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 RESPONSE IN OPPOSITION TO MOTION SEEKING ADMISSION OF VIDEOS AND FACT SHEETS**

The United State of America responds in opposition to Defendant's motion to admit certain SBA-related evidence at trial. Doc. 98. Crowther's motion seeks a ruling that videos and fact sheets, the contents of which are not specifically discussed, are admissible.[1] The motion should be denied because (1) the materials are not relevant to the case, and (2) the materials are hearsay and Crowther has not demonstrated that either the business records or statement-of-a-party opponent exception applies.

**Materials Suspected to be Referenced in the Motion**

Crowther has not divulged the contents of the materials to the Court, but he did provide the materials to the government for the first-time shortly

[1] Crowther calls his March 16, 2021 motion one for a "pre-trial ruling on the admissibility of SBA evidence," which is another way of saying a motion in limine, which were due on or before March 8, 2021. *See Whidden v. Roberts*, 334 F.R.D. 321, 323 (N.D. Fla. 2020) ("Courts use the term 'motion in limine' to refer to a motion to exclude *or admit* evidence before the evidence is actually offered.") (citing *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984)) (emphasis added).

before he filed the pending motion. The videos, totaling over 6 hours of footage, are summarized as follows: three videos from an YouTube page associated with the account "SBA South Florida District Office," with posting dates in October 2020 and February 2021; two videos posted on the Facebook pages to two U.S. Congresspersons, with posting dates in April 7, 2020 and February 2021; one video posted on a Facebook page for "Self Made," an unknown entity, with a posting date of July 27, 2020; one video posted on Vimeo[2] under the account "Broward Co. Gov.," with a posting date of April 9, 2020. Each video appears to show one or more SBA representatives from the Miami-area speaking about the PPP program, and some videos have question-and-answer sections with questions which appear to have been submitted by the public. Some of the participants in the videos are clearly not members of the SBA, including local governmental officials and U.S. congresspersons.[3]

[2] According to the website Vimeo.com, Vimeo is a "video platform giving creative professionals, businesses and organizations everything they need to make and market amazing, impactful videos." *See vimeo.com/about* (last accessed March 18, 2021). It appears to be a video hosting service in the vein of YouTube.

[3] Perhaps Crowther's motion only seeks the introduction of materials on YouTube which appear to be associated with an SBA account, but it is unclear, and prior conversations Crowther only make the issue murkier. For instance, Crowther states that he conferred extensively with the government about the materials, but at the time of those discussions, Crowther had only specifically provided a video of an SBA representative posted on a congressman's Facebook page. Adding to the confusion, the non-SBA hosted Facebook and Vimeo clips appear on Crowther's exhibit list. Whatever Crowther's actual intent in the motion, the following arguments against admissibility apply to all the documents listed above.

The fact sheets, all of which appear to have been posted on the United States Department of the Treasury website, are summarized as follows: a document titled "Small Business Paycheck Protection Program" which appears to have been posted on March 31, 2020; a document titled "Paycheck Protection Program (PPP) Information Sheet: Borrowers," which appears to have been posted on March 31, 2020, a document titled "Paycheck Protection Program Loan Forgiveness, which appears to have been posted in October 2020; and a document titled "Paycheck Protection Program (PPP) Report which appears to have been posted on April 16, 2020. The documents contain what appear to be broad, high-level summaries of the PPP program.

## Argument

### I. Crowther has not demonstrated the relevance of the materials he seeks to admit.

The defendant is charged with crimes that stem from his conduct in obtaining a loan from a local bank. Those crimes—bank fraud, false statement to a financial institution, and money laundering—all flow from false representations Crowther made to the bank about how he intended to use the proceeds of the loan. The loan was made pursuant to the "Paycheck Protection Program," an emergency program administered by the Small Business Administration designed to help small businesses survive the pandemic.

It is true that the PPP program is mentioned in the second superseding indictment. And it is true that the PPP program will be mentioned during the government's case-in-chief. But, this is not a case in which the government intends to prove, or has any burden to prove, that Crowther violated any of the requirements of the PPP program. This is a case about whether Crowther *lied to the bank*.

The PPP program plays a background role in the government's case. It explains why the Lender had the option of providing a PPP loan in the first place. It also illuminates why Crowther did certain things—like hire 39 fake employees, which helped ensure the loan would not have to be paid back to the bank.

