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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA

- against - 18 CR 177 (SJF)

BLAKE KANTOR,
also known as "Bill Gordon,"

Defendant.

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THE GOVERNMENT'S MEMORANDUM OF LAW
IN OPPOSITION TO THE DEFENDANT'S MOTION FOR SENTENCE REDUCTION

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The government respectfully submits this memorandum of law in opposition to the motion for compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A)(i) that the defendant filed on May 26, 2020. (See Def.'s Motion for Release ("Def. Mot."), ECF No. 62).

**PRELIMINARY STATEMENT**

The defendant's woeful record of recidivism, repeated violation of bail conditions, poor prison disciplinary record and service of little more than 8 months of an 86-month sentence, which the Court imposed because of his egregious record of fraud, obstruction of justice, drug trafficking and bail violations make him a thoroughly unsuitable candidate for compassionate release. Moreover, the record demonstrates that the defendant's purported medical conditions—consisting primarily of being an overweight smoker whose cholesterol levels are controlled with medication and who was diagnosed with pneumonia more than a year ago while on home confinement—do not demonstrate any "extraordinary or compelling" circumstance that would warrant relief because of the COVID 19 pandemic or at any other time. This is especially so because FCI Otisville, where the defendant is currently housed, has taken appropriate precautions to ensure the health and safety of the defendant as well as all inmates and staff. Similarly, the defendant's effort to gain release based upon his mother's medical condition is not "extraordinary and compelling." Indeed, the Court already rejected the defendant's effort to use his mother to obtain leniency at sentencing and the defendant tested positive for cocaine while on home confinement in his mother's residence. Accordingly, the defendant's motion is meritless and the Court should deny it.

## FACTS

### A. The Defendant's Criminal Record, Bail Violations, Plea and Sentencing

This is the second federal prison stint for the defendant, age 45, who was previously sentenced to 36 months' imprisonment for participating in an international ecstasy trafficking operation. See United States Probation Office, Presentence Investigation Report ("PSR") at ¶ 44 (Apr. 18, 2019) (on file with Court). In that case, the defendant used threatening conduct to attempt to extort a drug debt from a person who purchased ecstasy from one of his co-conspirators. Id. Before pleading guilty in November 2004, the defendant violated his pretrial supervision by using illegal drugs. See United States v. Kantor, 03-CR-449 (KMW) (S.D.N.Y.) (Aug. 19, 2004 Dkt. Entry).

Federal prison did not deter the defendant. Instead, following his release, the defendant perpetrated a sophisticated binary options fraud scheme, using manipulative computer software to dupe victims, who were often elderly or financially unsophisticated, of at least $1.5 million. PSR at ¶¶ 5-15, 30. During the scheme, the defendant also marketed a type of cryptocurrency known as ATM COIN or "ATMC." PSR at ¶¶ 10, 14. To induce investors to convert monies that they had invested with the defendant into ATMC, the defendant falsely told investors that ATMC was worth substantial sums of money, in one case as much as $600,000. Id. at ¶ 14. In reality, however, ATMC was worthless and was not convertible to United States currency or any other actual currency. Id. To cover up his scheme, the defendant had other individuals establish bank accounts, one of which was located in the Caribbean nation of St. Kitts and Nevis, which investors' funds were wired to. Id. at ¶¶ 9, 13, 15.

Compounding his fraud, when confronted by Federal Bureau of Investigation ("FBI") agents about his scheme, the defendant ordered a co-conspirator to alter lists of customer information; deleted incriminating emails; and lied to the government during a proffer about his involvement in the binary options industry, all in a failed attempt to cover his tracks. Id. at ¶¶ 16-17.

Following his arrest, and while released to home confinement—where he claims to have assisted mother, whose medical condition he now invokes—the defendant again violated the conditions of his bail by using cocaine, a fact that was uncovered when the defendant arrived for his presentence interview with the Department of Probation while high on that drug. Id. at ¶ 69. This was the second of the defendant's bail violations. In an earlier incident, he violated the Court's "no-contact" order by attempting to communicate both directly and with the assistance of his sister—who has now submitted an affidavit in support of his present motion—with a co-conspirator. See id. at ¶ 4.

Statements submitted by several of the victims of the defendant's fraud demonstrate the devastating effects that his crimes had—and continue to have—on victims who lost their hard-earned money through his deceit. This "smooth talk[ing]" defendant "cheated" victims out of money that they were "depending" upon for their retirements. See Exhibit A to Gov't's Sent. Ltr. (ECF No. 46) (victim name and address redacted). Indeed, as a result of the defendant's fraud, victims' "plans and dreams for . . . retirement are gone." See id. Exhibit B (victim name and address redacted). In some cases, the defendant's fraud also affected victims' health, causing them to grow "withdrawn, sick and depressed" because the defendant had "conned" them. See id. Exhibit C (victim name and address redacted); see

also id. Exhibit D (victim name and address redacted) (describing "mental . . . [and] physical breakdown" that the defendant's fraud caused).

