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 SUPPLEMENTAL MEMORANDUM RE: MATERIALITY OF "PROBATION STATUS" QUESTION

Defendant Eric Shibley, through undersigned counsel, supplements previous briefing on the issue of the materiality of his representation in various PPP Loan applications that he was not "on probation", when he was, in fact, on misdemeanor probation out of Anacortes Municipal Court for a previous violation of a no contact order issued in family court.[1]

The Small Business Administration, itself, does not consider such a conviction material, and, on June 12, 2020, after construing Congressional intent in enacting the CARES Act, expressly rescinded its prior interim final rule and narrowed the type of criminal history which served to disqualify a PPP loan applicant. Subsequently, it revised

[1] The court's filing deadline for in limine motions and responses has passed. This matter just came to the attention of defense counsel. Because it concerns a key issue and will inform the court's decision, it is presented now, still in advance of trial. Of course, the government should be afforded a chance to respond.

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its PPP application forms to include questions about criminal history that would not required an affirmative response from Mr. Shibley. Under the reconsidered interpretation of the CARES Act, Mr. Shibley's criminal history - his misdemeanor probation - would *not* disqualify him from seeking a PPP loan.

Background

The CARES Act was enacted in March 2020 to provide immediate assistance to individuals, families, and businesses affected by the COVID-19 emergency. Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program titled the "Paycheck Protection Program." Loans guaranteed under the Paycheck Protection Program (PPP) will be 100 percent guaranteed by SBA, and the full principal amount of the loans may qualify for loan forgiveness.

To implement the PPP program the SBA formulated its First Interim Final Rule (IFR) that provided, among other things, that a PPP loan would not be approved if an owner of 20 percent or more of the equity of the applicant has been convicted of a felony within the last five years or was presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction. This policy was reflected in one of the questions appearing in the online PPP application forms that Mr. Shibley answered in the negative and that constitutes a significant part of the government's wire and bank fraud allegations:

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> Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole?

On June 12, 2020, the First Interim Final Rule was amended after the SBA Administrator, in consultation with the Secretary of the Treasury (the Secretary), determined that a shorter time frame for felonies that did not involve fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance was more consistent with Congressional intent to provide relief to small businesses and also promoted the important policies underlying the First Step Act of 2018 (Pub. L. 115-391). The Administrator also determined that the restriction should be limited to pending criminal charges for felony offenses, which aligned with the Administrator's prior determination that only felony convictions (but not convictions for other types of offenses) should count. See attached copy of Small Business Administration 13 CFR Part 120 Docket No. SBA-2020-0039RIN 3245-AH53.

Subsequently, the PPP loan application was revised to reflect SBA's new interpretation of Congressional intent. See attached copy. Relevant questions on the new form ask:

> 5. Is the Applicant (if an individual) or any individual owning 20% or more of the equity of the Applicant presently incarcerated or, for any felony, presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction?

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Initial here to confirm your response to question 5 →

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6. Within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, has the Applicant (if an individual) or any owner of the Applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) commenced any form of parole or probation (including probation before judgment)?

Initial here to confirm your response to question 6 →

Conspicuously absent is any question relating to misdemeanor probation or any requirement that such status be revealed.

The SBA's change of position came in the wake of a civil suit challenging the breadth of the first IFR, issued on April 15, 2020. The suit alleged that the first IFR exceeded the SBA's statutory authority, was arbitrary and capricious, and failed to carry out a ministerial duty in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(1), 706(2)(A), 706(2)(C). See *Defy Ventures v. U.S. Small Business Administration*, 469 F. Supp. 3d 459 (D.Md. 2020). The plaintiffs sought a declaratory judgment that the IFR was unlawful, a temporary restraining order and preliminary and permanent injunctions enjoining the defendants from enforcing the IFR and ordering the defendants to secure PPP loans for the plaintiffs, and writs of mandamus ordering the SBA to administer PPP loans without regard to a business owners' prior criminal history. The SBA revised the IFR twice during the litigation and before the plaintiffs' motion for preliminary injunction was fully briefed. *Id.*, 469 F. Supp. 3d at 466. The third iteration of the IFR, issued on June 24, 2020 (six days before the PPP application deadline of June 30, 2020), excluded only those businesses with a greater than 20 percent owner who was presently facing any felony charges or whose probation or parole commenced within the last five years for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance and within the last year for other felonies. See *id*. The court found the plaintiffs were likely to succeed on their APA claim that the first two iterations of the rule were arbitrary and capricious. *Id.* at 475.

The present prosecution has the government (the SBA) alleging Mr. Shibley's material misrepresentation on a matter (his misdemeanor probation status) that its own revised guidelines do not consider material and at least one federal court has determined to have been improperly asked in the first place.

In addition to being inherently prejudicial, Mr. Shibley's misdemeanor probation status is not material as a matter of law. In enacting the CARES Act, Congress did not intend to exclude applicants in that status, and it was overreach on the part of the SBA to act contrary to that intent. SBA's revision of its policy in June 2020 and its PPP application form to reflect that intent are clear evidence that a misdemeanant's probationary status is simply not material to a PPP loan application. At trial the government should be precluded from presenting any proof or argument concerning Mr. Shibley's response to the probation question.

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Respectfully submitted this 12th day of November, 2021.

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