UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 23-60173-CR-WILLIAMS

UNITED STATES OF AMERICA

vs.

CAROLYN DENISE WADE,

Defendant.
_________________________________/

FIRST MOTION IN LIMINE BY THE UNITED STATES

Introduction

The United States of America, by and through its undersigned counsel, in advance of the jury trial as to Defendant Carolyn Denise Wade ("Defendant"), hereby moves the Court for *in limine* rulings as follows:

1. The Court should preclude Defendant from introducing evidence and arguments concerning any alleged negligence by the victim lenders, their loan processors, or the United States Small Business Administration ("SBA");

2. The Court should preclude Defendant from introducing evidence and arguments concerning any profit by the above-referenced victims; and

3. The Court should preclude Defendant from introducing any evidence and argument relating to jury nullification, including evidence and argument about the nature of the prosecution, use of federal resources, and the Government's charging decisions.

The Court should grant the relief requested by the United States for the reasons addressed below.

Background

On September 14, 2023, a grand jury sitting in the Southern District of Florida returned the Indictment (ECF No. 3) charging Defendant with one count of wire fraud, in violation of Title 18, United States Code, Section 1343. In sum, the Indictment alleges that, from May 2021 through August 2021, Defendant devised and participated in a scheme to defraud the SBA and its participating lenders by, among other things, submitting and causing the submission of a materially false and fraudulent application for a loan through the SBA's Paycheck Protection Program ("PPP"). The PPP, which authorized forgivable loans to small businesses for job retention and certain other expenses, was created by the Coronavirus Aid, Relief, and Economic Security (CARES) Act to provide emergency financial assistance to the millions of Americans who were suffering from the economic effects caused by the COVID-19 pandemic.

As part of the scheme to defraud, Defendant received a PPP loan in the amount of $20,833 for herself as a purposed sole proprietor with the business legal name "Carolyn Wade." Specifically, as a result of Defendant's false and fraudulent PPP loan application, Defendant received from Lender 1 the proceeds of the PPP loan ($20,833) in her personal bank account, having account number ending in 3926, at USAA Federal Savings Bank on or about June 7, 2021, via Automated Clearing House (ACH) transfer, which was a communication transmitted by wire in interstate commerce.

The Indictment alleges, and the United States intends to prove at trial, that Defendant's PPP loan application and supporting documents submitted therewith contained materially false and fraudulent information as to the respective borrower (Defendant's) gross business income for the tax year 2019, including a falsified Internal Revenue Service (IRS) tax form submitted with the PPP loan applications in support thereof. In particular, the United States intends to prove that Defendant's PPP loan application falsely represented that, for the tax year 2019, the business "Carolyn Wade" had "$113,560" in gross business income and, in support thereof, included an IRS Form 1040, Schedule C, which also falsely represented that the business "Carolyn Wade" had "113,560" in gross income. At trial the United States will prove with documentary and testimonial evidence that, among other things: 1) Defendant knew that the above-stated 2019 gross income information was included in Defendant's PPP application and was false; 2) the above-stated 2019 gross income information was about a material fact, that is, an important fact that a reasonable person would use to decide whether to do or not do something; and 3) Defendant acted with intent to defraud, that is, Defendant intended for the false 2019 gross income information to be included in Defendant's PPP loan application so that Defendant would receive the PPP loan.

Argument

I. The Court should preclude Defendant from introducing evidence and arguments concerning any alleged negligence by the victim lenders, loan processors, and the SBA.

At trial, the United States intends to call witness representatives from Cross River Bank, Prestamos (and/or its loan processor Blueacorn), and the SBA (which administered the PPP program and backed its loans, among other things). The United States respectfully askes the Court to preclude Defendant from introducing evidence and arguments concerning any alleged negligence by these victims.

A. Courts routinely find evidence of lender negligence inadmissible.

The Eleventh Circuit has held that evidence of a lender's alleged negligence is not relevant and is properly excluded at trial. *United States v. Powell*, 509 F. App'x 958, 967 (11th Cir. 2013)

("Whether the lenders in this case knew or should have known that the loan applications were fraudulent is of no consequence to this action. It has no bearing on the essential element of [defendant's] conduct, namely her intent to participate in the mortgage fraud scheme. Whether the lenders were motivated by profit or did, in fact, profit from [the defendant's] efforts is equally immaterial). "Likewise, whether the lenders negligently created an environment of lax lending standards is irrelevant. Contributory negligence is not a defense to the crime of fraud." *Id.* "[W]hatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces '*any* scheme or artifice to defraud.' A perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence." *United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (citations omitted).