At his sentencing on July 1, 2019, the defendant sought a reduced sentence because he claimed that his mother required his care. See July 1, 2019 Sent. Tr. at 5, 6, 8-9, 14 (attached hereto as Exhibit A). The Court rejected the argument, holding that the 86-month sentence, which was one month less than the high end of the 87-month sentencing guideline range, was proper because it would further "personal deterrence," "general deterrence" and the goal of providing justice to the defendant's "many[,] many . . . victims." See id. at 15.

**B. The Defendant's Prison Record**

Less than one year ago, on September 16, 2019, the defendant began serving his sentence at FCI Otisville, a minimum security prison camp located in Orange County, New York. Since his incarceration, the defendant has regularly received medical treatment for various conditions. See Def.'s Bureau of Prison Medical Records ("BOP Med. Recs.") (filed under seal as Exhibit B). As most relevant here, the defendant's Bureau of Prison Medical Records, reflect that, since on or about November 7, 2019, he has been treated with atorvastatin, an anti-cholesterol medication. See BOP Med. Recs. at 92. Contrary to the claims in his current motion, the defendant's most recent cholesterol test, administered on or about February 3, 2020, showed that all of his cholesterol readings where either within the relevant normal range or, in the case of his HDL cholesterol, low. See id. at 106. In fact, the BOP Medical Records demonstrate that the elevated cholesterol levels cited in the defendant's motion occurred because—as the defendant admitted in a contemporaneous email to BOP medical staff—he did not "fast" as he was "supposed to" before the test. Id. at

133 (Def. writing to BOP medical staff in Nov. 7, 2019 email chain). As the defendant further conceded in his email, he knew that his failure to "fast" could cause his cholesterol levels to "spike." Id. Not surprisingly, after having been treated with appropriate medication, the defendant's cholesterol levels stabilized, as demonstrated by the dose of his anti-cholesterol medication being lowered from 80 to 20 milligrams on or about February 24, 2020. See BOP Med. Recs. at 92.

Although the defendant was diagnosed with pneumonia about six months before his current incarceration, his BOP Medical Records reflect no complaints concerning any recurrence of this issue. Compare Def.'s Mot. ECF No. 62-3 at 3 with BOP Med. Recs. This despite the fact that while incarcerated, the defendant has apparently continued his smoking habit, which as he was previously advised, contributed to his more than year-old case of pneumonia. ECF No. 62-3 at 3.

With respect to his body mass index ("BMI"), which the defendant also relies upon, the BOP Medical Records show that the defendant's most current weight is "240" pounds, see BOP Medical Records at 4 (Feb. 24, 2020), which, because he is 6'1" tall, results in a body mass index of 31.7. See ECF No. 62-3 at 2 (stating defendant's height); https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html. Although this BMI is considered "obese" according to the Centers for Disease Control ("CDC"), those at "higher risk" for contracting COVID 19 based upon their BMI are individuals who are "severely obese," which the CDC defines as BMI of "40 or above." See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#severe-obesity. To reach this higher risk BMI, the defendant would need weigh

approximately 305 pounds, an increase of more than 60 pounds above his current weight. See https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html.

While incarcerated at FCI Otisville, the defendant has yet again proven himself unable to abide by the rules. In fact, in just about 8 months of incarceration—amounting to approximately 9% of his 86-month sentence—the defendant has incurred two disciplinary infractions. These were imposed because the defendant used his sister—who now submits an affidavit on his behalf—to wire money to a fellow inmate and because the defendant placed an additional mattress in his cell without permission. See BOP Disciplinary History (filed under seal as Exhibit C). Moreover, during his earlier prison stint for drug trafficking, the defendant was disciplined for fighting with another inmate. See id.[1]

**C. The BOP's Denial of the Defendant's Request for Release**

Although the defendant has not yet received a formal denial of his request for compassionate release—which his lawyer filed with the FCI Otisville Warden on or about April 11, 2020—on or about April 22, 2020, the Warden provided the defendant with a written

[1] The earlier fighting incident alone demonstrates that the defendant's current claim that he does not have a history of violent conduct is inaccurate. See Def.'s Mot. at 21. Moreover, the defendant was previously convicted of drug trafficking because he tried to extort a drug debt through intimidation. And, as disclosed in the PSR, the defendant was the subject of a criminal complaint filed with the New York City Police Department, based upon an April 2018 incident that occurred while he was released on bail. During the incident, the defendant threatened his building's superintendent, stating "I'll kick your ass [and] I will fuck you up." PSR at ¶ 47. In addition, in 2015, the defendant was the subject of a Metropolitan Transportation Authority complaint for punching a homeless individual who was begging on the street. See PSR at ¶ 49. Furthermore, during the course of the government's investigation, multiple sources, who were involved in fraudulent binary options schemes with the defendant, have informed the government that the defendant engaged in threatening conduct, sometimes while armed with firearms.

denial of his request for a 30-day furlough. As stated in that document, the Warden denied the defendant's request because the defendant's earliest release date was in October 2025 and he had "served only 8.4% of a[n] 86[-]month sentence." See Apr. 22, 2020 Furlough Denial (attached as Exhibit D). Moreover, the Warden concluded that a furlough was inappropriate because the defendant had committed the two disciplinary infractions described above within the "past 6 months" and because the defendant "has not been identified as having COVID 19 risk factors for serious illness as outlined in CDC guidance." Id.

