UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

UNITED STATES OF AMERICA	)	
v.	)	
	)	No. 22-cr-74-PB-01
PIERRE ROGERS,	)	
Defendant	)	

GOVERNMENT'S SENTENCING MEMORANDUM

Rolls Royce. Porsche. Coach. Cartier. Bulgari. Bottega Veneta. Ritz Carlton. These are some of the finest luxury brands in the world. They are also how the defendant squandered hundreds of thousands in taxpayer-backed funds intended for pandemic relief. PSR ¶¶ 53, 57.

Amidst the worst health crisis in a century, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act to extend lifelines to the millions of Americans struggling to put food on their table, pay for housing, afford medicine, and keep the lights on. Among those lifelines were the Paycheck Protection Program (PPP) and Economic Injury Disaster Loan (EIDL) program. These taxpayer-backed loans were intended to help businesses stay afloat during widespread lockdowns and economic turmoil. Given the exigencies of the pandemic, our Government trusted citizens to provide truthful information when applying for those loans to facilitate the quick distribution of funds.

The defendant and his co-defendant, Joshua Leavitt, brazenly violated that trust. In the largest CARES Act fraud prosecution in this district to date, they fraudulently obtained over $800,000 in CARES Act funds and tried to get millions more. Under the circumstances, a significant sentence is appropriate to reflect the seriousness of the offense and promote respect for the law. Accordingly, and for the following reasons, the Government respectfully requests the Court impose a Guidelines sentence of 41 months' imprisonment.

I. Factual Background

A. The CARES Act

On March 13, 2020, the President declared a nationwide disaster in response to the ongoing COVID pandemic and resulting economic crisis. PSR ¶ 17. Shortly thereafter, Congress passed the CARES Act. PSR ¶ 18. As relevant here, the CARES Act created the PPP. PSR ¶ 18. Under the PPP, small businesses could apply for loans from lenders at 1% interest. PSR ¶ 19. If the borrower spent the bulk of the loan proceeds on payroll, the loans would be forgiven. PSR ¶ 19. Because PPP loans were federally guaranteed, American taxpayers served as the backstop.

The CARES Act also expanded the Small Business Administration's (SBA) EIDL program. PSR ¶ 20. Like PPP loans, EIDLs were loan-interest loans which were supposed to be used to help businesses pay their operating expenses. PSR ¶ 20.

B. The Fraud

The defendant owned and controlled several companies, including Monticello Transnational, Puro Trader (d/b/a Yahyn), Puro Lounge, Puro Group, and Sunju (together, the "Companies"). PSR ¶¶ 12-16. He was the sole signatory over bank accounts belonging to Sunju, while he and Leavitt were both signatories on accounts belonging to Monticello, Puro Trader, Puro Lounge, and Puro Group. PSR ¶¶ 12-16.

Between March 2020 and November 2021, the defendant and Leavitt applied for dozens of EIDLs and PPP loans for the Companies using false information. They usually inflated the Companies' revenues and number of employees and provided supporting documentation in the form of tax filings purportedly submitted to the IRS. In total, the defendant participated in 22 fraudulent loan applications and modification requests, resulting in an intended loss of over $4.8 million. PSR ¶¶ 94-95, 102. Seven of the defendant's EIDL and PPP loan applications were approved, resulting in him successfully obtaining $803,756. PSR ¶¶ 94, 96, 102.

The Court has undoubtedly reviewed the PSR thoroughly, and this memorandum will not belabor the point by walking through all 22 fraudulent applications connected to the defendant. PSR at 34. Nevertheless, the following paragraphs highlight some of the defendant's more egregious conduct.

For example, on April 27, 2020, the defendants submitted a PPP application for $100,000 to TD Bank for Puro Lounge, a company Rogers owned 100%. PSR ¶ 47. As part of their application, they claimed Puro Lounge had monthly payroll of $40,000 and that they had five employees. PSR ¶ 47. They even provided a false IRS Form 941 claiming that they paid employees $118,750 during the first quarter of 2020. PSR ¶ 48. The defendants never made such a tax filing. PSR ¶ 48. And bank records showed Puro Lounge had no transactions suggesting any legitimate business activity. PSR ¶ 48. TD Bank granted the PPP loan, and the defendants spent the funds, including via a $16,000 cash withdrawal on September 18, 2020. PSR ¶ 49. Despite none of the money being spent on payroll for Puro Lounge, Puro Lounge claimed 100% of the proceeds were used to pay employees. PSR ¶ 50. The SBA ultimately forgave this loan. PSR ¶ 50.

