UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA, :
:
Plaintiff, :
v. : CASE NO. 2:20-CR-114-JES-MRM
:
CASEY DAVID CROWTHER, :
:
Defendant. :
______________________________________:

CASEY CROWTHER'S MOTION FOR PRE-TRIAL RULING ON ADMISSIBILITY OF UNITED STATES SMALL BUSINESS ADMINISTRATION (SBA) VIDEOS AND FACT SHEETS

Casey Crowther seeks a pre-trial ruling on the admissibility of SBA evidence he will offer at trial. After extensive conferral with the government, the parties have been unable to reach agreement on the admissibility of the SBA publications and the government does not stipulate to their authenticity. At the same time, the defense is attempting to secure the presence of an SBA witness (a process complicated by the closure of SBA's South Florida office due to COVID-19 precautions) and as of this filing, the government has not yet been able to secure the presence of the witness at trial. The undersigned spoke to the SBA general counsel on March 12, 2021 regarding the subpoena; however, as of the filing hereof the undersigned has yet to hear back from the SBA. In light of how the SBA publications may shape trial presentation and logistics for the parties, the defense believes seeking a ruling before the start of trial is the efficient and appropriate course of action. A ruling in advance will avoid what might otherwise be substantial mid-trial arguments on these matters.

The evidence at issue includes tutorial videos created by the SBA, performed by high-level SBA employees, and maintained on SBA websites for the specific purpose of educating small business owners about a loan program administered by the SBA. These videos were specifically sponsored by the SBA for educational and business purposes. This is the exact business mission of the organization and the SBA has created hundreds of these videos as a regular part of its business for various loan programs, including the Paycheck Protection Program ("PPP") since its inception in April 2020. The relevance is clear: the SBA's program tutorials, explanations, and guidelines – explained in the agency's own words and from the mouths of its own officials – contradict the theories and characterizations argued by the government.

A. The SBA Videos and Fact Sheets are Authentic

The government has declined to stipulate to the authenticity of SBA videos hosted on the SBA's official YouTube channels and Fact Sheets published by the SBA on the U.S. Department of the Treasury government website. All of these materials are authentic, and indeed are self-authenticating official publications under Federal Rule of Evidence 902(5).

The "About" section of each SBA YouTube Channel makes their official status patent. The SBA South Florida District Office describes itself as "The official YouTube Channel of the South Florida District of the U.S. Small Business Administration (SBA). Empowering small businesses to start, grow, expand or recover" and provides links to the SBA's Privacy Policy and Comment Policy. https://www.youtube.com/c/SBASouthFloridaDistrictOffice/about. Likewise, the Small Business Administration's YouTube Channel explains that it is official: "The official YouTube Channel of the U.S. Small Business Administration (SBA). Empowering small businesses to start, grow, expand, or recover." https://www.youtube.com/channel/UCxXd9AWfNNaNipc XNmFuCAw/about. It also links to the SBA Privacy Policy and Comment Policy:

Id. Furthermore, the SBA Fact Sheets and guidance are published directly on the U.S. Department of the Treasury's official government website.[1] *See e.g.* *https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses* and ***Exhibit A***.

Court's regularly take judicial notice of such material on government websites. *See*, *e.g.*, *United States v. Iverson*, 818 F.3d 1015, 1022 (10th Cir. 2016) (noting that

[1] The U.S. Department of Treasury worked in conjunction with the SBA to implement the Interim Final Rules and administer the PPP.

