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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. MICHAEL MARR, Defendant.	Case No. 14-cr-0580-PJH **DEFENDANT MICHAEL MARR'S SENTENCING MEMORANDUM** Date: October 18, 2017 Time: 1:30 pm Courtroom: Hon. Phyllis J. Hamilton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

I. INTRODUCTION

The defendant, Michael Marr, objects to the recommended sentence of 30 months because it is based on an erroneous calculation of the sentencing guidelines, disproportionate, and unsupported by consideration of the relevant sentencing factors under 18 U.S.C. § 3553. Mr. Marr respectfully requests a sentence of no more than 15 months imprisonment, the low end of the Sentencing Guideline range as correctly calculated. He objects to the proposed restitution order because such an order is not authorized by applicable law and, even if it were, the government has failed to prove that any specific victim suffered an actual loss, and he objects to the recommended fine as excessive under the correctly calculated Sentencing Guidelines.

II. BACKGROUND

A. Procedural Background

The defendant Michael Marr is one of numerous defendants who were indicted by the Antitrust Division of the United States Department of Justice for alleged bid-rigging at public foreclosure auctions of real property. Mr. Marr and three other employees of Community Fund LLC were charged with bid-rigging at foreclosure auctions in Contra Costa and Alameda counties, and with mail fraud for the same conduct in two other counts. Dkt. 1. Based on the mail fraud counts, the government also brought a forfeiture allegation. *Id.* On September 8, 2016, the Court dismissed the mail fraud counts and forfeiture allegations. Dkt. 173.

From the outset of this case, Mr. Marr's principle contention has not been a denial of the alleged bid-rigging conduct. Rather, he has argued that such conduct must be adjudicated under the rule of reason, rather than under the *per se* rule urged by the government. Mr. Marr first filed a motion to this effect on March 23, 2016. Dkt. 66. That motion was accompanied by the declaration of an economist, Jeffrey Andrien, who concluded that there was in fact no suppression of auction prices as a result of the bid-rigging conduct. Dkt. 66-1 at ¶33. This Court denied the motion on June 21, 2016. Dkt. 135.

Trial of the case was delayed until May 2017 due principally to the dismissal of the mail fraud counts and resulting necessity for many of the defendants who had pled guilty to re-enter their pleas. Before trial, in late March and early April, Mr. Marr submitted a proposed jury instruction

and supporting brief arguing for an instruction on the rule of reason, and an objection to the government's proposed *per se* instruction. Dkt. 212 & 231. On June 1, 2017, this Court denied the defendant's requests. Dkt. 288.

In the interim, Mr. Marr made several efforts to plead guilty while preserving the legal argument he had raised on the applicability of the rule of reason. Mr. Marr offered to plead guilty to the indictment's antitrust charge pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure, provided he could appeal his conviction on the grounds that the *per se* theory of liability adopted by the district court was an unconstitutional construction of the antitrust statute on which the charge was based. The government rejected Mr. Marr's offer. *See infra*. Mr. Marr then offered to waive a jury and present the case to the Court by stipulating to certain facts that would have ensured his conviction under the *per se* theory so that, again, he could preserve his right to appeal the constitutionality of that theory. But the government insisted that Mr. Marr stipulate to certain facts irrelevant to guilt but that would have undermined the legal bases for his constitutional challenge on appeal. As a result, the parties were unable to agree to a stipulated facts trial and Mr. Marr was forced to proceed to trial to preserve his appellate claim.

After Mr. Marr's son Victor was severed, Mr. Marr, Javier Sanchez, and Gregory Casorso proceeded to trial and were convicted on June 2, 2017. Mr. Marr's son, Victor, was acquitted at his later trial.