Crowther, however, seeks to turn the PPP program into something it is not: a defense to lying. Despite multiple opportunities to do so (including the pending motion), Crowther has never articulated what language from the PPP program provides him a defense. His failure to do so is suspicious because, if language in the PPP program made Crowther's boat purchase acceptable as a matter of law, Crowther's innocence would be a matter for the Court to decide and a trial would be unnecessary. Nor has Crowther ever stated that the terms of the PPP program provide him a factual defense to the charges (*e.g.* that

Crowther was so confused by the terms of the program that he thought it was permissible to buy a boat with funds from the PPP program).

Now, having never explained how the PPP program undermines the government's charges or provides him a defense, Crowther asks the Court to find that videos and "fact sheets" which purportedly involve the SBA are admissible. He claims such materials "contradict the theories and characterizations argued by the government," but provides no explanation why. The motion contains no detail about the speakers in the videos, no details about their authority within the SBA, no details about the subject matter of their speech, and no detail about the contents of the fact sheets.[4]

Nevertheless, Crowther tells the Court that the relevancy of such materials is "clear." The Court should not take his word for it. It is Crowther's burden to demonstrate the admissibility of his evidence.

Most of the materials appear to post-date Crowther's conduct in this case—in fact, all the YouTube videos which appear to come from an SBA account were generated after Crowther's arrest. The materials could not have informed any decision Crowther made with respect to his conduct in this case, and therefore are incapable of proving any relevant mental state. For the

[4] When the government requested that Crowther tell it which specific parts of the lengthy footage he intended to present to the jury, thus permitting an efficient response to the pending motion, Crowther replied succinctly, "it will depend on the testimony of government witnesses."

materials which pre-date the fraud, Crowther makes no representations that he saw or relied upon them.

Moreover, the materials Crowther seeks to admit do not change the law. Publicly disseminated YouTube videos of SBA officials speaking and the posting of program summaries to governmental websites do not change the statutes or rules. *See* 15 U.S.C. § 9002 (providing only the SBA Administrator with the power to promulgate rules for the PPP program); *see generally* 15 U.S.C. § 634(b)(6) (providing the SBA Administrator the power to make "rules and regulations" deemed necessary to carry out the duties of the SBA). And even if they did, that is a matter for the Court to decide, not the jury.

Because Crowther cannot meet his burden to establish relevancy, the Court should deny his motion to deem the materials admissible.

## II. Crowther has not demonstrated that the materials are the statement of a party opponent.

Crowther argues that the materials, while out of court statements, are admissible under the statement-of-a-party opponent exception to the hearsay rule. In support, Crowther relies heavily on opinions from the Court of Federal Claims and the First Circuit Court of Appeals. Neither opinion is persuasive in the context of this case.

*Long Island Sav. Bank, FSB v. United States*, 63 Fed. Cl. 157 (Fed. Cl. 2004) relates to a civil case and contains almost no facts regarding the dispute between the parties. The case does note, however, that multiple government employees were deposed and that the opposing party wished to present some of those statements at trial. *Id*. at 162. In a brief analysis of the party-against-interest exception, the Court found such statements admissible. *Id*. at 164-165. These government employees appear to have been witnesses to a contested issue at trial, or otherwise personally involved in the case, though it is not explicitly stated. Given the lack of factual clarity and the minimal legal analysis, it is not persuasive authority in a criminal case where the defendant seeks to introduce materials created by individuals who have no personal connection to this case.

Crowther also relies on *United States v. Kattar*, 840 F.2d 118 (1st Cir. 1988), a criminal matter which held, at most, that the *Department of Justice* is a party-opponent in federal criminal cases. The case is inapt here, as Crowther seeks to introduce materials which he believes belong to agencies outside of DOJ.

The Seventh Circuit Court of Appeals offers a more relevant and persuasive analysis in *United States v. Kampiles*, 609 F.2d 1233 (7th Cir. 1979). In *Kampiles*, the defendant in a criminal case tried to introduce the out-of-court statement of a CIA agent as a statement against a party opponent, the government. *Id*. at 1246. The Court noted the common law rule that "admissions by government employees in criminal cases [are] viewed as outside the exceptions to the hearsay rule," and held that the codification of the party-opponent exception within the Rules of Evidence did not change that. *Id*. Accordingly, the government believes the exception is not applicable in this case, especially as it relates to non-DOJ witnesses, and that Crowther's motion should be denied.

