UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-20290-CR-BLOOM

UNITED STATES OF AMERICA

v.

ERIC DEAN SHEPPARD,

Defendant.
_________________________________/

UNITED STATES' REPLY MEMORANDUM IN FURTHER SUPPORT OF ITS AMENDED MOTION FOR PRELIMINARY ORDER OF FORFEITURE

The United States of America (the "United States" or "Government") files this reply to Defendant Eric Dean Sheppard's Response in Opposition to Forfeiture [ECF No. 275] and in support of the United States' Amended Motion for Preliminary Order of Forfeiture [ECF No. 252] and provides the following factual and legal bases:

1. THE UNITED STATES IS AUTHORIZED TO FORFEIT THE DEFENDANT'S PROCEEDS OF HIS FRAUDULENTLY OBTAINED PPP LOANS.

The Defendant attempts to minimize his culpability by arguing that the Court should limit forfeiture to only the PPP loans he fraudulently obtained March 11 and March 12, 2021, PPP loans funded by Northeast Bank and Cross River Bank. *See generally* Def. Resp. in Op., ECF No. 275. He makes this flawed argument because, in the Defendant's view, the jury did not convict him of any other fraudulent conduct. The Court's ruling at the Defendant's sentencing hearing contradicts his argument.

The Defendant is correct that the property subject to forfeiture is based on the count of conviction. *See* 18 U.S.C. §§ 981(a)(1)(C) & 982(a)(2)(A). The Defendant's argument, however, is fatally flawed because where a defendant is convicted of wire fraud scheme—as is the case here—the Court is free to considerer all conduct involving the same fraud when determining a forfeiture amount, so long as the government proves by a preponderance of the evidence that the property to be forfeited was linked to the conduct. *See United States v. Holland*, 722 F. App'x

919, 982–929 (11th Cir. 2019).

The Court should disregard the Defendant's arguments because, contrary to the Defendant's assertions, there are no disputes as to which fraudulently obtained loans pertain to his various counts of conviction. As outlined in the Government's Amended Motion, the Defendant's fraudulent actions aimed to harm the PPP loan program; impacting unsuspecting financial institutions who approved and funded his loan applications based on straight up lies. *See* Gov. Amended Motion 8-15, ECF No. 255. As such, the jury convicted the Defendant of four counts of wire fraud—all of which alleged a fraud scheme spanning from April 2020 to March 2021. Specifically, there is no dispute that the jury convicted the Defendant of defrauding Northeast Bank and Cross River Bank in procuring the March 11 and March 12, 2021 PPP loan proceeds. The Defendant's grossly misrepresented PPP loan applications resulted in the Defendant receiving $296,988 in fraudulently obtained PPP loan proceeds from the two banks.

Similarly, the Court cleared up any perceived dispute regarding the Defendant's fraudulent conduct against WebBank in April of 2020 when it determined that his conduct against the bank was part of his fraud scheme—a scheme spanning from April 2020 to March 2021, which the jury found him guilty of executing. The Defendant defrauded WebBank, receiving $146,587 in fraudulently obtained PPP loan proceeds.

As such, the *maximum* amount of the Defendant's fraud proceeds that are subject to forfeiture under either of the applicable forfeiture statutes—18 U.S.C. §§ 981(a)(1)(C) and 982(a)(2)(A)—is $443,575.[1] As noted by the Defendant and in the Government's Amended Motion, 18 U.S.C. § 981(a)(2) provides that certain repayments of loans obtained through fraud may be deducted from the forfeiture amount. However, because the Defendant's fraud proceeds are subject to forfeiture under § 982(a)(2)(B), which does not provide for an offset to forfeiture, the Court must enter an order forfeiting the full amount of fraud proceeds he obtained. *See* § 2, *infra*.

[1] In the Government's Amended Motion, the property subject to forfeiture was subject to change because, at the time the Government filed its Amended Motion, the Defendant's objection to relevant conduct was unresolved. The Court made its determination at the sentencing hearing held on June 7, 2024.

