UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA :

- v. - : 17 Cr. 482 (JSR)

PETER G. JOHNSON, :

Defendant. :

- x

GOVERNMENT'S SENTENCING MEMORANDUM

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Preliminary Statement

The Government respectfully submits this memorandum in advance of sentencing of defendant Peter G. Johnson ("Peter G." or the "Defendant") scheduled for August 13, 2018. The Defendant was the founder, chief executive officer, and chairman of the board of directors of the Transmar Commodity Group Ltd. ("Transmar"), a closely-held family company in the cocoa supply and trading industry. From that perch, the Defendant carried out a massive and brazen fraud, submitting false documents to lenders to support a $360 million loan for over two years. The discovery of this enormous fraud in 2016 plunged Transmar into bankruptcy, leaving its lenders with massive losses. This criminal behavior is appropriately addressed through the imposition of a significant custodial sentence and an order of restitution.

Statement of Facts

Transmar was a supplier and trader of cocoa products founded by the Defendant and owned by the Defendant and his family, including his son Peter B. Johnson ("Peter B.," collectively the "Johnsons"). (5/14/18 Presentence Investigation Report ("PSR") ¶ 12). Peter B. was employed by Transmar as the managing director of Euromar Commodities GmbH ("Euromar"), Transmar's European affiliate. (*Id.*). Peter B. also had an active role in the management of Transmar and was in frequent communication with its officers and employees. (*Id.*). Other relevant Transmar employees included Thomas Reich, Transmar's vice president of finance who reported to the Johnsons, and Gary O'Connor and Nancy Pizzi, Transmar accountants who reported to Reich. (*Id.*).[1]

Beginning in or around September 2011, Transmar obtained the majority of its financing through a credit facility extended by a syndicate of banks (the "Banks"), some of which were

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[1] Peter B. and Reich are both scheduled for sentencing in front of this Court in September.

insured by the FDIC. (*Id.* ¶ 13). The loan amount available to Transmar under the credit facility was based on how much eligible collateral Transmar had in its possession including, among other things, cash, inventory, and receivables. (*Id.* ¶ 14). By late 2016, the amount of the loan had grown to approximately $360 million. (*Id.*). As part of the agreement for the credit facility, Transmar was required to submit periodic borrowing base reports ("BB's") to the Banks, often on a weekly basis, detailing the amount of eligible collateral in its possession. (*Id.*). The credit facility agreement placed numerous restrictions on what collateral was deemed eligible for inclusion in the BB, in order to ensure that it would actually be available for collection, for example, the requirement that receivables not be too old or that inventory be housed at recognized, approved warehouses. The credit facility agreement also placed caps on the amount of receivables from transactions with any given counterparty that could be counted as eligible collateral. Reich and O'Connor were the Transmar employees primarily responsible for preparing and submitting the BB's. (*Id.*). These submissions contained certifications about the accuracy of the information contained therein and were relied upon by the Banks in continuing to extend credit. (*Id.*) Pizzi was responsible for the preparation of company financial documents, which contained some similar information to the BB's and which were also submitted to the Banks.

At some point no later than 2014, Transmar had developed a substantial gap between the amount of eligible collateral it had on hand and the amount of outstanding credit. (*Id.* ¶ 15). The Johnsons and others at Transmar quickly became aware of this problem and instead of being honest with the Banks about the situation, they set out on a years' long course of conduct to cover up the problem and continue to draw on the credit facility. (*Id.* ¶¶ 15-16). The actual cover-up was relatively straightforward: the Defendant's employees, primarily Reich and

O'Connor, falsified the BB's through such methods as (a) including collateral on the BB's that Transmar no longer owned or that was stored under conditions that made it ineligible for inclusion in the BB's (*id.* ¶ 16); (b) including receivables on the BB's for which Transmar had already been paid or were too old to be eligible for inclusion in the BB's (*id.*); and (c) engaging in "circle" transactions, that is, transactions that involved the nominal sale of assets to amenable third-parties, in order to create the appearance of actual business and generate receivables that, on their face, could be included in the BB's (*id.* ¶ 17).