B. The Offense

For the most part, the defendants did not dispute at trial the evidence of the auction sales or the rounds. The testimony of cooperating defendants was that for years the participants at foreclosure auctions had entered impromptu agreements with each other, or groups of themselves, to stop bidding on a particular property at the public auction and then later have a secondary auction or "round" at which those participants resold the property amongst themselves and split the proceeds of the round. The evidence indicated that many people engaged in this conduct (which is also reflected in the more than 50 individuals who were indicted), and thousands of properties were purchased over the years by the participants in these rounds in the various counties in the Bay Area and Sacramento.

C. The Defendant

Michael Marr is a high school graduate who began investing in real estate in approximately 1976. He now runs two successful businesses related to real estate and employs numerous people in Oakland, California, including his son, daughters, and son-in-law.

Mike has not had an easy road in life, as appears from the final PSR (¶¶ 54-66) and some of the many letters undersigned counsel submits with this memorandum. (*See generally* support letters submitted under seal). Mike was the younger of two sons born to parents who separated when he was a year old. He was thereafter raised by his single mother in East Oakland. PSR ¶ 55; Letter of Jessica Ardell-Smith. He obtained only a high school education before beginning his working life. PSR ¶ 77.

Mike met his first wife, Catrina, while they were working at a Lucky's supermarket and were married in Lake Tahoe. PSR ¶ 59. He had his three children (Erica Marr, Jessica Ardell-Smith, and Victor Marr) with Catrina before he was 25. *See* Letter of Jessica Ardell Smith. But Catrina was murdered, shot to death at the age of 32 while sitting in a parked car on a city street. PSR ¶ 59. Mike's brother, James, who suffered from schizophrenia and manic depression throughout his life, died in prison about four years ago.

After Catrina's death, Mike devoted his life to raising his children and learning the real estate business, an endeavor at which, by all accounts, he has worked extraordinarily hard. *See* Letter of Erica Marr. In the meantime, he endured an unsuccessful second marriage before meeting Marta Sanchez, with whom he has enjoyed a solid and deeply loving relationship for the past 15 years. *See* PSR ¶ 61; Letter of Marta Sanchez.

This memorandum will not detail all of the praise expressed for Mike in the support letters from his family, friends, and acquaintances, or the specific experiences with Mike the letters recount; the accounts of these matters are best appreciated if read in their entirety. But it is fair to say that, without exception, they describe Mike as loyal, honest, hardworking, and exceptionally generous. For instance:

- Erica Marr notes that Mike and his family have devoted time to community service, and hold an annual toy drive for a women and children's center in San Leandro.

- Carlos Hague, another real estate agent and friend, recalls how Mike provided him financial support in 2009 when Carlos was in need.
- Paul Lussier, an accountant and friend, recalls the times when Mike has written off debt to seniors out of his sympathy and concern.
- Amy Ramos, a friend of Erica Marr, likewise talks about Mike's kind treatment of tenants in need and the others he helps without reservation.
- Mike's grandson, Xavier Murray, describes how Mike has helped his mother pay for Xavier's tuition year after year.
- Eligio Nunez recounts how, in 2010, Mike employed Eligio and other members of his family, all of them in the real estate business and suffering financial problems in the wake of the then-recent industry downturn.
- Drexel Perry, a longtime friend of Mike's, is a paraplegic who describes how Mike helped him and provided him a job when he was down on his luck. ("He is Honest, Giving, and Compassionate man [sic] that I have ever met.")

All the foregoing statements and the remainder of those set forth in the support letters should weigh heavily in the Court's consideration of an appropriate sentence under 18 U.S.C. section 3553.

III. ARGUMENT

The Sentencing Guidelines range reported in the final Presentence Report ("PSR") is in error because: 1) it does not award Mr. Marr a three-level reduction for his acceptance of responsibility; 2) it increases his base offense level based on the government's tardy, erroneous, and unsupported claim that the affected volume of commerce is over $70 million. When the sentencing guidelines are correctly calculated, it results in a sentencing guideline range of 15-21 months. Based on the sentencing factors this Court must consider under 18 U.S.C. § 3553, the defendant should be sentenced to no more than 15 months imprisonment. Because the fine is driven by the flawed calculation of the volume of commerce, and to impose a fine that is not disparate with others, Mr. Marr should be ordered to pay a fine of no more than $337,910. Because restitution is not authorized by statute and the government has failed to present any evidence that any specific individual or entity lost any money as a result of defendant's conduct, he cannot be ordered to pay

restitution.

