UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	:	18 Cr. 333 (JGK)
v.	:	
AKSHAY AIYER,	:	
Defendant.	:	

DEFENDANT'S RESPONSE TO THE GOVERNMENT'S SENTENCING MEMORANDUM

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Defendant Akshay Aiyer respectfully submits this memorandum in response to The United States' Sentencing Memorandum Regarding Defendant Akshay Aiyer.

ARGUMENT

I. The Government's Failure To Prove Volume Of Commerce Renders Improper Any Enhancement To Mr. Aiyer's Offense Level On Volume Of Commerce Grounds.

The Government does not dispute that Section 2R1.1(b)(2) of the Sentencing Guidelines (the "Guidelines") requires that the "volume of commerce" reflect commerce that was "affected by" the conspiracy, or that the burden of proving the volume of commerce lies with the Government alone. (*See* ECF No. 221, The United States' Sentencing Memorandum Regarding Defendant Akshay Aiyer ("Government's Memorandum" or "Gov't Mem."), at 19.) The Government also does not dispute that *United States v. SKW Metals & Alloys, Inc*., 195 F.3d 83 (2d Cir. 1999), is the Second Circuit precedent that controls here. (*See* Gov't Mem. at 17-18.) Under *SKW Metals*, the Government must show a measurable anticompetitive impact on price—i.e., that the "conspiracy [was] incrementally successful at impacting the terms of trade or at elevating the price above the putative market price"—to prove a relevant volume of commerce. 195 F.3d at 90-91. In other words, the conspiracy must have "act[ed] upon" or "influence[d]" the terms of trade or price. *Id*. The Government has not shown that the conspiracy acted upon or influenced any terms of a transaction or any price and thus has not met its burden of proving volume of commerce.

As detailed in Mr. Aiyer's sentencing memorandum, the record at trial failed to show that the conspiracy had any anticompetitive effects—not an agreed-upon price, not what prices would or should have been in the absence of the alleged conduct, not harm to customers, not any reduction in output or competition, and not any unfavorable terms to a transaction. (*See* ECF No. 220, Sentencing Memorandum on Behalf of Akshay Aiyer ("Defendant's Memorandum" or

"Def. Mem."), at 2, 6-17, 46-48.) Although the burden of proof lies with the Government, Defendant's Memorandum analyzed individual episodes in five representative categories of conduct in order to highlight the Government's specific evidentiary shortcomings. (*See generally id.* at 6-17.) This analysis showed that no identifiable volume of commerce was affected within the meaning of the Sentencing Guidelines. (*See id*.)

The Government's Memorandum does not address the failures of proof described in Defendant's Memorandum. Instead, the Government makes the sweeping, conclusory statement that "each time a member of the conspiracy refrained from trading, placed orders pursuant to the conspiracy, or quoted particular prices pursuant to the conspiracy," a volume of commerce has been affected "within the clear meaning of *SKW Metals*." (Gov't Mem. at 18.)

This approach to volume of commerce directly contravenes Second Circuit law. *SKW Metals*, the controlling authority, involved the sentencing of defendants that engaged in a two-year traditional price fixing conspiracy in the commodity ferrosilicon market. 195 F.3d at 85-86. The coconspirators had held meetings at which they agreed to set a "floor price" of 41 cents per pound, and this agreement remained in effect throughout the conspiracy period. *Id.* at 86-87. The government urged the court to find that all sales within the two-year conspiracy period were "affected by" the conspiracy within the meaning of the volume of commerce provision. *Id*. at 90-91. The Second Circuit rejected this argument. It concluded that, although the sales need not have been consummated at the agreed-upon floor price to have been affected, the sales must have been "influenced" in some measurable way—with above-market pricing or with unfair terms—to properly be the subject of a volume of commerce calculation. *Id*. On remand, the district court held that only sales within a two-month portion of the two-year conspiracy were shown to have been made at an elevated price, and thus were affected by the conspiracy. The court re-imposed

the same sentence of four months' home confinement and 18 months' probation, which the Second Circuit upheld on appeal. *See United States v. SKW Metals & Alloys, Inc.*, 6 F. App'x. 65, 66 (2d Cir. 2001).

Under *SKW Metals*, proof of an illegal conspiracy does not mean that commerce was affected by the conspiracy. The effect must be shown independently. The Government is not permitted to assume, to hypothesize, or to speculate. The Government must show an actual anticompetitive "influence" on "sale prices, the volume of goods sold, or other transactional terms," such that the "profits earned by conspirators" can be approximated.[1] 195 F.3d at 90-91. The Government has made no such showing here.

Indeed, the proof in this case falls even shorter of meeting the requisite showing than the proof in *SKW Metals*. While the evidence in *SKW Metals* proved a two-year continuous agreement to set ferrosilicon at a specific "floor" price, the record here showed that, at most, the conduct was episodic, infrequent, and involved no set price. *See id*. at 85-87. It bears little resemblance to a traditional per se price fixing conspiracy, which itself is still not enough to establish that volume of commerce has been "affected" under *SKW Metals*.

The Government asserts that Mr. Aiyer "would have the Court abandon the concept of volume of commerce and instead conduct a 'transaction-specific' analysis, calculating the particular price impact of the conspiracy corresponding to each instance of conduct," which, the Government contends, is not required under *SKW Metals*. (Gov't Mem. at 17.) Mr. Aiyer, however, has never disputed that *SKW Metals* does *not* require a sale-by-sale-accounting to prove volume of commerce. As the court in *SKW Metals* explained, the volume of commerce

[1] As detailed in Defendant's Memorandum, the "profits" earned by JP Morgan from the challenged transactions are inconsequential. (*See* Def. Mem. at 20-22.)

calculation is intended to be a "rough approximation of the damage caused by the conspiracy." 195 F.3d at 91. As the court expressly qualified, however, "this lightening of the government's burden does not excuse altogether the government's need to prove that *the prices charged were 'affected by' the conspiracy*." *Id.* (emphasis added). The Government has provided no such proof here.

