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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. FRANK MOSLEY, Defendant.	CASE NO. 23-CR-0134-AMO **UNITED STATES' SENTENCING MEMORANDUM** Date: May 6, 2024 Time: 2:00 p.m. Court: Honorable Araceli Martínez-Olguín

INTRODUCTION

Defendant Frank Mosley ("Frank"), his brother Reginald Mosley ("Reginald"), and their co-conspirators took advantage of the COVID-19 pandemic to line their own pockets. As described below, Frank and Reginald submitted a fraudulent loan application on behalf of their shared company, Forward Thinking Investors ("FTI"), seeking money meant for businesses struggling in the face of the pandemic. Although FTI had no outside employees and little actual business, Frank and Reginald's loan application fraudulently affirmed that their business had upwards of 49 employees and monthly payroll expenses north of $428,000. To support FTI's application, Frank created fake tax documents made up out of whole cloth, and later submitted false tax returns to the IRS to cover up the scheme. As a result, Frank and Reginald received $1,070,795 from that loan application. Rather than use that money for payroll and other business expenses (as required by the CARES Act), Frank and Reginald transferred the bulk of the money to other bank accounts, paid off credit cards, and transferred hundreds of thousands of dollars to an investment account held in Frank and Reginald's name.

But Frank and Reginald's scheme did not end with their fraudulent FTI loan. After receiving that money, Reginald recruited Marcus Wilborn, Aaron Boren, and Scott Conway to submit additional fraudulent COVID loan applications from which the Mosleys received a 15% kickback. Frank's role in that part of the scheme was to create fraudulent tax documents as part of the application package and then to create fake payroll transfers on the Gusto platform as part of the cover up. In total, Frank, Reginald, and their co-conspirators obtained $3,082,404 in fraudulent proceeds, which funds were meant to help struggling businesses in the wake of the worst pandemic in modern history.

Perhaps most egregious, Frank engaged in this criminal conduct despite having served as a lifelong public tax enforcer. From his years at the IRS and the City of Oakland, Frank knew the soft spots in the system and used his tax expertise to help cover up the fraudulent scheme. When public officials engage in fraud, it erodes society's confidence in government and our shared institutions. Accordingly, for the reasons set forth below, the government respectfully requests that the Court sentence Frank to 32 months imprisonment, a three-year term of supervised release (with the conditions recommended by probation and set forth in the plea agreement), $3,082,404 in restitution, a $200 special assessment, and order forfeiture of the items set forth in the plea agreement.

BACKGROUND

I. Offense Conduct

A. Background on Federal Loan Programs

The CARES (Coronavirus Aid, Relief, and Economic Security) Act is a federal law enacted in March 2020 and designed to provide emergency financial assistance to the millions of Americans who were suffering the economic effects caused by the COVID-19 pandemic. *See* Presentence Investigation Report ("PSR") ¶¶ 10-13. One source of relief provided by the CARES Act was the authorization of hundreds of billions of dollars in forgivable loans to small businesses for job retention and certain other expenses, through a program referred to as the PPP.

PPP loans were administered by the Small Business Administration (SBA) through approved lenders and were designed to assist small business owners with expenses such as payroll costs, rent, and utilities so that businesses could maintain their workforce during the COVID-19 crisis. The loan amount was determined by the monthly payroll of the small business. The loan money came directly from the approved lenders to the applicant and was guaranteed by the SBA. To qualify for a PPP loan, the applicant's business must have been in operation on February 15, 2020, have employees, have average monthly payroll costs, and provide documentation to support these assertions. The PPP loan application required the borrower to certify that the funds would be used to retain workers and maintain payroll; or make payments for mortgage interest, rent, utilities, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures as specified under the Paycheck Protection Program Rules. In addition, the PPP loan application required applicants to state any other businesses they own, and specify whether they have applied for any other PPP loans.