2. DEFENDANT RECEIVED ADEQUATE NOTICE OF THE GOVERNMENT'S INTENT TO FORFEIT THE FULL AMOUNT OF HIS FRAUD PROCEEDS

As previously mentioned in the Government's Amended Motion, Eleventh Circuit precedent states that the forfeiture allegations of an indictment are merely notice provisions notifying the defendant that the government seeks to forfeiture property. *See* Amended Motion n. 6 (citing *United States v. Diaz*, 190 F.3d 1247, 1257 (11th Cir. 1999) ("The essential purpose of the notice [required by Rule 32.2(a)] is to inform the defendant that the government seeks forfeiture . . . ."); *United States v. Wall*, 285 F. App'x. 675, 684 (11th Cir. 2008) (indictment that improperly cited § 982(a)(2) instead of § 981(a)(1)(C) was nevertheless sufficient to put defendants on notice that government was seeking forfeiture of the proceeds of the mail and wire fraud offenses); *see also*); *United States v. Silvious*, 512 F.3d 364, 370 (7th Cir. 2008) (erroneous citation in the indictment did not prevent the defendant from receiving adequate notice as required by under Rule 32.2(a)).

Regardless, any error was cured when the government filed its Amended Motion seeking to forfeit the Defendant's fraud proceeds pursuant to § 982(a)(A)(B) before the Court entered a final judgment. *But see, United States v. Annabi*, 746 F.3d 83, 85–86 (2d Cir. 2014) (holding that where the government fails cite an applicable forfeiture provision in the indictment, *and* fails to correct that error prior to the entry of final judgment, forfeiture is limited to what is authorized in the indictment, and of which the defendant had notice)).

a. The Government never changed its theory to forfeit the Defendant's fraud proceeds.

The Defendant attempts to improperly limit forfeiture of his ill-gotten gains by claiming his fraud proceeds are subject to forfeiture *only* under § 981(a)(1)(C) and not forfeitable under § 982(a)(2)(A). The Defendant quibbles that the Superseding Indictment fails to cite § 982(a)(2)(A), complaining the government changed its forfeiture theory.

Under both § 981(a)(1)(C) and § 982(a)(2)(A), the Court "shall order" forfeiture of the Defendant's proceeds resulting from his wire fraud scheme—which totals $443,575. *See* § 1, *supra*. Both statutes provide for a proceeds forfeiture theory, authorizing the government to forfeit the Defendant's fraud proceeds. *Cf*. 18 U.S.C. § 982(a)(1) (providing a different forfeiture theory, "[t]he court, in imposing sentence on a person convicted of [money laundering], shall order that the person forfeit to the United States any property, real or personal, ***involved in such offense***, or any property traceable to such property.").

The calculation of the amount of the Defendant's fraud proceeds subject to forfeiture is the same under either § 981(a)(1)(C) or § 982(a)(2)(A) in that the Court looks to the Defendant's counts of conviction and determines what property he obtained as a result of his fraud scheme. As noted by the Defendant and in the Amended Motion, the total amount of proceeds forfeitable under § 981(a)(1)(C) may be reduced by certain loan repayments made by the Defendant prior to sentencing *if* § 981(a)(1)(C) was the *only* statute authorizing forfeiture of the Defendant's fraud proceeds. But, as noted in the Government's Amended Motion, the Defendant's wire fraud scheme also affected financial institutions—that is the private lenders he duped into funding his grossly misrepresented PPP loan applications. Thus § 982(a)(2)(A) is another statute the government may use to forfeit the Defendant's fraud proceeds under a proceeds forfeiture theory.

Moreover, a common sense reading of the Superseding Indictment dispels the Defendant's argument that it fails to mention his fraud scheme harmed a financial institution, rendering it unconstitutional and limiting forfeiture solely to § 981(a)(1)(C). *See* Def.'s Resp. 4. This too is nonsensical for a number of reasons, the most obvious of which is that the Superseding Indictment states that "[i]f a PPP loan application was approved, the lender funded the PPP loan using its ***own money*** . . . ." *See* Superseding Indictment 2 (emphasis added).

