IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:22-cr-20290-BB-1

UNITED STATES OF AMERICA,

Plaintiff, November 28, 2023
9:01 a.m.

vs.

ERIC DEAN SHEPPARD,

Defendant. Pages 1 THROUGH 228

TRANSCRIPT OF TRIAL DAY 2
BEFORE THE HONORABLE BETH BLOOM
UNITED STATES DISTRICT JUDGE
And a Jury of 12

Appearances:

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I N D E X

W I T N E S S

E X H I B I T S

(Call to order of the Court, 9:01 a.m.)

THE COURT: Hi. Good morning to everyone. How is everybody this morning?

All right. Go ahead and have a seat.

We have our witness?

MS. WEINTRAUB: Judge, can I just bring something to the Court's attention before we begin, very briefly? It's not even legal, really.

There was a very long news article that was posted online last night by Jay Weaver, who was sitting here, so I was kind of looking for it. And it's an awful long article about all sorts of things, not -- obviously, it talks about Nevin Shapiro. It talks about all sorts of prior stuff that has nothing to do with this case. I'm very concerned about the jurors, and I would just ask that the Court instruct them again, like at the break, not to -- obviously, the Court did it yesterday -- but not to review any news or Google or anything like that.

THE COURT: Any objection to just reading that portion of the preliminary instructions?

MS. JIMENEZ: No. No objection, Your Honor.

THE COURT: All right, then.

MS. JIMENEZ: Your Honor, one more thing, we did invoke the Rule yesterday, and we asked that any witnesses other than the purported expert be excluded from the courtroom.

THE COURT: That's correct.

Are there any witnesses that are in the courtroom?

MR. ETRA: Not for the Defense.

THE COURT: All right. And as I did advise the attorneys, I'm not familiar with the witnesses. So just be mindful of who these witnesses are and advise them accordingly.

MS. JIMENEZ: And I understand the Defendant's wife is here. And so, if she's going to be testifying, we ask that she leave the courtroom.

MS. WEINTRAUB: Judge, we had a long talk last night, to be candid with the Court. And she wants to be here, so I'll remove her from the witness list.

THE COURT: All right, then.

Do we have our witness?

MS. JIMENEZ: We do.

THE COURT: Yeah. If we could put the witness on the witness stand.

And we have all our jurors ready to go?

COURT SECURITY OFFICER: All rise for the jury.

THE COURT: Wait. No. No. No. No. Not yet, please. Let me make sure the witness is here and on the stand. That's where we're going to pick up.

And for purposes of the Court's preliminary instruction, I will do that at the first break so that we can get right into the witness's testimony.

Good morning, Ms. Harris.

All right. Both sides ready to proceed?

MS. JIMENEZ: Yes, Your Honor.

MR. ETRA: Yes, Your Honor.

THE COURT: All right, then.

COURT SECURITY OFFICER: All rise for the jury.

(Before the Jury, 9:04 a.m.)

THE COURT: Good morning, Ladies and Gentlemen.

Please be seated, everyone.

It is good to see you. I hope you had a nice evening, and thank you for being so prompt. We are ready to get right back to work.

Recall that we were in the beginning of the direct examination of Witness Althea Harris.

Ms. Harris, let me remind you, you were previously placed under oath. And let us continue.

MS. JIMENEZ: Thank you, Your Honor.

DIRECT EXAMINATION [CONTINUED]

BY MS. JIMENEZ:

Q. Ms. Harris, I believe when we stopped yesterday you were explaining who and what types of entities are eligible to apply for and receive Paycheck Protection Program loans. Do you recall that?

A. Yes, ma'am. I believe I would have said -- or would have said small businesses, and those who are in their formation

represented as sole proprietors, independent contractors, corporations.
Q. All right. And for the businesses, business entities, would it be business entities with employees?
A. Yes. Oh, that's the critical piece, that they have to have employees on the payroll.
Q. And I think you had indicated that there was a threshold number of employees for them to qualify as a small business?
A. Well, what -- the limit was that you couldn't have more, initially, than 500 employees. And I think that I was explaining how big small businesses can be, as far as SBA standards are concerned. But a business with one employee is eligible for PPP potentially.
Q. Right. Now, who are employees?
A. For the purposes of the Paycheck Protection Program, they are employees in a company who are wage earners, where the business pays income tax for that employee.
Q. Now, were there certain types of businesses that were not eligible for PPP loans?
A. Yes. SBA has rules, and there are some businesses who aren't eligible for help by SBA, including the PPP, namely like businesses involved in sex, like, you know, websites and bookstores that sell pornography, sometimes religious organizations are not allowed, publicly traded companies. Real estate developers are not. Just a few of the ones who are not

eligible.
Q. Now, in 2020, what happened to funds that the Congress appropriated to the Paycheck Protection Program when it was first passed in March of 2020?
A. Well, the CARES Act allocated $349 billion for the Paycheck Protection Program, and it was gobbled up in 13 days.
Q. So mid-April the money was gone?
A. Gone.
Q. All right. Now, did the Congress authorize more funds for the Paycheck Protection Program to be available for the following year in 2021?
A. Yes. If I remember correctly, the Economic Aid Act provided additional funding in early 2021. And then subsequent to that, Congress passed ARPA, which also funded -- which is -- let me see. Give me a moment. ARPA stands for American Rescue Plan Act. And that, if I remember correctly, offered another seven and a quarter billion for PPP.
Q. That was also in 2021?
A. In 2021, right.
Q. Now, for the second round in 2021 of Paycheck Protection Program funds, approximately when were businesses and independent contractors and sole proprietors able to apply?
A. If I remember correctly, the Economic Aid Act passed in late December. And so some time in January the companies would have been able to make application for the Paycheck Protection

Program.
Q. Did eligibility change in 2021?
A. No. Only inasmuch as -- I believe in 2021 the threshold size went down from -- remember I said you couldn't have more than 500 employees? Well, then it dropped to no more than 300 employees.
Q. Now, what about a business that received funds in 2020 from the Paycheck Protection Program? Could it apply a second time in 2021 for what would be referred to as a second draw of funds?
A. Yes. The legislation allowed for companies who had gotten funding in 2021 for the Paycheck Protection Program -- they could apply for more the second time around in 2021. And then those who missed it in the first case, right, because the money was all gone so quickly, they could also apply for the first time.
Q. I don't know if you -- did you misspeak? When you said: "When they first applied in 2021," did you mean 2020?
A. Okay. Let me start over. Companies who got Paycheck Protection Program monies in 2020 could apply in 2021 to get additional funding to pay their employees.
Q. And generally what did a business have to show in 2021 to qualify for a second draw of funds?
A. Ah, yes. If you got funding in 2020, and wanted additional funding in 2021, you had to show that you had a 25 percent --

at least 25 percent drop in revenues. So comparing the same time period in 2021 versus 2020.

Q. Or 2020 versus 2019, correct?

A. Correct.

Q. Now, what about businesses with employees? What -- who were the employees in 2021?

A. It's going to be the same criteria from 2020, which is that you had to have employees on payroll for whom the business made income tax payments to the Treasury. So you know, it's kind of like the rest of us.

Q. All right. Now, in February 2021, did the SBA make any changes to the program to prioritize the smallest of small businesses to receive funding from this program that was being used up so quickly?

A. Yes. So we were obviously getting a lot of criticism, because back then there was like an estimated 30 million small businesses in America, and most of them are single-employee businesses. So those people couldn't get the attention of their lenders. And so SBA, recognizing that, opened up the PPP to financial institutions that could deal one-on-one with smaller groups of businesses.

So in late February, for 14 days that ended on March 9th in 2021, SBA would not accept applications from financial institutions where the applicant had 20 or more employees. If you had less than 20, and you were working with a financial institution, that financial institution could make application to SBA to get you a PPP loan. But if you had over 20, 20 or more, we were not taking applications for those companies during that 14-day period.

Q. All right. Now, generally, can you describe the application process for an individual or business applying for a Paycheck Protection Program loan.

A. Sure. The borrower, or would-be borrower, would go online choosing the financial institution they wanted to use, whether it was Bank of America, or Chase, or a little regional bank, or a credit union, whoever they chose to do business with. They would make application online filling out a form that SBA generated, and/or the bank may have adapted in their own process to collect the information, and the borrower would go online, fill in all the information, provide the requested documentation, and then the bank would take it from there.

Q. And then, when you say: "The bank would take it from there," was there any involvement by the SBA in that process?

A. Yes. So the bank takes it from there, scrutinizing the documents and then inputting into an SBA system the applications, saying: "Hey, ABC company is requesting $25,000 for the PPP." SBA would give it the once-over, give the bank an SBA loan number, and then the bank would, having that, be able to turn around and fund the PPP loan.

Q. And was it important for the lender to receive an SBA loan

number as you indicated?
A. Yes. Because that would help the bank in case the -- first of all, it would authorize the bank to make a PPP loan, and then also to cover the bank if the borrower -- anything went wrong. Right? Then the government would pay back the bank because they had a number from us.
Q. And the government would pay back the bank out of those funds that the Congress appropriated, right?
A. That's right. So once the -- everything was all said and done, the bank gets money that was appropriated by Congress, which is our money, the taxpayers' money.
Q. Now, for someone applying for a Paycheck Protection Program loan as a business with employees, what was the loan amount based on?
A. The loan amount was based on average monthly payroll of the business. So you know, the employees work, the business knows that, and just -- it's a calculation. And the calculation is your average monthly payroll times 2.5, and that's the maximum loan amount.
Q. And when you say "payroll," what was payroll for purposes of this program?
A. So for -- payroll includes the actual wages of the employee, state and local taxes, employment taxes. It could include health insurance that the business pays for the employee. It could be paid vacation time or sick time.

Q. So basically, the Paycheck Protection Program loan amount for a business with employees was to cover essentially two and a half months of the business's wages and things like health insurance for those employees; is that correct?
A. Correct.
Q. Now, you testified that independent contractors could apply for a Paycheck Protection Program loan; is that right?
A. Yes. They could apply for themselves.
Q. Can you include -- a business with employees, can it include the payments that business makes to its independent contractors for the payroll amount calculation?
A. I'm sorry. I don't understand the question.
Q. Can an independent contractor apply for a PPP loan on their own?
A. Yes.
Q. Okay. Now, when a business with employees applies for a loan, can it include the payments that the business makes to its independent contractors as part of its payroll?
A. Oh, I see. No, because independent contractors are really businesses on their own. Right? So they are not employees of a business. They're like -- if I call a plumber to my house, he's not my employee. He's an independent contractor, a business unto himself. I pay the plumber. And if the gentleman or woman who owns the plumbing company sent out an employee, then it's their responsibility to pay the employee

with the money I paid them for the service. I hope that makes sense. And I suppose that's why independent contractors could apply for --

MR. ETRA: Objection, Your Honor.

THE COURT: Sustained. There's no question pending.

BY MS. JIMENEZ:

Q. Now, that requirement that the independent contractor -- or payments to independent contractors were not to be counted as part of the payroll, did that ever change during the time that the PPP program was available either in 2020 or 2021?

A. I'm sorry. Could you repeat your question?

Q. Yes. The requirement that the independent -- or business's payments to an independent contractor not count as payroll, did that requirement ever change during the time that the program was available in 2020 or 2021?

A. I don't believe so. No.

Q. Now, based on your experience at the SBA and dealing with small businesses, can a business have both wage employees and independent contractors to whom it pays?

A. Sure. Of course. I can have, let's say, an architectural company, and I have architects, but I want to engage in a marketing campaign, so I might hire an independent contractor to help me with the marketing campaign.

Whether the person who helps me with the marketing campaign is an independent contractor versus a marketing

company is irrelevant. They are not my employee. I'm using them for a certain period of time and I'm paying them.
Q. All right. And so in the context of a Paycheck Protection Program, a business with both employees, wage employees and independent contractors, can it count payments to both in its payroll calculation?
A. No.
Q. Now, you mentioned that the independent contractor can apply for a loan on their own. What about that wage employee of the business? Could that wage employee apply to the Paycheck Protection Program on their own, not counting their employer?
A. No. Absolutely not.
Q. Now, based on your experience at the SBA, and with this program, the Paycheck Protection Program, a business owner who applies and does not know that payments to an independent contractor does not count toward payroll, what could that applicant do?
A. About what? I'm sorry.
Q. Well, can they apply? If they don't know whether or not they qualify, can they apply?
A. Oh, absolutely. I mean, part of the application process -- part of it will help you know whether or not you're eligible. Because as you begin to fill out the forms, and you start to read all the certifications that tell you what eligibility is,

you may self-discover that you're not eligible. Or if you make application with the financial institution, their role is to help determine eligibility by saying: "Well, no. You can't" -- when you give me your documents, and I see you have independent contractors, I can do the PPP for your employees, but not your independent contractors, for example.

Or when you list your industry code on the form, and it shows that, say, you're a real estate developer, then that would disqualify you, and the lender would tell you that. So there's a -- you know, by going through the process, you find out whether you're eligible.

Q. You mentioned industry code. As part of the application process, did it require that you indicate by way of a number the type of business industry that you're in?

A. Yes. The federal government uses something called the Northern American Industry Classification System codes. We call it NAICS code. And that is a unique number for every industry in America. So that number goes on your tax return for your business. It goes on the PPP application too.

Q. From your tax return; is that right?

A. Well, presumably it's the same number, yes. You know, you're telling the United States Government: "This is the industry I am in," and this is the number associated with that industry. So if you're in that industry for your tax return, then presumably you're in that same industry for your PPP application.

Q. Now, based on your experience at the SBA and with this particular loan program, what happens if a business owner submits truthful information about their payments to independent contractors, and the business submits truthful documents showing that they have payments to independent contractors, and that is the basis for their payroll? What happens?

A. So if -- what I understand you to be saying is if the borrower applicant makes an application with independent contractors listed, along with employees, and they submit that to a bank, what would happen?

Q. Yes.

A. Is that the question? Well, the bank or the financial institution should see that and pull out the independent contractor dollars and submit to the SBA for a reduced dollar amount because independent contractors are not allowed. And so you would have a new number for the PPP loan application, and they would submit that to the SBA to get approval for the wage earners but not the additional folks.

Q. Did the SBA require lenders to obtain supporting documentation as part of a PPP loan application?

A. Yes.

Q. What types of documents did the SBA indicate the lenders should obtain?

A. Well, the long and short of it is what we were looking for is proof that you have wage-earning employees, proof that the business owner makes tax payments for those employees, their portion of the employees' income tax.

So that could be represented by, say, for instance, payroll company documents. So a lot of companies use a payroll company. And so employees get, you know, their paycheck through ADP, for example, or Paychex. So those documents from those businesses showing employee wages, and the withholdings and all, that was acceptable. Bank statements showing regular withdrawals from the bank for payroll, 941 deposits to banks showing the employer's portion of income tax withholding for employees, those documents. So they're like official documents that show and prove that you have payroll.

Q. All right. Now, did the applicant have to sign ultimately their loan application?

A. Yes.

Q. And who is allowed to sign?

A. Well, it would most likely be the owner of the business or --

MR. ETRA: Objection, Your Honor.

THE COURT: And the basis of the objection?

MR. ETRA: It's speculation the way she said it.

THE COURT: Sustained.

THE WITNESS: Okay.
MS. JIMENEZ: Let me ask the --
THE COURT: Yeah. Ask the question again, please.
BY MS. JIMENEZ:
Q. Who is authorized to sign the loan application?
A. Well, on the loan application, it says the applicant authorized representative.
Q. That could be the owner?
A. That could be the owner, yes.
Q. Now, on the application document itself -- let me ask you, in terms of the application process, once the lender receives the information from the applicant, is there a form that goes back to the applicant?
A. I'm sorry?
Q. A 2483 Form that goes back to the applicant to sign?
A. Oh, yes. That's the form that the applicant signs.
Q. And on that form that the applicant signs, are there certifications?
A. Yes. Yes. There are lots of them.
Q. What are certifications?
A. They are statements that the applicant says they acknowledge. They acknowledge that the statement is there. It's an acknowledgement by the applicant that -- for -- yeah -- that what they're saying is true and accurate. So it's like a long list: "Do you understand what you're reading?"

"Yes."

"Do you agree to abide by the rules of the program?"

"Yes."

And you know, you saying yes, and you sign that you're agreeing with that.

"Are all the documents you're giving us true and accurate?"

"Yes."

"Do you have a need for this money?"

"Yes."

So those kinds of questions. And the person is saying that they are eligible, they need the money, these documents are -- right? So those kinds of things.

Q. Now, was -- is one of the certifications that the applicant signs -- are they required to certify the truthfulness and accuracy of the information that they are providing?

A. Yes.

Q. Is one of the certifications that they certify the truthfulness and accuracy of the documents that they're supplying to the lender?

A. Yes.

Q. Were these certifications important to the SBA?

A. Oh, yes. Yes.

Q. Why was that?

A. Because we -- in implementing the CARES Act, and all that other legislation, and taking the peoples' money -- we understand ourselves to be stewards of the peoples' money. And we want that money to go where it's supposed to go. Not only that, I mean, we're mandated, right, by Congress to get the money to the people who are supposed to have it.

And so we take that very seriously and rely on the truthfulness of applicants that they should, in fact, have this money, and that they are going to use the money in keeping with the Congress' intent to pay their employees so that those people can withstand the pandemic because they're not going to work. So that's -- I mean, that's central and foundational to our ability to do the job that we were given to do.

Q. In the context of this COVID pandemic, was the process intended to be somewhat expedited -- in terms of a loan approval or loan funding process, supposed to be somewhat expedited?

A. Yes. Everything, especially in the early days of the pandemic, was all very nerve-racking and critical. And in fact, Congress mandated in the CARES Act that SBA would get the money out fast. And so everybody, in an effort to comply with that mandate, did -- you know, the bankers were working around the clock. Everybody was working around the clock. And ultimately that $349 billion in 2020, as I mentioned, was gone in less than two weeks.

Q. And so, as part of this -- or in connection with this expedited process, did the certifications from the borrower play a role?

MR. ETRA: Objection. Leading.

THE COURT: Overruled. I'll allow it.

THE WITNESS: Sure. I mean, the certifications, inasmuch as they say: "I'm eligible. I should have this money. I have employees. I have" -- you know, "I'm eligible," we relied on that in being able to get the money out the door quickly. And if a person doesn't certify, then that stops the process for that applicant.

BY MS. JIMENEZ:

Q. Now, based on your experience at the SBA, and based on your experience with the Paycheck Protection Program, if the SBA became aware that the applicant was providing false information, say, about their wages that they paid, or was providing false documentation about wages that they were not actually paying -- if the SBA had that information, what would they do with respect to authorizing that loan?

A. Well, they wouldn't authorize that loan and would reject it.

Q. All right. Now, once a business receives the Paycheck Protection Program funds, were there requirements on how the business was to spend that money?

A. Yes. The Paycheck Protection Program, in 2020, dictated that at least 75 percent of the monies received in the PPP loan

had to go to wages for employees. In 2021, that number was reduced to at least 60 percent. So in no case could you spend less than 75 percent in 2020, less than 60 percent in 2021 on wages for employees.
Q. What about the remainder of that percentage?
A. So the remainder had to be spent on certain other expenses for the business.
Q. Such as what?
A. Such as interest on mortgages for the business, rent for the business, utilities for the business, late --
Q. I'm sorry. What happens if the borrower used the funds as directed by the program?
A. Ah. Then they could get one hundred percent forgiven for the loan, so they wouldn't have to pay the loan back.
Q. Who pays for that loan?
A. Well, that money gets paid for by the taxpayers from the CARES Act and the subsequent legislation.
Q. Now, if the borrower cannot show -- cannot truthfully show that they used the funds as directed by the program, what would that borrower have to do?
A. So if the borrower didn't use the funds as prescribed by the legislation in the program, then they -- the monies that they got for the Paycheck Protection Program becomes a loan to the business that they have to repay. So the taxpayers don't pay it. They pay it.

Q. Now, can the PPP funds be used to pay someone's home mortgage?
A. No.
Q. Can it be used to pay for personal expenses?
A. No.
Q. Can it be used to pay back another commercial loan?
A. No.
Q. Can the funds be used to fund a real estate development project?
A. No.
Q. Now, as to the second round of PPP funds that Congress authorized in 2021, I guess multiple times, did that money run out?
A. Oh, yes, it did. Of course.
Q. Approximately when?
A. Well, the program was scheduled to sunset on May 31, 2021, but the money ran out on May 28th, 2021.
MS. JIMENEZ: Your Honor, I don't have any other questions of the witness.
THE COURT: All right. Cross-examination.
MR. ETRA: Yes, Your Honor.
(Pause in proceedings.)
MR. ETRA: Your Honor, may I proceed?
THE COURT: Yes, of course.
MS. JIMENEZ: Your Honor, can we approach for a

moment?

THE COURT: Is there an issue?

MS. JIMENEZ: Yes.

THE COURT: All right. Come on forward.

(At sidebar on the record.)

MS. JIMENEZ: I've just been handed two volumes of I don't know what --

THE COURT: All right. I assume that it's evidence that you're seeking to use.

MR. ETRA: It's impeachment material.

(Court reporter interruption.)

MR. ETRA: Sorry.

It's impeachment material. We were told -- we understood that that did not have to go on the list. Some of it will be to impeach and not admitted. Some will be impeachment and perhaps admitted, but it's impeachment material.

THE COURT: I'm sorry. When you say you understood it did not have to be listed, is this the first time that the Government is looking at these documents?

MR. ETRA: Some of them, yes.

THE COURT: Well, why is that permissible?

MR. ETRA: Because, Your Honor, when we discussed the exhibit list, we specifically said that we were allowed to -- we didn't have to include impeachment material in our exhibit list. And frankly, we don't want the witness prepared with the impeachment material.

THE COURT: Well, what is it?

MR. ETRA: Well, a lot of them are exhibits that are already in the Government's -- the Government has put on. They are also -- some of them are on our exhibit list. Some of them are articles. Some of them are other documents from the Defendant that are -- that are impeachment material.

THE COURT: But what are they? Is there -- I mean, I see Volume 1, Volume 2 --

MR. ETRA: Just so you know, Your Honor, this is one document. We're using one page of the public material of a House report on Fintech, which is -- I'm just using one page, but I have to turn over the whole thing. But for the most part, it's the categories that I described. They are documents that the Government is going to be putting in but we want to use with this witness.

THE COURT: Oh, all right. Well, if they're -- let's -- first of all, you're objecting to the binders themselves being provided to you?

MS. JIMENEZ: Yes.

THE COURT: At this point, I don't know what's contained within the binders.

MS. JIMENEZ: Nor do I.

THE COURT: Why don't we, one at a time, by way of the impeachment, provide it to the Government, give you an opportunity to look at it, and then we can address each individual impeachment item. Because there may not be an issue if, in fact, it's a public record, you're aware of it. So the witness may not be able to identify it.

So there are a lot of variables right now. So let's take it as it comes, because I can't rule on binders that are being provided to the Government without going through it. And I'm not taking time out of the jury's -- or the cross-examination and time from the jury to look at it.

So let's take it one at a time and just give the Government an opportunity to review each of the documents.

MS. MARTINEZ: One of the reasons it's --

(Court reporter interruption.)

THE COURT: You need to be at a microphone.

MS. MARTINEZ: One of the reasons it's difficult, Your Honor, is because what Mr. Etra has done is provide it late, and he also has not given an answer to the Court about what is it that the United States has not seen that's in here. Can you summarize what it is that the United States has not seen that is in here?

MR. ETRA: There are -- I meant to. You haven't seen our materials from the Internet. They include public records, like SBA rules. They include congressional investigation-type documents. They include articles about the PPP program, things like that. There's also a category of documents from the -- from Mr. Sheppard -- from the Sheppards' business that are impeachment material. There are few of them. There's like maybe three or four of them. So it's not an overwhelming amount.

THE COURT: Okay. Well, here's what you need to do, Mr. Etra: You need to identify the document, and you need to identify for the record whether, in fact, that is listed on either the Defendant or the Government's exhibit list.

To the extent that it is not, then give the Government an opportunity to review and then the Court will address each individual objection.

MR. ETRA: Thank you.

MS. MARTINEZ: Thank you.

(End of discussion at sidebar.)

THE COURT: All right. Ladies and Gentlemen, I apologize for that noise.

Thank you for your patience, and we are ready to continue.

MR. ETRA: May I proceed, Your Honor?

THE COURT: You may.

