UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
_________________________________/

DEFENDANT ERIC SHEPPARD'S RESPONSE TO [DKT. No. 235] THE GOVERNMENT'S OBJECTIONS TO THE PRESENTENCE INVESTIGATION REPORT

Defendant Eric Sheppard ("Sheppard") respectfully submits the following Response to the government's Objections to the Presentence Investigation Report ("PSR").[1]

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[1] Sheppard also hereby corrects an inadvertent error on page 15 of his previously-filed Sentencing Memorandum, where we (mistakenly) stated: "And Sheppard did just that by paying ***$4,001,962.56 to his workers*** …" Dkt. No. 236-1at 15 (emphasis added). We should instead have stated: "And Sheppard did just that by paying ***a total of $4,001,962.56 toward permissible business expenses under the PPP and COVID-19 EIDL program, including but not limited to, payments to his workers*** (who were eligible for PPP and EIDL proceeds), at the peak of the pandemic, between May 2020 and December 2021—far in excess of the amount he received as government benefits under the PPP and COVID-19 EIDL program." Sheppard notified the government of this error via email on May 21, 2024, which pointed out that elsewhere in the Sentencing Memorandum we made clear that the "$4,001,962.56 were used for permissible purposes under the PPP and EIDL Program, namely, paying workers ***and paying off business expenses***." *Id*. at 14; *see also id*. at 17 ("$830,620.90 (*i.e.*, $676,946.90 in "Payroll" plus $153,674.00 in "Payroll to Individual Workers Incurred by Project Manager") was paid as payroll to workers, alongside $3,171,341.66 in other non-payroll business expenses, for a total of $4,001,962.56 in permissible uses of loan proceeds."). We apologize for any confusion our error may have caused.

Paragraph 37:

Sheppard makes no reply to the government's correction of the time frame set forth in the Offense Conduct at Paragraph 37.

Paragraphs 103, 109:

The government asserts that "Sheppard was not truthful in reporting to Probation that he does not earn any income from HM-UP Development Alafaya Trails, LLC because the company sold its assets in September 2022. Dkt. No. 235 at 1-2. The government claims that Sheppard sold the real property known as "Shoppes at Alafaya Trails" to himself. This assertion is incorrect.

Sheppard had originally planned (prior to the government's initial indictment) to refinance the loan associated with the Shoppes, as it had a come-due date of September 22, 2022, but was compelled to sell the Shoppes because, as a result of the July 2022 indictment, the bank no longer allowed him to be a guarantor on the loan.

Toward that end, on September 22, 2022, Sheppard, as a beneficial owner and managing-member of [seller] HM-UP Development Alafaya Trails, LLC ("HM-UP"), involuntarily caused the sale of the Shoppes to [buyer] 1200 Alafaya LLC, which is owned by two entities: [managing member] 1200 Alafaya Manager LLC (52%) and WAPD Holdings LLC (48%). Jennifer Sheppard is a 99% owner of 1200 Alafaya Manager LLC.

Therefore, [buyer] 1200 Alafaya LLC is not an alter ego of HM-UP —the two companies have different lenders, loans, and guarantors, with Sheppard neither as the new lender nor the new guarantor of 1200 Alafaya LLC. And at present, the property is not profitable.

<u>Paragraph 105:</u>

In its Objections to the PSR, the government objects to the description of HM Four, LLC as "active for the purpose of overseeing a 150,000 square foot shopping center and its common area requirements" in Paragraph 105 of the PSR. The government argues that HM Four was "a passive owner of Alafaya Trails" that was not entitled to a COVID-19 Economic Injury Disaster Loan ("EIDL"). Dkt. No. 235, at 2. The government's objection is without merit; the evidence at trial supports Paragraph 105's characterization of HM Four as an "active" company.