In addition to PPP loans, struggling business were allowed to apply for the SBA's Economic Injury Disaster Loan (EIDL) Program during the COVID-19 pandemic. *Id.* ¶ 30. EIDL Advances were administered and funded by the SBA. EIDL Advances were designed to give emergency assistance to small business that were experiencing a temporary loss of revenue due to the COVID-19 pandemic. To obtain an EIDL and advance, a qualifying business must submit an application to the SBA and provide information about its operations, such as the number of employees, gross revenues for the 12-month period preceding the disaster, and cost of goods sold in the 12-month period preceding the disaster. In the case of EIDLs for COVID-19 relief, the 12-month period was that preceding January 31, 2020.

B. Frank and Reginald's Fraudulent PPP Loan for FTI

In July of 2020, Frank and Reginald began discussing their scheme to submit a fraudulent PPP loan on behalf of their shared company, FTI. *Id.* ¶ 26. Although FTI had been incorporated many years earlier, it did not have employees outside of Frank and Reginald. On August 6, 2020, Reginald submitted FTI's PPP loan application, which listed the location of the business as Frank's home address in Oakland. *Id.* ¶ 27. The application falsely stated that FTI had an average monthly payroll of $428,318 and 49 employees. *Id.* The application included a Form 941 Employer's Quarterly Federal Tax Return from the second quarter (April, May, June) of 2020, which was supposedly filed with the IRS, and stated that FTI made wage payments to employees totaled $1,195,413 for that time frame. *Id.* The application also included a Form 940 Employer's Annual Federal Unemployment Tax Return for 2020, which stated that FTI estimated it would pay a total of $4,781,652 to all employees during 2020. Despite affirming that these tax forms had been filed with the IRS and reported true information, they were forgeries that Frank had created. In fact, FTI paid no payroll taxes and reported no employees from January 1, 2019 through June 30, 2020. *Id.*

On August 10, 2020, FTI received $1,070,795 in PPP loan proceeds. *Id.* ¶ 28. Rather than use the money for legitimate business purposes, as required by the CARES Act, Frank and Reginald used the funds to pay personal credit cards, transfer funds to other bank accounts, and transfer hundreds of thousands of dollars to an investment account Frank and Reginald held jointly at Fidelity. *Id.*

After receiving the loan proceeds, Frank filed false tax returns to cover up FTI's fraudulent PPP loan. *Id.* ¶ 29. Those tax returns, filed in November 2020 and February 2021, asserted that FTI had upwards of 49 employees and paid out hundreds of thousands of dollars in wages to those employees. *Id.* To further cover up the scheme, Frank created an account with Gusto payroll to funnel the PPP loan proceeds to friends and family members. *Id.* ¶ 32.

C. Frank and Reginald Help Others Submit Fraudulent PPP Loan Applications

After Frank and Reginald obtained their PPP funds on behalf of FTI, Reginald recruited others and helped them submit their own fraudulent PPP loan applications. *Id.* ¶ 33. Specifically, Reginald recruited Marcus Wilborn, Aaron Boren, and Scott Conway, all of whom had preexisting companies without any actual employees other than themselves. *Id*. Wilborn obtained a $1.02 Million loan by falsely asserting his company, MDK, had 49 employees with an average monthly payroll of $407,483.66. *Id*. ¶ 34. Boren obtained a $500,000 loan by falsely asserting his company, ABCG, had 25 employees with an average monthly payroll of $200,000. *Id*. ¶ 38. Conway obtained a $380,000 loan by falsely asserting his company, CTES, had 19 employees with an average monthly payroll of $152,000. *Id*. ¶ 41.

For each of these applications, Reginald prepared the loan forms and Frank prepared the fake tax returns. *Id*. ¶ 33. In exchange for their help, the Mosleys received a 15% kickback from the fraudulently-obtained funds. *Id*. For the MDK loan, after Wilborn received the loan proceeds, Frank and Reginald helped Wilborn funnel the funds through fake payroll transactions on the Gusto platform, which account Frank set up. *Id*. ¶ 36. The supposed "employees" that were receiving the funds from Gusto were not actual MDK employees, but instead were family and friends of Frank, Reginald, and Wilborn. *Id*. In fact, 43 of the 53 MDK employees that were entered into the MDK account at Gusto and were supposedly paid wages by MDK were listed as having a home address of a Post Office Box in Oakland, California that was registered to Frank. *Id*.

