IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	Criminal Action No. 15-23-RGA
DAVID GIBSON, ROBERT V.A. HARRA WILLIAM B. NORTH KEVYN N. RAWKOSKI	:	
Defendants.	:	

ORDER

All Defendants have appealed. (D.I. 918, 921, 929, 931). All are out on bail, and all have moved for bail pending appeal. (D.I. 900, 902, 904, 905). The motions are fully and extensively briefed.

Defendants do not generally obtain bail pending appeal, but in limited circumstances, the Court should grant bail pending appeal. Those limited circumstances require a defendant to show that the defendant is not likely to flee or pose a danger to the community if released, that the appeal is not for the purpose of delay, that the appeal raises a substantial question of law or fact, and, that if the substantial question is determined in defendant's favor, the decision is likely to result in, at a minimum, the grant of a new trial on all counts on which imprisonment has been imposed. *See United States v. Miller*, 753 F.2d 19, 24 (3d Cir. 1985). Defendants meet the first two issues (flight/danger and delay) without opposition from the Government. (D.I. 923 at 3 n.2). The main battleground concerns whether there is a substantial question, and the

Government does not separately argue that, if there is a substantial question on the issues discussed below,[1] it would not at least result in the convictions being vacated.

Thus, I consider the purported substantial questions raised. I first note that Third Circuit cases put a gloss on what is meant by a substantial question. A substantial question is one that is "fairly debatable," or "debatable among jurists," or "adequate to deserve encouragement to proceed further."

Defendants raise two main issues, one of which I think is "fairly debatable."

All Defendants raise what they call the "objective falsity" issue. (D.I. 901 at 7-10; D.I. 903 at 5-14; D.I. 904 at 4-10; D.I. 906 at 6-33). As I understand the issue generally, Defendants argue that I should have given the jury an instruction that the Government had to prove that the statements about the amount of 90-day past due loans were false under any reasonable interpretation of what a 90-day past due loan was. Defendants requested such jury instructions. (*See* D.I. 758 at 50-51, 61, 70-71, 76-77, etc.). The parties seem to agree that *United States v. Prigmore*, 243 F.3d 1 (1st Cir. 2001), or cases to the same effect, provide the relevant framework, which is, essentially, that it is the job of the Court to decide what an objectively reasonable interpretation of the 90-day past due reporting requirement was. (*See* D.I. 901 at 12; D.I. 903 at 5-6; D.I. 923 at 4-7; *see also* D.I. 904 at 6; D.I. 906 at 19). Defendant Gibson points to the TFR Question and Answer on the OTS website (D.I. 903 at 18)[2] to argue that the Government did not disprove that the Bank could count matured loans as not past due so long as the borrower paid interest post-maturity in the same fashion as it had pre-maturity and the

[1] On some of the issues raised by some Defendants, the Government does argue harmless error or lack of plain error. (D.I. 923 at 18, 27).
[2] As do Defendant North (D.I. 904 at 9) and Defendant Harra (D.I. 906 at 11-12).

loan was "in the process of extension." As some of Defendants point out, the question of how the falsity of the 90-day past due statements was going to be decided (*see, e.g.*, D.I. 906 at 13-16, 22-24) was an issue that was litigated throughout the case. I decided the relevant Call Report and SEC instructions were not ambiguous and that Defendants' arguments to the contrary were not reasonable. (*See* D.I. 837 at 5-11). I still think I am right. But the fact that a Government banking agency seemed to take a different view gives me pause. A jurist of reason might disagree with my ruling. Thus, I cannot say that the issue is not fairly debatable. Further, if it is decided in Defendants' favor, I would expect all the convictions to be, at a minimum, vacated.[3]

Three Defendants raise *mens rea* issues. (D.I. 901 at 13-21 (Rakowski); D.I. 904 at 10-14 (North); D.I. 906 at 33-51 (Harra)). I appreciate that juries are particularly suited to determine knowledge and state of mind issues, and that the jury resolved those issues against Defendants. I have sustained those determinations. (D.I. 837). Defendants have a formidable burden on appeal, that is, to show that no rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the available evidence. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). There is no doubt that all Defendants were familiar with the existence of the waiver practice and knew that it impacted the numbers that were publicly reported. There was also evidence that Defendants had all the motive in the world to keep the publicly-reported amount of 90-day past due loans low, and that they knew that steps were being taken to accomplish that end. The Government needed to prove, in addition to the foregoing, that Defendants

[3] There are some fine distinctions between "past due" in the Call Report context and in the securities context, but I do not read the Government's brief as indicating that I should undertake any separate analysis in the bail pending appeal context.

knew the publicly-reported numbers were false. I thought this was a close and complex question, which is why at the close of the Government's case, I took the issue under advisement. (D.I. 802 at 4; *see also* D.I. 801 at 170). I have since thought about the evidence and am convinced that the Government produced sufficient evidence on this issue, which is why I sustained the verdicts. When the principal payment is due under a contract on a date certain, and ninety days later it has not been paid, a jury could infer that when a banker does not describe the loan as being 90-days past due, the banker is lying. Thus, while I acknowledge my own earlier concern about the *mens rea* issue, I do not think that shows that the issue is "fairly debatable."

There are various other issues raised, but in light of my decision in regard to the "objective falsity" issue, I need not decide them.

I will continue Defendants on bail pending appeal. The self-report dates (D.I. 937) are continued until the appeals have been decided by a panel of the Court of Appeals.

IT IS SO ORDERED this 26 day of February 2019.

Richard G. Andrews
United States District Judge