Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

UNITED STATES OF AMERICA, Plaintiff, v. ERIC SHIBLEY, Defendant.	No. CR20-174 JCC DEFENSE RESPONSE TO GOVERNMENT MOTION RE: LENDER NEGLIGENCE AND PROFITS

Defendant Eric Shibley, through counsel, responds herein to the government's Motion *in Limine* to Exclude Evidence of Alleged Victim Negligence and Profits (Dkt. No. 86).

I. Introduction

The government has charged Mr. Shibley with committing fraud in connection with loans issued through the Paycheck Protection Program ("PPP").[1] As it notes, these loans were issued by private lenders to mitigate the economic effects of the Covid-19 pandemic. "[S]peed was of the essence" in the approval of these loans, and a

[1] The alleged fraud is based on two sorts of purported material misrepresentations in Mr. Shibley's PPP applications: 1) that he was not "on probation" in any jurisdiction and 2) that he grossly overstated the number of employees and related payroll in prior tax quarters. This argument relies substantially on the lack of materiality of his probation status.

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streamlined process was instituted to provide for financial institutions to quickly approve loan applications. Notably, the lenders were not ultimately responsible for any loss associated with the loans: *the government guaranteed all of the loans*. Dkt. No. 86 at 2. Those same lenders earned lending fees from the very loans that the government guaranteed.[2]

The government apparently intends to make the internal processes of the PPP program a key feature of its case. See Dkt.#86 at 2-3. At the same time, it seeks to prohibit the presentation of any evidence or argument by the defense which might call the government's narrative into question. The government's request, if granted, would deprive the defense of inquiring into the most basic aspects of the government's case: the loan programs and banks that Mr. Shibley is accused of defrauding.

II. Argument

A. Lending industry practice is directly relevant to the issue of materiality

The government cites *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017) but ignores one of its core holdings: defendants "may attack materiality through industry practice." *Id.*, 850 F.3d at 1016. "Among other things, defendants can disprove

[2] Mr. Shibley allegedly obtained (or sought to obtain) fraudulent loans involving at least *ten* different financial institutions. The indictment identifies them as "Financial Institution 1", "Financial Institution #2", etc. Together, they form a largely representative sample of lenders within the greater lending industry that have chosen to affiliate with the PPP program.

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materiality through evidence of the lending standards applied throughout the industry." *Id.* Evidence of industry-wide standards is relevant and admissible to determine "the intrinsic capabilities of a statement to influence" a lender – that is, whether the statements at issue were material. *Id.* at 1015-17.

Accordingly, the defense should be allowed to show that the alleged victim lenders acted in general conformity with lax industry standards to make the loans and were financially incentivized by the exigencies of the times to do so. The early onset of the Covid-19 pandemic crisis, accompanied by government shutdowns and mandates, were highly disorienting to society in general and small businesses in particular. Bolstered by government guarantees and told "speed was of the essence", the lenders were poised to make the loans in question regardless of the precise answer to whether an applicant was "on probation".

The Ninth Circuit's ruling in *United States v. Green*, 698 F. App'x 879, 880 (9th Cir. 2017) is instructive. *Green* reversed a trial court's refusal to allow evidence of lending standards in the mortgage industry. It held that the exclusion of evidence deprived that defendant of a "meaningful opportunity to present a complete defense" because, in large part, materiality was an essential element of wire fraud and his main defense to materiality was that mortgage industry lenders at the relevant time were only interested in closing on loans and would issue loans regardless of borrower qualifications. *Id.*, 698 F. App'x at 880.

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In the present matter the government seeks to prohibit the introduction of evidence or argument regarding the core issue of whether the statements made to the lenders were material. As defendants in fraud cases should be "permitted to develop fully and fairly all of the evidence that would tend to exonerate," *United States v. Thomas*, 32 F.3d 418, 421 (9th Cir. 1994), the Court should allow the defense to present this evidence and argument.

B. The financial benefits received by the lenders are probative of the lack of materiality of Mr. Shibley's probation status.

The government acknowledges that all of the PPP loans at issue were fully guaranteed by the government: lenders who participated in the PPP program would be fully reimbursed for any and all loans issued under the program. Dkt. #86 at 3. As such, they were financially incentivized to provide each of the loans and to process them as quickly as possible.

A misrepresentation is material if it had a natural tendency to influence, or was capable of influencing, a person to part with money or property. *Neder v. United States*, 527 U.S. 1, 16 (1999). The tendency of a particular misrepresentation to influence another person to part with money or property surely lies in tension with the financial incentive that person has to overlook the misrepresentation. The greater the financial benefit due a lender the less motivated he or she naturally will be to scrutinize a loan application for purported misrepresentations that would deny that benefit.

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The benefits received by the lenders—a widely publicized fact undoubtedly known to Mr. Shibley—were reflected in the lenders' behavior and the state of mind of both lenders and borrowers. Any policies, procedures, and representations designed to entice borrowers to use a particular service to apply for loans are thus directly relevant as well. The lenders at issue are sophisticated financial institutions, and to the extent that they promoted policies designed to solicit borrowers, the defense should be allowed to address these policies in light of the profits the lenders received in exchange for issuing the loans.

III. Conclusion

For these reasons, the Court should permit evidence and argument on the issue of industry-wide lender negligence and profits associated with the PPP program.

Respectfully submitted this 8th day of November, 2021.

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Certificate of Service

I hereby certify that on the 8th day of November, 2021, I electronically filed the foregoing with the clerk of the court using the CM/ECF system. Notice of this filing will be sent electronically to counsel of record for other parties.

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