D. Frank's Role in the Conspiracy

The narrative set forth in Frank's PSR interview response suggests that Frank's role in the conspiracy was small, and was limited to merely preparing IRS Form 940/941s for FTI's PPP application as well as such forms for the PPP applications of the other co-conspirators. *See id.*, ¶ 46. Specifically, Frank said that "my offense was completing the 940/941 forms as requested by my brother," that the "initial request to complete the 940/941 forms appeared genuine," and that Frank had been "used for [his] professional knowledge." *Id*. He went on to say that he "did not endorse the submission of the PPP application," that he was "not involved in any discussions with [his] brother regarding the other co-defendants," and that he "was not thinking that [he] was committing an offense when [his] brother asked [him] if [he] knew how to complete the 940/941 forms."

While forging and backdating fraudulent tax returns is a serious crime, Frank's statements understate his role in the conspiracy. In fact, as set forth below, Frank played an integral role in the conspiracy that consisted of more than merely filling out a few tax forms for his brother (see Fine Decl.

at ¶¶ 3-15):

- Frank and Reginald's text messages show that Frank was intimately involved in the preparation of multiple false loan applications, not just the preparation of tax returns.
    - On July 22, 2020, Frank and Reginald texted back and forth regarding a fraudulent $103,000 EIDL for FTI.
    - On August 6, 2020, Frank and Reginald exchanged text messages about the amount of $1,070,795, the same amount as the FTI PPP loan. Specifically, Reginald texted Frank: "Just signed docs." Frank responded: "How much?" to which Reginald responded "1070795" (the exact amount of FTI's PPP loan). Frank then responded "Cool. That's the number we working with? Banker gets 12% of that number?" Frank's knowledge and interest in the amount of the loan, as well as his knowledge of the kickback going to the "banker" (presumably Kenya Ellis) show he was far more involved than merely preparing false tax returns.
    - On August 6, 2020, the Mosley brothers also texted about creating Forms 940 and 941 for Aaron Boren.
    - On August 10, 2020, after receiving the fraudulent PPP proceeds, Reginald texted Frank "shoot me a pic, I just have to see it." Frank responded by texting a picture of the PPP loan amount from the FTI bank account.
    - On August 16, 2020, Reginald provided Frank with the name, social security number, and account and routing number for a specific person with the instruction "Add [that person] to 1 of my slots. I will forward address." This implies that Frank was in control of the Gusto payroll account and that Reginald had been assigned a certain number of "slots" to fill with willing participants.

- On August 10, 2020, the same day FTI's $1,070,795 PPP loan was deposited into Wells Fargo account x6953, Frank conducted two withdrawals from the x6953 account in the amounts of $58,495.40 and $70,020.00. Frank's signature appears on both withdrawal slips, indicating that he is the person who conducted the transactions.
- The Wells Fargo x6953 account in the name of FTI was set up at the Oakland City Center Wells Fargo branch, the statement mailing address was Frank's home address, and Frank was listed as the first "key executive" in control of the entity before Reginald.
- The Wells Fargo Business Platinum Credit Card account for FTI listed Frank, not Reginald, as the sole cardholder for the account.
- For the Gusto payroll account set up in the name of FTI (which account Frank set up), 12 of the 54 people listed had a home address of a P.O. Box in Oakland (a post office box in the name of Frank, not Reginald). Furthermore, for the Gusto payroll account set up in the name of MDK, 43 of the 53 people had a home address listed as Frank's P.O. Box.
- For the Fidelity Investment account x3836, the physical address of the business was Frank's home address and the mailing address of the business was Frank's post office box. This account received over $400,000 in fraud proceeds and Frank, as joint owner of the account with Reginald, would have profited from this account had it not been frozen via seizure warrant and later forfeited.
- On the Corporate Resolution for Fidelity Investment account x3836, while Reginald appears as an "authorized individual," the only signature that appears on the document is Frank's.
- In the months after FTI's PPP loan was deposited into the Wells Fargo x6953 account, a separate Citibank account x1657 held solely in the name of Frank received thousands of dollars in ACH transfers from the Wells Fargo x6953 account.

