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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT BENLEVI,

Defendant.

Case No. CR 21-00246-PA

**DEFENDANT'S POSITION RE
SENTENCING; EXHIBITS**

Hearing Date: July 19, 2022
Hearing Time: 12:00 p.m.

Robert Benlevi, through his attorneys, Deputy Federal Public Defenders Michael Parente and Adithiya Mani, submits this Sentencing Memorandum and respectfully submits that a sentence of 77 months is sufficient but no greater than necessary to satisfy the interests of justice in this case.

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1 Robert Benlevi, age 53, has a low probability of recidivism and suffers from
2 schizoaffective disorder and post-traumatic stress syndrome. He is the sole caregiver
3 for his elderly mother. As the government agrees, the PSR's guidelines calculation is
4 overstated, and Benlevi did not employ sophisticated means in the offense. Nearly all
5 of the money received through his loan applications was promptly recovered and will
6 be returned to the financial institution. No identifiable individuals were harmed
7 financially or otherwise by Benlevi's conduct. Under the circumstances, the requested
8 sentence of 77 months is sufficient to meet the ends of justice.

9
10 Respectfully submitted,
11 CUAUHTEMOC ORTEGA
12 Federal Public Defender

13 DATED: June 27, 2022

By: /s/ Michael Parente

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MEMORANDUM OF POINTS AND AUTHORITIES

I. ARGUMENT

A. Individualized Assessment of Robert Benlevi

Benlevi was born and raised in Tehran, Iran. He suffers from schizoaffective disorder and post-traumatic stress syndrome following the death of his father, who died in a tragic car accident when Benlevi was ten years old. (Ex. 1, Psychological Evaluation by Dr. Amini, at 3.) Schizophrenia runs in Benlevi's family. (*Id.* at 5.) His sister, Katerin, is institutionalized at North Valley Behavioral Health in Yuba City, California, and has been diagnosed with schizophrenia. (Presentence Report ("PSR") ¶ 62, ECF No. 98; Ex. 1 at 4.) One of Benlevi's uncles in Iran similarly suffers from symptoms consistent with schizophrenia. (*Id.*)

Benlevi immigrated to the United States as a refugee at age 17, settling in New York City. (PSR ¶ 63.) His mother and sister followed in 1990. Like his father, Benlevi took an interest in medicine and health. (Ex. 2, S. Rokhsar Letter, ¶ 3.) He graduated from Bayside High School in New York City in 1987 and earned a Bachelor of Science degree in Pharmacy from St. John's University in 1993. (PSR ¶ 74.) Benlevi was a licensed pharmacist from September 1993 until August 2015. (PSR ¶ 75.)

Despite Benlevi's efforts to escape the trauma from his early life by educating himself in the United States, he and his family have continued to suffer from health and financial issues. His mother requires in-home supportive services (IHSS), his sister is institutionalized, and Benlevi continues to suffer from mental health issues and declared bankruptcy in 2000. (PSR ¶¶ 76, 79.)

On June 21, 2022, after his conviction and while still on bond, Benlevi sought urgent psychological help on his own volition. (Ex. 1 at 3.) Benlevi made this decision after reflection on the mistakes of his past and how he could avoid such mistakes in the future. Doctor Amini diagnosed Benlevi with schizoaffective disorder, consistent with the schizophrenia that runs in Benlevi's family. (Ex. 1 at 4-5.) Doctor Amini also noted

1 his impression that Benlevi suffers from post-traumatic stress syndrome (PTSD) from
2 the untimely death of his father. (*Id.* at 5.)

3 **B. Applicable Guidelines Provisions**

4 The defense does not oppose the government’s guideline calculation that
5 Benlevi’s total offense level is 30, contrary to the PSR’s calculation of 34. (Gov. Mem.,
6 ECF No. 99, at 4.) Applying the PSR’s Criminal History Category of IV, the defense
7 agrees with the government that the applicable guidelines range is 135 to 168 months,
8 though the defense requests a three-level downward departure and three-level
9 downward variance corresponding to a 77-month sentence.