A. The Court Should Recognize Mr. Marr's Timely, Pre-Trial Acceptance of Responsibility and Reduce His Total Offense Level Accordingly

The probation office's draft presentence report ("PSR") declined to make a downward adjustment to Mr. Marr's offense level for acceptance of responsibility. The draft PSR acknowledged Marr's post-trial statements accepting responsibility, *id*., ¶ 31, but elsewhere stated that the defendant had not "clearly" demonstrated such acceptance, *id*., ¶ 42.

Mr. Marr objected to this statement on the grounds set forth below, but the final PSR adhered to it because U.S.S.G. § 3E1.1. purportedly rendered him ineligible for an acceptance adjustment "as he put the government to its burden of proof at trial." *Id*., par. 43. In its specific response to defendant's acceptance objection, the final PSR reiterated this view but added that the matter would be "deferred to the Court as it presided over the trial and is much more knowledgeable as to whether the adjustment should be applied." *Id*., addendum, ¶¶ 9-10 (summary of defendant's objection number 4 and the response).

The final PSR's conclusion that Mr. Marr is not entitled to an acceptance reduction fails to recognize the key developments that Marr proffered in his objection to the draft PSR and that plainly demonstrate such acceptance. Prior to trial, Mr. Marr offered to plead guilty to the indictment's antitrust charge pursuant to Rule 11(a)(2) of the Federal Rules of Criminal Procedure. His only condition for the offer was an agreement that he be permitted to appeal his conviction on the grounds that the *per se* theory of liability adopted by the Court was an unconstitutional construction of the antitrust statute on which the charge was based. *See* Section III.C., below (addressing the *per se* theory). The government, however, rejected Mr. Marr's offer. *See* Exhibit 1.

In subsequent exchanges, the parties discussed the possibility of presenting the case to this Court rather than the jury by stipulating to certain facts that would have ensured Mr. Marr's conviction under the per se theory. *See* Exhibit 2. Like the proposed plea offer, this arrangement would have preserved Mr. Marr's right to appeal the constitutionality of that theory. The government, however, insisted that Mr. Marr stipulate to certain facts that were extraneous to the issue of his factual guilt but would have inevitably undermined the legal bases for his constitutional challenge on

appeal. As a result, the parties were unable to agree to a stipulated facts trial and Mr. Marr was forced to proceed to trial to preserve his appellate claim.

The Application Note to U.S.S.G. § 3E1.1 establishes that, given his proposals to the government as described above, Mr. Marr is entitled to a downward adjustment for acceptance of responsibility. Specifically, Application Note 2 states that conviction by trial does not automatically preclude a defendant from consideration for an acceptance reduction, and that a defendant "may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial." The Note continues:

> This may occur, for example, where a defendant goes to trial to *assert and preserve issues that do not relate to factual guilt* (e.g., to make a constitutional challenge to a statute or a challenge to the applicability of a statute to his conduct.) In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

Ibid. (Emphasis added)

Mr. Marr's statements and conduct show unequivocally that, prior to trial, Marr (1) effectively admitted factual guilt of the antitrust charge under the legal theory adopted by the Court, and (2) proceeded to trial solely to preserve his constitutional challenge to the antitrust statute on appeal. His statements and conduct clearly demonstrate his acceptance of responsibility for the offense under the precise scenario described in Application Note 2. Mr. Marr is therefore entitled to an acceptance reduction.