Throughout this course of conduct, the Defendant engaged in the quintessential executive-corporate fraud; his underlings carried out the day-to-day falsifications while the Defendant was aware of and condoned the fraud. The Defendant expressed his knowledge of the criminal conduct in unmistakable terms via email. For instance, in an August 2015 email, the Defendant wrote concerning some of the "circle" transactions: "NOT SURE THESE CONTRACTS CAN BE TREATED AS FUNCTIONALLY 'REAL' – WE PUT THEM IN TO ARTIFICIALLY PUMP PROFITS/EXPAND VALUATIONS FOR IT/OFFSET INTERCOMPANY–BB HOLES ETC." (*Id.* ¶ 18). Company emails further show that the Defendant and his coconspirators were not just aware of the fraud, they spoke brazenly among themselves about its commission. Thus, for example, the Defendant and others at Transmar corresponded in detail about the falsification of BB's; dismissed auditors' concerns as "predictable"; and spent weekends brainstorming additional ways to manipulate the BB's. (*Id.* ¶¶ 16, 20). The defendant's emails also show the lengths to which he and others went to hide the fraud from outsiders, including asking that email be deleted and manipulating company financial statements to conform to the fraudulent BB's. (*Id.* ¶¶ 20-21).

Following years of fraud, the gap between Transmar's actual holdings and the credit it was receiving was in the hundreds of millions of dollars. (*Id.* ¶ 22). The revelation of this shortfall caused Transmar to go into bankruptcy at the end of 2016 and, as part of that process, the Defendant was fired. (*Id.*). Based on information obtained from the Banks, the total amount due to the Banks as of 2016 as well as the current value of the outstanding loan amounts following various collection efforts by the bankruptcy trustee is as follows:

Lender	**2016**	**Current Amount**
ABN AMRO	$ 76,478,750.00	$ 74,906,250.00
Soc Gen	$ 62,982,500.00	$ 61,687,500.00
BNP	$ 53,985,000.00	$ 52,875,000.00
Natixis	$ 53,985,000.00	$ 52,875,000.00
Macquarie	$ 40,488,750.00	$ 39,656,250.00
Hapoalim	$ 31,491,250.00	$ 30,843,750.00
MUFG	$ 26,992,500.00	$ 26,437,500.00
IDB	$ 13,496,250.00	$ 13,218,750.00
Total	**$359,900,000.00**	**$ 352,500,000.00**

Though collection efforts remain ongoing, the Defendant's fraud is likely to leave the Banks with significant losses.

Procedural History

On March 9, 2018, the Defendant pled guilty before this Court to Count One of indictment 16 Cr. 482, charging him with conspiracy to commit bank fraud and wire fraud affecting a financial institution. As part of the plea, the parties entered into a plea agreement finding an offense level of 36 as follows: a base offense level of seven pursuant to United States Sentencing Guidelines (USSG) section 2B1.1(a)(1); a 28-level enhancement for loss amount pursuant to USSG section 2B1.1(b)(1)(O); a 4-level leadership enhancement pursuant to USSG section 3B1.1(a); and 3-level reduction pursuant to USSG section 3E1.1(a) and (b). The PSR

concurs in this guidelines calculation. (PSR ¶ 7).[2] Because the Defendant has no known criminal history, the USSG recommends a sentence of 188 to 235 months' imprisonment. Neither the Probation Office nor the Government believe that a sentence within that range is appropriate or consistent with the sentencing factors set forth at 18 U.S.C. § 3553. (PSR at 28). In the plea agreement, the Defendant also agreed to make restitution "in an amount ordered by the Court," and to forfeit $1,534,156.22. This Court entered a forfeiture order in that amount on or about March 15, 2018.