10 **1. The defense objects to the PSR’s intended loss calculation of \$27** 11 **million but does not contest the government’s position that the** 12 **intended loss was at most \$21 million.**

13 In cases where the loss exceeds \$6,500, U.S.S.G. § 2B1.1(b) provides for an
14 increase in offense level corresponding to the actual or intended loss, whichever is
15 greater. U.S.S.G. § 2B1.1 cmt. n.3. While the loans distributed to Benlevi totaled \$3
16 million, the PSR calculates the intended loss at \$27 million based on Benlevi having
17 submitted a total of 27 loan applications, each requesting \$1 million dollars. (PSR ¶
18 13.) The PSR’s loss figure results in a 22-level increase in the offense level but is
19 rebutted by the government’s proposed \$21 million intended loss calculation.

20 The government bears the burden of proving loss for purposes of § 2B1.1 by a
21 preponderance of the evidence.¹ *United States v. Santos*, 527 F.3d 1003, 1006-07 (9th
22 Cir. 2008). The government contends that the intended loss is \$21 million because,
23 although Benlevi submitted twenty-seven loan applications in total, six of them were
24 submitted to PayPal only after Benlevi received notice that seven of the previous

25
26 ¹ While the preponderance standard generally applies to sentencing
27 enhancements, the Ninth Circuit has held that when a sentencing enhancement is based
28 on uncharged conduct and “has an extremely disproportionate effect on the sentence
relative to the offense of conviction,” “due process may require clear and convincing
evidence of that conduct.” *United States v. Hymas*, 780 F.3d 1285, 1289 (9th Cir. 2015)
(internal quotation marks omitted).

1 applications were denied. (Gov. Mem. at 5.) The government’s \$21 million loss
2 calculation results in a 20-level enhancement, which applies to defendants whose actual
3 or intended loss is greater than \$9.5 million but not more than \$25 million, pursuant to
4 U.S.S.G. § 2B1.1(b)(1)(K). (*Id.*)

5 The defense concurs with the government’s applicable guidelines range.
6 Although a defendant’s intended loss includes “intended pecuniary harm that would
7 have been impossible or unlikely to occur,” the loss must be “intended” and
8 encompasses only “the pecuniary harm that the defendant purposely sought to inflict.”
9 § 2B1.1 cmt. n.3 (A)(i)-(ii). In the context of health care fraud, where the same
10 intended loss guideline applies, the Ninth Circuit has held that the amount a defendant
11 fraudulently bills an insurer is only “prima facie evidence of intended loss” and may be
12 rebutted by other evidence, such as the defendant’s knowledge of caps on the amount
13 an insurer will pay. *United States v. Popov*, 742 F.3d 911, 916 (9th Cir. 2014).

14 Here, as the government explains, the face value of Benlevi’s loan applications,
15 as used by the PSR, does not accurately reflect the pecuniary harm that Benlevi
16 “purposely sought to inflict.” (Gov. Mem. at 5.) While the first 21 applications were
17 submitted over a two-day period, the additional six applications to PayPal were
18 submitted nearly a month later, only after Benlevi had learned that seven applications to
19 U.S. Bank were denied. (*Id.*) In addition, despite knowing that several of his loan
20 applications were rejected, Benlevi did not continue to pursue any loans after the first
21 million was disbursed on May 26, 2020, further rebutting that his intent was to obtain
22 \$27 million.

23 The First Addendum to the PSR responds that “there is a lack of information to
24 conclude that Benlevi had an intended loss lower than \$27 million.” (PSR Addendum,
25 ECF No. 100, at 2.) But the burden of proof to establish the intended loss lies squarely
26 with the government. *Santos*, 527 F.3d at 1006-07. Benlevi need not affirmatively
27 establish that his intended loss was lower than \$27 million. It is sufficient that the
28

1 government has not met its burden of proving an intended loss beyond the conceded
2 \$21 million figure.

3 In sum, the evidence does not show – and the government does not argue – that
4 Benlevi intended to inflict \$27 million in pecuniary harm, as reported by the PSR. The
5 defense concurs with the government in objecting to the PSR’s loss calculation of \$27
6 million and does not contest the government’s intended loss calculation of \$21 million.

