effort to provide this Court with a glimpse of who Rafael is as a person, beyond the conduct described in the Indictment, with the hope that this Court will recognize that it is a man's "whole life" that matters at sentencing, not just his most regrettable mistakes.

In some respects, Rafael's offense can be viewed as a warped extension of the otherwise admirable philosophy that has defined his life: that is, to provide for others and to step up when others have stepped aside. Deserted by his father when he was very young, Rafael is the eldest of four children, raised by their single mother, an immigrant from the Dominican Republic, who cleaned houses in Washington Heights in order to provide for her children. By age 13, he'd acquired a number of odd jobs around the neighborhood and spent the weekends fixing bike flats and carrying groceries for women in the community in an effort to lessen his family's financial burdens.

At age 24, Rafael married the love of his life, Ina, who was his anchor, his trusted confidant, and his best friend. As we describe below, Rafael and Ina believed strongly in community and strove to embody the ethos that to those whom much is given, much is expected. Rafael has served his community for 35 years as a youth mentor at his church. He and his family, including his two beloved daughters, Chelsea and Samantha, have for years delivered turkeys every Thanksgiving to disadvantaged families in his native Washington Heights community. Each fall, Rafael stocks the public school classrooms where his sisters teach with fresh school supplies, so that none of the children in their classes will suffer the indignity of not having the tools necessary to complete classwork. These small, consistent acts of community speak volumes about the kind of person that Rafael is.

Indeed, even in the face of unbearable grief, Rafael has tried to put others first. In 2018, despite a valiant five-year struggle against breast cancer, Ina passed away, leaving behind her young daughters and a devastated Rafael. Rafael's daughters, inspired by their mother's tremendous capacity for empathy, urged Rafael to make his wife's memory count for something bigger than themselves. He listened, and with their help, went on to establish 100 scholarships at Cardinal Hayes High School, in the Bronx. Those scholarships have allowed the sons of families who could never have otherwise afforded the tuition at a private school like Cardinal Hayes to receive an excellent high school education. In 2019, in recognition of how highly Ina had valued community engagement, Rafael renovated the community recreational center in Englewood, New Jersey, now named the Ina Martinez Fellowship Hall. Generosity of this nature is rare, even among those that are well-off, and its consistency over the course of Rafael's life evidences Rafael's real character and integrity and serves as proof that the circumstances that have led

Rafael to Your Honor's courtroom are indeed an anomaly in a life otherwise lived with deep compassion for others and respect for our system of law.

Indeed, even with respect to the instant offense, Rafael thought that his company, MBE Capital Partners ("MBE"), was uniquely situated to help businesses in need during an unprecedented global pandemic, especially the small and minority-owned businesses that were excluded from the PPP loan market established by traditional banks. Although it is undisputed that Rafael provided inaccurate information to the SBA on MBE's application for a license to issue PPP loans, it is equally undisputed that MBE provided almost $1 billion in much-needed loans to tens of thousands of deserving small businesses and people of color, exactly as the SBA intended when it granted MBE its license. Unlike most fraud cases where the Guidelines "loss" is the amount the defendant stole from innocent victims, here the "losses" which drive Rafael's advisory sentence are the fees MBE legitimately earned for doing its best to help the government get vital relief into the hands of underserved, minority-owned small businesses. While we do not dispute that it is a serious crime to submit an application to the federal government that contains false information, we respectfully submit that the moral culpability of the wrong is mitigated to a meaningful extent by the fact that Rafael's company worked hard in challenging circumstances to deliver the critical services it was expected to deliver, and in doing so, helped thousands of struggling small businesses weather the pandemic.

Likewise, there is no dispute that when MBE itself applied for a PPP loan—from Bank of America—Rafael overstated MBE's payroll obligations on the loan application. That misrepresentation is something that Rafael will regret for the rest of his life. But, unlike most of the PPP fraud cases that have been brought throughout this country, the $250,000 in PPP funds that Bank of America provided to MBE was in fact spent on payroll and business expenses, precisely as Congress intended when it launched the CARES Act in 2020. In other words, this case is very different than the typical PPP fraud case, in which the fraudster pocketed his PPP loan for himself, rather than on business expenses or employee payroll.

Last year, in an unrelated sentencing of a white-collar defendant, Your Honor took pains to explain that a "person is not defined by their worst conduct" and that the federal sentencing statute, 18 U.S.C. § 3553(a), is designed to give courts flexibility in sentencing, to reflect the whole of a person's character, not their weakest moments. *See* Tr. at 42, *United States v. Polevikov*, 1:21-cr-00774 (LJL) (S.D.N.Y. May 3, 2022), Dkt. 31. We respectfully submit that when Rafael's mistakes—serious as they are—are measured against the totality of his life, including the tremendous generosity of both time and resources that he has consistently given to his community, the Court can determine that a Guidelines sentence would be greater than is necessary to achieve the sentencing purposes of Section 3553(a). We respectfully and humbly request that the Court, in light of Rafael's status as a first offender, the nature of the offense, and in consideration of Rafael's demonstrated good character, vary downward substantially from the advisory Guidelines sentence. We submit that such a sentence would be sufficient, but not greater than necessary, to satisfy the legitimate objectives of sentencing.

DISCUSSION

"Imposing a sentence on a fellow human being is a formidable responsibility." *United States v. Gupta*, 904 F. Supp. 2d 349, 350 (S.D.N.Y. 2012). The responsibility carries with it the obligation to "consider every convicted person as an individual and every case as a unique study," and, for that reason, judges are given both flexibility and deference, so that they may freely exercise compassion in the face of the "the human failings" that can, and do, lead good people temporarily astray. *Gall v. United States*, 552 U.S. 38, 52 (2007).

Sentencing a man requires "great care and sensitivity" because the "facts and factors" that must be weighed are numerous and important. *Gupta*, 904 F. Supp. 2d at 350. While a sentencing court is required to "correctly calculat[e] the applicable Guidelines range," *see Gall*, 552 U.S. at 49, that calculation falls "second" to "the bedrock" of federal sentencing, 18 U.S.C. § 3553(a), which "requires a court to take account of a defendant's character in imposing sentence." *Gupta*, 904 F. Supp. 2d at 353-54. Under Section 3553(a), the Court must look at (1) the history and characteristics of the defendant; (2) the nature and circumstances of the offense; (3) the need to protect the public from further crimes of the defendant; (4) the need to afford adequate deterrence; and (5) the need to avoid unwarranted sentence disparities. *Gall*, 552 U.S. at 49-50 & n.6. As these factors reflect, sentencing bestows a "moral responsibility" to "judge the man as a whole." *Gupta*, 904 F. Supp. 2d at 350, 354.

The Guidelines sentence and statutory maximum term of imprisonment applicable in this case is 60 months. (PSR ¶ 5.) As the Second Circuit has explained, this Guidelines sentence is, at best, a "starting point in a deeper analysis" of the appropriate sentence, which should involve consideration of the Section 3553(a) factors. *United States v. Corsey*, 723 F.3d 366, 375-376 (2d Cir. 2013) (holding that district court committed procedural error by assuming that imposition of statutory maximum sentence was "per se reasonable" because Guidelines range prior to application of § 5G1.1 "soared past the statutory maximum.") Here, consideration of the factors described in Section 3553(a) leads to the conclusion that a non-Guidelines sentence is appropriate.

I. CONSIDERATION OF THE SECTION 3553(A) FACTORS MERITS A DOWNWARD VARIANCE FROM THE SENTENCING GUIDELINES.

A. Mr. Martinez's History and Character

In the Second Circuit, a defendant's history and character are "central consideration[s] in the fashioning of a just sentence." *United States v. Merritt*, 988 F.2d 1298, 1307 (2d Cir. 1993). By carefully considering a defendant's history and character, the Court adheres to the "elementary principle of weighing the good with the bad, which is basic to all the great religions, moral philosophies, and systems of justice" because "surely, if ever a man is to receive credit for the good he has done, and his immediate misconduct assessed in the context of his overall life hitherto, it should be at the moment of his sentencing, when his very future hangs in the balance." *United States v. Adelson,* 441 F. Supp. 2d 506, 513-14 (S.D.N.Y. 2006).