"courts have considered the FDIC website so reliable that they have taken judicial notice of information on it") (*citing Laborers' Pension Fund v. Blackmore Sewer Constr., Inc.*, 298 F.3d 600, 607 (7th Cir. 2002)); *Lawrence v. Fed. Home Loan Mortg. Corp.*, No. A-13-CV-913 LY, 2015 U.S. Dist. LEXIS 40012, at *34 n.6 (W.D. Tex. Mar. 30, 2015) (taking judicial notice of federal government's agreement with national bank as posted on government website); *Flores v. City of Baldwin Park*, No. CV 14-9290-MWF(JCx), 2015 U.S. Dist. LEXIS 22149, at *4–5 (C.D. Cal. Feb. 23, 2015) (taking judicial notice of material posted on municipal police department website); *FAS Capital, LLC v. Carr*, 7 F. Supp. 3d 1259, 1266–67 (N.D. Ga. 2014) (taking judicial notice of information posted on FDIC's website); *Curcio v. Wachovia Mortg. Corp.*, No. 09-CV-1498-IEG (NLS), 2009 WL 3320499, at *2, *3–4 (S.D. Cal. Oct. 14, 2009) (taking judicial notice of printouts from the FDIC's website).

The government has not explained its grounds for declining to stipulate to authenticity of these government-published materials. And no grounds for objecting exist. The SBA YouTube Channels and Fact Sheets are obviously authentic and self-authenticating under Rule 902(5).

B. The SBA Videos and Fact Sheets are Not Hearsay Because They are Statements by the Party-Opponent United States

The SBA's statements on its official YouTube Channel and its Fact Sheets are not hearsay because under Rule 801(d)(2) they are admissions by the party-opponent. "It is a widely accepted rule that admissions of a party-opponent under Rule 801(d)(2) are accorded generous treatment in determinations of admissibility." *Long Island*

Savings Bank, FSB v. United States, 63 Fed. Cl. 157, 164 (Fed. Cl. 2004) (quotation omitted) (admitting statements by Federal Deposit Insurance Corporation and Office of Thrift Supervision employees against party-opponent United States in civil case). "[T]he Federal Rules clearly contemplate that the federal government is a party-opponent of the defendant in criminal cases." *United States v. Kattar*, 840 F.2d 118, 130 (1st Cir. 1988) (citing *United States v. Morgan*, 581 F.2d 933, 937 n.10 (D.C. Cir. 1978)). "The party-opponent is the United States, not a particular agency." *Long Island Savings Bank,* 63 Fed. Cl. at 165.

As another court explained, "[I]t makes no sense to hold that the Department of Justice, which essentially is a law office, alone comprises the United States." *United States v. American Tel. & Tel. Co.,* 498 F. Supp. 353, 357 (D.D.C. 1980). That conclusion is consistent with the statutorily mandated role of DOJ. *See* 28 U.S.C. § 519 (stating that "[e]xcept as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys . . ."). For example, in *American Tel. & Tel. Co.*, the district court admitted "statements made by officials of Executive Branch agencies of the United States government" pursuant to Rule 801(d)(2)(D) in an anti-trust case. 498 F. Supp. 353 at 356.[2] That court elaborated:

> A second and related reason for rejecting the government's position is that its arguments would apply with equal force to any large organization with many individuals speaking

[2] Statements made by DOJ officials were also admissible under Rule 801(d)(2); however, the government did not contest those statements. *Id.* at 356 n.5.

> and acting on its behalf. Were the Court to accept the government's reasoning, all such organizations would effectively have to be exempted from the purview of the rule on party-opponent admissions. The unambiguous language of Rule 801(d)(2) clearly does not contemplate such a result.

Id. at 358.

In a criminal case, the government is (supposedly) seeking to vindicate the laws of the United States and the public interest in enforcing those laws. In particular, it accuses Casey Crowther of committing fraud in connection with Target Roofing's PPP loan. Though the SBA does not provide PPP loans (private lenders do), it is the government executive branch agency that administers the PPP and issued the interim final rules relating to the program. As such, the SBA is authorized to educate the public on PPP matters. In a prosecution where the central issues concern interpretation of the interim final rules established by the SBA, the SBA's statements – whether in the fact sheets it publishes or in the videos it publishes on its official YouTube channels – must be considered admissions of the party-opponent United States. As authorized and official statements by the SBA, they are not hearsay under four (4) subsections of the rule: (1) they are made by the party opponent in an individual or representative capacity (*see* Rule 801(d)(2)(A)); (2) the party-opponent has manifested that it adopted or believed the statements to be true (*see* Rule 801(d)(2)(B)); (3) they were made by a person authorized by the party opponent to make a statement on the subject (*see* Rule 801(d)(2)(C)); and (4) they were made by the party-opponent's agents or employees on matters within the scope of that relationship while it existed (*see* Rule 801(d)(2)(D)).

