UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES

v. Criminal No. 2:20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER

Defendant.
______________________________/

DEFENDANT'S RESPONSE TO THE UNITED STATES' MOTION FOR ORDER OF FORFEITURE AND PRELIMINARY ORDER OF FORFEITURE FOR DIRECT ASSETS

Pursuant to 18 U.S.C. §§ 982(a)(1), 982(a)(2)(A), and Rule 32.2(b)(2) of the Federal Rules of Criminal Procedure, Casey David Crowther ("Crowther"), by and through undersigned counsel, hereby objects to the Government's motion for a preliminary order of forfeiture for the following assets: a.) a 2020 40' Invincible Catamaran, Hull ID# IVBC0076D920, registered to and owned by the defendant (the Catamaran); and b.) approximately $630,482.37 received from the sale of the real property located at 3653 San Carlos Drive, Saint James City, Florida 33956, in lieu of the property itself (the Real Property). Crowther further objects to the United States' motion, pursuant to 18 U.S.C. §§ 982(a)(1), 982(a)(2)(A), and Rule 32.2(b)(2), for an order of forfeiture against the defendant in the amount of $2,739,081.21, representing the total loan proceeds in the offenses of which the defendant was convicted.

Crowther objects to the forfeiture on a number of grounds. First, the request for forfeiture incorporates untainted funds that are not derived from criminal proceeds.

Second, the money judgment for these untainted funds would result in the imposition of an excessive fine in violation of Crowther's Eighth Amendment rights. Finally, there is absolutely no statutory authority to support the order of a money judgment. For these reasons, we respectfully request that the Court deny the Government's motion for order of forfeiture and preliminary order of forfeiture for direct assets.

*Forfeiture related to the PPP Loan Fraud*

The evidence at trial established that Target Roofing, through Crowther, obtained a loan with Sanibel Captiva Community Bank pursuant to the Paycheck Protection Program ("PPP") for $2,098,700 on April 14, 2021. *Gov't Ex. 107.* The defendant initiated a series of transfers from the account, including a $689,417 wire to Sara Bay Marina on April 24, 2020, for the purchase of a Catamaran boat. *Gov't Exs. 33, 34, and 107.* The evidence also established that during the period of time allotted by the PPP for eligibility of forgiveness ("Covered Period"), Target Roofing spent the sum of the loan proceeds on payroll expenditures (*Exs. A4, A5.*) and other allowable expenditures. (*Gov. Exs. 73-78).*

Section 1106(b) of the CARES Act states: "An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to ***the sum of*** the following costs incurred and payments made during the covered period: (1) Payroll costs…" (emphasis added). "Payroll costs" are defined under the Act as the "sum of payments of any compensation with respect to employees" that is, *inter alia*, a "salary, wage, commission, or similar compensation . . ." Section

1102(a)(2)(A)(viii). Section 1106(d)(1) states: "The amount of loan forgiveness under this section shall not exceed the principal amount of the financing made available under the applicable covered loan." The statutory language is clear that if the sum of payroll costs equals the principal amount of the loan, these expenses may be forgiven. The evidence at trial revealed that Target Roofing's payroll expenditures far exceeded the sum of the loan. *Exs. A4, A5.* The bank records also accounted for additional forgivable expenses. *Gov. Exs. 73-78.*

Furthermore, the loan documents dictating the financial relationship of the loan transaction stated that the Borrower may apply to Lender for forgiveness of the amount due on this loan in an *amount equal to the sum of the following costs* incurred by borrower during the 8-week period[1] beginning on the date of first disbursement of this loan: a.) Payroll costs b.) Any payment of interest on a covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation) c.) *Any payment on a covered rent obligation d.* Any covered utility payment. *Ex. 9, pg. 1.* It is unclear how the funds could be considered tainted funds if the expenditures were allowable pursuant to the tracked language of both the CARES Act and the loan documents[2]. The loan remains a performing loan on the books and records of Sanibel Captiva Community Bank and there are no loss amounts associated with the loan.

---

[1] Congress changed the Covered Period to 24 weeks in later legislation.

[2] Assuming, *arguendo*, that the 2020 40' Invincible Catamaran, Hull ID# IVBC0076D920, registered to and owned by the defendant (the Catamaran) was a forfeitable asset, the evidence is irrefutable that the remainder of the loan was utilized on allowable expenses.

The payroll records submitted at trial show that Target Roofing spent approximately $3.3 million in payroll during the Covered Period[3] and the bank records submitted at trial show an additional approximately $311,000.00 expended on allowable expenses pursuant to the CARES Act. A forfeiture order would be a windfall to the government and an excessive financial hardship to Mr. Crowther who would essentially be paying for the exact same expenses three (3) times. Target Roofing paid over $2,098,700 in employee payroll and other allowable expenses during the Covered Period. The $2,098,700 loan is a performing loan and remains a financial obligation of Mr. Crowther. This alone would be over a $4 million payment by Mr. Crowther. Imposition of forfeiture would require Mr. Crowther to pay an additional $2,739,081.21 (minus the sales price of the boat[4]). This excessive financial hardship would not only financially devastate Mr. Crowther but it would also destroy his roofing business and both Mr. Crowther and his Company's ability to meet their financial obligations. Not only would this have a detrimental impact on employees, customers and vendors but, ironically, it places the victim of this case in a worse financial position than it was in prior to charges being brought against Mr. Crowther.

---

[3] This number does not include the 39 employees that the Government alleged were fake employees during trial.

[4] The value of the Catamaran is currently unknown however there are concerns about the resale value. After the government seized the boat, the boat remained in the water with no bottom paint for several months; the damage has not been assessed.