Rafael, in particular, is deserving of this Court's compassion. Dozens of people have written to the Court to explain that Rafael is, above all, a loving father and grandfather, a man of faith, and person who has spent his entire life giving back to people who are less fortunate than himself. (*See* Exhibit A, Letters to Judge Liman.) These letter-writers describe a fundamentally good man whose love for his two daughters, Chelsea and Samantha, his two grandchildren, [redacted] and [redacted] and his late-wife Ina has touched the lives of many, and who in return, ask this Court to exercise leniency during sentencing.

1. Mr. Martinez's Childhood and Education

Rafael, now 58, grew up in the Washington Heights neighborhood of New York City, the eldest of four children, in a proud Dominican family. Rafael's father abandoned the family when Rafael was a young child, but Rafael's mother, Maria, worked multiple jobs cleaning houses and cooking meals for other women in the neighborhood in order to provide for her family. As the oldest child, Rafael quickly stepped up as a father figure to his younger siblings. His sister, Rosa, recalls that Rafael was a "very responsible and thoughtful older brother," who helped with homework, maintained order when their mother was away, and took odd jobs all over the neighborhood to contribute to the family's finances. (Ex. A at 8.) Even as a kid, Rafael put his family first: when he earned his first paycheck at the age of 13, he did not spend the money on himself. Instead, he bought his twin sisters a hula hoop because they desperately wanted one and their mother was not able to afford it. (Ex. A at 7.)

Rafael attended high school at Cardinal Hayes High School. Although he was never a stellar student, he excelled on the football, baseball, basketball, track, and hockey teams. (PSR ¶ 68.) Both he and his mother worked hard in order to afford the tuition at Cardinal Hayes: in between practices and games, Rafael worked every chance he could get. He sold programs at Madison Square Garden for New York Ranger games and he worked as a clerk at a menswear store in Washington Heights, where he gained an appreciation for both business and fashion. As always, he continued to take odd jobs around the Washington Heights neighborhood. Yet, despite the efforts of both Rafael and his mother, the tuition obligations at Cardinal Hayes often felt out of reach and there were multiple times when Rafael was in jeopardy of being expelled from school because the tuition bill had not been paid. (PSR ¶ 68.) That experience, and that anxiety, was one he never forgot.

After graduating from high school, Rafael enrolled at the University of Syracuse, with the dream of studying architecture. After learning that it would take many years of apprenticeship before he would earn a meaningful income in architecture, he realized that such a degree did not make sense for him, given the financial needs of his family. (PSR ¶ 69.) Recalling his experience as a sales clerk in the menswear boutique in Washington Heights, he transferred to the Fashion Institute of Technology ("FIT") in New York City, where he began studying finance and apparel production management. (PSR ¶ 70.) Although he liked his classes very much, his mother was struggling to support his brother and sisters and Rafael ultimately withdrew from school two semesters before graduating in order to find full-time employment. (PSR ¶ 70.)

Despite the fact that they had very little in terms of material wealth, Rafael recalls a joyful childhood, and when he became a father, he strove to emulate that same happy upbringing in his own home. Indeed, the sacrifices Maria made for her family have left a life-long impression on Rafael. To this day, Rafael spends Father's Day with Maria because she played the role of both a mother and a father in his life. Her steadfast belief in him and his siblings was one of the driving forces behind Rafael's determination to do well, leave the Washington Heights neighborhood, and make a name for himself. To this day, Rafael has been unable to bring himself to tell his 90-year old mother, who devoted herself so selflessly to her children, about his conduct and the charges in this case for fear of breaking her heart.

2. <u>Mr. Martinez's Family and Commitment to Community</u>

Although Rafael did not graduate from FIT, the most pivotal moment of his life occurred while he was studying there: he met the love of his life, Ina Samuels, outside the school cafeteria. Theirs was a true love affair, and to this day Rafael considers his decision to ask Ina to marry him to be the best and most important decision he has ever made.

After they were married, Rafael and Ina moved to New Jersey to start a family. They had two daughters, Chelsea and Samantha. Rafael was determined to be the father to his daughters that he had never had: he checked homework, he taught the girls to dance, he made it a point to have dinner with his family. When his younger daughter Samantha, who was born with cerebral palsy, wanted to play fourth-grade basketball, Rafael didn't try to coax her out of it. Instead, he signed up to coach the girls' basketball team and designed special plays that wouldn't tax Samantha's much weaker left side. (Ex. A at 5.) When Samantha was 15, Rafael practiced slow dancing with her so that she could dance confidently at her "Sweet Sixteen" birthday party, despite the weakness in her ankles. (*Id.*) Rafael was equally as close with Chelsea, his oldest daughter. An accomplished athlete, Chelsea was recruited to attend Ohio State University as a fencer and was part of the NCAA champion women's team in her freshman year. Throughout her childhood, Rafael was the consistent parent on the sidelines, determined to make sure that Chelsea knew how proud he was of her.

Rafael and Ina were united in their belief that helping others is a vital part of any life worth living and they strove to instill those same values in their daughters. The family was active in St. Paul's Episcopal Church in Englewood, New Jersey where they actively supported the choir program. Rafael, who has been a member of the parish for 35 years, served on St. Paul's Vestry, which is the congregation's board of leadership, and also served as a mentor to young people in the parish. Father Bill Allport, the Church's pastor, describes Rafael as "a man of deep commitment to family . . . , to community, and to those without social or economic advantages." (Ex. A at 12.) Over the years, Rafael has donated more than $175,000 worth of furniture and others goods to local parishes, including the purchase of a replacement furnace for the Transcend Worship Center in Irvington, New Jersey.

As children, Chelsea and Samantha (along with their parents) fed the homeless on Thanksgiving and in more recent years, the family has donated hundreds of turkeys to struggling families in the Washington Heights neighborhood. (Ex. A at 3, 7, 8, 13.) When Chelsea was a teenager, she began playing golf and Rafael recalled his own first experience with the sport: he had been invited to a golf outing as part of a business event and was embarrassed to say that he had never played. Although Rafael realized that Chelsea would not have that same experience, Rafael realized he wanted to do more. Together with Ina, the couple began sponsoring a golf camp, so that kids from impoverished backgrounds who were interested in golf would have the opportunity to be taught by real players and play on real courses. (Ex. A at 7, 8.) Rafael and Ina similarly supported a soccer league which provided free after-school and summer camp experiences for young people in Washington Heights. (Ex. A at 13.) Indeed, his mother's immigrant background and his Dominican heritage inspired Rafael to create a civic organization called Entre Familia, which was dedicated to providing professional and educational opportunities for the Dominican community. (Ex. B, Entre Familia Presentation.)

When Rafael's daughters were still young teenagers, tragedy struck the family. Ina was diagnosed with breast cancer, which eventually metastasized to her lungs, stomach, spine, and brain. Although doctors only gave her three years to live, Ina fought the disease for five years, suffering through painful rounds of chemotherapy and other invasive treatments, with Rafael at her side. Three days a week, without fail, Rafael drove Ina to doctor appointments and watched her struggle through her treatment. Many of the letters submitted alongside this memorandum describe how tenderly Rafael cared for Ina in her final days and the enormous emotional and psychological toll her loss has taken on him. After learning that Ina's cancer was terminal, Rafael was determined to make a reality out of Ina's dreams of seeing the world: "[e]very few months, Rafael would tell Ina to pack a bag; only disclosing the temperature of the location he had planned to take her. She knew nothing until she got on the plane. He gave her hope." (Ex. A at 16.) In Ina's final days, Rafael carried her from her sick bed to the bathroom and urged her doctors to transplant one of his kidneys if it could buy him just a little bit more time with her. (Ex. A at 20.) And indeed Rafael was told by Ina's doctors that the tremendous support that he had shown to his wife had "extend[ed] her days beyond the time of medical science." (Ex. A at 15.) Ina passed away on January 10, 2018. (PSR ¶ 50.)

