UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 2:20-cr-114-JES-MRM

CASEY DAVID CROWTHER

UNITED STATES OF AMERICA'S MOTION IN LIMINE REGARDING LOAN "FORGIVENESS"

The United States of America seeks an order prohibiting Defendant Casey Crowther from eliciting testimony, introducing evidence, or making argument that the loan he procured for his company, Target Roofing and Sheet Metal, Inc. (Target Roofing), is forgivable under the terms of the Paycheck Protection Program (PPP).

Introduction

The defendant is charged in a seven-count second superseding indictment with bank fraud (18 U.S.C. § 1344) (Counts One and Five), false statements to a lending institution (18 U.S.C. § 1014) (Counts Two and Six), and illegal monetary transactions (18 U.S.C. § 1957) (Counts Three, Four, and Seven). Doc. 62. The seven charges can be grouped into two categories: those related to Crowther's procurement of a PPP loan from the Lender and those related to Crowther's procurement of a mortgage loan from the Mortgage Lender.

With respect to the PPP loan, the government intends to prove that Crowther applied for an approximately $2.1 million loan from the Lender on behalf of his company Target Roofing. When he applied for the loan, Crowther represented to the Lender that Target Roofing would only use the proceeds of the loan for things like payroll and rent, even though he intended to impermissibly use the proceeds to benefit himself. Upon receipt of the PPP money, Crowther quickly diverted much of it to purchase a nearly $700,000 boat and pay off $100,000 in debt to an old business partner.[1] Crowther took steps to conceal the payments by describing the wire for the boat as "equipment" and the wire to the ex-business partner as "payroll."[2]

Crowther appears to believe that the PPP loan he procured will qualify for forgiveness in the future and appears poised to argue that the anticipated forgiveness is evidence of his innocence.[3] Though it is not entirely clear why Crowther believes the loan will be forgiven, his argument seems premised on rules governing the PPP program which permit lenders to conduct a limited

[1] Crowther had been negotiating the purchase of the boat prior to obtaining the PPP loan.

[2] The ex-business partner was not owed any back pay.

[3] In a September 21, 2020 letter, counsel for Crowther told the government that Target Roofing Payroll records demonstrate that it spent the total amount of proceeds from the PPP loan on payroll, "thus qualifying the Company for full forgiveness of the loan." Crowther also claimed in a motion to dismiss that he qualifies for loan forgiveness because he can demonstrate he spent 100% of the PPP funds on payroll. Doc. 25 at p. 7-8.

review of forgiveness applications before making a recommendation to the Small Business Administration (SBA) on the issue.

Crowther should not be permitted to introduce evidence for the purpose of supporting an argument that the PPP loan will be forgiven in the future. Such an argument is speculative and improper to place before the jury. Moreover, such an argument places the cart before the horse—whether Crowther lied in obtaining the PPP loan will determine whether the loan is forgivable, not the other way around. [4]

Argument

Key portions of the PPP program are codified at 15 U.S.C. §§ 636 and 9005. Section 636(a)(36) sets forth the general framework of the program, which is administered by the SBA. It describes the general contours of the program, including who qualifies for such loans, so called "eligible recipients" (§ 636(a)(36)(A)-(B)), and the certifications eligible recipients must make to receive a loan (§ 636(a)(36)(G)). Section 9005 sets forth the forgiveness process. To obtain forgiveness of a PPP loan, the recipient must have been

[4] The argument is also circular in that it uses a premise to prove a conclusion that is in turn used to prove the premise. *See Sierra Club v. Flowers*, 423 F.Supp.2d 1273, 1356 at n. 240 (S.D. Fla. 2006)(discussing circular reasoning). Here, using the belief that the loan will be forgiven, which is premised on Crowther not having lied to the Lender, to prove that he didn't lie to the Lender, is circular.