CROSS-EXAMINATION

BY MR. ETRA:

Q. Good morning, Ms. Harris. Nice to see you.

A. Good morning.

Q. We have not met before, correct?
A. Correct.
Q. You are a lawyer by training, correct?
A. I'm a lawyer inasmuch as I've been to law school, but I don't possess a license to practice.
Q. But you've been properly trained by a great law school, correct?
A. Yes. The University of Miami, 20 years ago.
Q. The -- I want to focus on what you were doing during the COVID time period. Okay?
A. Okay.
Q. So I understand that you are a supervisory lead economic development specialist. Did I get that right?
A. Yes.
Q. And your job was to essentially -- one of your jobs was to promote what the SBA is doing in the public or for the small business owners so they would know, you know, what to take advantage of; is that correct?
A. Yes. Our job in the local office is to promote SBA to the public.
Q. If it's at all possible, I'd prefer a yes-or-no answer. If it's possible.
A. Yes. Yes.
Q. If you can't, you can't. Thank you.
And you believe in the American dream of small

businesses, correct?
A. Yes.
Q. And you have a passion for small businesses, correct?
A. I do, yes.
Q. And I want to focus on your involvement in the PPP program itself. You did not -- it sounds like you were not involved in setting up the program; am I correct?
A. Correct.
Q. And you were not involved in the rulemaking in the program, correct?
A. Correct.
Q. And by "rulemaking," what I mean is that the Congress created the statute but they didn't really create all the little nuances that you've been testifying about on direct, correct?
A. That is correct.
Q. And they left it to Treasury and the SBA to figure it out on the fly?
A. Correct.
Q. And you were not involved in doing that?
A. Correct.
Q. And you were not involved in the operations of whatever it is the SBA had to do to approve a PPP program, right?
A. Correct.
Q. And you were not involved in the oversight or working with

the various banks that were actually --
A. Oversight, no. But interaction, yes.
Q. Okay. What was your interaction with the banks?
A. Well, the banks typically sometimes would call the district office to get help. They have a question and we would help them.
Q. But you were not -- fair enough. And if they called, you answered the question, but otherwise you weren't really involved?
A. No. Just answering -- not -- yeah. Just answering questions.
Q. And did -- your testimony today about the process or -- and a little yesterday that went on was not based on your personal knowledge, right?
A. What do you mean by "personal knowledge"?
Q. Well, you weren't personally involved in the various things that you talked about with respect to the process about what goes on, correct?
A. No. Not involved in the process, no. I didn't push any buttons or approve anything.
Q. Well, that's not what I'm asking about. You're a fairly senior person in the SBA, correct?
A. Locally, yes.
Q. I'm not asking whether you actually pushed the buttons. I'm asking whether you were actually involved -- whether it's

pushing the buttons or overseeing the people that pushed the buttons, you were not involved in the process of how these SBA loans got approved, correct?
A. Correct.
Q. You were not involved in how the applications were taken in, correct?
A. Right.
Q. At a low level -- I'm not being judgmental. But at the lower level in the hierarchy, you were not involved in any of that?
A. No.
Q. And you don't really know what happened in the application process, correct?
A. No. I do know because the SBA informed its employees at our level, at the local level, in order to empower us to answer questions of the public and the lenders.
Q. Okay. So your information -- your testimony today and yesterday about how the SBA worked in the PPP program is based on people at the SBA telling you these things, correct?
A. Yes. And reading the regulation -- I mean, there was a lot of information pushed down to the local level so we would be able to understand and participate in helping the public access the program.
Q. Your understanding of how the process actually worked is based on what other people at the SBA told you; is that

correct?

A. Yes.

Q. Let's talk about what a small business is.

A. Okay.

Q. We'll cover that a little bit. Outside of the -- before COVID happened, the SBA -- or independent of COVID, the SBA had its own formula for how to determine small businesses based on industry; is that correct?

A. Yes.

Q. But when the COVID hit, you guys sort of said: "All right. We'll come up with a simpler way of making sure our programs are accessible to small businesses," right?

A. I don't understand your question.

Q. I'll re-ask it. But when COVID came along, you came up with -- one way to qualify as a small business is if you don't have more than a certain number of employees, whether it's 500 or 300, right?

A. SBA has always had size standards for what defines a small business. Generally, that is either averaged annual revenues over three years or number of employees. For the purposes of PPP, the program dictated in 2020 that you had to have less than 500 employees, in 2021, less than 300.

Q. So the answer to my question was yes. When COVID came along, you came up with a simple formula to qualify for programs based on the number of employees, whether it was 500

or 300, correct?
A. That was -- yes.
Q. And that's one of the reasons -- that's why in these programs you wanted to know about affiliated companies because you were going to treat -- you wanted to make sure that when you count the number of employees it includes affiliated companies, correct?
A. We always look at affiliates, yes.
Q. That was -- the focus in the PPP program when you asked about affiliates was simply to make sure that the company qualified to be under the 500 or 300 level and --
A. And that they are small in the aggregate, yes.
Q. In the aggregate. Correct.
There were some pretty big companies that got SBA PPP loans, correct?
A. That was the public criticism. I don't personally know.
Q. Are you aware of the fact that the Los Angeles Lakers got a PPP program?
A. No. I'm not aware of that.
Q. You never heard of that?
A. No.
Q. And that's a pretty big company, right?
A. Presumably. I don't know. Honestly, I've been surprised about organizations who are technically small by SBA standards.
Q. So you're telling me, notwithstanding your involvement --

well, you're telling me that -- well, let me start again.

You subsequently learned that the LA Lakers got a PPP program or you did not know that --

MS. JIMENEZ: Asked and answered.

THE WITNESS: I'm taking your word for it.

THE COURT: Sustained.

BY MR. ETRA:

Q. Okay. And that other big companies got a PPP program, right?

A. Like I said, I mean, I'm aware of the public criticism that -- you know, the outcry that there were people who were not small by the public's understanding and therefore ineligible.

Q. And you can be -- you can -- the owners could have actually money and still the companies could qualify for a PPP loan, correct?

A. I guess. Part of why SBA exists in the marketplace is to --

MR. ETRA: Your Honor, could I get a yes or no, please.

THE COURT: The question calls for a yes-or-no response. If you need to explain your answer, you may certainly do so.

THE WITNESS: So I'm not sure where we are, Judge.

THE COURT: Re-ask the question.

MR. ETRA: I'll re-ask the question.

BY MR. ETRA:

Q. There was no requirement to be eligible for the PPP loan. That was based on how much income or assets the owner or owners of the company had, correct?

A. Well -- yes.

Q. Yes. Okay.

And you wouldn't say, for example, that the PPP program was ineligible for businesses where the owners were wealthy, correct?

A. Correct.

Q. So you would never say, for example, that the PPP program was not for rich people. You would never say that, correct?

A. Correct.

Q. And are you aware of other companies getting -- I think you said public companies weren't allowed. But I thought public companies did get --

A. Publicly traded.

Q. Publicly traded companies. Yes?

A. That is -- I had to actually look that up for someone, and that's how I know.

Q. Okay. So you're confirming now that publicly traded companies were eligible and did get loans?

A. Were not eligible.

Q. Were not eligible. Okay.

A. Now, whether they got them or not, I can't say.
Q. And restaurant chains, like Shake Shack or Ruth's Chris Steak House, they got loans as well, correct?
A. I don't know.
Q. Were you paying attention at the time as to whether large companies were getting PPP loans?
A. Not especially. They're not our customer.
Q. I want to go back sort of to the beginning of this story. Obviously, the SBA is there for several reasons, including providing relief in difficult times. Is that fair?
A. A provision of what SBA does is disaster recovery, yes.
Q. So for example, as a disaster recovery, those are the EIDL loans that have always been -- well, for a long time -- pre-COVID -- were available when there was a disaster, correct?
A. Correct.
Q. So for example, when there's a hurricane, like down here, flooding, or tornado, or some other disaster, if there's a declaration that a local area has a disaster, that allows the SBA to provide favorable loans to small businesses under the EIDL program?
MS. JIMENEZ: Your Honor, objection. Outside the scope. EIDLs were not the testimony.
THE COURT: Overruled.
THE WITNESS: Yes. The SBA does provide Economic Injury Disaster Loans in incidents where disasters are

declared.

BY MR. ETRA:

Q. Okay. So -- and in this case, on March 13th, President Trump declared not just a local disaster, like maybe in South Florida for a hurricane, but a national disaster?

A. In 2020, yes.

Q. And it wasn't a disaster essentially for the country. It was a disaster for the world -- COVID was, was it not?

A. That's how I felt about it.

Q. Right. And even though -- when it started, no one knew exactly how long this was going to go; is that right?

A. Correct.

Q. And it lasted over a year, in fact, correct?

A. I don't know how long it lasted. I was just grateful to live in Florida where we could walk around.

Q. Isn't it true that in 2020 alone the US economy lost 114 million jobs?

A. I don't know.

Q. And isn't it true that when you combine the lost jobs, permanent and reduction in hours, it was five times -- the hit on the economy was five times worse than the housing crisis of 2008-2009?

MS. JIMENEZ: Objection. Outside the scope.

THE COURT: Overruled.

THE WITNESS: I don't know.

BY MR. ETRA:
Q. But there were certainly concerns that the economy would shut down and it would get really bad in this country without relief, correct?
A. That was the prevailing idea.
Q. And it made sense to help small businesses because of their role in the economy, right?
A. Yes.
Q. And I'm going to use your words, if you recognize them. I found them in testimony the Government was kind enough to provide.
A. Okay.
Q. Is it true that small businesses are over 99 percent of all businesses in the US?
A. Yes. By SBA standards.
Q. There are about 30 million small businesses.
A. There are now 32 and a half million small businesses in America by our estimates.
Q. Responsible for half of the US workforce?
A. Yes.
Q. And if small businesses aren't doing well, the country isn't doing well?
A. That is correct.
Q. And small businesses essentially are job creators, right?
A. Oh, yes. Two-thirds of all net new jobs are created by

small businesses.
Q. But not all small businesses are equal when it comes to job creation, right?
A. No. Of course. The vast majority of small businesses are one-man operations.
Q. Not only that, but some small businesses, by virtue of what they do, create new businesses for other people; isn't that right?
A. I'm not sure what you mean.
Q. Sure. Construction business. If I'm a small business in the construction business and I build a shopping center or a store, not only have I paid my workers, but now there's going to be a new business that's going to be able to employ their workers where I build, correct?
A. Well, what's your example of the new business to help me understand?
Q. Sure. A Burlington Coat Factory.
A. Oh, okay. So you mean when you construct it, then an occupying business can have jobs?
Q. Right.
A. Okay. Sure. I mean, I suppose so.
Q. That's like job creation on steroids, right?
A. I don't think of it that way. I think of it as Burlington Coat Factory generates jobs, but I don't necessarily connect the two of those in my mind.

Q. And because of the -- the government decided that the EIDL program -- funding it was part of the response to COVID, but we also had to come up with this new program, the PPP program, right?
A. Congress came up with the PPP program through the CARES Act, yes.
Q. That was the CARES Act. And essentially the CARES Act was passed in March 27 of 2020; am I correct?
A. That sounds right.
Q. And it went operational, the program, seven days later on April 3rd; am I correct?
A. I don't remember the day in April, but I do know it was in April.
Q. But it was about a week that the SBA had to put this all together and go operational; is that right?
A. It was a short period of time.
Q. And this was an unprecedented challenge for the SBA, correct?
A. Correct.
Q. In all of 2019, the SBA guaranteed approximately $30 million in loans. Is that about right?
A. No.
Q. How much in 2019?
A. It would have to be in the billions because we did 2.02 billion last year.

Q. I wasn't reading my outline carefully. Thank you for catching that.
A. Okay. Sure.
Q. So how about 30 billion, then?
A. That sounds about right.
Q. Great. Thank you.
But 348 billion went out in about two weeks with the PPP program, right?
A. Yeah. Yes.
Q. And Congress set up the general structure but didn't set up the rules on eligibility?
A. I don't actually know. I never read the legislation.
Q. Well, didn't the SBA set up the rules on eligibility?
A. Yeah. In concert with Treasury.
Q. And they didn't do it in just one big rule and say: "Okay. Here's our rule." That didn't happen that way, right?
A. Right.
Q. In fact, they actually created a series of interim final rules; is that right?
A. Yes.
Q. That sounds like an oxymoron to me. But am I correct that it's interim because it's only this time period, and it's final in the sense that it's binding when it's issued? Is that about right?
A. I would interpret it that way, yes.

Q. And actually, over the course of COVID, the SBA issued 32 different interim final rules, correct?
A. I don't know how many, but I do know there were many.
Q. Now, there was also an emphasis on speed, as you testified, right?
A. Yes.
Q. And in fact, there was a problem down here in Florida because the unemployment system would basically crash because of the demand because of the problems locally in the economy; is that correct?
A. I don't know.
Q. Don't know the problems with the unemployment --
A. I mean, I'm vaguely aware there were -- you know, some kind of controversy out there. We don't do unemployment at SBA, so I wasn't focused on that.
Q. Okay. So in your role with the SBA, you weren't focused on the problems with individuals having to apply for unemployment in COVID and not being able to get taken care of?
A. Right. That's not what we do.
Q. But there was definitely pressure to get everything out fast, right?
A. Yeah. Yes.
Q. And that 348 billion went by so fast because, as you said, there was a sense of urgency about the unknown that everyone just -- I think you used the term gobbled it up?

A. Yeah. Yes, they did.
Q. And between April of 2020 and May of 2021, it was about over 800 billion in total that was --
A. I believe so, yes.
Q. Of loans?
A. Yes.
Q. About a third of all US -- about a third of all US small businesses, as defined by the SBA, got PPP loans, correct?
A. Are you basing that -- math isn't my strong suit. So what's your calculation there? Based on 30 million divided by some other number?
Q. I'm just --
A. I can't say.
Q. Do you know what percentage of small business owners got PPP loans?
A. I don't.
Q. You don't know if it was 80 percent, 20 percent, or anywhere in between?
A. No. I didn't zero in on those numbers.
Q. And with all the pressure and the need to get money out, the SBA basically said: "We're not going to do this. We're going to basically deputize the banks to do this," right, primarily?
A. Yes. There was a framework for that.
Q. Well, you say there's a framework for that. That's in

the -- in certain other previous programs, correct?
A. In our flagship products, yes.
Q. But there was no framework for what went on in the PPP program. This was entirely new, correct?
A. Well, what I mean by framework is that lenders use essentially the same process that PPP used for us to do our regular 7(a) and 504 loan programs.
Q. But this was -- PPP was completely different, correct?
A. Well, not as to the framework, but it was based on wages and those calculations. And so in that way it was different, yes.
Q. You had to set up new rules, new procedures, new systems, correct?
A. Yes.
Q. You had to tell the banks that you worked with before: "Okay. This is how we're going to do it now in PPP," right?
A. Yes.
Q. You had to basically start over with these banks with the PPP program, right?
A. Yes.
Q. And the whole point was to keep people working, right?
A. Keep people paid.
Q. Right?
A. They weren't actually working.
Q. Well, working and paid. Fair enough.

A. You know what I mean. Okay.
Q. No one wants to work for free. Keep people working, keep the businesses going so they could pay their employees?
A. Well, PPP, again, was to pay primarily for wages and inasmuch as there were other uses --
Q. If I could get a yes or no and then an explanation, if needed.
A. Oh, okay. Sorry. What's your question again? Sorry.
THE WITNESS: Sorry, Judge.
MR. ETRA: I'll ask it again, Your Honor.
THE COURT: All right.
BY MR. ETRA:
Q. One of the points of the program was to keep people working and getting paid, correct?
A. Getting paid, correct.
Q. And keeping the businesses that employ them or pay them -- that they can continue functioning so they can keep doing what they do, including paying workers; isn't that correct?
A. Well, I'm not really sure how to answer you because businesses rely on their employees to generate the activity that gets the business paid. So if I have a restaurant with no employees, I can't -- and they're not working, I can't sell food to keep the business going.
Q. The PPP loans weren't just to pay payroll, correct?
A. They were mostly to pay payroll, yes.

Q. They were mostly. Okay. But they weren't just to pay payroll, correct?
A. Correct.
Q. And they were to pay -- you could pay your utilities with the PPP loans, correct?
A. Correct. The business utilities, yes.
Q. Business utilities. You could pay mortgage interest, correct?
A. For the business, yes.
Q. For the business, yes. Because the company needs to do those things to keep going to pay their workers, correct?
A. I suppose you could not pay your mortgage interest and your business would still operate.
Q. Have you tried doing that?
A. No. I don't have a business of my own.
Q. The point of the program was to keep small businesses going and paying their workers. Can we agree on that?
A. Yes.
Q. And for the most part, the PPP program seemed to have been successful in keeping this country going, correct?
A. Going? In what sense do you mean?
Q. Was the PPP successful in keeping the economy going, yes or no?
A. Yes.
Q. It was successful as an aid to small businesses, yes or no?

A. Yes.
Q. And you have no evidence that the companies that Mr. Sheppard's involved in -- that they didn't get -- that they -- that they weren't able to use the money -- let me strike -- sorry. Let me start that again.
The workers who worked for the companies that Mr. Sheppard is involved in, you don't know if they got paid with the PPP money, correct?
A. I don't know anything about Mr. Sheppard's businesses.
Q. You don't know if the businesses complied with the PPP rules or not, correct?
A. I don't, no.
Q. And you don't know if the PPP programs were instrumental to keeping the workers employed and food on the table?
A. At his business or in general? Yeah, no. I don't know about Mr. Sheppard or his business.
Q. Let's look at the actual application. I'd like to put up --
MR. ETRA: This is a document, Your Honor, that has been on the Government's exhibit list from the beginning, C6.
THE COURT: All right.
(Pause in proceedings.)
THE COURT: Ladies and Gentlemen, is everyone's screen turned on?
No? All right.

MR. ETRA: Your Honor, it's not in evidence yet.

THE COURT: Oh. I'm sorry. I thought this was something that was agreed upon. My apologies.

MR. ETRA: I'm about to offer it, if we could just do it that way.

Your Honor, I offer Exhibit C-6.

THE COURT: And I just want to make sure because the exhibit list numbering does not contain a C-6. What's the number on the exhibit list?

MR. ETRA: I apologize, Your Honor. This is our error in that we created our own exhibit list for the cross.

MR. CAVALLO: It's C-6 on Defendant's.

MR. ETRA: Oh. It's on Defendant's Exhibit List, C-6. So we actually did have that on our exhibit list.

THE COURT: Is there any objection to the admission of this document?

MS. JIMENEZ: No objection.

THE COURT: All right. Then admitted into evidence.

(Defendant's Exhibit C-6 received into evidence.)

THE COURT: Now it may be shown to the Members of the Jury.

MS. MARTINEZ: Your Honor -- okay. Just to clarify, are the Defense going to keep track of the admission of their own exhibits, because we don't have the list.

MR. ETRA: We'll do it. Yes.

MS. MARTINEZ: Okay. No. Because the Court has asked us to make sure we keep track.

THE COURT: Okay. C-6 in evidence.

And let's get back to the screens. Is everybody's screen on?

All right. Thank you.

MR. ETRA: May I proceed?

THE COURT: You may.

BY MR. ETRA:

Q. Do you recognize Exhibit C-6 that's on the screen?

A. Yes.

Q. And generally speaking, what is it?

A. This is the Paycheck Protection Program Borrower Application Form.

Q. Okay. And does it have a code, 2483? Have you heard that?

A. All forms have a number. I don't really remember which --

Q. Why don't we look at the bottom of the screen.

A. It's at the bottom. Right. Yep, 2438. Yes.

Q. And it also has a date of 4/20. So this was in effect as of April 2020?

A. That's correct.

Q. Okay. And this was created by -- this form was put together by the SBA to be the formal application for a PPP loan, correct?

A. That's correct.

Q. The SBA made the decision of exactly how to draft this, what to include, and what not to include, correct?
A. Yes.
Q. And that was sort of one of the things that was done in that approximately seven-day period between the CARES Act and going live, correct?
A. Correct.
Q. And even after that, the SBA continued to occasionally modify this form, correct?
A. That's correct.
Q. Now, if you look through this application, is it only about three or four pages?
MR. ETRA: Why don't we just skim through the pages. Keep going.
BY MR. ETRA:
Q. So the whole thing is about four or five pages. Do you see that?
A. Yes.
Q. Now, at the time that this application was put out, were there actually regulations that were longer than what's on this application?
A. Yes.
Q. And there are regulations that are not put into the application expressly to say: "Warning. This is the rule," correct?

A. I'm not sure. I mean, I'd have to reread the form.
Q. All right. So I just want to understand. When you talked about -- in your direct about the way the application and the application process notified borrowers, you don't actually know which of the rules are in the application, correct?
A. Could you rephrase your question, please?
Q. Sure. If I understood your testimony -- your direct testimony is you were saying the way a borrower learns about what the rules are about, for example, whether payment to employees that file -- for whom they file 1099, whether that's included in the program, that if they go through the application that tells them that. But it sounds like you don't actually know what's in the application, whether that actually gives you that information.
A. I have not read this form in years.
Q. So how do you know that what you said in direct is true that by going through the application process you'll find out, for example, that payments to employees who are independent contractors aren't included?
A. Are or are not included?
Q. Are not.
A. Right. Are not. Well, what I said or meant was that in making the application, submitting the application, and going through that part of the process, you could find out that you are ineligible because the bank, for example, rejects your

application.
Q. This is not based on any personal experience, correct?
A. I have never completed this for myself.
Q. And you never talked to -- and don't know what banks did when they got applications, correct?
A. I do inasmuch as we work with banks and, you know, I heard their stories or they called and asked questions. So in that way, I know. But not wholesale every banker, no.
Q. Let's look at the first page, the top half.
MR. ETRA: Okay. Zoom in on the top half.
BY MR. ETRA:
Q. Okay. I want to go through portions of this application. We're in the top half of the top third of the first page, and you see where it says: "Number of Employees," and number 80 is there? Do you see that?
A. Yes.
Q. Now, it says: "Number of Employees" there. It doesn't explain how the SBA -- how the PPP Program is using the word -- let me start again.
There's no definition of employee here, correct?
A. I don't see one, no.
Q. Okay. And that was the SBA's decision when they did this loan application not to actually define the employee in the PPP program?
A. I don't see a definition for employee here.

Q. Okay. And now let's go to -- so it doesn't say, for example, here not to include employees for whom you file 1099s, correct?
A. Not explicitly.
Q. Not explicitly. Okay.
A. Because --
Q. Does it say that implicitly?
A. Well, independent contractor is up at the top as a "check one." So that person, an independent contractor, would be the borrower. So by implication or inference, that's not an employee. That's a person who can make this application for themselves.
Q. Let me follow up with you and see where this is going. So on the upper left-hand, the applicant has to indicate what kind of entity they are, right?
A. Right.
Q. And here the applicant, which is HM-UP -- we call it HM-UP -- said they're an LLC, correct?
A. That's what it looks like, yes.
Q. All right. And an LLC can pay workers and file W-2s depending on how they think they're supposed to do it, or they can file 1099s, correct?
A. Any business can have employees and pay independent contractors with 1099.
Q. Where does it tell the LLC in this case that's applying for

a loan, when it says "Number of Employees," not to include employees for whom you -- your payroll department decides to file a 1099? Where does it say that in this application?
A. 1099 contractors are not employees.
Q. Oh, okay. So does it say that here?
A. Again, the inference I draw is that an independent contractor is a business type who can apply for this PPP on their own.
Q. You have a lot of experience with small businesses, correct?
A. I do.
Q. Do you work directly with any of them?
A. What do you mean by "work directly"? I feel like I work directly with them. But you know, I don't know what you mean by that.
Q. Sure. Do you ever have one-on-one conversations with small business owners?
A. Yes.
Q. Do you understand that they may use the term -- they may not have gone to law school like the two of us, correct?
A. Of course.
Q. Okay. And they may be very sophisticated in certain ways because they're businesses, but -- businessmen, but they may not be sophisticated in nuances of employment law?
A. That has been my experience.

Q. Exactly. And they don't necessarily -- and they might rely on a bookkeeper or an accountant to do -- make decisions about W-2 and 1099, right?
A. I hope so.
Q. Right.
A. But many don't.
Q. And they may not -- they may refer to all their workers, whether they work -- I'm talking about individuals. I'm not talking about companies. A person who comes to work or goes to the jobsite, they may refer to all of them as employees, whether the payroll department files a 1099 or a W-2?
A. Right. Because they wouldn't know the difference. Is that what you mean?
Q. Exactly.
A. Okay.
Q. Okay. And the SBA knows that, right? The SBA knows that small businesses can refer to all of these workers as employees, right?
A. I don't know -- I wouldn't say that. No.
Q. Well, you do know that?
A. I mean, I am aware that many business owners are -- have elected to pay people as independent contractors in an effort to have -- in an effort to avoid payroll.
MR. ETRA: Your Honor, I ask that the answer be stricken. It was non-responsive. I simply asked the question

about whether -- a question, and she just went on and started making the testimony she made.

THE COURT: The motion is granted. The jury is to disregard the last response.

BY MR. ETRA:

Q. You're certainly aware that some small business owners legitimately think of all their workers as employees, the way they use the term. You're aware of that, right?

A. I suppose some do believe that, yes.

Q. And there's nothing on here that tells those people: "Oh, by the way, this has to be employees for whom you file W-2," correct?

A. Yeah. Except that "Independent Contractor" is up at the top. So yes, no. I'm not sure how to answer you.

Q. I don't even understand what you're saying because you could be an independent contractor but you could be an LLC or not-for-profit and have employees and also have 1099 workers, right?

A. Oh, sure.

Q. So it doesn't say here that if you're an LLC don't include the employees that you file 1099 on?

A. Right. It does not explicitly say that.

Q. All right. "Average Monthly Payroll" is on the other side, correct?

A. Yes.

Q. Again, it doesn't say: "Payroll means only payments you make to people that your payroll department calls them W-2," or files W-2, correct?
A. It does not say that.
Q. So you can go through this application and not be aware that that's -- certainly filling out the application, that it has to be W-2 workers, correct?
A. I guess.
Q. Okay.
MR. ETRA: Let's go to the third page, please.
If we can blow up the top half, please.
BY MR. ETRA:
Q. Now, for those small businesses that are going to go to the third page -- and I blew it up, but read the fine print. It does talk a little about payroll costs. Do you see that?
A. Sorry, sir. Say again.
Q. Okay. Let me withdraw the question. Let me start again.
If you go to the third page in the small print -- and we're in the second paragraph of this page, correct?
A. Okay.
Q. Do you see that?
A. The second paragraph, yes.
Q. Yeah. Have you ever read this paragraph before?
A. Yes.
Q. Okay. Great. You know this paragraph comes from the rule,

right?
A. Generally speaking, yes.
Q. Okay. So this paragraph that we're looking at here is verbatim from one of the rules that the SBA wrote into law basically?
MS. JIMENEZ: Excuse me. Can we identify the paragraph.
MR. ETRA: I'm sorry. The paragraph that begins: "With respect to purpose of the loan," under the topic of "Instructions for Completing This Form."
BY MR. ETRA:
Q. So the question is: This comes verbatim from one of the rules, correct?
A. I would think so.
Q. Okay. And it says: "With respect to the purpose of the loan, payroll costs consist of compensation to employees," in parenthesis, if they work in the US, paraphrasing. Again, it's using the word "employees," but it's not defining employees like we talked before, correct?
A. I'm sorry. How did we characterize it before?
Q. Well, in the sense that the word "employees" doesn't come defined --
A. Oh. Right. It's not defined on the application. Yes. Uh-huh.
Q. Okay. Very good.

Okay. And I want to jump to the next paragraph very briefly: "For purposes of calculating average monthly payroll." I just want to look at that very briefly.