After Ina's death, Rafael and his daughters coped in different ways. Although he tried to hide it, Rafael began drinking, in part as a way to disguise the overwhelming loneliness he felt in the evenings without Ina's presence. (PSR at ¶ 65.) As Chelsea explains in her letter to the Court, Ina's death "broke" something in Rafael. She watched as he "drown[ed] himself in regrets" and became so "depressed…that he couldn't even speak." (Ex. A at 3.) Rafael, however, tried to work through his crippling grief by honoring Ina's memory in a manner consistent with the values that were important to her. Aware of how important early detection can be in cancer cases, Rafael donated hundreds of thousands of dollars to a hospital in Englewood in 2019, which was earmarked to assist women of color, who lacked health insurance, to obtain cancer tests and screenings. (Ex. A at 11.) Ultimately Rafael's generosity inspired others to give, and the hospital was able to raise another $500,000 in 2020 to fund a breast screening program for women of color. Rafael had also learned, through his parish, that a local recreation center desperately needed some long-delayed repairs. Recalling Ina's belief in community and the power of local institutions to bring people together, Rafael spearheaded the renovations, refinishing the gym floor, installing new technology, replacing the lighting, and giving everything a fresh coat of paint and a much needed deep clean. Ultimately the gym was named for Ina. (Ex. A at 15.) Rafael also donated more than $400,000 to renovate the community center at NAN Tech, a learning center in Newark, New Jersey, that is devoted to helping low-income Newark residents access and use technology they otherwise might not be able to afford. For the last five years, Rafael has worked towards building a community center in Washington Heights that will be named after Ina and will allow adults to learn English and computer skills and will provide underprivileged children with a safe space to go after school to receive tutoring and a hot meal.

Both Chelsea and Samantha were strong students—Chelsea had transferred to Fordham when her mother was sick and graduated with a degree in Psychology. She currently attends virtual classes at Pepperdine University to obtain her MBA. (PSR ¶ 51.) Samantha graduated from George Washington University, earned a Master's in Public Health from Columbia University, and is currently earning her MBA from the University of Chicago's Booth School of Business. In addition to her studies, she works at the University of Chicago Medical Center. (Ex. A at 5.) Rafael, who was never a star student, is immensely proud of his daughters' achievements and credits them to Ina's strong influence. Knowing how important education was to Ina, and recalling the anxiety he had felt as a teenager at Cardinal Hayes, when he was perpetually uncertain as to whether he would be able to make the tuition payments, Rafael decided, after Ina's death, to establish 100 scholarships at Cardinal Hayes, in Ina's memory. These scholarships have allowed students who otherwise would never have been able to afford to attend Cardinal Hayes an opportunity to receive an excellent high school education. (Ex. A at 13.)

In addition to financing the scholarship program at Cardinal Hayes, Rafael and his family established a nonprofit called Reaching New Heights, which is dedicated to providing students of color with an introduction to careers in different professions, including business, politics, and media. Chelsea currently works with her father to run Reaching New Heights and they have been able to provide some truly exceptional opportunities to high school students from low income neighborhoods.[1] By way of just one example, in 2021, Reaching New Heights paid for a number of students at Cardinal Hayes to take a one-day aviation course, where they received firsthand experience flying in the cockpit of a plane with a pilot. (*See* Exhibit C, Reaching New Heights Webpage.) In addition to Reaching New Heights, Rafael has also found ways to mentor those in his community who need a friend. For example, as Sweta Shah explains in her letter to the Court, Rafael has taken her teenage son [redacted], who suffers from autism, under his wing. This relationship is important to both of them: despite the fact that [redacted] needs significant assistance, including help cleaning himself after he uses the bathroom, Rafael has not shied away from spending significant time with [redacted] Indeed, this past year, he and [redacted] took a special trip by themselves to the City—to the Bronx Zoo—to see the holiday lights and decorations because Rafael knew that [redacted] very much wanted to go but that the excursion would be a challenge for [redacted]'s family. (Ex. A at 9.)

Rafael remains extraordinarily close with his two daughters. Chelsea lives close to her father and has two small children, two-year old [redacted], and a baby girl, [redacted], who was born this past April. As Chelsea explained to Probation, Rafael takes care of his grandchildren three days a week and he is an extraordinarily important person in her life. (PSR ¶ 55.) As she explains in her letter to Your Honor, she worries that a long custodial sentence for her father will send her "into a dark place" where she would "truly be lost." (Ex. A at 3; PSR ¶ 55.) Samantha, now 25, is equally close with Rafael. She identifies her father as "one of the greatest inspirations in [her] life," and describes him as "the most caring person I have ever met." (Ex. A at 5.) Inspired by her father's lifelong work helping underprivileged communities, Samantha has been

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[11] *See Reaching New Heights Inc.*, https://www.youtube.com/watch?v=uL1ocSCNEAk, YouTube (last accessed June 22, 2023); *Men in the Media Panel- Brought to you by Reaching New Heights Inc.*, YouTube, https://www.youtube.com/watch?v=UuRmelpUJBM (last accessed June 22, 2023).

driven to use her education and talents to provide healthcare to immigrant and minority families who often lack access to medical care.

3. Mr. Martinez's Career

Having grown up admiring the diverse business owners in his native Washington Heights, Rafael dedicated his career to helping small, minority businesses thrive. After working for a couple years for local car dealerships, a friend helped Rafael get a job as a representative for a fashion designer named Emil Rutenburg. (PSR ¶¶ 75-77.) During this time, Rafael became familiar with the concept of "purchase order financing," which is a financing arrangement in which businesses that lack liquidity to satisfy large customer orders use a third party to provide short-term financing, backed by the purchase order as collateral. Rafael eventually went into business on his own. Using startup capital from wealthy investors, Rafael founded Republic Group, LLC, and later MBE Capital Partners, which focused on providing short term financing solutions to women and minority-owned small businesses that serve as vendors to Fortune 500 corporations. Rafael has been doing this type of work for 30 years.

Many of the small businesses that Rafael worked with over the years have written to the Court to describe how instrumental his assistance has been in ensuring that their businesses thrived. Olu Victor Longe, owner of a Michigan-based minority temporary staffing agency describes how, in 2016, Rafael provided Longe's business with working capital. Longe states that "[w]ithout Mr. Rafael Martinez['s] help, it could have been impossible to grow our company because not only did he find us access to working capital; he constantly for a period of three years mentored my partner and I in growing the business." (Ex. A at 25.) John Henderson, the CEO and President of a minority-certified logistics company recalls how "[f]rom early 2016 through most of 2018 my company obtained much needed working capital financing through [Rafael's] business MBE Capital. This financing supported my company's growth to more than

$50 million in revenue and gave us the means to transition to a traditional finance institution. The availability of these services was difficult to obtain but Ra[f]ael was knowledgeable and able to provide the financing we needed. I truly believe that we could not have survived without his assistance." (Ex. A at 27.)

Jose Arias, the owner of a New York construction business, explains that "Rafael Martinez and his firm have been instrumental in our success as both financial support and more importantly served as a personal mentor. He has spent many hours of his time instructing and guiding me on achieving higher levels of success as minority and overcoming the challenges that we face as both a small business and a minority." (Ex. A at 26.) These are only a few examples of the many minority small businesses that Rafael has assisted during the course of his three-decade career. *See also* (Exhibit D, Video testimonial of David Segura) (explaining how MBE helped Mr. Segura's business quickly raise money to make investments and hire personnel); (Exhibit E, Video testimonial of Frank Garcia) (president of environmentally friendly technology company and President of Hispanic Chamber of Commerce describing how financing obtained from MBE helped his business get a contract with Amazon); (Exhibit F, Video testimonial of Gurudas Sarkar) (describing how Rafael helped his software business obtain financing in 2015, which allowed the business to maintain and expand payroll); (Exhibit G, Video testimonial compilation).

