UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

UNITED STATES OF AMERICA

v. **CRIMINAL NO. 2:24-CR-00192**

KISHA SUTTON, ET AL.

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT KISHA SUTTON'S SECOND MOTION TO CONTINUE TRIAL

Comes now the United States of America, by Jonathan T. Storage, Assistant United States Attorney for the Southern District of West Virginia, and respectfully requests that the Court deny the defendant's second motion to continue the trial date. ECF No. 179.

I. BACKGROUND

On May 6, 2025, defendant Kisha Sutton ("defendant") filed a second motion to continue the trial date in this case. ECF No. 179. The basis for the motion is that counsel for the defendant "recently discovered new and potentially exculpatory/favorable information relating to the parties/participants in this case." ECF No. 179 at 1. More specifically, counsel for the defendant seeks to develop information about how financial institutions and their third-party administrators may have "caused, contributed to, or in any way facilitated the alleged fraudulent activity." ECF No. 179 at 2.

The defendant requests a 90-day continuance of all trial-related deadlines.

II. DISCUSSION

The stated reasons for the defendant's requested continuance are meritless. The defendant is attempting to deploy an impermissible "blame-the-victim" strategy. The defendant cites to published reports that suggest that lenders, such as the ones at issue in this case, "failed to even review the PPP Loan applications processed by [the third-party processor] opting to fund the loans without any underwriting." ECF No. 179 at 3. The defendant goes on to state, "It is hard to imagine, in a bank fraud prosecution, where 'materiality' of false or fraudulent statements is at issue, that a lender was victimized when they failed to even review the application and instead acted as a rubber stamp." ECF No. 179 at 4. But the defendant's arguments are wrong on the law and raise arguments that should be precluded from the jury's consideration.

"Materiality" of a falsehood is an element of bank fraud. Neder v. United States, 527 U.S. 1, 25 (1999). "In general, a false statement is material if it has 'a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" Id. at 16. In other words, the standard is objective, not subjective: a misrepresentation may be material even if evidence demonstrates that the misrepresentation would not have actually influenced or actually deceived the lender. See id. at 25 ("By prohibiting the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted."); see also United States v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989) ("[T]the government does not have to prove actual reliance upon the defendant's misrepresentations nor do they have to prove that the victim suffered actual pecuniary losses from the scheme." (referring to the mail fraud statute)).

The defendant requests a 3-month continuance to explore a theory that the financial institutions relevant to this case were negligent (or even grossly negligent) in not better vetting the defendant's loan submissions. As discussed, what the lender actually relied on in approving the loan in not the proper standard in a bank fraud case; the government does not have to present particularized evidence about the decision-making process for each separate financial institution. Instead, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed. Neder, 527 U.S. at 16.

The defendant's scheme to defraud is the offense conduct at issue in this case. The subjective considerations of relevant financial institutions are never an element of proof in a bank fraud case. Accoridngly, the grounds on which the defendant seeks a continuance are flawed and meritless.

III. CONCLUSION

For the reasons stated herein, the government respectfully requests that the Court deny the defendant's second motion to continue the trial date and all trial-related deadlines. ECF No. 179.

Respectfully submitted,

LISA G. JOHNSTON
Acting United States Attorney

By:

s/Jonathan T. Storage
JONATHAN T. STORAGE
Assistant United States Attorney
WV State Bar No. 12279
300 Virginia Street, East
Room 4000
Charleston, WV 25301
Telephone: 304-345-2200
Fax: 304-347-5104
E-mail: Jonathan.Storage@usdoj.gov

CERTIFICATE OF SERVICE

It is hereby certified that the foregoing "GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT KISHA SUTTON'S SECOND MOTION TO CONTINUE TRIAL" has been electronically filed and service has been made on opposing counsel by virtue of electronic mail this the 12th day of May, 2025, to:

Connor D. Robertson, Esq.
2702 Main Street
Hurricane, WV 25526
Email: cdr@croblaw.com

Michelle R. Fox, Esq.
LAW OFFICES OF MICHELLE ROMAN FOX
3359 Teays Valley Road
Hurricane, WV 25526
Email: mrfoxlaw@suddenlink.net

Clayton T. Harkins, Esq.
DINSMORE & SHOHL
P.O. Box 11887
Charleston, WV 25339
Email: clayton.harkins@dinsmore.com

John J. Balenovich, Esq.
1554 Kanawha Boulevard, East, Suite 100
Charleston, WV 25311
Email: john@wvlitigator.com

Natalie R. Atkinson, Esq.
ATKINSON & FRAMPTON
2306 Kanawha Boulevard, East
Charleston, WV 25311
Email: natkinson@amplaw.com

s/Jonathan T. Storage
JONATHAN T. STORAGE
Assistant United States Attorney
WV State Bar No. 12279
300 Virginia Street, East
Room 4000
Charleston, WV 25301
Telephone: 304-345-2200
Fax: 304-347-5104
E-mail: Jonathan.Storage@usdoj.gov