- During execution of a search warrant at Frank's house on August 3, 2022, agents found individual physical file folders for the various subject companies, a pay/owe sheet related to PPP loans for the subject businesses, and multiple copies of tax returns created and filed for the subject companies. No such records were found at Reginald's house.

Accordingly, Frank was deeply involved in the fraudulent scheme with Reginald did much more than merely filling out a few tax forms for his brother.

II. Procedural Posture

On May 4, 2023, the government filed an Information charging Frank, as well as Reginald Mosley, Marcus Wilborn, Aaron Boren, and Scott Conway, with one count of conspiracy bank fraud, in violation of 18 U.S.C. § 1349. ECF No. 1. The Information also charged Frank and Reginald with aiding and advising false tax returns in violation of 26 U.S.C. § 7206(2). Frank and his co-defendants were released pending trial. On August 7, 2023, Frank pled guilty to the two counts against him. ECF No. 36. Per the plea agreement, the parties agreed that the applicable Offense Level under the Sentencing Guidelines is 22 (plus an additional two-point reduction given that Defendant is a zero-point offender), and the government agreed to recommend a sentence of 32 months in custody, as well supervised released, forfeiture, restitution, and a special assessment. *See* ECF No. 34 at ¶¶ 7, 15.

ARGUMENT

I. Legal Standard

The United States Sentencing Guidelines serve as "the starting point and initial benchmark" of any sentencing process and are to be kept in mind throughout the process. *See United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008); *see also United States v. Kimbrough*, 522 U.S. 85, 108 (2007). The overarching goal of sentencing, as set forth by Congress, is for the Court is to "impose a sentence sufficient, but not greater than necessary." *Carty*, 520 F.3d at 991. In accomplishing that goal, the Court should consider the factors set forth under 18 U.S.C. § 3553(a), to include:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(3) the need for the sentence imposed to afford adequate deterrence to criminal conduct;

(4) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.

II. Sentencing Guidelines Calculation

As set forth in the PSR and the plea agreement, the Sentencing Guidelines calculations for Defendant's offense level is as follows:

	U.S.S.G. Section	**Level/Points**
Base offense level	§2B1.1(a)(1)	7
Specific offense characteristics	§2B1.1(b)(1)(I) - Intended loss amount between $1,500,000 and $3,500,000 §2B1.1(b)(17)(a) - The defendant derived more than $1,000,000 in gross receipts from one or more financial institutions as a result of the offense	+16 +2
Adjusted offense level		25
Acceptance of responsibility	§3E1.1	-3
Zero Point Offender	§4C1.1	-2
Total offense level		20
Criminal History Category		I
RANGE		33-41 months

PSR ¶¶ 47-59.

The Probation Officer concluded that Defendant's criminal history score is 0, and he therefore falls into Criminal History Category I. *Id.*, ¶¶ 63-64. As reflected in the PSR, the Guidelines range for imprisonment associated with adjusted offense level 20 and Criminal History Category I is 33 to 41 months. *Id.* ¶ 86. The Probation Officer recommends a 32-month sentence. *Id.* at Sentencing Recommendation.

III. The United States' Sentencing Recommendation

Based on a consideration of the Guidelines and the factors in Section 3553(a), the United States submits that a sentence of 32 months' imprisonment, coupled with a three-year term of supervised release, a restitution order as set forth in the PSR, and a forfeiture order are sufficient, but not greater than necessary, to comply with the factors set out above.