As such, the Defendant's claim that the government changed its forfeiture theory is baseless and should be rejected by the Court.

b. The Defendant's claim that the government violated his Due Process rights because the Superseding Indictment did not cite § 982(a)(2)(A), failing to notify him of his maximum forfeiture exposure is nonsensical and disingenuous.

Unpersuasively, the Defendant argues that Government's failure to cite § 982(a)(2)(A) in the Superseding Indictment did not notify him of his maximum forfeiture exposure, violating his Due Process rights. The government is not required to specify that it is seeking a money judgment, let alone specify the amount of that money judgment. *See* Fed. R. Crim. P 32.2(a); *see also United States v. Kalish*, 626 F.3d, 165, 169 (2d Cir. 2010). Sure, the government at times may request that the grand jury make a finding regarding the forfeitability of certain assets in order to *restrain* those assets to *preserve* their availability for criminal forfeiture. *See Kaley v. United States*, 571

U.S. 320, 330-331 (2014). But, the grand jury need not make a probable cause finding of a notice provision as the Defendant suggests.

Here, the Government went above and beyond what is required in order to notify the Defendant of its intent to forfeit the *entirety* of the proceeds he received by fraudulently obtaining EIDL and PPP loans—$893,145. Specifically, and explicitly, the Superseding Indictment notified the Defendant that:

> [t]he property subject to forfeiture as a result of the alleged offenses includes, but is not limited to . . . a sum of [ ] $893,145 in U.S. currency, which represents the total amount of funds constituting, or derived from, proceeds traceable to the alleged offenses and ***fraud scheme***, which may be sought as a forfeiture money judgment.

See Superseding Indictment 9 (emphasis added). As such, it cannot be said that the Defendant's Due Process rights were violated when the Superseding Indictment *explicitly* stated the Government's intent to seek a forfeiture money judgment in the amount of $893,145—his *maximum* forfeiture exposure prior to conviction.

Despite that, the Defendant claims that the Supreme Court's recent holding in *Erlinger v. United States*, No. 23-370, 2024 WL 3074427 (U.S. June 21, 2024), calls into question the constitutionality of the forfeiture notice provisions of his Superseding Indictment. The court in *Erlinger*—a case concerning the Armed Career Criminal Act ("ACCA") and *not* forfeiture—ruled that the Fifth and Sixth Amendments require a unanimous jury verdict to determine, beyond a reasonable doubt, whether a defendant's past offenses qualify as "separate occasions" under ACCA. This finding, the Supreme Court reasoned, increases the potential mandatory minimum and maximum imprisonment sentence, so it must be decided by a jury, not a judge.

The Defendant's case here is clearly distinguishable. First, the Defendant's conviction is not subject to ACCA and *Erlinger* is not relevant to forfeiture. Next, even if *Erlinger* applied to forfeiture notice provisions, the Defendant's potential forfeiture exposure has not increased at any point during the proceedings. Indeed, at every stage of the case from Indictment to Superseding Indictment to conviction to sentencing, the Defendant's potential forfeiture exposure has always been the total amount of proceeds fraudulently obtained from his fraud scheme—that is the funded EIDL and PPP loans totaling $893,575.

Even when the government specifies the amount of a forfeiture money judgment in the forfeiture allegations, it is not limited to seeking that amount when moving for a forfeiture order. *See United States v. Rosen*, 263 F. App'x 16, 38 (11th Cit. 2008) (affirming entry of a forfeiture money judgment that was approximately $500,000 greater than the amount listed in the forfeiture allegations of the superseding indictment); *United States v. Decent*, 292 F.3d 703, 706 (11th Cir. 2002) ("[A] change in the jury instructions concerning forfeiture does not affect the determination of guilty or innocence and, accordingly, does not modify the elements of the offense charged. For these reasons, the district court's modified jury instructions did not constructively amend the indictment.). Further, because forfeiture is based on the counts of conviction, the amount fo the forfeiture money judgment authorized by statute may change when the defendant is not found guilty on all counts of the indictment.

