The Hon. John C. Coughenour

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	CASE NO. CR20-174-JCC **UNITED STATES' RESPONSE TO DEFENSE'S MOTION FOR CLARIFICATION OF RESTITUTION CREDIT FOR FORFEITED FUNDS OR FOR INDICATIVE RULING**

I. INTRODUCTION

On March 8, 2022, the Court sentenced the Defendant, Eric Shibley, and entered a judgment that incorporated a combined Preliminary Order of Forfeiture and Order of Forfeiture and ordered Defendant Shibley to pay restitution of $1,438,000.00. Dkt. Nos. 144, 152, 159. Defendant Shibley now seeks an Order from the Court authorizing credit against his restitution order for forfeited property. Dkt. No. 170. Because restitution and forfeiture are separate, distinct, and mandatory parts of a criminal sentence and only the United States Attorney General may direct forfeited funds be applied to orders of restitution, Defendant Shibley has no right to have, and this Court cannot order, forfeited funds credited to his restitution obligation.

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
(206) 553-4399

Defendant Shibley engaged in a scheme to obtain over $3.6 million dollars from COVID-19 relief programs set up by the government, including the Paycheck Protection Program ("PPP") and Economic Injury Disaster Loan ("EIDL") program run by the Small Business Administration ("SBA"). As part of his scheme, Defendant Shibley submitted false information and documentation about the payroll, employees, and revenues of the entities he controlled to obtain pandemic relief funds. Defendant Shibley received over $2.8 million in PPP and EIDL funds, which he immediately transferred to other accounts and attempted to withdraw in cash. The United States seized some of these funds with forfeiture seizure warrants. The financial institutions also recovered some of these funds. Defendant Shibley was successful in withdrawing approximately $200,000 in cash that the government was unable to trace.

The Court ordered Defendant Shibley to pay restitution of $1,438,000, to be divided by the victims of the PPP loans, Huntington Bank ($200,00) and Customers Bank ($960,000), and the EIDL loans, the SBA ($278,000), to make those victims whole. Dkt. Nos. 152, 159. The Court also ordered Defendant Shibley's interest in the proceeds of his Wire Fraud and Bank Fraud schemes and the property involved in his Money Laundering offenses forfeited to the United States. This forfeited property includes loan proceeds seized from accounts controlled by Defendant Shibley at Navy Federal Credit Union ($49,500.86), Wells Fargo Bank ($100,000 and $804,816.63), and Verity Credit Union ($114,440.00 and $114,743.59), and a sum of money reflecting the remaining proceeds the government was unable to seize ($254,199). Dkt. No. 144.

II. LAW AND ARGUMENT

A. Restitution and Forfeiture are Mandatory.

Restitution and forfeiture are both mandatory. *See United States v. Feldman*, 853 F.2d 648, 663-64 (9th Cir. 1988), cert. denied, 489 U.S. 1030 (1989); *United States v. Carter*, 742 F.3d 440 (9th Cir. 2014).

This Court ordered restitution under 18 U.S.C. § 3663A, the Mandatory Victim Restitution Act (MVRA); 18 U.S.C. § 3664; and 18 U.S.C. § 3771(a)(6) and (c)(1). The

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
(206) 553-4399

MRA made restitution mandatory for most federal crimes, including fraud, where a victim suffers a loss. *See United States v. Carter*, 742 F.3d at 446, citing 18 U.S.C. §§ 3663A(a)(1), (c)(1)(a)(ii). Restitution makes the victim whole by restoring to the victim the actual loss caused by the defendant's criminal conduct. *United States v. Newman*, 659 F.3d 1235, 1241 (9th Cir. 2011), abrogated on other grounds by *Honeycutt v. United States*, 137 S.Ct. 1626 (2017); *see also United States v. Hunter*, 618 F.3d 1062, 1064 (9th Cir. 2010).

Courts must also order forfeiture when a defendant is convicted of a crime that provides for forfeiture as part of the penalty. *See, e.g.*, 18 U.S.C. § 982(a)(1) ("The court, in imposing sentence on a person convicted of an offense in violation of section 1956, 1957, or 1960 of this title, shall order that the person forfeit to the United States any property, real or personal, involved in such offense, or any property traceable to such property."); *see also United States v. Monsanto*, 491 U.S. 600, 607 (1989) (stating that by using the words "shall order" in a forfeiture statute, "Congress could not have chosen stronger words to express its intent that forfeiture be mandatory in cases where the statute applied"); *United States v. Newman*, 659 F.3d at 1240 ("the district court has no discretion to reduce or eliminate mandatory criminal forfeiture.").