The denial of the defendant's request for release was in line with an April 22, 2020 BOP Memorandum (the "April 22 Memo."). See Exhibit E (attached). In that memorandum, the BOP explained that the criteria involved in determining whether release based upon the COVID 19 pandemic was appropriate, included "the inmate's institutional discipline history for the last twelve months"; reviewing the inmates recidivism score, with "inmates who have anything above a minimum score not receiving priority treatment"; and "reviewing the age and vulnerability of the inmate to COVID 19, in accordance with CDC guidelines." Id. at 1-2. Here, contrary to the defendant's claim, his BOP records show that his recidivism score is "low," not "minimum." See Def.'s BOP Inmate Profile at 1 (filed under seal as Exhibit F) (noting the defendant's "low risk recidivism level."). Moreover, the April 22 Memorandum makes clear that priority for release should be given to defendants—who unlike Kantor—"have served 50% or more of their sentences" or "have 18 months or less remaining on their sentences and have served 25% or more of their sentences." Id. at 2. Through applying these criteria, the government has been informed by FCI Otisville's Executive Director, the Warden has released 41 of the 105 inmates who were assigned to the

Camp where the defendant is imprisoned. As a result, the defendant is currently housed with just 63 other inmates in a facility that is made to accommodate 116.

The defendant's current claim that he was informed that he would be granted a furlough is false. Instead, the government has confirmed that the Executive Assistant and Camp Director at FCI Otisville, informed all inmates at the Camp that they would be considered for a COVID 19 furlough if they applied for one. Although no promises were made concerning the outcome of that review, the Executive Assistant offered inmates the opportunity to quarantine during the consideration of their applications so that they could be processed for release more quickly if their application was granted. As stated above, the Warden's review of the defendant's application for furlough release demonstrated that it was meritless and, as such, it was denied.

**D. FCI Otisville's Precautionary Measures**

Although the BOP, as a whole, has been severely impacted by COVID-19, FCI Otisville, like all BOP facilities, is currently in Phase 7 of a multi-pronged plan to ensure the health and safety of inmates and prison staff. As part of the plan, the defendant is issued a new surgical mask each week and he has also been issued three washable cloth masks. In addition, all staff members at FCI Otisville are outfitted with appropriate personal protective equipment ("PPE"), including masks, and anti-bacterial soap is widely available throughout the facility.

Currently, in addition to the defendant, there are only sixty-three inmates residing at the camp where the defendant is housed. Because the camp's capacity is 116, this reduced number of inmates makes social distancing possible in many situations, including meals, programming, recreation and religious services. As a further social distancing

measure, inmates are permitted to eat meals in their cells, which not normally allowed. In addition, the defendant currently resides alone in a dormitory cubicle because the bunk bed located above where he sleeps is unoccupied.

As of June 1, 2020, 17 inmates and 13 staff members at FCI Otisville have tested positive for COVID 19. All those who have tested positive were properly quarantined and have since recovered from the disease. None required the use of a ventilator. No inmate has tested positive for COVID 19 since April 14, 2020 and no staff member has tested positive since April 20, 2020, both of which are more than approximately six weeks ago.

More generally, the defendant's medical records demonstrate that the BOP is more than capable of providing adequate medical care to the defendant and most recently provided care to him on or about February 24, 2020 to monitor his cholesterol and to respond to his complaints of back and knee pain as well as warts on his hand. See BOP Med. Recs., Sealed Exhibit B, at 3.

## PROCEDURAL HISTORY

On September 16 2020, the defendant surrendered to begin serving his 86-month sentence. On or about April 11, 2020, essentially repeating the arguments that he makes here, the defendant filed a request for compassionate release with FCI Otisville's Warden. Although the defendant has not yet received a formal written denial, FCI Otisville's Executive Assistant and Camp Administrator has informed the government that the defendant was informed verbally that his request for compassionate release was denied. As described above, the Warden also issued a written denial of the defendant's furlough request. On or about May 26, 2020, the defendant filed his present motion.

## ARGUMENT

### I. The Defendant Has Not Met His Burden to Demonstrate "Extraordinary and Compelling" Reasons For His Immediate Release

The Court should reject the defendant's motion because he has not met his burden to demonstrate "extraordinary and compelling" reasons for his immediate release. As discussed further below, and as the Warden of FCI Otisville has already concluded, this forty-five year old defendant does not appear to be at higher risk of serious complications from COVID-19 under the CDC criteria. The defendant's supposed medical justification for his release consists of a single, more than year-old, documented instance of pneumonia caused by his smoking habit, his 31.7 BMI—which is not within the "higher risk" "severely obese" category that the CDC has identified—and his cholesterol, which his BOP medical records demonstrates is currently normal because of the treatment and medication that BOP personnel has administered to him. Far from being "extraordinary and compelling," this showing is woefully deficient. Further demonstrating the meritless nature of the defendant's motion are the precautions that FCI Otisville has taken to ensure the health and safety of all inmates and staff, which, as noted above, have resulted in no new cases of COVID 19 since April 20, 2020.