At trial, Sheppard presented evidence indicating that HM Four had its own operational responsibilities and business functions, with multiple business functions beyond being the managing-member for this asset, including maintaining the common area of the property and other upkeep. *See* Def. Ex. M-50 (a "Declaration of Reciprocal Easements, Rights, and Maintenance Covenants for Shoppes at Alafaya Trail" containing and detailing HM Four's contractual obligations). For example, Sheppard testified that he applied for the EIDL loan on behalf of HM Four to cover HM Four's business expenses apart from the ownership of HM-UP Development Alafaya Trails:

> Q: Now, separately, on your own, October 22nd, 2020 you apply on behalf of the owner of HM-UP Development Alafaya Trails for its own Economic Injury Disaster Loan, correct?
>
> A: Well, implied for HM-Four for the other functions and their other business not for the ownership of the 99 percent of HM-Up. This was specifically HM-Four was applying for their other obligations and their business that they have -- that's what was applied for, the purpose.

1/9/24 A.M. Tr. 83:25-84:7.

Sheppard further testified that, regarding a lease between HM Four and another entity (Pacific Management), HM Four was responsible for maintaining the common area of the property as set forth in the Declaration of Reciprocal Easements, Rights, and Maintenance Covenants for Shoppes at Alafaya Trail (Def. Ex. M-50; *see also* Gov't Ex. 58), a recorded document with Orange County, Florida, and that was the subject of the lease:

> Q. Mr. Sheppard, you were shown in cross some type of a computer report or printout reflecting a lease or -- between or a draft lease between the Pacific management and HM-Up. Do you recall being shown something along those lines?
>
> A. Yes.
>
> Q. How did that -- how and why did that turn into the HM-Four lease?
>
> A. I'm sorry how did it turn into the HM-Four lease.
>
> Q. Yes?
>
> A. When the negotiation was going on for the new lease for a short-term 6-m[onth] lease, they would not provide the financial statements of the new company Pacific management and that was a problem because we knew SOS furniture but we didn't know who Pacific

management was so during the negotiations that's when we shifted it to HM-Four because we couldn't get the financial information there and short reason why that is -- relates to the shifts it to HM-Four. I thought it was very strange a national company would change their tenant from SOS furniture to Pacific management that was very strange for a national company so obviously there was something wrong we wanted to see the financials. They wouldn't give us the financials. *So we change -- I say okay fine then we're going to put HM-Four as the landlord.* And whatever this Pacific management is.

Q: What was the business reason to switch them over that reason or others -- what was the issue with keeping it with HM-Up?

A: They were -- we just wanted them out, and they wouldn't leave. So I just did not want to get into litigation with HM-Up because I have a 20 million-dollar loan in HM-Ups name. *HM-Four owns it, and HM-Four is responsible for all the common area.* And since they haven't been paying rent for a long time. They owed approximately $70,000, I'm like: Listen, you're no[t] going on[sic] sue me during COVID -- not me, but HM-Up. If you're going to put this false -- I don't know false -- this company I have no idea who they are, okay. *But HM-Four is in charge of all the common area which you are delinquent with.* So HM-Four -- the 99 percent owner of HM-Up -- that's how the decision came about to avoid any type of litigation that this guy has shown that he was, you know, capable of.

1/9/24 P.M. Tr. 97:11-98:25 (emphasis added).

Sheppard was not the only witness to testify to HM Four's business functions outside of its ownership of HM-UP Development Alafaya Trails. Sheppard's partner, Robert Kallman, also testified that HM Four was responsible for the common area maintenance of the property owned by HM-UP Development Alafaya Trails:

Q. Do you know what -- what cam is sorry?

A. *Common area maintenance*.

MR. ETRA: Sorry Your Honor.

Q. Generally speaking do you know what that is?

A. Yes, I do.

Q. Briefly, what is it?

A. *Cam is all the expenses everything outside the tenants demised property for instance the walkways the parking lot, the garbage areas. The lighting in the parking lot. Anything that encompasses that is not the tenant's actual demised property itself.*

Q. Do you know what an REA is?

A. Yes, I do.

Q. And generally speaking what is the function of an R?

A. The R is the master document that governs the rules and regulations of the project. It's a very important document. It lays out the what the tenants can and cannot do. It lays out the scope of the common area. The control, and what happens in the overall project and the overall -- and building of the --

Q: Did HM-Four have any operational responsibilities at the project?

A: *HM-Four management basically ran the cam.*

Q: Okay. Put up the HM-Four operating agreement. Sir are you familiar generally with this document?

