Honorable John Coughenour

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON, SEATTLE

UNITED STATES OF AMERICA,	)	
	)	No. CR20-174 JCC
Plaintiff,	)	
	)	DEFENSE MOTION FOR CLARIFICATION
v.	)	OF RESTITUTION CREDIT FOR
	)	FORFEITED FUNDS OR FOR
	)	INDICATIVE RULING
ERIC SHIBLEY,	)	
	)	Noted: June 17, 2022
Defendant.	)	
	)	

Motion

Defendant Eric Shibley, through undersigned counsel and pursuant to Rule 36, moves the Court for an order clarifying its intent that specific monies forfeited to the government in the Court's Order of January 21, 2022, be credited toward the restitution order contained within the criminal judgment. As explained below, this is necessary to avoid double-dipping by the government and to fully compensate aggrieved victims only once for their losses.

Alternatively, if the court determines it lacks authority to act because an appeal has been docketed and is pending[1], the defense requests, pursuant to Rule 37, an indicative ruling from the Court that, if it had proper authority, it would grant the motion or that the

[1] An appeal on the judgment is pending in COA# 22-30043.

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motion raises a substantial issue. See also FRAP 12.1.

Relevant procedural and factual background

Mr. Shibley was convicted at a jury trial of seven counts of wire fraud (18 U.S.C. § 1343), three counts of bank fraud (18 U.S.C. § 1344(2)), and five counts of money laundering (18 U.S.C. § 1957). The charges arose from various loan applications he made in the spring of 2020 in connection with the federal Paycheck Protection Program (PPP) and the Economic Injury Disaster Loan (EIDL) program. The Indictment alleged a scheme to defraud various financial institutions and the U.S. Small Business Administration in order to unjustly enrich himself by the use of false statements about monthly payroll expenses, employees and revenues of entities that Mr. Shibley controlled. dkt #31.

As developed at trial Mr. Shibley's basic pattern was to apply online for these loans in the names of various LLCs he controlled. Typically, he would apply for PPP loans through private lenders using a standardized application. When a particular loan was approved funds would be wired into a bank account associated with the LLC in question. He followed a similar process with EIDL loans except that the funding source was the US Small Business Administration, itself.

Mr. Shibley was determined to have applied for, in the aggregate, over $3 million in these loans, a large portion of which were funded and transferred to the various LLC accounts. But the bulk of the funds were frozen before they could be accessed and

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preliminary orders of forfeiture were sought. The Indictment, itself, sought forfeiture of five specific monetary seizures clearly traceable to the alleged fraud and for an unspecified amount "reflecting the proceeds the defendant obtained from this offense." dkt #31.

Following the verdict the court, on government motion and in close conformity with the Indictment, ordered the forfeiture of all seized funds as follows:

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 ("Subject Property 1");

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 ("Subject Property 2");

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 ("Subject Property 3");

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 ("Subject Property 4");

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 ("Subject Property 5"); and

6. A sum of money in the amount of $254,199, reflecting the remainder of the proceeds the Defendant personally obtained from the offenses ("Subject Property 6").

Order of Forfeiture dated 1/21/2022 (dkt # 144).

At Mr. Shibley's sentencing on March 8, 2022, the Court ordered

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restitution as follows:

Customers Bank	$ 960,000
Huntington Bank	200,000
Small Business Administration	278,000
	$ 1,438,000

Judgment and Amended Judgment (dkt # 152, 159).

The basis for the restitution (from Government Sentencing Memorandum (dkt #148)) was for purportedly "unrecovered PPP loans" and "unrecovered EIDL loans" by SBA as follows:

PPP loans

entity	**Lender**	**Loan amount**
A Team Holdings, LLC.	Customers Bank	$ 960,000
Eric Shibley MD, PLLC	Huntington Bank.	$ 100,000
ES1 LLC	Huntington Bank	$ 100,000
total		**$ 1,160,000**

EIDL loans by SBA:

entity	**Loan amount**
Dituri Construction LLC	$ 115,000

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Eric Shibley MD LLC	4,000
Eric Shibley MD LLC	31,000
Eric Shibley (Sole Proprietorship)	5,000
ES1 LLC	4,000
SSI LLC	115,000
A Team Holdings, LLC	4,000
total	**$ 278,000**

The issue of credit toward any outstanding restitution to lenders from specific loan proceeds already seized and forfeited was never addressed by the Court.

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Argument

I.

The Court should clarify its intent that specific monies forfeited to the government in its Order of January 21, 2022, be credited toward the restitution later ordered to aggrieved lenders identified in the Amended Judgment.[2]

Recognizing that in a fraud scheme the amount of restitution may include all losses caused during the course of the scheme, district courts have "wide discretion in fashioning restitution orders". See *United States v. Grovo*, 826 F.3d 1207, 1221 (9th Cir. 2016).