B. Like the Final PSR, the Court Should Decline to Find Mr. Marr an Organizer or Leader of the Offense Conduct

The draft PSR relied on factual submissions from the government to conclude that Mr. Marr was an "organizer or leader" of the offense conduct within the meaning of U.S.S.G. § 3Bl.l(a), and accordingly proposed an upward four level adjustment to his offense level. *Id.*, ¶ 38; *see also id*., ¶ 23, 27. In response to Mr. Marr's objection, however, the final PSR declined to propose this adjustment. *Id*., ¶ 39; *see also* final PSR addendum, ¶ 5-6 (summary of defendant's objection number 4 and the response).

Mr. Marr was not an "organizer or leader" within the meaning of the sentencing Guidelines.

Mr. Marr was rarely, if ever, present at rounds. While he exercised supervisory control over his own employees, those employees are not legally coconspirators under the Sherman Act and therefore Mr. Marr's control or supervision of those employees does not make him an organizer or leader of "a criminal activity." *See American Needle, Inc. v. National Football League*, 560 U.S. 183, 190-196 (2010); *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 768-69 (1984).

Mr. Marr cannot fairly be deemed an organizer or leader of non-employees involved in the conspiracy. The evidence in these cases shows that the rounds had been part of the auction process long before Mr. Marr or his company entered the business of purchasing homes at foreclosure auctions. Furthermore, the other groups and businesses involved in the bid rigging that occurred while Mr. Marr's group was operating made independent decisions to participate in the bid rigging activity and were not made to do so by anyone, Mr. Marr included. As this Court found in rejecting the government's proposed organizer/leader enhancement in the related case of defendant John Galloway:

> The government has argued that Mr. Galloway should be deemed a leader, an organizer or manager/supervisor largely because of his relationship with directing Mr. Diaz, and I totally agree with that. I don't think he just offered him an opportunity. He supervised him. He told him what to do. He called -- talked to him on the phone.
>
> But one of the other bases of the government's position is that in addition to supervising one other member, he was also a leader and organizer of the conspiracy as a whole. And what -- and so you've argued that he -- that argument is based upon the fact that he led and organized rounds. He supervised Diaz. He recruited others. And he intimidated outsiders. Those are the four arguments you make in your papers.
>
> Well, intimidation is obviously a matter of perception. And it's the perception of the person being intimidated that's most critical. I've heard some of that in prior trials.
>
> And with regard to recruiting of others, it seems to me that that happened on a fairly regular basis with regard to everybody who participated in it. I mean, the way in which the -- the auctions occurred suggests -- it certainly suggests to me from the testimony that I've heard that any participating member could do the wink or the nod and you want to round this.
>
> I mean, there wasn't one group that was directing all of the activity.

> Everyone was in it for themselves. Now, that doesn't mean that there weren't these individual pods that -- you've charged people together in these groups that logically fit together because of their business relationships, but -- but I'm not at all persuaded that there was any one group or any one person who was in charge of it all.
>
> And in order to -- and Mr. Weinberg makes a good point that in order for me to determine which of these 50 people belong to that -- the top tier of it, I'd actually to have hear it all so that I could compare it.
>
> From what I've heard so far, seems to me that everybody was in it for themselves and everybody was making a decision for themselves or for their business group what bids were important. And even within the business groups in order to have more seats, more than one person per group participated in some of the bids. I'm not persuaded that this enhancement is appropriate for the kind of conspiracy that we have here. So I'm not going to apply it.

See Transcript of 3/15/17 John Michael Galloway sentencing hearing, 4:14 cr 00607-PJH, pp. 22-24 (Dkt. 330).

The analysis employed by the Court in Mr. Galloway's case is equally applicable here. It cannot fairly be said that Mr. Marr was a leader or organizer in sense that other defendants already sentenced by the Court were not. Indeed, a contrary finding would create an unwarranted disparity in sentencing within the meaning of 18 U.S.C.A. § 3553(a). The Court should accordingly decline to make such a finding or related adjustment in this case.