7 **2. The defense objects to the PSR’s application of a “sophisticated**
8 **means” enhancement under Guideline § 2B1.1(b)(10).**

9 The defense agrees with the government that the sophisticated means
10 enhancement, though recommended by the PSR, is not appropriate to this case based on
11 a “review of applicable caselaw and the commentary to the United States Sentencing
12 Guidelines.” (Gov. Mem. at 6.)

13 The PSR applied a “sophisticated means” enhancement at the government’s
14 initial recommendation (now withdrawn) on the ground that Benlevi “created eight
15 shell companies” as part of the fraud. (PSR ¶ 31.) The PSR cites *United States v.*
16 *Jennings*, 711 F.3d 1144 (2013) for the proposition that the “sophisticated means”
17 enhancement does not require “highly complex schemes or . . . exceptional brilliance to
18 justify” its application. (PSR ¶ 31.)

19 Nonetheless, *Jennings* does not support application of the sophisticated means
20 enhancement here. As commentary to the guidelines explain, the “sophisticated means”
21 enhancement is appropriate only where the crime is accomplished through “especially
22 complex or especially intricate offense conduct pertaining to the execution or
23 concealment of an offense.” *Id.* at 1147. The note goes on to explain that “[c]onduct
24 such as hiding assets or transactions, or both, through the use of fictitious entities,
25 corporate shells, or offshore financial accounts ordinarily indicates sophisticated
26 means.” *Id.*

27 In *Jennings*, for example, the Ninth Circuit affirmed the district court’s
28 conclusion that the defendants had employed “sophisticated means” to accomplish a tax

1 fraud offense where defendants created a shell company that purported to sell advanced
2 technology to limit hazardous waste and then created a fake bank account named after a
3 legitimate company, so they could disguise payments to themselves as legitimate
4 expenses. *Id.* at 1146. *Jennings* agreed with the district court that such a scheme “was
5 ‘more complex’ than found in a typical tax fraud case” and therefore justified the
6 enhancement. *Id.*

7 Here, unlike in *Jennings*, there is no evidence that Benlevi created his LLC’s as a
8 means of concealing or executing the fraud. In fact, the government’s trial exhibits
9 show that all eight of Benlevi’s LLC’s were incorporated by October 2019, well before
10 COVID-19 hit the United States of America. (Ex. 3, Gov. Trial Exhibits 101-108
11 (California Sec. of State LLC Documents).) Accordingly, Benlevi’s companies were
12 merely incidental to the fraud, which involved Benlevi submitting identical loan
13 applications for each company with misinformation about his payroll expenses. Benlevi
14 was transparent with the banks that he owned and controlled each of the companies and
15 did not use the companies to conceal any information. On these facts, as the
16 government agrees, Benlevi’s loan applications were not “more complex than found in
17 a typical [PPP loan] fraud case.” *Jennings*, 711 F.3d at 1146. Accordingly, the
18 sophisticated means enhancement does not apply.

19 **3. The defense requests a few corrections to the PSR’s factual**
20 **information.**

21 The PSR misstates Benlevi’s date of birth as August 4, 1968. (PSR ¶ 60.) The
22 correct date is August 13, 1968.

23 The PSR states that Benlevi earned his Bachelor of Science degree from St.
24 John’s University in January 2003. (PSR ¶ 74.) The correct date, as reflected by the
25 transcript, is January 24, 1993.

26 The PSR states that Benlevi “came to the United States as a refugee with his
27 mother and sister in 1985.” (PSR ¶ 63.) Although Benlevi came to the United States in
28 1985, his mother and sister followed in 1990.

1 The PSR states that Benlevi takes “over-the counter supplements for low
 2 testosterone: Nugenix, D-Aspartic Acid, and Orchic PMG.” (PSR ¶ 69.) Dr. Amini now
 3 recommends that Benlevi “continues to take the following daily medications: Liquid
 4 Vitamin D3, Liquid Vitamin E, Orchid PMG, Dasportic Acid, Free Testosterone
 5 Booster, COID Liver Oil, Nugenix, B-6/B1, Zinc 50mg, and DHEA 50mg. (Ex. 1 at 2.)
 6 In addition, Dr. Amini prescribed that Benlevi take 5 mg Haldol tablets daily and states
 7 that he “needs to be seen by a Psychologist and Psychiatrist and need[s] to take Anti-
 8 Psychotic medication.” (*Id.* at 5.)