More recently, in *United States v. Rabuffo*, 716 F. App'x 888, 899 (11th Cir. 2017), the Eleventh Circuit declined the defendants' argument to overturn their convictions for bank and wire fraud in an extensive mortgage fraud scheme based on the district court's exclusion of certain evidence at trial. The defendants' "arguments rest[ed] on the contention that bad conduct by [the mortgage company] and its employees undercut the government's case, and was relevant to whether they (and their co-defendants) committed bank fraud." *Id.* The Eleventh Circuit, however, rejected defendants' argument, affirmed the convictions and sentences. *Id.* In affirming the district court's decision to exclude the evidence, the *Rabuffo* court noted that "the gravamen of § 1344 is the 'scheme,' rather than the 'completed fraud,' and . . . the offense therefore does not require 'damage' or 'reliance.'" *Id.* at 899 (quoting *Loughrin v. United States*, 573 U.S. 351, 372 (2014)); *see also id.* (quoting *United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017) (the "lender's negligence, or even intentional disregard, cannot excuse another's criminal fraud.").

Other circuits have reached similar conclusions. *See Lindsey*, 850 F.3d at 1014 (affirming district court's decision to exclude any evidence of victim negligence and citing cases from the Second, Third, Fourth, and Fifth Circuits); *United States v. Coyle*, 63 F.3d 1239, 1244 (3d Cir. 1995) ("[T]he negligence of the victim in failing to discover a fraudulent scheme is not a defense to criminal conduct."); *United States v. Moore*, 923 F.2d 910, 917 (1st Cir. 1991) ("[I]t is not a defense that the bank might have prevented its losses had it better internal controls or procedures."); *United States v. Winkle*, 477 F.3d 407, 418 (6th Cir. 2007) (approving the exclusion of an FDIC report that criticized the bank fraud victim's failure to detect a fraud scheme); *United States v. Rennert*, 374 F.3d 206, 213 (3d Cir. 2004) ("fraud victim's negligence or lack of diligence in uncovering the fraud is not a defense"); *United States v. Thomas*, 377 F.3d 232, 243-44 (2d Cir. 2004) (affirming restrictions on cross of victim; rejecting defendant's argument that victim's foolishness vitiated defendant's fraudulent intent); *United States v. Frenkel*, 682 F. App'x 20, 22 (2d Cir. 2017) ("A victim's negligence is not a defense under the federal fraud statutes.") (citing *United States v. Thomas*, 377 F.3d 232, 240-43 (2d Cir. 2004)); *United States v. Ellison*, 704 F. App'x 616, 620 (9th Cir. 2017) ("a victim's negligence is not a defense" to securities fraud); *United States v. Palamarchuk*, 791 F. App'x 658, 660 (9th Cir. 2019) ("neither individual victim lender negligence nor an individual victim lender's intentional disregard of relevant information is a defense to mail fraud").

B. Whether a victim is sophisticated is immaterial to the intent to defraud.

In the Eleventh Circuit, as in other circuits, the government need not prove that a fraud scheme was calculated to deceive only persons of ordinary prudence and comprehension, as fraud statutes protect the naïve as well as the sophisticated. *Svete*, 556 F.3d at 1165 ("Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent."); *see also United States v. Hendrick,* 663 F. App'x 788, 790 (11th Cir. 2016) (holding that the wire fraud statute "prohibits '*any* scheme or artifice to defraud,' no matter how fanciful and without regard to whether a person of ordinary prudence and comprehension would rely upon the misrepresentation") (*citing Svete*, 556 F.3d at 1169); *United States v. Masino*, No. 18-15019, 2021 WL 3235301, at *9 (11th Cir. July 30, 2021) (affirming a wire fraud conviction and holding that "the government did not need to prove that the victims were actually tricked—or even that a person of ordinary prudence would have been tricked by defendants' scheme"); *United States v. Teers,* 591 F. App'x 824, 844 (11th Cir. 2014) ("[T]he negligence of the victim in failing to discover a fraudulent scheme cannot be a defense to bank or wire fraud …."); *accord United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000) ("The susceptibility of the victim of the fraud, in this case, a financial institution, is irrelevant to the analysis: If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright. These are criminal statutes, not tort concepts.")

Accordingly, whether the institutional victims' internal controls or personnel were sufficient to detect and prevent fraud is irrelevant to the crimes charged in this case, and inadmissible as a defense.

