Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	No. CR20-174 JCC DEFENSE MOTION TO DISMISS MULTIPLICITOUS COUNTS OR REQUIRE GOVERNMENT ELECTION OF COUNTS Noted: October 8, 2021

Motion

Defendant Eric Shibley, through undersigned counsel, moves the court for an order dismissing either counts 2 and 4 or counts 8 and 10 of the indictment as multiplicitous. Alternatively, the court should direct the government to elect which counts upon which it will proceed at trial. This motion is based on the due process and double jeopardy clauses of the Fifth Amendment to the United States Constitution and the adjoined memorandum.

Relevant procedural and factual background

Mr. Shibley is charged by Indictment with seven counts of wire fraud (18 U.S.C. § 1343), three counts of bank fraud (18 U.S.C. § 1344(2)), and five counts of money laundering (18 U.S.C. § 1957). The charges arise from various loan applications he

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made in the spring of 2020 in connection with the federal Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL) program. The Indictment alleges a scheme to defraud various financial institutions and the U.S. Small Business Administration in order to unjustly enrich himself by the use of false statements about monthly payroll expenses, employees and revenues of entities that Mr. Shibley controlled. In a section spanning several pages and headed “Manner and Means of the Scheme to Defraud”(paragraphs 35— 45), the Indictment details the alleged actions of Mr. Shibley in committing this fraud. Based on that rendition the Indictment then charges seven counts of wire fraud, based on the specific electronic transmissions of different loan notes and PPP and EIDL loan applications. (Counts 1 - 7).

A short section charging bank fraud follows. It begins by re-alleging virtually the entirety of the previous 45 paragraphs of the indictment, including everything supporting the wire fraud allegations. Short sections on “The Scheme to Defraud”, “The Purpose of the Scheme to Defraud”, and “Execution of the Scheme to Defraud” follow, but they are repetitive of previous language. Three separate bank fraud counts are alleged based on the submission of two particular PPP loan applications and a signed bank note. (Counts 8, 9 and 10).

Two of the three bank fraud counts allege virtually identical conduct already charged in other wire fraud counts. Count 2 alleges wire fraud based on an April

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25, 2020 "Electronic submission of fraudulent PPP loan application in the name of Seattle's Finest Cannibis LLC to Financial Institution 4." Count 8 alleges bank fraud based on an April 25, 2020 "Submission of fraudulent PPP loan application in the name of Seattle's Finest Cannabis LLC to Financial Institution 4." In a similar fashion the wire fraud in Count 4 and the bank fraud in Count 10 are both specifically based on the May 4, 2020 electronic "submission of fraudulent PPP loan application in the name of Dituri Construction LLC to Financial Institution 1."

Argument

Counts 2 and 4 are multiplicitous with respect to Counts 8 and 10 because they charge the same conduct in two different counts and, in this case, their respective proofs are identical.

Multiplicity in an indictment occurs when one crime or act has been divided into more than one count. *Gerberding v. United States*, 471 F.2d 55, 58 (8th Cir. 1973). Multiplicitous indictments violate the double jeopardy clause of the Fifth Amendment by subjecting a defendant to punishment for the same offense more than once. *United States v. Chacko*, 169 F.3d 140, 145 (2d Cir. 1999). They also create a psychological effect on the jury at trial by suggesting that the alleged

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criminal activity is of greater scope and gravity than it actually is. *United States v. Marquardt,* 786 F.2d 771, 778 (7th Cir. 1986).

The proper remedy for a multiplicitous indictment is an election or consolidation of the offending counts and dismissal of the surplus count. *United States v. Seda*, 978 F.2d 779 (2d Cir. 1992). Either Mr. Shibley acted fraudulently when he electronically submitted the two PPP loan applications referenced in these counts or he acted with no fraudulent intent. But he should not have to defend himself against double charges arising from identical evidence and an identical alleged fraud scheme. Nor should he be forced to combat the impression, sure to be harbored by the jury, that the dual charges reflect a greater scope and gravity of criminal activity that it actually was.

Submitted this 1st day of October, 2021.

/s/ Michael Nance
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Certificate of Service

I hereby certify that on the 1st day of October, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system. Notice of this filing will be sent electronically to counsel of record for other parties.

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