UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
---------- X
UNITED STATES OF AMERICA,

-against- 1:20-cr-00394-KAM

Kevin Lipsitz,

Defendant.
---------- X

MEMORANDUM IN AID OF SENTENCING
ON BEHALF OF KEVIN LIPSITZ

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I. PRELIMINARY STATEMENT

Defendant Kevin Lipsitz respectfully submits this memorandum in aid of his sentencing, scheduled for May 4, 2022, at 11:00 a.m. On October 7, 2021, the defendant pled guilty to Count 4 of Indictment 1:20-cr-00394 (KAM) pursuant to a written plea agreement, which charges Mail Fraud in connection with the marketing sale of personal protective equipment ("PPE"), in violation of 18 U.S.C. § 1341.

Mr. Lipsitz is genuinely remorseful for his behavior. The instant offense occurred during the initial onset of the COVID-19 pandemic, when this country's collective health, business and commerce—both nationally and globally—were thrown into chaotic upheaval. He is a divorced, sole custodial parent who has one surviving daughter from the marriage—Rachel, 14 years old—for whom he has always provided financial and emotional support [redacted]

For the reasons set forth below, it is respectfully submitted that the Court impose a permissible statutory sentence of three years of probation. Such a sentence is available because the offense of conviction in the instant case constitutes a Class C Felony. 18 U.S.C. § 3561(c)(1). As a condition of probation, Mr. Lipsitz should be directed to complete 100 hours of community service. 18 U.S.C. § 3563(a)(2).

Since restitution is mandatory for the instant offense pursuant to 18 U.S.C. § 3663A and Guideline 5E1.1(a)(1), we request that Your Honor, per 18 U.S.C. § 3664(d)(5), hold an evidentiary hearing within 90 days after sentencing to determine the specific amount owed to the victims. As part of the sentence recommended here, Mr. Lipsitz—as reflected in the plea agreement, ¶ 6 through 12—is already subject to forfeiture in the amount of $90,000.

Alternatively, pursuant to U.S.S.G. § 5B1.1(a)(2), counsel suggests that the Court impose a sentence outside of the United States Sentencing Guidelines (the "Guidelines") range, of 3 years probation that includes as a condition a period of 100 hours of community service, and an order of forfeiture in the amount of $90,000. This recommendation calls for a non-Guideline sentence below the current applicable range of 15-21 months' imprisonment, which is based upon a total offense level of 14 and a criminal history category of I.

Here, the proposed alternative sentences properly reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense. See 18 U.S.C. § 3553(a)(2)(A). In addition, either alternative proposed sentence takes into account Mr. Lipsitz's history and characteristics, affords adequate deterrence to criminal conduct by himself and others, and protects the public from further crimes by him. Id. § 3553(a)(1)–(2).

As discussed in detail below, when the Court considers all of the facts relevant to his sentencing, including an examination of the § 3553 factors, Mr. Lipsitz's family and personal history and other information, he respectfully requests that the Court exercise its vast discretion and impose either a statutory sentence of three years of probation with additional conditions, or a sentence below the recommended guidelines range for this offense of conviction, which is appropriate to meet all of the sentencing goals embodied in 18 U.S.C. § 3553(a).

II. STATEMENT OF FACTS

Mr. Lipsitz's arrest here stems from an investigation initiated by special agents with the Federal Bureau of Investigations (FBI), concerning the COVID-19 Outbreak and its impact on the Defense Production Act ("DPA"), specifically with regard to designated items of personal protective equipment ("PPE"). How the Outbreak caused changes in the Defense Production Act

is adequately explained in the Pre sentence Investigation Report ("PSR") prepared by the U.S. Probation Office (EDNY), dated February 25, 2022, at ¶¶ 6 -13 and will not be repeated here.

During the relevant period covering the offense conduct, Mr. Lipsitz was the Chief Executive Officer and sole owner of SuperGoodDeals.com Inc. ("SGD"), a New York domestic corporation that has been operating in Richmond County, New York since 2007. He and SGD sold merchandise directly to consumers through a website that bore the URL www.supergooddeals.com (the "Website") and offered a large variety of items such as clothing, electronics, bathroom products and home goods. Between approximately February 1, 2020, and May 31, 2020, Mr. Lipsitz and SGD acquired PPE and other health and medical resources from various third-party suppliers here in the U.S., China and India.