The Government's contention that Mr. Aiyer "would have the Court abandon the concept of volume of commerce" is also incorrect. Mr. Aiyer's position is that if the volume of commerce analysis is conducted correctly, then the affected volume of commerce here is zero, as the Government has not carried its burden as to any of the sales at issue in this case.[2] This is completely consistent with *SKW Metals*: "[A] price-fixing conspiracy that fails to influence market transactions notwithstanding overt acts sufficient to support criminal responsibility has affected *no sales* within the meaning of the Guidelines." *Id.* (emphasis added).

More than two-thirds of the volume of commerce that the Government claims was "affected" for Guidelines purposes arises from four trading episodes: November 4, 2010; January 18, 2012; January 27, 2012; and May 8, 2012. (*See* Def. Mem. at 11-12, 16-17.) Mr. Aiyer disputes that the Government has shown an actual effect on commerce in any trading episode, and Defendant's Memorandum discusses each of these four episodes. Because these episodes loom so large in the Government's calculation, we briefly recapitulate here why the record fails to show any effect on the price or other terms of Mr. Aiyer's trades on these dates.

On November 4, 2010, the price at which Mr. Aiyer transacted in the ruble was a price that he set independently, without any consultation with Mr. Katz. Indeed, it appears from the

[2] Mr. Aiyer also argues, in the alternative, that even if the volume of commerce principle was applied correctly—which Mr. Aiyer maintains is not the case here—a downward adjustment is warranted because, in this case, the volume of commerce figure greatly overstates the financial significance of the conduct at issue. (*See* Def. Mem. at 20-23.)

record that Mr. Aiyer quoted this price to the customer before he even knew that Mr. Katz had been asked for a quote on the same transaction. Certainly, the Government has offered no evidence to the contrary, and there is no basis for concluding that Mr. Aiyer's price was anything but competitive.

On January 18, 2012, the date on which Mr. Aiyer executed a dollar/rand stop loss order for his client, the evidence shows that the order would have been triggered by the natural movement of market prices, regardless of any trading by participants in the Rand Chat Room. As a result, the customer got exactly the price it bargained for—likely, in fact, a better price—and the conspiracy had no identifiable effect on transactions in dollar/rand.

On January 27, 2012, a date on which Mr. Aiyer traded before, during, and after the dollar/shekel fix window, the fix price was determined by extensive and aggressive trading by major market participants, including Goldman Sachs, RBS, and TD Bank. There was no evidence that Mr. Katz's withdrawal of a small bid before the fix had any impact on the fix outcome, and, in any event, his aggressive buy—undisclosed to Mr. Aiyer—more than offset any effect of his withdrawn bid.

On May 8, 2012, Mr. Cummins, learning that Mr. Aiyer would be trading in the dollar/rand fix, placed offers during the fix window to "help" Mr. Aiyer. It is undisputed that Mr. Cummins posted such offers on his own initiative, not at Mr. Aiyer's request, and equally undisputed that his offers were so far out of the market that they not only were not transacted on, they were not even visible to other market participants. Although Mr. Waller testified that these offers could have affected the market under different hypothetical circumstances, the Government does not argue that they affected actual market transactions in this instance.

In short, in these four large trading episodes—as in the smaller episodes on which the Government relies—the Government fails to show *any* impact on commerce.

II. The Government Failed To Provide Any Justifications For The One-Level Enhancement For Bid Rigging.

In Defendant's Memorandum, Mr. Aiyer set out in detail the evidence presented at trial and the relevant case law demonstrating why no adjustment to the offense level for bid rigging is warranted. (*See* Def. Mem. at 24-28.) In response, the Government largely ignores the evidence and case law and instead advances three arguments: 1) the evidence concerning the episodes on November 4, 2010 and February 28, 2012 support a finding of bid rigging; 2) the fact that the banks' customers viewed the traders as competitors and were not aware that the traders were communicating supports a finding of bid rigging; and 3) the jury determined that the conduct presented at trial is bid rigging. The Government's arguments fail.

First, the Government's characterization of November 4, 2010 and February 28, 2012 as examples of bid rigging is unsupported. (*See* Gov't Mem. at 27.) With respect to both of these episodes—as well as the other episodes involving the ruble and the zloty—the Government did not present any evidence at trial of the Rand Chat Room members agreeing to provide Mr. Aiyer with the prices that they had quoted or would quote to a customer, providing Mr. Aiyer with their prices so that Mr. Aiyer could win the transactions at favorable prices, or believing that they would be awarded a later transaction as a quid pro quo for their assistance. At most, the Government presented evidence that, on one or two occasions, Mr. Aiyer unilaterally took advantage of information provided to him by other Rand Chat Room participants.

Other than these two episodes, it is still unclear which specific episodes the Government contends constitute bid rigging. To the extent that the Government asserts that the interdealer episodes are also bid rigging, as the Government seems to suggest in its submission (*see id.* at 9

("These [episodes of interdealer trading] were just some of the many instances of price-fixing and *bid-rigging* conduct engaged in by Defendant and his co-conspirators") (emphasis added)), controlling case law refutes the Government's point.

In *In re London Silver Fixing, Ltd., Antitrust Litigation*, the court dismissed a claim for bid rigging, but not a claim for price fixing, because the relevant conduct did not involve "a bidding process for any particular contract, project, or transaction." 213 F. Supp. 3d 530, 564 (S.D.N.Y. 2016). There, plaintiffs alleged that traders of silver and silver-related products participated in a price fixing and bid rigging conspiracy by manipulating the daily benchmark price of silver, sharing confidential information, and coordinating bid-ask spreads. In reaching its conclusion, the court reasoned that "the auction process was a benchmarking mechanism, not a bidding process for any particular contract, project or transaction." *Id*.