The defendant's effort to obtain release based upon his mother's medical condition, which the Court already rejected at sentencing, is equally flawed. See Exhibit A at 15. Contrary to the defendant's claim, his release to home confinement was demonstrably not an "enormous success." See Def.'s Mot. at 6. After all, while supposedly caring for his mother, the defendant violated his bail conditions by using cocaine and arriving to his presentence interview high on that drug. And this failure to abide by the rules occurred after

the Court imposed home confinement because the defendant violated the no-contact provision of his bail by attempting to contact a co-conspirator. Thus, even without his egregious record of recidivism, bail violations and history of complaints for violent conduct, the defendant's ability to provide adequate care for anyone is obviously lacking. See United States v. Lisi, 2020 WL 881994, at *6 (S.D.N.Y. Feb. 24, 2020), reconsideration denied, No. 15 CR. 457 (KPF), 2020 WL 1331955 (S.D.N.Y. Mar. 23, 2020) (denying compassionate release because the defendant "has known of his mother's declining health for the last ten years. He could have devoted himself to planning for her care. Instead, he chose to devote his energies towards a series of frauds for which he has to this day failed to account for. Worse yet, [the defendant] has sought to capitalize on his mother's woes by proffering them as a basis for leniency, even as he continued — undeterred and with evident disregard for [his mother's] conditions — to engage in criminal conduct. Compassionate release was not intended to reward such unrepentant defendants, regardless of the circumstances they have, through their own misdeeds, put their family members in.").

The defendant's request for release is also incredible. This is because he proposes to move from the highly-controlled environment of a federal prison in Otisville, New York—which has not experienced a COVID-19 positive result amongst inmates and staff for nearly six weeks—to his mother's home in Fort Lee, New Jersey, which is located in the epicenter of the pandemic and which is experiencing new infections daily. Indeed, Bergen County, New Jersey, where Fort Lee is located, has had nearly twice the number of COVID-19 cases and four times the amount of deaths from the virus compared to Orange County, New York, where FCI Otisville is located. Compare https://covid19tracker. health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID 19TrackerMap?%3

Aembed=yes &%3Atoolbar=no&%3Atabs=n (last visited June 2, 2020) (noting that Orange County has had 10,422 residents test positive for COVID-19 since the start of the outbreak) and https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n (last visited June 2, 2020) (376 COVID-19 deaths in Orange County) with https://www.nj.gov/health/cd/topics/covid2019_dashboard.shtml (last visited June 2, 2020) (noting 18,302 positive COVID-19 test results and 1,580 deaths in Bergen County). The defendant's request that the Court grant him permission to "leave home only for grocery shopping, medical appointments, and other essential caretaking," all of which would repeatedly expose him to infection in one of the country's COVID-19 hotspots only further underscores how meritless his current application is. Cf. United States v. Davenport, No. 17-CR-61 (LAP) (S.D.N.Y. Apr. 9, 2020) (ECF No. 255, at 2) (denying as insufficiently compelling 18 U.S.C. § 3582(c)(1)(A) motion of defendant with diabetes and heart disease; explaining "that there are no current cases of COVID-19 at Schuylkill but that Haverford, the town in which [the defendant] proposes to be released, has one of the highest rates of COVID-19 infection in the Commonwealth of Pennsylvania").

In addition, the defendant has served only approximately eight months, or around 9%, of an 86-month sentence that the Court imposed because of the egregious fraudulent and obstructive conduct that the defendant committed despite having already served a substantial federal sentence for drug trafficking. Unlike the precedents that the defendant cites, see Def.'s Mot. at 3, 14, 16, the defendant has come nowhere near serving a substantial portion of his sentence, let alone the 50% of time that would be required to consider him for priority COVID-19 release under the BOP's April 22 Memorandum. See

Exhibit E; Compare United States v. Sawicz, Case No. 08-cr-287, ECF No. 66 (E.D.N.Y. Apr. 10, 2020) (ordering compassionate release where the defendant was "less than five months away from the date on which he would be eligible for release to home confinement under normal circumstances.") and United States v. Plunk, No. 94-CR-36 (TMB), ECF No. 733, at 3, 6 (D. Alaska Apr. 9, 2020) (ordering release with the consent of the government because the "26 year sentence [that the] Defendant has served to date" satisfied the goals of sentencing under 18 U.S.C. § 3353(a)); and United States v. Perez, No. 17-CR-513 (AT), ECF No. 98, at 5 (S.D.N.Y. Apr. 1, 2020) (granting release where the defendant had "less than three weeks remaining on his sentence"). As such releasing him would be fundamentally unjust to his victims and society and would not serve the goals of "personal" and "general" deterrence that the Court reasoned that its sentence furthered. See 18 U.S.C. § 3353(a); Exhibit A at 15; United States v. Kerrigan, 2020 WL 2488269, at *4 (S.D.N.Y. May 14, 2020) (rejecting compassionate release motion based on COVID-19 because "converting Kerrigan's 7.5-year term of incarceration into one of home confinement, when he has served little more than two years of his original sentence, would disserve the above important sentencing factors," including "the nature and circumstances of the offense" and the need for the sentence imposed to "reflect the seriousness of the offense," "promote respect for the law," "provide just punishment for the offense," "afford adequate deterrence to criminal conduct," and "protect the public from further crimes of the defendant."); United States v. Okpala, No. 17-CR-533 (CBA), ECF No. 51 (denying compassionate release, noting the "serial nature" of the defendant's violations of supervised release and reasoning that proper deterrence counseled against "granting leniency from the sentence imposed.").