B. Restitution and Forfeiture are Different.

Restitution and forfeiture serve distinct goals and are calculated differently. *See United States v. Carter*, 742 F.3d 440 (9th Cir. 2014); *United States v. Davis*, 706 F.3d 1081 (9th Cir. 2013); *United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004). The defendant's criminal proceeds and assets involved in the offense are subject to forfeiture. Restitution, in contrast, seeks to repay the victims of crime for their out-of-pocket expenses and losses caused by the offense, and can be paid out of any assets or earnings that the defendant has. *See United States v. Rich*, 603 F.3d 722 (9th Cir. 2010). In sum, forfeiture is imposed as punishment for a crime, and restitution is to make the victim whole. *United States v. Newman,* 659 F.3d 1235, reaffirmed in *United States v. Davis*, 706 F.3d 1081 (9th Cir. 2013).

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700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
(206) 553-4399

C. Restitution and Forfeiture Do Not Constitute "Double Dipping."

Defendants may be required to pay restitution and to forfeit the same amounts and that result is not an impermissible "double recovery" or "double dipping." *United States v. Newman*, 659 F.3d at 1241-42 ("While we recognize to the untrained eye, this might appear to be a 'double dip,' restitution and forfeiture serve different goals, and we have approved of [ordering both restitution and forfeiture] in the past"), quoting *United States v. Leahy*, 464 F.3d 773, 793 n. 8 (7th Cir. 2006); *see also United States v. Feldman*, 853 F.2d at 663–664 (a court does not lose its discretion to impose a sentence of restitution merely because a defendant must also forfeit the proceeds of illegal activity); *United States v. Boulware*, 384 F.3d 794, 813 (9th Cir.2004).

Here, the Court imposed a restitution obligation of $1,438,000 to be paid to the three victims: Customers Bank ($960,000), Huntington Bank ($200,000), and the Small Business Administration ($278,000). A federal government agency, such as the Small Business Administration may quality as a victim entitled to receive compensation through the restoration and remission procedures, if it demonstrates that it suffered a pecuniary loss as a direct result of the offense underlying the forfeiture. *See* 28 C.F.R. §§ 9.2 and 9.8(b). The act of forfeiting the seized assets and depositing the proceeds into the Assets Forfeiture Fund does not, however, mean that the seizing agency has received victim compensation. The victim agency should be included in the restitution order for restoration purposes, as it is here. *See* Asset Forfeiture Policy Manual Chapter 14, II.D.

In *United States v. Davis*, the Ninth Circuit upheld forfeiture to the Department of Justice and restitution to the Federal Bureau of Investigation—an agency within the Department of Justice—finding that it would be appropriate even if they were to be considered the same "entity." *United States v. Davis*, 706 F.3d 1081. ("Even if the same government entity will receive both forfeiture and restitution, there is simply no double recovery."). The *Davis* Court held that there is no double recovery, or "windfall," to the victim because forfeiture and restitution serve different purposes, and because there is no statutory provision providing for offset against restitution for forfeiture. *Id.* The court

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
(206) 553-4399

noted that other circuits addressing the issue "hold or imply that if two entities are related closely enough, restitution or forfeiture should be reduced," and that it was disagreeing with that approach. *United States v. Davis*, 706 F.3d at 1083.

D. Only the United States Department of Justice May Direct that Forfeited Funds Be Applied to Restitution Obligations and Only if Defendant Has No Other Assets Available to Pay Restitution.

A district judge does not have discretion to reduce or eliminate a criminal forfeiture unless required by statute or the Constitution. *United States. v. Newman*, 659 F.3d at 1240. The Ninth Circuit is among those districts holding that a district court does not have discretion to offset restitution and forfeiture and that the government has the sole discretion to apply forfeited funds to restitution. *See United States v. Newman*, 659 F.3d 1235; *see also United States v. Bodouva*, 853 F.3d 76, 78–79 (2d Cir. 2017) citing *United States v. Newman*, 659 F.3d 1235 (9th Cir. 2011); *United States v. Browne*, 505 F.3d 1229 (11th Cir. 2007), cert. denied, 554 U.S. 918 (2008); and *United States v. McGinty*, 610 F.3d 1242, 1248 (10th Cir. 2010); *see also United States v. Joseph*, 743 F.3d 1350, 1354-55 (11th Cir. 2014) ("a district court [] has no authority to offset a defendant's restitution obligation by the value of the forfeited property.")