A: Yes.

Q: And generally, what, if anything, was HM-Four's responsibility under this agreement?

A: *HM-Four -- hmfourmanager would be responsible basically for the cam*. And at is search point HM Management. Guys back -- it's slightly confusing because all of the companies are named HM so I forget sometimes what the actual pecking order is.

1/9/24 P.M. Tr. 114:3-115:9 (emphasis added).

The abovementioned testimony indicates that HM Four is more than just a pass-through company: HM Four had its own business functions and expenses that made it EIDL-eligible, including those stemming from the common area maintenance of the property owned by HM-UP Development Alafaya Trails. And it is evident that the jury believed Sheppard's and Kallman's testimony on the matter as the jury acquitted Sheppard of all charges related to the HM Four EIDL loan. Thus, as evidenced by the abovementioned testimony, Paragraph 105 of the PSR is correct: HM Four is "active for the purpose of overseeing a 150,000 square foot shopping center and its common area requirements." The government's objection regarding this paragraph should be overruled.

Paragraphs 75, 118:

Finally, in its Objections to the PSR, the government objects to the total offense level of 25 because it does not include an additional two-level enhancement under U.S.S.G. § 2B1.1(b)(12), which applies if the offense involved conduct described in 18 U.S.C. § 1040. The government's objection is misplaced. Section 2B1.1(b)(12) of the Guidelines provides that "[i]f the offense involved conduct described in 18 U.S.C. § 1040, increase by 2 levels." In turn, 18 U.S.C. § 1040 proscribes, in relevant part,

> (1) falsif[ying], conceal[ing], or cover[ing] up by any trick, scheme, or device any material fact; or
>
> (2) mak[ing] any materially false, fictitious, or fraudulent statement or representation, or mak[ing] or us[ing] any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or representation
>
> in any manner involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with a major disaster declaration under section 401 of the Robert T.

> Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170) or an emergency declaration under section 501 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5191)[.]

18 U.S.C. § 1040(a). "Benefit" is defined by the statute as "any record, voucher, payment, money or thing of value, good, service, right, or privilege provided by the United States, a State or local government, or other entity." *Id.* § 1040(c). The Robert T. Stafford Disaster Relief and Emergency Assistance Act (the "Stafford Act"), 42 U.S.C. §§ 5121-5208, sets forth the process by which the President may declare a state of major disaster or emergency that would necessitate federal assistance to state and local governments. The Stafford Act defines a "major disaster" as

> any natural catastrophe (including any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought), or, regardless of cause, any fire, flood, or explosion, in any part of the United States, which in the determination of the President causes damage of sufficient severity and magnitude to warrant major disaster assistance under this chapter to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.

42 U.S.C. § 5122(2). And the Stafford Act defines "emergency" as

> any occasion or instance for which, in the determination of the President, Federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to lessen or avert the threat of a catastrophe in any part of the United States.

42 U.S.C. § 5122(1).

The government contends that payments under the Paycheck Protection Program ("PPP") and COVID-19 EIDL program are "benefits" within the meaning of 18 U.S.C. § 1040, and thus, the two-level enhancement under U.S.S.G. § 2B1.1(b)(12) applies here. However, the government ignores that the provision of the Coronavirus Aid, Relief, and Economic Security ("CARES") Act that created the PPP and authorized the loans issued thereunder does not mention, or invoke any of the terms as defined by, the Stafford Act. *See* CARES Act, § 1102, 134 Stat. 281, 286-94. Nor do any of the PPP's rules or regulations cite to or mention the Stafford Act.[2] Thus, it strains credulity to find that PPP loans are somehow benefits "authorized, transported, transmitted, transferred, disbursed, or paid in connection with" a major disaster or emergency declaration under the Stafford Act. The government attempts to conjure a connection between the Stafford Act and the PPP where one simply does not exist. And, as the government admits, there is no case law to support the application of U.S.S.G. §2B1.1(b)(12) to PPP loans. *See* Dkt. No.