Discussion

In light of the scope and nature of the offense as well as the Defendant's leadership role therein, the Court should impose a significant term of incarceration. In addition, the Court must order restitution to the Banks.

a. A Substantial Term of Imprisonment is Appropriate

A just and appropriate punishment to the criminal offense in this case requires a significant term of incarceration. Once the Court has calculated the application of the sentencing guidelines, it must consider an appropriate sentence under the totality of factors set forth under

[2] Two other USSG provision that the parties and the Probation Office considered but rejected were a 2-level enhancement for sophisticated means under USSG section 2B1.1(b)(10)(C), and a 2-level enhancement for gross receipts in excess of $1 million under USSG section 2B1.1(b)(16)(A). With respect to the former, the fraud at hand involved false entries in weekly reports and did not involve "especially complex" means such as hiding in different jurisdictions or the use of such artifices as "fictitious entities, corporate shells, or offshore financial accounts." USSG 2B1.1, Application Note 9(b). With respect to the latter, fraudulently obtained funds from financial institutions were directed in the first instance to Transmar, a company that was approximately 85% owned by the Defendant and four family members (including Peter B.) and approximately 15% owned by a Japanese corporation, and which was simultaneously a going concern with legitimate sources of income. The Defendant, in turn, received a salary and bonus from Transmar rather than obtaining funds "from" a financial institution. *See, e.g.*, *United States* v. *Castellano*, 349 F.3d 483, 486 (7th Cir. 2003) (questioning the applicability of the enhancement where corporation received funds inasmuch as "a top manager's ability to control the corporation is not enough to treat the corporation and the manager as a single entity").

Title 18, United States Code, Section 3553(a). While the Court must calculate the Guidelines, it is "emphatically clear that the Guidelines are guidelines-that is, they are truly advisory." *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008). "A sentencing judge has very wide latitude to decide the proper degree of punishment for an individual offender and a particular crime." *Id.* at 188. "A district court may not presume that a Guidelines sentence is reasonable; it must instead conduct its own independent review of the sentencing factors, aided by the arguments of the prosecution and defense." *Id.* 189; *United States v. Genao*, 869 F.3d 136, 141 (2d Cir. 2017) ("The sentencing court must make an individualized assessment based on the facts presented.").

Application of the factors set forth in 18 U.S.C. § 3553(a) support the imposition of a significant term of incarceration. While it is unlikely that this particular Defendant would ever reoffend, a punishment of incarceration is necessary "to afford adequate deterrence to criminal conduct." *Id.* § 3553(a)(2)(B). In the context of economic crimes, it is insufficient to impose an obligation to pay back losses. For one thing, that merely restores the victim, it does not punish the offender. It is the element of punishment, and particularly a custodial sentence, that is necessary to effectively prevent people from engaging in such crime in the first place. *See United States v. Livesay*, 587 F.3d 1274, 1279 (11th Cir. 2009) ("[I]t is difficult to imagine a would-be white-collar criminal being deterred from stealing millions of dollars from his company by the threat of a purely probationary sentence."). Moreover, it is imperative that punishment for economic crime not be viewed as simply a cost of doing business, to be balanced against the potential economic rewards. Instead, sentencing for economic crimes can only be expected to have a true deterrent effect when it includes incarceration. Accordingly, the only way to impose a punishment that can be expected to have a deterrent effect would be to impose a term of incarceration.

Moreover, the particular custodial sentence imposed must be sufficient to "reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment." 18 U.S.C. § 3553(a)(2)(A). Inherent in the notion that punishment ought to reflect the seriousness of the offense is the idea of proportionality, namely that the more serious the offense, the greater the appropriate term of incarceration. *See generally* USSG §1A1.1 (Policy Statement) ("Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity."); *Robles v. United States*, No. 14 Civ. 9311 (LAP), 2017 WL 1025993, at *3 (S.D.N.Y. Mar. 16, 2017) (noting that "a longer sentence" may be appropriate "given the seriousness of the offense" and "for the purpose of deterrence"). Here, three aspects of the offense are particularly noteworthy and contribute to its seriousness:

