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. CR20-174-JCC **UNITED STATES' PROPOSED FORFEITURE JURY INSTRUCTIONS (CITED)**

The United States, by and through its undersigned counsel, submits these Proposed Forfeiture Jury Instructions for use, as necessary, in the forfeiture phase of trial conducted pursuant to Fed. R. Crim. P. 32.2(b)(1).

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DATED this 1st day of November, 2021.

Respectfully submitted,

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GOVERNMENT'S PROPOSED FORFEITURE INSTRUCTION NO. ____

Jurors: Now that you have found that Defendant Eric Shibley committed offenses including *Wire Fraud* (as charged in Counts 1 – 7), *Bank Fraud* (as charged in Counts 8 – 10), and *Money Laundering* (as charged in Counts 11 – 15), you have one more task to perform before you are discharged.

Under federal law, any person who is convicted of the above offenses shall forfeit, to the United States:

- any property that constitutes or is traceable to proceeds of *Wire Fraud*;
- any property that constitutes or is traceable to proceeds of *Bank Fraud*; and,
- any property involved in *Money Laundering*, or property traceable to such property.

Certain property may be connected to more than one offense, and thus, be subject to forfeiture as to each of those offenses. You should make a determination as to each item of property and each offense.

The United States has alleged that the following property is forfeitable on one or more of these bases:

1. $804,816.63 in U.S. funds seized on or about May 27, 2020 from a Wells Fargo account ending 3536, held in the name of The A Team Holdings, LLC;
2. $100,000 in U.S. funds seized on or about May 29, 2020 from a Wells Fargo account ending 2378, held in the name of ES1, LLC;
3. $49,500.86 in U.S. funds seized on or about May 29, 2020 from a Navy Federal Credit Union account ending 7528, held in the name of Eric R. Shibley MD, PLLC;
4. $114,440 in U.S. funds seized on or about June 25, 2020 from a Verity Credit Union account ending 5390, held in the name of Dituri Construction, LLC; and,

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5. $114,743.59 in U.S. funds seized on or about June 25,2020 from a Verity Credit Union account ending 5320, held in the name of SS1, LLC.

You must now determine whether this above-identified property is, in fact, forfeitable and return a special verdict reflecting your findings.

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18 U.S.C. § 981(a)(1)(C) ("any property, real or personal, which constitutes or is derived from proceeds traceable to . . . any offense constituting "specified unlawful activity" (as defined in section 1956(c)(7) of this title), or a conspiracy to commit such offense" is subject to forfeiture to the United States.)

Wire Fraud and Bank Fraud are specified unlawful activities as defined by 18 U.S.C. §1956(c)(7). *See* 18 U.S.C. § 1957(f)(3).

18 U.S.C. § 982(a)(1) ("The Court, in imposing sentencing on a person convicted of an offense in violation of section 1956, 1957, or 1960 . . . 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."); Fed. R. Crim. P. 32.2(b)(1)(A) ("As soon as practical after a verdict or finding of guilty … on any count in an indictment . . . regarding which criminal forfeiture is sought, the court [or jury] shall determine what property is subject to forfeiture under the applicable statute.").

28 U.S.C. § 2461(c) (any civil forfeiture authorized by statute may be imposed against a defendant as part of the sentence upon conviction of an offense for which civil or criminal forfeiture of property is authorized).

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The burden of proof is different at the forfeiture phase of trial. Whereas the United States had the burden of proving the Defendant's guilt "beyond a reasonable doubt," the United States need only prove the identified property is forfeitable "by a preponderance of the evidence." This is a much lower burden.

When a party has the burden of proving any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not.

You should base your decision on all of the evidence, regardless of which party presented it.

Ninth Circuit Model Civil Jury Instruction – 1.6 (2017 Edition, last updated March 2021); *United States v. Garcia-Guizar*, 160 F. 3d 511, 523 (9th Cir. 1998) ("criminal forfeiture need only be proved by a preponderance of the evidence") (citing *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1576-77 (9th Cir. 1989)); *United States v. Shryock,* 342 F.3d 948, 991 (9th Cir. 2003) (the Supreme Court's holding in *Apprendi* "does not disturb the rule that statutorily-prescribed forfeiture is constitutional when supported by the preponderance of the evidence").