The Government also previously identified *In re Foreign Exchange Benchmark Rates Antitrust Litigation.*, 74 F. Supp. 3d 581, 594 (S.D.N.Y. 2015) and *United States v. Usher*, No. 17 CR 19 (RMB), 2018 WL 2424555, at *4 (S.D.N.Y. May 4, 2018) as the most analogous cases that support the proposition that the challenged interdealer conduct is price fixing or bid rigging. (*See* ECF No. 212, Government's March 16, 2020 Letter at 2.) Notably, in *In re Foreign Exchange*, the plaintiffs characterized the challenged conduct as price fixing; there was no mention of bid rigging in the complaint or the motion to dismiss decision. 74 F. Supp. 3d 581 at 592, at ¶ 6 ("[T]he U.S. Complaint plausibly alleges a price-fixing conspiracy"); Third Amended Complaint, *In re Foreign Exchange Benchmark Rates Antitrust Litigation.*, 1:13-cv-07789 (S.D.N.Y. June 3, 2016), ECF No. 619 ("Beginning at least as early as 2003 and continuing through 2013, Defendants conspired with each other to fix prices in the FX market."). In *Usher*,

there was no determination by the court that the challenged conduct actually constituted bid rigging *or* price fixing, and the case ended with the defendants' acquittal.

Next, the Government argues that the Rand Chat Room members' customers viewed them as competitors and were unaware that the traders were sharing information with one another. (*See* Gov't Mem. at 27.) According to the Government, this fact establishes that the Rand Chat Room members were not in a vertical relationship, but instead a bid rigging conspiracy. (*Id.*) That customers viewed the Rand Chat Room participants as competitors, however, is irrelevant. What matters is whether they were in fact competitors, or whether Mr. Katz and Mr. Cummins needed Mr. Aiyer to support their trading in the ruble. It is for the Court, based on all of the facts, to determine the economic realities of the relationship and the competitive significance of the alleged restraint. *See Copy-Data Sys., Inc. v. Toshiba America, Inc.,* 663 F.2d 405, 408, 411 (2d Cir. 1981) (finding the per se rule not applicable to the alleged restraint, even though the entities were "on the same market level" and thus competitors in some respects, because of the dual-distribution structure of the parties' relationship); *Abadir & Co. v. First Miss. Corp.*, 651 F.2d 422, 427 (5th Cir. 1981) ("It has already been noted that antitrust law is concerned not with superficial technical appearances, but with practical economic substance.") (citations omitted).

Finally, the Governments asserts that "[i]n this case … the *jury* concluded that the facts supported the allegation that Defendant was involved in a price-fixing and *bid-rigging* conspiracy." (Gov't Mem. at 29 (emphasis in original).) The Government is mistaken. Although the jury instructions briefly described bid rigging, the jury was never asked to determine whether Mr. Aiyer engaged in bid rigging, as distinct from price fixing. Indeed, as Mr. Aiyer repeatedly argued throughout this case, the determination of whether the actual

behaviors underlying the Indictment, if proven to have occurred, are per se illegal—i.e., either price fixing or bid rigging—or subject to the rule of reason is a question of law for the Court to decide.

Significantly, the Government did *not* charge Mr. Cummins or Mr. Katz with bid rigging. (*See* Information, *United States v. Katz,* No. 17-cr-003 (S.D.N.Y. Jan. 4, 2017); Information, *United States v. Cummins*, No. 17-cr-026 (S.D.N.Y. Jan. 12, 2017).) This characterization of the conduct was plainly an afterthought in Mr. Aiyer's case, not an accurate way to describe the conduct. Of course, Mr. Aiyer could not have participated in a bid rigging conspiracy by himself.

For these reasons, the one-level enhancement for bid rigging is not appropriate.

III. The Government's Sentencing Memorandum Asks The Court To Ignore Section 3353(a) Factors.

The Guidelines are "not the only consideration" for a sentencing court, nor are they binding. *Gall v. United States*, 552 U.S. 38, 49 (2007). A Guidelines calculation, in fact, 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 a sentence." *United States v. Gupta*, 904 F. Supp. 2d 349, 354 (S.D.N.Y. 2012). The Government essentially asks the Court to ignore these well-established principles. According to the Government, Mr. Aiyer's history and character—as being "a good friend, son, brother, and partner"—are irrelevant. (Gov't Mem. at 12 ("Defendant's sentencing memorandum sets forth exhaustive detail about his upbringing and his life as a citizen and currency trader. It may well be that Defendant has been a good friend, son, brother, and partner. However, as his submission demonstrates, Defendant lived a privileged life.").) But that is not the law. As set forth in Defendant's Memorandum, and as discussed more fully below, Mr. Aiyer's character, as well as the other Section 3553(a) factors, are

significant considerations in determining an appropriate sentence. These factors weigh heavily in favor of a non-custodial sentence.

A. Mr. Aiyer's History And Character Are Important Considerations For Sentencing.

The Government offers only a brief response to the detailed discussion of Mr. Aiyer's extraordinary decency. In summary, the Government all but dismisses the content of the more than fifty letters[3] attesting to Mr. Aiyer's character and counters with two assertions—that Mr. Aiyer "lived a privileged life" and that Mr. Aiyer's so-called "greed and arrogance drove him to cheat." (Gov't Mem. at 12.) These inflammatory statements are inaccurate, unrelated to the merits of the case, and not a proper basis for sentencing.

Regarding the first claim, the Government asserts, "It may well be that Defendant has been a good friend, son, brother, and partner. However, as his submission demonstrates, Defendant lived a privileged life." (*Id.*) This characterization is a gross oversimplification of Mr. Aiyer's life. While it is true that Mr. Aiyer attained success as a trader at JP Morgan, it is also true that Mr. Aiyer immigrated from Pune, India, earned a scholarship to Vassar College, and worked tirelessly in college—"taking the hardest classes …, working extra jobs and interning at offices in the city while concurrently completing his studies," in the words of a close friend—to ultimately earn a position at JP Morgan. (Def. Mem. at 37.) It is far more accurate to describe Mr. Aiyer as hardworking, diligent, and resourceful than it is to describe him as "privileged."