The PPE included different models of N-95 filtering facepiece respirators, KN-95 filtering facepiece respirators, disposable 3-ply surgical facemasks and PPE face shields. SGD's intention was to give buyers a choice of items they were having trouble finding anywhere else due to overwhelming demand. Mr. Lipsitz and SGD deny they were "stock-piling" this PPE merchandise in various quantities at any one time. SGD bought the items as needed, trying to buy enough to have a few weeks extra merchandise in stock so that it could stay ahead of the selling curve. However, when sales of the PPE items took off, SGD became overwhelmed in its efforts to package and ship the orders to its customers.

When receiving customer orders for the PPE, SGD attempted to promptly package and drop off for shipping many of its orders; however, delays occurred which were often the result of backlogs being experienced by the USPS due to the COVID pandemic. Some orders that would normally take 2-3 days to get across the country were taking weeks. Further, some of SGD's

packages dropped off at the Post Office for shipping were being held for Postal Inspectors to examine, adding to the shipping delay. At its peak, the Post Office had to send several trucks to SGD's office to pick up packages for shipment, as it was filling up more than one truck per day. On at least one occasion, a Post Office manager personally drove over a large box truck to pick up packaged merchandise ready for shipping.

A shipment delay of "several weeks" was an infrequent occurrence, not SGD's standard practice or intention. According to Mr. Lipsitz, every customer who placed an order for PPE merchandise ultimately received his or her product(s). As to those instances where the promised delivery date was surpassed, he is regretful and acknowledges that ultimately he and SGD were responsible, because "the buck stopped with us." Some of the customers who received late shipment of their orders after having paid extra for expedited shipping were refunded that cost by SGD and were not asked to return the merchandise.

A. The Plea Agreement and the Presentence Report

Following meaningful negotiations with the government, on October 7, 2021, Mr. Lipsitz pled guilty before Your Honor to Count Four of a six-count Indictment. See, ECF Dkt. No. 28. Count Four charges that on April 9, 2020, the defendant devised a scheme and artifice to defraud consumers in the marketing sale of PPE to obtain money and property from them by means of materially false and fraudulent pretenses, representations and promises for the purpose of executing the scheme and artifice, placed and caused to be placed matters and things in a post office and authorized depository for mail matter, to be sent and delivered by the United States Postal Service, and did deposit and cause to be deposited one or more matters and things to be

sent and delivered by private and commercial interstate carrier, and did take and receive them from such matters and things, in violation of 18 U.S.C. § 1341.

B. The Guidelines Calculation

The parties agree that the guideline for 18 U.S.C. § 1341 offenses is U.S.S.G. §2B1.1. That section provides a base offense level of seven, as the statutory maximum custody on Count Four is 20 years. U.S.S.G. §2B1.1(a)(1).

Base Offense Level: (§ 2D1.1(a)(5) and §2D1.1(c)(4))	7
Specific Offense Characteristics: The defendant is responsible for the loss related to the devised scheme and artifice to defraud individual consumers which exceeded $95,000. As such, 8 levels are added per U.S.S.G. §2Bl.l(b)(1)(E).	+8
Specific Offense Characteristics: Since the instant offense involved 10 or more victims, an additional 2 levels are added per U.S.S.G. §2B 1.1(b) (2)(A)	+2
Victim Related Adjustment: None.	0
Adjustment for Role in the Offense: None.	0
Adjustment for Obstruction of Justice: None.	0
Adjusted Offense Level (Subtotal):	17
Chapter Four Enhancement: None.	0
Acceptance of Responsibility: The defendant has clearly demonstrated acceptance of responsibility for the offense. Accordingly, the offense level is decreased by two levels. U.S.S.G. §3E1.1(a).	-2
Acceptance of Responsibility: The Government intends to make a motion stating that it was notified in a timely manner of the defendant's intention to enter a plea of guilty. Accordingly, the offense level is decreased by one additional level. U.S.S.G. §3E1.1(b).	-1

Total Offense Level: **14**

All parties agree that Mr. Lipsitz falls within Criminal History Category I. Accordingly, the calculated applicable Guidelines sentencing range is 15 to 21 months' imprisonment. This guideline range falls within in Zone D of the Sentencing Table. U.S.S.G. Ch. 5 Pt. A. Pursuant to U.S.S.G. § 5C1.1, the minimum term may be satisfied by a sentence of imprisonment. See U.S.S.G. § 5C1.1(f).