It says: "For purposes of calculating average monthly payroll, most applicants will use the average monthly payroll for 2019," and you could read the rest if you want to. I'm just trying to keep the main points. Do you see that?

A. Yes.

Q. And essentially, if you're applying for a PPP loan certainly in the beginning of the pandemic, and you want to go to payroll, they tell you go to 2019, basically, correct?

A. Correct.

Q. Okay. That's all I wanted to know.

Now, do you agree with me -- let's go to that first paragraph there, "Purposes of the Loan." Do you agree with me that the SBA understood that this paragraph was ambiguous about whether payments to 1099ed workers would be included in payroll?

A. Can you ask again, please.

Q. Sure. Didn't the SBA understand that the paragraph -- the paragraph that says: "With respect to purposes of the loan," that paragraph --

A. Yes?

Q. -- that the SBA understood that this did not clarify that payments to 1099ed workers somehow are excluded from the program?

A. I think so. I can't say for sure.

Q. Okay.

MR. ETRA: Your Honor, the next document, which is L-10, is the first interim rule by the SBA -- our L-10. It's on the Defense Exhibit List.

THE COURT: Well, your exhibit list only goes to K-1.

MR. ETRA: It's not on the exhibit list. Well, it's impeachment, Your Honor.

THE COURT: It needs to be identified for the record. So what's the number that you have?

MR. ETRA: The number we have for it is -- sorry -- L-10.

THE COURT: Only to show the witness, please.

MR. ETRA: Let me go a little higher up so the witness can read what's going on in this document.

BY MR. ETRA:

Q. Are you able to see it or --

A. I mean, I see the whole --

Q. Do you recognize this document?

A. I see that it's from the Federal Register.

Q. Okay. Do you recognize this to be the first interim rule that the SBA created?

A. I don't see where it's labeled that. Oh, there it is over there. "Action: Interim Final Rule."

Q. Let me go step by step here. Leaving out the word "first" for now. If you see "agency," do you see it says: "Small Business Administration"?
A. Yes.
Q. That means it's a regulation --
A. Pertaining to us.
Q. Okay. And prepared by the SBA?
A. Probably. Yeah. A rule by the SBA on 4/15/2020.
Q. Right. On April 15 of 2020. Do you see that?
A. I do.
Q. And do you see on the second page it says: "Interim Final Rule"?
A. Under the word "action"?
Q. Yes.
A. Yes.
Q. Okay. Well, whether it's the first or not, do you recognize this to be an interim final rule from the SBA?
A. Yes.
MR. ETRA: I offer L-10.
THE COURT: Is there any objection?
MS. JIMENEZ: Yes, Your Honor.
I have a copy of the Interim Final Rule, and I haven't read this. Mine doesn't look this way.
MR. ETRA: There are different versions.
THE COURT: The request is denied. If what has been

shown to the witness is not the same document that has been given to the Government, then the request is denied. Let's continue.

MS. JIMENEZ: This was not provided to the Government.

MR. ETRA: It's the same document.

MS. JIMENEZ: It's the same document as what?

MR. ETRA: It's the same document that's on the screen.

MS. JIMENEZ: The document that's on the screen is the document that's in the binder. I have not seen the document that's in the binder before. What I'm saying is I have the Federal Register's publication of that rule, which does not look like this document, and I have not read this document.

MR. ETRA: I'll use their version.

THE COURT: The request to introduce it into evidence is denied.

Let's continue.

MR. ETRA: Can I ask for their version of this document? Then I'll use their version.

THE COURT: Ms. Jimenez, is your document reflected on the Government's exhibit list?

MS. JIMENEZ: It's not, Your Honor.

THE COURT: All right. Let's continue.

MS. JIMENEZ: It's the Federal Register's publication.

MR. ETRA: Your Honor, my problem is that this is not necessarily on our database to show the witness.

THE COURT: Mr. Etra, you asked for the document.

MR. ETRA: I'm sorry?

THE COURT: You've asked for the document. It's now been given to you.

MR. ETRA: I understand, Your Honor. It's the same thing. It just looks different. It comes from the CFR. I'm not making up new CFR rules.

THE COURT: Ladies and Gentlemen, this might be a good time for us to take a 15-minute recess, please.

COURT SECURITY OFFICER: All rise for the jury.

(Jury not present, 10:24 a.m.)

THE COURT: Mr. Etra, how many of these, quote/unquote, impeachment exhibits are contained within the binder that Ms. Jimenez has that you're seeking to use during your cross-examination?

MR. ETRA: Several.

THE COURT: Several meaning three or four?

MR. ETRA: More.

THE COURT: How many?

MS. JIMENEZ: The binder has 68 tabs, Your Honor.

THE COURT: How many exhibits? I don't want to take time away from the jury. So we're going to take a 15-minute recess and let Ms. Jimenez know what exhibits you're seeking to use for impeachment purposes and possibly seeking to introduce, so I don't have unnecessary sidebars that I will quickly deny.

All right. I'll see you back here in 15 minutes.

COURT SECURITY OFFICER: All rise.

(Recess from 10:25 a.m. to 10:39 a.m.)

THE COURT: All right. Welcome back.

Let me acknowledge the presence of the Defendant.

Have we had an opportunity to review the exhibits that you're intending to use with this witness, Mr. Etra?

MR. ETRA: I identified -- yes, Your Honor. I identified the specific documents that I'm planning on using, and I cut it down, obviously.

THE COURT: All right.

Go ahead and have a seat, everyone.

And we just need the witness.

MS. JIMENEZ: Your Honor, there are several exhibits that I have not seen before. I don't have any objection to the loan applications, although I will say that there are several loan applications, the 2483 Form. This witness, I think it's been established, did not review the individual loan applications.

I don't have any issue with him asking her about anything that's on the form. But to go over application after application with a witness who's never looked at any of the actual documents that were submitted, I don't know what the point of that would be, other than to waste the jury's time.

THE COURT: Well, I tend to agree. This witness has already testified that she knows nothing about Mr. Sheppard or his companies, or any of those documents.

So to that extent, I agree that it certainly appears that this witness is not competent, quote/unquote, to testify with regard to those items.

MR. ETRA: Your Honor, the witness has described -- and maybe we need to -- let me start again. I apologize.

The witness described in great detail how everything worked, what the rules were, for maybe 45 minutes -- I don't have the exact time -- without the benefit of what the rules were. I'm cross-examining her on what she said, how it worked, what the rules were, what was made public to the borrower.

THE COURT: That's separate from the actual loan application documents that Ms. Jimenez is referring to, the specific loan application documents that are germane to this case.

MR. ETRA: They are.

THE COURT: This witness has no knowledge of what's contained within those documents themselves.

MR. ETRA: Right. Your Honor, she testified what the certifications were. I want to cross -- without looking at them. So they didn't show the document. I want to show the document and cross-examine her that --

THE COURT: She's already testified she hasn't seen any documents related to Mr. Sheppard's businesses.

MR. ETRA: Right. Right. But she -- sorry, Your Honor. But her direct testimony about the certification stands. And I want to show that it's not true based on what the application and the certification actually say. There's like a world of difference between what she told the Court, without the benefit of the actual documents and the rules, and what the documents and the rules show. I think that's normal cross-examination to show that essentially I think almost everything she said is not true, or at least it wasn't disclosed to the borrowers in the way that she described them.

THE COURT: What you're intending to show her -- and I haven't seen the document that Ms. Jimenez is referring to. But if it's specific with regard to the Defendant's companies, she's already testified she has no knowledge of those companies.

MR. ETRA: I apologize, Your Honor.

THE COURT: So to show her documents related to his company, and ask her to confirm certain information on there, even if it's inconsistent with her previous testimony in terms of a generic sense as to what should have been included, is inappropriate. She's not competent to testify with regard to his businesses.

MR. ETRA: I now understand, and I was missing the point of Ms. Jimenez's argument.

THE COURT: All right.

MR. ETRA: May I just clarify?

I'm using the applications that he filled out, but it's not focused on how he filled them out. It's focused on the forms themselves --

THE COURT: Then you can refer to the forms and information on the forms, but not the content with regard to what may have been contained by Mr. Sheppard's companies or individuals related to Mr. Sheppard's companies.

MR. ETRA: A hundred percent. A hundred percent.

THE COURT: And to that extent, I'm not going to allow its introduction, unless there's been an agreement ahead of time.

Okay. All right. Let's bring in the jury.

COURT SECURITY OFFICER: All rise for the jury, please.

THE COURT: Just for purposes of timing, we'll take a lunch recess, if we could, at about 12:30. We have a matter about 1:15, but we will be done by 1:30.

(Before the Jury, 10:45 a.m.)

THE COURT: Welcome back, Ladies and Gentlemen.

Please be seated, everyone.

And we'll continue with the cross-examination.

MR. ETRA: Your Honor, we offer O-1 -- as in the letter O-1, which is the form of the rule that we discussed that the Government has.

THE COURT: Ms. Jimenez, is there any objection?

MS. JIMENEZ: No objection, Your Honor.

THE COURT: Admitted into evidence.

(Defendant's Exhibit O-1 received into evidence.)

MR. ETRA: We probably have to take this down from the jury.

THE COURT: All right. If we can take this document down, and if we can publish O-1.

MR. ETRA: Sorry, Your Honor. I haven't used an ELMO in 20 years.

THE COURT: Is there someone that can assist you, Mr. Etra?

(Pause in proceedings.)

MR. ETRA: So may I proceed, Your Honor?

THE COURT: You may.

BY MR. ETRA:

Q. I have Exhibit O-1, which is the interim rule from April 15, 2020. You with me?

A. Yes. Thank you.

Q. Okay. And I've put a circle and little brilliant squiggly on letter F. Do you see that?

A. Yes.

Q. And you see there's a definition, or it says what qualifies as payroll costs, right?

A. Yes.
Q. And it gives a paragraph right there, right?
A. Yes.
Q. It's the exact same paragraph that we saw in the application that we looked at before, correct?
A. I believe so.
Q. Okay. And this is again -- take a step back. These are rules the SBA created on how -- what the rules were going to be with this new program, right?
A. Correct.
Q. Okay. And this definition of what qualifies as payroll costs didn't really change throughout the entire time of the PPP program, right?
A. Yeah. By and large, yes, it stayed the same.
Q. And isn't it a fact that the SBA, in drafting this, recognized that this description of payroll costs didn't answer the question about whether payments to employees for whom you file 1099 -- whether those are included in payroll costs? Isn't that correct?
A. Could you ask again, please?
Q. Sure.
A. Sorry. Yeah. That's a complex question.
Q. This is a mouthful. I understand.
A. Yes.
Q. Didn't the SBA -- isn't it correct that the SBA, your

agency, understood that this paragraph right here doesn't answer the question about whether payments to people who work and get 1099s -- whether those payments are included in the program? Isn't that true?
A. So I'm going to try to rephrase, and you tell me if I got it right. You're asking me if SBA knew that small business owners may not -- or thought that independent contractors were included as employees.
Q. Well, I mean -- or at least this didn't clarify --
A. Okay. Okay. I guess.
Q. Okay. Well, let's take a look at what else they wrote in the rule. I'm now going to Subsection H. Okay. F, G, H -- two subsections later, and it says: "Do independent contractors count as employees for purposes of PPP loan calculations?" You see that?
A. I do.
Q. And the answer is: "No. Independent contractors have the ability to apply for a PPP loan on their own, so they do not count for purposes of a borrower's PPP loan calculation," correct?
A. Correct. It says that.
Q. So in the rule the SBA realized they better clarify in simple words of one syllable that -- don't include payments to 1099 workers, correct?
A. Yes.

Q. And that was in the rule, correct?
A. Yes.
Q. To follow the other definition of payroll costs that we saw, right -- that we just saw, F?
A. Oh, yes. Yes. Thank you.
Q. And it stayed in the rule the whole time?
A. Yes.
Q. But it didn't go in the application?
A. I don't know. Do you -- can we see the application again?
You mean this -- H is not in the application? That's what you're saying?
Q. In any version of it, it's not in the application.
MR. ETRA: Let's go to 6.
BY MR. ETRA:
Q. Why don't I take you through the application parts of it. And if you want to see more when I'm done, you say so. Is that fair?
A. Yes. Thank you.
Q. Sure. No problem.
MR. ETRA: Why don't we go to the fourth page of the application where we were the last time.
Sorry. Third page. I apologize.
Okay. We can blow up the top half, please.
BY MR. ETRA:
Q. So here -- we were looking at this page before. It's the

third page, the paragraph that begins: "With respect to purpose of the loan." Again, that's the paragraph that was in Subsection F of the rule, correct?
A. Yes.
Q. Okay. And we don't see here Subsection H, which would clarify you don't pay -- you don't include payments to 1099 workers, right?
A. Right. That's not here. That's correct.
Q. I'm just going to keep directing you. And if you want to see more, I'll let you see whatever you want to see.
A. Okay. Yeah. Thank you.
MR. ETRA: Let's go to the previous page.
BY MR. ETRA:
Q. So these are the certifications and authorizations we talked about, right?
A. Yes.
Q. Okay.
MR. ETRA: If we can blow up -- let's look at the top briefly as well.
Top half, yeah.
BY MR. ETRA:
Q. This is -- for some reason, the top half doesn't require signatures the bottom half does. Do you see that?
A. Yes. I see that.
Q. Do you know why that is?

A. I don't.
Q. Okay. All right. Do you see anything in the top half that explains the certifications or authorizations that -- not to include payments to 1099 workers, like we saw on the regulation?
A. Do I see here that H section? You're talking about --
Q. Sorry. We're in the Certifications and Authorizations.
A. Yes.
Q. Second page of the document.
A. Yes.
Q. And it's the top portion where there are bullet points but there's no place to initial.
A. Yes. That's correct.
Q. So -- I'm sorry. I wasn't sure if you answered my question.
A. Oh, sure.
Q. You do agree with me that on this part of the form it doesn't say anything about not including payments to 1099 workers?
A. Okay. If you give me a moment, let me read it.
Q. Take your time.
(Pause in proceedings.)
THE WITNESS: Thank you for letting me read it. Now, could you remind me your question, please.

BY MR. ETRA:

Q. Absolutely. Do you agree with me that the portion of the application you were looking at, which is the Certifications and Authorizations, where there are bullets but no place to sign, does not tell the reader what we saw in the rule, that payments to independent contractors, 1099s, whatever, are not included?

A. Right. It does not say that.

Q. Okay. All right. Now let's go to the portion where there are places to sign. Okay?

A. Okay.

Q. I want to take you to some of them, and then you can look at others. Okay?

A. Uh-huh.

Q. So the prelude to this, it says -- the sentence that leads into the certification, it says: "The authorized representative of the applicant must certify in good faith to all the below by initialing next to each one," correct?

A. Yes.

Q. So you're looking for good faith from the applicant, correct?

A. Yes.

Q. And let's go to the -- focus on the first bullet point -- excuse me -- the first certification, where there's a signature -- a place to sign.

"The applicant was in operation on February 15th, 2020, and had employees for whom it paid salaries and payroll taxes or paid independent contractors as reported on Form 1099."

Do you see that?

A. Yes.

Q. And do you agree with me that, however you read this sentence, as a lawyer or non-lawyer, it doesn't say to exclude workers who are 1099?

A. It does not say to exclude them.

Q. And actually mentions 1099 workers in its own formulation?

A. Correct.

Q. And let's go to the second bullet while we're on -- and we'll cover this point I was going to cover later. And it says: "Current economic uncertainty makes this loan necessary to support the ongoing operations of the applicant."

Do you see that?

A. I do.

Q. You were testifying about -- that a small business has to have a need for the money, correct?

A. Yes.

Q. And this is the actual certification on that, correct?

A. Yes.

Q. And the actual certification is -- again, is in good faith from the applicant. "Current economic uncertainty makes this

loan request necessary to support ongoing operations," right?
A. Right.
Q. There's no definition of what that means, "provided in this application," correct?
A. Definition of what this sentence means?
Q. Well, yeah. What level of necessity is needed.
A. Oh, no. I mean, no, I don't see one.
Q. Right. And it's left to the small business owner to determine whether, in light of the situation of COVID at the time, the business owner felt it was necessary, correct?
A. Right.
Q. And they are not required, business owners, to go and say: "Well, since I have access, because maybe I can mortgage my house, or I could do -- or I could borrow money from people," you know, maybe at high rates if you can get loans -- you're not required to do that in order to certify this, correct?
A. No. I don't think so.
Q. Right. Part -- the program was to provide the businesses with the funds and didn't make them pledge that they couldn't get the money from --
A. Otherwise. I think you're right, but I also think that good faith triggers the notion that if you can pay your employees from your own resources, you would. But no.
Q. I want you to tell me where in the SBA rules or website it says what you just said.

A. No, it doesn't. I said: "I think" --
Q. You think. Okay.
A. -- "that good faith engenders that notion." But it does not say that, to my knowledge.
Q. It doesn't say that. So part of your testimony today and a little last night isn't just what the SBA rules and regulations are; it's part of what you, Ms. Harris, think is appropriate, correct?
A. No. You asked me about this, and I answered about this.
Q. What else that you've testified to doesn't come from the SBA rules and regulations but just comes to what you think as an individual?
A. I don't know. I don't know. I mean, that's kind of vague for me.
Q. Well, I don't want to, and Judge wouldn't let me, go through every part of your direct and say which part.
A. Right. Right.
Q. So can you answer now which part of your direct testimony is based on your personal feelings as opposed to what the SBA rules and procedures are?
A. No.
Q. Okay. So the first certification talked about independent contractor and Form 1099-C, but it did not say not to include payments to them, correct?
A. It does not say: "Do not include payments to them."

Q. And this is the fourth certification that the signer is supposed to sign, correct?
A. Yes.
Q. Pretty foundational, right?
A. I mean, I wouldn't -- I don't know. I didn't make the list.
Q. Okay. Let's go to the next place to sign, the third one where there's a place for the applicant to initial. Says: "The funds." Let's just focus on the words: "The funds will be used to retain workers and maintain payroll."
MR. ETRA: Stop there.
BY MR. ETRA:
Q. Okay. So do you agree with me that even as a lawyer the word "workers" isn't clear that it's talking about W-2 employees? Correct?
A. Yes. That's correct.
Q. Even those of us who understand -- who went to law school and -- or businesspeople who understand some of these things, correct?
A. That "workers" is not synonymous with "employee"? Is that what you mean?
Q. Right.
A. Oh. I think the words are synonymous, but it's not about me.
Q. Okay. So -- well, you're here as a representative of the

SBA. Does the SBA -- according to the SBA, does the word "workers" mean only people who get W-2s or also people who get 1099? Just tell me what the SBA's view is.

A. I can't speak for the entire agency. I just can't. I can only tell you what I understand that to mean.

Q. Is your testimony in this court about the agency's views or your views?

A. It is both, I suppose. But again, I just go back to the Paycheck Protection Program as we talked about it during that time --

MR. ETRA: Your Honor, I would ask that the witness just answer the question.

THE COURT: The question calls for a yes-or-no response. If you need to explain your answer, you may certainly do so.

MR. ETRA: May I continue with the next question?

THE COURT: You may.

MR. ETRA: Thank you.

BY MR. ETRA:

Q. Let's just go back to simple terms here. It says: "The funds will be used to retain workers," correct?

A. Yes.

Q. It doesn't say: "To retain employees for whom you file W-2," correct?

A. Correct.

Q. And the SBA could have written it that way, correct?
A. Correct.
Q. And it certainly doesn't say what's in the regulation that we looked at that you don't include payments -- that this is not for payment -- let me start again. I apologize.
It certainly doesn't say what the regulation says, that the program isn't for people who get 1099s, correct?
A. Correct.
Q. And you also said, I think, that the purpose or the main purpose is to pay payroll, correct?
A. Yes.
Q. But let's read what the certification says. Let's keep going. "The funds will be used to retain workers and maintain payroll or..." right? It's got a big "or" there and then it has a list of things.
A. Yes.
Q. "Make mortgage interest payments, lease payments, and utility payments." And -- okay. Let me stop there.
Isn't it correct that the certification that's being signed by the person applying doesn't make clear that it's really supposed to be for payroll, as opposed to mortgage interest, lease payments, or utility payments?
A. Right. It does not say the percentage breakout.
Q. It doesn't even say you have to pay any here because it's an "or" there, correct?

A. Yes.

Q. And that's in the certification -- third certification that the applicant has to sign, correct?

A. That is the third item.

Q. Okay. And so far we haven't seen anything that says you don't include payment to 1099ed workers, right?

A. Right.

Q. And I'm going to skip -- let's go to the fifth one, where someone signs. And if you want to look at anything else, Ms. Harris, I will give you all the time you need. And if you feel you need to, you should take it.

So the fifth place to sign that says: "I understand that loan forgiveness," says: "I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest, covered payments, covered rent payments, and covered utilities, and not more than 25 percent of the forgiven amount may be for non-payroll costs."

Did I get that, right?

A. Yes.

Q. And that's actually the rule, correct?

A. Okay. I'm sorry. Let me read it a little more closely.

(Pause in proceedings.)

THE WITNESS: Yes. It's a ugly sentence, but yes.

BY MR. ETRA:

Q. So I want to go back to your testimony about the percentages that you have to spend on payroll. Respectfully, I think you got it a little bit wrong, and tell me if you agree with me.

A. Okay.

Q. When you talked about the percentages for payroll you're not saying that that was a requirement of the program. You're saying that was needed if you wanted forgiveness, correct?

A. Oh. That's an interesting question and very nuanced.

What I can say -- I think you're sort of like technically right.

Q. So that's a yes?

A. I guess that's a yes. Yeah.

Q. Okay. So to be clear --

A. So because -- so -- okay.

THE WITNESS: May I explain, Your Honor, or no?

THE COURT: If you need to explain your answer --

THE WITNESS: Okay. Thank you.

The intention of the Paycheck Protection Program was to preserve payroll. If you elected not to use the money that way, then your loan would not be forgiven. But the intention was that it would be used to maintain payroll.

Certainly -- and we know that people did take PPP money and did not preserve payroll. And those loans were presumably not forgiven by the government.

BY MR. ETRA:

Q. Right. I mean, the borrower is basically being told: "This is a great program. If you want the best version of the program, which is the forgiveness, you have to spend a certain amount on payroll," correct?

A. Yes.

Q. But you could still get the benefit of the program, which is still, like you testified, favorable loan terms, even if you don't meet that requirement for paying payroll, correct?

A. I wouldn't characterize it that way.

Q. So is it your testimony that under the SBA rules and procedures, even without seeking forgiveness, you had to spend a certain amount on payroll, yes or no?

A. That is my understanding of the intention of the CARES Act and the Paycheck Protection Program.

Q. I'm not asking your intention. I'm asking the actual rules. Is it your --

A. I have not read all the rules lately, so I don't know, then, the answer to your question. I just know what I understood at the time, and how I understood the program as explained to us in the district office and as we explained to the public, that you had -- this is what we said at the time. You had to make the payments, 75 percent, 60 percent in payroll, and 40 percent, and whatever -- 25 percent in certain other ways. And if you did not, then the loan would not be forgiven. It would convert into a five-year loan at one percent. That's what I understood, and that's what we communicated to the public.

Q. When you're talking about communicating to the public, you did not communicate that to my client?

A. No. I don't know if he was on any of our webinars.

Q. Nevertheless, I think you're agreeing with me that regardless of what you say, the intent of the program was you could legally and properly borrow the money, and spend none of it on payroll, and you just -- you don't get the benefit of forgiveness. Am I correct, yes or no?

A. I don't know that part about the legally. But I do know the back end of your question, that if you didn't do it as prescribed or desired by the legislation, then no, you would not be forgiven for your loan.

Q. I want to make sure I understand how this applies to some of your other testimony. For example, you said this wasn't available to real estate developers. Is that your knowledge legally or your view of the intent?

A. That is based on my knowledge of how SBA's loan programs work in general, right, irrespective of all of this.

And then, in looking up who was eligible, my recollection is I got a call asking if publicly traded companies are eligible. I went to the rules, looked to see, and saw similar language to my own understanding of who is eligible and ineligible for SBA-supported financing.

Q. Does that include the PPP program?

A. That's the regulation I was looking at.

Q. Let me ask you something about that regulation. What about companies that are engaged in construction? Are they eligible?

A. They are normally eligible.

Q. Normally. Why are you qualifying that?

A. Yeah. Because I'm trying to establish that I'm talking about the framework that PPP draped over, so to speak. That under normal circumstances a construction company is eligible for SBA financing -- backed financing.

Q. Are there any reasons why a construction company would not be eligible for PPP --

A. None I can think of.

Q. And do you know whether the companies in this case were engaged in construction during COVID?

A. Say again.

Q. Do you know whether the companies in this case --

A. Oh. I don't know anything about the companies in this case.

Q. Okay. Very good.

All right. Okay. Let's go to the second-to-last certification that has to be signed. Jumping down to -- you gave some testimony -- feel free to review it. You gave some testimony about making a false statement, that that was part of the certification. I just want to show you the language and ask you about that, okay?

A. Okay.

Q. It actually doesn't say you can't make a false statement. It says you can't knowingly make a false statement, correct?

A. Is this the one with the little yellow --

Q. Yes. The second sentence.

(Pause in proceedings.)

THE WITNESS: Okay. Thank you for letting me read that. What's the question?

BY MR. ETRA:

Q. I'm not sure I remember exactly what you said on direct, so I may have it wrong. But I thought you said there was a certification that you can't make a false statement. And I'm asking you: Isn't it true that the certification is you can't knowingly make a false statement?

A. Okay. I don't recall saying what you just said -- attributed to me. What I remember saying was that -- I said that there was a certification that you're submitting documents that are true and accurate, which is in the first sentence.

Q. Okay. Fair enough.

And all of that is qualified by the very top of the line that the applicant is certifying in good faith, basically, to their knowledge?