The Government's statement is also a non sequitur. Even if Mr. Aiyer could be said to have "lived a privileged life," any privilege that Mr. Aiyer may have enjoyed in no way

[3] Three additional letters in support of Mr. Aiyer are attached hereto as Exhibit A. These letters arrived at defense counsel's office after the shelter-in-place order went into effect, and counsel only recently learned of them.

undermines the fact that he is a kind, caring, generous, and upstanding person. Defendant's Memorandum detailed the great lengths to which Mr. Aiyer goes for his family, friends, partner, classmates, teammates, and community, especially in their times of need. (*See generally id.* at 34-44.) That Mr. Aiyer is a decent human being, deserving of the Court's leniency, does not relate to the question of privilege.

Regarding its second claim, the Government asserts, "By the age of 30, Defendant was a millionaire with a lucrative finance job and a vacation home in Martha's Vineyard—but that was not enough. Defendant's greed and arrogance drove him to cheat others in order to make even more money for himself." (Gov't Mem. at 12.) This description is baseless and offensive. The record is devoid of any evidence showing Mr. Aiyer to be greedy or arrogant or "cheat[ing] others to make even more money." (*See* Def. Mem. at 2, 6-17, 46-48 (discussing lack of proven harm to customers or significant profits earned).) The Government's theory that Mr. Aiyer was motivated by financial gain or "greed" is implausible. With respect to the ruble, for example, it makes no sense that Mr. Aiyer, who was unquestionably a highly skilled trader with a very large trading volume, would enter into a conspiracy—for the purpose of "making more money"—with Mr. Cummins and Mr. Katz, who admitted to being far less competent ruble traders than Mr. Aiyer and who did almost no business in the ruble. (*See* ECF No. 196, Memorandum of Law in Support of Defendant's Motion for a Judgment of Acquittal or, in the Alternative, for the Declaration of a Mistrial or a New Trial, at 39.) Whether or not his actions were completely permissible, Mr. Aiyer's far more likely motive was to help friends whom he perceived to be in need of assistance. With respect to interdealer trading, the Government presented no evidence of any actual and tangible benefit to Mr. Aiyer.

B. The Unique Nature And Characteristics Of The Conduct For Which Mr. Aiyer Was Convicted Support A Sentence Of Probation With A Period Of Home Confinement.

As discussed in Defendant's Memorandum, Mr. Aiyer is a non-violent, first-time offender, who was convicted of a crime premised on conduct that was widespread in the foreign exchange industry, that required no knowledge of illegality or showing of harm, and from which Mr. Aiyer did not profit significantly. Pursuant to the ABA Task Force Report, these circumstances warrant this Court's consideration of a non-incarceratory sentence. (*See* Def. Mem. at 49 (citing the ABA Task Force Report).)

The Government's Memorandum does not dispute that the conduct for which Mr. Aiyer was convicted was rampant in the foreign exchange industry or that numerous individuals who engaged in similar conduct will never be prosecuted, much less imprisoned. Indeed, the Government acknowledges that several banks pled guilty to violating the Sherman Act for "similar" behavior. (*See* Gov't Mem. at 35.) This alone is reason not to "make an example" of Mr. Aiyer by imposing a lengthy sentence. (*See* Def. Mem. at 59-60 (citing Sentencing Transcript at 85:1-86:12, *United States v. Connolly*, No. 16 Cr. 370 (S.D.N.Y. Oct. 24, 2019) ("*Connolly* Sentencing Tr.") (McMahon, J.).)

The Government also cites the bank guilty pleas, including the one involving JP Morgan, as indicative of the "seriousness of [the] conduct" for which Mr. Aiyer was convicted. (Gov't Mem. at 36.) This assertion is mistaken for at least two reasons. First, it is our understanding that the criminal pleas entered into by JP Morgan, Citigroup, and Barclays were premised on one type of conduct only—manipulating the euro/dollar fix in London. This was the conduct at issue in *United States v. Usher*, No. 17 Cr. 19 (RMB) (S.D.N.Y.), in which, of course, the defendants were acquitted. The pleas by JP Morgan, Citigroup, and Barclays were not based on the activities of the Rand Chat Room. Second, although the conduct that was the subject of the bank

plea agreements was indeed similar in some respects to what was tried here, there are many features of Mr. Aiyer's case that are idiosyncratic to Mr. Aiyer: he is an individual of upstanding character, who was well-respected by both colleagues and customers, with no criminal history, no proven awareness of the potential criminality of his conduct, and no proven significant financial gains. It is the sum of these factors that matters most in determining the appropriate sentence.

C. The Court Can And Should Consider Collateral Consequences In Determining An Appropriate Sentence For Mr. Aiyer.

The Government argues that the fact "[t]hat Defendant has suffered personal and professional consequences for having committed a crime should not be considered by the court in fashioning a just sentence." (Gov't Mem. at 43.) In so arguing, the Government mischaracterizes Mr. Aiyer's position regarding the import of the collateral consequences that he has already experienced and will continue to experience as a result of his prosecution and conviction. It also ignores the case law that Mr. Aiyer cited demonstrating that courts can and should consider collateral consequences in determining a just sentence.