III. ARGUMENT

A. The Applicable Legal Standard

18 U.S.C. § 3553 outlines the procedures for imposing sentence in a criminal case. The "starting point and the initial benchmark" in evaluating a criminal sentence is the Guidelines sentencing range. *Gall v. United States*, 552 U.S. 38, 49, 128 S. Ct. 586, 169 L. Ed. 2d 445 (2007). Section 3553(a) provides a set of seven factors for the Court to consider in determining what sentence to impose on a criminal defendant. *United States v. Savarese*, No. 12-CR-421 (WFK), 2020 U.S. Dist. LEXIS 221708 (E.D.N.Y. Nov. 25, 2020).

When considered in their entirety, Mr. Lipsitz respectfully submits that a sentence below the current guidelines range, is sufficient, but not greater than necessary, to achieve the goals of sentencing. See 18 U.S.C. § 3553(a). Alternatively, under the statutory sentencing scheme, because Count 4 is a Class C Felony, Mr. Lipsitz is eligible for not less than one nor more than five years probation. 18 U.S.C. § 3561(c)(1). One of the following must be imposed as a condition of probation unless extraordinary circumstances exist: a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2).

Consistent with case law in this district, an appropriate sentence should, among other things, reflect the seriousness of the offense, promote respect for the law and provide just punishment for the offense. See 18 U.S.C. § 3553(a)(2)(A); *United States v. Jamison*, 838 F. App'x 622 (2d Cir. 2021). In addition, an appropriate sentence should take into account the history and characteristics of the defendant, afford adequate deterrence to criminal conduct, and protect the public from further crimes of the defendant. Id.; § 3553(a)(1)–(2). In weighing these factors, "a district court has broad latitude to 'impose either a Guidelines sentence or a non-Guidelines sentence.'" *United States v. Rigas*, 583 F.3d 108, 114 (2d Cir. 2009) (quoting *United States v. Sanchez*, 517 F.3d 651, 660 (2d Cir. 2008)).

Presently, Mr. Lipsitz stands before this Court as a nonviolent offender and the applicable Guidelines range falls within Zone D of the Sentencing Table. Within Zone D, the defendant is ineligible for probation. U.S.S.G. §5B1.1, comment.(n.2). We urge that this Court should consider imposing a non-Guidelines sentence of three years of probation, a condition which is 100 hours of community service, along with forfeiture in the amount of $90,000 and restitution to each victim in an amount to be determined following a hearing on that specific issue. An evaluation of the Section 3553(a) factors weighs in favor of a sentence outside of the current Guidelines range of 15-21 months.

Mr. Lipsitz is currently 63 years old and the custodial parent of his only child, Rachel Lipsitz, age 14. As verified by court documents from the Supreme Court of the State of New York, Richmond County, [redacted]

According to the pretrial services office, Mr. Lipsitz was released on July 8, 2020, on a

$50,000 co-signed bond with pretrial supervision requirements and is complaint with his conditions of supervision. A native of Staten Island, Mr. Lipsitz attended both the University of Georgia and Cornell University and until his arrest here, he had been employed full-time as the Chief Executive Officer and sole owner of SuperGoodDeals.com Inc. ("SGD"), a New York domestic corporation that has been operating in Richmond County, New York since 2007.

As will be discussed below, the nature and circumstances of the offense, the history and characteristics of the defendant, and the need for just punishment weigh in favor of the above-described non-guidelines sentence.

B. A Review of the Section 3553(a)(2) Factors Weighs in Favor of a Sentence Below the Lowest End of the Current Guidelines Range

1. The Nature and Circumstances of the Offense and the History and Characteristics of the Defendant

The first § 3553(a) factor requires the Court to evaluate "the nature and circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

Mr. Lipsitz is awaiting sentence after having pleaded guilty to Mail Fraud, that is, defrauding consumers in the marketing sale of PPE to obtain money and property from them by means of materially false and fraudulent pretenses, in violation of 18 U.S.C. § 1341. By and through his allocution, he has clearly demonstrated acceptance of responsibility for the offense. The loss figure exceeds $95,000. As also reflected in the plea agreement, ¶ 6 through 12, he is subject to forfeiture in the amount of $90,000. Restitution has yet to be determined. Notably, as of February 25, 2022, Affidavits of Loss had been sent to the purported victims. Only one returned an Affidavit of Loss, reflecting a harm of simply $100.00.

