UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE No. 22-20290-CR-BLOOM

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
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DEFENDANT'S RESPONSE TO GOVERNMENT'S AMENDED MOTION FOR PRELIMINARY ORDER OF FORFEITURE

Defendant Eric Dean Sheppard, through undersigned counsel, hereby opposes the government's amended motion [DE:255] for preliminary forfeiture order and requests that the Court conduct a hearing to address contested issues regarding the government's motion.

Defendant contests the government's forfeiture motion which seeks to impose, in addition to any restitution order, forfeiture of loan amounts that were repaid by Defendant as well as forfeiture regarding an abandoned allegation on which the jury did not find any liability by the Defendant.

The government seeks forfeiture as to the face amount of each PPP loan attributed to the Defendant, including two loans referenced in the counts of conviction (where Defendant was convicted of Counts 5, 7, 8, and 9, all of which relate to conduct occurring on or after February 11, 2021) and a PPP loan that the government originally indicted, but then dismissed, which pertains to conduct nearly one year earlier, on April 15, 2020. *See* DE:255 at 8–9. The loans at issue are:

4/15/2020	PPP loan	$146,587 - Dismissed count	Debt forgiven
3/11/2021	PPP loan	$148,397 - Count 7 (convicted)	Repaid by Defendant
3/12/2021	PPP loan	$148,591 - Count 9 (convicted)	Repaid by Defendant

1. Repayment of loans associated with counts of conviction precludes forfeiture of the repaid loans.

Defendant first objects that his repayment in full of the loans associated with the counts of conviction forecloses any forfeiture under the relevant statute. Specifically, as to the two loans relating to the counts of conviction—a loan of $148,397 on March 11, 2021 and a loan of $148,591 on March 12, 2021—Defendant fully repaid both loans prior to sentencing. Under the express terms of the forfeiture statute employed by the grand jury in returning the indictment, 18 U.S.C. § 981, because those loans were repaid in full, that repayment must be deducted from the forfeiture calculation, leaving no forfeiture to be imposed as to those two loans. *See* § 981(a)(2)(C) ("In cases involving fraud in the process of obtaining a loan or extension of credit, the court shall allow the claimant a deduction from the forfeiture to the extent that the loan was repaid, or the debt was satisfied, without any financial loss to the victim.").

The government has acknowledged that if the Court concludes that the indicted basis for forfeiture (§ 981) is used, then forfeiture as to the repaid loans is not warranted. However, the government argues in its motion that it is not bound by the forfeiture allegations in the indictment and that it is free to add, following the trial, a new claim for forfeiture under a different statute, specifically 18 U.S.C. § 982, which lacks the set-off provision of § 981(a)(2)(C).

As argued in its motion, the government claims it may assert additional grounds and statutory bases of forfeiture after trial, because—in the government's view—even an incorrect form of forfeiture notice is satisfactory in federal criminal proceedings. *See* DE:255 at 4 & n.6 (relying principally on the non-precedential decision in *United States v. Wall*, 285 F. App'x. 675, 684 (11th Cir. 2008), which permitted the government to amend a scrivener's error in the indictment). In *Wall*, the court concluded that a citation to § 982, rather than § 981 was a scrivener's error, where the fraud did not concern a financial institution and it was clear that referencing financial institution fraud rather than the generic fraud charged was simply an oversight, and not a decision by the grand jury.

In the present case, unlike *Wall*, because no financial institution was actually financially liable for loan repayment—in that the federal government was merely using the banks to pass through federal funding for PPP loans—it cannot be said that the decision to treat the loss as one pertaining not to the banks, but instead to the federal government, was a scrivener's error. *See*, *e.g.*, *United States v. Esterman*, 135 F. Supp. 2d 917, 919 (N.D. Ill. 2001) (rejecting forfeiture claim where despite involvement of bank, there was no intent to harm the bank and no meaningful risk of harm to the bank from the fraud scheme; citing cases); *accord United States v. Grass*, 274 F. Supp. 2d 648, 653 (M.D. Pa. 2003) (concluding that the § 982(a)(2)(A) term "affecting a financial institution" requires an allegation that the financial institution was affected in an adverse manner, rather than merely used as an instrumentality of the crime; citing cases).

In the present case, the notion that the banks would have been adversely affected by the alleged fraud arises only in the newly filed forfeiture motion. The new claim for forfeiture is thus substantive and was not alleged in the indictment, which makes no reference to "financial institution" forfeiture issues. Rather than a scrivener's error, it appears instead that when the case was indicted, the government and the grand jury correctly viewed the federal government, and not bank processors of PPP loans, as the victim that was adversely affected.

Adding to this interpretation of the indictment is that the allegations of the indictment omit any reference to affecting the interests or assets of any bank. The banks the government now identifies as being affected in some manner by the loans are not even identifiedned in the indictment. One of the two counts of conviction (Count 7) makes this point even clearer by referring to "Bank Processor 2," thus highlighting the role of the bank as processing the loan under the PPP program, rather than being financially affected by fraud.

Notice is effective where a mere scrivener's error is involved. But prejudice and reliance ensue when a substantive alteration of a key punishment allegation of the indictment is implicated. Whether or not the Fifth Amendment required the notice in this context is an unresolved question, particularly in light of the Supreme Court's recent holding in *Erlinger v. United States*, No. 23-370, 2024 WL 3074427 (U.S. June 21, 2024), that defendants' Fifth *and* Sixth Amendment rights are implicated by matters affecting maximum sentences, even as to enhancements for prior convictions. The due process requirement of the Fifth Amendment that a defendant know what he faces before going to trial creates at least constitutional doubt whether the provision of notice that did not alert the Defendant that the government was going to seek forfeiture based on a theory of harm to financial institutions.