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While deliberating on forfeiture, you may consider any evidence, including testimony, offered by the parties at any time during the trial.

Fed. R. Crim. P. 32.2(b)(1)(B) ("The court's [or jury's] [forfeiture] determination may be based on evidence already in the record … and on any additional evidence or information submitted by the parties and accepted by the court as relevant and reliable."); *United States v. Newman*, 659 F.3d 1235, 1244-45 (9th Cir. 2011) (recognizing Rule 32.2(b)(1)(B) allows the court, when making a forfeiture determination, to rely on evidence already in the record, including any admissions in written plea agreement); *United States v. Bornfield*, 145 F.3d 1123, 1134-36 (10th Cir. 1998), *cert. denied*, 538 U.S. 1139 (2000) (implicitly approving instruction that the jury, when deciding forfeiture, could "consider any evidence offered by the parties before [its] previous deliberations" on the substantive criminal charges).

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When considering the evidence for forfeiture, the instructions you previously received regarding what is evidence, direct and circumstantial evidence, the credibility of witnesses, and reaching a unanimous verdict continue to apply.

Ninth Circuit Model Criminal Jury Instructions -1.3, 1.4, 1.5, 1.7, 3.7 & 7.1 (2010 Edition, last updated March 2021).

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You have already found that Defendant Eric Shibley committed *Wire Fraud*, as charged in Counts 1 – 7 of the Indictment; *Bank Fraud*, as charged in Counts 8 – 10 of the Indictment; and *Money Laundering*, as charged in Counts 11 – 15 of the Indictment. When deliberating on forfeiture, you are bound by these previous findings and must not reconsider or revise them.

United States v. Bornfield, 145 F.3d 1123, 1138 n.12 (10th Cir. 1998), *cert. denied*, 538 U.S. 1139 (2000) (because forfeiture is imposed following conviction, as part of the sentence, it "does not affect … [a Defendant's] substantive conviction"); *United States v. Cauble,* 706 F.2d 1322, 1348 (5th Cir. 1983) (bifurcating forfeiture in a second phase of a trial "prevents the potential penalty of forfeiture from influencing the jurors' deliberations about guilt or innocence").

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When deliberating on forfeiture, you should not consider what might happen to the identified property if it is forfeited. The ultimate disposition of forfeited property is a matter for the Court to decide. Nor should you consider, when deliberating, whether anyone other than the Defendant may have an interest in the identified property. Any third-party interests will be addressed by the Court in a separate proceeding.

Fed. R. Crim. P. 32.2(c) (the court enters a final order of forfeiture after any third-party claims are adjudicated in post-sentencing ancillary proceedings).

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Pursuant to Section 981(a)(1)(C) of Title 18 of the United States Code, by way of Section 2461(c) of Title 28 of the United States Code, any property that constitutes or is traceable to proceeds of *Wire Fraud* is subject to forfeiture to the United States.

The United States alleges that certain identified properties are forfeitable because they are traceable to the scheme to defraud alleged in Counts 1 – 7 of the Indictment.

In a case involving a scheme to defraud, property is subject to forfeiture if it is derived from or traceable to the scheme as a whole. It is not necessary for the United States to trace the property to a particular execution of the scheme, such as a particular wire described in one of the charged Counts.

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18 U.S.C. § 981(a)(1)(C) ("[a]ny property, real or personal, which constitutes or is derived from proceeds traceable to a violation of . . . any offense constituting "specified unlawful activity" is subject to forfeiture to the United States"); *United States v. Venturella*, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a fraud case is not limited to the particular conduct described in the Counts, but "extends to the entire scheme").

28 U.S.C. § 2461(c) (any civil forfeiture authorized by statute may be imposed against a defendant as part of the sentence upon conviction of an offense for which civil or criminal forfeiture of property is authorized).

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Pursuant to Section 982(a)(2) of Title 18 of the United States Code, any property that constitutes or is traceable to proceeds of *Bank Fraud* is subject to forfeiture to the United States.

The United States alleges that certain identified properties are forfeitable because they are traceable to the scheme to defraud alleged in Counts 8 – 10 of the Indictment.