"eligible" for it in the first place. *See* 85 F.R. 33010, 33012 (stating that "the CARES Act provides for forgiveness of a PPP loan only if the borrower is an 'eligible recipient.' The Administrator has determined that to be an eligible recipient that is entitled to forgiveness … the borrower must have been an eligible recipient under [Section 6366(a)(36)(A)]."). *Id.*

Accordingly, the SBA has issued rules which state that, if during the course of an SBA review of a loan in connection with a forgiveness application, it determines that "the borrower was ineligible for the PPP loan based on … the terms of the borrower's PPP loan application (for example because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), the loan will *not be eligible for forgiveness*." 85 F.R. 33004, 33005 (emphasis added); *see also* 86 F.R. 8283, 8288 (Final Interim Rule consolidating prior rules regarding PPP program and stating the same). In such a case, the "SBA will direct the lender to deny the loan forgiveness application." 86 F.R. 8283, 8295.

Upon receipt of a forgiveness application, a lender must decide on forgiveness within 60 days and forward the decision to the SBA. 86 F.R. 8283, 8296. The lender's review role, however, is limited. It examines forms submitted by the borrower and it is entitled to rely on representations made in them. *Id.* In that regard, "the lender does not need to independently verify the borrower's reported information if the borrower submits documentation supporting its request for loan forgiveness and attests that it accurately verified the payments for eligible costs." *Id*. Once the lender has made its recommendation on forgiveness, the SBA may accept or deny it. 86 F.R. 8283, 8297 (discussing SBA review after lender recommendation on forgiveness).

In summary, a borrower who lies in the certifications made to obtain a PPP loan is not eligible for forgiveness, and if discovered, the SBA will direct the bank who provided the loan to deny the forgiveness application, whatever the lender's initial recommendation may have been. With that established, the impropriety of accepting evidence and argument solely directed at demonstrating the PPP loan in this case is forgivable becomes clear.

Evidence is only admissible if it is relevant. Fed. R. Evid. 402. And evidence is only relevant if it has "any tendency to make a fact more or less probable than it would be without the evidence" and the fact is of consequence in the case. Fed. R. Evid. 401. As discussed above, forgiveness turns on (amongst other things) whether Crowther committed the fraud alleged in this case. Thus, the loan's forgivability cannot be demonstrated until the jury determines the central issue in this case: whether Crowther lied to the lender when procuring the PPP loan. Any attempt to suggest to the jury the loan qualifies for forgiveness proves nothing about the fraud, and evidence and argument in that regard is therefore irrelevant.

Such evidence or argument presents other problems, too—confusing and misleading the jury and wasting time. When those dangers substantially outweigh the probative value of certain evidence, the evidence should be excluded. *See* Fed. R. Evid. 403 (permitting the exclusion of evidence with probative value that is substantially outweighed by the danger of confusing the issues, misleading the jury, and wasting time.).

The risk is high that a jury will be misled and confused by evidence and argument regarding forgiveness. The term itself connotes a sense of blamelessness, especially in the context of a loan, which is misleading in this criminal inquiry. Moreover, this a is a bank fraud case, not a case regarding whether Crowther has complied with or violated any terms of the PPP program as set forth in statutes and rules. The structure of the PPP program plays a limited role in this case, and admitting forgiveness-related evidence and argument serves only to distract from the main issue—whether Crowther lied to the Lender in obtaining the loan. *See United States v. Myers*, 524 Fed. Appx. 479, 482 (11th Cir. 2013) (excluding evidence of defendant's beliefs on sovereign citizenship and taxation because it did not bear on innocence, and therefore risked confusing and misleading jury, even though the government referred to defendant's beliefs in its case).

The government would also be forced to spend considerable time explaining the nuances of the PPP forgiveness statutes and rules to overcome the confusing and misleading nature of forgiveness evidence, bogging the trial down unnecessarily. Those dangers substantially outweigh whatever probative value one might assign to forgiveness evidence and argument. Thus, evidence directed solely at, and argument regarding qualification for, forgiveness should be excluded under Rule 403.

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CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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