**A. Applicable Law**

Under Section 3582, the Court "may reduce the term of imprisonment . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that . . . extraordinary and compelling reasons warrant such a reduction . . . and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(1)(A).

The relevant Sentencing Commission policy statement is U.S.S.G. § 1B1.13. That statement provides that the Court may reduce the term of imprisonment if "extraordinary and compelling reasons warrant the reduction," id. § 1B1.13(1)(A); "the defendant is not a danger to the safety of any other person or to the community, as provided in 18 U.S.C. § 3142(g)," id. § 1B1.13(2); and "the reduction is consistent with this policy statement," id. § 1B1.13(3).

The Application Note describes the circumstances under which "extraordinary and compelling reasons exist":

> (A) Medical Condition of the Defendant. —
>
> (i) The defendant is suffering from a terminal illness (*i.e.*, a serious and advanced illness with an end of life trajectory). A specific prognosis of life expectancy (*i.e.*, a probability of death within a specific time period) is not required. Examples include metastatic solid-tumor cancer, amyotrophic lateral sclerosis (ALS), end-stage organ disease, and advanced dementia.
>
> (ii) The defendant is—
>
> (I) suffering from a serious physical or medical condition,
> (II) suffering from a serious functional or cognitive impairment, or
> (III) experiencing deteriorating physical or mental health because of the aging process,

> that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover.
>
> (B) Age of the Defendant. — The defendant (i) is at least 65 years old; (ii) is experiencing a serious deterioration in physical or mental health because of the aging process; and (iii) has served at least 10 years or 75 percent of his or her term of imprisonment, whichever is less.
>
> (C) Family circumstances. —
>
> (i) The death or incapacitation of the caregiver of the defendant's minor child or minor children.
> (ii) The incapacitation of the defendant's spouse or registered partner when the defendant would be the only available caregiver for the spouse or registered partner.
>
> (D) Other Reasons. — As determined by the Director of the Bureau of Prisons, there exists in the defendant's case an extraordinary and compelling reason other than, or in combination with, the reasons described in subdivisions (A) through (C).

Id. § 1B1.13 Application Note 1.

Regardless of the theory of "extraordinary and compelling reasons" under which a defendant proceeds, as noted above, the 18 U.S.C. § 3553(a) factors are relevant to whether release is warranted. See 18 U.S.C. § 3582; U.S.S.G. § 1B1.13.

The Guidelines and BOP policy have established clear criteria to aid in a court's determination of when compassionate release is appropriate pursuant to 18 U.S.C. § 3582(c)(1)(A)(i). See U.S.S.G. § 1B1.13; see also BOP Program Statement 5050.50. Both the Guidelines and the BOP Program Statement primarily limit compassionate relief to cases of serious illness or impairment, advanced age or a need to care for a child, spouse or registered partner. See id.; see also United States v. Traynor, 04-CR-0582 (NGG), 2009 WL 368927, at *1 n.2 (E.D.N.Y. Feb. 13, 2009). As the court recognized in Traynor, Congress

noted that Section 3582(c)(1) "applies . . . to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner." Id. at *1 (citing Senate Report No. 98–225, 98th Cong., 2d Sess., reprinted in 1984 U.S.C.C.A.N. 3182, 3304).

As the proponent of release, the defendant bears the burden of proving that "extraordinary and compelling reasons" exist. See United States v. Butler, 970 F.2d 1017, 1026 (2d Cir. 1992) ("If the defendant seeks decreased punishment, he or she has the burden of showing that the circumstances warrant that decrease."); United States v. Gotti, No. 02-CR-743 (CM), 2020 WL 497987, at *5 (S.D.N.Y. Jan. 15, 2020) (defendant "has the burden of showing that 'extraordinary and compelling reasons' to reduce his sentence exist").

### B. The BOP's Response to the COVID-19 Pandemic

The BOP has made and continues to make significant efforts to respond to the threat posed by COVID-19. Since at least October 2012, the BOP has had a Pandemic Influenza Plan. See BOP Health Management Resources, https://www.bop.gov/resources /health_care_mngmt.jsp. In January 2020, the BOP began to plan specifically for COVID-19 to ensure the health and safety of inmates and BOP personnel. See BOP COVID-19 Action Plan, https://www.bop.gov/resources/news/20200313_covid-19.jsp. As part of its Phase One response, the BOP began to study "where the infection was occurring and best practices to mitigate transmission." Id. In addition, the BOP stood up "an agency task force" to study and coordinate its response, including using "subject-matter experts both internal and external to the agency including guidance and directives from the [World Health Organization (WHO)], the [Centers for Disease Control and Prevention (CDC)], the Office of Personnel Management (OPM), the Department of Justice (DOJ) and the Office of the

Vice President. BOP's planning is structured using the Incident Command System (ICS) framework." Id.