A. It's in that section, yes.
Q. All right. So this process about this application we're looking at -- this 2483 Form, right?
A. Yes.
Q. -- the way it worked is the borrower really didn't fill this out at the beginning of the process, correct?
A. I don't know that that's true.
Q. Okay. Is it your understanding as the SBA representative that the beginning of this loan process was the borrower answering these questions on the application?
A. I understand that -- part of the process is to fill out this form. Is that what you mean?
Q. Well, I asked it differently. So let me ask it my way, and then just answer it, and we'll keep going.
A. I'll try.
Q. I appreciate that. Is it your testimony that the way a borrower goes into a bank, or starts this process, is they take this form that we're looking at and they fill it out? Is that your testimony?
A. In one way or another, yes, they fill out this form.
Q. What you mean by that is they don't actually go in -- they don't actually go somewhere online, fill out this form, at the beginning of this process, correct?
A. They could.
Q. But do you know if that's how it really worked in the real

world?
A. I have seen during that time period this document completed by small business owners. I'm aware that banks and financial institutions took the substance of this form and made it electronic in order to receive applications in a streamlined way.
Q. Right. In other words, the way it worked in the real word is someone goes on their computer, clicks something, and they are in portal and they answer the prompts that are available, correct?
A. Yes. Yes.
Q. Now, the SBA doesn't know, if what you just said is true, whether those prompts that the person fills out actually contains the same information in this application?
A. I believe that was the requirement for the lenders to gather this information as such.
Q. Right. But you don't know what the lenders actually did --
A. No. I never saw any of the portals.
Q. You don't know what they look like, correct?
A. I've never seen any of them. No.
Q. You don't know -- and there are prompts, right? You get a --
A. Presumably. I mean, I've filled out online forms before.
Q. So you're not here to testify about how this process worked in reality, given the way -- and we'll talk soon about what the

banks did and their process. You're not here to testify about what actually happened in the real world, correct?
A. I don't think so.
Q. I want to talk about the banks and how they got paid and their incentives.
A. Okay.
Q. The banks got fees for successfully closing these loans, correct?
A. I believe so.
Q. Okay. So they could do work on an application. And if it doesn't fund, if it doesn't get approved, they don't get paid for that, right?
A. Presumably.
Q. Like a civil contingency fee, like you learned about in law school, right?
A. Sir, there's very little I remember about law school.
Q. Fair enough. Okay.
All right. So do you recall how much banks make from successfully closing loans?
A. I don't.
Q. Was it about five percent for loans under 150,000?
A. I don't remember, honestly. What you're saying sounds familiar, but I can't say for sure.
Q. Okay. Do you know how much money was spent -- was charged by the banks?

A. No, I don't.
Q. Did you prepare for your testimony today?
A. Yes.
Q. Did you meet with the prosecutor?
A. Yes.
Q. Did you spend your own time looking at information?
A. Yes.
Q. So you would be ready to answer my questions?
A. Yes.
Q. And then the reality is that the banks actually didn't do most -- let me take a step back.
Okay. The SBA basically looked to the banks to do the work and all the work that gets done in this process, with the SBA getting final approval for each loan, right?
A. Yes.
Q. Okay. But the reality is the banks didn't do the work themselves, correct?
A. No, that's not true.
Q. Really?
A. Okay. So what do you understand the work to be --
Q. Okay.
A. -- that you're saying they didn't do?
Q. Have you heard of the term "loan service provider"?
A. Yes.
Q. Okay. What's a loan service provider?

A. An LSP is a separate company that helps banks do some of the work related to getting SBA guarantees on loans the bank makes.

Q. And that's allowed under the PPP rules, right?

A. I don't know, actually. I know it's allowed under the regular program that I've worked with over two decades. But I don't -- I assume it is because a lot of the framework of the regular program I understand was utilized for the PPP, but I couldn't say definitively.

Q. Have you heard of the term "referral agent" in the world of the SBA?

A. No.

Q. Do you know whether there were referral agents that were allowed to go out there and look for loans for the loan service provider to give to the bank?

A. For PPP?

Q. Yes.

A. No, I don't know.

Q. And do you know whether the -- you don't know about the referral agent, but do you know the loan service provider -- do you refer to them as LSP --

A. Yes. I've heard that term.

Q. And the LSPs got paid for the work they did, correct?

A. They are a company providing a service. I'm assuming they got paid.

Q. Okay. And they don't get paid extra from the SBA, but the banks have to share some of their fees --

A. I believe that's how the structure is -- the fee structure is.

Q. Isn't it true that in reality the LSPs and the referral -- well, the LSPs did virtually all the underwriting and all the work for these PPP loans?

A. I don't know.

Q. You don't know?

A. I don't.

Q. What oversight did the SBA provide for the banks to make sure the banks were following the rules?

A. I guess I don't know.

Q. You don't know?

A. Technically, no, I don't know.

Q. Do you know if there was any oversight?

A. If I don't know what the oversight was -- but then -- no. We -- the federal -- we do oversight. What that constitutes, I don't know, in this case. But may I explain a little more, just a little bit?

MR. ETRA: I'm sorry. I wasn't --

THE COURT: I'm sorry?

THE WITNESS: May I just explain a little bit more about that whole oversight thing?

MR. ETRA: I was asking whether the SBA provided oversight of the banks.

THE COURT: That's correct. And the witness would like to explain a little bit more.

THE WITNESS: Just a little.

We do provide oversight inasmuch as there's a division at SBA that makes sure that the lenders are doing what they're supposed to, how they're supposed to, and that's the Office of Credit Risk Management. They do that sort of thing. So there is oversight, and presumably they did it for PPP as well.

BY MR. ETRA:

Q. So --

A. Because that's part of getting the loan number -- loan guarantee number as well.

Q. You're basically saying that it's your general knowledge that there's a department in the SBA that's supposed to do that kind of oversight, correct?

A. Yes.

Q. But you don't know what oversight they did or didn't do, correct?

A. For PPP and at that time?

Q. Yes.

A. Not specifically, no.

Q. And what about for the loan service providers? Do you know what oversight was done for loan service providers?

A. I don't. Not specifically, no.
Q. You basically know how it's supposed to go, but you don't know how it actually went for these loans, correct?
A. "It" meaning oversight?
Q. Sure.
A. No. I don't really know specifically.
Q. Now, the banks were incentivized to move as fast as possible in order to earn fees, correct?
A. I know they were asked. I don't know about their incentives.
Q. Let's talk about how the system was set up and what the incentives were. Okay?
A. Okay.
Q. So you testified already, I think -- and I'm not sure if we covered this, but there were basically three tranches or allocations of funding, correct?
A. Correct.
Q. So at the beginning it was about 348 billion that went by in two weeks?
A. Yes. In less than two weeks, yes.
Q. And the government used up the money and -- well, the allocations ran out, right?
A. Yes.
Q. And there was still more demand?
A. Yes.

Q. Okay. So there was a second tranche or money allocated by Congress --
A. Yes.
Q. -- in I think April 24 of 2020. Does that sound about right?
A. What I have in my memory banks is the funding came at the end of December of that year, and then another batch in, what, March, for the ARPA.
Q. Okay. So you don't think -- so are you saying that after the money was gobbled up in two weeks in April, there was no more funding for the rest of 2020?
A. I don't recall, to be honest with you. I mean, that sounds right, but I just -- in my research, I didn't see that specifically.
Q. Well, the first loan here was funded on May 1st. So it would have to have been --
A. Okay. See, I can accept that.
Q. Okay. So maybe we'll just keep it very general, then. There was a series of allocations of money, correct?
A. Yes.
Q. And it got used up, correct?
A. Yes.
Q. And there was greater demand afterwards, correct?
A. Yes. Yes.
Q. And it wasn't like you went to the banks and said: "Okay.

Citibank, we have 348 billion. You get 20 billion," or some other bank -- you didn't set it up that way, right?
A. No. Huh-uh.
Q. And you set it up as essentially first come, first served?
A. That's right.
Q. So essentially the incentive for the banks was -- if they want to earn fees, is: "Let's get going fast," right?
A. Sure.
Q. And if you slow down or maybe take too much time scrutinizing the applications, you might lose out to the next guy, right?
A. I wouldn't say that.
Q. I know you wouldn't say that --
A. And I say that because the same banks are the banks who do our regular program. And I have talked to lenders over the course of my --
MR. ETRA: Your Honor, could I -- explaining and talking about conversations outside --
THE COURT: That's correct.
Your next question, please.
MR. ETRA: Thank you.
BY MR. ETRA:
Q. We'd just agree the incentive was to go as fast as possible to close the next loan to get the fee. That's the way this was set up for the banks, right?

A. I don't know if it was characterized as an incentive. I appreciate what you're saying, in that it may have happened that way. But I'm not saying that the SBA provided the incentive in the hopes that the lenders would make loans quickly and ignore the intention of Congress. I'm not saying that.
Q. Well, Congress didn't set up these rules. The SBA did.
A. Right.
Q. Okay. So let's talk about what it means when we talk about allocating money. All right?
A. Okay.
Q. And money going to a loan.
A. Okay.
Q. The money is allocated to the SBA to use to have available to guarantee the loan, correct?
A. Yes.
Q. So we start off with 348 billion. If a loan for 150,000 is closed, that part can no longer be used to guarantee the next loan, but it doesn't actually get spent by the government yet?
A. Correct.
Q. So that just means you're allocating more funding?
A. Right.
Q. And eventually, when all that allocation runs out, there's no more money in the program?
A. Correct.

Q. And let me just see if I got this right. In each case, demand was greater than supply?
A. Yes.
Q. So in each case, the person who got the loan, right?
A. Uh-huh.
Q. If they didn't get the loan, it would go to the next guy or woman, correct?
A. Correct.
Q. Okay. It wasn't like the SBA was trying to hold on to this money and not use it for the next loan?
A. That's correct.
Q. Because your job --
A. To get the money out to the businesses, yes.
Q. And use up those allocations of funds to guarantee the loan?
A. That's right.
Q. So if there's a company that's not eligible -- let's just say there's a company that's not eligible, right?
A. Yes.
Q. And it gets a loan. Okay? Let's call it Bob's Construction Company.
A. Uh-huh.
Q. Bob's Construction Company gets a loan, and that 150,000 is not available, correct?
A. Correct. That's right.

Q. For the next one?
A. Okay.
Q. If they hadn't gotten the loan, the 150 would go to the next person, Sam's Construction Company, right?
A. Yes.
Q. So the reality is that an ineligible loan didn't threaten the finances -- didn't threaten a financial harm to the government, correct?
A. Only if it was funded, yes.
Q. Hang on.
A. Sorry.
Q. Before I get to the funding, because if it didn't go to --
A. If it didn't get funded, right, it's still in the bucket to be given to someone else.
Q. It's still in the bucket to be given to someone else?
A. Yes.
Q. The harm to the government is their policy interest, right? The SBA has a policy interest, which are the rules about who gets the loans and who doesn't, correct?
A. Yes.
Q. So if an ineligible company gets a loan that it's not supposed to get in this program, it doesn't create a risk of financial harm to the PPP program because it's all the same loans. It just hurts their policy under the rules about who gets the loans?

A. It hurts the policy and the would-be other small business owner who can't get the money because it's been -- gone to someone who's ineligible.
Q. Speaking of policy, there's no policy reason why a 1099 worker shouldn't get the benefit of a PPP loan, correct?
A. Do you mean a 1099 worker who applied for themselves?
Q. I mean in general. In general for the SBA, 1099 workers should get support just like W-2 workers?
A. Yes.
Q. And what we saw in the rule was it's not prejudiced against 1099 workers, but the concept was they should get their own loan, correct?
A. Correct. That was it. That's right.
Q. But in concept the program was also designed to help 1099 workers too, wasn't it?
A. Yes.
Q. Okay. Great. And the problem would be -- well, let me ask this question: Do you know whether -- did you research whether any of the workers that got money from Mr. Sheppard's company -- whether they got their own PPP loans?
A. No. I didn't do any research on Mr. Sheppard or his companies.
Q. So you don't know whether the danger that the SBA is concerned about, which is the money comes from Mr. Sheppard's company and these people can get their own loans -- you don't

know if that took place?
A. I don't, no.
Q. And generally speaking, this is a policy-driven program, correct? Meaning to help the workers in the way we've talked about, right?
A. Yes.
Q. Creditworthiness wasn't important. Those issues were all put to the side, right?
A. The creditworthiness, you mean, of the applicant?
Q. Yes.
A. Right. I don't believe that came up.
Q. Right. Okay. It's really about a set of policies to promote the goals of the program?
A. Right.
Q. Do you know approximately what percentage of PPP loans were forgiven?
A. A good number of them, as in high percentages. But I don't specifically know how many.
Q. I've seen in the 90 percent range. Does that sound right?
A. That sounds right, correct.
Q. Do you know -- of the two PPP loans charged in this case, do you know whether they were forgiven or not?
A. I don't.
Q. But generally speaking, almost all the loans were forgiven?
A. Yeah. I mean, 90-something percent. So closer to a

hundred than zero.
Q. And that's what actually cost the taxpayers the money, when the loans were forgiven?
A. When the loan -- yes.
Q. Okay. You covered this a little bit about -- in your direct about how the average monthly payroll drives the loan amount, right?
A. Yes.
Q. Okay. So we saw in the application before that there's a place for average monthly payroll and number of employees, correct?
A. Yes.
Q. The number of employees doesn't drive the loan amount, right?
A. The average monthly payroll drives it.
Q. Right. So whether the number of employees is -- I'm just going to make up numbers. Doesn't matter what's in the application --
A. Right.
Q. -- one, two, five, eight, 299. That doesn't affect the loan amount. It's the average monthly payroll that affects the loan amount, correct?
A. Yes.
Q. You also said that a company has to have at least one W-2 worker to get a loan. Did you say that? Did I get that right,

because I thought you said that on direct.
A. I know I said something about the number of employees.
Q. But reality is -- reality is you don't even need any employees at all to get a PPP loan, right -- W-2 employees?
A. Oh, right. Correct.
Q. You don't need --
A. Because you could be a sole proprietor.
Q. Right. You could use your own ability to get money?
A. That's right.
Q. The SBA had a lot of options in how they could verify payroll, correct?
A. Yes.
Q. They could use bank records?
A. Yes.
Q. They can use tax forms, like 940, 941s, things like that?
A. Yes.
Q. By the way, I think you said that with respect to the world of W-2 employees it's only those employees that the company pays income tax -- pays their income tax. Did you say that?
A. So -- okay. I'm not sure what I said. So wages include -- we saw that, right -- includes certain things, which we won't continue to articulate. And part of wages is that employers pay income tax, a portion, and the individual pays their own income tax as a portion that's withheld.
Q. Okay. We looked at the rule before where it says you don't

count workers who are independent contractors, right?
A. I believe so, yes.
Q. That's the rule. Nothing about who's paying whose taxes, right?
A. Oh, okay. Okay. So I'm going to tell you that I don't work for the Internal Revenue Service, so I don't want to sit here and proclaim what is, isn't, da, da, da. What I know is that W-2 earners, because I am one -- withholding is taken from my paycheck. And I don't know, actually, because I work for the government, but presumably it went to the Treasury too.
Q. I just want to focus on the PPP rules, okay? Not the IRS issues, the PPP rules, right? You're saying that payroll includes people, workers, but it doesn't include people who are independent contractors. That's what the rule said. We could put that rule up again.
A. Okay. Maybe you should do that.
Q. Okay.
A. I'm sorry.
Q. Okay. No not at all.
It's on the screen now. Do you see it?
A. Yeah. Sorry. Okay. Thank you for -- so the H is what you're asking me about?
Q. Right.
A. Okay.
Q. And specifically it doesn't talk about whether taxes are

paid or not paid. It just talks about people -- if they're independent contractors, you don't count payments to them, right?
A. Right.
Q. It doesn't even say if you file a 1099. It just says independent contractors, right?
A. Yes.
Q. That's the rule. That's the whole rule right there, correct?
A. That independent contractors don't count.
Q. Okay. Nothing about whether the employer is withholding or not withholding. It's simply a fact that independent contractors, whatever that means, don't count?
A. Right.
Q. Correct? And we'll talk a little later about what that means.
A. Thank you.
MR. ETRA: You can take that off.
BY MR. ETRA:
Q. Am I correct that under the PPP loan program there was no requirement, whether for the bank or their agents, the LSPs or whoever, to get annual tax returns from LLCs that applied?
A. Are you correct that they did not have to get tax returns? I don't know. I know that people offered tax returns, but I don't know if it was required.

Q. This may sound like a strange question, but I'll ask anyway.
A. Okay.
Q. Do you know whether under the SBA rules if -- if you get a tax return, whether it has to have the name of an accountant on it for it to count as a tax return?
A. No.
Q. It doesn't have to, right?
A. Yeah. No. Not everybody has an accountant who prepares their taxes.
Q. Okay. Do you know whether tax returns are the crux or the key mover of PPP loans?
A. No. I do not know.
Q. Do you know whether the name of an accountant on a tax return is the crux or key mover of a PPP loan?
A. No. I do not know.
Q. Okay. Let's talk about the -- you used the term "scrutinize" referring to the banks, what they have to do. You used it last night and you used it today. Is it your testimony that under SBA rules and procedures the banks had to scrutinize the information they were getting from the applicants?
A. I understood that SBA --
Q. Can I get a yes or no?
A. Oh, okay. Sorry. Sorry. Could you ask your question again?

Q. Sure.
A. Sorry. Could you ask your question again? Sorry.
Q. Was it SBA rules and practice that the banks had to scrutinize the information being given to it by the applicants?
A. Yes.
Q. And they also had to work -- check the calculations for average monthly payroll. Is that part of that?
A. Yes.
Q. So they didn't just have to take the representations as they were. They had to scrutinize them and really look at them carefully, correct?
A. Yes.
Q. Okay.
MR. ETRA: Your Honor, I have a slight problem in the sense that I had only documents that were filled out by the applicant to use, ready to go. I'm not going to focus on how it was filled out, but I'm focusing on the form. Can I use those forms?
THE COURT: Is there any objection, Ms. Jimenez?
MR. ETRA: Sorry?
THE COURT: I'm asking if there's any objection.
MS. JIMENEZ: A form, not three different lenders with the same -- essentially the same form.
THE COURT: What is being requested by Mr. Etra is that he utilize the form that was involved in this case, but

focus on the -- not the content of what was completed, but the other portions of the form.

Perhaps it would be helpful if you could refer to the exhibit and show Ms. Jimenez, so she has an understanding as to what you're seeking to do at this time.

MR. ETRA: Sure.

(Pause in proceedings.)

MS. JIMENEZ: Your Honor, Defense Exhibit I-13, a Form 2484, the Government has no objection.

THE COURT: All right. Are you seeking to admit it into evidence, Mr. Etra?

MR. ETRA: I am moving it into evidence, Your Honor.

THE COURT: All right. Without objection, admitted into evidence.

(Defendant's Exhibit I-13 received into evidence.)

MR. ETRA: Why don't we not do that.

BY MR. ETRA:

Q. You have in front of you Exhibit I-13. Again, as you heard, we're only talking about the form and not the specific information filled in. That's not material to what I'm asking you, okay?

A. Okay.

Q. Do you recognize this form generally?

A. Generally, yes.

Q. Could you tell us what it is.

A. It is SBA Form 2484-SD, effective in January 2021. And it's called "Paycheck Protection Program Lender's Application Second Draw Loan Guarantee."
Q. Okay. And this is a form that is prepared by the banks when they finish their job and they are basically saying: "We think this loan is eligible. Would you please approve it for PPP"; is that correct?
A. Yes.
Q. And if it's approved, that's when they get the loan number which gives it the ability to issue the loan -- the banks the ability to issue the loan that's protected by the PPP, guaranteed?
A. Yes.
Q. Okay. And the reality is that for all these loans that got issued, this is really the only form the SBA got to see, correct?
A. Yes. I believe so.
Q. Okay. So the formal application we looked at, it gets drafted by -- prepared by the SBA to use, but you don't actually get to see -- the SBA doesn't actually get to see any of that, right?
A. I don't believe they do, no.
Q. And the loan file, whatever that is, that you're not familiar with for each of these banks and their loan service providers, that doesn't go to the SBA, correct?

A. I don't know. I don't think so.
Q. Okay. You just get this form.
MR. ETRA: And could we go to the next page.
BY MR. ETRA:
Q. So one thing they ask is -- in the first -- first -- first section, essentially just some of the things we looked at in the certifications, correct?
A. Yeah. This looks familiar. Uh-huh. Yeah. It -- well, there's additional things, but yeah. Like the first one and two things are repeats.
Q. Okay. Four, for example, is: "The funds will be used to retain workers and maintain payroll or pay other allowed costs," right?
A. Uh-huh.
Q. And the SBA approves that when they approve the loan?
A. They approved -- I'm sorry?
Q. Sorry. It's a bad question.
A. All right.
Q. This is an -- this is the SBA form to get the final approval, correct?
A. Right. Uh-huh.
Q. And if we go to the third box, essentially this has to do with the size of the business, right? Employees -- no more than 300 employees?
A. Yeah.

Q. Together with its affiliates, the first line, correct?
A. Yes. "Employs no more than 300 employees."
Q. So essentially, again, the main issue with the affiliates and disclosing the affiliates is just to make sure they meet that requirement of not having too many workers?
A. Yeah. That they're small.
Q. Okay. And there's nothing in this form about tax returns, right?
A. No.
MR. ETRA: Your Honor, may I confer with the Government about the next document?
THE COURT: Certainly.
(Pause in proceedings.)
MR. ETRA: Your Honor, the Defense moves Exhibit -- Defense Exhibit J-3. The Government does not object.
MS. JIMENEZ: Correct, Your Honor.
THE COURT: All right. Admitted into evidence.
(Defendant's Exhibit J-3 received into evidence.)
BY MR. ETRA:
Q. Okay. This is a document prepared by Cross River. And again, I'm not going to ask the -- focus on the answers, just the forms. Okay?
A. Understood. Uh-huh.
Q. Do you recognize Cross River as one of the banks that were involved in PPP loans?

A. No.
Q. Okay. Do you know whether -- when a borrower gets a PPP loan, besides filling out the 2483 application in some form, do you know whether there are any other documents they have to fill out?
A. To apply for a PPP loan? Am I aware of any other form than the one we've been talking about today?
Q. Right.
A. No, I'm not.
Q. Don't they also have to sign a promissory note?
A. Oh, sure. Yes.
Q. Okay. And in fact, the SBA has a form of the promissory note that the borrowers are allowed to use, correct?
A. Yes.
Q. And they can vary from it, as long as they are not varying inconsistently with it, right? They can add to it but they have to have the bones of it, correct?
A. I'm not aware specifically --
Q. Okay.
A. -- about that.
Q. Okay. This package shows that it has several different documents. If you look at the first item, it says: "2483." That's the application, right?
A. Okay. Hold on. I'm sorry.
Q. Look at the bullet points on the first page.

A. Yeah. Okay. Okay. What about it? It's there.
Q. It's there. And there are other forms too, in other words. You see the reference to a promissory note?
A. Yes.
Q. But there are other forms in addition, and that's because the banks were allowed to provide other forms that the borrower had to sign if the banks wanted to, correct?
A. Wait. Ask again, please.
Q. Sure. The banks had to make sure that the 2483 application was signed in all the right places, correct?
A. Right. Complete.
Q. And they had to have the promissory note signed, correct?
A. Of course. Otherwise it's not a loan, right?
Q. Exactly. Okay.
A. Okay.
Q. But they are allowed to have other forms signed by the borrower if they felt it was appropriate or justified?
A. Well, it looks that way.
Q. But you don't know that?
A. Yeah. I don't know.
Q. Okay. Got it. Got it. Okay.
All right. This is -- I'm going to show you again. I'm not talking about the answers. It's just the information.
A. Okay.
Q. Let's stay on the application and look at the next page.

MR. ETRA: Go to the page after that, please.

BY MR. ETRA:

Q. Okay. So do you recognize this form of the application, again, just the questions?

A. This -- yes. This is the 2483.

Q. Right. And if you look at the bottom, it gives you a date of --

A. March of 2021.

Q. So this is one of the modifications that was made to the PPP loans application, right?

A. Yes.

Q. And this is not the second round where the borrower comes in and does the second loan. This is essentially potentially for a new borrower, correct?

A. Yes.

Q. Because otherwise it would say on the top "second round" on it?

A. Correct.

Q. Fair enough. I want to talk about a few things. One is the NAICS code, which is towards the top.

A. Yes.

Q. And I think you testified what that code means generally in direct, correct?

A. Yes.

Q. Okay. And what instructions were given by the SBA as to

which code to use?
A. I don't know.
Q. You don't know. So I think you testified on direct that the borrowers could or should use the code that was in their tax forms, but you don't even know if that's what the SBA rules were, correct?
A. I don't know the rules concerning the NAICS code.
Q. Okay. So you don't know, for example, whether -- and you could see why having a different code from the tax forms may make sense, correct?
A. No.
Q. Okay. I'll give you an example. In say -- let's look at this time period. Okay? We're in March of 2021. They haven't done their 2021 tax returns yet, correct?
A. Right. Right. That's right.
Q. So you're asking a small business owner essentially: "What's your main area of business?" Small business owner has to figure out what to answer, correct?
A. Okay. Yes.
Q. And they don't have any tax returns for this year yet, where they look at the whole year back and they figure out what the right code is, right?
A. Oh. I guess.
Q. You really don't know whether it's appropriate or not -- whether it's appropriate or not for NE -- for the NI -- excuse

me -- for the code here --
A. Yes.
Q. -- to be different from the tax returns, right?
A. Okay. Your questions are crashing into what I understand about NAICS codes and tax returns. Either you're an office of a lawyer or not all year. Right? So when you file your taxes, you put the code for office of lawyer, because that's what you are. And when you apply for the PPP, you put the code for office of lawyer on the form in that box, is what I understand about the whole process and businesses and self-identifying what industries they are in, et cetera.
Q. And there were no instructions -- do you know whether there were instructions -- you don't know what instructions were from the SBA?
A. I don't.
Q. I'm going to show you.
A. Okay. Great.
MR. ETRA: Let's go to -- three more pages in.
BY MR. ETRA:
Q. This is the page we looked at before, the earlier application. Now there's more small print. Do you see that?
A. Yes.
Q. It's small. First of all, I'll make any of it bigger, but let's first focus on that first paragraph that says: "With respect to purpose of the loan."