a. Mr. Lipsitz's Family and Personal Background Merit a Variance From the Applicable Guidelines Sentencing Range

Mr. Lipsitz was [redacted], in Staten Island, New York. He is one of two children born to the marriage of Kenneth and Marilyn Lipsitz. His father died in 1999, at age 70, [redacted] and before his passing had been employed in television sales and services. His mother died in 2017, at age 89, [redacted] Prior to her death, she was a homemaker. Mr. Lipsitz had very close relationships with his parents prior to their deaths. He was reared in a middle-income household; his family always showed him a lot of love and support and he acknowledges having been well taken care of. "I was fortunate." The deaths of his grandparents and parents were the most difficult times in his life.

Mr. Lipsitz has one sibling. Penny Brown, age 58, who resides in Old Bridge, New Jersey, and is married with one child. [redacted] Currently, she is employed with Kings County Supreme Court as a court reporter.

Marital History

On December 16, 2001, the defendant married Lorraine Arroll, age 58. The couple separated in 2011, and their divorce was granted on May 1, 2014, at the Richmond County Supreme Court. [redacted] Following their divorce, Mr.

Lipsitz was granted sole custody of their daughter Rachel, discussed below, [redacted] Although Mr. Lipsitz strained to keep their family together, he [redacted]

Presently, although Mr. Lipsitz was granted sole custody of Rachel, he has attempted as best he can to maintain a relationship between Ms. Arroll and Rachel. "Throughout his divorce Kevin was trying to do what was best for his daughter Rachel and be fair to his ex-wife. He wanted Rachel to have a good relationship with her mother since that [sic] in Rachel's best interest even when Kevin had to take extra time and effort to achieve it." Ex. K, Schlesinger, M.D., Fred. Letter in Support of Sentencing, 12/24/2021. Mr. Lipsitz tries to include Ms. Arroll in family activities such as going to the zoo or out to eat. [redacted] Mr. Lipsitz still feels conflicted as to whether or not Rachel should have Ms. Arroll be a part of their daughter's life, stating, [redacted]

[redacted]

Rachel, The Surviving Twin

While married, the couple bore twins, Rebecca and Rachel Lipsitz. The twins were born 9.5 weeks early, having come at 30.5 weeks. Rebecca died after 21 days. Rachel stayed in the hospital for about 6 weeks, until she got up to 5 lbs. Mr. Lipsitz never even got to hold Rebecca in his arms while she was alive, as she had to stay in her incubator continuously. According to Rachel's pediatrician, [redacted] Mr. Lipsitz is and has been the primary caregiver and was present at each and every health care maintenance visits. [redacted] I was grateful for the collaboration of a dedicated and concerned parent in the medical management of a fragile infant and child. He pursued every recommendations which included [redacted] Ex. D, Mevs, M.D., Clifford. Letter in Support of Sentencing, 02/01/2022. Rachel, age 14, is presently healthy despite her premature birth, and attends school. [redacted] Mr. Lipsitz' central and motivating goal is to reunite with Rachel and continue fulfilling his role as both father and mother to her.

Mr. Lipsitz recognizes that raising his daughter on his own has been challenging and sometimes "awkward," especially when planning playdates with other parents, who are predominantly mothers. "After his divorce he never stopped being a caring father nor shrugged

his responsibility and duty as one." Ex. C, Lerman, Donald. Letter in Support of Sentencing, undated. "Kevin is a loyal friend, but more importantly, a dedicated father. [redacted] Rachel is always Kevin's first priority. He made sure she went to school each day, attended extra-curricular activities and attended religion classes. Kevin took her on numerous vacations and made sure she saw the newest released children movies. In addition, they frequented amusement parks, museums and family functions." Ex. B, Morris, David. Letter in Support of Sentencing, undated.

