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' REPLY TO DEFENDANT'S RESPONSE REGARDING ENTRY OF FORFEITURE ORDERS

The United States disputes the merits of the defendant's objections to the requested forfeiture (Doc. 149). In support of its reply, the United States submits the following memorandum of law:

MEMORANDUM OF LAW

I. Introduction

The defendant's objections to forfeiture in this case ignore the well-established law: the requested forfeiture is mandatory.

First, the defendant is required to forfeit the total amount of the fraudulent loans he obtained from the bank fraud and false statement offenses of which he has been convicted. The defendant appears to confuse his restitution and forfeiture obligations, both of which are mandatory in this case. He is not entitled to credit for amounts he may have repaid on the loans or any amounts he alleges he later paid on the loans that he believes would qualify for forgiveness. While payment towards the loans may ultimately reduce the amount of restitution owed, the defendant must still forfeit the gross proceeds he obtained from the fraudulent loans.

Second, the requested forfeiture does not violate the 8th Amendment. The United States only seeks forfeiture of the total amount of proceeds the defendant obtained from the two fraudulently acquired loans.[1] By definition, requiring a defendant to pay forfeiture in the amount of the fraudulent proceeds he or she obtained from their offenses cannot be grossly disproportionate to the crime.

Finally, the United States is entitled to seek a forfeiture money judgment in this case. The Eleventh Circuit has consistently held that the United States may seek a forfeiture money judgment in criminal cases when the forfeitable property is no longer available. The Supreme Court has never ruled to the contrary.

II. Argument

A. The Defendant is Required to Forfeit the Total Amount Obtained from the Fraudulent Loans

The defendant asserts that the United States has improperly included "untainted funds" in the amount sought for forfeiture because the figure includes amounts that he has paid back on the fraudulently acquired loans or amounts he allegedly later paid in accordance with the terms of the loans. He is mistaken because all of the funds he acquired through his fraud are subject to forfeiture.

As the Court is aware, the defendant either pled guilty to or was found guilty

[1] As the United States noted in its original motion, this figure also includes the $789,417 involved in the two money laundering violations for which the defendant was found guilty (Counts Three and Four). The defendant's response appears to ignore the applicability of forfeiture to these separate money laundering violations of which he has been convicted. Those illegal transactions involved a $100,000 wire to the defendant's former business partner on April 21, 2020 (Count Three) and a $689,417 wire on April 24, 2020, for the purchase of the Catamaran sought for forfeiture in this case (Count Four).

by a jury of multiple counts of bank fraud, making false statements to lending institutions, and conducting illegal monetary transactions——all of which stemmed from misrepresentations he made in connection with two loan applications. The first involved a loan under the Paycheck Protection Program (PPP) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act: the defendant was convicted of bank fraud (Count One) and making false statements to a lending institution (Count Two) because of misrepresentations he made on his PPP loan application and in the loan documents regarding how he planned to use the loan, which ultimately caused to the lender to approve and disburse $2,098,700 to an account controlled by the defendant. The second involved a mortgage loan: the defendant pled guilty to bank fraud (Count Five) and making false statements to a lending institution (Count Six) based on misrepresentations he made in a mortgage application regarding the extent of his assets, which the mortgage lender relied on when it approved and disbursed a $640,381.21 for the defendant's purchase of the real property located at 3653 San Carlos Drive, Saint James City, Florida 33956 (the Real Property).

The offenses were based on the lies and misrepresentations the defendant made while seeking the loans—they have nothing to do with accounting on the loans after they were disbursed.[2] Based on the lies and misrepresentations in his applications and in the loan documents, lenders disbursed loans totaling $2,739,081.21 to the defendant. The United States now seeks to forfeit that amount.

[2] The defendant's accounting arguments regarding the PPP loan are no more of a defense to forfeiture than they were to his guilt.

Doc. 148 at 1.

Forfeiture is mandatory for convictions of bank fraud and making false statements to lending institutions pursuant to 18 U.S.C. § 982(a)(2). Section 18 U.S.C. § 982(a)(2) provides that, for violations of sections 1014 or 1344, affecting financial institutions, among others, "t[]he court . . . ***shall*** order that the person forfeit to the United States any property constituting or derived from, proceeds the person obtained directly or indirectly as a result of such violation." (emphasis added). "For purposes of criminal forfeiture, the 'proceeds' of a fraudulently obtained loan equal the amount of the loan." *United States v. Newman,* 659 F.3d 1235, 1244 (9th Cir.2011), *abrogated on other grounds by Honeycutt v. United States,* 137 S.Ct. 1626, 1635 (2017), citing *United States v. Boulware,* 384 F.3d 794, 813 (9th Cir.2004); *see also United States v. Joel,* 2012_WL 2499424 at *3 (M.D.Fla. June 5, 2012) ("[a] defendant convicted of a financial institution offense is liable for forfeiture of the entire amount of the loan.").