C. Videos from the SBA Official YouTube Channels and SBA Fact Sheets are Also Admissible Pursuant to the Hearsay Exception for Records of a Regularly Conducted Activity

In addition to their status as statements by a party-opponent, publications on the SBA's official YouTube channels and the SBA fact sheets posted on the U.S. Department of the Treasury's official government website fall under Rule 803(6), the hearsay exception for records of a regularly conducted activity.

First, the publications are records of acts under Rule 803(6). Specifically, the videos are recordings of content generated by the SBA for the purpose of posting same to the SBA's YouTube page. Likewise, its fact sheets are created for the purpose of publishing them via the U.S. Department of the Treasury's website.

Next, with respect to Rule 803(6)(A) (i.e., the requirement that the record was made at or near the time by—or from information transmitted by—someone with knowledge), the videos and fact sheets were made at or near the time by SBA representatives who oversaw production and creation of the same.

With respect to Rule 803(6)(B) (i.e., the requirement that the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit), the videos and fact sheets were created specifically in the course of the SBA's regular business activities of creating, producing, and distributing information regarding SBA loan programs to the general public. The production, transmission, and distribution of these materials were part of the SBA's regularly conducted business activities.

With respect to Rule 803(6)(E) (i.e., the requirement that making the record was a regular practice of that activity), the videos were themselves records that were part of the SBA's regular practice of creating and uploading content onto the SBA YouTube page for viewing by the general public and the fact sheets were part of SBA's regular practice of creating and uploading content to the SBA and the U.S. Department of Treasury websites.

With respect to Rule 803(6)(D) (i.e., all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification), the SBA's records custodian would testify to all of the foregoing, including that the publications were kept in the course of the SBA's regularly conducted activities. *See*, *e.g.*, *United States v. Hasan*, 742 F.3d 104, 133-34 (4th Cir. 2014) (affirming trial court's ruling that "YouTube videos were self-authenticating under Federal Rule of Evidence 902(11), and thus that they were admissible as business records.").

Finally, based on the testimony of the SBA's records custodian, the government will be unable to demonstrate that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness. *See* Rule 803(6)(E). All of these materials were prepared by the SBA and its employees, in the normal course, for SBA's typical purposes, and published on SBA's usual platforms.

Conclusion

The videos on the SBA's official YouTube channels and the fact sheets on its government website are indisputably authentic. They are admissible at trial as statements by party-opponent United States, and also as records of regularly conducted activity. In light of the impact on trial presentation and logistics, Mr. Crowther respectfully requests that this motion be heard prior to the start of trial.

Accordingly, Casey David Crowther respectfully requests this Court (a) grant the instant Motion in all respects; (b) rule that the SBA materials are admissible; and (c) enter such other and further relief this Court deems just and proper.

Certification Regarding Conferral

The undersigned have conferred with opposing counsel and the undersigned have been unable to resolve the motion by agreement. The undersigned further certify that this motion concerns a matter not covered by the Magistrate Judge's Amended Pretrial Criminal Scheduling Order.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Nicole H. Waid, attorney for Casey David Crowther, do hereby certify that I have, this day, filed the foregoing with the Clerk of Court via the CM/ECF system, which has caused a true and correct copy to be served on all counsel of record.

/s/ *Nicole H. Waid*____
Nicole H. Waid, Esq.