Because the notice issue in this case is substantive and because the government's new claim results not from a scrivener's error, but rather a change in the exposure the Defendant faces, the Court should decline the government's invitation to amend the forfeiture allegation at this time.

A further constitutional ground warrants limiting the government to the § 981 forfeiture ground asserted in the indictment. Where a defendant has fully repaid the loan obtained and thus has complied with loan obligations, it is incorrect to treat the defendant as being required to forfeit his *gain* from the transaction, because there actually was no gain. By analogy, if a person rents a car based on a false driver license, but returns it timely and pays the amounts owed, even though he has committed a fraud, it would be arbitrary in the extreme to order the defendant to forfeit the value of the car. So too here. Imposition of forfeiture for a repaid loan to a bank never at risk compels a finding of no forfeitable gain to the Defendant consistent with principles of due process and equal protection.

2. The April 15, 2020 loan transaction which was originally charged, but later dismissed, by the government cannot be the basis for a forfeiture order.

The government concedes that it dismissed, upon filing a superseding indictment, all charges pertaining to an April 15, 2020 PPP loan in the amount of $146,587. The government also seeks restitution for this loan (as it does for the loans applicable to counts of conviction). Whether or not restitution is owed, there cannot be a forfeiture order regarding this 2020 loan transaction given its excision from the indictment by the government. Unlike relevant conduct determinations made for sentencing guideline purposes, the forfeiture statutes limit the government's right to seek forfeiture to matters on which there is a count of conviction. There is no count of conviction for the 2020 loan. And equally important, although acquitted conduct may still be employed for guideline purposes, it clearly cannot be employed for forfeiture purposes.

In this case, the jury acquitted the Defendant of all loan fraud accusations relating to conduct occurring prior to February 2021, including even Count 4, pertaining to a transaction in January 2021. There is no basis for the government, on this record of acquittal, to claim that the jury found the Defendant guilty of any crimes occurring in 2020. For that reason, relevant conduct analysis is of no use to the government in this context, and forfeiture cannot be awarded as to the dismissed count pertaining to the April 15, 2020 transaction.

3. The government has represented that it no longer will seek forfeiture of loans addressed in dismissed and acquitted counts relating to EIDL loans.

At sentencing, this Court excluded from the relevant conduct calculation of intended loss the EIDL loans that were previously referenced in the government's forfeiture motion. *See* DE:255 at 8–9. As to Counts 1, 2, and 3 of the indictment (relating to an October 2020 loan), the jury acquitted, leaving no basis for forfeiture.

Regarding the remaining two EIDL loans (part of the 2020 conduct that the jury acquitted across the board), the Court found no relevant conduct basis for loss calculation, particularly in light of the acquittal as to all EIDL allegations that had not already been dismissed.

The government has therefore agreed that it will not pursue forfeiture as to any of the EIDL loans, reducing the government's forfeiture claim by a total of $450,000.

4. <u>Additional statutory and constitutional grounds of objection to the government's remaining claim (of $443,575)</u>.

The government correctly observes that the Eleventh Circuit has upheld the use of money judgment forfeiture orders even though there is no express statutory basis for them. Defendant nevertheless preserves his objection to the use of money judgment forfeiture in the context of this case, and particularly in the context of repaid loans and where restitution is ordered for any unpaid loan.

First, money judgment is a form of substitute asset forfeiture. *See* Fed. R. Crim. P. 32.2(e) (providing for imposition of forfeiture money judgment as substitute asset); *see also United States v. Waked Hatum*, 999 F.3d 1156, 1166 (11th Cir. 2020) ("[F]orfeiture money judgment is available because 21 U.S.C. § 853(p) permits substitute forfeiture where, as here, a defendant does not retain" the property subject to direct forfeiture.). But where a repaid loan is concerned, there is no lost or dissipated asset, the item or money has simply been returned (as in the car rental example).

Thus, even treating money judgment forfeiture as a form of substitute asset forfeiture—and Defendant disputes such a reading of the statute and notes that certiorari review may still be sought in *Waked Hatum* as the case remains on appeal after remand—there is no substitute asset to forfeit where the loan has been repaid and the loaned item returned. Treating the absconder/dissipator the same as the loan repayor makes no coherent or logical sense in this context, whatever value it may have in money laundering or other instrumentality cases. *See id*.

Second, denying Defendant the constitutional right to a jury trial and a beyond a reasonable doubt proof standard, including as to uncharged conduct, defies the Sixth Amendment principles recently reiterated by the Supreme Court in *Erlinger*, such that Defendant preserves this issue dispute the prevailing interpretation of *Libretti v. United States*, 516 U.S. 29 (1995), excising forfeiture from the protection of the Sixth Amendment. *Id*. at 49 ("right to a jury determination of forfeitability is merely statutory in origin").

CONCLUSION

This Court should deny the government's motion for a preliminary order of forfeiture of $443,575. Alternatively, this Court should reduce the forfeiture amount to the amount of the defendant's actual gain, if any, attributable to any count of conviction.

Respectfully submitted,

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