In a case involving a scheme to defraud, property is subject to forfeiture if it is derived from or traceable to the scheme as a whole. It is not necessary for the United States to trace the property to a particular execution of the scheme, such as a particular act described in a charged Count.

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18 U.S.C. § 982(a)(2) ("The court, in imposing sentence on a person convicted of a violation of, or a conspiracy to violate . . .[section] 1344 of this title, affecting a financial institution . . .shall order that the person forfeit to the United States any property constituting, or derived from, proceeds the person obtained directly or indirectly, as the result of such violation."); *United States v. Venturella*, 585 F.3d 1013, 1015, 1016-17 (7th Cir. 2009) (forfeiture in a fraud case is not limited to the particular conduct described in the Counts, but "extends to the entire scheme").

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Pursuant to Section 982(a)(1) of Title 18 of the United States Code, any property involved in the offense of *Money Laundering*, or any property traceable to such property, is subject to forfeiture to the United States.

The United States alleges that certain properties are forfeitable because they are traceable to one or more of the offenses alleged in Counts 11 – 15 of the Indictment.

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18 U.S.C. § 982(a)(1) (in imposing a sentence on a person convicted of a money laundering offense, the court "shall order that the person forfeit to the United States any property, real or personal, involved in [. . . the] offense, or any property traceable to such property."

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"Proceeds" means property of any kind, including but not limited to money, that the Defendant obtained directly or indirectly as a result of committing the offense. Put another way, "proceeds" means all property the Defendant would not have obtained but for his commission of the crime.

Property "traceable to" the proceeds of an offense includes property that was purchased or acquired with the proceeds. For example, if someone purchases a car with the proceeds of a fraud offense, the car is forfeitable because it is traceable to the proceeds of the offense. Proceeds, in other words, remain proceeds even if they change from one form to another, or move from one bank account to another.

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18 U.S.C. § 982(a)(2)(B) (defining "proceeds" as those a defendant "obtained directly or indirectly, as a result of […the criminal] violation"); 18 U.S.C. § 981(a)(1)(C) (providing forfeiture authority for "any property … which constitutes or is derived from proceeds traceable to [… the identified criminal] violation"); 21 U.S.C. § 853(a)(1) (providing forfeiture authority for "any property constituting, or derived from, any proceeds the person obtained [from the offense]"; *United States v. Lo,* 839 F.3d 777, 793 (9th Cir. 2016) ("The language of the forfeiture status broadly makes forfeitable any property, obtained by the defendant directly or indirectly, as a result of the commission of a mail fraud or wire fraud offense."); *United States v. Newman,* 659 F.3d 1235, 1244 (9th Cir. 2011) ("For purposes of criminal forfeiture, the 'proceeds' of a fraudulently obtained loan equal the amount of the loan."); *United States v. Farkas*, 474 Fed. Appx. 349, 359 – 60 (4th Cir. 2012) (collecting cases in which the "but for" test has been applied to determine proceeds).

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Property "facilitates" a criminal offense if it makes that offense easier to commit or more difficult to detect. To be forfeitable, there must be a substantial connection between the facilitating property and the illegal activity. The facilitating property need not be indispensable to the commission of the offense, but there must be more than an incidental or fortuitous connection between that property and the illegal activity.

United States v. Wyly, 193 F.3d 289, 302 (5th Cir. 1999) ("Facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance.") (citing *United States v. Tencer,* 107 F.3d 1120, 1134 (5th Cir. 1997)); *United States v. All Monies ($477,048.62) in Account No. 90-3617-3,* 754 F. Supp. 1467, 1473 (D. Hawai'i 1991) (a "substantial connection" exists when there is "more than an incidental or fortuitous connection between the property and the illegal activity, but the property need not be indispensable to the commission of the offense") (citing *United States v. Schifferli,* 895 F.2d 987, 989-90 (4th Cir. 1990) and *United States v. 3639-2nd St., N.E.,* 869 F.2d 1093, 1096 (8th Cir. 1989)).