To begin with, contrary to the Government's assertion, Mr. Aiyer is not "essentially argu[ing] that having been exposed as a criminal is punishment enough" (*id*. at 42) and that he therefore should not receive any sentence whatsoever. Mr. Aiyer simply argues that for the many reasons articulated in his memorandum, including the collateral consequences that he has suffered and will continue to suffer, a sentence of probation with a special condition of home confinement is appropriate. Although the Government implies that a non-custodial sentence is equivalent to no punishment at all, this is far from the truth. As courts have acknowledged, probation is "*significant* punishment" and "substantially restrict[s]" a defendant's "liberty." *United States v. Leitch*, No. 11-cr-00609 (JG), 2013 WL 753445, at *12 (E.D.N.Y. Feb. 28,

2013) ("[I]t bears emphasis that when a judge chooses between a prison term and probation, she is not choosing between punishment and no punishment. … And as the Supreme Court has recognized, probation is *significant* punishment. …") (emphasis in original).

The case law cited in Defendant's Memorandum provides ample support for the Court's consideration of such consequences in determining Mr. Aiyer's sentence. *See United States v. Stewart*, 590 F.3d 93, 141 (2d Cir. 2009) (finding that a court cannot "properly calibrate a 'just punishment' if it does not consider the collateral effects of a particular sentence"); *United States v. Nesbeth*, 188 F. Supp. 3d 179, 180, 186, 188 (E.D.N.Y. 2016) (noting that there is a circuit split on the issue of whether collateral consequences can be considered in fashioning a sentence and remarking that "the Second Circuit['s] … embrace of the impact and significance of the collateral consequences facing a convicted felon as bearing upon a just punishment is the enlightened view"); *United States v. Chong*, No. 13-CR-570, 2014 WL 4773978, at *6 (E.D.N.Y. Sept. 24, 2014) ("In imposing 'just punishment' for a particular offense, a sentencing judge cannot ignore the additional penalties and hardships that will attach as a result of conviction"); *see also United States v. Prosperi*, 686 F.3d 32, 48 (1st Cir. 2012) (affirming a variance from the Guidelines range of 87 to 108 months of imprisonment to a non-custodial sentence based on "the anguish and the penalty and the burden that persons face when called to account, as these men are, for the wrong that they committed," the cost of incarceration to taxpayers, and the personal toll that the defendant's incarceration would take on his ill wife); *United States v. Vigil*, 476 F. Supp. 2d 1231, 1315 (D.N.M. 2007) (accounting for the "incalculable damage to [the defendant's] personal and professional reputation as a result of tremendous media coverage of his case and the case against his co-conspirators" as a collateral consequence for the purposes of "fashioning a just sentence").

The Government also fails to respond to Mr. Aiyer's specific point, and corresponding case law, noting that the loss of the defendant's career is a collateral consequence to which courts generally pay particular attention, especially when the defendant's offense conduct was inherently related to his or her career, as it indicates a reduced need for deterrence. *See United States v. Emmenegger,* 329 F. Supp. 2d 416, 428 (S.D.N.Y. 2004) (noting that "there is less need for incarceration to protect the public from future crimes committed by [a] defendant" where the defendant lost his livelihood due to his conviction for an offense that was "particularly adapted to his chosen career," since "[t]hat career is over, and his potential to commit this particular type of crime has been eliminated"); *United States v. Gaind*, 829 F. Supp. 669, 671 (S.D.N.Y. 1993), *aff'd*, 31 F.3d 73 (2d Cir. 1994); *Gupta*, 904 F. Supp. 2d at 355; *Stewart*, 590 F.3d at 141 (in cases where the defendant's conviction has resulted in the loss of his career, "the need for further deterrence and protection of the public is lessened because the conviction itself already visits substantial punishment on the defendant") (quotations omitted); *Nesbeth*, 188 F. Supp. at 194 (sentencing the defendant to one month of probation, despite a Guidelines range of 33-41 months of imprisonment, and explaining, "the collateral consequences [the defendant] will suffer, and is likely to suffer—principally her likely inability to pursue a teaching career and her goal of becoming a principal …—has compelled [the court] to conclude that she has been sufficiently punished, and that jail is not necessary to render a punishment that is sufficient but not greater than necessary to meet the ends of sentencing"); *Leitch*, 2013 WL 753445, at *12.

The only authority that the Government cites for its position that the Court should not consider collateral consequences in determining Mr. Aiyer's sentence is *United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008). At most, *Cutler* stands for the proposition that courts should not impose a non-custodial sentence on a defendant who would otherwise receive prison time (in that

case, the Guidelines range for the defendant's twelve counts relating to his bank fraud offenses was 108-135 months—far higher than here) on the *sole* basis of collateral consequences such as public humiliation and employment loss. *See id.* at 170-171 (disapproving of the district court's "imposition of a nonincarceratory sentence on the basis that a defendant has suffered sufficiently *simply* because he was prosecuted and convicted," despite the fact that "the seriousness of [the defendant]'s offense would ordinarily warrant a prison term") (emphasis added). Mr. Aiyer does not contend that the personal and professional collateral consequences that he has experienced and will continue to experience are, on their own, sufficient to justify a nonincarceratory sentence. Rather, these consequences, when properly considered in conjunction with the other factors described in Defendant's Memorandum, justify a non-custodial sentence.

D. A Non-Custodial Sentence Is Appropriate To Avoid Unwarranted Sentencing Disparities.

In Defendant's Memorandum, Mr. Aiyer explained in detail why sentencing him to a non-custodial sentence would avoid unwanted disparities. (*See* Def. Mem. at 57-63.) In response, the Government takes issue with the fact that Mr. Aiyer included in his discussion the many individuals who engaged in the same conduct underlying Mr. Aiyer's conviction but who were never prosecuted or convicted. Although courts are not required to consider the fact that individuals who participated in the same or even worse behavior as the defendant were not prosecuted, they are free to do so.[4] At least one Southern District of New York court has. (*See* Def. Mem. at 60, fn. 11 (citing *Connolly* Sentencing Tr. at 85:1-86:12) (noting that the defendants were "participants along with many other people, a few of whom have been indicted

[4] Even *United States v. Douglas*, the case cited by the Government, does not suggest otherwise; the court noted that it was "*[a]ssuming without deciding* that a district court *may* take patterns of prosecutorial discretion into account in determining an equitable sentence that avoids unwarranted disparities among similarly situated offenders." 713 F.3d 694, 701 (2d Cir. 2013) (emphasis added).

here and abroad, most of them have not, in a massive effort, one that went on at many if not all of the submitting banks over a course of years to manipulate LIBOR" and criticizing the government for having used the defendants "as proxy wrongdoers, to make them an example for the wrongdoings of [their respective financial institutions] … and for similar wrongdoing of other unindicted institutions as well").)