This makes sense because the United States' interest in criminal proceeds relates back to the time that the act giving rise to the forfeiture occurs. *See United States v. Browne,* 505 F.3d 1229, 1281 (11th Cir. 2007) (United States' interest in embezzlement proceeds dated back to when the defendant embezzled money from the victim). In other words, in financial institution fraud cases such as this, the entire amount of the loan a defendant applies for and ultimately receives becomes forfeitable criminal proceeds, or "tainted funds," the moment an application containing lies or misrepresentations is submitted to a bank in support of that loan.

Here, the sum of the two loans the defendant fraudulently obtained—$2,739,081.21—constitutes "tainted funds" or criminal proceeds in this case, which are subject to mandatory forfeiture pursuant to 18 U.S.C. § 982(a)(2)(A).

The defendant's objections and arguments relating to payments he made or intended to make towards the loans ignores the law—forfeiture is mandatory and cannot be offset by restitution already paid to victims. *See United States v. Bailey*, 630 Fed. Appx. 902, 903-904 (11th Cir. 2015) (the Eleventh Circuit has "refused to offset the required forfeiture by restitution already paid to victims, recognizing that forfeiture and restitution are separate concepts serving different goals"); *see also United States v. Joseph*, 743 F.3d 1350 (11th Cir. 2014) (finding that the district court's oral pronouncement directing that restitution to the IRS be offset by the amount of the forfeiture was contrary to law and affirming written judgment, which declined to make such an offset). Similarly, contrary to the defendant's assertions, he is not entitled to claim credit against forfeiture for any portion of a fraudulently obtained loan he subsequently repays. *See United States v. Holzendorf*, 576 Fed. Appx. 932 (11th Cir. 2014) (holding that gross proceeds of mortgage fraud scheme was not subject to reduction for amounts repaid on loans) (collecting cases). The flaw in the defendant's argument on this issue appears to stem from a misunderstanding of his restitution and forfeiture obligations, which are both mandatory in this case. Restitution focuses on the harm to the victim, whereas forfeiture focuses on punishing the defendant. *Browne*, 505 F.3d 1229 at 1281. As a result, the court calculates restitution based on the loss to the victims and calculates forfeiture based on how much the defendant obtained from his crimes. *Id.*

While the United States does not dispute that the defendant should receive credit against any restitution owed in this case for payments he makes or has made to the victim lenders, the defendant is not entitled to double credit against his forfeiture obligation for those payments. *See United States v. Hoffman-Vaile,* 568 F.3d 1335, 1345 (11th Cir. 2009) (following *Browne*; doctor convicted of Medicare fraud not entitled to offset forfeiture to reflect restitution she has already paid to victims).

For these same reasons, the defendant's suggestion that he is entitled to a return of the proceeds obtained from the interlocutory sale of the Real Property is equally without merit. As explained above, the United States' interest in the criminal proceeds from the bank fraud and false statement offenses relating to the fraudulent mortgage vested the moment the mortgage loan was funded based on the defendant's misrepresentations. The Real Property, which was directly traceable to proceeds from the fraudulent mortgage, was then subject to forfeiture pursuant to 18 U.S.C. § 982(a)(2)(A).

In an effort to save all parties' the unnecessary costs of maintaining the Real Property during the pendency of this case, the United States agreed to an interlocutory sale so that the property could be sold and the victim lender could be paid in full. This allowed the mortgage loan—or, what would have been the mandatory restitution for the mortgage fraud offenses—to be paid in full. The parties mutually agreed, however, that the net proceeds obtained from the sale of the Real Property would be held as substitute *res*—or, as the defendant likes to call it, the substitute "tainted property"—subject to forfeiture in lieu of the Real Property itself. *See* Doc. 148-1. The defendant benefited from this sale because it allowed his restitution obligation to be satisfied. As detailed above, however, he is not entitled to claim double credit and nullify his forfeiture obligation as well.

B. Forfeiture of the Fraudulent Loan Proceeds Does Not Violate the 8th Amendment

The defendant also erroneously contends that the requested forfeiture would amount to an excessive fine in violation of the Eighth Amendment. The Eighth Amendment prohibits, among other things, excessive punishment in the form of an excessive fine payable to the government. *Austin v. United States*, 509 U.S. 602, 607-10 (1993). Under the Eighth Amendment, a forfeiture is excessive "if it is grossly disproportional to the gravity of a defendant's offense." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Three factors guide the gross-disproportionality inquiry: "(1) whether the defendant falls into the class of persons at whom the criminal statute was principally directed; (2) other penalties authorized by the legislature (or the Sentencing Commission); and (3) the harm caused by the defendant." *Browne*, 505 F.3d 1229 at 1281. The defendant bears the burden of showing that a forfeiture money judgment is grossly disproportionate to the gravity of his offense, *Bajakajian*, 524 U.S. at 334, and the defendant cannot meet that burden here.