C. The Court Should Reject the Government's Dramatically Increased Estimate of the Volume of Commerce Affected by the Offense Conduct in Determining the Total Offense Level

The draft PSR adopted the government's initial submissions in calculating the affected volume of commerce at approximately $33,800,000, a number that the government previously provided to the defense before trial. *Id.*, ¶ 28. That volume corresponded to a four-level increase in Mr. Marr's total offense level and a statutory fine range of $337,910 to $1,689,550. *Id.* ¶ 36 (four levels added if volume was more than $10 million but less than $50 million); *id.* ¶ 94 (discussing fine range).

The government thereafter objected to the draft PSR — and therefore to its own initial submissions — by revising the volume calculation upwards to nearly $80,000,000, an increase of more than $45 million. The final PSR adopted that higher number, without specific justification or

analysis. *Id*. ¶ 29. The final PSR's new, higher number corresponds to an additional two-level increase in the proposed guideline calculation and significant increase in the applicable fine range. *Id*. ¶ 37 (six levels added if volume was more than $50 million but less than $100 million); ¶ 96 (discussing fine range).

The government has not provided the defense, the Probation Office or the Court with evidence of how it reached either number. A brief review of the lists of properties on which the volume of commerce is ostensibly based, shows that some properties that were on the first list totaling $33 million have now been dropped from the list totaling $79 million, while other properties have now been added – all without explanation. Some of the properties were purchased outside the time period of the conspiracy, some of the "payouts" may not have been related to the rounds, and many of the properties were not purchased by Mr. Marr but for a customer. Furthermore, the volume of commerce the government now attributes to Mr. Marr and his codefendants is dramatically higher and more inclusive than the volume of commerce attributed to any of the many defendants who plead guilty, making the government's effort to increase the volume of commerce appear disproportionate and inequitable as well as lacking a factual basis.[1]

The Sentencing Guidelines for Antitrust offenses adjust the offense level according to the "volume of commerce attributable to the defendant." Sentencing Guidelines § 2R1.1(b)(2). The Commentary to this section, in the Background paragraphs, observes that "[t]he offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute." Volume of commerce is essentially a proxy used for the presumed harm in antitrust cases adjudged under a *per se* theory of liability.

[1] The government's effort to increase Mr. Marr's volume of commerce cannot be squared with the government's own calculations in this case either. The government apparently attributes approximately $20 million to Mr. Casorso and the same to Mr. Sanchez for their volume of commerce, or about $40 million between the two. The evidence was undisputed that Mr. Marr himself only rarely attended the auctions or engaged in rounds, so how could his volume of commerce be double the total for Mr. Casorso and Mr. Sanchez? Again, the government's position appears disproportionate and inequitable.

The volume of commerce enhancements, accordingly, are a rule of thumb estimate, based at most upon generalized assumptions regarding the probable harm created by anticompetitive conduct. In this case, Mr. Marr has offered clear statistical evidence that his actions during the time period charged in the indictment *did not suppress prices* in either Alameda or Contra Costa counties. The study conducted by Jeffrey Andrien is a straightforward analysis of auction sale prices in Alameda and Contra Costa counties during the time period charged by the government in its indictment. The analysis demonstrates that the defendant's conduct did not suppress auction prices in those counties during the charged time frame. In fact, Andrien's analysis also demonstrates that auction prices declined following the termination of the charged conspiracy. That evidence has remained completely unrebutted by the government. [2]

The guidelines presumption of anticompetitive harm cannot overcome the uncontradicted evidence adduced in the Andrien analysis. Mr. Marr therefore objects to either volume of commerce figure unless and until the government has proven at an evidentiary hearing that sales of particular properties were "affected" by the bid-rigging conspiracy. Even if the volume of commerce number is required under the Guidelines, Andrien's evidence of lack of anticompetitive damages should be considered as basis for a guidelines departure because the volume of commerce number from application of the Guidelines overstates the seriousness of the offense.