Next, the Government states that Mr. Aiyer's analysis of the largely non-custodial sentences imposed on other antitrust defendants in the Southern District of New York is "misleading" because the Court is free to consider sentences outside of this jurisdiction. (Gov't Mem. at 45.) Mr. Aiyer never suggested otherwise, and Defendant's Memorandum explicitly mentions that courts in other jurisdictions have imposed probationary sentences on Sherman Act defendants. (*See* Def. Mem. at 62.) On the other hand, the Southern District of New York served as a logical limiting parameter for the exercise of compiling publicly available information on Sherman Act sentences for a span of 20 years. It is unclear why the Government believes that using the Southern District of New York as a sample pool of sentences is "misleading." The Government does not contend that Sherman Act sentences in the Southern District of New York are typically more lenient than in other jurisdictions, and it has presented no evidence suggesting that Southern District of New York sentences are not representative.

The Government also states, without providing any citation or source information, that "in the 2000-2018 time period, of the twenty-three criminal antitrust defendants who were found guilty by a jury of a Sherman Act offense, only one defendant received a non-custodial sentence." (*Id*. at 45-46.) Mr. Aiyer cannot evaluate the accuracy or applicability of this assertion without any information about its source. Suffice it to say that the Government has presented no evidence that these cases are comparable. Where the relevant conduct clearly is

comparable—other traders at major financial institutions who participated in chat rooms—there have been almost no prosecutions, and no one, to date, has been sentenced to a term of imprisonment. (*See* Def. Mem. at 45-46, 57-58.)

IV. Special Considerations Applicable To Mr. Aiyer Weigh In Favor Of A Sentence Of Probation With A Period of Home Confinement.

A. Mr. Aiyer's Non-Citizen Status Is An Appropriate Sentencing Consideration.

As discussed above (*supra* at 13-15), and in Defendant's Memorandum, Second Circuit courts can and should consider the collateral consequences that a sentence will hold for the defendant in determining what constitutes a just punishment. *See Stewart*, 590 F.3d at 141; *Nesbeth*, 188 F. Supp. 3d at 186; *Chong*, 2014 WL 4773978, at *6. One such collateral consequence is the defendant's potential deportation, as the Second Circuit definitively held in *United States v. Thavaraja*. 740 F.3d 253, 262-63 (2d Cir. 2014) ("In determining what sentence is 'sufficient, but not greater than necessary,' to serve the needs of justice, 18 U.S.C. § 3553(a), a district court *may* take into account the uncertainties presented by the prospect of removal proceedings and the impact deportation will have on the defendant and his family.") (emphasis added). At least one court in this circuit has held that Section 3553 in fact *requires* courts to consider a defendant's potential deportation in determining his sentence. *See Chong*, 2014 WL 4773978, at *4, *7 (holding that "Section 3553 should now be interpreted as requiring district courts to weigh the prospect of deportation, which is … sometimes the most important part … of the penalty that may be imposed on noncitizen defendants[,]" and noting that this consideration "may require —as it does in the present case—a lesser term of imprisonment for noncitizen defendants than otherwise would be appropriate") (quoting *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010)).

The Government seems to acknowledge that *Thavaraja* allows courts to consider the prospect of deportation in determining a defendant's sentence.[5] (*See* Gov't Mem. at 51). According to the Government, however, the Court may not take into consideration other collateral consequences of Mr. Aiyer's non-citizen status, including his ineligibility to serve any sentence of imprisonment at a low security level institution, the probability that he would be assigned to a private prison, and that, following release, he would likely face detention in ICE custody for an indeterminate period of time. (*See id*. at 47.) But it makes no sense that courts should be permitted to consider collateral consequences generally, to consider the prospect of deportation specifically, but that they should not be permitted to consider other collateral consequences of alien status. The Second Circuit specifically noted in *Thavaraja* that "a sentencing judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." 740 F.3d at 262 (internal citations omitted).

In fact, the Government's position on this point is directly contradicted by *Connolly*, where Judge McMahon's decision to impose a non-custodial sentence on the defendant Gavin Black was based almost entirely on the very same factors that the Government argues should not be taken into consideration by the Court. (*See* Def. Mem. at 64 (citing *Connolly* Sentencing Transcript at 91:17-92:3 (determining that a non-custodial sentence was appropriate because, if Mr. Black received a sentence of imprisonment, it "would be served in a private facility and not

[5] The Government nonetheless attempts to distinguish *Thavaraja* based on the fact that the defendant in that case had already been incarcerated for several years by the time he was sentenced and faced possible retribution when he returned to his native Sri Lanka, facts that had been noted by the district court. (*See* Gov't Mem. at 51.) In affirming the district court's sentence, however, the Second Circuit did not hold that deportation may only be considered in certain scenarios. The court stated plainly that, despite the government's argument that the district court "gave improper weight to [the defendant's] family circumstances and his prospect of future deportation," a district court "may take into account" those factors. *Thavaraja*, 740 F.3d at 262-263.

at some place like FCI Allenwood" and then, "at the end of that term … [h]e would be treated like an illegal alien, and he would be released into the custody of ICE, and at some point long after my intended sentence had expired he would be deported").) Although the Government attempts to distinguish *Connolly* on the basis of factors such as Mr. Black's heart condition and the fact that Mr. Black did not intend to contest deportation (*see* Gov't Mem. at 52-53), Judge McMahon did not give any indication that those considerations were determinative. Instead, Judge McMahon focused on one fact that is equally applicable to Mr. Aiyer—that, "simply because he is a noncitizen," any sentence of imprisonment imposed would be disproportionately harsher than it would be for an American citizen. (*See* Def. Mem. at 64 (citing Connolly Sentencing Transcript at 91:8-92:13).) As Judge McMahon concluded, that simply is "not right." (*Id*.)