Nonetheless, the Defendant's maximum forfeiture exposure is the same under either of the applicable forfeiture statutes, § 981(a)(1)(C) or § 982(a)(2)(A)—and remained the same until the jury returned a mixed verdict.

3. <u>REPAYMENT OF LOANS DOES NOT PRECLUDE FORFEITURE OF ILL-GOTTEN PROCEEDS</u>

The Defendant wrongly claims that only financial gains or profits are forfeitable and that the absence of any gains after he repaid his fraudulently obtained PPP loans in the eleventh hour before his sentencing hearing obviated the government's entitlement to forfeiture. Here, the total amount of fraud proceeds the Defendant's obtained is $443,575, and are subject to forfeiture pursuant to both §§ 981(a)(1)(C) and 982(a)(2)(A). *See generally* Gov.'s Amended Mot. Neither § 981(a)(1)(C) nor § 982(a)(2)(A) limit forfeiture to the Defendant's profits or gains. The statutes provide for mandatory forfeiture of the Defendant's fraud proceeds. 18 U.S.C. §§ 981(a)(1)(C) & 982(a)(2)(A).

Importantly, forfeiture serves a vital role in criminal cases and "help to ensure that *crime does not pay*: [forfeitures] at once punish wrongdoing, deter future illegality, and "lesson the economic power" of criminal enterprises. *See Kaley v. United States*, 571 U.S. 320, 323 (internal quotes omitted) (emphasis added). The concept put forth by the Defendant would only encourage defendants to dissipate assets to avoid forfeiture. *See United States v. Ginsburg*, 772 F.2d 798 ,802 (7th Cir. 1985). And, that concept clashes with congressional intent, especially since courts are required to liberally construe provisions of the criminal forfeiture statutes to fulfill their remedial purposes of aiding, rather than impeding, the government's efforts to punish and deter criminal activity by removing financial incentives for committing crimes. *See* 21 U.S.C. § 853(o) ("The provisions of this section shall be liberally construed to effectuate its remedial purposes.").

4. FORFEITURE MONEY JUDGMENTS ARE AUTHORIZED

Although the Defendant concedes that forfeiture money judgments against defendants are permissible, he argues the Court should disregard Eleventh Circuit precedent and deny the Government's Amended Motion because there is no express statutory basis for forfeiture money judgments; particularly where the loans are repaid.

Indeed, the Eleventh Circuit recently reaffirmed that forfeiture money judgments remain permissible. *United States v. Waked Hatum*, 969 F.3d 1156, 1163-64 (11th Cir. 2020) ("Unless and until Congress, the Supreme Court, or this Court sitting en banc changes the law of forfeiture, we will follow this Court's precedent permitting forfeiture money judgments."), *cert. denied sub nom. Hatum v. United States*, 142 S. Ct. 72 (2021); *see also United States v. Elbelawy*, 899 F.3d 925 (11th Cir. 2018) (permitting forfeiture money judgment for proceeds). In *Waked*, the Eleventh Circuit specifically rejected the argument that "forfeiture money judgments are not authorized by statute." *Id.* at 1163. Moreover, the Eleventh Circuit in *Waked* rejected the argument that forfeiture money judgment cannot be order when loans are repaid stating:

> Even if we agreed that laundered funds voluntarily returned to the victim [(the bank)] are not always subject to forfeiture, [ ] that is not what happened here. Mr. Waked does not argue that he "returned" the fraudulently obtained funds out of the goodness of his heart. His laundering scheme depended on the Bank being repaid in full . . . .