D. The Applicable Sentencing Factors Warrant a Sentence of No More Than 15 Months

1. General Sentencing Principles Justify the Requested Sentence

Congress has directed that the district courts "*shall* impose a sentence sufficient, *but not greater than necessary*, to comply with [the purposes of sentencing]." 18 U.S.C. § 3553(a); *Pepper v. United States*, 131 S.Ct. 1229, 1242 (2011) (sentencing judge's "overarching duty under § 3553(a) is to impose a sentence sufficient, but not greater than necessary"); *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (*en banc*) (same). The Supreme Court has also directed that the punishment must "fit the offender and not merely the crime." *Pepper*, 131 S.Ct. at 1240. Sentencing, therefore,

[2] In one of its pretrial rulings, the Court found that Andrien was not qualified to testify as an expert regarding the results of his analysis. We respectfully submit that his statistical analysis remains highly probative evidence even without any economic opinion proffered by Andrien.

is "an art, not to be performed as a mechanical process but as a sensitive response to a particular person who has committed a particular crime." *United States v. Harris*, 679 F.3d 1179 (9th Cir. 2012). And the sentencing guidelines are not only merely advisory, but also are to be given no more weight than any other factor under § 3553. *Carty*, 520 F.3d at 991 (citing *Kimbrough v. United States*, 522 U.S. 85 (2007)).

Particularly among low-risk offenders, more time in prison actually leads to increased risk of recidivism because of the loss of "pro-social contacts in the community," and the removal from "legitimate opportunities." *See* Valerie Wright, Ph.D., *Deterrence in Criminal Justice: Evaluating Certainty v. Severity of Punishment, The Sentencing Project*, at p. 7 (November 2010);[3] *see also*, United States Sentencing Commission, Staff Discussion Paper, *Sentencing Options Under the Guidelines* (1996) (recognizing the "criminogenic effects of imprisonment which include contact with more serious offenders, disruption of legal employment, and weakening of family ties"). Furthermore, statistically, a longer jail sentence does not necessarily increase the deterrence effect, particularly in white collar cases. Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 Cardozo J. Conflict Resol. 421, 447-48 (2007) ("there is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders").

Even the former Attorney General Eric Holder has now recognized that "too many Americans go to too many prisons for far too long, and for no truly good law enforcement reason. . . . widespread incarceration at the federal, state, and local levels is both ineffective and unsustainable. It imposes a significant economic burden – totaling more than $80 billion in 2010 alone – and it comes with human and moral costs that are impossible to calculate." Speech of Attorney General Eric Holder, American Bar Association Convention, August 12, 2013, http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html. In fact, "the United States incarcerates more people than any country in the world, including the far more populous China. . . . America is also the global leader in the rate at which it incarcerates its citizenry, outpacing nations like South Africa and Iran." Pew Report (Feb. 28,

[3] http://www.sentencingproject.org/doc/deterrence%20briefing%20.pdf.

2008), *One in One Hundred: Behind Bars in America 2008*, at 5.[4] The federal prison population is currently more than four and half times what it was when the Sentencing Guidelines were enacted: in 1986, the total federal prison population was 44,408, and today it is 216,130. *See* Katherine M. Jamieson and Timothy Flanagan, eds., *Sourcebook of Criminal Justice Statistics – 1988*, Table 6.34; Federal Bureau of Prisons, Statistics, http://www.bop.gov/about/statistics/population_statistics.jsp. While the cost to government has ballooned as a result, America's reliance on incarceration "for many low-risk offenders inflicts economic hardship in many, less obvious ways. If they have a job at all, prisoners are typically unable to earn more than a very low wage, making it unlikely they will pay much, if anything, in child support, victim restitution, or taxes." Pew Report, *supra*, at 13.