Long before the Covid-19 pandemic, Rafael had earned a positive reputation in the minority small business community for his work providing small businesses with access to capital. Rafael was a member of the New York & New Jersey Minority Supplier Development Counsel ("NYNJMSDCC"), which is a professional non-profit organization that certifies minority small businesses and provides those businesses with resources to help them grow.

Terrence Clark, the President and CEO of NYNJMSDC, has written to the Court to explain that Rafael was one of the first people he met who "shared a passion for assisting in the growth and development of minority business owners as they look to scale their businesses" and, in the more than eight years that they have known one another, Rafael has "always been a respected person in this endeavor." (Ex. A at 24.) Mr. Clark explains how he partnered with Rafael to provide affordable capital to certified minority small businesses in NYNJMSDC's database and that, under the program, Mr. Clark's clients were able to "elevate" their businesses thanks to Rafael's help. (Exhibit H, Testimonial video of Terrence Clark.)

Rafael's company also partnered with the federal government to provide small minority businesses with access to capital years before Covid-19 or the PPP program. In 2017, MBE entered into a memorandum of understanding with the Department of Commerce's Minority Business Development Agency ("MBDA") to provide over $1 billion in financing to companies that were clients of MBDA "Business Centers." (Exhibit I, Press release announcing MOU.) The partnership was extremely successful. A year after entering into the memorandum of understanding, MBE was awarded MBDA's "Access to Capital" award after financing $970 million in accounts receivables and helping its clients grow an average of 31%. (Exhibit J, MDBA's Access to Capital Award Press Release.)

The record before the Court makes clear that Rafael Martinez is a hardworking, generous man who cares deeply about others. His extraordinary generosity and kindness distinguishes him from most criminal defendants. These are the same characteristics that Your Honor has found deserving of mercy in other cases. *See, e.g.*, Tr. at 47, *United States v. Guzzone*, 20-cr-354 (LJL), (S.D.N.Y. Jan. 19, 2021), Dkt. 28 (imposing below Guidelines sentence in tax evasion case based, in part, on letters that "paint a remarkably consistent picture, paint a picture of somebody who is an extraordinarily hard worker, who came from a background that was not a privileged one, with a single mother. They paint a picture of a person who is a good family man, who cares deeply about his wife and whose wife cares deeply about him, cares about his mother and his in-laws, and his son, and who cares about his neighbors and colleagues."); Tr. at 47, *United States v. Huberfeld*, 16-cr-467 (LJL) (S.D.N.Y. Sept. 28, 2021), Dkt. 420 (imposing a sentence of 7 months for conspiracy to commit wire fraud and finding that defendant's "long history of giving argues strongly in favor of leniency."); Tr. at 44, *United States v. Polevikov*, 1:21-cr-00774 (LJL) (S.D.N.Y. May 3, 2022), Dkt. 31 (imposing below Guidelines sentence after finding that letters from friends and family "speak to a person [who] thinks about and who cares about and who devotes time and energy an[d] effort to causes [and] people outside of himself and that speaks very highly of [the defendant] and is a factor I need to think about and do think about.").

B. The Nature and Circumstances of the Offense

1. Offense Background

While Rafael takes full responsibility for his mistakes, it is important for the Court to understand the context in which the offense occurred. On March 29, 2020, the federal government enacted the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. (PSR ¶ 11.) One of the purposes of the CARES Act was to assist small businesses maintain payroll and satisfy other expenses through the PPP, in order to stabilize the American economy and prevent a catastrophic depression during an unprecedented worldwide crisis. (*Id.*) Congress crafted the PPP program to allow businesses to receive unsecured loans that the businesses were required to use on payroll costs, mortgage interest, rent, and/or utilities. (*Id.* at ¶12.) Those loans would then be forgiven if the funds were spent appropriately. (*Id.*)

The federal government did not provide PPP loans to small businesses directly. Instead, commercial lenders issued loans that were guaranteed by the SBA. (*Id.* at ¶ 12.) Congress authorized up to $349 billion in SBA-guaranteed PPP loans on March 29, 2020, a second round of $300 billion in PPP funding on April 24, 2020, and additional rounds of funding that ended on May 31, 2021. (*Id.* at ¶ 11.)

Prior to the Covid-19 pandemic, non-traditional lenders like Rafael's company, MBE, which specialized in purchase order financing, were generally ineligible to participate in SBA lending programs. As with other SBA loan programs, traditional banks issued the vast majority of the original $349 billion that Congress authorized for PPP loans.[2] Businesses with pre-existing banking relationships—which also tended to be larger companies predominately owned by white entrepreneurs—had an easier time obtaining PPP loans from these traditional lenders than did small businesses that did not have such relationships.[3] According to one study conducted by economists at the Federal Reserve Bank of New York, "95 percent of large bank applicants and 83 percent of small bank applicants had a prior relationship with their PPP lenders. . . . These borrowers had more employees, higher credit scores, and were more likely to have white owners."[4] As a result, during the first round of PPP, minority-owned and traditionally underserved businesses had difficulty obtaining loans.

The federal government received loud and well-deserved criticism for its distribution of the first round of PPP funding. Traditional banks had distributed large portions of

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[2] U.S. Gov't Accountability Off., GAO-21-601 *Paycheck Protection Program Program Changes Increased Lending to the Smallest Businesses and in Underserved Locations*, at 18 (Sept. 2021) (attached hereto as Exhibit K).

[3] Jessica Battisto et. al, *Who Received PPP Loans by Fintech Lenders?* Liberty Street Economics, (May 27, 2021) (attached hereto as Exhibit L).

[4] *Id.*

PPP funding to corporations like Shake Shack,[5] the Los Angeles Lakers,[6] and Ritz-Carlton[7], while the businesses that needed the money the most—and which employed almost half of all Americans—were left without assistance, especially those owned by self-employed individuals, minorities, women, and veterans.[8]

Congress made several changes to the PPP program in response to the public's criticism and in an effort to get funding to deserving small businesses that had been excluded from the first round of funding. One of these changes was to permit new, non-traditional lenders to participate in the second round of PPP, including firms like Rafael's business.[9] Indeed, the SBA appeared eager to approve nonbank lenders, like MBE, that had a proven history of providing financing solutions to small minority-owned businesses. For example, on April 21, 2020, while MBE's lender application was pending, Susan Streich, the SBA's Director of the Office of Credit Risk Management, emailed another SBA employee, Paul Kirwin, to check the status of MBE's application and Mr. Kirwin thereafter confirmed in an internal SBA email that the agency wanted to "prioritize the review of" MBE's application "[d]ue to [its] active history of making 'smaller' small business loans."[10] At the same time, Dr. Christopher Metzler, the Senior Vice President of Corporate Diversity, Equity and Inclusion at the National Urban

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[5] Alicia Wallace, *Shake Shack, Ruth's Chris and Other Chain Restaurants Got Big PPP Loans When Small Businesses Couldn't*, CNN Business (Apr. 20, 2020) (attached hereto as Exhibit M).

[6] Kevin Arnovitz, *Lakers Got Money from Loan Program, Returned It*, ESPN (Apr. 27, 2020) (attached hereto as Exhibit N).

[7] Shannon K. Crawford, *Luxury Hotels Benefitted from PPP Loans. So Did the Investment Trusts That Own Them*, ABC News (Apr. 29, 2020) (attached hereto as Exhibit O).

[8] Ex. K at 1; The U.S. Chamber of Commerce, *The State of Small Business Now* (April 10, 2023) (attached hereto as Exhibit P).

[9] Ex K at 20.

[10] April 21, 2020 email from Susan Streich to Paul Kirwin (attached hereto as Exhibit Q); April 21, 2020 email from Paul Kirwin to Scott Inouye (attached hereto as Exhibit R).