9 In the section addressing Benlevi’s mental and emotional health, Benlevi asks
 10 that the PSR be updated to reflect Dr. Amini’s report indicating that he suffers from
 11 schizoaffective disorder, post-traumatic stress syndrome, anxiety, tension, depressed
 12 mood, and personality disorder. (*Id.*)

13 **C. Application Note 21(C) to Guideline § 2B1.1 warrants a three-level**
 14 **downward departure because “the offense level determined under this**
 15 **guideline substantially overstates the seriousness of the offense.”**

16 Application Note, 21(C) to Guideline § 2B1.1 acknowledges that in some cases,
 17 the intended loss calculation will not produce a fair measure of the defendant’s
 18 culpability. In considering whether to depart on this basis, courts have considered that
 19 “where a defendant devises an ambitious scheme obviously doomed to fail and which
 20 causes little or no actual loss, it may be unfair to sentence the defendant based on the
 21 intended (but highly improbable) loss determination from the § 2B1.1 table.” *United*
 22 *States v. Roen*, 279 F. Supp. 2d 986, 991 (E.D. Wis. 2003). This factor is relevant to
 23 culpability because “[t]hose who devise ridiculous schemes (1) do not ordinarily have
 24 the same mental state and (2) do not create the same risk of harm as those who devise
 25 cunning schemes. In short, they are not as dangerous.” *Id.* Benlevi squarely falls within
 26 this latter camp of defendants.

27 Although Benlevi submitted 21 loan applications in a two-day period, elevating
 28 the intended loss to \$21 million, that figure is grossly disproportionate both to the

1 actual loss and to any realistic probability of loss created by his conduct. All of the
 2 applications submitted by Benlevi were identical. None was supported by the
 3 documentation requested, and for that very reason, three of the four banks promptly
 4 denied *all* of the applications. One of the banks approved three applications while
 5 denying three identical applications after promptly detecting possible fraud—a fraud
 6 that was rendered easier to detect, not less so, by the numerous identical applications
 7 Benlevi submitted to the same bank.

8 Benlevi’s deficient online applications did not create the same risk of harm as a
 9 cunning scheme to obtain tens of millions of dollars. But applying the government’s
 10 \$21 million loss determination from the § 2B1.1(b) table (much less the PSR’s \$27
 11 million figure) does not reflect this difference and would treat Benlevi no differently
 12 than a sophisticated defendant who engaged in a credible scheme. A three-level
 13 downward departure accounts for Benlevi’s more limited culpability and still produces
 14 a total offense level *greater* than the 16-level enhancement a defendant would receive
 15 for an intended loss of up to \$3.5 million.

16 **D. Section 3553(a) factors support an additional three-level variance,**
 17 **resulting in a sentence of 77 months.**

18 A three-level downward variance, in addition to the three-level downward
 19 departure, yields a sentencing range of 77-96 months. The proposed 77-month sentence
 20 is supported by the Section 3553(a) factors.²

21 As the Court is aware, the guidelines range is neither mandatory nor
 22 presumptively reasonable. *Nelson v. United States*, 555 U.S. 350, 352 (2009). This
 23 Court’s mere disagreement with the guidelines may justify a downward variance.
 24 *Spears v. United States*, 555 U.S. 261, 263–64 (2009) (per curiam); *see also United*
 25 *States v. Booker*, 543 U.S. 220 (2005) (the guideline ranges are advisory).

26 //

27
 28 ² The defense contends that a six-level downward variance is justified should the
 Court deny the defense’s request for a three-level downward departure.