A. Okay. Can y'all bump that up for me, please?
Q. Yeah.
A. Thank you.
Is this the one or the one before?
Q. No. This is the one.
A. Oh, okay. "Instruction for Completing." I thought you said: "Purpose of the Form."
Q. I did misspeak. Thank you.
A. Oh, okay. Just want to be on the same page.
Q. We're in the paragraph that begins: "With respect to the purpose of the loan." This is the identical paragraph we saw in the earlier application and in the reg for the purpose of the loan --
A. Can I read it really quickly?
Q. -- where it talks about payroll, correct?
A. I'm going to read it really quickly.
(Pause in proceedings.)
BY MR. ETRA:
Q. I could put up the other one, if you would like.
A. Yeah. I just feel like I didn't see this parenthetical after cash tips --
MR. ETRA: Could we put up -- is it different -- C-6 next to it?
BY MR. ETRA:
Q. Good memory. So I've got up on the left side --

A. So it is there. Sorry. It's the same.
Q. Let me just say what we're doing. On the left side is the version from 2021. And on the right side of the screen is the version we looked at earlier from the beginning of April of 2020. Essentially --
A. It's the same.
Q. And it's essentially what was in the regulation that we looked at for the purposes of the loan?
A. I think so.
Q. And you'll agree with me that here too in this newer version --
MR. ETRA: We can take down the older version.
BY MR. ETRA:
Q. -- it doesn't have the language from the regulation, from Subsection H, which says: "Payment to independent contractors are not included," right?
A. I don't see it here.
Q. Okay. All right. But I want to go to the next page and talk about the NAICS code.
A. Okay.
Q. Well, actually -- I'm sorry. It was back there. I apologize.
A. It's actually on this page.
Q. It says: "For purposes of recording NAICS code" -- NAICS code -- "applicants must match the business activity code

provided on the IRS income tax filings, if applicable," right?
A. Yes.
Q. Use what's in the tax filings if it's applicable, correct?
A. Yes.
Q. And if it's not applicable to what you're doing, then you don't use what's in the filings, correct?
A. If it's not applicable.
Q. Okay.
A. I think so.
Q. Okay. Let's go now to the promissory note that's in this package, which I'll show you is -- has the SBA's name on it.
A. Okay.
MR. ETRA: 71. SHEPP 71.
Oh. I've got the wrong...
(Pause in proceedings.)
BY MR. ETRA:
Q. Sorry for the delay.
A. Yeah.
Q. So we're in -- so Exhibit J-3. And in this package of materials is what says a "US SBA Paycheck Protection Program Note." Do you recognize the form of the document at all?
A. I've never seen it before.
Q. Okay. So you're not familiar with the note?
A. No.
Q. All right. Do you know whether the note basically tells

the borrower --

MR. ETRA: Let's go to the bottom. I'll go quickly, Judge, on this.

BY MR. ETRA:

Q. Do you know whether -- it tells the borrower in Section F: "The proceeds of the loan shall be only used for the following purposes," right, "payroll costs, mortgage, rent," and then it continues on the next page, right?

A. Sorry. Let me read it.

It got small. Could you put that back. I didn't answer your question. I wanted to read it.

Yes. Okay.

(Pause in proceedings.)

THE WITNESS: Oh, okay. Okay. So what was your question about this? I see it here.

BY MR. ETRA:

Q. So essentially the SBA form of the promissory note -- which has to get signed by the applicant, correct -- the direction is to use the money for the following purposes. Basically, all the allowed purposes, correct?

A. Yes. Yes.

MR. ETRA: Now let's go back to the application -- the beginning of the application, please, 2483.

BY MR. ETRA:

Q. There's a place in the middle where the person could check

the uses they're making of it. Do you see that?
A. Yes.
Q. And there are more uses than there were --
A. Before. That's correct. In 2020. Uh-huh.
Q. But it doesn't really matter what the person checks because the note says you could use it for any of these purposes, right?
A. I don't -- I wouldn't say that it doesn't matter.
Q. Okay. How is it material to the SBA, or important to the SBA, what's checked here -- and it doesn't matter what's checked in this particular one --
A. Yeah.
Q. -- what's checked here -- these are all allowed purposes, right?
A. Yes. They are all allowed, yes.
Q. Certain things are checked. And then you go to the note, it says you could use it for all those purposes. So why does what's checked here matter?
A. I think because -- I think --
Q. Could I ask if you could give me the SBA perspective.
A. Well, the government collects a lot of data, so it's important that we get good data.
Q. If there's an agency in the government that's collecting data for statistical purposes they should have accurate data?
A. That's the idea.

Q. Other than that, from the perspective of the SBA administering this program, am I correct it really doesn't matter which of these things are checked off because the note says you can use them for all the purposes?
A. Right. Outside of maybe the data collection purpose.
MR. ETRA: And let's go to the data certifications here.
Keep going.
BY MR. ETRA:
Q. All right. So now we have in this one a similar-looking certification, some that are not signed and some that are to be signed, correct?
A. Right. Uh-huh.
Q. And am I correct that now in 2021 there's still nothing in this application that tells the borrower in words of one syllable not to include payments to 1099ed workers?
A. I don't think so. I haven't read this, but I'm pretty sure.
Q. And let's look at the certifications that are initialed.
A. Okay.
Q. So that first certification we looked at, all under "Good Faith." The first one that's signed: "The applicant was in operation on February 15th, 2020, has not permanently closed."
Okay. It goes on with more language, but it continues to say: "Had employees for whom it paid salaries or paid

independent contractors," correct?
A. Yes. I see that here.
Q. So essentially there's some added wording. The SBA changed the certification from the year before, correct?
A. Yeah. This language is not the same as the one the year before.
Q. But it still didn't clarify --
A. Not on the form, no.
Q. Let me finish, for the record.
A. Oh, sorry.
Q. It's okay. It still didn't clarify: "Don't include payments to independent contractors." That's still not fixed here, correct?
A. That's not. I don't see that here, no.
Q. And if you go to the third bullet point -- I shouldn't say bullet point. I apologize -- the third place to sign, it says: "The funds will be used to retain workers and maintain payroll." That part is the exact same as before, right?
A. Right.
Q. Still doesn't clarify not to include independent contractors, right?
A. Right.
Q. The rest of it's different because it talks about all the other purposes, and the other purposes have changed, correct?
A. I'm sorry?

Q. I'll go through the rest of the paragraph.
A. What's the question?
Q. I'll ask it again. That's okay.
A. Okay.
Q. After it says: "The funds will be used to retain workers and maintain payroll," it then goes on to talk about the other possible uses of the funds, correct?
A. Yes. Uh-huh.
Q. And it includes what we've seen before, mortgage interest, utilities, things like that, right?
A. Gosh. I lost it. Hold on a second.
Yes. It says that.
Q. But it now includes new things, like covered worker protections expenditures, right?
A. Uh-huh.
Q. Is that like masks or things like that?
A. Covered property damage -- yes. Yeah. Like probably -- what do you call it -- the stuff for your hands, the masks.
Q. And again, you could -- like we said before, you could -- now in 2021, you could take out the money and it doesn't have to go to payroll -- forget forgiveness for the moment. It doesn't have to go to payroll. You could use it for other purposes too?
A. There were additional uses that businesses could use PPP monies for. But again, the understanding was it was for

payroll, the bulk was for payroll.

Q. Okay. The understanding -- I think you said that was what you understood the intent of the program was to be.

A. Yeah. And the communication was internal to the SBA, and were communicated to the public -- and were asked to communicate to the public.

Q. And -- but the reality is the rule was you -- you could spend none of it on payroll if you spent it on other purposes, correct -- on these other purposes?

A. I, again, haven't read all the rules and all the regs. So I can only tell you what I understood the program rules to be at the time as we were communicating them at the time.

Q. So I thought earlier you conceded to me that for the first -- for 2020, whatever you say the SBA intent was, the rule was that you could spend all of it on non-payroll allowed purposes. And that's okay; you just don't get forgiveness?

A. You don't get forgiveness.

Q. And that's still true in 2021, correct?

A. I believe so.

Q. Okay.

MR. ETRA: Let's go back to the first page of the package.

BY MR. ETRA:

Q. There's a document called a 4506-T Form. Do you know what that is?

A. Yes.
Q. Could you tell us what that is.
A. That is an IRS form that a person could fill out, giving another or -- you know, person, organization, the right to see their tax returns.
Q. And was that required for this program?
A. I don't recall.
Q. But evidently some banks --
A. It looks like this group asked for it.
Q. Let me ask you about where the money went -- to the bank account, right? The money has to -- let me start again.
Let's change topic and talk about the loan being approved and going to the borrower. Okay?
A. Okay.
Q. From the bank to the borrower, correct?
A. Yes.
Q. Okay. What were the rules for the SBA as to what kind of account it had to go to?
A. A business account is what I recall.
Q. Okay. All right. There was no rule that said you had to put it in a new segregated account and keep it separate from the rest of the business, correct?
A. I don't think there was a rule for that, but we recommended it locally.
Q. Right. Okay. So it wasn't a requirement, correct?

A. I don't believe so.
Q. Like you said, a business account, right?
A. Yeah.
Q. And the SBA understands that businesses, if they're functioning, have money coming into a business account and money going out of the business accounts, correct?
A. Ideally.
Q. Ideally, correct. And by the way, this relates to another topic about whether -- did the SBA expect that borrowers, in addition to getting PPP loans, if they had access to other capital, should also use other capital?
A. I don't understand.
Q. In other words, was it a good thing or bad thing from the SBA's perspective for a business owner that got a PPP loan to also not just rely on the government dole here -- D-O-L-E, dole -- but also, if they could put more money into the business that would be great? Right?
A. I don't know. I don't know that we're thinking that way. I mean, it's always just generally a good idea to be capitalized.
Q. Right. That's not something to be criticized, correct?
A. Oh, no. No. Only in the -- for sure in the other loan programs, yes.
Q. Okay. Well -- okay. We're on PPP today. And I agree with Ms. Jimenez. I want to focus with you on PPP.

A. Okay.
Q. Okay. Very good.
So you do know that -- the SBA understands generally how small businesses work generally?
A. Yes. Yes.
Q. It's going to sound very basic. I apologize.
A. That's great. I like it.
Q. Okay. Good. Very good.
Okay. In a small business account, money gets spent for various purposes, correct?
A. Correct.
Q. It could go to pay any kind of a bill, correct?
A. Right.
Q. It could go to pay a 1099ed worker, correct?
A. Yes.
Q. Okay. Could pay taxes, correct?
A. Uh-huh.
Q. All those things?
A. Yes. Uh-huh.
Q. And the SBA understood that the money was going to go into a business account that's being used to pay other purposes besides what's provided for in the PPP program, correct?
A. Yes. And that was certainly possible.
Q. And that's okay from the SBA's perspective?
A. Yes.

Q. So you weren't telling the borrowers that, when the money comes in, like: "Oh, you know, look at the serial number." I don't even know how you would do that.
A. Right.
Q. "And make sure that exact dollar goes into payroll or mortgage interest." That wasn't how the program worked, correct?
A. I don't believe that was a requirement of the program, no.
Q. Right. Not only it was not a requirement, it was the expectation that that probably wouldn't happen, right, if you put -- if you put the borrowed money, the PPP money, into an operating account for an operating business, right?
A. I'm sorry. If you put the money into an operating account, what's the question? That that's expected?
Q. You wouldn't be able to trace the serial number, say, or the electronic serial number, or the wire, keep that separate from the other money?
A. Oh. Segregate it. No. No. Yeah. It all gets commingled together.
Q. Thank you. Money comes in, money goes out. You can't really track these things, right?
A. Well, okay --
Q. Let me withdraw the question. You are not required to track the actual serial number or electronic code of a wire that goes into the operating account, correct?

A. No. No.
Q. Okay. So when the SBA says that the PPP money has to be used for X, for payroll or something, what they really mean is not the actual physical dollar?
A. Five dollar, 10 dollar, right.
Q. What they mean is -- or the SBA means is the amount of the loan has to be used for that purpose, correct?
A. Yes. That's correct.
Q. Okay. Great. Because money can go in today, money in/money out, and you don't expect the company to say: "Well, I'm not spending any money other than payroll," because you got to pay your suppliers, right?
A. Um...
Q. I'll re-ask the question. You're not expecting the company to take that borrowed money, put it into an account, and say: "Well, now that it has government money -- or government-backed money, I can't spend any -- I can't spend from this account except for, say, payroll" --
A. Oh, yeah. No. No. You can -- the money goes in, you can spend it --
Q. Right. And it might be, for example --
A. -- on payroll. But it might be sitting in there with 50,000 other dollars, and you use that for what you're talking about.
Q. Right. And it might be that you spend the money in that

account and then you got to pay payroll so you put other money in to make up the payroll, right? It's all fungible, right?
A. I think so.
Q. It doesn't matter, right? And the money can go into account A, right -- let me start again.
Some small businesses have more than one bank account?
A. Right.
Q. And you don't really care which account -- let me start again.
You can get the money coming into Account A -- and that's an operating account. It's doing its thing -- and then payroll or mortgage interest, it may be paid out of Account B, C, or D, correct?
A. Of the company, yes.
Q. And that's -- sorry. That's fine, correct?
A. I believe so.
Q. Okay. Great. In fact, let's talk forgiveness for a moment.
A. Okay.
Q. Forgiveness works when you make sure you've paid a certain amount to payroll, right?
A. Right.
Q. When you go to the bank and you seek forgiveness, they don't ask you to trace the dollars like I just --
A. Described, no.

Q. They just say: "Just prove that somehow you paid your payroll out of any of your accounts"?

A. The business has to demonstrate that they used the amount they got in PPP towards payroll.

Q. Got it. Okay. Let's talk about the time to spend the money. Right? Isn't that called the covered period?

A. Yes. Yes.

Q. So this is a comfortable area for you?

A. It's all very awful, but go on.

Yes. The business owners had to spend the PPP money over a certain time period.

Q. Is that only for payroll or for other purposes too, like mortgage and utilities?

A. I understood that, but -- that it was about the payroll portion.

Q. The payroll portion. So for example, if you're going to pay your mortgage -- let's say you decide you're going to use it to pay -- let me take a -- maybe an extreme example. You're going to use it to pay utilities.

A. Okay.

Q. There's no rule that you had to use up the amount of the money in 24 weeks, correct?

A. On utilities?

Q. Correct.

A. I don't recall that being a requirement.

Q. Right. And utilities, I picked it because it's not as high as maybe a mortgage interest payment, correct?
A. Not these days. I don't know.
Q. Let's take a $150,000 loan, right?
A. Uh-huh.
Q. Let's say -- just extreme for purposes of making the point, let's say utilities are a thousand a month.
A. Okay.
Q. In theory, at least, you have 150 months you could use the PPP money to pay off those utilities?
A. Oh, okay. You mean because you're not going to use it on payroll?
Q. Let's say you're not using it on payroll.
A. Okay. So your question is if I have a $150,000 PPP loan and I intend to use it a thousand dollars a month on utilities only, I have 150 months with which to spend that money?
Q. Right.
A. That's right.
Q. That's the question.
A. That's the question. I don't understand the program to work that way.
Q. Well, do you know whether there's a rule that says you can't do that?
A. I have not read all the rules.
Q. So you don't know whether that's allowed or not?

A. I don't.
Q. Okay. I got to put this back on.
All right. Going back to my favorite regulation, H. So this says, again: "Do independent contractors count as employees for purposes of PPP calculations," and the answer is no. And again, the SBA realized they had to use the word "count as employees" because some people might think of an employee as -- excuse me. Some people might think of someone who is an individual who happens to be an independent contractor as an employee, right?
A. Right.
Q. Okay. And again, this doesn't necessarily say that the decision -- let me start again.
This doesn't say you exclude a worker for whom you filed a 1099. It says you exclude independent contractors, correct?
A. Okay. For H?
Q. Yeah.
A. Okay. Now ask your question again. I'm sorry.
Q. The wording in the rule that the SBA formulated is you don't include payments to independent contractors, right?
A. It says that independent contractors don't count.
Q. Okay. And you know generally -- and I promise you this is very generally. Generally, this world of employment law and practice is the IRS has rules about how to classify people as

either an employee --
A. Yes.
Q. -- or an independent contractor?
A. Correct. Uh-huh.
Q. And again, without going into the weeds, it's based on a lot of factors, right? Do you know that?
A. I do.
Q. Okay. And factors like how much control, things like that?
A. How much control over the work that the person does, their day-to-day work.
Q. Okay. And -- but it's more complicated, and I'm not going to go through those factors with you today.
A. Correct.
Q. You're aware that it can be a close call for a company about how to make that determination, correct?
A. No. I'm not aware of that being a close call.
Q. You think it's always easy to tell whether a worker fits into the category of -- under the IRS of an employee versus independent contractor?
A. Okay. I don't know all of the rules from the IRS. However, in my mind, it is clear which is which -- sorry -- whether a person is an employee of the business versus a 1099ed contractor.
Q. All right. It doesn't say here that in deciding whether payments to a worker are included or not -- it doesn't say that

you consult how the company happened to classify them for tax purposes, correct?
A. I don't see that here.
Q. Right. So for example, you can have a situation where someone who -- maybe should have been classified as an employee but they did a 1099 for whatever reason -- mistake, innocent or not, correct?
A. Yes.
Q. Okay. Those individuals, if they are truly employees under the IRS standard, their payments count for PPP purposes, right?
A. I don't think so.
Q. Well, you say you don't think so or the rules don't say so --
A. I thought over here under -- can we see what F says again?
Q. Sure.
A. I mean, because H says independent contractors don't count.
Q. Right.
A. Okay. So maybe I'm not following you.
Q. And I admit it's a little subtle. Well, maybe more than a little.
Can we agree that it says independent contractors don't count? Correct?
A. Yes. That's clear.
Q. It doesn't say you rely on how the company, maybe their accounting department or payroll department, classified a

worker, correct?
A. You're talking about SBA?
Q. Talking about this rule here. Inclusion or not in -- which rule do you want up, F or H?
A. I'm looking at F and --
Q. But does F tell you that the only payments that you could make are to workers that the company has classified as W-2?
A. No. I don't see that distinction.
Q. And I'll show you other -- elsewhere if you want.
MR. ETRA: So let's go back to H, which says to exclude independent contractors.
BY MR. ETRA:
Q. Again, it doesn't say you rely on how the company classifies the person, correct?
A. I don't see that here.
Q. Right. So we could have a situation where, for whatever reason, someone who maybe should be on the side of an employee under --
A. Should be characterized as an employee. Uh-huh.
Q. -- those people are classified by whoever makes decisions as a 1099?
A. Yeah. Business owners do that all the time.
Q. But those payments -- if they really fall under the category of the employee, then the payments to them count as payroll and are covered by the program, correct?

A. Oh, okay. I don't know.
Q. You don't know?
A. I don't know. Because it seems to me if they really are employees, then you should be making the tax deposits and they shouldn't be making 1099 --
Q. I'm not asking -- again, I'm not asking for your personal opinion. I'm asking for the rules. The rules are not about how the employer classifies them but how they really are in reality based on the standards --
MS. JIMENEZ: Your Honor, I object to this line of questioning.
THE COURT: Sustained.
BY MR. ETRA:
Q. There was, I think you said, a lot of criticism on how this program was run?
A. Yes.
Q. And in reality, one of the criticisms was based on the fact that the big banks weren't really doing as much of the funding as you would expect, right?
A. No. The big banks were doing a lot of funding.
Q. Are you familiar with the concept of Fintech companies?
A. Yes.
Q. And what are Fintech companies with respect to this program?
A. Well, I don't know what they're defined as, but I

understand them to be banks or financial institutions that don't have brick and mortar, that they are mostly online. Examples are like PayPal and others.

Q. And wasn't there criticism that those Fintech companies were getting a lot of the market share of these loans?

A. I don't recall that there was criticism about them getting market share. I recall criticism about the big banks; therefore, SBA expanded to include Fintech, so that people who don't have brick-and-mortar accounts for their businesses could utilize something they are more familiar with in order to get the smaller small businesses access to PPP.

Q. Are you aware that two of the banks in this case, Cross River -- and we looked at the documents a little bit -- and Northeast Bank in Portland, were among the top producers of PPP loans?

A. I did not know that.

Q. Do you know that Cross River, which is one of the banks in this case, got so much money that the SBA announced an investigation into Cross River and how it ran its PPP program?

A. I did not know that.

MR. ETRA: Your Honor, could I have a few minutes to confer with counsel?

THE COURT: Yes, you may.

(Pause in proceedings.)

THE COURT: Any further cross-examination?

MR. ETRA: No further questions. Thank you.

THE COURT: All right. Redirect.

REDIRECT EXAMINATION

BY MS. JIMENEZ:

Q. Ms. Harris, let me ask you -- you mentioned a couple of times and did not explain the framework under which the Paycheck Protection Program was founded. Can you explain what that is.

A. Okay. So in order to do what Congress wanted with the CARES Act, to get the money out to small businesses, they charged SBA with doing it because that's what we do. We have a process -- a mechanism, a framework in place so that a business owner, when they want financing for their business, goes to a bank, just like with PPP, fills out the paperwork that the bank requests, just like PPP, then the bank looks at the documents, submits an application to SBA, just like PPP, and asks us to guarantee that loan, just like PPP -- guarantee it against non-payment of the loan by the borrower.

And so, because we already do that, and the lenders already do that, and the lenders already know the rules and have processes in place and have infrastructure in place to do that, that was the best, fastest, easiest way to get the money out to what is essentially our customers, right, small business. And so that's the framework that I meant.

Q. So the SBA was not starting something brand new in that

sense?
A. Right. Not completely brand new, no.
Q. Were there -- but there were specific rules for this particular program regarding who can get this money?
A. Yes.
Q. For the underlying SBA program, can anyone apply for a loan?
A. Well, there are rules about that too. They have to be, you know, an American company. They have to be small. They have to be engaged in industries that are not prohibited, right, by -- so in that sense, you know, most people can apply, if you meet those sort of minimum criteria.
Q. And those underlying rules carried over unless the Paycheck Protection Program had a specific rule indicating something different?
A. Right. That's my understanding, yes.
MS. JIMENEZ: Now, can we go ahead and look at your Exhibit C-6, the loan application.
BY MS. JIMENEZ:
Q. You had testified about different categories of applicants, right?
A. Yes.
Q. Independent contractors, sole proprietorships were also categories, right?
A. Yes. Yes.

Q. And for an independent contractor to get money from the Paycheck Protection Program --

MR. ETRA: Sorry. He's looking for it.

THE WITNESS: I don't see it.

BY MS. JIMENEZ:

Q. -- an independent contractor -- or really for anyone's salary, was that capped at an amount?

A. I'm sorry. I was distracted by the fact that it was not on my screen.

Q. For an independent contractor, or a sole proprietorship, or, say, a business with a single employee, is the amount capped at a certain amount?

A. Is the dollar amount capped?

Q. Yes.

A. Yes.

Q. What's the --

A. 2.5 times your average monthly payroll.

Q. Let me ask you this: For an independent contractor, one person, what is the amount of their salary that they can draw this average monthly payroll from --

A. Right. So --

Q. -- for the year?

A. Right. Well -- so in order to get an average monthly payroll, you look at the entire year, divide by 12. That's your average.

Q. Was it capped at a hundred thousand?
A. Oh, okay. Yes. Salaries -- so you could not do that calculation where a person's salary was over a hundred thousand, using how much they actually make.
So you could only -- if a person in your business made $150,000 a year, you could not do the calculation with the 150,000. You could only do it up to a hundred thousand.
Q. So if you're a sole proprietorship yourself, or an independent contractor just yourself, the annual -- the maximum annual you could use is a hundred thousand dollars?
A. That's my understanding, yes.
Q. And then you would divide that by 12, which my bad lawyer math is 8,000-something; is that right?
A. Sounds right.
Q. Times two and a half, it comes to about $20,000; is that right?
A. Yes.
Q. So for a sole proprietor, for an independent contractor, a business with just one person, their loan is essentially maxed out at about $20,000; is that right?
A. That's my understanding, yes.
Q. So let me ask you: In your experience with the SBA dealing with small businesses, what is the common general understanding of the term "employees"?
A. The person to whom you give a paycheck every two weeks.

Q. Wages; is that right?

A. Wages, yes.

Q. And if we look at this application --

MS. JIMENEZ: One moment, Your Honor.

(Pause in proceedings.)

MS. JIMENEZ: Can we use the counsel's table?

MS. MARTINEZ: What -- you're asking to use your own exhibit?

MS. JIMENEZ: Yes.

MS. MARTINEZ: So you need to identify it.

THE COURT: All right. What exhibit?

MS. JIMENEZ: Exhibit 17-11, which is a sub-exhibit of the PayPal records for the Government.

MR. ETRA: What is it? Can I just see it?

THE COURT: All right. Shown only to the witness at this time.

(Pause in proceedings.)

MR. ETRA: Aimee?

MS. JIMENEZ: Yeah?

MR. ETRA: Is it just the application?

MS. JIMENEZ: Yeah.

MR. ETRA: No objection.

MS. JIMENEZ: Okay. So Your Honor, Government would like to move in Exhibit 17-11 at this time.

THE COURT: All right. Any objection?

MR. ETRA: No objection.
THE COURT: Admitted into evidence.
(Government's Exhibit 17-11 received into evidence.)
THE COURT: You may publish and you may show the jury.
MS. JIMENEZ: All right. Now, the very top box here, if we could expand that out.
Oh. The very top, where it says: "Check one."
BY MS. JIMENEZ:
Q. All right. So a sole proprietor would be maxed out at $20,000; is that right?
A. Right. That's my understanding.
Q. And an independent contractor would be maxed out at $20,000?
A. Right.
Q. So if you apply as a business with employees, based on your understanding at the SBA, the common understanding in the small business world for an employee is what?
A. An employee is a person to whom the business pays wages roughly every two weeks.
Q. All right.
MS. JIMENEZ: Now, can we close that out for a moment.
The next box, where it says: "Average Monthly Payroll."
BY MS. JIMENEZ:
Q. All right. Now, if you apply as a business with employees,

and you're asked to provide a payroll figure, what is the common-sense understanding from you at the SBA dealing with small businesses that that payroll would be based on?