Crowther's motion is also insufficient because it provides little more than a recitation of the elements of the exception as justification for the introduction of the materials. His most thoroughly developed argument is that "as authorized and official statements by the SBA, [the materials] are not hearsay." That argument is conclusory. Crowther has not demonstrated that the statements were made by a person authorized to make the statement, or that they were acting within the scope of their employment duties with the agency. Those things may turn out to be true, but it is Crowther's burden to substantiate his claims and he has not done so. Therefore, Crowther has met his burden.

### III. Crowther has not demonstrated that the materials are records of a regularly conducted activity.

Crowther also argues that the materials are admissible under the regularly recorded activity exception to the hearsay rule. "The touchstone of admissibility [under the exception] is reliability, and a trial judge has broad discretion to determine the admissibility of such evidence." *United States v. Arias-Izquierdo*, 449 F.3d 1168, 1183 (11th Cir. 2006). The exception, often referred to as the business records exception, exists for two reasons: "First, businesses depend on such records to conduct their own affairs; accordingly, the employees who generate them have a strong motive to be accurate and none to be deceitful. Second, routine and habitual patterns of creation lend reliability to business records." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 205 (4th Cir. 2000). Those realities work in tandem to produce materials which are presumed to be reliable and trustworthy. *Id.*

Although Crowther does not say specifically, he apparently wants to introduce the videos and fact sheets because they contain information about what the law is. But, videos and summary fact sheets do not define the law. *See* 15 U.S.C. § 9002 (providing only the SBA Administrator with the power to promulgate rules for the PPP program); *see generally* 15 U.S.C. § 634(b)(6) (providing the SBA Administrator the power to make "rules and regulations" deemed necessary to carry out the duties of the SBA).

More importantly to the business records analysis, the materials are not generated by the SBA for use in conducting its own affairs. SBA employees don't consult things like educational YouTube and Facebook videos before deciding whether to extend a loan to an applicant, nor do its lawyers review high-level "fact sheets" to ensure they understand the law before going to court. The materials are not regularly created materials *relied on by the SBA* to conduct its business. Without such reliance, the materials fall outside of the exception because they do not have the inherent reliability the exception contemplates. *See* Fed. R. Evid. 803(6)(B) (requiring material be shown that it was kept in the course of a regularly conducted activity); *United States v. Ruan*, 966 F.3d 1102, 1152 (11th Cir. 2020) (finding that business's reliance on records established that they were kept in course of regular business practice).[5]

Crowther also asserts that it is the practice of the SBA to "regularly make" such videos and fact sheets. He claims there are many videos of SBA representatives speaking online, and thus concludes that such videos must be regularly made. "Regularly made," however, does not simply mean "a lot." The term must be viewed in the context of the business records exception, which is based on the idea that "routine and habitual patterns lend reliability to business records." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232

[5] Moreover, many of the materials Crowther apparently seeks to admit are not "kept" by the SBA at all. *See* fn. 3 (discussing clarity issues surrounding which exhibits Crowther's motion relates to). Multiple videos are posted on websites which are not associated with the SBA, including two that are pulled from individual congressional members' Facebook pages, one pulled from a YouTube page associated with an unknown entity called "Self Made," and one pulled from a video hosting platform that appears to be associated with the government of Broward County, Florida. Moreover, certain of the "fact sheets" have no obvious markings on them suggesting the SBA created them, and according to Crowther, they were posted on a separate agency's website—the Department of Treasury.

F.3d 200, 205 (4th Cir. 2000). Crowther has made no showing of how common it is for the SBA to record its informal public pronouncements *compared to how common it is for the SBA not to record those pronouncements*. It is only by comparing the two, that one could demonstrate how regularly an activity was conducted. [6]

Without that, Crowther cannot demonstrate that the materials he seeks to introduce were regularly made. Further, accepting his argument about regularity would lead to illogical results. Very large companies or organizations which make some type of record sporadically and inconsistently, might be thought of as making the records regularly simply because there are numerous examples of such records by virtue of their size.

Crowther has also not explained how he intends to prove the facts he believes make the materials fit within the business records exception. Those facts must be provided by a records custodian, other competent witness, or proper certification—none of which have been identified with any specificity in his motion. Such a showing is a required part of admissibility, and his lack specificity in that regard is fatal to the motion. Fed. R. Evid. 803(6)(D).

[6] After speaking with a representative of the SBA South Florida District Office, the government has learned that the employees having been providing hundreds of unrecorded webinars to the public in the South Florida region alone, and that, by far, most public information sessions are unrecorded.

In the end, the government believes Crowther has not demonstrated that the materials he seeks to admit fall within the business records exception and requests that his motion be denied.

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 18, 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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