Finally, Congress directed the Sentencing Commission to "insure that the guidelines reflect the general appropriateness of imposing a sentence *other than imprisonment* 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." 28 U.S.C. § 994(j) (emphasis added). Given this directive, as a first-time offender with no violent criminal history, Mr. Marr would be an appropriate candidate for probation. The advisory guideline range here offers little help because that range is exclusively driven by the volume of commerce, a proxy for competitive harm that was never proven under the government's *per se* theory of liability. This case is thus one of those where the Court can and should consider the factors discussed below to impose a just and righteous sentence on Mr. Marr, and such a sentence does not require a lengthy term of imprisonment, if any at all.

2. Applicable Sentencing Factors Justify the Requested Sentence

Under Section 3553, the Court "shall impose a sentence that is sufficient, but not greater than necessary, to comply with the purposes [of 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

[4] Available at http://www.pewtrusts.org/en/research-and-analysis/reports/2008/02/28/one-in-100-behind-bars-in-america-2008)

(D) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner."

18 U.S.C. § 3553(a)(2)(A)-(D). In determining the minimally sufficient sentence, courts consider these purposes, as well as "the nature and circumstances of the offense and the history and characteristics of the defendant," (§ 3553(a)(1)), "the kinds of sentences available" (§ 3553(a)(3)), "the need to avoid unwanted sentence disparities" (§ 3553(a)(6)), and "the need to provide restitution" (§ 3553(a)(7)).

The court must also consider the applicable guideline ranges, but those guidelines are advisory under *United States v. Booker*, 543 U.S. 245, 756 (2005). 18 U.S.C. § 3553(a)(4).

i. The Need for the Sentence to Reflect the Seriousness of the Crime

Mr. Marr will not be the first nor the last person to be sentenced in these bid-rigging cases. Both to avoid disparities, *see* § 3553(a)(6)), and to ensure that the sentence adequately reflect the seriousness of the offense, the Court should take into account the sentences imposed in those other cases. Given the sentences received by other defendants, a sentence of more than 15 months would both exaggerate the seriousness of the offense and result in an unwarranted disparity. Most defendants who have been sentenced so far – mostly defendants who pled guilty – have received sentences of home confinement or minimal jail terms. Those defendants who have exercised their right to trial have received harsher sentences, but no more than 21 months (Al Florida) and as low as 8 months (Refugio Diaz-Cuco).

ii. The Need for the Sentence to Afford Adequate Deterrence

A lengthy term of imprisonment is not necessary to deter Mr. Marr from committing an offense in the future. The offense conduct was committed in a situation that is unlikely to repeat itself. The "rounds" had been going on at the foreclosure well before Mr. Marr got involved in the business. As soon as the FBI searched his offices, seven years ago, Mr. Marr stopped participating in rounds, got legal advice, and now regularly trains his employees to ensure that their conduct at the auctions complies with the law. Since the indictment seven years ago, Mr. Marr has continued to run his business lawfully. In sum, the bid-rigging conduct with which he was charged has been deterred already.

Mr. Marr has already suffered significant adverse consequences as a result of the offense, including the refusal of banks to conduct business with him or his business, the financial impact on his children, and the future impact it will have on his earning capacity and ability to engage in his profession. Mr. Marr has been informed by Merrill Lynch, Bank of America, Fidelity, Charles Schwab, Union Bank, Wells Fargo, and other financial institutions that they will no longer do business with him, *i.e.*, they have closed and will not open any accounts, making it extremely difficult for Mr. Marr run his businesses so he can support himself and his family. Once sentenced, Mr. Marr may be obligated to pay a significant sum as a fine, which itself may provide even more deterrence than a term of imprisonment. *See, e.g.*, R. Posner, *Optimal Sentence for White Collar Defendants, University of Chicago Law School*, Chicago Unbound (1980) (arguing that for white collar defendants such as Mr. Marr, "a sufficiently large fine is an equally effective deterrent that is cheaper to administer and therefore socially preferable"). Furthermore, Mr. Marr will have a felony conviction for the rest of his life. This alone is sufficient deterrence. *See United States v. Smith*, 683 F.2d 1236, 1240 (9th Cir. 1982) ("The stigma of a felony conviction is permanent and pervasive."); *see also*, Wayne A. Logan, *Informal Collateral Consequences*, 88 Washington Law Review 1103 (2013) ("Today, convict status serves as a perpetual badge of infamy, even serving to impugn reputation beyond the grave.").