1. The Scope of the Offense

This is a severe economic crime, both in terms of the length of time over which the Defendant committed it and the financial losses it entailed. The Defendant and his coconspirators engaged in the fraudulent submission of false BB's to the Banks for at least approximately two years. These submissions were made multiple times each month, as frequently as weekly. (PSR ¶ 14). Thus, the scheme required a sustained, consistent course of conduct that is plainly inconsistent with a momentary lapse in judgment or a short-lived error. Moreover, the stakes of this crime were high and the loss was enormous. Indeed, no later than March 2016, months before the fraud came to light, the Defendant and his coconspirators were analyzing falsified BB's that involved nearly $200 million worth of alterations. (PSR ¶ 19). And, when the Defendant and his coconspirators could no longer sustain the scheme, the discrepancy between the amount that Transmar had borrowed –$360 million – and Transmar's

actual eligible collateral was so great that the company ultimately filed for bankruptcy and very little of the outstanding loan amount has been recovered.[3] (PSR ¶ 22). Engaging in a crime involving this amount of money and accordingly, this risk of loss, is quite serious and merits a proportionally adequate sentence.

2. The Defendant's Role in the Scheme

Second, the Defendant was a leader in the scheme. As the CEO of Transmar, the buck stopped with him (and his fellow officers and family members). Whoever was carrying out the day-to-day manipulation of the BB's and financial statements at Transmar, the control and responsibility remained with the Defendant. In simple terms, the Defendant had the power to fire his employees and not the reverse. The Defendant's role as a leader of this scheme, and one of the people with awareness and power to end it, adds a heightened dimension of seriousness to the offense and culpability to the conduct. It was due, in part, to his conduct that others at Transmar continued to engage in fraud. The sentencing guidelines recognize this through the leadership enhancement; the sentence imposed should take that factor into account as well. Indeed, over the last number of years, much attention has been given to the need to hold executives and higher-level management accountable for corporate fraud. The Government submits that holding the Defendant accountable for this fraud is precisely what such a prosecution looks like. The message of holding corporate leadership accountable for fraud

[3] Indeed, it is these staggering losses that are a significant driver of the USSG calculation in this case. While the Government urges the Court to consider the magnitude of the losses in assessing the seriousness of the offense and fashioning an appropriate sentence, both the Government and the Probation Office believe that the Guidelines range calculated in the Plea Agreement over-weights this loss in arriving at the length of a just and appropriate sentence. (*See* PSR ¶ 23; PSR Sentencing Recommendation at 29).

further requires the imposition of a significant sentence. Without meaningful consequence, a criminal prosecution is of diminished value.

3. The Brazenness of the Offense

Third, the Defendant and his coconspirators were brazen. As their communications make clear, they often discussed the "hole" and the "shortfall" internally, and corresponded and met about ways to further the fraudulent activity. (PSR ¶¶ 16, 20). They talked about deleting emails and they manipulated financial statements in furtherance of their fraud. (*Id.* ¶¶ 20-21). These communications evince a clear understanding of the illegality of the conduct as well as a lack of care for the victim – the Banks – and a lack of concern with the fraudulent behavior itself. These circumstances demonstrate a qualitative element of seriousness to the crime: a disregard for fraudulent activity. The sentence imposed should reflect this degree of seriousness as well.

In addition to reflecting the seriousness of the offense, in imposing sentence, the Court should "avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar crimes." 18 U.S.C. §3553(a)(6). Precise comparisons are always hard to find, as no two offenses or defendants are exactly alike. The recent case *United States* v. *Cohen, et al.*, 15 Cr. 396 (LAK) provides a useful data point, however. In that case, over the course of approximately seven years, the CEO, CFO, sales manager, and outside accountant of a Florida-based company conspired to commit bank fraud by submitting borrowing base certificates and financial statements to banks in order to obtain loans, which documents contained falsely inflated sales and accounts receivables numbers. During company meetings involving the CEO, the CFO, and others, the CEO indicated that the company needed to inflate these numbers in order to be in compliance with the banks' lending requirements. Each month, prior to submitting the borrowing base certificate to the banks, the CFO, at the behest of the