See id. at 1164 (noting that the Ninth Circuit in *United States v. Boulware*, 384 F.3d 794 (9th Cir. 2004) did not allow for forfeiture off-set of repaid loans in the context of § 982(a)(2), and applied similar logic to Mr. Waked's money laundering case).

The Defendant also claims that the Court cannot order a forfeiture money judgment because forfeiture money judgements are a form of substitute asset forfeiture, and submits that his PPP loan repayments means there is no lost or dissipated asset. None of the applicable forfeiture statutes contain language limiting criminal forfeiture to whatever tainted property (in this case PPP fraud proceeds) the Defendant has left in his possession by the time he is convicted. *See United States v. Blackman*, 746 F.3d 137, 144 (4th Cir. 2014) (citing *United States v. Hampton*, 732 F.3d 687, 692 (6th Cir. 2013)); *see also United States v. Amend*, 791 F.2d 1120, 1127 n.6 (4th Cir. 1986) ("[T]he government need not have offered evidence that the forfeitable assets were still in existence at the time of [defendant's] conviction.")). "To conclude otherwise would enable wrongdoers to avoid forfeiture merely by spending their illegitimate gains prior to sentencing." *Id*. (citation omitted). Imposing forfeiture on defendants who have divested themselves of forfeitable assets is necessary to give full effect to the penal purposes of the forfeiture statute. *See United States v. Newman*, 659 F.3d 1235, 1243-44 (9th Cir. 2011).

It's important to note that the Defendant did not attempt to repay the loans until after he was months after he was originally indicted in June 2022. And, certainly did not make any significant repayments until he was nearing trial in late 2023. To the Defendant's credit, he finally finished repaying the remaining EIDL and PPP loan a mere days before his sentencing hearing. Even if we assume the Defendant transferred his fraud proceeds back to the banks in order to repay his PPP loans rather than keeping them for himself, that repayment does not eliminate his forfeiture obligation or the government's interest in those fraud proceeds. *See* 21 U.S.C. § 853(c) ("All right, title, and interest in [certain forfeitable] property . . . vests in the United States upon the commission of the act giving rise to the forfeiture . . . and any such property that is subsequently transferred to a person other than the defendant . . . shall be ordered forfeited to the United States . . . .").

Instead, when forfeitable property is no longer available, the government may seek a forfeiture money judgment under Fed. R. Crim. P. 32.2(b)(1)(A), as sought in this case, and may seek to satisfy outstanding forfeiture money judgments by forfeiting any of the defendant's assets as a substitute asset. *See Waked*, 969 F.3d at 1166 (holding defendant's repayment of loans using funds subject to forfeiture places the forfeitable property with a third-party).

Further, The Defendant's arguments that forfeiture money judgments must be submitted to the jury are in direct contrast of Eleventh Circuit precedent. *See* Fed. R. Crim. P. 32.2(b)(1)(A) ("If the Government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay."); *see also United States v. Padron*, 527 F.3d 1156, 1162 (11th Cir. 2008) (holding that Federal Rules of Criminal Procedure "explicitly contemplate the entry of money judgments in criminal forfeiture cases"); *United States v. Curbelo*, 726 F.3d 1260, 1278 (11th Cir. 2013) ("We remain persuaded that the court, not a jury, should determine the amount of a money judgment forfeiture."). Likewise, substitute asset forfeiture under 21 U.S.C. § 853(p) is mandatory, and there is no right to have a jury determine whether substitute assets may be forfeited. *See United States v. Alamoudi*, 452 F.3d 310, 314 (4th Cir. 2006) ("an order authorizing forfeiture of *substitute* assets pursuant to § 853(p) does not require a jury determination because it does not at all increase the amount of forfeiture. Rather, § 853(p) simply requires the court to allow the Government to seize substitute property when the defendant has placed the assets initially sought—and to which the Government is legally entitled—beyond the court's reach") (emphasis in original) (citations omitted).

THEREFORE, the United States respectfully requests the Court disregard the Defendant's arguments and grant the Government's Amended Motion.

Respectfully submitted,

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