League, was discussing MBE's application with the SBA's top official, Administrator Jovita Carranza, and forwarded the application for her personal review.[11]

Ultimately, SBA staff prepared an "Action Memo" discussing how to proceed with MBE's nonbank lender application. The Action Memo raised concerns with MBE's application, including that:

- MBE "**ha[d] not met** the necessary qualifications to process, close, disburse, and service PPP loans."
- Because MBE "ha[d] not provided 2019 Audited Financials, it [was] not possible to determine [its] [loan] originations, and the 2018 Financials show inconsistencies."
- "Given the short-term nature of the loans[] it specializes in, as well as the relatively few clients it services, and missing 2019 financials it is impossible to verify originations."
- "It seems unlikely that [MBE Capital] would be able to quickly and efficiently process a meaningful volume of applications if it were approved as a PPP loan non-bank lender."[12]

Despite these reservations about MBE's application, and without raising these issues with MBE, the SBA drafted a letter approving the application the very next day, a fact which suggests that the SBA's priority was to find lenders willing to work with smaller and minority-owned businesses, who could immediately begin disbursing much-needed federal loans to these struggling entities.[13]

As soon as MBE was approved as a nonbank lender, it began issuing PPP loans to small businesses, consistent with the SBA's expectations. While we do not dispute that Rafael submitted inaccurate information to the SBA regarding MBE's financial statements in MBE's

[11] April 22, 2020 email rom Chris Metzler to Gail Harris-Berry (attached hereto as Exhibit S); Biography of Chris Metzler (attached hereto as Exhibit T).

[12] SBA Action Memorandum at 2-3, dated April 22, 2020 (attached hereto as Exhibit U).

[13] April 23, 2020 email from P. Kirwin to S. Streich (attached hereto as Exhibit V).

nonbank lender application—and that such conduct was wrong—it is important to note that MBE was not issuing loans from the assets reflected on the financial statements submitted to the SBA. In other words, MBE's assets (or lack thereof) had no bearing on its capacity to issue loans to borrowers in need. Rather, MBE obtained funding from Equitrust Life Insurance Company to finance the first $100 million in PPP loans, and then obtained funding from the Federal Reserve Bank's Payment Protection Liquidity Facility (the "PPPLF") to issue additional PPP loans. (PSR ¶¶ 14, 18.) Equitrust lost nothing. By September 2020, MBE had repaid Equitrust its $100 million investment, as well as $3 million in fees that it earned from the SBA for issuing the PPP loans. (PSR ¶ 18.)[14] In total, Equitrust saw a profit of almost $4.3 million as a result of its partnership with Rafael and MBE.

In addition to the $100 million in capital that Equitrust invested in MBE's PPP lending efforts, MBE also obtained $832 million in capital from the PPPLF to make additional loans. (PSR ¶ 18.) The entire purpose of the PPPLF was to provide liquidity to small lenders like MBE so that they could make PPP loans.[15] As one economist at the Federal Reserve Bank of New York noted, one "issue affecting small lenders' incentives to participate in the PPP was

[14] *See also* September 3, 2020 email from R. Martinez to V. Bhatt and K. Matheny (attached hereto as Exhibit W).

[15] In its responses to Mr. Martinez's objections to the PSR, the Government states that MBE "completely subverted the structure and purpose of the PPPLF" by "pledg[ing] PPP loans that had not yet been issued in seeking funding from the PPLF program, and then us[ing] the funding the Fed provided to fund the very loans that were supposed to serve as collateral." (ECF 74 at 32.) MBE utilized the PPPLF in precisely the way representatives from the Federal Reserve publicly described how the program was designed to function. In a clear diagram explaining "How the PPPLF works," the Federal Reserve explained that the Federal Reserve Bank would send the money to the PPP lender which would, in turn, provide that money to the small business. *See* Stefanie Aschenbrenner et al., Federal Reserve Bank of Minneapolis, *The Fed's emergency lending supports the Paycheck Protection Program* (Aug. 2, 2021) https://www.minneapolisfed.org/article/2021/the-feds-emergency-lending-supports-the-paycheck-protection-program#_ftn2; *see also* Federal Reserve Bank of Minneapolis, *Conversations with the Fed: Paycheck Protection Liquidity Facility*, at 11:40 https://www.youtube.com/watch?v=6YlYOgtnKiU, YouTube (last accessed June 22, 2023) (explaining that, under the PPPLF, the lender pledges to the Fed the very loan for which the lender is seeking an advance, and then the lender issues the loan "on the back end" after it receives the funds from the Fed, with the terms of the Fed's advance to the lender "exactly match[ing]" the terms of the loan the lender subsequently issues to the PPP borrower). As the Federal Reserve explained the program, the whole purpose of the PPPLF was to encourage lenders who did not have the necessary balance sheet capital to borrow from the PPPLF and use those funds to issue loans.

their balance-sheet capacity . . . [Thus,] the Federal Reserve, with the backing of the Secretary of the Treasury announced on April 6, 2020, that it would establish [the PPPLF] to facilitate lending to small businesses through the PPP."[16]

Of critical importance, not a single cent of Equitrust's $100 million or the $832 million of PPPLF funds went into Rafael's pocket. Rafael and MBE used that money to issue PPP loans to minority-owned small businesses who desperately needed it—exactly as intended by the SBA and Congress. While MBE, like many other nonbank lenders inundated with PPP applications, at times struggled to keep up with demand (resulting in some unhappy PPP borrowers), reviews left by many MBE borrowers attest to the critical role that those loans played in helping their businesses survive the pandemic:

- Marcus Farrell wrote that his loan "helped us get through a very hard period."
- William Perla wrote that MBE was "Great[.] [T]hey were very helpful so we can keep up with the business."
- Sheron Booth wrote: "You help[ed] my business to stay afloat by being able to pay ongoing expenses while I was economically impacted when my bank failed me with PPP. Thank you MBE[.]
- Kowondra Price wrote that the loan her business received from MBE "Save[d] us from closing."
- Cal D. Wentworth wrote that the PPP loan he received from MBE "stopped layoffs." Antonio Moore wrote: "Thanks to [MBE] we were able to stay afloat during the pandemic."
- Patty Norona wrote that MBE "made the PPP process quite easy. I thank you for taking the time to assist a small business owner."
- Donnean Bolds wrote that MBE "helped me to keep my business afloat for now."
- Ramiro Martinez wrote that the loan his business received from MBE "Kept my shop open during the pandemic."

[16] Desi Volker, *The Paycheck Protection Program Liquidity Facility*, Federal Reserve Bank of New York Economic Policy Review 28, at 190 (June 2022) (attached hereto as Exhibit X).

- Tyrone Johnson wrote that MBE's help "Means the world to me and [I] appreciate your support and assistance!"
- Angela Amoroso wrote that the PPP loan her dance studio received from MBE "saved us! After 40 years in business looking into an abyss is frightening."
- Carl Webb wrote the MBE "helped my business stay afloat during this unprecedented pandemic. Process an[d] timing eliminated a lot of stress."[17]

The above reviews reflect only a small percentage of the businesses that received critical PPP funds through MBE. After it became an approved lender, MBE issued loans to approximately 36,600 small businesses, (PSR ¶ 18), many of whom could not obtain a PPP loan from a bank. One PPP borrower, Ricardo Villarreal, the owner of the Itty Bitty Inn in North Bend, Oregon—a complete stranger to Rafael except for his interactions with MBE during the PPP process—describes in a letter to the Court just how meaningful Rafael's efforts were to helping businesses like his weather the pandemic. Mr. Villarreal, who has been the innkeeper of his family run business since 2014, struggled to get a loan from traditional banks after Oregon mandated the shut down of hotels and motels in the state. The representatives of those traditional banks appeared to Mr. Villarreal to be "complacent, uninterested, and disconnected" to the dire situation that his business faced. (Ex. A. at 37.) Rafael and MBE, on the other hand, "demonstrated empathy" during the darkest days of the pandemic and "were respectful and quick-to-act" in helping Mr. Villarreal's business find financial relief. (Ex. A at 37-38.) Mr. Villarreal credits Rafael's "professional grit and heart" with saving his business "when it seemed that no one else would." (Ex. A at 38.)