*Forfeiture Related to the Mortgage Fraud*

Crowther pled guilty to the mortgage fraud based upon his purchase of a residence located at 3653 San Carlos Drive. Crowther purchased the home for $1,336,732.56; he obtained a loan in the amount of $640,381.21 from the lender and he provided a down payment of $686,732.56 (plus his initial down payment of $10,000). *Gov. Ex 42.* After his arrest, the 3653 San Carlos Drive residence was sold for approximately $1,300,000 on November 22, 2020, and the mortgage lender, Angel Oak, received full repayment of the loan amount ($640,381.21). [D.E. 148, pg. 3, fn. 1] Therefore, the loss amount for the mortgage fraud is $0. The money held in the escrow account by the government represents the over 50% down payment provided by Mr. Crowther to the lender on the residence at 3653 San Carlos Drive and remains untainted proceeds of any crime. A money judgement for these untainted funds would result in the imposition of an excessive fine upon Mr. Crowther. As such, the government should not be entitled to forfeiture of these funds via money judgment.

## ARGUMENT

The forfeiture order requested by the government violates the Eighth Amendment's prohibition against excessive fines. The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const., Amdt. 8. A court considering whether a proposed forfeiture violates the Eighth Amendment's prohibition against excessive fines applies the two-step inquiry established by the U.S. Supreme Court in *United States v.*

*Bajakajian,* 524 U.S. 321 (1998). First, the court must determine the applicability of the Excessive Fines Clause, which applies only to forfeitures that may be characterized, at least in part, as "punitive", that is forfeitures for which a defendant is personally liable. *Id at 328*. If the court concludes that the clause applies, it must proceed to the second step and determine whether the challenged forfeiture is unconstitutionally excessive. *Id at 334.* To determine whether a forfeiture is unconstitutionally excessive, the court must assess whether the amount of the forfeiture bears some relationship to the gravity of the offense that it is designed to punish. *Id.* In this case, the Government is seeking forfeiture via money judgment from Crowther which constitutes punishment and is a fine within the meaning of the Excessive Fines Clause. There was no loss to the government or any victim of the crime. The fine is disproportional because Crowther would be forced to pay the amount of the loan (fine) three separate times – he paid his employees the sum of the loan amount pursuant to the requirements of the CARES Act; he must pay the outstanding loan amount with the lender; and, and he would be subject to the money judgement for these exact same monies. This excessive punishment would effectively impede his ability to make Sanibel Captiva Community Bank financially whole which is the exact opposite of the statutory intent of Congress. Moreover, the intent of the CARES Act was to pay the employees of the company during a global pandemic which is exactly what Crowther did during the Covered Period. Excessive financial hardship will only hurt the employees of the business – the exact people who the legislature sought to protect. It will also financially cripple any remaining viable business causing harm to customers, vendors, and other businesses within the community including the victim.

Crowther also objects to the forfeiture on the grounds that there simply is no statutory authority that allows for money judgments, thus posing a threat to the actual statutory structures enacted by Congress to distinguish between tainted and untainted property. In addition, Crowther argues that forfeiture should be limited to the [tainted] property he actually acquired as the result of the crimes, if any. On March 26, 2021, a petition for a writ of certiorari was filed with the United States Supreme Court specifically addressing these exact questions. Petitioner Nidal Waked petitioned the Supreme Court for issuance of a writ of certiorari to review the decision of the Eleventh Circuit that: (1) upheld the imposition of a "forfeiture money judgment" not authorized by statute; (2) held that criminal forfeitures are not limited to tainted property, notwithstanding this Court's opinion in *Honeycutt v. United States*, 137 S. Ct. 1626 (2017); and (3) held that the Government can forfeit a defendant's legitimate, untainted assets even after—indeed, because—the tainted funds were returned to the alleged crime victim. The published opinion of the Eleventh Circuit reversing the district court is reported as *United States v. Waked Hatum*, 969 F.3d 1156 (11th Cir. 2020). The Government's response to the petition for writ of certiorari is due June 18, 2021. For purposes of this response, Crowther adopts and incorporates the arguments within the petition for a writ of certiorari which is attached as ***Attachment A***.

On February 11, 2021, Petitioner Benjamin Bradley filed a petition for a writ of certiorari with the United States Supreme Court specifically addressing the question of whether in personam money judgments—which seize even untainted assets—are an end-run around the criminal forfeiture statute and inconsistent with this Court's precedent in

Honeycutt. The August 1, 2018 opinion of the Sixth Circuit Court of Appeals is published as *United States v. Bradley, 897 F.3d 779 (6th Cir. 2018)*. The August 10, 2020 Sixth Circuit Court of Appeals opinion in the second appeal following remand is published as *United States v. Bradley, 969 F.3d 585 (6th Cir. 2020).* The Respondent United States opposition brief was filed on May 10, 2021, and the reply of Petitioner Benjamin Bradley was filed on May 25, 2021. The briefs were distributed for Conference scheduled for June 10, 2021. For purposes of this response, Crowther adopts and incorporates the arguments within the petition for a writ of certiorari and the Reply which are attached as ***Attachments B and C***.

## CONCLUSION

For the reasons stated above, Crowther respectfully requests that the Court deny the entry an order of forfeiture against the defendant in the amount of $2,739,081.21 or any further relief this Court deems just and proper.

Respectfully Submitted,

*/s/ Nicole H. Waid*

Nicole H. Waid, Esq.
Fla. Bar No. 0121720
*nicole.waid@fisherbroyles.com*
FISHERBROYLES, LLP
625 Tamiami Trail North, Suite 203
Naples, Florida 34103
Phone: (202) 906-9572
Fax: (239) 236-1360

# 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.