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	No. CR20-174-JCC **MOTION FOR FINAL ORDER OF FORFEITURE** NOTE ON MOTION CALENDAR: September 16, 2022

The United States, by and through its undersigned counsel, moves pursuant to Federal Rule of Criminal Procedure ("Fed. R. Crim. P.") 32.2(c)(2) for Final Order of Forfeiture forfeiting to the United States the following property (collectively, the "Subject Property"):

1. $49,500.86 in U.S. funds, seized on or about May 29, 2020 from Navy Federal Credit Union account #******7528, held in the name of Eric R. Shibley MD PLLC;

2. $100,000.00 in U.S. funds, seized on or about May 29, 2020 from Wells Fargo account #******2378, held in the name of ES1 LLC;

3. $804,816.63 in U.S. funds, seized on or about May 27, 2020 from Wells Fargo account #******3536, held in the name of The A Team Holdings LLC;

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4. $114,440.00 in U.S. funds, seized on or about June 30, 2020 from Verity Credit Union account #***5390, held in the name of Dituri Construction LLC; and

5. $114,743.59 in U.S. funds, seized on or about June 30, 2020 from Verity Credit Union account #***5320, held in the name of SS1 LLC.

This motion is based on the following procedural facts, which are reflected in the pleadings filed and orders entered in this matter.

I. THE CRIMINAL PROCEEDINGS

On November 18, 2021, Defendant Shibley was convicted of Wire Fraud, in violation of 18 U.S.C. §§ 1343 and 2, as charged in Counts 1 – 7 of the Indictment; Bank Fraud, in violation of 18 U.S.C. §§ 1344(2) and 2, as charged in Counts 8 – 10; and Money Laundering, in violation of 18 U.S.C. §§ 1957 and 2, as charged in Counts 11 – 15. Dkt. Nos. 31, 128. The evidence at trial established that the Subject Property was forfeitable, pursuant to 18 U.S.C. § 981(a)(1)(C), by way of 28 U.S.C. § 2461(c), and 18 U.S.C. § 982(a)(1) – (2), as property that constitutes or is traceable to proceeds of the Wire Fraud and Bank Fraud schemes or property that was involved in the Money Laundering offenses. Dkt. Nos. 140, 144; *see also* Dkt. No. 175.

On December 17, 2021, the United States filed its Motion for Entry of a Combined Preliminary Order of Forfeiture and Order of Forfeiture (the "Combined Motion"). Dkt. No. 140. In the Combined Motion, the United States moved for a preliminary order of forfeiture as to the Subject Property, and a final order of forfeiture as to a sum of money in the amount of $254,199, reflecting the unrecovered proceeds of Defendant's fraud schemes. *Id.* One of the entities that Defendant used to submit false and fraudulent PPP and EIDL applications as part of his scheme to defraud COVID-19 relief programs — ES1 LLC — attempted to intervene in the criminal case regarding the $100,000, discussed above; the United States opposed ES1 LLC's attempt. Dkt. Nos. 142 - 143.

On January 21, 2022, the Court granted the Combined Motion and entered an Order (the "Order"), finding the Subject Property forfeitable pursuant to 18 U.S.C.

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§ 981(a)(1)(C), by way of 28 U.S.C. § 2461(c), and 18 U.S.C. § 982(a)(1) – (2), and forfeiting to the United States the Defendant's interest in it. Dkt. No. 144. The Court overruled ES1 LLC's objection to the preliminary forfeiture of the $100,000. *Id.* The Court also granted the United States' request for the forfeiture of a sum of money reflecting the unrecovered proceeds of the Defendant's fraud schemes. *Id.* The forfeiture of the sum of money is personal to the Defendant is not at issue in this Motion for Final Order of Forfeiture of the above-identified property. *Id.*

On March 8, 2022, the Court sentenced Defendant to 48 months of imprisonment, to be followed by three years of supervised release. Dkt. Nos. 151 - 152, 159. The Court ordered Defendant to pay restitution of $1,438,000.00 to his victims and ordered the forfeiture of Defendant's interest in the Subject Property and the sum of money, as previously held in the Order. Dkt. Nos. 152, 159.