Primarily, Frank's charged conduct was extremely serious. The PPP fraud was undertaken during a time of great national hardship. Many legitimate businesses were in need of the type of PPP loan funds that Frank obtained; he took advantage of a program that was meant to make those funds flow easily to needy legitimate recipients, and not to him. As described above, funding for the PPP program was capped, so any money Frank obtained from the program did not go to other struggling businesses that needed it.

And what Frank and Reginald did with that money was equally egregious. Rather than use that money for payroll and other business expenses, as required by the CARES Act, they used the money to pay personal credit cards, transfer funds to other bank accounts, transfer hundreds of thousands of dollars to an investment account Frank and Reginald held jointly at Fidelity, and funneled portions of the money through fake payroll transactions on the Gusto platform. In addition, Frank played a central role in the conspiracy. While he did not actually file the fraudulent PPP applications or recruit the other participants, he created the fake tax returns that were a required part of the applications, created and controlled the fake payroll account used to cover up the scheme, maintained detailed pay/owe documentation about the fraudulent PPP loans at his residences, and filed false tax returns with the IRS to cover up the scheme.

Moreover, general deterrence and the message this case sends to the public are important principles to consider. As noted above, the government funds at issue in the PPP-loan fraud aspect of this case flowed freely – as they should have – during a time of national hardship. Other individuals who are in Frank's position now and in the future must know that, on top of a federal felony conviction, defrauding programs like the PPP will result in prison time and monetary penalties. That consideration is especially true here, where Frank is a former IRS revenue agent and served as a public tax enforcer while committing the crimes at issue in this case. If those charged with enforcing the rules receive merely a slap on the wrist when they break them, confidence in the rule of law will be diminished.

Finally, one of the § 3553(a) factors is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. As the Court might expect, Frank was not the only person to commit PPP fraud, and many others around the country who committed similar crimes have already been sentenced. A representative sample of some of those sentences from our district and other districts in California are as follows:[1]

District	**Case Name/Number**	**Loss Amount**	**Sentence**
N.D.C.A.	*United States v. Christina Burden*, No. 21-CR-0362-YGR	$1,143,191	36 Months
E.D.C.A.	*United States v. Aaron Ashcraft*, No. 22-CR-0087-KJM	$1,200,000	41 Months
N.D.C.A.	*United States v. Miranda Devlin*, No. 21-CR-0226-MMC	$565,355	18 Months
C.D.C.A.	*United States v. Vardan Khalatyan*, No. 22-CR-0441-MCS	$3,000,000	51 Months
N.D.C.A.	*United States v. Caesar Oskan*, No. 21-CR-0143-CRB	$268,719	18 Months
C.D.C.A.	*United States v. William Sadleir*, No. 20-CR-0299-DMG	$1,700,000	41 Months
C.D.C.A.	*United States v. Raymond Magana*, No. 21-CR-0007-SB	$2,237,831	41 Months
C.D.C.A.	*United States v. Steven Goldstein*, No. 20-CR-0597-SB	$655,000	12 Months + 1 Day
N.D.C.A.	*United States v. Ester Ozkar*, No. 21-CR-0144-CRB	$483,132	12 Months + 1 Day
C.D.C.A.	*United States v. Llerenas*, No. 21-cr-0187-JWH	$4,300,000	63 Months
C.D.C.A.	*United States v. Amiryan*, 20-cr-0520-DMG	$650,000	41 Months

Given the pandemic fraud sentences that have been ordered in this district, other districts in California, and throughout the country, the government submits that a 32-month sentence is appropriate in this case.

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[1] Several websites have been tracking CARES Act Fraud cases and sentences, such as https://www.arnoldporter.com/en/general/cares-act-fraud-tracker/ (last updated February 1, 2024).

CONCLUSION

For the foregoing reasons, the government recommends that the Court sentence Defendant to 32 months in prison, a three-year term of supervised release, $3,082,404 in restitution, and a $200 special assessment. The Court should also order Defendant to forfeit his interest in the items set forth in paragraph 11 of the parties' proposed plea agreement.

DATED: April 29, 2024

Respectfully submitted,

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/s/
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