This Court need not undertake an analysis of the *Browne* factors, however, because the requested forfeiture money judgment is based simply on the proceeds of the fraudulent acquired loans.[3] As a matter of law and logic, requiring the defendant to forfeit proceeds of his offenses is *exactly proportional* to the gravity of the offense. *See United States v. Betancourt*, 422 F.3d 240, 251 (5th Cir. 2005) ("This Court has held that the Eighth Amendment has no application to forfeiture of property acquired with drug proceeds."); *cf. United States v. Rosin,* 263 F. App'x 16, 37 (11th Cir. 2008) (requiring defendant to pay both restitution and a forfeiture money judgment in the amount of fraud proceeds does not violate excessive fine); *United States v. MacKay*, 506 F. Supp. 2d 1206, 1212 (S.D. Fla. 2007) (ordering defendant to pay money judgment for exact amount of proceeds of his offenses is not excessive).

The requested money judgment in this case cannot be considered grossly disproportionate to the harm caused by the defendant's crimes, because it represents exactly the fruits of his criminal conduct.[4] The requested forfeiture money judgment, which is equivalent to the proceeds of the fraudulently acquired loans, is constitutionally appropriate and legally required.

C. Forfeiture Money Judgments

Finally, contrary to clear Eleventh Circuit precedent, the defendant baldly

[3] It is worth noting that for Count One, alone, the defendant could face a fine of up to $4,197,400 under 18 U.S.C. § 3571(d). In other words, the requested forfeiture order of $2,739,081.21 is significantly less than the statutorily authorized fines in this case.

[4] While the United States believes that any post-loan disbursement accounting has no bearing on forfeiture, the defendant's claim that the forfeiture is somehow excessive because he allegedly spent money on payroll during the "covered period" for the PPP loan is disputed. The United States introduced evidence at trial that the defendant paid employees who did not exist and family members who performed no work. His accounting is completely unreliable.

asserts that there is no statutory authority for forfeiture money judgments.[5] The Eleventh Circuit has consistently upheld the entry of forfeiture money judgments in criminal cases where the proceeds or directly forfeitable assets are no longer available. *See United States v. Waked Hatum,* 969 F.3d 1156 (11th Cir. 2020) (following existing precedent in rejecting defendant's contention that forfeiture money judgments are not permitted by statute)*; United States v. Elbeblawy*, 899 F.3d 925, 940 (11th Cir. 2018) ("proceeds" of a criminal offense "constitute[s] a defendant's interest in property" and are subject to forfeiture via an in personam money judgment); *United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008) ("[t]he federal rules explicitly contemplate the entry of money judgments in criminal forfeiture cases.")

Regardless, the defendant's argument implicitly suggests that a forfeiture money judgment seeks something other than the forfeiture of the proceeds that were transferred to his control as a result of his fraud. That is not so. The plain language of 18 U.S.C. § 982(a)(2)(A) authorizes the forfeiture of the $2,098,700 in PPP loan proceeds that were deposited into the defendant's Sanibel Captiva Account ending in 6781 on April 14, 2020, as a result of the bank fraud and false statement offenses. Likewise, section 982(a)(2)(A) authorizes the forfeiture of the $640,381.21 that the defendant received as a result of the bank fraud and false statement offenses relating to the mortgage.

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[5] The only support offered by the defendant for this position are two pending petitions for writs of certiorari. Neither of these petitions have been granted, much less resulted in any change in the status of the law.

That the funds have been spent changes nothing.[6] Indeed, 21 U.S.C. § 853(p) provides that if, because of any action or omission by the defendant, the specific property subject to forfeiture has been transferred or sold to a third party, or substantially diminished in value, then the court "shall order the forfeiture of any other property of the defendant, up to the value of the property" transferred or sold. 21 U.S.C. § 853(p)(1)(B) and (2). To suggest that there should be no forfeiture because a defendant has transferred, spent, or otherwise depleted the criminal proceeds he obtained would defeat the purpose of this provision. As the Supreme Court recently explained, "[b]y adopting an *in personam* aspect to criminal forfeiture, and providing for substitute-asset forfeiture, Congress made it easier for the Government to hold the defendant who acquired the tainted property responsible." *Honeycutt v. United States,* 137 S.Ct. 1626, 1635 (2017).

[6] Forfeitures under section 982 are "governed by the provisions of [21 U.S.C. § 853]." 18 U.S.C. § 982(b)(2).

III. Conclusion

For the reasons set forth above, the United States' Motion for Order of Forfeiture and Preliminary Order of Forfeiture for Direct Assets should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 21, 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 counsel of record.

s/Suzanne C. Nebesky
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