On March 17, 2022, Defendant appealed his conviction and sentence to the Ninth Circuit Court of Appeals. Dkt. No. 155.

On June 10, 2022, Defendant filed his "Motion for Clarification of Restitution Credit for Forfeited Funds or for Indicative Ruling," requesting the Court authorize credit against his restitution order for forfeited property (the "Motion"). Dkt. No. 170. After considering the opposition of the United States and the Defendant's Reply, Dkt. Nos. 173 – 174, the Court held that it lacked jurisdiction to adjudicate the Motion due to the Defendant's pending appeal of his conviction and sentence. Dkt. No. 175. The Court also issued an indicative ruling that if the Ninth Circuit were to remand the matter to the Court, then the Court would deny the Motion to credit the forfeited funds toward the restitution order. *Id.* The Defendant also appealed this Order. Dkt. No. 176.

II. NO CLAIMS WERE FILED IN ANCILLARY PROCEEDINGS

Consistent with the Order, and as required by 21 U.S.C. § 853(n)(l) and Fed. R. Crim. P. 32.2(b)(6)(C), the United States published notice of the Order and its intent to dispose of the Subject Property in accordance with governing law. Dkt. No. 147. That

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notice informed any third parties claiming an interest in the Subject Property that they were required to file a petition with the Court within 60 days of the notice's first publication on January 25, 2022. *Id.*

Additionally, as required by Fed. R. Crim. P. 32.2(b)(6)(A), the United States also sent notice and a copy of the Order to one individual and five businesses (including ES1 LLC) who were identified as potential claimants based on the underlying investigative materials. *See* Declaration of Assistant U.S. Attorney Krista K. Bush in Support of Motion for a Final Order of Forfeiture ("Bush Decl."), ¶ 2 and Exhibits A, B, C, D, E, & F. As provided by 21 U.S.C. § 853(n)(2), that notice informed the potential claimants, and counsel, where applicable, that if they wanted to assert an interest in the Subject Property, they were required to file a petition within 30 days of receiving the notice. *See id*. The last of these notices were delivered on or about July 22, 2022. *See* Bush Decl., ¶ 2.

No third parties have filed a petition, and the relevant period for doing so has expired. *See* Docket (CR20-174-JCC); *see also* 21 U.S.C. § 853(n)(2); Fed. R. Crim. P. 32.2(b)(6).

II. FORFEITURE IS NOT STAYED PENDING APPEAL

A district court may stay a forfeiture order pending appeal "on terms appropriate to ensure that the property remains available pending appellate review." *See* Fed. R. Crim. P. 32.2(d). While Defendant has appealed his judgment, neither he nor the United States have sought to stay enforcement of the sentence. *See* Docket (CR20-174-JCC). Further, even had Defendant made such a request, it would not satisfy the four factor test set forth in Rule 32.2(d): Defendant has a low probability of success on the merits; the cost to the government of maintaining the Subject Property is minimal, but stay of enforcement would impede application of any of the forfeited funds to victims; and, because the property is fungible, it has no intrinsic value to Defendant and its value is not likely to increase pending appeal. *See* Fed. R. Crim. P. 32.2(d); *see also United*

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States v. Grote, 961 F.3d 105 (2d Cir. 2020); *United States v. Ngari*, 559 F.App'x 259, 272 (5th Cir. 2014); *United States v. Riedl*, 214 F.Supp.2d 1079, 1082 (D. Haw. 2001).

IV. CONCLUSION

Defendant's rights in the Subject Property have been forfeited to the United States. Ancillary proceedings have now concluded as well. Accordingly, the United States respectfully requests that the Court enter a final order forfeiting this property to the United States. A proposed order is submitted herewith.

DATED this 7th day of September, 2022.

Respectfully submitted,
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s/Krista K. Bush

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CERTIFICATE OF SERVICE

I hereby certify that on September 7, 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
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