Specific loan amounts advanced by the lenders were clearly traceable to the LLC accounts in question and later seized by and forfeited to the government. The restitution obligation largely arises from the same funds. While the overlap was apparent from the record before the Court, the issue of whether the forfeited funds should be credited toward the ordered restitution was never addressed.

In particular:

Customers Bank made a PPP loan of $960,000 to A Team Holdings LLC, but $804,816.63 of that amount was seized on or about May 27, 2020 from A Team Holdings'

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[2] A post-sentencing motion to clarify ambiguities is properly considered by a trial court, even after an appeal has been filed. See *United States v. Stewart*, 770 F.2d 825 (9th Cir. 1985). The intent of the sentencing court must guide any retrospective inquiry into the term and nature of a sentence. *Fenner v. U.S. Parole Comm'n*, 251 F.3d 782 (9th Cir. 2001).

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Wells Fargo account # ******3536, later forfeited to the government, and never credited toward restitution; ("Subject Property 3" in Order of Forfeiture);

Huntington Bank made a PPP loan of $100,000 to Eric Shibley MD PLLC, but $49,500.86 of that amount was seized on or about May 29, 2020 from Shibley PLLC's Navy Federal Credit Union account # ******7528, later forfeited to the government, and never credited toward restitution; ("Subject Property 1" in Order of Forfeiture);

Huntington Bank made a PPP loan of $100,000 to ES1 LLC but, on or about May 29, 2020, all $100,000 was seized from ES1's Wells Fargo account #******2378, forfeited to government, and never credited toward restitution. ("Subject Property 2" in Order of Forfeiture);

The SBA made an EIDL loan of $115,000 to Dituri Construction LLC, but $114,440.00 was seized, on or about June 30, 2020, from Dituri's Verity Credit Union account #***5390, forfeited to government, and never credited toward restitution. ("Subject Property 4" in Order of Forfeiture);

The SBA made an EIDL loan of $115,000 to SS1 LLC, but $114,743.59 was seized on or about June 30, 2020, from SS1's Verity Credit Union account #***5320, forfeited to government, and never credited toward restitution. ("Subject Property 5" in the Order of Forfeiture).

Eric Shibley personally retained only about $254,199 in loan funds ("Subject Property 6" in the Order of Forfeiture); the entire balance of the $2.8+ million in funded

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loan amounts was either recalled before being funded or frozen, seized and forfeited to the government.

Essentially, the PPP loan proceeds that the private lenders extended and did not recover were largely the same proceeds that the government seized and forfeited and, rather than transfer them to victim lenders, have retained for itself. In the case of the SBA, an actual government entity, the virtual entirety of the loan money it extended to Mr. Shibley's LLCs was seized and forfeited and, rather than being returned to the SBA, is now held by the seizing agency of the government.

The "unrecovered loans" (monies advanced by lenders) underlying the restitution order is largely money now held by the government after its successful forfeitures. If the forfeited monies were simply paid over to the aggrieved lenders the remaining amount of restitution would equal the $254,199 the Court determined that Mr. Shibley personally retained.

Unless the Court actually intended that Mr. Shibley suffer a double loss (i.e., that he forfeit all the ill-gotten funds once to the government and still be on the hook for a substantially equivalent amount to the lenders) it should clarify that no such outcome was intended and direct that the proper restitution owing is one net of the amounts already recovered by the government and traceable to these specific lenders.

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II.

If the court determines it lacks authority to act because an appeal has been docketed and is pending, the defense requests an indicative ruling from the Court that, if it had proper authority, it would grant the motion seeking clarification of its intent or, at least, that the motion raises a substantial issue.

Criminal Rule 37 and FRAP 12.1 contemplate situations in which a trial court lacks authority to grant a pending motion without a remand from the Circuit Court.[3] In these circumstances the trial court can entertain the motion and deny it, defer consideration on the motion, state that it would grant the motion if the court of appeal remands it for that purpose, or state that the motion raises a substantial issue. Rule 37(a).

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[3] **Rule 37. Indicative Ruling on a Motion for Relief That Is Barred by a Pending Appeal**

(a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:

(1) defer considering the motion;
(2) deny the motion; or
(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

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Conclusion

The Order of Forfeiture and the restitution subsequently ordered with the Amended Judgment pertain largely to the same funds. Specific loan money advanced by the lenders was seized and forfeited by the government and apparently not returned to the lenders, one of which (the SBA) was a government agency, itself.

The Court should clarify its intent that specific monies forfeited to the government in its Order of January 21, 2022, be credited toward the restitution later ordered to aggrieved lenders identified in the Amended Judgment. Alternatively, if jurisdictional authority is a concern, the Court should issue an indicative ruling that the motion raises a substantial question or that with proper authority it would grant the motion outright.

Respectfully submitted this 10th day of June, 2022.

/s/ Michael Nance, WSBA #13933
/s/ Cynthia Jones, WSBA #38120
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Certificate of service

I hereby certify that on the 10th day of June, 2022, 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 for other parties of record.

/s/ Michael Nance

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