The Honorable 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. CR20-174JCC **GOVERNMENT'S RESPONSE TO MOTION TO DISMISS MULTIPLICITOUS COUNTS OR REQUIRE GOVERNMENT ELECTION OF COUNTS (Dkt. #78)**

The government files this response in opposition to Defendant Eric Shibley's Motion to Dismiss Multiplicitous Counts or Require Government Election of Counts. Dkt. # 78. Counts 2 and 8 and Counts 4 and 10 of the Indictment are not multiplicitous and thus dismissal or election of counts is not warranted.

I. BACKGROUND

On October 15, 2020, the Defendant was indicted by a grand jury with seven counts of Title 18, United States Code, Section 1343 (Wire Fraud); three counts of Title 18, United States Code, Section 1344(2) (Bank Fraud); and five counts of Title 18, United States Code, Section 1957 (Money Laundering) related to a scheme to submit false and fraudulent applications for Paycheck Protection Program (PPP) loans and Economic Injury Disaster Loans (EIDL). Dkt. #31. During the scheme, the Defendant

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sought multiple PPP and EIDL funds by submitting applications in the name of fake businesses that he falsely stated had dozens of employees for which the businesses paid salaries and payroll taxes and thousands of dollars in payroll as of February 15, 2020. To support his applications, the Defendant also submitted fake tax returns that had not been filed with the Internal Revenue Service ("IRS"). In reality, the Defendant's companies did not have employees, payroll expenses, or revenues as claimed in his applications. The Defendant's scheme resulted in the submission of approximately 30 fraudulent PPP applications to various lenders and over 10 fraudulent EIDL applications to the SBA.

As alleged in the Indictment, the PPP was established by the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, a federal law enacted in or around March 2020 and designed to provide emergency financial assistance to the millions of Americans suffering the economic effects caused by the COVID-19 pandemic. In order to obtain a PPP loan, a qualifying business was required to submit a PPP loan application to a participating lender. The loan application was signed by an authorized representative of the business and required the business to acknowledge the program rules and make certain affirmative certifications about its eligibility for a PPP loan. In addition, businesses applying for a PPP loan were required to provide documentation showing their payroll expenses. The participating lender then processes the PPP loan applications. If a PPP loan application was approved, the participating lender funded the PPP loan using its own monies, which were 100% guaranteed by the U.S. Small Business Administration ("SBA"). Participating lenders in the PPP were not required to be federally insured financial institutions. In this case, the Defendant sought loans from both federally insured financial institutions as well as other participating lenders that were not federally insured. Data from the application, including information about the borrower, the total amount of the loan, and the listed number of employees, was transmitted by the lender to the SBA in the course of processing the loan.

The Indictment charges the Defendant with 15 counts in total. Counts 2 and 8 charge the Defendant with wire and bank fraud respectively for the submission of

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fraudulent PPP loan application in the name of Seattle's Finest Cannabis LLC to Financial Institution 4 on or around April 25, 2020. Counts 4 and 10 charge the Defendant with wire and bank fraud respectively for the submission of fraudulent PPP loan application in the name of Dituri Construction LLC to Financial Institution 1 on or about May 4, 2020.

II. ARGUMENT

A. Legal Standard

Multiplicity occurs when an indictment charges "a single offense in more than one count." *United States v. Garlick*, 240 F.3d 789, 793–94 (9th Cir. 2001). "It is not determinative whether the same conduct underlies the counts; rather, it is critical whether the 'offense'—in the legal sense, as defined by Congress—complained of in one count is the same as that charged in another." *United States v. Chacko*, 169 F.3d 140, 146 (2d Cir. 1999) (*citations omitted*). "The test for multiplicity is whether each count 'requires proof of an additional fact which the other does not.'" *Garlick* at 794 (*quoting Blockburger v. United States*, 284 U.S. 299, 304, 52 S.Ct. 180, 76 L.Ed. 306 (1932)). "The *Blockburger* test examines whether each charged offense contains an element not contained in the other charged offense." *Chacko* at 146 (*citing United States v. Dixon*, 509 U.S. 688 at 696 (1993). "If there is an element in each offense that is not contained in the other, they are not the same offense for purposes of double jeopardy, and they can both be prosecuted." *Id.* (*citing Knapp v. Leonardo*, 46 F.3d 170, 178 (2d Cir.1995)).

B. Counts 2 and 8 and Counts 4 and 10 are not multiplicitous.

The Defendant's argument as it relates to Counts 2 and 8 and Counts 4 and 10 of the Indictment fail the *Blockburger* test because the wire fraud and bank fraud statutes contain different elements. Counts 2 and 4 charge the Defendant with wire fraud in

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violation of 18 U.S.C. § 1343. According to the Ninth Circuit Model Criminal Jury Instructions, the elements of wire fraud are:

> 1. The defendant knowingly devised a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises;
>
> 2. The statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property;
>
> 3. The defendant acted with the intent to defraud, that is, the intent to deceive and cheat; and
>
> 4. The defendant used, or caused to be used, an interstate wire communication to carry out or attempt to carry out an essential part of the scheme.

Ninth Circuit Model Criminal Jury Instruction 8.124 (2010).

Counts 8 and 10 charge the Defendant with bank fraud in violation of 18 U.S.C. § 1344(2). According to the Ninth Circuit Model Criminal Jury Instructions, the elements of bank fraud in violation of 18 U.S.C. § 1344(2) are:

> 1. The defendant knowingly carried out a scheme or plan to obtain money or property from the [financial institution] by making false statements or promises;
>
> 2. The defendant knew that the statements or promises were false;
>
> 3. The statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;
>
> 4. The defendant acted with the intent to defraud; and
>
> 5. Fifth, [financial institution] was federally insured.

Ninth Circuit Model Criminal Jury Instruction 8.127 (2010).

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The proof of the wire fraud and bank fraud counts will necessarily overlap, as the government will call one bank witness that will testify about the particular PPP loan application. But the counts are not multiplicitous because each statute requires the government to prove an element that the other statute does not: the wire fraud statute requires the government to prove that the Defendant used an interstate wire to carry out the scheme; the bank fraud statute requires the government prove that the Defendant carried out a scheme to obtain money from a federally insured financial institution. The Defendant's argument that the counts are multiplicitous fails the *Blockburger* test because each statute contains a unique element.

III. CONCLUSION

The government respectfully requests that the Court deny the Defendant's Motion to Dismiss Multiplicitous Counts or Require Government Election of Counts.

DATED this 8th day of October, 2021.

Respectfully submitted,

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