Mr. Lipsitz has had to learn how to do things that would normally come natural to mothers, such as doing Rachel's hair and has turned to watching YouTube videos to learn different skills. He does try his best to provide Rachel with positive, adult female influences such as his sister ("when he is on her good side") and Alyssa DeCicco, an employee at his company for the last 8 years. Ms. DeCicco describes Mr. Lipsitz as "[Kevin is] a hard working business man to make sure his daughter is properly taken care of with a roof over her head, plenty of food and very well dressed." See, Ex. A, DeCicco, Alyssa. Letter in Support of Sentencing, 12/17/2021. [redacted]

Physical, Mental and Emotional Health

Physically, based on his most recent medical evaluation, Mr. Lipsitz suffers from insulin dependent diabetes. Most recently, his "A1C" (the test result which reflects average blood sugar level for the past two to three months) was 10.1, uncontrolled and at a very dangerous level when

he went on insulin. He has since been prescribed [redacted] allowing him to modify his diet throughout the day to try to get his A1C level down below 6.0. He has special foods to keep his blood sugar at healthier levels and is struggling with this right now, as he experiments with different low-carb foods. He has a number of other conditions for which he receives treatment and/or is currently taking prescribed medications. Those ailments are thoroughly covered in the PSR and will not be repeated here.

Apart from these noted afflictions, Mr. Lipsitz enjoys good mental and emotional health other than the understandable anxiety he experiences resulting from the instant matter, and his fears for Rachel's well-being depending on whatever sentence might be imposed here.

b. Legal History, Nature of Offense

Mr. Lipsitz has one prior felony conviction dating back to 1999, to which he pled guilty and was then placed on probation. He successfully completed the probationary period of 5 years in 2004 without incident and repaid a total of $82,000 as ordered. His only other arrest on 11/10/21 in Richmond County has resulted in an adjournment of contemplation of dismissal ("ACD") pursuant to New York Criminal Procedure Law (NY CPL) § 170.55.[1]

This recent state court proceeding [redacted] Because her household recently consisted solely of herself and Mr. Lipsitz, it was almost inevitable that they would clash, as teenagers and single, custodial

[1] Under New York Criminal Procedure Law Section 170.55, a New York Adjournment in Contemplation of Dismissal is an adjournment of the case to a future date, on which the case will be dismissed, unless the prosecutor moves to reopen the matter beforehand.

parents often do under similar circumstances. The cumulative stressors have led Mr. Lipsitz to voluntarily attend what both he and Rachel recognize as constructive family counseling, provided by [redacted]

Mr. Lipsitz has voluntarily chosen to [redacted] He believes that the lessons he can draw from these programs will enable him to be a better parent going forward. Mr. Lipsitz sincerely hopes that [redacted]

Regarding the charged conduct, friends and family members have expressed dismay at what they view as uncharacteristic behavior on his part in the commission of the instant offense. Mr. Lipsitz can't adequately explain his illegal conduct and is sorely disappointed in himself for having participated in behavior that would jeopardize his family relationships, the most important of which is his relationship with daughter Rachel. "This entire incident has saddened Kevin and I'm sure that he learned from the error of his ways. I know in my heart of hearts and I feel if Kevin is given a chance to move on from this negativity that he will remain a [sic]

upstanding Father and good Family man.“ Ex. C, Lerman, Donald.

As the *Gall* Court noted, a district court is well-situated to make determinations about the "character of the defendant" and whether, given such a character, the defendant is more or less likely "to return to criminal behavior" or constitute "a danger to society." *Gall*, 128 S. Ct. at 600-01. By pleading guilty, Mr. Lipsitz has clearly demonstrated responsibility for this offense and this Court should find it highly unlikely that he will engage in similar behavior in the future. Letters written by numerous individuals on Mr. Lipsitz's behalf and addressed to the court—attached as exhibits here—offer earnest and expansive, positive perspectives of who he is as a person and why he is worthy of the Court's leniency.

2. The Need for the Sentence Imposed

The second § 3553(a) factor instructs the Court to consider "the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2).

18 U.S.C. Section 3553(a)(2)(A)

18 U.S.C. § 3553(a)(2)(A) demands that the penalty "provide just punishment for the offense" that simultaneously "afford[s] adequate deterrence to criminal conduct" and protects the public from further crimes of the defendant, as required by 18 U.S.C. § 3553(a)(2)(B).

Mr. Lipsitz is a first offender for purposes of this matter. The Sentencing Reform Act, 28

U.S.C. § 994(j), directed the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence other than incarceration in cases in which the defendant is a first offender who has not been convicted of a crime of violence, or an otherwise serious offense." Id. It would not offend the spirit of that directive to impose a sentence of probation here—with conditions—where the statutory sentencing provisions for a conviction of Mail Fraud, 18 U.S.C. § 1341, render Mr. Lipsitz eligible for not less than one nor more than five years probation. See, 18 U.S.C. § 3561(c)(1). See, *United States v. Berson*, 2016 U.S. Dist. LEXIS 17107 (S.D.N.Y. Feb. 11, 2016).