While the PSR reports that MBE was "unqualified to underwrite loans," *see* PSR ¶ 20, in fact, as detailed above, MBE had years of experience providing working capital to small businesses in need and had even partnered with the federal government to lend close to a billion

[17] Reviews MBE received from PPP borrowers (attached hereto as Exhibit Y).

dollars to small businesses three years before the pandemic. *See supra* at 14-16. Although MBE experienced some challenges in getting loans out quickly to borrowers and detecting fraudulent applications, that was a struggle shared by nearly all PPP lenders. From May 2020 through August 7, 2021, the SBA's Office of General Counsel received at least 2,800 inquiries from PPP lenders—particularly from non-traditional lenders like MBE who "generally had less experience with SBA and dealing with fraud,"—regarding the enormous volume of PPP applications.[18] The SBA Inspector General has since concluded that the agency did not provide adequate guidance to lenders about how to detect fraud. That "lack of specific guidance for lenders" increased "the risk of guaranteeing and forgiving PPP loans for potentially fraudulent and ineligible applicants."[19] Moreover, given the nature of the pandemic, the federal government prioritized the speedy distribution of funds to struggling businesses over the detection of fraudulent applications. As the Inspector General has explained, PPP lenders were not required to conduct extensive due diligence on applicants and were permitted to rely on "borrower certifications" of eligibility.[20] Given these relaxed criteria, a large amount of potentially fraudulent loans were processed, by traditional banks and nonbank lenders alike. Indeed, the Inspector General has reported that in one five-month period, lenders provided $692 million in duplicate loans.[21] In total, the SBA suspects that over 70,000 loans were issued to potentially ineligible borrowers.[22]

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[18] SBA Inspector General Report, SBA's Handling of Potentially Fraudulent Paycheck Protection Program Loans, Report No. 22-13 at 9 (May 26, 2022) (attached hereto as Exhibit Z).

[19] *Id.* at 10.

[20] *Id.* at Appendix C, pg. 2.

[21] SBA Inspector General, Flash Report Duplicate Loans Made Under the Paycheck Protection Program, Report No. 21-09 at 2 (March 15, 2021) (attached hereto as Exhibit AA).

[22]Ex. Z at 1

Despite the fact that PPP lenders were not required to conduct extensive diligence on prospective borrowers, Rafael and his team at MBE did their best to avoid funding ineligible applications, despite pressure from the SBA to get loans to small businesses quickly. For example, in response to inquiries from the SBA about why a particular loan had not been funded, Rafael explained that MBE had flagged 368 loan applications that did not have any of the required tax documents and that MBE's employees were trying to work with borrowers to obtain the required documentation.[23] One report detailing the loans that were processed through MBE shows that the company declined to fund 18,368 applications totaling over $617 million for reasons such as suspected fraud or because a borrower had submitted multiple applications.[24]

The SBA expressed gratitude to Rafael for his efforts to help small, underserved businesses obtain PPP loans. Indeed, in August 2020, the SBA informed Rafael that MBE and Equitrust had been nominated for the agency's "National Award." In contacting Rafael about the award, the SBA noted that Rafael had "been incredible to work with" and that MBE's partnership with Equitrust "has been a game changer for so many."[25]

Processing and issuing tens of thousands of PPP loans to small businesses in need was a tremendous undertaking, which required Rafael to hire more people at MBE. Knowing that he would need to retain more employees, Rafael applied for a PPP loan himself, from Bank of America. In doing so, he made a decision he will regret for the rest of his life: on his PPP application, Rafael overstated the number of employees employed by MBE and his payroll costs. (PSR ¶ 16.) However, shortly after obtaining the PPP loan of approximately $283,000, MBE ***did***

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[23] May 20, 2020 email from R. Martinez to M. Schindler (attached hereto as Exhibit BB).

[24] April 8, 2022 email from Hubspot to Kenya Shiver (attached hereto as Exhibit CC).

[25] August 12, 2020 email from Ashley Bell to Rafael Martinez (attached hereto as Exhibit DD).

substantially increase its payroll. MBE's payroll and bank records for 2020 show that MBE paid 17 employees over $250,000 in payroll in 2020.[26] This amount was approximately $130,000 greater than the payroll that Rafael represented to Bank of America when he applied for the PPP loan. (PSR ¶ 16.) In other words, the PPP loan application actually ***underestimated*** MBE's actual payroll costs for 2020, even if the information provided was overstated at the time it was submitted. Rafael has since withdrawn MBE's PPP loan forgiveness application and paid back the full amount of the loan.

By setting forth the above context, we do not mean to make light of the offenses for which Rafael has pled guilty. Providing false information to the federal government and financial institutions is a serious crime and Rafael is deeply ashamed of his actions. What we wish to convey, however, is that while Rafael understood that participating in the PPP program could inure to his financial benefit, he was also motivated to—and actually did—help thousands of people in need. That makes Rafael's conduct different than most wire fraud cases, where defendants prey on helpless victims and act solely from greed. For the reasons set forth below, the Court should consider these differences, as part of its consideration of the Section 3553(a) factors, as a meaningful justification for a non-Guidelines sentence.

2. **<u>The Nature and Circumstances of the Offense Call for Leniency</u>**

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[26] The Government contends in its responses to Mr. Martinez's objections to the PSR that it "cannot verify the sourcing or accuracy of the records," submitted to Probation, which documents MBE's actual payroll for 2020. (ECF No. 74 at 29). But the bank records that the Government produced to Mr. Martinez in discovery show that, less than a month after MBE received its PPP loan from Bank of America, it transferred $600,000 to another MBE bank account from which it made payroll payments. Those bank records, in combination with the W-2 forms for each of MBE's employees and MBE's internal payroll detail report, demonstrate that MBE did use the funds it received from Bank of America for payroll. (*See* Exhibit EE, W-2 forms for MBE employees for FY 2020; Exhibit FF, May 2020 Bank of America Records; Exhibit GG June 2020 Bank of America Records; Exhibit HH, JP Morgan Chase Bank Records from June 8, 2020 to August 19, 2020; Exhibit II JP Morgan Chase Bank Records from August 14, 2020 to December 31, 2020; Exhibit JJ, MBE Capital Payroll Detail Report).

The Guidelines sentence of 60 months is driven almost entirely by the "loss" amount. The base offense level is 6—which under the Guidelines, results in a recommendation of no prison time for a first offender like Rafael. However, Rafael's offense level was increased by 24 levels based on the fees earned by MBE in connection with the loans it issued. (PSR ¶ 28.) We respectfully contend that an increase of 24 levels based upon the "losses" in this case vastly overstates the true nature of the offense and is inconsistent with the bedrock principles of sentencing, as espoused in Section 3553(a).

The Guidelines applicable to economic crimes have been consistently criticized, including by experienced members of the judiciary. In November 2014, an ABA Criminal Justice Task Force on the Reform of Federal Sentencing for Economic Crimes, which included Judge Gerard Lynch and Judge Jed Rakoff, submitted a proposal to the Sentencing Commission seeking substantial revisions of the Sentencing Guidelines for economic crimes. (Exhibit KK, "A Report on Behalf of the American Bar Association Criminal Justice Section Task Force on the Reform of Federal Sentencing for Economic Crimes," American Bar Association, Nov. 10, 2014).) The ABA Task Force observed that, under certain circumstances, the Guidelines may produce an offense level that substantially overstates the seriousness of an offense. Specifically, the ABA Task Force noted that:

> Where the motive for the offense was not entirely predatory, where the loss was largely intended rather than actual, where the defendant's gain from the offense was significantly less than the loss, where the offense was of limited sophistication or duration, where significant and unusual extenuating circumstances contributed to the commission of the offense, or where the defendant took significant steps to mitigate the harm caused by the offense, the guidelines may produce an offense level that substantially overstates the seriousness of the offense. If so, a downward departure may be warranted.[27]

[27] *See* Testimony from the American Bar Association before the United States Sentencing Commission, at 14 https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20150312/Felman.pdf (March 12, 2015).