1 **1. A 77-month sentence adequately reflects “the nature and**
 2 **circumstances of the offense” and “characteristics of the**
 3 **defendant” under § 3553(a)(1).**

4 Section 3553(a)(1) requires courts to consider “the nature and circumstances of
 5 the offense” and “characteristics of the defendant” in determining an appropriate
 6 sentence. The facts underlying Benlevi’s conviction involved his submission of
 7 multiple loan applications online during the early stages of the COVID-19 pandemic, a
 8 time when Benlevi was living in close quarters with his elderly mother. (PSR ¶ 61.)
 9 Benlevi is a mentally compromised individual who suffers from schizoaffective
 10 disorder, consistent with the schizophrenia that runs in his family. (Ex. 1, Psychological
 11 Evaluation, at 4-5.) He also suffers from symptoms of post-traumatic stress syndrome
 12 following his father’s death. (*Id.* at 5.)

13 The stressors produced by the pandemic, combined with Benlevi’s mental
 14 illness, help explain why, during a two-day period in April 2020, he
 15 uncharacteristically submitted multiple online loan applications for millions of dollars.
 16 Benlevi’s conduct was, however, limited in scope and duration, and ultimately caused
 17 minimal financial harm. The PSR reports that of the \$3 million in improperly disbursed
 18 funds, all but \$123,333 have been fully recovered and will be returned to the bank.
 19 (PSR ¶ 17.)

20 **2. The proposed 77-month sentence is adequate “to reflect the**
 21 **seriousness of the offense, to promote respect for the law, and to**
 22 **provide just punishment for the offense.” 18 U.S.C. §**
 23 **3553(a)(2)(A).**

24 The requested 77-month sentence is adequate to reflect the seriousness of the
 25 offense. The offense level of 24, as requested by the defense, is substantially higher
 26 than the offense level of 18 that would apply for recklessly killing another person.
 27 U.S.S.G. § 2A1.4(a)(2). If Benlevi had been convicted of involuntary manslaughter in a
 28 reckless manner instead of the instant offense, his guidelines range would be 41-51

1 months at Criminal History Category IV. Instead, the government’s recommended
2 guidelines range is more than double that at 135 to 168 months. (Gov. Mem. at 4.) And
3 the PSR’s range of 210-262 months is more than four times the punishment for reckless
4 manslaughter, largely due to the inflated intended loss figure and misapplied
5 sophisticated means enhancement. (PSR at 4.) Considering the totality of the
6 circumstances, a 77-month sentence is more than adequate to “reflect[s] the
7 seriousness” of the bank fraud that occurred and “to provide just punishment for the
8 offense.” 18 U.S.C. § 3553(a)(2)(A).

9 **3. Neither specific nor general deterrence will be served by**
10 **incarceration exceeding 77 months.**

11 In fashioning an appropriate sentence, the Court must also consider the need for
12 deterrence and to protect the public from the potential that the defendant will commit
13 additional crimes. 18 U.S.C. §§ 3553(a)(2)(B), (C).

14 Here, the proposed sentence of 77 months followed by two years of supervised
15 release is sufficient to meet this objective. Benlevi is 53 years old. According to the
16 United States Sentencing Commission’s (“USSC”) 2017 study, “The Effects of Aging
17 on Recidivism Among Federal Offenders,” Benlevi’s estimated rate of rearrest is
18 30.1%, and his estimated rate of reconviction is 15.9%. (Ex. 4, USSC Study, at 29.).
19 Upon completing a 77-month sentence, Benlevi’s estimated rates of rearrest and
20 reconviction as a 55-59 year old would decrease to 22.2% and 12.2%, respectively.
21 (*Id.*) Imposing a 135-month sentence, as the government requests, would only reduce
22 those rates further to 18.9% and 11.4% when Mr. Benlevi would be between 60 and 64
23 years old. Thus, imposing a 135-month sentence rather than a 77-month sentence would
24 add minimal additional deterrence.

25 In addition, Benlevi’s prior offenses, nearly a decade old, show he does not tend
26 to recidivate, and in the instant case, he has had a spotless record while on bond. Thus,
27 Benlevi has demonstrated that a lengthy period of incarceration is unnecessary, and he
28 would perform well on supervised release.