MR. ETRA: Objection. I'm confused by the question.

THE COURT: The legal basis?

MR. ETRA: I'm just not sure what the question is.

THE COURT: You're confused?

MR. ETRA: The question is unclear.

THE COURT: Does the witness understand the question?

THE WITNESS: I believe I do.

THE COURT: Overruled.

THE WITNESS: You're asking me, looking at this, what's the common-sense understanding of -- if you put a number of employees, that that's the number of employees you have, and that this is the average monthly payroll for that number of employees, and multiplied by 2.5 is the dollar amount that you would use to pay that number of employees for two and a half months. That's, I believe, the common-sense understanding.

BY MS. JIMENEZ:

Q. And that potentially is more than $20,000, right?

A. What --

Q. In other words, if you have, let's say, just a round number 10 W-2 employees.

A. Uh-huh.

Q. Yes?

A. Okay.

Q. And let's say their annual salary is capped at a hundred thousand.

A. Right.

Q. That's -- times 10 -- I'm not going to do the math --

A. Like, I think we said it was 20,000 times 10.

Q. Right. So it's potentially a lot more than $20,000 if you're applying as a business with employees?

A. Right.

Q. And if you have an infinite -- not infinite but up to 500 employees, you could possibly count that hundred thousand for each of them, correct?

A. If they earned -- yeah -- more than --

Q. And in fact, for a single business with employees, the maximum amount that they could obtain from this program was capped at what, $2 million?

A. I believe under PPP it was 10 million, and that's how the money got gobbled up so quickly.

Q. So is it fair to say that the more W-2 employees you have, and the more W-2 employees you claim, the more money you can receive, up to $10 million?

A. Yes.

MR. ETRA: Objection. Leading.

THE COURT: Sustained.

BY MS. JIMENEZ:
Q. What is the maximum amount of money you could obtain as a business with W-2 employees?
A. Okay. The PPP maximum was $10 million, substantiated by wages of employees.
Q. And if you're just one, how much can you get?
A. Twenty thousand, I think -- if your math is right, let me put it that way.
Q. Approximately 20,000?
A. Approximately 20,000, right.
Q. Now, you were shown the regulations that show whether or not an independent contractor counts toward the payroll calculation, right?
A. Yes.
Q. And what was the -- what did the regulations say?
A. Independent contractors do not count as employees.
Q. For purposes of the payroll calculation?
A. Right.
Q. Is that right?
A. Yes, ma'am.
Q. And the payroll calculation, what does that determine with respect to the loan?
A. The maximum loan amount.
Q. Is it the case that your loan amount is based on the payroll calculation?

A. Yes.
Q. So can a business with employees also have independent contractors?
A. Yes.
Q. Can a business with employees include what that business pays to independent contractors in their payroll calculation?
A. No.
Q. And if you're a business who pays independent contractors, does that business give those independent contractors W-2 Forms?
A. No.
Q. And if that business who is applying for a Paycheck Protection Program loan submits documents, are they supposed to indicate whether or not those documents reflect wages or payments to independent contractors?
A. Yes. The documents that are provided are to articulate and evidence that you have employees for whom you pay wages.
Q. And I think you had indicated that an IRS Form 941, for instance --
A. Yes.
Q. -- is a document that would indicate wage payments.
A. Yes.
Q. Does the Form 941 indicate -- reflect payments to independent contractors?
A. No.

Q. That's an IRS form, right?
A. Yes. It's an IRS form about withholding, income tax withholding, and business owners make -- they withhold it from the employee and deposit it into the bank for the Treasury.
Q. Does a business report payments to independent contractors on a 941?
A. No.
Q. So if a business is submitting a Form 941 to the lender to substantiate their payroll, is that business telling the bank: "This is what I pay my employee wages," or "This is what I pay my independent contractors"?
MR. ETRA: Objection. Beyond the scope.
THE COURT: Overruled.
THE WITNESS: If I just may about a little clarification. It's not just the form. Right? Because I could just fill out the form. It's really the receipt for the deposit at the bank that you actually made the withholding deposit, when I say 941.
Okay. And then you asked me -- I'm sorry.
BY MS. JIMENEZ:
Q. So in general, did the SBA -- and -- directed the lenders to obtain documentation?
A. Yes.
Q. To support their payroll?
A. Yes.

Q. And if a borrower submits a Form 941 to that lender, is the borrower telling the lender: "This is what I pay my independent contractors," or is the borrower saying to the lender: "This is what I pay my wage employees"?
A. A borrower is saying -- when they submit a 941 tax receipt, they're saying: "This is the withholding I have for my wage employees," not 1099 contractors.
Q. And if a borrower submits a typed document called a Payroll Report or Wage Report that lists withholdings for the people they pay, are they representing to the lender that: "These are the wages that I pay," or "This is what I pay my independent contractors"?
MR. ETRA: Objection. Beyond the scope and into what -- how documents are interpreted by banks.
THE COURT: That's sustained.
MS. JIMENEZ: Could we turn to the next page on Exhibit 17-11.
THE COURT: Just for purposes of timing, Ms. Jimenez, because I want to be sensitive to the jurors having a lunch break, you think you have more?
MS. JIMENEZ: I probably have at least 15 minutes.
THE COURT: All right. Ladies and Gentlemen, if you can just be patient, let's get through this witness and then we'll take our lunch recess.
MS. JIMENEZ: Can we enlarge this.

The top part, yes.

BY MS. JIMENEZ:

Q. All right. If we go to this certification -- one, two, three -- the third dot that we've already looked at --

MS. JIMENEZ: Highlight that for a moment.

BY MS. JIMENEZ:

Q. This is an -- these categories are either/or. Do you see that? Is that what they are?

A. Yes.

Q. In other words, I'm an independent contractor, or sole proprietor, or I employ no more than 500 employees, right?

A. Uh-huh. I see that.

Q. So those are either/or?

A. That's how I read it.

Q. Okay.

MS. JIMENEZ: If we can go down to the next part of the certification, that first certification. If we can highlight that first certification.

BY MS. JIMENEZ:

Q. This sentence: "The applicant was in operation on February 15 and had employees and payroll taxes or paid independent contractors," what is that sentence -- well, let me ask you this: Was there a requirement in April, when a business applied, whether or not they had to have been in business as of a certain date?

A. Yes. You had to have been in business prior to the pandemic.
Q. You had to have been in business -- was it as of February 15, 2020?
A. Yes.
Q. So the sentence -- on the sentence you have to certify that you had been in operation as of that date?
A. Yes.
Q. And you could have employees, correct?
A. Yes.
Q. And you could be paying independent contractors?
A. As a business, yes.
Q. Yes.
A. Uh-huh.
Q. You could be one or the other or both of those things, correct?
A. Sure.
Q. But you had to be in business as of February 15?
A. Yes.
Q. In terms of payroll, however, what can you count toward your payroll?
A. Wages. Is that what you mean? Wages, insurance.
Q. And the loan amount -- I'm sorry -- the loan amount is based on your payroll?
A. Payroll, yes.

Q. Let me ask you about the business code for a moment. We talked about the NAICS code, which, in 2021 -- do you remember -- you were supposed to draw it from your tax return; is that right?
A. Right.
Q. And that's your business industry code?
A. Right.
Q. And you indicated that a construction business -- is it an eligible business?
A. For SBA financing, guaranteed financing, yes. Under PPP, yes.
Q. And based on your experience with small businesses, is a construction business like a contractor who goes and, you know, builds buildings, let's say, or structures?
A. Yes.
Q. And if you're a developer, a real estate developer, and you hire a construction company to build something on the land you're developing, are you the developer or construction company, based on your experience with small businesses?
A. You're the developer.
Q. And is a developer eligible for this type of loan?
A. No.
Q. What about a landlord of a retail commercial space? Is a landlord retail owner a commercial -- owner of retail space a construction company?

A. No.
MS. JIMENEZ: Could we go to the last certification here in this, "I further certify."
So it's actually the part that's not highlighted.
BY MS. JIMENEZ:
Q. "I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects."
Do you see that?
A. Yes.
Q. Now, if you're a borrower, and you think that your payments to an independent contractor for some reason qualify as your employee payroll, do you submit an IRS Form 941 to support your payments to your independent contractors?
A. No.
MR. ETRA: Objection about banks.
THE COURT: The objection is sustained.
BY MS. JIMENEZ:
Q. When -- we talked about -- you were asked about how the lenders had an incentive to get the money out quickly. Do you remember that?
A. Yes.
Q. And in terms of -- it's true that banks had to get the money out quickly, right?

A. Yes. That was --
Q. That was --
A. -- the desired end. Uh-huh.
Q. Did the SBA and you working with the lenders rely on the certifications provided by the borrower?
A. Oh, yes.
Q. And did the certifications serve a purpose in helping to expedite this process?
A. Yes.
Q. How so?
A. It gives everyone confidence to move forward in the application process that a person is certifying that the information they're providing is true and accurate, or I think in all material respects.
Q. These -- you were asked about Fintech companies.
A. Yes.
Q. In your experience during the pandemic, and dealing with various banks, did regular banks also provide loans?
A. Yes. When it was all said and done, there were about 5,500 different financial institutions that participated in PPP.
Q. Did banks like Bank of America provide loans?
A. Oh, yes. All the big banks participated.
Q. Wells Fargo provide loans?
A. Yes. Chase.
Q. Truist, which used to be SunTrust Bank?

A. Yes.
Q. Was it your experience dealing with small businesses whether they would go to the bank where their business is banking and where they have a relationship?
A. Yes. A lot of business owners did go to their own banks first.
May I add to that?
THE COURT: There's no question pending.
BY MS. JIMENEZ:
Q. You were asked about tax returns and whether or not -- do you know whether sometimes lenders required tax returns?
A. I know that some did because I just saw it on the screen that Cross River asked for it.
MR. ETRA: Objection. Move to strike. She asked if she knows and then she --
THE COURT: Let's complete the question so that the answer can be provided.
BY MS. JIMENEZ:
Q. Do you know generally whether some lenders require tax returns?
A. Yes.
Q. Do you know whether the regulations in 2021 provided that tax returns would be provided depending on the type of business you were?
A. I don't know about the rules requiring tax returns.

Q. All right. Based on your experience at the SBA, and dealing with the PPP loan program, if a business provides a tax return and it contains false information about wages, something -- is wages something important in this process?
A. Yes.
Q. So if it contains false information about wages, and the SBA or the lender is made aware, would you provide that loan authorization to the lender to fund that loan?
A. No.
Q. If the SBA or the lender is made aware that the tax return that is provided as supporting documentation for a loan has a forged signature of that business's accountant, and you're made aware, would you authorize that loan?
A. No.
Q. If the business provides false Forms 941, those IRS documents that report withholdings, when there are no such documents that exist, and the SBA is made aware of that, and the lender, would you authorize that loan?
A. No. SBA would not.
(Pause in proceedings.)
BY MS. JIMENEZ:
Q. You were shown the Form 4506-T. Do you generally know what that is?
A. I don't remember that we saw it today. But I know what it is, yes. I've seen lots of them there.

Q. Well, what is it?
A. It is a IRS form that one person can complete and sign giving authorization to someone else to see their tax returns and get them from the IRS.
Q. So if the lender -- and it was provided in the Cross River documents, if you might recall.
A. Yes. Yes.
Q. If the lender requests the borrower to execute that document, it is for the lender presumably to have permission --
A. To get --
Q. -- to get the tax return?
A. Yes.
Q. And so, when the borrower signs that, presumably they have a belief or an understanding that that could happen, yes?
A. Yes.
Q. For the use of the money, you were asked some questions about where the money could go and the money could not go. Did the SBA have a view whether best practices, for instance, for a loan forgiveness -- to substantiate your loan forgiveness -- that you keep that money in an account where you can track where the money went?
A. Yes. That's what we told people locally in our webinars and small businesses because it is predictable that small businesses -- they could come in various levels of sophistication.

So our recommendation was, you know, once you get the money, create an account and just make the payroll. Because you want to be able to show very easily that you pay payroll. You don't want to show that you did this or that and having commingled funds, because it gets harder, particularly for unsophisticated small business owners, to show -- properly show and to get forgiveness. And ultimately, they all wanted to have the money and have it forgiven, not have it become a loan.

MR. ETRA: Objection to what those small business owners wanted.

THE COURT: Sustained.

BY MS. JIMENEZ:

Q. All right. And so in terms of the time within which the money has to be spent, was that 24 weeks or six months?

A. Yes.

Q. All right. Now, let me ask you, in terms of the money that has to be spent -- for forgiveness purposes, the money that has to be spent within the 24-week or six-month period, what was it? Was it the loan amount or what? What was it?

A. Yes. I understand that for the purposes of the payroll -- whatever the business was going to use for payroll had to be spent in the 24 weeks. And my recollection is that you also had to spend the proceeds before you could get another PPP loan.

Q. Right. But was it payroll or was it the loan amount -- or

I should say whatever amount of the loan you are applying for forgiveness loan -- for forgiveness on, it was the amount that you spent in those six months?

A. Yes.

THE COURT: We're at the 15-minute mark. Do we have much further or should we bring this witness back after the lunch break?

MS. JIMENEZ: I don't have much further, no.

THE COURT: How much further do you have?

MS. JIMENEZ: Couple of minutes.

THE COURT: All right.

(Pause in proceedings.)

MS. JIMENEZ: If I could just have a moment, Your Honor.

THE COURT: All right.

(Pause in proceedings.)

MS. JIMENEZ: Your Honor, I have nothing further of the witness. Thank you.

THE COURT: All right. Is Ms. Harris excused?

MS. JIMENEZ: She is.

THE COURT: On behalf of the Defendant?

MR. ETRA: Yes, Your Honor.

THE COURT: Thank you, Ms. Harris. You are excused.

(Witness excused.)

THE COURT: Ladies and Gentlemen, we're going to take a one-hour recess for lunch.

Recall I did say to you yesterday that you're not to read, watch, or listen to any news accounts related to the case that may be reported by newspapers, television, radio, the Internet, or any other news media. Let me emphasize that point.

Have a pleasant lunch, and I'll see you back here at five minutes to two. Have a pleasant lunch.

COURT SECURITY OFFICER: All rise for the jury, please.

(Jury not present, 12:52 p.m.)

THE COURT: Thank you, Ms. Harris. You are excused.

We do have a matter at 1:15, so if I can ask counsel to just move your items to the side, so we can make use of the tables, and I'll see you back here at 1:55.

I do wish to remind you, for purposes of scheduling the witnesses, that we will conclude at four p.m. today.

MS. MARTINEZ: Thank you, Your Honor.

(Recess from 12:52 p.m. to 1:54 p.m.)

THE COURT: All right. Welcome back.

I trust that everyone had a pleasant lunch and ready to get back to work.

We have our next witness ready to go?

MS. MARTINEZ: Yes, Your Honor.

THE COURT: If we could just check and make sure we have all the jurors.

MS. MARTINEZ: Your Honor, would you like to hear any evidentiary issues before the jury comes in?

THE COURT: What are they?

MS. MARTINEZ: The Defense has advised me that they are objecting to one part of a form. It's a form called K-1. It's part of a partnership tax return.

THE COURT: Go ahead and have a seat, everyone. My apologies.

It's -- all right. Continue.

MS. MARTINEZ: And so, they can frame their argument better, but they somehow believe that you can redact a piece of the record and not use that in a way to not reveal what went to the Defendant personally. However, the Defendant submitted these partnership forms, which necessarily show distributions that went out to the partners in this K-1. He submitted these false forms to the lenders. So we are moving into evidence true forms, which we argue should be complete, not somehow redacted.

THE COURT: It's exemplar forms?

MS. MARTINEZ: No. No. We are going to submit -- we are moving into evidence actual forms of the Defendant, true ones.

THE COURT: All right. So what's the issue?

MS. MARTINEZ: When I say "true," filed with the IRS, at least what the IRS has.

THE COURT: Then what's the issue?

MR. ETRA: The issue is the dollar amount that it shows that it's going to Mr. Sheppard. It appeals to the wealth and how much money he has or earns. I think they want to show that the money flows to Mr. Sheppard. The K-1s do that. They don't need to see the dollar amounts to make that determination. Seems to be unnecessary.

THE COURT: Well, it's evidence in the case. What does it matter?

MR. ETRA: Okay. It's evidence in the case in the sense that they are tax returns. It just seems to me that the jury doesn't need to see the dollar amounts that he's earning. I don't see how that's relevant to the issues in dispute. They opened the case on him being too rich to get PPP loans, and now they are showing how much money he has. So --

THE COURT: Well, what's the import of these forms? What are you seeking to introduce them for? Does it matter what the income was of Mr. Sheppard?

MS. MARTINEZ: Oh, my goodness, Your Honor. Number one, he submitted multiple false versions. So we are --

THE COURT: Is the income relevant?

MS. MARTINEZ: Your Honor, number one, it is a case that was --

THE COURT: I'm sorry --

MS. MARTINEZ: Yes. Yes. Yes.

THE COURT: And how is it relevant?

MS. MARTINEZ: Your Honor, it's relevant to show that he is controlling these companies. He is benefiting from these companies. When these companies have influx of proceeds of fraud, he is the one that benefits.

I will tell the Court that the amounts of those distributions are tiny compared to the amount of money that is going to be talked about in this case. It's only, for example, a hundred thousand of a distribution per year. It is not -- in other words -- and also, if we would somehow pluck this out, somehow the true evidence that the IRS has would be incomplete and we would not be able to completely compare it to what he filed falsely with multiple lenders.

THE COURT: All right. So the amount that's reflected on what was filed with the IRS is connected to the other documents that the Government is showing has a flow of monies that were received by certain accounts? I'm just trying to see the connection between whether it's a million dollars or a hundred thousand dollars. What's the relevance?

MS. MARTINEZ: Oh. I'm not -- number one, Your Honor, as I said in my opening statement, this crime is committed for money. And as the Indictment states, he moved money for his own personal use. I mean, this is part of the scheme to defraud.

THE COURT: All right. So the amount that's reflected is important for the Government to show the monies that flowed or were --

MS. MARTINEZ: To the Defendant.

THE COURT: -- were within certain accounts?

MS. MARTINEZ: Right.

THE COURT: All right. Then to that extent, it's relevant.

MS. WEINTRAUB: Judge, can I just remind the Court that the Court excluded -- we also -- they wanted to show pictures of his house, and they wanted to show the wealth --

THE COURT: But the pictures of his house is a little bit different than what -- the forms that he submitted and the amount of money that he's represented was the income and the Government is seeking to tie the amount of loans to that income.

I mean, I see that as relevant, as opposed to the house, which certainly is not relevant. So I excluded that because it bears no relevance. But I don't see how the probative value is outweighed by any unfair prejudice. I see that it's relevant and it's proper.

We have all our jurors?

All right. Both sides ready to proceed?

MS. MARTINEZ: Your Honor, just to advise you, I did get a little binder, and I'm still going through it. In other words, I'm still going through what the Defense -- yeah, I just received it. So if there's any issues, I'll let you know, but I haven't been able to look at it.

THE COURT: All right. Let's proceed.

COURT SECURITY OFFICER: All rise for the jury.

(Before the Jury, 1:59 p.m.)

THE COURT: Welcome back, Ladies and Gentlemen.

Please be seated.

I hope that you had a pleasant lunch and ready to get back to work.

Recall that we will break today at four p.m.

On behalf of the Government, your next witness.

MS. MARTINEZ: Your Honor, the United States calls to the stand Philip Palmer.

THE COURT: Good afternoon.

MS. MARTINEZ: And Your Honor, he asked me for permission to go up with his water. I said okay.

THE COURT: Yes. Of course.

(Pause in proceedings.)

PHILIP PALMER, GOVERNMENT WITNESS, SWORN

COURTROOM DEPUTY: Thank you.

You can have a seat.

Would you please state your name and also spell it for the record.

THE WITNESS: Philip Palmer. P-H-I-L-I-P P-A-L-M-E-R.

COURTROOM DEPUTY: Thank you.

DIRECT EXAMINATION

BY MS. MARTINEZ:

Q. Mr. Palmer, where are you employed?

A. With the Internal Revenue Service.

Q. And before you were employed with the Internal Revenue Service -- I wonder if you can see me above that. Barely?

A. I can.

Q. Before you were employed by the Internal Revenue Service, what was your education at that point?

A. In 2007, I had obtained a bachelor's degree in accounting from Florida International University, and then I started with the IRS.

Q. And after you started with the IRS, did you pursue additional education?

A. I did. Between 2011 and 2012 I obtained a master's in taxation from Nova Southeastern University.

Q. Now, when you were initially hired by the IRS in 2007, what was your position?

A. I came into the IRS as an internal revenue agent, where I primarily focused on doing audits of both individuals, corporations, and partnerships, as it related to income tax. And I served in that role from 2007 to 2015.

Q. And during that time, did you also begin to have other responsibilities of becoming an instructor for others on the job?

A. I did. So during that time, I served as what's called an on-the-job instructor, where it was my responsibility to teach and train the newer agents that came into the service but also more senior agents that needed refreshing on specific tax topics.

I also served as an acting manager for several groups of my peers, where I was in charge of managing the flow of our workload during that time.

Q. Did there come a time when you moved to a more specialized section?

A. Yes. So starting in 2015, I was promoted to the Employment Tax Division, where I remain today. I received a promotion to be an employment tax specialist, where I primarily audit partnerships and corporations as it relates to employment tax specifically.

Q. And what is your position today?

A. Currently, I serve as a lead employment tax specialist, which is a promotion I received earlier this year. In that role it's my responsibility to handle audits of the most complex employment tax-related issues, as it relates to partnerships and corporations, but also to serve as a lead or as a guide for peers in my group.

MS. MARTINEZ: Your Honor, at this time, the United States offers Mr. Palmer as an expert in the area of employment taxes, corporate partnership, and individual taxes.

MR. ETRA: No objection.

THE COURT: All right, then.

BY MS. MARTINEZ:

Q. Mr. Palmer, could you explain to the jury what is a W-2 Form.

A. A W-2 Form is an informational return that's used by an employer to report wages paid to its employees. The W-2 Form will reflect monies paid to its workers for services provided.

In addition to that, it will also reflect withholdings that are applicable to those wages. Those withholdings are typically going to be federal income tax withholdings, Social Security tax withholding, and Medicare tax withholding.

Q. So to be clear what the word "withholding" means, the salary that -- the employee has a gross salary, but the employee does not receive that gross salary; is that right?

A. Correct. So to put it in a number form, the easiest way to think about it would be that if an employee is to earn a hundred thousand dollars per year, that's their salary on paper, but there's also withholding that's applicable to that salary. So for Social Security tax, the rate is 6.2 percent.

So what that means is the employee won't receive the full hundred thousand dollars. They will receive a hundred thousand dollars less 6.2 percent of that, which is 6,200. So they would receive 93.8, for example, if it was Social Security being withheld. But that also applies to Medicare and income tax as well.

Q. And what is the employer's responsibility with respect to the amount that the employer withholds from the employee, the income tax withheld, the Medicare tax withheld, and the Social Security tax withheld? What is the employer's obligation with respect to that?

A. So it's the employer's responsibility to turn those funds over to the IRS. How that's typically done is through the filing of an employment tax quarterly return, which is Form 941. What that form does is it tells the IRS what the employer paid in wages to all its employees for that specific period in time, the corresponding taxes associated with it, and it allows the employer to deposit those taxes with the IRS that were withheld from the employees.

Q. In addition to the employer paying to the IRS the amount of Medicare and Social Security taxes that were withheld from the employee's check, does the employer, at that time when they file the Form 941, also have to pay -- well, let me not say precisely at that time, but at the appropriate time set for their payments, does the employer also have an obligation to pay an additional employer's portion of Medicare and Social Security tax?

A. That's correct. So as it relates specifically to a Social Security and Medicare tax, the employer is required to match that amount. So going back to the example of Social Security tax being 6.2 percent, the employer is responsible for an additional 6.2 percent. That's their responsibility. It's not withheld. They have to pay that on top of everything else.

As it relates to Medicare tax, which is 1.45 percent, there is a portion that's withheld from employees, and then there's a portion that the employer has to match, which is also required to be paid.

Q. When I was asking you the question, I made a reference to a timetable. Are all employers on the same timetable for paying the taxes or do they set different schedules for different employers?

A. All employers are not on the same schedule. The typical two schedules that will be affiliated with employment taxes is what's called a monthly deposit schedule or a semiweekly deposit schedule. Based on the amount of wages that's paid in prior years, it's determined what schedule they will be on.

For a monthly depositor, they are required to deposit the money that's withheld from their employees during, let's say, the month of January. Wages that are paid in January, the withholding is required to be deposited by the following month on the 15th day. So for -- wages in January needs to be deposited by February 15th.

For semiweekly depositors, the wages are required to be deposited in the following week that they're withheld. So if a wage is paid on Friday, those deposits need to be made by the following Wednesday. For wages paid through Wednesday, the deposits need to be done by that Friday. Those are the two different schedules.

Q. So one schedule is monthly, another one is even more frequent?

A. Correct.

Q. And the ones who have to do it very frequently are the ones who have a lot of employees?

A. Correct. A lot of employees, lots of wages.

Q. But regardless of what your payment schedule within a quarter, within a three-month quarter, the 941 is due every quarter basically roughly 30 days after the end of the quarter; is that right?

A. Correct. Yes.

Q. So an employer would file about four of them a year if they're meeting their obligations, correct?

A. Correct.

Q. Now, before moving on, I want to go back to the W-2 and ask you: Is there another form that is used when an -- when someone is providing services but is not a wage employee? Is there a non- -- what do you -- non-employee compensation?

A. Correct. So in that situation, the form that would be used to report those payments is called a 1099-NEC. N-E-C for non-employment compensation.