On or about March 13, 2020, the BOP implemented its Phase Two response "to mitigate the spread of COVID-19, acknowledging the United States will have more confirmed cases in the coming weeks and also noting that the population density of prisons creates a risk of infection and transmission for inmates and staff." Id. These national measures were intended to "ensure the continued effective operations of the federal prison system and to ensure that staff remain healthy and available for duty." Id. For example, the BOP (a) suspended social visits for 30 days (but increased inmates access to telephone calls); (b) suspended legal visits for 30 days (with case-by-case accommodations); (c) suspended inmate movement for 30 days (with case-by-case exceptions, including for medical treatment); (d) suspended official staff travel for 30 days; (e) suspended staff training for 30 days; (f) restricted contractor access to BOP facilities to only those performing essential services, such as medical treatment; (g) suspended volunteer visits for 30 days; (h) suspended tours for 30 days; and (i) generally "implement[ed] nationwide modified operations to maximize social distancing and limit group gatherings in [its] facilities." Id. In addition, the BOP implemented screening protocols for both BOP staff and inmates, with staff being subject to "enhanced screening" and inmates being subject to screening managed by its infectious disease management programs. Id. As part of the BOP's inmate screening process, (i) "[a]ll newly-arriving BOP inmates are being screened for COVID-19 exposure risk factors and symptoms"; (ii) "[a]symptomatic inmates with exposure risk factors are quarantined; and (iii) "[s]ymptomatic inmates with exposure risk factors are isolated and tested for COVID-19 per local health authority protocols." Id.

On or about March 18, 2020, the BOP implemented Phase Three, which entailed: (a) implementing an action plan to maximize telework for employees and staff; (b) inventorying all cleaning, sanitation, and medical supplies; (c) making sure that ample supplies were on hand and ready to be distributed or moved to any facility as deemed necessary; and (d) placing additional orders for those supplies, in case of a protracted event. See BOP Update on COVID-19, https://www.bop.gov/resources/news/pdfs/20200324 _bop_press_release _covid19_update.pdf.

On or about March 26, 2020, the BOP implemented Phase Four, which entailed: (a) updating its quarantine and isolation procedures to require all newly admitted inmates to BOP, whether in a sustained community transition area or not, be assessed using a screening tool and temperature check (including all new intakes, detainees, commitments, writ returns from judicial proceedings, and parole violators, regardless of their method of arrival); (b) placing asymptomatic inmates in quarantine for a minimum of 14 days or until cleared by medical staff; and (c) placing symptomatic inmates in isolation until they test negative for COVID-19 or are cleared by medical staff as meeting CDC criteria for release from isolation. See BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/ resources/news/20200331_covid19_action_plan_5.jsp.

On or about April 1, 2020, the BOP implemented Phase Five, which entails: (a) securing inmates in every institution to their assigned cells/quarters for a 14-day period to decrease the spread of the virus; (b) to the extent practicable, offering inmates access to programs and services that are offered under normal operating procedures, such as mental health treatment and education; (c) coordinating with the United States Marshals Service to significantly decrease incoming movement; (d) preparing to reevaluate after 14 days and

make a decision as to whether or not to return to modified operations; and (e) affording limited group gathering to the extent practical to facilitate commissary, laundry, showers, telephone, and Trust Fund Limited Inmate Computer System (TRULINCS) access. Id. All new inmates are screened, and those with any risk factors, even if asymptomatic, are quarantined. See BOP Implementing Modified Operations, https://www.bop.gov/coronavirus/covid19_status.jsp; BOP COVID-19 Action Plan: Phase Five, https://www.bop.gov/resources/news/20200331_covid19_action_plan_5.jsp.

On or about April 13, 2020, the BOP implemented Phase Six, which extended all measures from Phase Five, including enhanced modified operations for all institutions, until May 18, 2020. See https://www.bop.gov/resources/news/pdfs/20200414_press_release_action_plan_6.pdf.

On or about May 20, 2020, the BOP announced Phase Seven, which extended measures from prior phases, including enhanced modified operations for all institutions, until June 30, 2020. See https://www.bop.gov/resources/news/20200520_dir_message.jsp. In addition, BOP announced an additional testing initiative to test inmates and staff using rapid testing. See id.

The BOP has also "increased Home Confinement by over 40% since March and is continuing to aggressively screen all potential inmates for Home Confinement." Update on COVID-19 and Home Confinement, https://www.bop.gov/resources/news/20200405_covid19 _home_confinement.jsp. In addition, the BOP "has begun immediately reviewing all inmates who have COVID-19 risk factors, as described by the CDC, starting with the inmates incarcerated at FCI Oakdale, FCI Danbury, FCI Elkton and

similarly-situated facilities [with COVID-19 outbreaks] to determine which inmates are suitable for home confinement." Id.

