THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA v. RAYMOND RAHBAR, and RYAN MACAULAY *Defendants*.	Case No. 1:24-cr-180-PTG **Trial Date**: April 22, 2025

GOVERNMENT'S OMNIBUS MOTION *IN LIMINE* TO ALLOW AND EXCLUDE CERTAIN EVIDENCE

The United States of America, though undersigned counsel, respectfully moves this Court to allow and exclude certain trial evidence. *First*, the United States seeks a ruling by the Court that certain tax records (and the absence of tax records) are "probative of a matter in issue relevant in establishing the commission of the crime or the guilt or liability of a party . . . ." 26 U.S.C. § 6103(i)(4)(A). Such a ruling is necessary by law to allow the government to seek introduction of such tax information as trial evidence. *Second*, the United States seeks to exclude evidence, argument, and cross examination by the defendants designed to highlight the victim-lenders' negligence as it pertains to the Paycheck Protection Program ("PPP") loan process. Such evidence is not relevant to any allowable defense theory of the case and is foreclosed by established precedent. *Lastly*, and relatedly, the United States seeks to exclude evidence, argument, and cross examination by the defendants implying that Small Business Administration ("SBA") PPP loan guarantees to lending financial institutions vitiates the materiality of the defendants' fraud. Such arguments are also foreclosed by law and would be untethered to the elements of the charges set forth in the Superseding Indictment.

I. Background

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security ("CARES") Act to address the COVID-19 global pandemic, including the crisis facing American small business owners and their employees whose livelihoods were at stake. One source of relief that the CARES Act provided was the PPP, which provided forgivable loans to small businesses for payroll expenses for existing employees and certain other covered expenses. As detailed more comprehensively in the Superseding Indictment, defendants Raymond Rahbar, Jr. and Ryan Macauley submitted fraudulent PPP loan applications to these financial institutions. *See* ECF No. 38. Specifically, the defendant fraudulently obtained at least seven PPP loans from SBA-certified, Federal Deposit Insurance Corporation ("FDIC")-insured lenders on behalf of companies that the defendants owned and controlled: BF Chinatown LLC, BF Georgetown Waterfront LLC, AMC Building Group Inc, American Majestic Construction LLC, and BF Management (collectively "subject companies").

In the loan applications, the defendants falsely represented material information, including: (i) company average monthly payroll in preceding time periods; (ii) number of employees in preceding time periods; and (iii) intended use of the loan proceeds (*i.e.*, for improper personal benefits instead of for the limited business-related expenses as required under the PPP). The defendants submitted fraudulent supporting documentation for each application, including fabricated IRS Forms 940 (Employer's Annual Federal Unemployment Tax Return) and/or 941 (Employer's Quarterly Federal Tax Return) for each company, with each such form containing false statements about the wages each company paid.

On August 15, 2024, a grand jury indicted Raymond Rahbar, Jr. and his coconspirator Ryan Macaulay. *See generally* Indictment, ECF No. 1. The grand jury thereafter returned a 14-

count Superseding Indictment on November 14, 2024, charging the defendants with: (Count 1) Conspiracy to Commit Bank Fraud, in violation of 18 U.S.C. § 1349; (Counts 2-6) Bank Fraud, in violation of 18 U.S.C. § 1344(2); (Count 7) Conspiracy to Commit Money Laundering, in violation of 18 U.S.C. § 1956(h); (Counts 8-11) Money Laundering – Unlawful Monetary Transaction, in violation of 18 U.S.C. § 1957; (Counts 12-13) Aggravated Identity Theft, in violation of 18 U.S.C. § 1028A; and (Count 14) Bankruptcy Fraud – Perjury, in violation of 18 U.S.C. § 152(2). ECF No. 38. Rahbar is charged with all 14 counts while Macaulay is charged only with Counts 1, 5, 7, and 11. Trial is set to commence on April 22, 2025.

II. First Motion in Limine: The Court should find that certain tax records concerning defendants' businesses are "probative of a matter in issue relevant in establish the commission of the crime. . ."

The United States intends to admit certain tax records and proof of a lack of tax records spanning tax years 2019 through 2022 for defendant-controlled subject companies. Specifically, the government seeks to introduce the following evidence for each of the subject companies (collectively "subject tax information"):

- Tax returns, tax return transcripts, and IRS Forms 940 and 941 for tax years 2019 through 2022; and
- Certifications of lack of IRS Forms 940 and 941 for certain tax years between 2019 and 2022.

