Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	No. CR20-174 JCC DEFENSE REPLY TO GOVERNMENT RESPONSE RE: RESTITUTION CREDIT

Reply

Defendant Eric Shibley, though undersigned counsel, replies herein to the government's response to his request for credit toward restitution from specific monies previously forfeited.

The government asserts its own exclusive authority to use forfeited funds to make victims whole through the restoration process of 21 USC §853(i)(1) and posits that the court has no independent authority to do so. Gov't brief 5-6. But its cited authority speaks more to the power and duty of the court to order both forfeiture and restitution in appropriate cases than to the discretion of the court to consider available sources when setting restitution. The cited cases also speak generally to the proposition that a forfeiture of crime proceeds cannot be offset by restitution and not so much to whether restitution can be offset by forfeited proceeds clearly available through a restoration process within

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the prerogative of the government. *United States v. Newman*, for example, says that a court cannot reduce or eliminate forfeiture. But the defense here is seeking to have the court reduce/offset restitution, leaving the forfeiture intact; while a defendant may be required to pay both forfeiture and restitution, *Newman* falls short of *mandating* that defendants pay both; *Id.*, 659 F.3d 1235, 1241 (9th Cir. 2011). *United States v. Carter*, another cited case, honored a plea agreement that *did* allow a credit toward restitution from forfeited funds. *Id.*, 742 F.3d 440, 448-9 (9th Cir. 2014).

No Ninth Circuit authority speaks explicitly to whether a trial court may, in its discretion, accord credit toward a victim's restitution where the specific funds associated with that loss have been forfeited to the government and the victim has already been (or almost certainly will be) made whole under the terms of an independent government guarantee. As developed at trial, PPP loans extended by the victim lenders were guaranteed by the SBA. In its discretion the court could take this into account in setting restitution. See 18 §981(a)(2)(C).[1]

Other cases involving forfeitures and restitution have allowed courts some discretion in setting amounts. See *United States v. Bengis*, 631 F.3d 33, 41 (2d Cir. 2011),

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[1] 18 §981(a)(2)(C):

> In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.

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a Lacey Act case involving simultaneous impositions of restitution and forfeiture. "We leave to the district court's determination in the first instance all relevant issues relating to the amount of restitution, whether any off-set should apply, and if so, whether there should be one based on the forfeiture." *Id*. at 41. See also *United States v. Kalish*, 626 F. 3d 165, 169–70 (2d Cir. 2010) (noting that "simultaneous imposition" of both a forfeiture remedy and a restitution remedy, authorized by separate statutes, "offends no constitutional provision", but that "once some payment has been made by way of restitution, a defendant would be in a position to argue that such a payment should be a credit against any then remaining forfeiture amount. The forfeiture amount represents "ill-gotten" gains . . . and it is at least arguable that any money returned to a victim has reduced the amount of "ill-gotten" gains remaining in the defendant's possession.

Conclusion

The trial court is not a rote functionary, hidebound and unable to resist the dictates of a government unsatisfied with the full spoils of a seven-figure forfeiture. It presided over Eric Shibley's trial and has a command of the full circumstances of the case. Surely it has discretion to consider those circumstances in assuring that victims are properly protected but not at the expense of basic fairness or government overreach.

As suggested in the original defense motion, the Court should clarify its intent that specific monies forfeited to the government in its Order of January 21, 2022, be credited

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toward the restitution later ordered to aggrieved lenders identified in the Amended Judgment.

Respectfully submitted this 21st day of June, 2022.

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Certificate of Service

I hereby certify that on the 21st day of June, 2022, I electronically filed the foregoing with the clerk of the court using the CM/ECF system.

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