**C. Discussion**

The defendant argues that he is at an increased risk of serious complications from COVID-19. This, he claims, is the result of a single documented instance of pneumonia that occurred in March 2019; his "obese" BMI; and his purportedly "high" cholesterol. See Def.'s Mot. at 4. The defendant also argues that his mother's medical condition warrants his release because his sister and stepfather are "returning to work" and cannot afford to pay for his mother's care. Id. at 19. In urging release, the defendant points to the allegedly "enormous success" that he had while on pretrial supervision. Id. at 6. Unmentioned in the defendant's motion are his use of cocaine in violation of his pretrial release conditions, while he allegedly "cared" for his mother, and his use of his sister to attempt to contact a co-conspirator in violation of the no-contact order contained in his bail conditions. PSR at ¶ 4. Also unmentioned is the status of the defendant's brother, who, at the time the PSR was prepared, resided in New Jersey, was employed as a dental supply salesperson and was in "good health." PSR at ¶ 54. Nor does the defendant mention the three children of his step-father, who resides with his mother and sister in Fort Lee. Id.

**1. Kantor Has No Extraordinary Medical Condition that Warrants Release**

According to the CDC, Severe obesity, defined as a body mass index (BMI) of 40 or above, puts people at higher risk for complications from COVID-19. See https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html#severe-obesity. Significantly, defendant's own submission demonstrates that he

does not meet this criteria. Indeed, the defendant's March 2019 medical records show that he is 6'1" tall, 245 pounds and that his BMI was "32.323." ECF No. 62-3 at 2. Based upon his most recent Otisville medical records, weighed "240" pounds as of February 2020. See BOP Med. Recs. at 4. Thus, while in prison the defendant's BMI has decreased to 31.7. See https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/english_bmi_calculator/bmi_calculator.html (CDC BMI Calculator). Although this BMI is classified at the lower range of "obese," it is well short of the BMI of 40 that puts "severely obese" individuals at "higher risk" of developing COVID 19. Accordingly, the defendant's reliance on his BMI as a basis for release fails.

Neither does the defendant's cholesterol provide an "extraordinary and compelling" basis for release. Instead, the defendant's current BOP Medical Records show that, as of February 3, 2020, immediately before the pandemic, the defendant's cholesterol was normal. See BOP Med. Recs. at 107. The defendant's reliance upon cholesterol readings that were elevated because he admittedly failed to "fast" as required for proper testing and that have since been demonstrably controlled through the BOP's administration of anti-cholesterol medication only underscore the transparently self-serving and manipulative nature of the defendant's present motion. See id. at 133. In any event, the CDC has not identified "high cholesterol," standing alone, as a factor placing individuals at "higher risk" for developing COVID 19. As such, the defendant's reliance upon his cholesterol levels, which have been stabilized with medication to normal, is misplaced.

Similarly, the defendant's smoking habit and single instance of pneumonia are not "extraordinary and compelling." Although the CDC guidance does state that individuals with "chronic lung diseases," are at "higher risk" of COVID 19 infection, a single instance of

pneumonia cannot reasonably be characterized as "chronic." Indeed, the BOP Medical Records show that the defendant has never been diagnosed with pneumonia during the more than eight months that he has been incarcerated. Moreover, the CDC guidance does not reflect a concern that smokers are at greater risk for COVID 19 transmission and to the extent that the defendant believes his continued to decision to smoke affects him negatively, he should simply take the advice of the doctor who diagnosed him with pneumonia in March 2019 and use his time in prison to "quit smoking." See ECF No. 62-3 at 3.

In summary, the defendant does not have a "medically-vulnerable" condition so serious that it warrants the extraordinary relief he seeks of immediate and permanent release from prison. In short, even accepting his purported medical conditions at face value, the defendant, who is only 45 years old, has not shown that he is at an increased risk of contracting or having a severe reaction to COVID-19 because he is being treated with cholesterol medication, has a BMI characterized as "obese," and is a smoker who was diagnosed with pneumonia more than a year ago. Such common conditions, standing alone, are not sufficient for the defendant to discharge his burden to demonstrate that he—personally and individually—falls into the narrow band of inmates who are "suffering from a serious physical or medical condition," "that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and from which he or she is not expected to recover." U.S.S.G. § 1B1.13, Application Note 1(A). See, e.g., Gileno, 2020 WL 1307108, at *4 (D. Conn. Mar. 19, 2020) (defendant, who allegedly suffered from high blood pressure, high cholesterol, asthma, and allergies, "has not shown that his medical issues, which remain largely the same as when he was sentenced, 'substantially diminish [his] ability . . . to provide self-care' within the correctional facility"

(brackets in original)); Kerrigan, 2020 WL 2488269, at *3 (denying compassionate release to 43-year-old defendant because his "age and the medical issues he belatedly identifies are not severe enough to warrant compassionate release.").