The only support that the Government offers for its position that the Court should not consider the collateral consequences of Mr. Aiyer's non-citizen status is a series of cases that are no longer good law, are inapplicable, or both. The Government relies heavily on *United States v. Restrepo*, 999 F.2d 640, 644 (2d Cir. 1993), a case that was not only decided prior to *United States v. Booker*, 543 U.S. 220 (2005)—and therefore of questionable continued relevance—but was also invalidated by *Thavaraja*. *See Chong*, 2014 WL 4773978, at *3 (noting that, by holding in *Thavaraja* that district courts may consider deportation and related uncertainties in determining a just sentence, the Second Circuit "recognized that an earlier line of its cases prohibiting consideration of deportability was abrogated," and citing *Restrepo*, as well as *United States v. Wills*, 476 F.3d 103 (2d Cir. 2007), as examples). Not one of the cases cited by the Government as relying on *Restrepo* was decided after *Thavaraja*, and therefore they are all of questionable relevance. (*See* Gov't Mem. at 48, fn. 10.)

Finally, the Government attempts to argue that "a sentence that does not include a period of incarceration could well be considered substantively unreasonable" and cites as support two completely inapposite cases. (*Id*. at 51-52.) In the first case, *United States v. Park*, 758 F.3d 193 (2d Cir. 2014), the Second Circuit vacated the district court's non-custodial sentence because the *sole* basis for the district court's choice not to impose a sentence of imprisonment was the fact that the defendant was sentenced during a government shut-down. 758 F.3d at 196. In so holding, the court explicitly stated that a probationary sentence could be held substantively reasonable on remand. *Id.* at 202 ("Our holding is therefore limited to the record currently before us, which shows the District Court's sole reliance on the cost of incarceration in fashioning an appropriate sentence, as well as its belief that, were the government not shut-down, a term of incarceration would be warranted. We thus do not foreclose the possibility that the imposition of a probationary sentence on remand, after appropriate consideration of the § 3553(a) factors thus far left unaddressed, could be substantively reasonable as well"). The second case cited by the Government, *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) fares no better. The decision was abrogated—for its statement that "a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant" is "inherently suspect"—by *Kimbrough v. United States*, 552 U.S. 85, 108 (2007). Therefore, the Second Circuit's decision in that case to vacate the non-custodial sentence imposed by the district court carries little weight.

B. The Court Can And Should Consider The Current Global Pandemic In Determining An Appropriate Sentence For Mr. Aiyer.

The Government's assertion that "the BOP is prepared to handle the risks posed by COVID-19, as with other infectious diseases and other medical conditions" is unpersuasive. (Gov't Mem. at 53.) This suggestion is directly contradicted by publicly available information,

and more importantly, by guidance and actions taken by top officials within the Department of Justice.

Since the filing of Defendant's Memorandum, the global health pandemic has only worsened. Approximately 3.2 million people worldwide have been diagnosed with the virus, and more than 233,000 people have died. (*See Coronavirus Map: Tracking the Global Outbreak*, The New York Times (last updated May 1, 2020), attached hereto as Exhibit B).

The situation is especially dire for federal and state inmates and ICE detainees. There is daily reporting on the rapid advancement of the virus within the prison systems and the catastrophic consequences of this advance. (*See* Elie Honig, *Releasing prisoners during Covid-19 crisis makes good sense*, CNN (April 20, 2020) ("Many prosecutors nationwide have made the difficult but just decision in recent weeks … to release a carefully selected group of prisoners from custody, to lessen the grave risks posed by the coronavirus crisis within our prisons and beyond. It is difficult to think of any place more susceptible to the spread of the coronavirus than prisons."), attached hereto as Exhibit C; Kimberly Kindy, *Inside the deadliest federal prison, the seeping coronavirus creates fear and danger*, The Washington Post (Apr. 10, 2020) ("In less than a month, the Bureau of Prisons has gone from having one reported case of covid-19 to, as of Friday afternoon, having at least 318 federal inmates and 163 prison staff diagnosed with the disease"), attached hereto as Exhibit D.)

The Federal Bureau of Prison's ("BOP") response to the crisis has been described as "slow." (*See* Walter Povlo, *COVID-19 Anxiety And Pressures Inside Federal Prisons*, Forbes (Apr. 16, 2020), attached hereto as Exhibit E.) Prison guards are "being told to report to work, even after they [have] been exposed to the virus," making the chances of spread more likely, inmates and guards are unable to get the necessary supplies to protect themselves, and the BOP

is accused of underreporting the number of confirmed cases on its website. (Kindy, *supra* at 4; *see also* Povlo, *supra* at 1 ("According to Joe Rojas, Southeast Regional Vice President at Council of Prison Locals, BOP front-line staff have reported to him that the pandemic virus has infected far more than what is being reported on the agency's website"); James Hill and Luke Barr, *No COVID-19 tests available for prisons at center of New York outbreak, court documents show*, ABC News (Apr. 4, 2020) ("A federal detention center at the epicenter of the coronavirus pandemic in New York City has no in-house ability to test sick or high-risk inmates for COVID-19, according to a letter from the jails top officials"), attached hereto as Exhibit F.) "[A]n explosion of cases in jails could cause the total death count in the United States to double." (The Editorial Board, *No One Deserves to Die of Covid-19 in Jail*, The New York Times (Apr. 23, 2020), attached hereto as Exhibit G; *see also* Udi Ofer and Lucia Tian, *New Model Shows Reducing Jail Population will Lower COVID-19 Death Toll for All of Us*, The American Civil Liberties Union (Apr. 22, 2020) ("The ACLU partnered with epidemiologists, mathematicians, and statisticians to create a first-of-its-kind epidemiological model that shows that as many as 200,000 people could die from COVID-19 – double the government estimate – if we continue to ignore the incarcerated people in our public health response."), attached hereto as Exhibit H.)

