IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF SOUTH CAROLINA
CHARLESTON DIVISION

UNITED STATES OF AMERICA v. **CARL ULM**	Criminal No: 2:22-cr-00994-BHH **REPLY TO DEFENDANT'S MOTION FOR A VARIANCE AND SENTENCING MEMO**

On July 11, 2023, Defendant Carl Ulm pled guilty to Count 1 of the Indictment against him pursuant to a written plea agreement. The United States submits this response to Defendant's sentencing memorandum in advance of Defendant's sentencing. The purpose of this response is to discuss the nature and circumstances of the Defendant's offense and address how Defendant's conduct is very easily distinguishable from the conduct of another individual who was prosecuted in the Columbia Division of the District of South Carolina.

I. THE NATURE AND CIRCUMSTANCES OF DEFENDANT'S OFFENSE AND THE NEED TO AVOID UNWARRANTED DISPARITIES.

At the outset, the Government would like to address the representations defense counsel makes in Defendant's motion for a variance regarding certain conversations he has had with the undersigned AUSA and her supervisor. These conversations were had during negotiations of Defendant's plea and after the Defendant's plea being entered. As this Court is well aware, "[t]he court must not participate in [plea] discussions." Fed. R. Crim. P. 11(c)(1).[1] Further, Federal Rule of Evidence 408 governs compromise offers and negotiations and generally holds that they are

[1] Federal Rule of Criminal Procedure 11(f) refers the question of whether plea discussions are admissible to Federal Rule of Evidence 410; however, Federal Rule of Evidence 410 pertains to statements made by a defendant during plea negotiations which is not at issue in the present case.

inadmissible in any proceeding. *See* Fed. R. Evid. 408. In Defendant's motion for a variance, his counsel sets forth many details about discussions between the undersigned AUSA and her supervisor; specifically, Defendant's counsel requested for the undersigned AUSA to consider an 11(c)(1)(C) plea and/or a recommendation for probation. Pursuant to Federal Rule of Criminal Procedure 11(c)(1) and Federal Rule of Evidence 408, the Government believes these discussions are inappropriate for the Court's consideration and are also inappropriately raised because they were discussions had during negotiations of a resolution of the Defendant's case.[2] Although the Government takes issue with defense counsel's characterization and interpretation of these conversations, the Government refrains some specifically responding to the Defendant's claims given the clear prohibitions set forth in Rules 11 and 408. When fashioning a sentence, the Court must consider both the advisory guidelines and the 18 U.S.C. § 3553(a) factors, two of which will be discussed below.

Nature and Circumstances of Defendant's Offense

The Presentence Report sets forth in detail the nature and circumstances of the Defendant's offense. *See* PSR ¶¶ 1 - 17. As set forth in the PSR, Defendant owned Anchor Restoration Contractors, LLC ("Anchor 1") until January 2021 when he sold the company and its assets to Randall Sizemore and his company, Anchor Restoration Construction ("Anchor 2"). Despite no longer having an active operating business that had qualifying expenses for a PPP loan (i.e.: payroll), Ulm directed an employee to submit a round two PPP loan application in February 2021.

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[2] Defendant's counsel also represents in his motion for a variance that the undersigned AUSA advised him that she planned to supersede if the case went to trial. The undersigned did, in fact, make this representation because further investigation into the Defendant's offenses after indictment supported a money laundering charge, and it is the Government's practice to notify defense counsel of the likelihood of a superseding indictment in advance of trial when negotiating in good faith.

See PSR ¶ 15. Importantly, the evidence obtained in the investigation revealed that Ulm had been advised by his accountant that he and Anchor 1 did not qualify for the round two PPP loan. Despite this advice, Defendant directed the employee to apply for the round two PPP loan. It is also worth noting that Ulm agreed to these facts when read during his change of plea hearing.

When Defendant became aware that the loan had been funded, he emailed the employee the following message: "ALL OF THIS MONEY WILL GO TO ME IT WILL NOT BE SHARED WITH RANDALL IT WILL NOT BE APART OF ANY DEAL WE HAD." When the employee questioned Defendant about how he would show the loan was used for operating and payroll costs Defendant replied as follows: "WE WILL BUT QUALIFYING WAS LAST YEAR IF YOU HAVE ANY QUESTIONS ASK [ACCOUNTANT] WE HAVE TALKED ABOUT IT." The investigation has revealed that Defendant did speak to his accountant and was advised he and Anchor 1 did ***not*** qualify for the loan. Once the loan proceeds were deposited in Anchor 1's bank account, Defendant directed his employee to write a check, representing a majority of the loan funds, to a personal account of his; essentially, not only did he fraudulently apply for a loan, but he misused proceeds of the loan by directing them to his personal bank account rather than for qualifying PPP expenses.

As will be discussed in more detail at Defendant's sentencing, and is described in detail in the PSR, Defendant committed this offense after being told he was not entitled to apply for and receive the loan and then directed that a majority of the proceeds be transferred to his personal bank account. The Defendant abused a government program that was designed to help businesses affected by the COVID-19 pandemic.

Need to Avoid Unwarranted Disparities

In his motion for a variance, Defendant's counsel sets forth that it was represented to him there was a similar case in Columbia where the Columbia AUSA also was not going to agree to probation because both AUSAs felt that these cases needed to be prosecuted. The only similarity between Ulm's conduct and the conduct of the defendant charged in the Columbia is that both individuals applied for loans under the CARES Act.[3] The undersigned trusts that Defendant and his lawyer know that all cases are evaluated based on the individual facts and circumstances of each case and investigations and prosecutions are fluid. While Defendant and his counsel seem to contend that Defendant entered this plea solely on the representation of a similar case in the Columbia Division, a review of the evidence in this case clearly shows that the Defendant committed the crime of wire fraud, and a plea was in his best interest.

Any sentence this Court chooses to impose on Defendant would not create an unwarranted disparity because the cases are substantially distinguishable. The Columbia Division case involved an application for an active business being operated solely by the applicant; whereas Defendant had sold Anchor 1 and no longer had operating costs. Moreover, there is no evidence to indicate that the defendant in the Columbia Division case was told by an accountant that he was not entitled to the loan. The Columbia Division case was a strictly misuse of funds case – here we have a fraudulent application ***and*** a misuse of funds. The facts are distinguishable for many reasons, and any sentence this Court decides to impose would not create an unwarranted sentencing disparity.

[3] The Government is prepared to address at sentencing arguments raised by Defendant about how the EIDL application process is more extensive and, respectfully, disagrees with this assertion. However, the Government believes this is irrelevant for the purposes of Defendant's sentencing given the nature and circumstances of his offense.

II. CONCLUSION.

For the reasons stated in this memorandum, and for reasons that will be more fully addressed at sentencing, the Government believes the nature and circumstances of Defendant's offense warrant any sentence this Court chooses to impose and would not create any unwarranted disparity.

RESPECTFULLY SUBMITTED,

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