The defendants filed fraudulent PPP applications in the name of each of these subject companies. The United States obtained the subject tax information from the IRS pursuant to an *ex parte* order, *see* 26 U.S.C. § 6103(i)(1), and provided them to defendants in discovery.

Legal Standard

To use the returns as evidence in a criminal trial, the United States must obtain an order "that such return or taxpayer return information is probative of a matter in issue relevant in establishing the commission of the crime or the guilt or liability of a party . . . ." *Id.* § 6103(i)(4)(A); *see, e.g.*, *United States v. McClellon*, No. 2:22-CR-00073-LK, 2023 WL 9002865, at *6 (W.D. Wash. Dec. 28, 2023) (granting use of tax information at trial in a PPP bank fraud prosecution).

Argument

The subject tax information clears this threshold. The Indictment alleges, and the government intends to prove at trial, that for each fraudulent PPP application the defendants filed in the name of the subject companies, the defendants manufactured false and fabricated supporting tax documentation. PPP lenders required defendants to submit payroll supporting documentation, which could be satisfied in part by providing IRS Tax Forms 940 and/or 941 for businesses seeking PPP loans. Yet, on various fraudulent PPP applications the defendants submitted to the lenders, the defendants falsified IRS Tax Forms 940 and/or 941 for the subject companies and provided these fabricated forms to lenders as supporting documentation. The subject tax information is probative and relevant to the question of guilt, because it establishes that the supporting documents the defendants appended to their PPP applications were fictitious; specifically, the subject tax information demonstrates that the defendants never actually submitted the materials they appended to the fraudulent PPP applications to the IRS as part of any legitimate tax filing.

As an illustrative example, in support of the second draw PPP application in the name of BF Chinatown, the defendants submitted as supporting documentation an IRS Form 941 for

Third Quarter 2020 signed by Raymond Rahbar representing 54 employees and $662,115 in wages, tips, and other compensation. Yet, the actual BF Chinatown IRS Form 941 for Third Quarter 2020 submitted to the IRS listed no employees and no wages, tips, or other compensation, and it was signed by a representative of BF Chinatown's payment processor (not Rahbar). As another illustrative example, in support of the second draw PPP application in the name of BF Management, the defendants submitted as supporting documentation an IRS Form 941 for Third Quarter 2021 signed by Ryan Macaulay representing 19 employees and $279,713.21 in wages, tips, and other compensation. Yet, the actual BF Management IRS Form 941 for Third Quarter 2021 submitted to the IRS listed no employees and no wages, tips, or other compensation, and it was signed by a representative of BF Management's payment processor (not Macaulay).

In another instance, the defendants submitted fabricated tax documents on PPP applications when, as they well knew, defendants made no analogous submittal to the IRS whatsoever. In support of the first draw PPP application in the name of BF Georgetown, the defendants submitted an IRS Form 941 for First Quarter 2020 signed by Raymond Rahbar representing 18 employees and $262,600 in wages, tips, and other compensation. Yet, the subject tax information shows an absence of records: Defendants never filed any IRS Form 941 for First Quarter 2020 for BF Georgetown.

* * *

Taken together, the subject tax information clarifies the falsity of the defendants' statements to the financial institutions, their intent to defraud, and their knowledge of the scheme. For these reasons, the United States respectfully requests that the Court issue an order finding the subject tax information as "probative of a matter in issue relevant in establishing the

commission of the crime or the guilt or liability of a party," 26 U.S.C. § 6103(i)(4)(A), so that the United States can introduce these records into evidence at trial.

III. Second Motion *in Limine*: The Court should exclude evidence, argument, and cross examination pertaining to alleged victim-lender negligence related to PPP loans.

The Court should exclude any evidence, argument, and cross examination designed to elucidate the negligence of victim-lenders as it relates to the PPP loan program. Excluded topics should encompass: (1) victim-lenders' alleged lack of due diligence in approving PPP loans; (2) victim-lenders' sophistication (and that they should have known better than to approve the PPP loans at issue); and (3) victim-lenders' actual or intended profits (or lack thereof) from PPP lending activity, including that the lender's financial motives fueled lax lender PPP loan diligence. Because such evidence, argument, and cross examination is plainly irrelevant under the Federal Rules of Evidence 401 and 402, it is also inadmissible. Such evidence would further fail the balancing test of Federal Rules of Evidence 403 by misleading the jury as to the elements of the crimes at issue, unfairly prejudicing the jury, and confusing the issues.