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[2] See 85 Fed. Reg. 20811 (Apr. 15, 2020); 85 Fed. Reg. 20817 (Apr. 15, 2020); 85 Fed. Reg. 21747 (Apr. 20, 2020); 85 Fed. Reg. 23450 (Apr. 28, 2020); 85 Fed. Reg. 23917 (Apr. 30, 2020); 85 Fed. Reg. 26321 (May 4, 2020); 85 Fed. Reg. 26324 (May 4, 2020); 85 Fed. Reg. 27827 (May 8, 2020); 85 Fed. Reg. 29845 (May 19, 2020); 85 Fed Reg. 29842 (May 19, 2020); 85 Fed. Reg. 29847 (May 19, 2020); 85 Fed. Reg. 30835 (May 21, 2020); 85 Fed. Reg. 31357 (May 26, 2020); 85 Fed. Reg. 33004 (Jun. 1, 2020); 85 Fed. Reg. 33010 (Jun. 1, 2020); 85 Fed. Reg. 35550 (Jun. 11, 2020); 85 Fed Reg. 36308 (Jun. 16, 2020); 85 Fed. Reg. 36717 (Jun. 18, 2020); 85 Fed. Reg. 36997 (Jun. 19, 2020); 85 Fed. Reg. 38301 (Jun. 26, 2020); 85 Fed. Reg. 38304 (Jun. 26, 2020); 85 Fed. Reg. 39066 (Jun. 30, 2020); 85 Fed. Reg. 52883 (Aug. 27, 2020); 85 Fed. Reg. 52881 (Aug. 27, 2020); 85 Fed. Reg. 66214 (Oct. 19, 2020); 86 Fed. Reg. 3692 (Jan. 14, 2021); 86 Fed. Reg. 3712 (Jan. 14, 2021); 86 Fed. Reg. 8283 (Feb. 5, 2021); 86 Fed. Reg. 13149 (Mar. 8, 2021); and 86 Fed. Reg. 15083 (Mar. 22, 2021).

235 at 5 n.1 (noting the government "has found no case in which the application of U.S.S.G. §2B1.1(b)(12) was directly addressed").[3] The government notes that the Fourth Circuit—in *United States v. Griffin*, 2024 WL 1505512 (4th Cir. Apr. 8, 2024) and *United States v. Redfern*, 2023 WL 2823064 (4th Cir. Apr. 7, 2023)—upheld, ***under a harmless error standard***, the application of an enhancement to EIDL benefits (not PPP benefits); the sentencing court expressly *declined* to apply this enhancement to conduct under the PPP. That the parties could find so few cases applying this enhancement even in the context of EIDL is telling. Absent evidence showing that this enhancement is meant to address the conduct at issue in this case, and particularly considering "the need to avoid unwarranted sentence disparities" among similar defendants under 18 U.S.C. § 3553(a)(6), the Court should not strain to apply this enhancement here.

Furthermore, regarding Sheppard's conduct under the EIDL program: Sheppard was acquitted by the jury of *all* charges associated with any EIDL loan, notwithstanding the government's use of unfunded/funded and charged/uncharged EIDL loans at trial to prove its case. Thus, the government urges the Court to apply

[3] *Cf. United States v. Golding*, 2024 WL 2178962, at *4 (E.D.N.Y May 13, 2024) (applying the § 2B1.1(b)(12) enhancement where the defendant pled guilty to using the personal identifying information of third-party victims to fraudulently receive state unemployment insurance benefits that were expanded under federal COVID-19 assistance programs); *Jones v. United States*, 2023 WL 6541023, at *1 (M.D. Fla. Oct. 6, 2023) (applying the § 2B1.1(b)(12) enhancement for "conduct involving fraud in relation with a presidentially declared major disaster (the COVID-19 pandemic)").

a two-level enhancement—that, to be clear, the U.S. Probation Officer does *not* include in her recommendation—based on (1) conduct related to a program that is wholly unconnected to the Stafford Act and (2) conduct for which Sheppard has been unequivocally acquitted. To apply such an enhancement would contravene fairness and is unnecessary to crafting a sentence that is sufficient but not greater than necessary under 18 U.S.C. § 3553. Accordingly, Sheppard respectfully requests the Court overrule the government's objection and decline to apply the enhancement under § 2B1.1(b)(12).

Respectfully submitted,

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