18 U.S.C. Section 3553(a)(2)(B)

The second factor listed in 18 U.S.C. § 3553(a)(2) is to "afford adequate deterrence from criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Here, either a statutory or non-Guidelines sentence of 3 years probation that includes as a condition a period of 100 hours of community service, and an order of forfeiture in the amount of $90,000, plus an amount of restitution payable to the victims (to be determined at a future hearing), will provide adequate general deterrence to the criminal conduct of others. This is particularly so in light of the collateral consequences of a conviction, the accompanying reporting requirements where probation is imposed and the cumulative financial liabilities which the defendant will incur.

This factor focuses on specific deterrence when it requires the Court to consider the need "to protect the public from further crimes of the defendant." Mr. Lipsitz is not a future risk to society and incarceration at the current Guidelines range is not needed. See Michael Tonry, Purposes and Functions of Sentencing, 34 Crime & Just. 1, 28 (2006) (Research has consistently shown that while the certainty of being caught and punished has a deterrent effect,

"increases in severity of punishments do not yield significant (if any) marginal deterrent effects."); see also Zvi D. Gabbay, Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime, 8 Cardozo J. Conflict Resol. 421, 447 (2007) ("[C]ertainty of punishment is empirically known to be a far better deterrent than its severity."). See also, *United States v. Lawrence*, 254 F. Supp. 3d 441 (E.D.N.Y. 2017)("[a] 'rational offender' will decide whether or not to commit a crime by weighing the benefit of not committing a crime with the benefit of committing the crime without being caught and the benefit of committing a crime that results in being caught and punished." Def.'s Ex. B (Report of Jeffrey Fagan. Ph.D.), at 4.)

The proposed sentence advocated here adequately punishes Mr. Lipsitz for his crime and provides both general and specific deterrence. Although he has admitted guilt to the offense openly, his actions in the commission of the instant offense appear more negligent than intentional, given the chaos of supply-chain deliveries during the first months after the COVID-19 pandemic was declared. No other conduct in his employment history either mirrors or foreshadowed the acts he engaged in here. There is minimal likelihood that he would repeat this impropriety again.

18 U.S.C. Section 3553(a)(2)(C)

In a related proceeding, *Federal Trade Commission, v. SuperGoodDeals.com, Inc.; and Kevin J. Lipsitz, individually and as an officer of SuperGoodDeals.com, Inc.*, (Case No. 20-cv-3027-ENV-RER [EDNY]), the FTC is looking to enjoin Mr. Lipsitz and his business (SGD) from engaging in similar conduct and is willing to resolve the pending dispute if he agrees to modify the manner in which he maintains, monitors and advertises the merchandise SGD offers

for commercial sale. He has already taken steps to accomplish this by changing the inventory software which keeps track of items actually in stock, rather than those ordered, pending delivery. This likely resolution provides added general and specific deterrence which should persuade this court that a non-incarceratory sentence is appropriate here to "afford adequate deterrence from criminal conduct" and more likely to protect the public from further crimes by Mr. Lipsitz, under 18 U.S.C. § 3553(a)(2)(C).

Accordingly, the suggested non-Guidelines sentence below 15-21 months will, with a high degree of probability, deter Mr. Lipsitz and others similarly charged from engaging in similar conduct, and justly punishes him for the severity of his actions.

3. The Kinds of Sentences Available

The third § 3553(a) factor requires the Court to discuss "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines[.]" 18 U.S.C. § 3553(a)(3).

The statutory and guidelines provisions regarding terms of custody for Mr. Lipsitz's violation of law are as follows:

Custody

Statutory Provisions: The maximum term of imprisonment is 20 years. 18 U.S.C. § 1341.

Guideline Provisions: Based upon a total offense level of 14 and a criminal history category of I, the guideline imprisonment range is 15 months to 21 months.

Supervised Release

Statutory Provisions: The Court may impose a term of supervised release of not more

than three years. 18 U.S.C. § 3583(b)(2).

Guideline Provisions: Since the offense is a Class C Felony, the guideline range for a term of supervised release is 1 year to 3 years. U.S.S.G. §5D1.2(a)(2).