CEO, instructed the sales manager regarding the false figures that had to be met in order to satisfy those requirements and provided instructions regarding how to do this. The accountant, at the behest of the CEO, separately issued "clean opinion letters," falsely asserting that the company's altered financial statements were accurate. Eventually, the company defaulted on the loans, leaving an outstanding balance of approximately $4.8 million. Judge Kaplan sentenced the CEO and accountant each to 27 months' imprisonment, the CFO to 16 months' imprisonment, and the sales manager to 21 days' imprisonment.[4]

The Defendant's scheme, while of shorter duration than the scheme in *Cohen*, involved a significantly larger fraud, resulting in greater victim losses by multiple orders of magnitude. The sentences imposed in that case, therefore, should be considered in the calculation of a fair and appropriate sentence for the Defendant.

Further, data compiled by the United States Sentencing Commission indicates that the *Cohen* case is not a significant outlier from the average fraud case, both in terms of loss amount involved and the length of the sentences imposed: In the Southern District of New York, in Fiscal Year 2016 – the year that the *Cohen* defendants were sentenced – defendants convicted of fraud received an average sentence of 29 months' imprisonment, compared with an average 30 months' imprisonment nationwide.[5] (https://www.ussc.gov/sites/default/files/pdf/research-and-

[4] In imposing a sentence of 27 months' imprisonment on the CEO, Judge Kaplan noted: "I am imposing a sentence of incarceration. . . . I am doing it not because I think it needs to be done to protect society against further crimes by this individual . . . I feel it needs to be done so that people in general will feel you can't rip off a bank for $5 million and walk away from it because you're 70-plus-years old and know a lot of doctors and have various things wrong with you." (*United States* v. *Cohen, et al.*, 15 Cr. 396 (LAK), Dkt. No. 88 at 22-23).

[5] In Fiscal Year 2017, defendants convicted of fraud in the Southern District of New York received an average sentence of 30 months' imprisonment, compared with an average 35 months' imprisonment nationwide. (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/federal-sentencing-statistics/state-district-circuit/2017/ny17.pdf, Table 7).

publications/federal-sentencing-statistics/state-district-circuit/2016/nys16.pdf, Table 7). And, in Fiscal Year 2016, Federal fraud cases averaged approximately $2.3 million in loss. (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/FY16_Overview_Federal_Criminal_Cases.pdf at 9).[6]

This case, however, involves many times the amount of loss as the "average" fraud, as well as other aggravating circumstances described above, including the Defendant's role as a leader, that make this fraud more serious and severe than the average fraud. Thus, such statistics tend to demonstrate that a fair and appropriate sentence in this case – and one that promotes uniformity in sentencing and respect for the law – should exceed that imposed on the "average" fraud.

In sum, a significant sentence of imprisonment is necessary to adequately reflect the seriousness of the offense and meet the sentencing factors set forth in Section 3553.

b. The Court Must A Restitution Order

In addition, the Court must order restitution pursuant to 18 U.S.C. § 3663A. 18 U.S.C. § 3663A(a)(1) and (c)(1)(B) ("[W]hen sentencing a defendant convicted of an offense [in which an identifiable victim has suffered a [] pecuniary loss, the court shall order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense."). As set forth above, information obtained from the Banks show that they have sustained outstanding losses in the amount of $ 352,500,000. Accordingly, the Court should order the Defendant liable in that amount to the Banks, joint and severally with his co-defendants. The restitution order should also call for the reduction of that amount by any

[6] In Fiscal Year 2017, federal fraud cases averaged approximately $6 million in loss. (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf).

additional recoveries obtained by the Banks, including through the recoupment efforts of the bankruptcy trustee. *See* 18 U.S.C. § 1664(j).

Conclusion

For the foregoing reasons, that a substantial term of incarceration, but one that is below the Guidelines range of 188 to 235 months, would be sufficient but not greater than necessary to serve the legitimate purposes of sentencing.

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New York, New York

Respectfully submitted,

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