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Property "involved in" money laundering includes:

1. The money or other property that was the subject of the financial transaction that constituted the money laundering violation;
2. Any fees or commissions paid to the money launderer; and,
3. Any property used to facilitate the money laundering violation.

Property may be the subject of the money laundering financial transaction in a number of ways. For example, the property may be the proceeds of the underlying specified unlawful activity which are being laundered; it may be property that was commingled with those proceeds at the time the financial transaction took place; or it may be property that was obtained as part of an exchange or purchase that constitutes the money laundering violation for which the Defendant has been found guilty.

Property that is used to facilitate a money laundering offense is "involved in" the money laundering offense. Property "facilitates" a money laundering offense if it makes that offense easier to commit or more difficult to detect. This includes "clean" funds that are commingled with "proceeds" in financial accounts that are involved in a money laundering offense. To be forfeitable, there must be a substantial connection between the facilitating property and the illegal activity. The facilitating property need not be indispensable to the commission of the offense, but there must be more than an incidental or fortuitous connection between that property and the illegal activity.

Property that is "traceable to" property "involved in" money laundering is also subject to forfeiture to the United States.

United States v. Wyly, 193 F.3d 289, 302 (5th Cir. 1999) ("Facilitation occurs when the property makes the prohibited conduct less difficult or more or less free from obstruction or hindrance.") (citing *United States v. Tencer,* 107 F.3d 1120, 1134 (5th Cir. 1997)); *United States v. All Monies ($477,048.62) in Account No. 90-3617-3,* 754 F. Supp. 1467, 1473 (D. Hawai'i 1991) (a "substantial connection" exists when there is "more than an incidental or fortuitous connection between the property and the illegal activity, but the property need not be indispensable to the commission of the offense") (citing *United States v. Schifferli,* 895 F.2d 987, 989-90 (4th Cir.

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1990) and *United States v. 3639-2nd St., N.E.,* 869 F.2d 1093, 1096 (8th Cir. 1989))18 U.S.C. § 982(a)(1); *United States v. Bornfield*, 145 F.3d 1123, 1138 (10th Cir. 1998), *cert. denied*, 538 U.S. 1139 (2000) (recognizing that a bank account may be used to "facilitate" money laundering by hiding tainted funds, such that all funds in the account may be forfeitable); *United States v. Trost,* 152 F.3d 715, 720-21 (7th Cir. 1998) (affirming district court finding that funds in excess of the amount the Defendant was convicted of laundering were properly forfeited on an "facilitating" theory where they were funneled through an account the Defendant used to launder proceeds of the underlying offenses – i.e., an account that served "an almost totally illicit purpose"); *United States v. Huber*, 404 F.3d 1047, 1056, 1058 (8th Cir. 2005).

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To reach a verdict on forfeiture, with respect to the *Wire Fraud* scheme, you must determine whether the identified property constitutes, or is traceable to, proceeds the Defendant obtained from the *Wire Fraud* scheme. You may consider the full scope of the scheme and are not limited to the specific conduct identified in Counts 1 – 7.

To reach a verdict on forfeiture, with respect to the *Bank Fraud* scheme, you must determine whether the identified property constitutes, or is traceable to, proceeds the Defendant obtained from the *Bank Fraud* scheme, or are traceable to such proceeds. You may consider the full scope of the scheme and are not limited to the specific conduct identified in Counts 8 – 10.

To reach a verdict on forfeiture, with respect to the *Money Laundering* in Counts 11 – 15, you must determine whether the identified property was involved in one or more of the Defendant's *Money Laundering* offenses or is traceable to such property.

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A Special Verdict Form for Forfeiture has been prepared for you to record your forfeiture verdicts. Where indicated in the form, you may record your verdict by putting an "X" or check mark in the space provided next to the word "YES" or "NO." The foreperson must then sign and date the form.

Items of property may be subject to forfeiture on multiple grounds. You need not be concerned with "overlapping" of properties.

Fed. R. Crim. P. 32.2(b)(5)(B) (when the jury determines forfeiture, the government must submit a Special Verdict Form for that purpose).

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You must reach a unanimous verdict as to each question on the special verdict form. Everyone must agree to any "YES" or "NO" answer.

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which automatically serves the ECF participants of record.

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