Q. So just to clarify, that 1099-NEC, non-employment compensation form, it just came -- meaning it just -- the label to the form was just changed at the end of 2019, correct, before it was 1099 --
A. Miscellaneous.
Q. Yeah.
A. Correct.
Q. Is -- those individuals that are not employees, is that what we use as a term of independent contractor?
A. Correct. Interchangeably; non-employee, independent contractor, yeah.
Q. Non-employee is an independent contractor?
A. Correct.
Q. Okay. Now, with respect to independent contractors, does the employer withhold income tax?
A. No. So non-employee contractors are not subject to withholding. The employer just reports the gross amount that's paid to them for the year, the calendar year.
Q. So the business that's paying a non-employee does not keep a portion of their income tax to pay the IRS. The independent contractor pays the IRS directly for their own taxes, correct?
A. Correct, yeah. So in the eyes of the tax law, the independent contractor is seen essentially as an independent business. So they're responsible for paying and reporting their taxes on their own, separate and aside from whoever paid

them.

Q. Likewise, for independent contractors, the employer does not withhold Medicare or Social Security taxes?

A. Correct. There's no withholding on payments to non-employee contractors.

Q. Do independent contractors then -- how do they deal with the fact that there's -- do they have to pay their entire Medicare tax and their entire Social Security tax if they want to have that -- those benefits?

A. Correct. So again, a typical situation with an individual independent contractor is the amounts received -- the gross amounts are going to be reported on that 1099. When that contractor goes to file a return, which would be a 1040 tax return, the gross amount is reported there, and the corresponding Social Security and Medicare at the full rates would be paid at that point in time.

Q. When you say "the full rates," meaning an employee gets the benefit of their employee paying half to the IRS of Medicare and Social Security but an independent contractor does not have that benefit?

A. Correct. There is an offsetting credit that's given at the 1040 level. But technically it's the full 15.3 percent, which is that Social Security and Medicare, both the employer and the employee's side.

Q. So employers have additional obligations and costs for folks that are termed employees as opposed to folks that are termed independent contractors, correct?

A. Correct.

Q. Now, in addition, the 941 forms that we were talking about -- that was where the employer is submitting the withholdings to the IRS and reporting the number of employees and what they have withheld -- again, those are not filed at all by the employer with respect to their independent contractors because they're not withholding.

A. Correct.

Q. So in addition to the 941, could you tell the jury, what is a Form 940?

A. So a Form 940 is a yearly form. It's the employer's annual unemployment tax return, and that's for wages and taxes associated with unemployment tax to be reported, FUTA tax. That tax is subject to -- or subject on the first $7,000 of wages paid to each employee, and it's at a rate of six percent. And again, that's something that's specific to employees only, not independent contractors.

Q. And with an employer's responsibility with respect to that unemployment compensation, that 940 form, they are able to -- the employers are able to do an offset or some kind of allowance for the fact that they have already paid some of those taxes to a state, such as the state of Florida; is that right?

A. Correct. Yeah. So again, with the unemployment tax, it's not going to be a withholding. It's going to be a tax that the employer is subject to. And so, for unemployment tax, there is a state credit that's given. For example, in the State of Florida, the unemployment tax that's required to be paid is 5.4 percent. And so if an employer pays the full state tax, then they are allowed to use that to offset what's due at the federal level. So instead of the full six percent to the IRS, it would be six percent less the 5.4 percent previously paid to the state.

Q. And just like the 941s, if someone is an independent contractor, the person who is paying them doesn't have any responsibility to pay unemployment compensation, file a 940 with the IRS, none of that; is that right?

A. Correct.

Q. Now, turning to your experience with partnership returns and how a partnership such as a limited liability company -- correct -- what type of form would they file for their taxes? Is that a 1065?

A. Correct. Yes. So partnership return or partnership businesses report their taxes on Form 1065, which is a Partnership Return of US Income.

Q. Now, what is the form that is used to reflect the money that then is distributed to the partners from the partnership?

A. That's going to be a Schedule K-1, which is also required to be attached and filed with the partnership return. And that essentially breaks down the profit, losses, deductions, and distributions from that partnership to each of the partners that are involved.

Q. And if a partner receives something on a -- from the partnership on the K-1, that then would be reflected on the individual tax return of that partner, correct?

A. Correct.

Q. Which would be the IRS --

A. A Form 1040.

Q. Thank you.

You're familiar with searches for tax returns that were done relating to this case, correct?

A. I am, yes.

Q. Can you just describe -- describe to the jury how -- in general, how it is the IRS keeps these records. For example, with respect to 941s, if you're looking for 941s, how is it that you would do a search, how is it that you would determine: "Here's one. We found it," or here's -- you know, "We can determine there that there was no record?"

A. So there are two ways in which records are normally stored. If a taxpayer submits a paper return, that return goes to our campus facility, which is where the returns are processed. They're scanned in to our computer system and then they're stored at a federal records facility.

If the return is submitted electronically, much the same way, it gets scanned into our online system. There is no necessarily paper trail, but we have a system that stores electronically filed returns that we can search and access for every taxpayer when needed.

Q. Is the process similar whether it's a 941, a 940, a 1065, a 1040?

A. Correct. Yeah. So it's the same system for all returns. Internally, we're able to differentiate each return based on a specific code. So if I wanted to find a partnership return, I would just search using a specific code. If I wanted to find an individual return, I would use a different code. But it's all housed within the same system.

Q. Have you reviewed the records that the Internal Revenue Service found searching for records relating to this case?

A. I have, yes.

Q. And in addition, have you redone the searches to confirm that the records are accurate?

A. Correct. I did.

MS. MARTINEZ: Your Honor, I'd like to move into evidence several exhibits. And if I may just list them and then I will inquire if Defense has any objection.

It's from Exhibit 12-1 --

THE COURT: All right. So you want to admit 12-1?

MS. MARTINEZ: No. It's from Exhibit 12-1 through

Exhibit 15-2. Would the Court like me to read those all out -- or let me just first ask: Is there any objection to any of those from 12-1 through 15-2?

MR. ETRA: Could I look through the exhibit list before I respond?

MS. MARTINEZ: Yeah. Of course.

MR. ETRA: Your Honor, if I may have a moment.

(Pause in proceedings.)

MS. MARTINEZ: And I am moving to include the K-1 in 12-1, the K-1 transcript.

(Pause in proceedings.)

MR. ETRA: Your Honor, on the first request, which was 12-1 through 15-2, no objection through 14-3.

MS. MARTINEZ: Could you repeat? No objection...

MR. ETRA: Through 14-3.

THE COURT: All right. So up to 14-2, no objection. Each admitted into evidence.

Now, with regard to 14-3.

MR. ETRA: No. Up to 14-3.

(Government's Exhibits 12-1 through 14-3 received into evidence.)

THE COURT: All right. So 15?

MR. ETRA: Fifteen is an issue that was raised in in limine motions, and we had discussed that we would discuss it before it became an issue in the case.

THE COURT: This is what we just addressed --

MR. ETRA: No. It was in the earlier in limine motions. There was an issue on this, and I'd asked that before it comes up that we'd talk to the Court about it, and the Court said we can. I didn't realize --

THE COURT: All right. Can we work with up to 14-3, and then at the appropriate break we'll address those remaining issues?

MS. MARTINEZ: Yes, Your Honor. So Your Honor, I think you've stated that from 12-1 to 14-3 they are admitted?

THE COURT: They are.

MS. MARTINEZ: Thank you, Your Honor.

12-1. So can you please highlight just the top, the top of the form, the top part.

Yes. Thank you.

BY MS. MARTINEZ:

Q. Mr. Palmer, could you read to the jury the year, the name of the partnership.

A. So what I see before me is a Form 1065, US Return of Partnership Income for HM Management and Development, LLC for the 2019 tax year.

MR. ETRA: Your Honor, I have an objection based on the scope of the expert notice. I didn't understand it was going to be involving the specifics of the companies' returns, but rather only on procedures.

THE COURT: All right. Well, at this point the witness is just reading what's already in evidence, so that's acceptable. The objection is overruled at this point.

BY MS. MARTINEZ:

Q. What is the principal business activity that's stated?

MR. ETRA: Your Honor, now my objection is we're discussing the actual return. In this case, principal business activity stated, that's beyond the scope of the expert notice.

THE COURT: Which is in evidence. He's reading what's in evidence. Overruled.

THE WITNESS: Rental properties.

MS. MARTINEZ: And could you highlight the business code.

BY MS. MARTINEZ:

Q. In general, what are these business codes?

MR. ETRA: Objection, Your Honor. Now we're beyond in scope in the sense that the business code is not the subject of the expert disclosure. The expert disclosure was about how to handle employee/1099s and those issues.

MS. MARTINEZ: Oh, no.

THE COURT: Does this come within the witness's expertise of employment tax, corporate partnership and individual taxes?

MS. MARTINEZ: Corporate taxes.

THE COURT: Then let's lay the predicate before you ask him with regard to that code number.

MS. MARTINEZ: Oh, Your Honor, as an expert witness, I --

THE COURT: Let's lay the proper predicate, please.

BY MS. MARTINEZ:

Q. As you previously stated, Mr. Palmer, when you first went to the IRS for a good number of years, you were involved with auditing with respect to corporate returns, individual returns such as this, such as a partnership, correct?

A. Correct. Yes.

Q. And it was only in 2015 that you moved over to the employment tax section, correct?

A. Correct. So my work, I would say from about 2008 to present, has always involved partnership or corporate returns.

Q. And as indicated here, the partnership returns have a box that says: "Business Code Number," correct?

A. Correct.

MS. MARTINEZ: May I proceed, Your Honor?

THE COURT: Yes.

BY MS. MARTINEZ:

Q. Could you describe to the jury what that is.

MR. ETRA: Your Honor, I'm not -- the objection is not that he doesn't have the requisite expertise. The objection is that it's not covered at all in the expert disclosure.

THE COURT: And again, the Defendant had no objection to tendering this individual as an expert in employment taxes, corporate partnership, and individual taxes. To the extent that his knowledge, training, and experience allows him to understand what the business code number is, he may certainly explain what that is.

Overruled.

THE WITNESS: Okay. So business codes are codes that the IRS uses to describe the activity that the business is involved in. So for example, this business code 531390 references other real estate-related activities, which is a general code that can be used for anything real estate.

BY MS. MARTINEZ:

Q. And -- okay. Let me --

MS. MARTINEZ: Can you go to the -- go further down or zoom back out.

There we go.

Can you please highlight the Salaries and Wages portion.

BY MS. MARTINEZ:

Q. For this particular company, HM Management, in 2019, what was the salaries and wages that were reported?

A. What's reported here is $134,811.

MS. MARTINEZ: Zoom back out, and could you highlight just the bottom signatures, that area.

Thank you.

Oh. Go all the way to the right.

Thank you.

BY MS. MARTINEZ:

Q. So could you explain to the jury, what is this PTIN that is next to the accountant's name?

A. A PTIN is a tax preparer's identification number that's used to identify a specific preparer, in this case, the one that prepared the return.

Q. So in addition, the accounting firm has their own employer identification number as well, correct?

A. Correct.

MR. ETRA: A renewed objection -- or could I get a standing objection?

THE COURT: Certainly. I'll give you a continuing objection.

MR. ETRA: Thank you.

(Pause in proceedings.)

MS. MARTINEZ: I'LL need you to scroll down. I'm going to try to count the number of pages.

Or go ahead. Scroll down.

Scroll down till you get to -- keep going.

It's Schedule B-2.

It will come up.

Stop there for one second.

BY MS. MARTINEZ:
Q. The page that I have stopped on is relating to deductions. These are type of deductions that a corporation lists on their return to try to offset income or to offset income?
A. Correct. These would be deductions or expenses associated with the business for that tax year.
MS. MARTINEZ: Now the page following right after that -- oh. I'm sorry. Two pages down.
Next.
There we go.
Could you highlight who the partners are.
BY MS. MARTINEZ:
Q. Can you read out to the jury who the partners are of this partnership.
A. Eric Sheppard and Jeffrey Graff.
(Pause in proceedings.)
MS. MARTINEZ: I need to move for -- to the ELMO for one quick second. Can we switch off?
(Pause in proceedings.)
BY MS. MARTINEZ:
Q. Mr. Palmer, do you recognize this document?
A. I do. Yes.
Q. And that's the K-1 transcript from that return, correct?
A. Correct. This is a IRMF print from our internal database that shows the K-1s that were issued for the partnership for

that year.

Q. Now, within that I'm going to --

(Court reporter interruption.)

MS. MARTINEZ: Oh. Big difference.

I hope I can...

BY MS. MARTINEZ:

Q. The pointer is not working for me. But if you -- here. I can zoom in. Could you read the amounts that are indicated for each partner.

A. Sure. So that first area is for Eric Sheppard, again, for 2019. And it's saying that he received ordinary income from the partnership of $485,417. The secondary area is for Jeffrey Graff, and it states that he received ordinary income from the partnership of $4,903.

Q. Thank you.

MS. MARTINEZ: Okay. We're back to Trial Director, please. Thank you.

I mean counsel's table. I think that's what I needed to say.

(Pause in proceedings.)

MS. MARTINEZ: Could you please pull up 12-4, and could you highlight the middle portion that shows just really basically the middle of the form.

Little lower.

Lower.

Just a little lower. So we can show...

Can you do the same thing, but do the box a little bit lower. Start from "Taxpayer Identification Information."

There you go. Perfect. We're going to be doing this.

BY MS. MARTINEZ:

Q. Okay. Mr. Palmer, are you familiar with this Certification of Lack of Record in Exhibit 12-4?

A. I am. Yes.

Q. And this resulted from a search for other partnership returns for this same partnership, correct?

A. Yes. Correct.

Q. And what are the results of the search?

A. So this form is a Certification for Lack of Record, in essence saying that the IRS does not have any filings from this specific taxpayer, HM Management and Development, LLC, for the periods listed below, which is December 31, 2018, December 31, 2020, and December 31, 2021.

Q. So what this was was a search for the same form that we just looked at that we had for 2019, but it was not found in the IRS records for 2018, 2020, or 2021, correct?

A. Correct. Yes.

MS. MARTINEZ: Could you go to 12-5. And can you also highlight the form that we were looking for.

Thank you.

BY MS. MARTINEZ:

Q. Call you tell the jury what this Certificate of Lack of Record is for.

A. This is, again, for the same taxpayer, HM Management and Development, LLC. But the form that this certifies is Form 940, the employer's Annual Federal Unemployment Tax Return. And this states that for tax years 2019, 2020, and 2021 the taxpayer had -- I'm sorry -- the IRS has no record of any filings from the taxpayer.

MS. MARTINEZ: Now could you go to 12-2.

Please, just first start at the box at the top.

Yes. Thank you.

BY MS. MARTINEZ:

Q. Now, this is a 940 for 2018, a year before the years that we just said there was no record, correct?

A. Correct.

Q. So in 2018, HM Management did do an annual 940 filing with the IRS, correct?

A. Correct.

MS. MARTINEZ: Could you go to the box below it. And actually, if there's any way that you could just do the bottom half.

BY MS. MARTINEZ:

Q. So could you explain what -- this is an example of the 940 Form that you had told the jury about -- could you explain,

what is HM Management reporting to the IRS here?
A. All right. So again, this is going to be the annual return for unemployment tax. Here, HM Management is saying that the total wages paid to employees for 2018 was $156,926.38. Again, for federal unemployment tax purposes, the tax is only applicable to the first $7,000 of wages paid to each employee.
And so, further down in the form, Line 5 says total payments made to each employee in excess of 7,000, for 135,926.38. That would mean that that portion of the wages are not subject to unemployment tax. So you go a little bit further down to Line 7, with 21,000. What that states is that there were three employees in this case that received at least 7,000 in wages. And so they would be subject to unemployment tax on that portion.
Now, because the taxpayer has reported that unemployment tax was paid to the State of Florida -- not to jump back up, but if you look at Line 1a, it specifies the State of Florida there -- they are receiving a credit for the 5.4 percent of state unemployment tax. And so the tax applicable to these wages is going to be listed on Line 8, which is .006, and that's the tax that was paid on the wages for 2018.
Q. Mr. Palmer, I think you did some math. Did you divide the 21,000 by seven or is the three somewhere else in here?
A. I did. Correct.

Q. That's what you did?
A. Yeah. But technically the more accurate way to do it would be to subtract Line 3, subtract Line 5, and that will give you the 21,000. So...
Q. Right.
A. So 156,926 less 135,926 will give you what's subject to unemployment tax.
Q. Right. But the unemployment tax is on the first 7,000 to each employee?
A. Correct.
Q. Which is how we can just do the math that if what's taxable is 21,000, it's because there was three employees reported. Am I reading wrong?
A. Yes. Because that doesn't necessarily specify the number of employees that were involved in that 21,000. So that's where it gets a little bit tricky.
Q. Okay. So that's what I was asking. It's not specifically on this form?
A. Correct.
Q. Okay. Thanks.
MS. MARTINEZ: So if you just finally go to the bottom.
BY MS. MARTINEZ:
Q. So in effect, if the employer filed this form, and then with the offset -- and maybe I'm not using the right word, but

with the credit from the Florida unemployment tax paid -- it's reporting -- the employer is just reporting that they paid 126,000 -- I'm sorry -- $126 to the Internal Revenue Service?
A. Correct. Yes.
MS. MARTINEZ: Could you scroll down to the second page and just highlight the signature and the date.
BY MS. MARTINEZ:
Q. And could you read out the name that is listed as a representative of the company.
A. Eric Sheppard.
Q. And it states his title as?
A. Managing member.
Q. And the date that's handwritten there?
A. 2/4/19.
MS. MARTINEZ: Could you go to 12-3.
BY MS. MARTINEZ:
Q. We just looked at a Form 940 for 2018. This is -- tell the jury what this is.
A. Yeah. So this is a Form 941 for 2018. Unlike the Form 940 that has an annual filing requirement, the 941 is required to be filed quarterly. So there should be, if wages are paid throughout the year, four of these per calendar year.
Q. So this particular one that we're looking at, the first page, it does indicate what quarter it's for, correct?
A. Correct. If you look to the right-hand section of the

page, the taxpayer is able to check a box in the quarter that it applies to. In this case, the first quarter, January through March.

MS. MARTINEZ: Could you go to the middle of the form.

BY MS. MARTINEZ:

Q. Now, you previously described what a 941 was. In this one, we see the boxes that you described. Number one, how many employees is HM Management and Development reporting to the IRS?

A. Three.

Q. And then, next for that quarter, what is HM Management reporting to the IRS for wages?

A. Total wages paid during the quarter, $36,213.78.

Q. And then the next box, HM Management is reporting that it withheld from the employees -- did not pay to the employees income tax that it is withholding as an employer, correct?

A. Correct. Federal income tax of $3,525.60.

Q. What is Line 5a?

A. Line 5a specifies the wages that are subject to Social Security, which in this case it's the full amount, $36,213.78. At, again, the -- both the employee and the employer's share of Social Security, which is 6.2 percent times two. If you look in the middle of those two boxes, you'll actually see the rate at .124. That gives you a tax that's due of $4,490.51.

Q. And can you describe Box 5c?

A. Box 5c is going to reference Medicare wages. Again, the wages subject to Medicare for this quarter is the full amount, $36,213.78, and it's subject to the withholding portion of 1.54 percent and the employer-matching portion of 1.45 percent, for a total of $1,050.20.
Q. Now, on the next line, that is an addition of both --
A. Correct.
Q. -- of both Medicare and Social Security employee and employee portions. That's what you get as the 5,540, correct?
A. Correct.
Q. And then later you have to add to that the income withheld and that's how you get the $9,066.31, correct?
A. Correct.
MS. MARTINEZ: Could you go to -- no. Go to the bottom of this form. So zoom back out and go to the bottom of the form.
BY MS. MARTINEZ:
Q. So describe Line 13.
A. Line 13 references total deposits for this quarter, including overpayments applied from a prior quarter. And that's going to be deposits that the employer made of the withholdings throughout the quarter that it applies to.
So in this case, the taxpayer is saying that matching the tax that's owed all deposits were made for that first quarter.

Q. And by "deposits," what that means, it's deposited for payment to the IRS. So it's deposited into an IRS account, correct?
A. Correct. Yeah. So those amounts that were withheld in addition to the portion that the employer is responsible for, were paid over to the IRS or deposited. Yes.
MS. MARTINEZ: Second page. And just go to the top of the page there.
BY MS. MARTINEZ:
Q. When you described the Form 941 previously, you described that some employers are in a monthly schedule for making those deposits, rather than waiting until the end of the quarter. What do you see here?
A. Yeah. So here it indicates that the taxpayer was on the monthly deposit schedule, which, again, means that the deposits should be made by the 15th day of the following month that the wages are paid. And here it states that the employer made those deposits in month one, two, and three, as applicable.
MS. MARTINEZ: Could you go to the bottom on the signature.
BY MS. MARTINEZ:
Q. And again, what is the name of the representative?
A. Eric Sheppard.
Q. And his title?
A. Managing member.

Q. And the date when this was -- the written date on this form?
A. April 13th, 2018.
MS. MARTINEZ: Now what I'm going to ask you to do is just to scroll so that we can show that there is a form for each quarter. So let's stop at the second quarter.
Can you stop a little bit higher up, so we can -- no. No. No. A little higher up, so we can confirm.
BY MS. MARTINEZ:
Q. So here, as part of this exhibit, we have multiple quarters. So -- because these are the forms for 2018. So what quarter is here?
A. Again, if you look to the right section of the page, this is going to be applicable to the second quarter, which covers the periods April through June.
MS. MARTINEZ: Can you go to the next page, and just highlight the signature and the date.
BY MS. MARTINEZ:
Q. So this reflects, likewise, Mr. Sheppard's name and the date of July 17th, 2018, correct?
A. Correct.
Q. I'm just going to ask you about the next one, the next quarter. So this 941 Form for 2018 is filed for the third quarter, correct?
A. Correct.

Q. That would be for July, August, and September?
A. (No verbal response.)
Q. Again, it reports three employees again that quarter, correct?
A. Correct.
MS. MARTINEZ: And just go to the bottom of that form. There you go.
No. Just the bottom of that page there.
BY MS. MARTINEZ:
Q. Again, for the third quarter, it reflects that the deposits were made, correct?
A. Correct.
MS. MARTINEZ: Let's see if I...
Now go to the next page. Go to the signature section. There.
BY MS. MARTINEZ:
Q. Now, this was for the third quarter of 2018. Again, the representative is?
A. Eric Sheppard.
Q. And the handwritten date, can you make that out?
A. January 30th, 2019.
MS. MARTINEZ: Now let's go to the next page.
BY MS. MARTINEZ:
Q. What is this?
A. This is an account transcript or an internal print of a

filed 941 return from the IRS.

Q. Does it tell you whether or not a 941 was filed?

A. It does, yes.

Q. And does it tell you whether deposits or payments were made for the employees that year -- I mean that quarter?

A. It should. If payments were made, it would be reflected in that bottom half of the page. But it appears that no payments were made for that period.

MS. MARTINEZ: Go to Exhibit 12-6.

BY MS. MARTINEZ:

Q. What is the Certificate of Lack of Record in Exhibit 12-6?

A. This Certification of Lack of Record pertains to the Form 941, Employer's Quarterly Federal Tax Return. And it states that for the full 2019 tax year, the full 2020 tax year, and the full 2021 tax year there's no record of filings from the taxpayer.

Q. So after the forms that we just saw relating to 2018 for HM Management, the IRS has no record of Employer's Quarterly Federal Tax Returns Form 941 for HM Management and Development, LLC the entire 2019, entire 2020, and entire 2021, correct?

A. Correct.

Q. Similar to what we had seen for the 940, which is the Unemployment Federal Return -- that there was none for those years?

A. Correct.

(Pause in proceedings.)

BY MS. MARTINEZ:

Q. Staying with 940s and 941s, I'm going to direct your attention to Exhibit 13-5. Now, this is a different company. Can you tell the jury, what's the taxpayer's name?

A. HM-UP Development Alafaya Trails, LLC.

Q. And what form did the IRS look for here?

A. Here there was a search done for Form 941, Employer's Quarterly Federal Tax Return.

Q. And were any found for tax years 2019, 2020, or 2021?

A. No records or filings for those periods.

MS. MARTINEZ: Go to Exhibit 13-4.

BY MS. MARTINEZ:

Q. Again, this is the company -- the second company that we've been looking at. Can you read out the name.

A. HM-UP Development Alafaya Trails, LLC.

Q. And what form did the IRS look for here?

A. Form 940, Employer's Annual Federal Unemployment Tax Return.

Q. And were any found for 2019, 2020, or 2021?

A. No. There were no records of filings.

MS. MARTINEZ: Now let's go to Exhibit 13-1.

Can you please highlight the top.

BY MS. MARTINEZ:

Q. Can you read out the -- tell the jury, what form is this?

A. This is Form 1065, US Return of Partnership Income for the 2018 tax year.
Q. For what company?
A. For HM-UP Development Alafaya Trails, LLC.
Q. And can you explain what that business code is, 531120.
A. That business code refers to lessors of non-residential real estate.
Q. And this is the same company that we just saw that there was no 940s or no 941s, correct?
A. Correct.
MS. MARTINEZ: Now, could you highlight the middle of the form, where it says -- I'll help you. Line 9.
BY MS. MARTINEZ:
Q. Is there any wages or salaries other than to partners reported on this form?
A. No. There are none.
MS. MARTINEZ: Go to the third page.
Oh. Sorry. Go back to the first page.
Could you highlight the bottom.
BY MS. MARTINEZ:
Q. Again, can you read out the -- the date when it was signed by the partner?
A. November 5th, 2019.
Q. And the name of -- if you can make it out, the name of the accountant or the preparer?

A. Neal A. Cupersmith.
Q. And the date when he signed it?
A. October 14th, 2019.
Q. And likewise, this form has a PTIN and an EIN for the preparer, correct?
A. Correct.
MS. MARTINEZ: Now go to the third page.
Please highlight the bottom of the third page.
Next.
There you go.
BY MS. MARTINEZ:
Q. Could you describe what this section is.
A. This section is where a partnership designates its representative. And here it has designated HM Four, LLC to be its representative.
In a situation where the representative is not an individual, it then flows to the owner of that representative that's been designated. So HM Four, LLC's owner in this case is Mr. Eric Sheppard, and he ultimately is who should be contacted with tax-related questions or issues for this return.
MS. MARTINEZ: Can you scroll down to Schedule 8825, and can you highlight Line 13.
BY MS. MARTINEZ:
Q. For HM-UP Development Alafaya Trails, what is reflected on the line for wages and salaries?