In Rafael's case, the nature and circumstances of the offense justifies a downward variance from a 60-month Guidelines sentence for at least two reasons.

(a) <u>There Was No Predatory Motive</u>

First, the conduct for which Rafael was convicted falls outside the heartland of typical fraud cases because he lacked a predatory motive. This is not a typical fraud case in which an offender preys on innocent victims to steal money from them. Rather, the gravamen of the offense conduct is that Rafael provided inaccurate information to the SBA in order to obtain a license for his company, MBE, to operate as a nonbank lender of PPP loans. The critical fact that justifies a substantial downward variance is that Rafael actually ***did*** provide PPP loans to businesses in need. In other words, even though Rafael obtained a license to act as a PPP lender by providing inaccurate information to the SBA, he actually earned the fees he generated by performing the services that the SBA desired. And he did so by providing loans to small businesses that were being ignored by traditional lending institutions.

In this way, Rafael's conduct constitutes what the ABA Task Force described as a "gatekeeping" offense. Such "offenses are not specifically intended to cause loss or even to shift the risk of loss. Instead, they violate so-called 'gatekeeping' requirements intended generally to prevent practices that create potential loss or a risk of loss." (Ex. KK at 3.) As an example, the ABA Task Force describes "billing Medicare for medically necessary goods and services that are actually provided without the appropriate third-party verification of medical necessity" as a prototypical gatekeeping offense. *Id.* Gatekeeping offenses "are generally at the lower level of culpability" when compared to crimes that are designed to intentionally impose a loss on, or purposely shift the risk of loss to, the victim. *Id.*

Rafael's conduct violated the gatekeeping requirements that the SBA imposed on nonbank lenders to ensure that they were qualified to participate in the PPP program. He did not set out to defraud innocent victims. The fact that Rafael acted out of a desire to—and actually did—help small businesses in need during an unprecedented pandemic justifies a sentence significantly lower than that calculated under the Guidelines.

(b) <u>The Loss Amount Overstates the Seriousness of the Offense</u>

Second, the loss amount in this case overstates the seriousness of the offense because the "losses" here are the bank fees earned by MBE for distributing PPP loans. While MBE's license to provide PPP loans was obtained via an application that contained false information, MBE, once licensed, did the work to distribute real loans to real Americans in a desperately underserved community, who very much needed the funds. As such, the fees earned by MBE for this work are different than the typical "loss" ordinarily at issue in wire fraud cases.

Furthermore, as many critics have pointed out, the approach to "loss" that has been incorporated into the Guidelines exacerbates the potential for an unfair sentence. Both scholars and judges have observed that the way Section 2B1.1 of the Guidelines calculates loss for economic crimes routinely results in "arbitrary, disproportionate, and often draconian sentences" especially for "first-time offenders of economic crimes." Barry Boss & Kara Kapp, *How the Economic Loss Guideline Lost its Way, and How to Save It*, 18 Ohio St. J. of Cr. Law 605, 605-06 (2021). The current loss table "has an outsized role in determining the length of an economic crime offender's sentence," and recommends "extraordinarily high sentences . . . in high-loss cases," which "result[s in] overemphasis on loss that overstates offenders' culpability." *Id.* at 606; *see also United States v. Johnson*, No. 16-CR-457-1 (NGG), 2018 WL 1997975, at *3 (E.D.N.Y. Apr. 27, 2018) ("[T]he Sentencing Commission's loss-enhancement numbers do not result from any reasoned determination of how the punishment can best fit the crime, nor any approximation of the moral seriousness of the crime."); *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) ("By making a Guidelines sentence turn, for all practical purposes, on this single factor [loss or gain], the Sentencing Commission ignored [§ 3553(a)] and . . . effectively guaranteed that many such sentences would be irrational on their face."); *United States v. Adelson*, 441 F. Supp. 2d 506, 509 (S.D.N.Y. 2006) (criticizing "the inordinate emphasis that the Sentencing Guidelines place in fraud cases on the amount of actual or intended financial loss" without any explanation for "why it is appropriate to accord such huge weight to [this] factor[]").

For this reason, many courts in this Circuit have imposed substantial downward variances in fraud cases involving particularly high Guidelines recommendations, similar to those that the loss amount table recommends in Rafael's case.

- *United States v. Gupta*, 904 F. Supp. 2d 349 (S.D.N.Y. 2012) (imposing 24-month sentence in case where Guidelines range was 78-97 months);

- *United States v. Milton*, No. 3:06-cr-00137 Dkt.1216 (D. Conn. Jan. 30, 2009)(Judgment); Dkt. 1164 (D. Conn. Oct. 31, 2008) (Ruling on Loss Calculation, Victim Enhancement, and Restitution) (imposing 48-month sentence in case where the Guidelines range was life imprisonment);

- *United States v. Ferguson*, No. 3:06-cr-00137, Dkt. 1199 (D. Conn. Dec. 31, 2008) (Judgment); Dkt. 1164 (D. Conn. Oct. 31, 2008) (Ruling on Loss Calculation, Victim Enhancement, and Restitution) (imposing 24-month sentence in case where Guidelines range was life imprisonment and loss amount was $544 million);

- *United States v. Whittier*, No. 1:07-cr-0087, Dkt. 12 (S.D.N.Y. Oct. 18, 2007) (Judgment); 1:07-cr-0087, Dkt. 14 (S.D.N.Y. Nov. 6, 2007) (Tr.) (imposing 36-month sentence in case where Guidelines range was 188-235 months and loss amount was $88 million);

- *United States v. Argo*, No. 1:07-cr-00683, Dkt. 14 (S.D.N.Y. Jan. 23, 2008) (Government's Sentencing Memorandum); Dkt. 16 (S.D.N.Y. Jan. 29, 2008) (Judgment) (imposing six-month sentence in case where Guidelines range was 97-121 months and stipulated loss amount was $1-2.5 million);

- *United States v. Ghavami*, No. 1:10-cr-01217, Dkt. 374-3 (S.D.N.Y. May 8, 2013) (Guidelines Calculation); Dkt. 374-6 (S.D.N.Y. May 8, 2013) (Loss Calculation); Dkts. 384, 385, 389 (Judgments) (imposing sentences of 3 years, 18 months, and 16 months on codefendants in an over $9 million fraud scheme where the Guidelines ranges were 235-293 months, 210-265 months, and 135-168 months respectively);

- *United States v. Chow*, No. 17-cr-667, Dkt. 161 (S.D.N.Y. Jan 17, 2019) (Tr.) (imposing three-month sentence where loss amount was $5 million and Guidelines range was 63-78 months);

- *United States v. Hastings*, No. 1:20-cr-00534, Dkt. 97 (S.D.N.Y. Nov. 8, 2021) (Government's Sentencing Memorandum); Dkt. 102 (Nov. 29, 2021) (Judgment) (imposing 36-month sentence where loss amount was over $9 million and Guidelines calculation was 10 years);

- *United States v. Archer*, No. 1:16-cr-00371, Dkt. 1005 (S.D.N.Y. March 4, 2022) (Tr.) (imposing a sentence of a year and a day where loss amount was over $25 million and Guidelines sentence was 108 to 135 months);

- *United States v. Cooper Morgenthau*, No. 1:23-cr-00002, Dkt. 13 (S.D.N.Y. April 17, 2023) (Government's Sentencing Memorandum); Dkt. 15 (S.D.N.Y. May 1, 2023) (Judgment) (imposing 36-month sentence where loss amount was over $5 million and Probation had calculated a Guidelines range of 87-108 months).

The Guidelines sentence here is driven entirely by the 24-level increase attributed to the loss amount; the base offense of 6 would result in a recommendation of probation for a first time offender like Rafael. The Second Circuit has found that, in circumstances like these, a significant downward variance from a Guidelines sentence is appropriate. *United States v. Algahaim*, 842 F.3d 796, 800 (2d Cir. 2016) ("Where the Commission has assigned a rather low base offense level to a crime and then increased it significantly by a loss enhancement, that combination of circumstances entitles a sentencing judge to consider a non-Guidelines sentence.").