C. <u>Victim negligence is irrelevant for assessing the materiality of a false statement.</u>

The federal mail fraud, wire fraud, and bank fraud statutes generally require a misrepresentation or concealment of *material* fact. *See Neder v. United States*, 527 U.S. 1, 22–

25 (1999). In assessing whether a misrepresentation of fact was material, the Eleventh Circuit has time and time again rejected the argument, commonly made by defendants in fraud cases, that victim negligence is somehow relevant to materiality. The materiality requirement does not permit defendants to backdoor victim negligence into a case because materiality is an objective, rather than subjective, test. *See Svete,* 556 F.3d at 1165 (holding that "the focus of the mail fraud statute . . . is on the violator, [therefore] the purpose of the element of materiality is to ensure that a defendant actually intended to create a scheme to defraud . . . . [W]hatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces 'any scheme or artifice to defraud.'"); *United States v. Scott,* 701 F.2d 1340, 1344–45 (11th Cir. 1983) (rejecting defendant's assertion that loan officers' testimony that they were not actually influenced by defendant's false statements was evidence that the defendant lacked the *intent* to influence).

The materiality requirement is not concerned with whether a decisionmaker relied on a false statement, but instead materiality focuses on whether a false statement "has a tendency to influence or is capable of influencing a decision." *United States v. Neder,* 197 F.3d 1122, 1128 (11th Cir. 1999); *see also United States v. Swearingen,* 858 F.2d 1555, 1558 (11th Cir. 1988) (holding that a bank's actual reliance on false statements is not determinative of materiality; materiality turns on "whether the false representations were capable of influencing the Bank's actions").

Along similar lines, the Eleventh Circuit has held that actual reliance is not a requirement for materiality. *See Powell,* 509 F. App'x at 967 ("Whether the lenders in this case knew or should have known that the loan applications were fraudulent is of no consequence to this action."); *see* *also Neder,* 197 F.3d at 1129 ("[T]he issue is whether a statement has a tendency to influence or is capable of influencing a decision, and not whether the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement.")

As noted above, the Eleventh Circuit in *Rabuffo* rejected the argument, commonly made by defendants in fraud cases, that victim negligence is somehow relevant to materiality. As the *Rabuffo* court observed, the materiality requirement does not allow defendants to backdoor victim negligence into a case because materiality is an objective, not subjective, test. *Rabuffo*, 716 F. App'x at 899–900 (holding that defendants' contention that they could not have committed bank fraud if the negligent or complicit mortgage processer knew that the statements were false "misse[d] the mark" because materiality focuses on the violator's intent); *see also Lindsey*, 850 F.3d at 1015 ("A false statement is material if it objectively had a tendency to influence, or was capable of influencing, a lender to approve a loan."). The materiality requirement is not concerned with a statement's subjective effect, but instead on a statement's objective reliability. *Svete*, 556 F.3d at 1165; *see also Neder*, 527 U.S. at 24–25 ("The common-law requirement[ ] of 'justifiable reliance' . . . ha[s] no place in the federal fraud statutes.").

D. <u>The relevant inquiry is of the Defendant's intent, not the victim's negligence.</u>

In the instant case, the relevant inquiry is whether: (i) Defendant submitted or caused to be submitted fraudulent PPP loan applications; (ii) whether Defendant had the requisite intent to defraud; and (iii) whether the information that Defendant caused to be submitted to the victim lenders was material, that is, had the capacity or natural tendency to influence a person's decision. Hindsight challenges to any of these institutional victims' internal controls are irrelevant, waste time, and create the risk of jury confusion. *See* Fed. R. Evid. 404(b).

Accordingly, this Court should prohibit Defendant from introducing evidence or making arguments concerning any supposed victim negligence, including any criticism of a PPP lender, processor, or SBA's internal controls, as well as the internal controls of banks and financial institutions whose accounts were used to receive or transfer fraudulent loan proceeds. *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991) (upholding exclusion of testimony that "would have improperly shifted the jury's attention away from the knowledge and intent of [defendant] and focused instead on the beliefs of the victim of the alleged scheme to defraud").

For similar reasons, the Court should exclude any evidence and arguments concerning the SBA's guarantees to PPP lenders as a defense to the alleged fraud. The government does not know on what basis Defendant would try to introduce evidence or make arguments concerning this guarantee, but any such evidence or argument should be excluded as irrelevant to the case, a waste time, and tending to confuse and mislead the jury. Even in civil cases, where a victim's negligence might be relevant to damages, evidence of financial compensation (insurance) is inadmissible to prove negligence or wrongdoing. Fed. R. Evid. 411. This is truer in the criminal context of the instant case, where victim negligence is irrelevant, and should therefore be excluded.

II. The Court should preclude Defendant from introducing evidence and arguments concerning any profit by the above-referenced victims.