Nor do the defendant's generalized complaints about the BOP's response to the COVID-19 pandemic, and his concern that he could contract COVID-19 at some point while incarcerated, furnish a basis to meet his burden. As detailed above, the measures taken by the BOP, in general, and FCI Otisville, in particular, belie the defendant's suggestion that the BOP is failing to address meaningfully the risk posed by COVID-19 to inmates. To the contrary, they show that the BOP has taken the threat seriously, has mitigated it, and continues to update policies and procedures in accord with the facts and recommendations. This is particularly true at FCI Otisville, where the defendant is incarcerated in a one-man cell with PPE, anti-bacterial soap and the ability to socially distance because of BOP measures that have reduced the current inmate population at FCI Otisville to just 64, including the defendant. Indeed, FCI Otisville has not seen any inmate or staff deaths, has had only 30 inmates and staff test positive—all of whom have recovered—and which has not experienced a positive test since April 20, 2020. The risk of potential exposure to COVID-19 in a BOP facility cannot alone form the basis to release a sentenced prisoner, particularly in a case such as this one where he is both relatively young and not in a high-risk category. See United States v. Raia, 2020 WL 1647922, at *2 (3d Cir. Apr. 2, 2020) ("We do not mean to minimize the risks that COVID-19 poses in the federal prison system, particularly for inmates like Raia. But the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot

independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread.").

**2. The Defendant's Effort to Use His Mother's Medical Condition to Gain Release is Not "Extraordinary and Compelling"**

Likewise, the defendant's claim that his mother's medical condition warrants release is unavailing. As an initial matter, compassionate release is not intended to allow for care of all relatives. Rather, it is intended to apply when the defendant is the "only available caregiver" for a spouse, registered partner or child. U.S.S.G. § 1B1.13 Application Note 1. Here, the defendant's stepfather and sister, both of whom reside with his mother, are "available" caregivers. So, too, are the defendant's brother, who resides in New Jersey, and his stepsiblings. Id.[2] Likewise, the alleged financial burden related to the defendant's mother's care is not an "extraordinary and compelling" reason for release, but the inevitable outgrowth of the defendant's selfish decision to defraud his victims of more than $1.5 million after he already experienced what should have been the chastening effect of a significant federal prison sentence for drug trafficking. See Lisi, 2020 WL 881994, at *6 (denying compassionate release because the defendant "has known of his mother's declining

[2] The defendant's rehashed effort to obtain release based on his stepfather's and sister's supposed difficulties in caring for his mother pales in comparison to the only parental care case that he cites in support of his motion. See Def.'s Mot. at 20 (citing United States v. Hernandez, 16-cr-20091, ECF No. 561 (S.D. Fla. Apr. 3, 2020)). Indeed, in Hernandez, the defendant was the only available caregiver for his blind eighty-four year old mother because the brother who resided with her had been "involuntarily committed" to a mental institution and was not able to care for his mother because of his "mental instability and prior violent outbursts." See id. at ECF No. 553, p. 3. And Hernandez is even more inapposite because there the defendant was just "7 months" away from his ordinary release date and had compiled an "exemplary" prison disciplinary record. See id. at 1-2. Here, in contrast, the defendant has served approximately 9% of an 86-month sentence and has a poor prison disciplinary record, having already received two disciplinary infractions in just around eight months of imprisonment.

health for the last ten years. He could have devoted himself to planning for her care. Instead, he chose to devote his energies towards a series of frauds for which he has to this day failed to account for."). In any event, the defendant's record of bail violations, including testing positive for cocaine when he claims to have been "caring" for his mother, thoroughly undercuts his effort to obtain release on the basis of his supposed caregiving abilities. Indeed, the Court already rejected the defendant's attempt to obtain leniency based upon his mother's infirmities when it initially sentenced him and the Court should continue to adhere to that determination here. See Exhibit A at 15.

**3. The Section 3553(a) Factors Weigh Against the Defendant's Release**

Because the defendant has not met his burden to show that there are "extraordinary and compelling reasons" that might permit his release at this time, the Court need not proceed to the analysis under Section 3553(a) as to whether release is indeed warranted. See 18 U.S.C. § 3582; U.S.S.G. § 1B1.13. However, if a Section 3553(a) analysis was conducted, it would weigh against the defendant's release. The Court evaluated these factors in selecting the 86-month sentence here and specifically noted that the sentence was appropriate to further the aims of specific and general deterrence and provide justice for the defendant's victims. See Exhibit A at 15. To allow the sentence here to be converted to a sentence of just eight-months would not properly reflect and account for the nature and circumstances of the offense (theft by deception of at least $1.5 million in a sophisticated financial fraud and subsequent obstruction of a grand jury investigation into that fraudulent scheme), the history and characteristics of the defendant (who was previously convicted of drug trafficking, repeatedly violated the conditions of his bail, has a poor prison disciplinary record and has a demonstrated record of violent conduct, both while in prison and as

demonstrated by complaints filed against him for assault and other conduct), just punishment, both specific and general deterrence, protection of the public from additional fraudulent schemes and the defendant's erratic behavior and avoiding unwarranted sentencing disparities. See 18 U.S.C. § 3553(a); Exhibit A at 15.

## CONCLUSION

For the foregoing reasons, the defendant's motion should be denied.

Dated: Central Islip, New York
June 2, 2020

Respectfully submitted,

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