A. Nothing.

MS. MARTINEZ: Can you scroll down to Schedule B-1.

BY MS. MARTINEZ:

Q. Can you describe this schedule to the jury.

A. Schedule B-1, information on partners owning 50 percent or more of the partnership is used to list partners that have more than a 50 percent stake in the partnership.

Q. And who does this form -- or what entity is stated as the entity that owns HM-UP Development Alafaya Trails?

A. This states that HM Four, LLC owns approximately 99 percent of the company.

MS. MARTINEZ: Can you go to the last page of the form. Highlight just the top section -- well, the top half. How's that?

Thank you.

Oh. Go down.

Sorry. Do it again. And if you could, get down to the percentage. If you can. I don't know if we can do that.

BY MS. MARTINEZ:

Q. What is this form?

A. This is Schedule K-1, where again it reports the income, loss, deductions, credits applicable to the specific partner of the partnership.

Q. And --

MR. ETRA: Objection, Your Honor. We're now in 2018 with the K-1 issue, which was -- the argument was it was part of the case for the periods in time that are relevant to the case. This is 2018, which is outside the scope --

THE COURT: That's correct. The objection is overruled.

Ms. Martinez, let me know when it might be a good time to give the jurors a short recess, please.

MS. MARTINEZ: Any time is okay, Your Honor.

THE COURT: All right. Then Ladies and Gentlemen, let's go ahead and take a 10-minute recess, please.

COURT SECURITY OFFICER: All rise.

(Jury not present, 3:06 p.m.)

THE COURT: All right. Go ahead and have a seat.

Mr. Etra, what is the issue that remains with regard to the tax returns?

MR. ETRA: Oh. I'm sorry. The earlier issue.

We had a motion in limine on the tax returns and we lost. And then I raised at a pretrial conference -- I think the most recent one -- that we'd like to sort of have another chance on the individual tax returns to put the Government to the proof that they need to put in his individual tax return and all the money that's in it as being really relevant to the case. And we agreed that we would raise it with the Court first, and I would renew my objection, which is that it's one thing to say you need to show the flow of money to the extent it's part of the case, but how much he makes as a whole -- and by the way, the entire return seems to be outside the scope of what's required in the case. And --

MS. WEINTRAUB: It's also showing a bad act and it's also showing prejudice --

THE COURT: Mr. Etra, if we could -- the record can reflect one attorney for each side.

MS. WEINTRAUB: I was just whispering to --

MR. ETRA: Sorry, Your Honor. There's going to be other things in there that the jurors can marvel about and wonder about, about returns and deductions for his personal returns.

THE COURT: So you believe it's unduly prejudicial?

MR. ETRA: Yes.

THE COURT: All right. Ms. Martinez?

MS. MARTINEZ: Your Honor, in opening statement, the Defendants talked about the fact that he had multiple companies, that it was very important for the jury to know that they were not just created yesterday, that they had been around for a long time. In fact, in their expert disclosure, they're going back to 2014 -- is what they're proposing. All I'm doing is putting in returns from 2019 --

THE COURT: What's the relevancy of the tax returns?

MS. MARTINEZ: Your Honor, the relevancy includes, number one, the fact that the only way he makes money -- and there's a schedule that show all these companies that he owns -- you see that here.

THE COURT: "You see that here," meaning that's reflected on the tax returns as well?

MS. MARTINEZ: That's right, Your Honor. And that -- because you have to reflect how you make your money. And part of their argument, including the expert opinion that they're proposing, is that you need to take a global view. So again, it's part of the story. You can't say one thing without saying the other.

MR. ETRA: Your Honor, the K-1 does the job. Your Honor let the K-1 in. It shows the flow of the money.

THE COURT: The request to exclude the tax returns is denied and you may seek to admit them at the appropriate time.

We're on a 10-minute recess.

MS. MARTINEZ: Thank you.

(Recess from 3:09 p.m. to 3:22 p.m.)

THE COURT: All right. Both sides ready to continue?

MS. MARTINEZ: Yes, Your Honor.

MR. ETRA: Yes, Your Honor.

THE COURT: All right. Let's bring in the jury.

COURT SECURITY OFFICER: Please remain standing for the jury.

MS. WEINTRAUB: Judge, before the jury comes in, can we get -- I'm watching. Can we get a limiting instruction?

This is what I was afraid of. This isn't a tax case, and it seems like they are accusing him of not filing income tax. That's my issue.

THE COURT: You'll have an opportunity to cross-examine. I don't believe a limiting instruction at this point is appropriate.

(Before the Jury, 3:23 p.m.)

THE COURT: All right. Welcome back, Ladies and Gentlemen.

Please be seated, everyone.

And we'll continue with the direct examination.

MS. MARTINEZ: Could I have Exhibit 13-1.

BY MS. MARTINEZ:

Q. So we were in Exhibit 13-1, and it was the last page that we were looking at, and the bottom of the last page. Now, this was the K-1 at the end -- there's two K-1s, but this is the one at the last page. So which partner is being reflected in this K-1 as one of the owners of HM-UP Development Alafaya Trails?

A. The partner specified here is HM Four, LLC.

Q. And it reflects an ownership of how much of HM-UP Development Alafaya Trails?

A. Ninety-nine percent.

Q. And going to Box L, this partner HM Four received what kind of -- the withdrawal amount or distribution amounts regarding -- from HM-UP Development Alafaya Trails?

A. Withdrawals and distributions totaling $166,380.

MS. MARTINEZ: Can you move to the page just prior to this one, and highlight the top. The top half, if you would.

A little bit lower, so that we can catch the company and the partner.

There you go. There. Perfect.

BY MS. MARTINEZ:

Q. So this is a second K-1 Schedule that's within Exhibit 13-1. What does it reflect?

A. This is a K-1 for partner HM Eight, LLC.

Q. As the second partner to HM-UP Development Alafaya Trails. And what percentage is HM Eight?

A. One percent owner.

Q. And with respect to Box 19 on the right, are there any distributions to HM Eight?

A. No distributions.

MS. MARTINEZ: Now could you go back to the first page of the form, the first page of the exhibit. That's a lot to -- again, highlight the top, the top section.

Thank you.

BY MS. MARTINEZ:

Q. So again, this was the 1065 partnership return for HM-UP Development Alafaya Trails for 2018. Previously, you had indicated that that business code, 531120, was for lessors of non-residential real estate. I realize that to you that's a

common word, "lessor," but is there another word for lessor? What does lessor mean? Is that L-E-S-S-O-R?
A. Correct.
Q. Someone who rents?
A. Someone who leases parts of the property out to other businesses or individuals.
Q. Like a landlord?
A. Correct. Yeah.
Q. But like a commercial landlord?
A. Correct.
Q. So with respect to the distributions that we were just looking at in the K-1, how -- can you explain to the jury, how is that different from the wages that we saw? There were zero. There were zero wages on this form. If we go --
MS. MARTINEZ: Right now, on the same page that you are -- can we go to Line 9.
BY MS. MARTINEZ:
Q. Salaries and wages 2018 for HM-UP Development Alafaya Trails, zero, correct?
A. Correct.
Q. So -- however, we saw on the K-1 distributions. So can you explain to the jury the difference between salaries and wages versus a distribution to a partner.
A. So distributions are monies from the partnership going to a specific partner. In general, only partners or shareholders

are able to receive distributions. Whereas salaries and wages can be paid to non-related individuals, an employee doesn't have to be an owner or a partner in a business.

So in this case there were distributions made to the partners, but there's no salaries or wages on record to any employees and there's no guaranteed payments made to any partners.

MS. MARTINEZ: Can we go to Exhibit 13-2.

Yes. Please highlight the top.

BY MS. MARTINEZ:

Q. 13-2 is the return for the same company, but for the next year, for 2019, partnership return for HM-UP Development Alafaya Trails, LLC, correct?

A. Correct.

Q. And the items on the top are similar to what we saw in 2018, same business code number, correct?

A. Correct.

MS. MARTINEZ: Could you go to Line 9.

BY MS. MARTINEZ:

Q. And what are the salaries and wages other than to partners that are reported?

A. Nothing was reported.

MS. MARTINEZ: Can you go to the bottom of that page.

BY MS. MARTINEZ:

Q. And again, here, the same accountant, Mr. Neal Cupersmith,

is shown as the preparer, correct?
A. Correct.
Q. With his PTIN and his employment identification number, correct?
A. Correct.
Q. And I'm going to --
MS. MARTINEZ: Could you go to the middle of the form for a second.
BY MS. MARTINEZ:
Q. That stamp, what does that show?
A. That stamp shows the date that the IRS received the return. In this case, October 16th, 2020.
MS. MARTINEZ: And can you scroll down to the last page.
BY MS. MARTINEZ:
Q. What's reflected on the last page?
A. Again, this is a Schedule K-1 for partner HM Four, LLC, showing an ownership percentage of 99 percent.
Q. And what -- what distributions did HM Four take?
A. Distributions of $210,787.
MS. MARTINEZ: Can you go to Schedule 8825. That's up -- same exhibit, but up.
Sorry. It's close to the front. It is going to be -- I should have told you from the start it was Page 5 -- no. Page 6.

That was good.

Could you highlight Line -- okay.

BY MS. MARTINEZ:

Q. So what is reflected here? What is 8825?

A. Form 8825 is for rental real estate income and expenses of, in this case, a partnership.

Q. And in this case -- right. And it's for HM-UP Development Alafaya Trails, correct?

A. Correct. Yeah.

Q. Which is -- can you read out there the address.

A. Eleven --

Q. She'll highlight it.

A. Okay. Eleven hundred North Alafaya Trail, Orlando, Florida 32828.

Q. Now, here it reports gross rents of how much?

A. $1,933,651.

MS. MARTINEZ: Am I looking at the right one?

One second.

(Pause in proceedings.)

MS. MARTINEZ: Your Honor, I need to go to ELMO for a second.

THE COURT: All right.

BY MS. MARTINEZ:

Q. So -- I apologize, Mr. Palmer. Our highly fancy digital technology is inferior to paper. So I'm going to show you the

Exhibit 13-2. We're looking at the 2019 HM-UP Development Alafaya Trails Form 1065.

A. Correct.

Q. And I'm going to turn to Schedule 8825 that we were just looking at.

Now looking at our paper copy, what is the amount of gross rents reported?

A. $1,414,576.

Q. And again, looking at Form 8825 in Exhibit 13-2, can you see how much is reported for the wages and salaries.

A. Nothing was reported.

MS. MARTINEZ: 13-3.

BY MS. MARTINEZ:

Q. In Exhibit 13-3 Certification of Lack of Record, what did the IRS look for?

A. On this form, they searched for Form 1065, US Return of Partnership Income, and determined that for the December 31, 2020 and December 31, 2021 tax year there were no filings.

Q. For HM-UP Development Alafaya Trails, LLC, correct?

A. Correct.

MS. MARTINEZ: And can you go to Exhibit 14.

Go to the top.

BY MS. MARTINEZ:

Q. What is Exhibit 14?

A. This is Form 1065, US Return of Partnership Income for Taxpayer HM Four, LLC, for the 2019 tax year.
Q. And what is the code given for HM Four?
A. 531390, which relates to other real estate-related activities.
MS. MARTINEZ: Now, if you could go to the middle of the form.
BY MS. MARTINEZ:
Q. For HM Four, on Line 9, what salaries and wages are reported?
A. Nothing was reported.
MS. MARTINEZ: Go to the next page.
Go to the middle of the document.
BY MS. MARTINEZ:
Q. Does this form indicate -- what company does HM Four own?
A. It indicates that it owns 99 percent of HM-UP Development Alafaya Trails, LLC.
MS. MARTINEZ: Now, to go -- go back to the first page, and give me the full middle -- the full middle portion of that form, where there's all the blanks.
No. The full middle down to the zero. And go from Line 1 to Line 30.
BY MS. MARTINEZ:
Q. What is reflected on the HM Four tax return for 2019 for Line 1 through Line 30?

A. Nothing.

Q. There's only a zero at the bottom, correct?

A. Correct.

Q. So that would be Line 1, no gross receipts or sales, correct?

A. Correct.

Q. Line 9, no salaries or wages, correct?

A. Correct.

Q. No ordinary business income or loss, nothing?

A. Correct.

MS. MARTINEZ: Can you go to the end -- actually, the second-to-last page.

Sorry. It's a pretty long document. I think it's more than 20 pages.

Thank you.

The top, including the ownership percentage, please.

BY MS. MARTINEZ:

Q. What is this document at the end of the partnership income return?

A. This is going to be Schedule K-1 for the specific partner, showing the ownership percentage, as well as the partner's share of income, deductions, credits, and losses. In this case, it specifies that the named partner is Eric and Jennifer Sheppard, joint tenants by entirety, and they own approximately 52 percent of the partnership.

Q. And this is the partnership HM Four, LLC, correct?
A. Correct.
Q. And how much are the distributions for 2019?
A. $109,609.
MS. MARTINEZ: Could you go to the next page.
BY MS. MARTINEZ:
Q. Who is the second partner reflected here as the second partner within HM Four?
A. In Section F, it mentions WAPD Holdings, LLC, care of Robert Kallman.
Q. And what is the ownership interest?
A. Forty-eight percent.
Q. And what was the distribution to Mr. Kallman for 2019?
A. $101,178.
MS. MARTINEZ: Could you go to 14-1.
BY MS. MARTINEZ:
Q. 14-1 was a search relating to the same company, HM Four, LLC, correct?
A. Correct.
Q. And for the same type of form, 1065, US Return of Partnership Income, correct?
A. Correct.
Q. And what does the search result reflect?
A. For tax years ending December 31, 2020, and December 31, 2021, there's no record of any filings for this

taxpayer.

MS. MARTINEZ: Could you go to 14-3.

BY MS. MARTINEZ:

Q. With respect to the search for the same taxpayer, HM Four, LLC, what does Exhibit 14-3 reflect?

A. This certification was done on Form 941, Employer's Quarterly Federal Tax Return. And it shows that for quarters March 31, 2019, through the rest of the year, for quarters March 31, 2020, through the rest of that year, and March 31, 2021, through the remainder of that year, there's no record of any filings.

Q. Now, had there been, for example, a payment, a deposit of some withholdings, some employer taxes, but somehow the Form 941 not been filed, would a record have come up in the search? In other words, how do your modules work in searching? Does this indicate that -- not only that there was not a form but no payment?

A. This indicates that there was not a form. The modules typically for each tax year, tax period, tax quarter, don't get created unless there is a form that's filed or a payment that's made. So in searching, we also noted that there were no modules for these periods either, so no payments were made during that time.

Q. And you confirmed that yourself?

A. I did, yes.

Q. And you confirmed that for not only HM Four but the two previous companies that we talked about for the one with the name Alafaya and the one with the name HM Management, correct?
A. Correct.
Q. Can -- and I don't know -- did we read out the tax years that we did not find here?
A. Yes.
Q. Okay.
MS. MARTINEZ: Can you go to 14-2.
BY MS. MARTINEZ:
Q. Again, another search for records relating to HM Four, and a Certification of Lack of Record. What form was being searched for here?
A. This is for the Form 940, Employer's Annual Federal Unemployment Tax Return. And it shows that for calendar year or tax years ending 2019, 2020, and 2021 there are no records of any filings.
MS. MARTINEZ: Could you go to Exhibit 15.
Could you go to the top.
BY MS. MARTINEZ:
Q. What is this?
A. This is Form 940, US Individual Income Tax Return, for the 2019 tax year for taxpayer Eric Sheppard.
MS. MARTINEZ: Can you step back.

BY MS. MARTINEZ:

Q. Does it show any net income -- I don't know if I used the right word.

A. Yeah. No. I would say no. Line 7a reflects the K-1s that the taxpayer in question received, the total of which is reported there.

MS. MARTINEZ: Can you go to Page 5.

Scroll down.

BY MS. MARTINEZ:

Q. Part 2 reads: "Income or loss from partnership and S corporations." Can you describe what this is to the jury.

A. Yeah. So this schedule reflects in part -- I say "in part" because if you look at Line 28, that area allows for four partnership or S corporation returns to be reported there. If there's an excess of four, then it requires an additional schedule to report the rest.

So this particular form shows three of the partnership returns to which Mr. Sheppard was a partner. And directly below that area it shows -- from Section A through C, it shows the losses or income potentially generated from those entities.

Q. Could you read out the first three entities that are listed there.

A. Sure. Line A is for WSG Kansas City, LLC. Line B is for HM Eight, LLC. And Line C is for HM Management and Development, LLC.

MS. MARTINEZ: Can you scroll down about three pages to another list of companies.

Stop.

BY MS. MARTINEZ:

Q. What is this form? Is this additional companies or...

A. I believe this reflects one additional company. But a little bit further down on the tax return should have the complete schedule.

Q. So -- right. So let me go --

MS. MARTINEZ: Go just a little further down. It's hard to -- it's called "Additional Information From Your 2019 Federal Tax Return."

Schedule 1. So just go -- you're going to see that we just went through A, B, C, and it's going to start at D, like dog. So keep going.

BY MS. MARTINEZ:

Q. So is this a continuation of the page that we were reading?

A. Yes, it is.

Q. And it says: "Additional Information From Your 2019 Federal Tax Return, Supplemental Income Analysis Income or Loss From S Corporations."

Can you read to the jury the name of the companies on D, E, F, G, H, I, and J?

A. Sure. D is for Sheppard Flagler Holdings, LLC; Line E is HM Eight Manager, LLC; Line F, HM Four LLC; Line G, HM Eight, LLC; Line H, JES Alafaya Holdings, LLC; Line I, Alafaya Investors, LLC; Line J, Alafaya Investors GP, LLC.

MS. MARTINEZ: Can you turn to 15-1.

BY MS. MARTINEZ:

Q. Can you help me and the jury understand --

MS. MARTINEZ: Can you go to the top so we can see the label of this exhibit.

BY MS. MARTINEZ:

Q. What is this?

A. This is a tax return transcript for tax period ending December 31, 2020. And what this is is an internal record of a Form 1040 filing for taxpayer Eric Sheppard for, again, the 2020 tax year.

MS. MARTINEZ: And can you just go to the middle of the page.

BY MS. MARTINEZ:

Q. So that just reflects that it was received on January 20th, 2022, correct?

A. Correct.

Q. What is a tax return transcript that's not the actual form? It populates the information from the form?

A. So when a return is typically -- typically received, it's input into our internal system, and this is how it looks when we print a copy of the return if it's not the full return. It's just an internal copy, so to speak.

MS. MARTINEZ: And can we go to 15-2.

BY MS. MARTINEZ:

Q. Just -- I know I just jumped out. But did we make clear for what tax year was the previous one?

A. Yeah. 2020.

Q. Okay.

MS. MARTINEZ: So 15-2.

BY MS. MARTINEZ:

Q. The IRS looked for and did not find a record for what year?

A. Form 1040, US Individual Income Tax Return was searched. And for tax year ending December 31, 2021, there was no record of filing.

Q. And for what individual?

A. For taxpayer Eric Sheppard.

MS. MARTINEZ: I've concluded my questioning, Your Honor.

THE COURT: All right. Then this might be a good time for us to stop for the evening. And Mr. Palmer, we'll see you tomorrow morning.

Ladies and Gentlemen, we will adjourn for the evening. Please remember that as we adjourn and you go about your evening and morning that you are not to discuss this case with anyone, nor permit anyone to speak with you. Everything learned about the case is learned within this courtroom.

I will see you tomorrow morning right at nine a.m.

Thank you for being prompt, as you did this morning. And I hope that we will do the same tomorrow, so we'll get right to work.

Remember, tomorrow we will have a short day. We'll end at four p.m. as well.

Have a nice evening. I'll see you tomorrow morning at nine a.m.

COURT SECURITY OFFICER: All rise.

(Jury not present, 3:59 p.m.)

THE COURT: All right. Thank you, sir. We'll see you tomorrow.

Go ahead and have a seat.

MS. WEINTRAUB: Your Honor, most respectfully, I have to make a motion.

THE COURT: All right.

MS. WEINTRAUB: I'd like to make a motion for a mistrial based on what's gone on in the past two and a half hours with this tax expert.

Can I do it outside the presence of the witness, Your Honor?

THE COURT: Yes. Mr. Palmer, we'll see you tomorrow.

Thank you, sir.

And before we proceed with your motion, I just want to make certain, Ms. Weintraub, you have fully discussed your motion with Mr. Sheppard?

MS. WEINTRAUB: No, I have not, Your Honor.

THE COURT: Well, is it appropriate to move for a mistrial without speaking with your client about the ramifications of that motion?

MS. WEINTRAUB: I think that it's perfectly appropriate at this time.

THE COURT: I would suggest that before you move forward that you at least have a discussion with Mr. Sheppard.

(Pause in proceedings.)

MS. WEINTRAUB: May I proceed?

THE COURT: Yes.

MS. WEINTRAUB: And yes, I conferred with my client.

Judge, we filed a motion in limine specifically raising the issue of the Government trying to add a lot of evidence. It's 404(b), in my opinion, of uncharged acts about income tax evasion, or not filing proper taxes, or all these -- I mean, we have listened for two and a half hours about all these uncharged tax violations.

And I think that the jury is -- if they're awake, they will get the impression from hearing Mr. Palmer as an expert talking about not just the tax returns not being filed, but he was implying the distributions were wrong. He was talking about revenues. I mean, we had no notice of this. And after all that the Government put on and carried on about our expert disclosures not being enough and not being precise, they've done worse than that because they gave us a very specific disclosure and didn't include this information.

We raised all these objections till we had a standing objection this afternoon. But the Court's order of September 28th rules on it and says the Government represents it's part of their story that's inextricably intertwined. Well, how can 2018 be inextricably intertwined in a case about PPP loans for COVID, which didn't even start until 2020?

I mean -- I have more. For those reasons, Your Honor, and a 403 objection on top of it, and the fact that we were denied a limiting instruction, I think that it is grounds for a mistrial.

THE COURT: All right. Response?

MS. WEINTRAUB: And I don't make it willingly because we're very pleased with the way that our case has been going. But I feel I have to because I'm afraid that this jury is tainted with all this evidence that they should never have heard.

THE COURT: All right. Response?

MS. MARTINEZ: Your Honor, first of all, the Defense has had this discovery for quite a bit of time, and the Defense agreed in advance to the admission of the exhibits, number one.

Number two, this -- at the heart of this case includes the submission to lenders of multiple different false tax returns, which then, when you go to the IRS, they are either different or not there. So that's one, with respect to the ones that relate to partnerships and income. But with respect to the ones that reflect employer taxes, Your Honor, also the Defendant filed with the lenders, in an effort to persuade them to get loans, multiple false 941s, multiple false 940s that did not exist. So we necessarily have to show that they do not exist.

And indeed, that's what -- they agreed to the admission of these records because, again, it makes perfect sense. So I don't get the logic of this motion at this point at all. It's not about inextricably intertwined. It's just direct evidence of falsity, number one.

And with respect to the time period, Your Honor, again, I'm at a loss, because the charts that have been given to me from their expert go back to 2014. They have made arguments that are very broad to the jury regarding the importance of the fact that these companies have existed for a long period of time, so I'm just at a loss on this motion.

THE COURT: All right. Anything further?

Anything further?

MS. WEINTRAUB: Judge, it wasn't based on the 940s and the 941s. My motion is based specifically on the continual and repeated references to no taxes being filed, the revenues are wrong, the distributions are wrong. I mean, what's really irking is that they're going to call his accountant.

THE COURT: All right. Well, why don't we focus on the motion, not what's going to happen in the days ahead of us.

But with regard to this motion, let me say first and foremost that the Court has already ruled at ECF Number 111. So this is nothing more than reargument, and there's no basis to reconsider the Court's argument.

Moreover, the Court found at that time that the individual tax returns would be admissible as evidence that is inextricably intertwined with the charged crimes.

Moreover, the Court, with regard to the motion in limine at that point, noted that the Defendant failed to identify what specific evidence the Defendant sought to exclude, and the Court could not decide whether the Defendant's alleged conduct with respect to his IRS filings and withholding obligations was intrinsic to the charged conduct.

Ms. Martinez sought to introduce 14 exhibits, and without objection they were admitted into evidence. This witness, Mr. Palmer, is testifying specifically with regard to these items that are already in evidence, which is proper. And as such, the motion for a mistrial is denied.

All right. I do need counsel table because we do have a hearing that was scheduled to begin at four o'clock. I will see the parties tomorrow morning at nine a.m., and the courtroom will be open at 8:30 for you to go ahead and bring your items in.

MR. ETRA: Can we talk about witnesses tomorrow, Your Honor?

THE COURT: I'm sorry?

MR. ETRA: Could we talk about witnesses tomorrow?

THE COURT: Yes. I believe we still have the list of witnesses that have yet to be called from today. Martin Beirne, Jammie Hutcheson, Ian Zalewski, and David Toye, and Carlos Granda?

MS. JIMENEZ: Yes, Your Honor.

THE COURT: All right. Are those the same witnesses?

MS. JIMENEZ: Yes, Your Honor.

THE COURT: All right. Then we'll see everybody tomorrow.

Have a nice evening.

(Proceedings adjourned at 4:08 p.m.)

UNITED STATES OF AMERICA)
ss:
SOUTHERN DISTRICT OF FLORIDA)

C E R T I F I C A T E

I, Yvette Hernandez, Certified Shorthand Reporter in and for the United States District Court for the Southern District of Florida, do hereby certify that I was present at, and reported in machine shorthand, the proceedings had the 28th day of November, 2023, in the above-mentioned court; and that the foregoing transcript is a true, correct, and complete transcript of my stenographic notes.

I further certify that this transcript contains pages 1 - 228.

IN WITNESS WHEREOF, I have hereunto set my hand at Miami, Florida, this 25th day of February, 2025.

/s/Yvette Hernandez

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