Legal Standard

Evidence is relevant if it "has a tendency to make a fact more or less probable than it would be without the evidence and . . . the fact is of consequence in determining the action." Fed. R. Evid. 401. However, "[i]rrelevant evidence is not admissible." Fed. R. Evid. 402. The relevance of a particular piece of evidence must be evaluated in the context of the charged offenses. *See Spring/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 387-88 (2008) ("Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.") (quoting Fed. R. Evid. 401 advisory committee's note).

The Fourth Circuit has held that evidence of a victim's alleged lack of due diligence and sophistication are not relevant to bank fraud charges. In *United States v. Colton,* the defendant was convicted of several counts of bank fraud after the Government presented evidence that he failed to disclose material information to the victimized financial institutions prior to obtaining loans to finance commercial real estate projects. 231 F.3d 890, 894 (4th Cir. 2000). On appeal, he argued that one of the lenders failed to request certain details prior to entering into the financing agreement. *Id.* at 903. The Fourth Circuit explicitly rejected this argument, explaining:

> **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." *United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980); *see also Neder,* 527 U.S. at 24-25, 119 S. Ct. 1827 (holding that "reliance" and "damages" are not necessary elements of an offense under the federal fraud statutes); *United States v. Stewart,* 872 F.2d 957, 960 (10th Cir. 1989) (same); [Stuart M.] Speiser et al., [9 *The American Law of Torts*] § 32.73 ("[T]he rule that fraud cannot be predicated on a failure to disclose facts where ... the truth may be ascertained by the exercise of reasonable diligence does not justify a resort to active deceit or fraud.").

Id. (emphasis added). Other courts considering this issues have reached the exact same conclusion. *United States v. Raza*, 876 F.3d 604, 618 (4th Cir. 2017) (quoting *Colton* for the proposition that "the susceptibility of the victim of the fraud, in this case a financial institution, is irrelevant to the analysis"); *United States v. Gaver*, 815 F. App'x 700, 702-03 (4th Cir. 2020) (affirming district court's exclusion of evidence of "victims' alleged negligence, complicity, or actual knowledge of [the] fraudulent scheme" because "susceptibility of the victim is not a valid defense to bank fraud") (unreported case with internal quotations and citations omitted);

The Fourth Circuit is not alone in reaching this conclusion. Far from it, other courts around the country have similarly found that victim blaming is no defense to fraud. *See United States v. Lindsey*, 850 F.3d 1009, 1014-15 (9th Cir. 2017) (collecting cases and finding: "We join

several of our sister circuits in holding that a victim's negligence is not a defense to wire fraud."); *see also United States v. Moore*, 923 F.2d 910, 917 (1st Cir. 1991) ("Appellant says that the court should not have instructed the jury that it is not a defense to claim that the bank might have prevented its losses had it had better 'internal controls or procedures.' We can find nothing wrong with this instruction. It is accurate."); *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.") (citing *United States v. Kreimer,* 609 F.2d 126, 132 (5th Cir.1980); *United States v. Frenkel*, 682 F. App'x 20, 22 (2d Cir. 2017) ("The essential elements of the crime of wire fraud are (1) a scheme to defraud, (2) money or property as the object of the scheme, and (3) use of the mails or wires to further the scheme. A victim's negligence negates none of those elements.") (internal quotations and citations omitted); *United States v. Powell*, 509 F. App'x 958, 967 (11th Cir. 2013) (finding the district court did not abuse its discretion in granting a similar motion in limine and noting, "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 Powell's conduct, namely her intent to participate in the mortgage fraud scheme. . . 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."); *United States v. Palamarchuk*, 791 F. App'x 658, 660 (9th Cir. 2019) (approving exclusion of evidence related to "the conduct and motives of the victim lenders" because victim-lender negligence is not a valid fraud defense).

Similarly, whether a victim suffered damages has no bearing on bank fraud. *See Neder*, 527 U.S. at 24–25 (finding damages are not a necessary element of federal fraud statutes). Nor does whether the victim profited or had a profit motive. *See, e.g.*, *Powell*, 509 F. App'x at 967

("Whether the lenders were motivated by profit or did, in fact, profit from Powell's efforts is equally immaterial. . .").