iii. The Need to Protect the Public From Further Crimes

Mr. Marr is 61years old, high-school educated, and has maintained steady employment all of his life, even after these criminal proceedings were instituted against him. He has no criminal history and he has the support of his family members despite the harm he has inflicted upon them. *See* Letter of Victor Marr. These characteristics put Mr. Marr at an extremely low risk of recidivism. *See Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines*, A Component of the Fifteen Year Report on the U.S. Sentencing Commission's Legislative Mandate (May 2004), (offenders over the age of 50 with criminal history Category I have a 9.5% recidivism rate; offenders with criminal history of Category I with no illicit drug use have a 10.8% recidivism rate); Ex. 10 (legally married offenders with a criminal history of Category I have a 9.8% recidivism rate); Ex. 11 (fraud offenders with a criminal history of Category I have a 9.3%

recidivism rate)); *see also* Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002) ("The relationship between family ties and lower recidivism has been consistent across study populations, different periods, and different methodological procedures."); Phyllis J. Newton, Jill Glazer, & Kevin Blackwell, *Gender, Individuality and the Federal Sentencing Guidelines*, 8 Fed. Sent'g Rep. 148 (1995) ("[T]he better family ties are maintained[,] the lower the recidivism rate").

iv. The Kinds of Sentences Available

When determining the minimally sufficient sentence, courts are permitted to consider all types of available sentencing options, even when the advisory guideline range includes a lengthy period of incarceration. 18 U.S.C. § 3553(a)(3); *Gall v. United States*, 552 U.S. 38 (2007). Mr. Marr's recommended sentence of no more than 15 months, the low end of the applicable guideline range, is appropriate in light of the offense conduct, Mr. Marr's personal background and character, and the general sentencing principles discussed above.

E. The Restitution Requested Cannot be Ordered

The Presentence Report recommends that the Court order Mr. Marr to pay restitution of $1,785,403.88. Such an order would, however, be illegal because neither restitution statute – 18 U.S.C. § 3663 or § 3663A – applies to anti-trust offenses under Title 15. Each of those provisions clearly applies only to offenses under Titles 18, 21 and 49 (§3663), or to an even more limited list of Title 18 and 21 offenses (§3663A). The only exception to the exclusion of Title 15 offenses from the restitution statutes is Section 3663(a)(3), which allows the Court to order restitution in "*any* criminal case to the extent *agreed to by the parties in a plea agreement*." Given that there is no plea agreement here, there is no legal authority for an order of restitution.

Moreover, even if the restitution statutes did apply to this Title 15 offense, the government has not proven that any specific victim suffered any specific loss as a result of the defendant's conduct. *See* 18 U.S.C. § 3663(a)(1)(A) (court *may* order restitution to any victim of the offense); *Id.* §3663(a)(2) (for purposes of the statute a victim is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered); *United States v. Andrews*, 600 F.3d 1167, 1170-71 (9th Cir. 2010) (restitution order must be based on losses "directly

resulting from the defendant's criminal conduct" and a victim for restitution purposes is a person who has suffered a loss "caused by the specific conduct that is the basis for the offense of conviction"). Therefore, no restitution should be ordered.

F. The Recommended Fine is Excessive

The recommended fine is excessive inasmuch as it is premised upon the inflated volume of commerce figure, and any fine ordered should be both consistent with the correct guideline calculation and proportionate to fines other defendants in these cases have been ordered to pay.

IV. CONCLUSION

For the forgoing reasons and based on the record herein, Mr. Marr requests a sentence of no more than 15 months, a fine commensurate with a correctly calculated guideline range, and no restitution.

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