On May 6, 2020, the defendants submitted a PPP application for $175,000 to TD Bank for Puro Group. PSR ¶ 51. Rogers also owned this company 100%. PSR ¶ 51. The application falsely claimed the company had six employees earning $70,000 per month. PSR ¶ 51. In support, the defendants offered a "Payroll Summary" for another company the defendant owned—Sunju—purporting to show payroll of approximately $210,000 in Q1 2020. PSR ¶ 52.

The defendants also offered a false IRS Form 941 for that quarter showing the same. PSR ¶ 52. No such filing was ever submitted to the IRS. Indeed, the real IRS filing for Puro Group in 2020 showed the company paid $48,255.53 to its employees that entire calendar year, less than what Puro Group claimed to pay in a single month. PSR ¶ 52. And, the defendants did not even create a bank account for Puro Group until the day they applied for the PPP loan. PSR ¶ 52. TD Bank granted this loan. Of the $175,000 in PPP proceeds, the defendant spent $107,780 alone to purchase a 2011 Rolls Royce Ghost. PSR ¶ 53. The defendant spent approximately another $56,000 to purchase a Porsche. PSR ¶ 53. These purchases are the antithesis of what Congress intended the CARES Act to provide.

Yet the defendant's greed was not sated. In perhaps the most egregious loan, on May 18, 2020, the defendant helped arrange an application for a $175,000 PPP loan for Sunju. PSR ¶ 54. The application falsely claimed a monthly payroll of approximately $70,000 and included doctored supporting documents, including the same fraudulent "Payroll Summary" provided for Puro Group showing five employees making $70,000 per month. PSR ¶ 55. The defendants also provided a false Form 941 claiming not only that Sunju paid its employees approximately $210,000 during Q1 2020, but also that it had actually withheld federal income tax of $27,600 that quarter. PSR ¶ 55. The defendant successfully obtained the $175,000 loan, and the proceeds were deposited into an account he had total control of. He proceeded to spend the taxpayer-backed funds on jewelry, fine clothing, vehicles, and resort stays. PSR ¶ 57. For example, he spent $1,777.88 at Cartier on July 27, 2020, $4,039.99 at a Jaguar/Land Rover dealership on August 10, 2020, $5,855.67 at Coach on September 22, 2020, $4,049.42 at the Ritz Carlton on October 13, 2020, $3,542.27 at the Monarch Beach Resort on October 30, 2020, $3,340.25 at the Italian luxury clothing company Bottega Veneta on December 17, 2020, and $3,167.85 at

Bulgari on December 23, 2020. PSR ¶ 57. The defendant also was a regular connoisseur of sushi and steak on the taxpayer dime. PSR ¶ 58.

As time went on, the defendants' claims became more outlandish. For example, on January 19, 2021, the defendant applied for a second draw PPP loan for Puro Trader seeking $216,370. PSR ¶ 71. He was the majority (75%) owner and falsely claimed that monthly payroll was $86,548 and that he had 11 employees. PSR ¶ 71. This represented remarkable growth. After all, less than a year earlier, the defendant had claimed a monthly payroll of $53,102 and just six employees to get a $132,756 PPP loan for Puro Trader. PSR ¶ 34. In this second draw application, the defendant also falsely asserted Puro Trader had a banner year. Supporting tax documents claimed Puro Trader paid employees a grand total of $1,038,577.14 in 2020, including $470,250 in Q4 2020 alone. PSR ¶ 72. Of course, as with the other applications, the claimed figures and supporting documents were bogus and wildly inflated the truth.

II. Guidelines Calculation

The Government agrees with Probation's calculated Guidelines range of 41-51 months based off a total offense level of 22 and Criminal History Category of I. PSR ¶ 147. The offense level includes an 18-level enhancement because the intended loss exceeded $3.5 million. *See* U.S.S.G. § 2B1.1, App. Note 3(A) (defining "loss" as "the greater of actual loss or intended loss"). Therefore, the proposed sentence falls within the Guidelines range and no variance is needed.

The defendant raised an objection to the PSR contending that only a 14-level enhancement should apply because the actual loss was between $550,000 and $1.5 million. *See* PSR at 41. Following this reasoning, his total offense level would be 18, resulting in a

Guidelines range of 27-33 months. In support he relies chiefly on *United States v. Banks*, 55 F.4th 246 (3d Cir. 2022). There, the Third Circuit relied on the Supreme Court's decision in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019), where the Court cautioned that before applying *Auer* deference,[1] "a court must exhaust all the 'traditional tools' of construction." The *Banks* panel accorded no deference to the Guidelines commentary because in its view the meaning of "loss" in the Guidelines means only "actual loss." 55 F.4th at 257.