Under Federal Rule of Evidence 403, the court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, and misleading the jury, among other factors.

Argument

All variants of defense arguments highlighting a PPP lender's negligence in approving a PPP loan (*e.g.*, a victim's failure to conduct proper diligence in approving a fraudulent PPP loan, a victim's status as a sophisticated entity that should have known better than to approve a fraudulent PPP loan, and a victim's profits and profit motive from fraudulent PPP loans) are inadmissible under the Rules of Evidence and established precedent.

These victim traits bear no relevance to any element of bank fraud, as charged in the Superseding Indictment.[1] Except for the materiality and jurisdictional elements, all the other elements relate to the *defendants'* actions and mental state, not to those of the victims. As for the materiality element—*i.e.*, whether the statement had a natural tendency to influence, or was capable of influencing, the victim to part with money—it follows an objective and not a

[1] The elements of 18 U.S.C. Section 1344(1) are: (i) that the defendant knowingly executed (or attempted to execute) a scheme or artifice to defraud a financial institution; (ii) that the financial institution was then federally insured; (iii) that the defendant did so with intent to defraud; and (iv) the scheme to defraud was material. *See* Ruschky & Shealy, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina*, p. 264, 265 (2024 Online Edition).

The elements of 18 U.S.C. Section 1344(2) are: (i) that the defendant knowingly executed (or attempted to execute) a scheme or artifice to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody of, a financial institution by false or fraudulent pretenses, representations, or promises; (ii) that the defendant did so with intent to defraud; (iii) the false or fraudulent pretenses, representations, or promises were material; (iv) the defendant acted with the intent to defraud; and (v) the financial institution was federally insured. *Id.* at 264, 266.

subjective test. *Raza*, 876 F.3d at 621 ("In fact, the correct test for materiality—as the district court recognized—is an objective one, which measures a misrepresentation's capacity to influence an objective 'reasonable lender,' not a renegade lender with a demonstrated habit of disregarding materially false information."); *Colton*, 231 F.3d at 903 n.5 ("It is important to bear in mind that the government must also prove . . . the materiality of the information concealed, i.e., what a **reasonable financial institution** would want to know in negotiating a particular transaction.") (emphasis added); *see also* Ruschky & Shealy, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina*, p. 266 (2024 Online Edition) ("A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the fact finding body. A false statement's capacity to influence must be measured at the point in time that the statement was made. In other words, it concerns what a reasonable financial institution would want to know in negotiating a particular transaction.").

In other words, the specific actions, inactions, or motives of any individual victim-lender have no bearing on the materiality analysis, which moors itself to an objective standard of a "reasonable lender." Any specific victim-lender's "[i]ntentional disregard of relevant information is not a defense to wire fraud, and evidence of intentional disregard by lenders is not admissible as a defense to mortgage fraud." *Lindsey*, 850 F.3d at 1019. Similarly, the sophistication of the victim and whether such sophistication should have detected the fraud is irrelevant. *Colton*, 231 F.3d at 903 ("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.").

Nor does the United States "have to prove actual reliance upon the defendant's misrepresentation" or damages. *Neder*, 527 U.S. at 25.

In sum, the fraud statutes protect lenders regardless of their own negligence, lack of due diligence, sophistication, or even intentional disregard for information in a loan application. Accordingly, the Court should exclude any argument, evidence, and cross-examination designed to show the victim-lenders were negligent or otherwise operated with insufficient due diligence in the loan approval process. *See also United States v. Baver*, No. 2:21-CR-520-JNP-CMR, 2023 WL 4138319, at *4 (D. Utah June 22, 2023) ("The Government asserts—and the court agrees—that victim blaming is not a defense to fraud."). Relatedly, the Court should also exclude any argument, evidence, and cross-examination advanced for the purpose of showing that the victim-lenders were sophisticated entities that should have known better than to approve the loans. Such argument, evidence, and cross-examination is irrelevant and cannot form the basis of any legitimate defense theory of the case. Lastly, the Court should exclude evidence of any profit by the victim-lenders and profit motive, suggesting that the victims' motivations for gain made the victim negligent in the loan approval process.