The number of confirmed cases and deaths in prison are trending upward—"thousands of prisoners have caught the illness, and the number of cases has grown more than threefold in the last week alone. Thousands more workers, correctional officers, and medical staff have been sickened. And more than 140 people—most of them incarcerated—have died thus far." (*See* Katie Park, Tom Meagher, and Weihua Li, *Tracking the Spread of Coronavirus in Prisons*, The Marshall Project (Apr. 24, 2020), attached hereto as Exhibit I.)

Recently, Judge Bernal of the U.S. District Court for the Central District of California condemned ICE for its "inadequate and slow efforts to protect detainees." (Camilo Montoya-Galvez, *Judge orders ICE to consider releasing all immigrants at risk of dying if infected by coronavirus*, CBS News (Apr. 20, 2020), attached hereto as Exhibit J; *see also* Order, *Faour Abdallah Fraihat, et al. v. United States Immigration & Customs Enforcement*, 19-EDCV-1546 (C.D. Cal. Apr. 20, 2020), ECF No. 132.) Judge Nathan similarly "slammed the federal Bureau of Prisons for what she contends are 'illogical' and 'Kafkaesque' quarantine policies that put inmates and the community at greater risk of contracting coronavirus." (Josh Gerstein, *Judge rips feds over prison quarantine policies*, Politico (Apr. 20, 2020), attached hereto as Exhibit K; *see also*, Opinion and Order, *United States v. Scparta*, 18-cr-578 (S.D.N.Y Apr. 19, 2020) (Nathan, J.), ECF No. 69.)

In response to this health crisis, courts across the country, and the BOP itself, have released defendants from prison and other detention centers. For example, Judge Bernal ordered ICE "to identify and track all ICE detainees with Risk Factors" and to "make timely custody determinations for detainees with Risk Factors." (*See* Order at 38, *Faour Abdallah Fraihat, et al. v. United States Immigration & Customs Enforcement*, 19-EDCV-1546 (C.D. Cal. Apr. 20, 2020), ECF No. 132.) In mid-April, the BOP "began moving the majority of the inmates … – more than 100 prisoners … from [FCI Otisville, a minimum security camp] into the [connected] medium-security prison in anticipation of possible release into home confinement[.]" (*See* Benjamin Weiser and William K. Rashbaum, *Michael Cohen Is Among Prisoners to Be Released Because of Virus*, The New York Times (Apr. 17, 2020), attached hereto as Exhibit L.) This move to release the majority of the camp's population followed an outbreak at the facility, with at least "16 inmates and nine staff members [ ] test[ing] positive for the virus." (*Id.*)

Just yesterday, Judge Marcia G. Cooke found that ICE has "failed in its duty to protect the safety and general well-being" of the immigrant detainee petitioners in *Gayle v. Meade*, due in large part to the deplorable conditions at the three Florida detention centers at which the petitioners are being held, including the fact that "social distancing is not only practically impossible, the conditions are becoming worse every day" and that ICE has failed to provide detainees with masks, soap, and other essential cleaning supplies. (Order Adopting in Part Magistrate Judge's Report and Recommendation at 6, *Gayle v. Meade*, 20-cv-21553-MG (S.D. Fl. April 30, 2020), ECF No. 76.) Judge Cooke concluded that these failures have placed the petitioner detainees not only "at a heightened risk of not only contracting COVID-19, but also succumbing to the fatal effects of the virus" and that "[s]uch failures amount to cruel and unusual punishment" and are "exemplary of deliberate indifference." (*Id*. at 6.) She ordered ICE to inform her, within three days, how it plans to reduce the population at each of the three detention centers to 75% of its capacity within two weeks of the order. (*Id*. at 10.)

Significantly, at least one judge in this district has already modified a defendant's sentence because of coronavirus concerns, indicating that this is a factor properly taken into account by courts at sentencing, and not merely a matter of BOP administration. (*See* Opinion and Order, *United States v. Scparta*, 18-cr-578 (S.D.N.Y Apr. 19, 2020) (Nathan, J.), ECF No. 69 (resentencing defendant to time served plus 36 months of supervised release and noting that "the COVID-19 pandemic, the 'history and characteristics of the defendant' and the 'need … to provide the defendant with needed … medical care,' § 3553(a), now weigh heavily in favor of [defendant's] release").)

The Government's Memorandum disregards the reporting on COVID-19 and the judicial response to the crisis. Similarly, there was no response by the Government to Attorney General

Barr's directive calling for an increase in the release of prisoners because of the dangers presented by COVID-19. (*See* Def. Mem. at 73-74.) In fact, the Government has failed to reconcile the inconsistencies between its position and the guidance and directives from the Department of Justice and other Government agencies. The Government goes as far as insisting that Mr. Aiyer report within 60 days of sentencing. (*See* Gov't Mem. at 53.) Simply put, with "[t]he prison infection rate now eclips[ing] the spread among the general population by more than 150 percent" (Park, *supra* at 5), the Government's arguments regarding COVID-19 are unreasonable and should be disregarded by this Court.

CONCLUSION

For the foregoing reasons, Mr. Aiyer respectfully requests that the Court impose a sentence of probation with a special condition of a period of home confinement, which is sufficient but not greater than necessary to satisfy the objectives of sentencing.

Dated: May 1, 2020
New York, New York

By: /s/ Martin Klotz

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