A criminal defendant has no right to use forfeited funds to satisfy a restitution obligation. *United States v. Carter*, 742 F.3d 440. Because forfeited assets are property of the government, courts and defendants lack authority to use them to satisfy a defendant's criminal debts, including fines or restitution obligations. *See United States v. Trotter*, 912 F.2d 964. 965-966 (8th Cir. 1990). *See also United States v. Yeh*, 199 F. Supp.3d 998 (E.D. Va. 2016) (rejecting defendant's claim that forfeited funds seized from bank accounts be credited to his restitution obligation); *United States v. O'Connor*, 321 F.Supp.2d at 722, 729 (E.D. Va. 2004) (funds seized by forfeiture and those ordered for restitution are completely separate forms of punishment; the fact that defendant pays one does not negate his duty to pay the other).

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SEATTLE, WA 98101
(206) 553-4399

Applying forfeited funds to restitution is strictly controlled by statute and only the government may do so. Congress exclusively authorizes the United States Attorney General to exercise his discretion concerning whether to provide forfeited assets to victims. 21 U.S.C. § 853(i)(1); 18 U.S.C. §§ 981(e)(6) and 1963(g)(1); *United States v. MacInnes*, 223 F. App'x 549, 553 n.3 (9th Cir. 2007) (explaining that statutes and C.F.R. authorize the Attorney General to determine whether to provide relief to victims); *United States v. Carter*, 742 F.3d at 446 (explaining that "the Government may choose to assign forfeited proceeds to victims . . . ."). The Attorney General has delegated this authority to the Chief of Money Laundering Asset Recovery Section ("MLARS"), Criminal Division, United States Department of Justice. 28 C.F.R. § 9.1(b)(2). There is no presumption that a defendant will receive credit towards restitution from forfeited assets and no one in the United States Attorney's Office or the Department of Justice can promise anything about the outcome of this procedure. It is in the exclusive realm of the Chief of MLARS. 28 C.F.R. § 9.1(b)(2) ("Within the Criminal Division [of the Department of Justice], authority to grant remission and mitigation is delegated to the Chief, Asset Forfeiture and Money Laundering Section" (subsequently renamed Money Laundering and Asset Recovery Section)).

Department of Justice policy permits transfer of forfeited property to compensate victims of the offenses underlying the forfeiture—under certain circumstances. The policy was created in part to implement two statutory provisions: a) under 18 U.S.C.A. § 981(e)(6), the Attorney General is authorized to transfer forfeited property under certain circumstances as restoration to any victim of the offense giving rise to the forfeiture; and b) under 21 U.S.C.A. § 853(i)(1), the Attorney General is authorized, with respect to property forfeited under 21 U.S.C.A. § 853, to grant petitions for mitigation or remission of forfeiture to restore forfeited property to victims.

This policy permits transfers of forfeited assets to satisfy restitution orders after the time for filing an appeal challenging either the restitution order of the forfeiture has passed, or all relevant appeals have been adjudicated, and where the defendant does not

UNITED STATES ATTORNEY
700 STEWART STREET, SUITE 5220
SEATTLE, WA 98101
(206) 553-4399

have sufficient resources to pay restitution outside of the forfeited assets. Because restitution and forfeiture are mandatory and independent parts of a criminal sentence, forfeited assets may not be used to satisfy the restitution order if other assets are available for that purpose. *See* Asset Forfeiture Policy Manual, Chapter 14, II.B.2. Defendant Shibley has other assets, including several real properties in the Seattle area. *See* Dkt. Nos. 58 at 2-3, 149 at 5-6; Dkt. No. 138, at 338-404, Defense Trial Exhibits A-3, A-4 (photographs of construction work at some of Defendant Shibley's real properties); *see also* Presentence Report at ¶ 64.

III. CONCLUSION

For the reasons set forth above, the United States opposes Defendant Shibley's request that the Court Order forfeited funds applied against his restitution obligation.

DATED this 15th day of June, 2022.

Respectfully submitted,

NICHOLAS W. BROWN
United States Attorney

s/Krista K. Bush
KRISTA K. BUSH
Assistant United States Attorney
700 Stewart Street, Suite 5220
Seattle, Washington 98101-1271
(206) 553-7970
Krista.Bush@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2022, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the parties of record.

s/Hannah G. Williams
HANNAH G. WILLIAMS
FSA Paralegal III, Contractor
United States Attorney's Office
700 Stewart Street, Suite 5220
Seattle, Washington 98101
(206) 553-2242
Hannah.Williams2@usdoj.gov