The aforementioned lender negligence arguments equally fail Rule 403's balancing test. Even were the Court to find that such arguments bear some relevance—which they do not—any probative value would be minimal at best. The fundamental factual issue for the jury to decide concerning the bank fraud charges in this case is whether the *defendants* lied to lenders to obtain PPP funds. Evidence of victim negligence, sophistication, and motive invites the jury to excuse the defendant's fraud and blame the lenders for failing to detect their wrongdoing. Evidence of lender profits and profit motive could shift the jury's focus from the defendants' fraud to whether the lenders they defrauded approved PPP loans to profit on lender fees. Accordingly, any

probative value of such evidence would be negligible and would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury as to the proper elements of the charged crimes.

IV. Third Motion *in Limine*: Court should exclude argument, evidence, and cross examination that SBA loan guarantees vitiated the materiality of the defendants' fraud.

Relatedly, the Court should exclude any argument, evidence, and cross examination suggesting that the defendants' lies on PPP applications were immaterial because the SBA's guarantees to PPP lenders resulted in a negligent (or worse) loan approval process and no losses to the bank.

Legal Standard

Materiality is evaluated based on whether a statement had a "tendency to influence, or is capable of influencing, the decision-making body to which it was addressed." Ruschky & Shealy, *Pattern Jury Instructions for Federal Criminal Cases, District of South Carolina*, p. 266 (2024 Online Edition) ("A statement is material if it has a natural tendency to influence, or is capable of influencing, the decision-making body to which it was addressed. It is irrelevant whether the false statement actually influenced or affected the decision-making process of the fact finding body."). As explained above, whether the loan approval process was negligent, or even intentionally deficient, is irrelevant to materiality. Likewise, that the lender may not have suffered losses is irrelevant to bank fraud. *See Neder*, 527 U.S. at 24–25 (finding damages are not a necessary element of federal fraud statutes).

The fact that bank shifts putative losses to a third party (here, the SBA) also does not change this analysis. As the Supreme Court in *Shaw v. United States* explained:

> [W]here cash is taken from a bank "but the bank [is] fully insured[,] [t]he theft [is] complete when the cash [i]s taken; the fact that the bank ha[s] a contract with an

> insurance company enabling it to shift the loss to that company [is] immaterial." *United States v. Kucik*, 844 F.2d 493, 495 (C.A.7 1988). And commentators have made clear that "on the criminal side, it is generally held that the lack of financial loss is no defense to false pretenses." 2 W. LaFave & A. Scott, Substantive Criminal Law § 8.7(i)(3), p. 404 (1986). We have found no case from this Court interpreting the bank fraud statute as requiring that the victim bank ultimately suffer financial harm, or that the defendant intend that the victim bank suffer such harm.

580 U.S. 63, 68 (2016).

Argument

Because the SBA loan guarantees to lenders issuing PPP loans does not relate to the materiality element of bank fraud, the Court should exclude argument, evidence, and cross examination suggesting that such SBA loan guarantees undercut the materiality of the defendants' actions. For avoidance of doubt, the government has no objection to any other *mens rea* argument that the defense may make pertaining to SBA loan guarantees.

The Fed. R. Evid. 401 and 402 analysis weighs in favor of excluding any argument, evidence, and cross examination to show that the SBA guarantees to PPP lenders resulted in a negligent loan approval process, insufficient due diligence, and no losses to the lenders. Finally, Rule 403 also dictates that the Court should exclude the same items. As with lender negligence, evidence of this type could shift the jury's focus from the defendants' fraud to whether the lenders they defrauded approved loans to profit on lender fees. Tempting jurors to blame the victim-lenders in this way is inappropriate. Any probative value of such evidence would be minimal at best and would be substantially outweighed by the danger of unfair prejudice, confusion of the issues, and misleading the jury.

V. Conclusion

The United States respectfully requests that this Court grant the aforementioned motions *in limine*.

Respectfully submitted,

ERIK S. SIEBERT
UNITED STATES ATTORNEY

By: /s/

Avi Panth
Virginia Bar No. 92450
Christopher J. Hood
Kristin S. Starr
Assistant United States Attorneys
United States Attorney's Office
2100 Jamieson Avenue
Alexandria, VA 22314
Phone: (804) 819-5400
Fax: (804) 819-7417
Email: Avishek.Panth@usdoj.gov