However, the Government believes that *Banks* was incorrectly decided because it is inconsistent with Supreme Court precedent. Thirty years ago, the Court held that commentary in the Sentencing Guidelines "that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." *Stinson v. United States*, 508 U.S. 36, 38 (1993). The Court defined "inconsistent" in this context as meaning "that following [either the commentary or the guideline it interprets] will result in violating the dictates of the other." *Id.* at 43. In reaching its holding, the Court noted that Congress had entrusted the Sentencing Commission with "establishing sentencing policies and practices for the Federal criminal justice system." *Id.* at 40-41 (cleaned up). These included the guidelines themselves, along with policy statements and commentary. *Id.* at 41. The Court explained that according deference to the commentary "is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to

[1] Under *Auer* deference (also called *Seminole Rock* deference), courts are to defer to an agency's interpretation of its own regulations unless it is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945).

be consistent with the Guidelines Manual as a whole as well as the authorizing statute." *Id.* at 45.

The *Banks* panel understood *Kisor* to effectively abrogate *Stinson*. *Banks*, 55 F.4th at 255-56 (citing *United States v. Nasir*, 17 F.4th 459, 470 (3d Cir. 2021) (en banc)). But *Kisor* expressly declined to reverse *Auer* and its related cases, including *Stinson*. *Kisor*, 139 S. Ct. at 2418-23; *see also id.* at 2412 n.3 (including *Stinson* as part of the progeny of *Seminole Rock* and *Auer*). By its own words, the Supreme Court only sought to "restate, and somewhat expand on, those principles" underlying *Auer*. *See United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020) (citing *Kisor*¸ 139 S. Ct. at 2414-15). Unless and until the Supreme Court reverses *Stinson*, it is still good law and binding on all lower courts. Indeed, the First Circuit and other lower courts have faithfully applied *Stinson* even after *Kisor*. *See Lewis*, 963 F.3d at 18 (upholding career-offender enhancement under App. Note 1 to U.S.S.G. § 4B1.2); *United States v. Rueda*, 933 F.3d 6, 9-11 (1st Cir. 2019) (upholding $500-per-card multiplier under App. Note 3(F)(i) to U.S.S.G. § 2B1.1); *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022); *United States v. Broadway*, 815 F. A'ppx 95, 96 & n.2 (8th Cir. 2020); *United States v. Richardson*, 958 F.3d 151, 154-55 (2d Cir. 2020).[2] *But see United States v. Riccardi*, 989 F.3d 476, 485 (6th Cir. 2021) (agreeing with the Third Circuit that *Kisor* upended cases that "upheld commentary"); *United States v. Kirilyuk*, 29 F.4th 1128, 1138-39 (9th Cir. 2022) (same).[3]

Relatedly, the limits on *Auer* deference set forth by the Supreme Court in *Kisor* should not extend to Guidelines commentary. As Judge Niemeyer recently explained in *Moses*, 23 F.4th

[2] The Fifth Circuit had also continued to apply *Stinson* post-*Kisor*. *See United States v. Vargas*, 35 F.4th 936, 939-40 (5th Cir. 2022). However, the Fifth Circuit agreed to rehear *Vargas* en banc. *See United States v. Vargas*, 45 F.4th 1083 (Mem.) (5th Cir. 2022).

[3] Judge Collins dissented, noting that the majority was ignoring not only Ninth Circuit precedent, but also *Stinson*. *Kirilyuk*¸ 29 F.4th at 1141-42 (Collins, J., dissenting).

at 356:

> *Kisor* deference, as the *Kisor* Court explained, comes into play only when agencies are interpreting their regulations. But the Sentencing Guidelines provide a broader role for commentary, as recognized in *Stinson*. *See* 508 U.S. at 44. As the Guidelines themselves provide, commentary was provided not only to interpret Guidelines but also to "explain how [they are] to be applied." U.S.S.G. § 1B1.7 (emphasis added). And as the *Stinson* Court explained, commentary "provides concrete guidance as to how even unambiguous guidelines are to be applied in practice," 508 U.S. at 44, and it helps ensure that each Guideline is applied in a manner most "consistent with the Guidelines Manual as a whole as well as the authorizing statute," *id.* at 45. . . . Indeed, the commentary's particularized role in this regard supported *Stinson's* holding that commentary is authoritative and binding, regardless of whether the Guideline is ambiguous, except when inconsistent with the Constitution, federal statute, or the Guideline.