The Eleventh Circuit has held that "[w]hether the lenders were motivated by profit or did, in fact, profit from [defendant's] efforts is equally immaterial." *Powell*, 509 F. App'x at 967. "[T]he government can convict a person for mail or wire fraud even if his targeted victim never encountered the deception—or, if he encountered it, was not deceived.'" *Id.* (quoting *United States v. Svete*, 556 F.3d at 1166 ; *see also Rabuffo,* 716 F. App'x at 900 ("Our precedent thus establishes that whether [the victims] . . . would have or in fact did rely on the fraudulent statements contained in the mortgage applications does not undermine the fairness of the trial or the jury's findings."); *United States v. Gray,* 367 F.3d 1263, 1269–70 (11th Cir. 2004) (finding defendant guilty of mail fraud the moment the defendant mailed a letter with fraudulent misstatements, noting that even had victim not received the letter defendant would still be guilty of mail fraud). Therefore, the Court should exclude any evidence and arguments concerning any profits the victim lenders may have made as a result of the loans that are at issue in this scheme.

III. The Court should preclude Defendant from introducing evidence and argument relating to jury nullification, including evidence and/or argument about the nature of the prosecution, use of federal resources, and the Government's charging decisions.

Any statements or arguments from the defense regarding uncharged co-conspirators, or selective prosecution, are not relevant to the defendant's guilt, have no probative value, and should be precluded. *United States v. Armstrong*, 517 U.S. 456, 463 (1996) ("[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution"); *United States v. Shaygan*, 652 F.3d 1297, 1314 (11th Cir. 2011) ("[T]he Government retains 'broad discretion' as to whom to prosecute," and the "decision to prosecute is particularly ill-suited to judicial review.") (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Any statements by defense counsel regarding the exercise of prosecutorial discretion in this case have no probative value and are only meant to prejudice the jury. Fed. R. Evid. 403.

Moreover, permitting such argument would be tantamount to a request for jury nullification. "Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court – in the words of the standard oath administered to jurors in the federal courts, to 'render a true verdict according to the law and the evidence.'" *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (citation omitted; emphasis in original). The Eleventh Circuit has unequivocally disapproved of this practice and has issued clear instructions that "defense counsel may not argue jury nullification during closing argument." *United States v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983); *see United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) (collecting cases in support of proposition that a defendant has no right to present evidence or make arguments geared towards nullification). Because "the potential for nullification is no basis for admitting otherwise irrelevant evidence," *Funches*, 135 F.3d at 1409, the Government moves to exclude evidence and to preclude argument designed to convince the jury to acquit not because the Government failed to prove the charged crimes, but because a guilty verdict would be contrary to a sense of justice, morality, or fairness. *Washington v. Watkins*, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981) (noting that with respect to jury nullification, courts "have almost uniformly held that a criminal defendant is not entitled to an instruction that points up the existence of that practical power to his jury"); *United States v. Gorham*, 523 F.2d 1088, 1097–98 (D.C. Cir. 1975) (affirming trial court's refusal to admit evidence bearing no legal relation to the charges but which might encourage a "conscience verdict" of acquittal).

Improper arguments would include, for example, suggestions that the prosecution is unfair because the Government has prosecuted some individuals, but not others. Furthermore, the identity and quantity of individuals charged in connection with the scheme at issue, the reasons behind the Government's charging decisions, and the culpability of the Defendant as compared to other individuals are all examples of irrelevant and unfairly prejudicial evidence aimed at jury nullification. *See, e.g.*, *United States v. Thompson*, 253 F.3d 700 (5th Cir. 2001) (upholding grant of the Government's motion in limine to prevent counsel from comparing defendant's conduct to that of other uncharged or immunized witnesses); *United States v. Re*, 401 F.3d 828, 833 (7th Cir. 2005) (finding that the Government's exercise of prosecutorial discretion is not proper subject for cross-examination). Thus, Defendant should be precluded from making arguments or comments to the jury—and from eliciting statements on cross-examination—which are irrelevant to the record evidence and charges and that are, instead, designed to encourage a verdict without regard to the law.

Certificate Pursuant to Local Rule 88.9

Pursuant to Local Rule 88.9, undersigned counsel contacted counsel of record for Defendant, Attorney Johnny McCray, by email on April 1, 2024, for his position on the relief requested herein by the government. As of the filing of this motion, undersigned counsel has not received a response from Mr. McCray as to Defendant's position on the Motion.

Conclusion

For the foregoing reasons, the United States of America respectfully submits that the Court should grant the relief requested herein.

Respectfully submitted,

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