When considering whether the loss amount in this case appropriately reflects Rafael's culpability, it is helpful to analogize to situations in which courts have sentenced defendants in procurement fraud cases. In such instances, where defendants fraudulently procure set-aside contracts by misrepresenting their status as a minority or veteran owned business but actually perform the work required under the contract, courts have held that the appropriate calculation of loss requires crediting the defendant for the market value of the work performed.

See United States v. Shulick, 18 F.4th 91, 114 (3d Cir. 2021); *United States v. Kozerski*, 969 F.3d 310, 313 (6th Cir. 2020); *United States v. Harris*, 821 F.3d 589, 602–04 (5th Cir. 2016); *United States v. Martin*, 796 F.3d 1101, 1110–11 (9th Cir. 2015). Even though the parties have stipulated to the loss amount in this case, it is still appropriate for the Court to conclude that the Guidelines calculation overstates Rafael's culpability because it doesn't account for the fact that MBE earned $71 million in fees for PPP loans it actually provided to borrowers in need.[28] *See United States v. Corsey*, 723 F.3d 366, 379 (2d Cir. 2013) (Underhill, J. concurring) ("Although the District Court used the intended loss amount correctly for purposes of calculating the Sentencing Guidelines range, the Court erred by failing to dramatically discount that calculation when weighing the section 3553(a) factors against the totality of circumstances.").

In addition to the $71 million in PPP lender fees, the loss amount also accounts for a $283,764 PPP loan that MBE obtained based on inaccurate information that Rafael provided to Bank of America about MBE's employees and payroll. But, as described above, even though Rafael provided inaccurate information about the number of MBE's employees and payroll at the time he applied for the loan, he subsequently hired more employees and increased MBE's payroll by an amount that ***exceeded*** what he represented in MBE's PPP loan application.[29] While Rafael should never have provided inaccurate information on MBE's PPP loan application, the fact that the loan was used for its legitimate, intended purposes should weigh in favor of a downward variance. *See, e.g.*, Sentencing Tr. at 11-12, 25-26, *United States v. Smith*, No. 1:21-cr-20001 (S.D. Fla. Dec. 16, 2021), Dkt. 54 (sentencing defendant who pled

[28] It is also worth noting that the $71 million in the fees that MBE earned was spent primarily on business expenses, including fees paid to Equitrust, fees paid to other banks and technology companies MBE partnered with to process PPP loans, rent, employee salaries, and other operating expenses incurred in processing approximately 40,000 PPP applications.

[29] *See* Exs. EE-JJ.

guilty to one count of conspiracy to commit wire fraud to 20 months' imprisonment, which was a downward variance from the Guidelines, where he applied for multiple PPP loans totaling over $1 million and spent some money on luxury items and some on legitimate business expenses).

C. A 60-Month Sentence Is Greater Than Necessary to Achieve Deterrence.

Imposing a Guidelines sentence of 60 months' imprisonment is greater than is necessary to deter Rafael from committing further crimes. Rafael is 58 years old and has never been in trouble with the law before being arrested for the offenses in this case. He has already suffered consequences sufficient to deter him from committing similar crimes in the future, including the agony his conviction has caused to his two daughters and the damage it has inflicted on his reputation as a businessman. This damage to Rafael's family and reputation are sufficient to deter him from committing future crimes. *See, e.g.*, *Gupta*, 904 F. Supp. 2d at 355 ("As to specific deterrence, it seems obvious that, having suffered such a blow to his reputation, [defendant] is unlikely to repeat his transgressions, and no further punishment is needed to achieve this result."); *United States v. Gaind*, 829 F. Supp. 669, 671 (S.D.N.Y. 1993) (granting downward departure where defendant was punished by the loss of his business); *United States v. St. Bernard*, No. 06-CR-483 (JBW), 2008 WL 973138, at *1 (E.D.N.Y. March. 19, 2008) ("In view of [defendant's] history and close family ties, specific deterrence is achieved by a sentence of time served."). Additionally, as part of his plea agreement, Rafael has agreed to pay over $70 million in restitution, in addition to almost $45 million in forfeiture payments. The severe economic consequences of his conviction serve as further deterrence to Rafael from committing future crimes.

Statistically, defendants in Rafael's position pose a low risk of recidivism. As the Sentencing Commission has recognized, first time offenders, particularly older offenders, are far less likely to recidivate than others. *See* U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, at 28, Ex. 9 (May 2004) (showing a 6.2% recidivism rate for offenders over the age of 50 with a Criminal History Category of I). For this reason, the Sentencing Commission recently adopted amendments to the Guidelines that provide an additional decrease of two levels from the offense level for offenders who have zero criminal history points. *See* U.S. Sent'g Comm'n, *Amendments to the Sentencing Guidelines*, at 79 (April 27, 2023). The Sentencing Commission adopted this amendment after analyzing data that showed offenders with "zero criminal history points have considerably lower recidivism rates than other offenders, including offenders with one criminal history point." *Id.* The Commission also noted that, in fiscal year 2021, offenders with zero criminal history points received downward departures or variances in over 60% of cases. *Id.* While these amendments are not effective until November 2023, the Court should take them into consideration when determining whether a downward variance is appropriate here. *See, e.g.*, *United States v. Hamilton*, 323 F. App'x 27, 31 (2d Cir. 2009) ("[T]he district court abused its discretion in not taking into account policy considerations with regard to age recidivism not included in the Guidelines").

A 60-month sentence is also substantially greater than necessary to deter others from committing similar crimes. "Current empirical research on general deterrence shows that while certainty of punishment has a deterrent effect, increases in severity of punishments do not yield significant (if any) marginal deterrent effect . . . Three National Academy of Science panels . . . reached that conclusion, as has every major survey of the evidence." *United States v. Velazquez*, No. 16-cr-233, 2017 WL 2782037, at *4 (S.D.N.Y. May 26, 2017). "[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders." Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 448-49 (2007). While the Court should consider the need for a sentence to impose adequate general deterrence, "[s]entencing judges should try to be realistic about the incremental deterrent effect of extremely long sentences." *United States v. Craig*, 703 F.3d 1001, 1004 (7th Cir. 2012) (Posner, J., concurring). Thus, even if the Court were to conclude that a custodial sentence was necessary in this case for general deterrence purposes, a sentence of 60 months is significantly longer than is necessary to achieve that goal.

D. <u>A 60-Month Sentence Would Impose Unnecessary Collateral Costs on Rafael's Family and Community.</u>

Imposition of a five-year custodial sentence would also impose meaningful collateral consequences on Rafael's family and the community at large. As Rafael's daughter, Chelsea, explained to Probation, she relies on him to take care of her young children three days a week. (PSR ¶ 55.) Rafael supports many of his family members, including his 90-year old mother who is in ill health, his siblings, his children, and his grandchildren. (PSR ¶ 46, 55.) Even if he will not be able to support them financially, given his restitution and forfeiture obligations, Rafael still provides important social support to his family, visiting his elderly mother and helping her with her daily tasks, providing childcare for his grandchildren, and working with his neighbors in his parish community. The Court can, and should, take these considerations into account when determining whether a years-long custodial sentence is necessary in this case. *See United States v. Lawrence*, 254 F. Supp. 3d 441, 447 (E.D.N.Y. 2017) ("Another vector is the cost to a defendant's community of long-term imprisonment: defendants are usually incapable of making substantial contributions to their communities and families while they are incarcerated and after a long sentence has been served.").

CONCLUSION

We hope that when Your Honor considers the life Rafael Martinez has lived—one defined by kindness, generosity, compassion and caring for others—and the fact that the Guidelines sentence here is driven not by money stolen from victims, but by fees earned for helping the government get critical relief into the hands of overlooked minority-owned small businesses, the Court will conclude that a sentence that is substantially shorter than five years is appropriate.

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