Moreover, to the extent defendants may rely on the Sixth Circuit's note that only the Guidelines and not commentary "must go through notice-and-comment rulemaking," *Riccardi*, 989 F.3d at 485, this is not borne out in practice. The Commission "nonetheless follows the practice of providing, 'to the extent practicable, comparable opportunities for public input on proposed policy statements and commentary considered in conjunction with guideline amendments.'" *Moses*, 23 F.4th at 353 (citing U.S. Sentencing Commission Rules of Practice and Procedure 6-7 (as amended Aug. 18, 2016)).

III. Argument

The sentencing statute, 18 U.S.C. § 3553, sets forth the factors district courts must consider in imposing a just sentence. Those factors include "the nature and circumstances of the offense," "the history and characteristics of the defendant," and the "need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law," and "to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(1) & (2).

A. Nature and Circumstances of the Offense

Here, the defendants' actions in this fraud shock the conscience. The defendants did not merely steal funds from the government. Rather, they fleeced a limited pool of funds which were designed specifically to serve as a lifeline to small businesses and their employees during the worst public health crisis in a century. The Court is undoubtedly aware of the myriad of news stories discussing how quickly the limited pot of PPP funds was depleted. *See e.g.¸*Stacy Cowley, *The Paycheck Protection Program is out of money*, N.Y. Times, May 4, 2021, https://www.nytimes.com/2021/05/04/business/paycheck-protection-program-closes.html; Carmen Reinicke, *Paycheck Protection Program has run out of money for most borrowers. What you need to know*, CNBC, May 5, 2021, https://www.cnbc.com/2021/05/05/ppp-has-run-out-of-money-for-most-borrowers-what-to-know.html. By taking over $800,000 in CARES Act funds, the defendant denied legitimate businesses those funds.

In doing so, they took advantage of the fact that lenders did not subject CARES Act loans to the same vetting and due diligence as normal business loans given the exigencies of the pandemic. They fabricated information about their companies and doctored tax filings to deceive lenders, taking advantage of an especially vulnerable moment in history.

Moreover, this was not some one-off fraud. The defendant participated in 22 fraudulent loan applications times to the SBA, TD Bank, and other lenders. PSR ¶¶ 94-95. The revolving door of fraudulent applications totaled over a whopping $4.8 million in principal alone. PSR ¶ 102. And while, fortunately, lenders denied most of the applications, the defendant was still able to obtain $803,756 in funds through lies. PSR ¶¶ 96, 102.

The defendant's purchases with his CARES Act funding are another aggravating factor. As described in the PSR, the defendant spent hundreds of thousands of dollars on luxury vehicles, jewelry, resort stays, and deluxe meals. PSR ¶¶ 53, 57, 58. The defendant was living the high life while the rest of the country was in economic turmoil.

Altogether, these aggravating factors suggest nothing less than a Guidelines sentence is appropriate.

B. History and Characteristics of the Defendant

The Government accepts as true that the defendant had a difficult childhood and an unstable family environment growing up. PSR ¶¶ 121-24. But that neither explains nor excuses his fraudulent conduct almost a quarter century into adulthood. In fact, the PSR shows the defendant has been a successful white-collar professional, earning six-figure salaries for almost 15 years. PSR ¶¶ 133-41. Even today, he was recently employed as a software sales director, earning over $150,000 per year plus commission. PSR ¶ 133.[4] And, he enjoys a strong relationship with his wife and children. PSR ¶¶ 125-27. Taken altogether, the defendant's history and circumstances show that he is an intelligent and successful individual. But despite having it all, he still chose to commit this crime.

C. The Need for Deterrence

When drafting the sentencing statute, Congress specifically noted that general deterrence is particularly important for white-collar criminals. Specifically, Congress stated "Major white collar criminals often are sentenced to small fines and little or no imprisonment. Unfortunately, this creates the impression that certain offenses" are punished so lightly that the consequences "can be written off as a cost of doing business." S. Rep. No. 98-225, at 76 (1983), *reprinted in* 1984 U.S.C.C.AN. 3182, 3259. A significant sentence of imprisonment is necessary to convey a message so that prospective wrongdoers will recognize that the justice system will impose

[4] The defendant's sentencing memorandum indicates he has since been terminated from that position. [ECF No. 49 at 8]

significant consequences on those who defraud pandemic relief programs. The proposed sentence of 41 months will send that message loud and clear.

IV. Conclusion

For the foregoing reasons, the Government respectfully requests the Court impose a sentence of 41 months' incarceration.

Respectfully submitted,

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Dated: January 18, 2023 By: /s/ Alexander S. Chen

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