Probation

Statutory Provisions: Because Count 4 is a Class C Felony, the defendant is eligible for not less than one nor more than five years probation. 18 U.S.C. § 3561(c)(1). One of the following must be imposed as a condition of probation unless extraordinary circumstances exist: a fine, restitution, or community service. 18 U.S.C. § 3563(a)(2).

Guideline Provisions: Since the applicable guideline range is in Zone D of the Sentencing Table, the defendant is ineligible for probation. U.S.S.G. §5B1.1, comment. (n.2).

Fines

Statutory Provisions: The maximum fine is $250,000. 18 U.S.C. § 3571(b).
A special assessment of $100 is mandatory. 18 U.S.C. § 3013.
Guideline Provisions: The fine range for this offense is from $7,500 to $75,000. U.S.S.G. §5E1.2(c)(3).

Restitution

Since the instant offenses occurred after April 24, 1996, restitution is mandatory pursuant to 18 U.S.C. § 3663A and Guideline 5E1.1(a)(1).

4. The Kinds of Sentence and the Sentencing Range Established for Defendant's Offenses

The fourth § 3553(a) factor requires the Court to discuss "the kinds of sentence and the sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines[.]" *Id.* § 3553(a)(4)(A).

As to Count Four of the indictment, the most appropriate guideline for a violation of 18 U.S.C. § 1341 is U.S.S.G. §2B1.1. That section provides a base offense level of seven, as the statutory maximum custody on Count Four is 20 years. U.S.S.G. §2B1.1(a)(1).

The defendant is responsible for the loss related to the devised scheme and artifice to defraud individual consumers which exceeded $95,000. As such, 8 levels are added per U.S.S.G. §2Bl.l(b)(1)(E). Since the instant offense involved 10 or more victims, an additional 2 levels are added per U.S.S.G. §2B 1.1(b)(2)(A). The adjusted offense level is therefore 17.

Further, as the defendant has clearly demonstrated acceptance of responsibility through his allocution and subsequent conduct before the imposition of sentence, a two-level reduction is warranted, pursuant to §3E1.1(a). Lastly, assuming the defendant has accepted responsibility as described in the previous sentence, the Government should move at sentencing for an additional one-level reduction, pursuant to §3E1.1(b), because the defendant gave timely notice of his intention to enter a plea of guilty, thereby permitting the Government to avoid preparing for trial and permitting the Court to allocate its resources efficiently.

Based on the foregoing, the applicable Guidelines offense level is 14, for which the applicable guidelines sentencing range is 15-21 months.

Under the facts presented here, any period of imprisonment within this range would be greater than necessary to achieve the goals of sentencing, while either a statutory or non-guidelines sentence of 3 years probation that includes as a condition a period of 100 hours of community service, and an order of forfeiture in the amount of $90,000 would be more than adequate to do so. *See* 18 U.S.C. § 3553(a).

a. Sentencing Recommendations

The Government has not yet submitted a sentencing memorandum and its recommendation is unknown. The same applies to the U.S. Probation Office.

Given a review of the 18 U.S.C. § 3553(a) factors thus far discussed, this Court should seriously consider whether this individual, under the facts of this case, warrants a non-Guideline sentence lower than 15-21 months if the Court chooses not to impose a statutory sentence. Counsel urges that Mr. Lipsitz does and suggests a variance from that applicable range which would allow for a sentence of 3 years probation that includes as a condition a period of 100 hours of community service, and an order of forfeiture in the amount of $90,000.

5. Pertinent Policy Statement(s) of the Sentencing Commission

The fifth § 3553(a) factor, requires the Court to evaluate "any pertinent policy statement . . . issued by the Sentencing Commission," 18 U.S.C. § 3553(a)(5).

Admittedly, this factor is not relevant to Mr. Lipsitz's sentencing.

6. The Need to Avoid Unwarranted Sentence Disparities [Among Defendants with Similar Records Who Have Been Found Guilty of Similar Conduct]

The sixth § 3553(a) factor requires the Court to consider "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). Indeed, § 3553(a)(6) "requires a sentencing court to consider nationwide sentence disparities …." *United States v. Ghailani*, 733 F.3d 29, 55 (2d Cir. 2012) (quoting *United States v. Frias*, 521 F.3d 229, 236 (2d Cir. 2008)).

For the reasons stated in this Memorandum, and considering the other § 3553(a) factors, counsel's proposed sentencing recommendation of a non-Guideline sentence below 15-21

months would avoid unwarranted sentence disparities between Mr. Lipsitz and other, non-violent offenders convicted of similar conduct.

Mr. Lipsitz's commission of the instant offense—although serious—does not rise to the level of egregious conduct. A sentence lower than 15-21 months imprisonment, specifically one which imposes a sentence of 3 years probation that includes as a condition a period of 100 hours of community service, and an order of forfeiture in the amount of $90,000, promotes the salutary goal of providing uniformity in sentencing. The Sentencing Guidelines are designed in significant part to bring about nationwide uniformity in sentencing and to avoid unwarranted sentencing disparities. See *Rita v. United States*, 551 U.S. 338, 127 S. Ct. 2456, 2463-64, 168 L. Ed. 2d 203 (2007); *United States v. Savin*, 349 F.3d 27, 34 (2d Cir. 2003) (noting that "a policy underlying the Guidelines is the promotion of 'reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders.'" (quoting U.S.S.G. ch. 1, pt. A, § 3 (1995)).

Other defendants within this Circuit and District have received such sentences under roughly similar facts. See, *United States v. Bical*, 819 F. App'x 26 (2d Cir. 2020), wherein following a guilty plea, convicting the defendant of attempt and conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. §§ 1341, 1343, and 1349, the district court sentenced Bical to three years' probation, with six months in community confinement, and imposed a fine of $55,632. See also, *United States v. Hurtado*, 756 F. App'x 63 (2d Cir. 2018).

In *Hurtado*, the defendant was arrested and pleaded guilty in the United States District Court for the Southern District of New York, to one count of mail fraud, one count of wire fraud, and two counts of conspiracy to commit mail and wire fraud, in violation of 18 U.S.C. § 1341, §

1343, and § 1349, respectively. The United States Probation and Pretrial Services Department (the "probation department") then calculated Hurtado's adjusted offense level to be 30 and his criminal history category to be Category I, resulting in a sentencing Guidelines range of 97 to 121 months. At the sentencing hearing, Hurtado told the court that he wished to pay restitution to his victims. The court responded that a commitment to make restitution was "one of the strongest statements one could make about admitting that you did wrong" and that it was "important to [the court] in fashioning the sentence." Id., Sealed App'x at 61. The court adopted the recommended Guidelines range, but sentenced Hurtado to a non-Guidelines sentence of five years probation, and $2.2 million dollars in restitution. See also, *United States v. Pope*, No. 03 CR 492 (RJD), 2013 U.S. Dist. LEXIS 53232 (E.D.N.Y. Apr. 12, 2013) (in connection with her plea of guilty to a single count of mail fraud in violation of 18 U.S.C. §1341, Pope was sentenced to five years' probation and restitution in the amount of $67,608.)

The proposed sentencing recommendation made here on Mr. Lipsitz's behalf is the more appropriate sentence based on his history, characteristics, and the facts of the instant matter. Given in particular his work history, health, demanding parental obligations and lack of any violent criminal history, a non-Guideline or statutory sentence of 3 years probation that includes as a condition a period of 100 hours of community service, an order of forfeiture in the amount of $90,000 and restitution in an amount to be determined, would be sufficient, but not more than necessary, to meet the goals of sentencing.

7. The Need to Provide Restitution

The seventh § 3553(a) factor requires the Court to touch upon "the need to provide restitution to any victims of the offense." 18 U.S.C. § 3553(a)(7). This factor remains open and

in dispute pending a hearing on the issue. We note in advance, however, that a fair number of customers who complained of late delivery after payment of expedited delivery charges were either reimbursed for those charges, or refunded the full amount of the purchase price of the merchandise ordered and shipping charges, *and* permitted to keep the merchandise ultimately delivered.

CONCLUSION

For the foregoing reasons, the Court should sentence Mr. Lipsitz to either a statutory or a non-Guideline sentence of 3 years probation that includes as a condition a period of 100 hours of community service, an order of forfeiture in the amount of $90,000, and restitution in an amount to be determined along with any other conditions that the Court deems necessary for Mr. Lipsitz's punishment and rehabilitation.

This recommended sentence is appropriate and comports with the dictates of § 3553. This sentence is consistent with, and is sufficient but no greater than necessary to accomplish, the purposes of § 3553(a)(2).

Dated: New York, NY
April 11, 2022

Respectfully submitted,

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