UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 22-20290-CR-BLOOM

UNITED STATES OF AMERICA

v.

ERIC DEAN SHEPPARD
_________________________________/

SHEPPARD'S MEMORANDUM REGARDING RESTITUTION

The government's restitution arguments, see ECF#258, are founded not on the theory that the *offenses of conviction* caused economic loss. Instead, the government seeks restitution for (1) a dismissed offense, *i.e.*, Count 1 of the original indictment alleging fraud regarding a 4/15/2020 PPP loan application, ECF#3 at 6, that was abandoned in the superseding indictment, ECF#189 at 7, and that the jury's verdict confirms was not part of the substantive offenses of conviction or even the alleged criminal scheme, given acquittals as to all conduct prior to 2021, ECF#190, and (2) extraordinary expenditures (legal fees) allegedly incurred by a witness (Cupersmith) subpoenaed by the government, who is not a victim under any count of conviction.

The statutory limits of restitution would be unwarrantedly extended by the government's request. The witness's claim of entitlement to attorney fees would constitute witness remuneration well beyond the scope of the Mandatory Victim Restitution Act (MVRA), 18 U.S.C. § 3663A. The Court should deny the restitution requests.

As relevant here, the MVRA addresses only victims proximately harmed by of specified Title 18 offenses of conviction and scheme elements proven applicable to the conduct. *United States v. Brown*, 665 F.2d 1239, 1252 (11th Cir. 2011); *United States v. Dickerson*, 370 F.3d 1330, 1341 (11th Cir. 2004)). Restitution awards "must be based on the amount of loss *actually* caused by the defendant's conduct," and "[t]he government bears the burden of proving the amount of the loss." *United States v. Huff*, 609 F.3d 1240, 1247 (11th Cir. 2010) (internal citation omitted; emphasis in original). The government must prove both proximate and but for causation of actual loss. *Id.*; 18 U.S.C. § 3663A(a)(2). "Restitution is not to provide a windfall for crime victims." *United States v. Martin*, 803 F.3d 581, 594 (11th Cir. 2015) (citations and internal quotation marks omitted).

The 2020 PPP Loan

The jury acquitted Sheppard of all loan applications submitted before 2021. These acquittals show that the jury found that the criminal scheme did not stretch back to 2020. Yet the government seeks restitution for a PPP loan issued in April 2020. That loan was not part of the criminal scheme found by the jury, so the government cannot seek restitution and forfeiture for the loan—the government cannot recover for conduct that has not been found to be criminal.

The Eleventh Circuit "has cautioned that 'the amount of loss for restitution purposes will not always equal the amount of loss under the sentencing guidelines' and courts must be careful to narrowly tailor restitution.'" *United States v. Kreitman*, 773 F. App'x 1073, 1077 (11th Cir. 2019) (quoting *United States v. Bane*, 720 F.3d 818, 827 (11th Cir. 2013)); *see United States v. Hesser*, 800 F.3d 1310, 1332 (11th Cir. 2015) (reversing restitution order as to tax fraud convictions where sentencing court went beyond offense of conviction; holding that "a district court is only authorized to order restitution in the amount of the actual losses the defendant causes *in committing [an] offense*") (citing *United States v. Nolen*, 472

F.3d 362, 382 (5th Cir.2006); *United States v. Campbell*, 106 F.3d 64, 69–70 (5th Cir. 1997)) (emphasis added). "Without an anchor to the offense of conviction, the government is left only with distinct, unrelated conduct for which separate charges should have been brought." *United States v. Amedeo*, 370 F.3d 1305, 1322 (11th Cir. 2004). After all, "[a] federal district court has no inherent authority to order restitution, and may do so only as explicitly empowered by statute." *United States v. Valladares*, 544 F.3d 1257, 1269 (11th Cir. 2008) (quoting *United States v. Dickerson*, 370 F.3d 1330, 1335 (11th Cir. 2004)).

Cupermith's Legal Fees

For two overarching reasons, the government is not entitled to recover $220,000 in legal fees incurred by Neal Cupersmith. *First*, Cupersmith is not a victim of any offense of conviction, as that term is used in the MVRA. This Court acquitted Sheppard of criminal conduct relating to his alleged forgery of Cupersmith's name, concluding that the use of Cupersmith's name bore an insufficient nexus to the wire fraud. To be sure, Cupersmith's testimony was germane to the now-dismissed aggravated identity counts, but the government cannot obtain restitution on a claim it *lost*. *Second*, Cupersmith's high legal fees, even if recoverable, are unjustified and unsupported.

The government seeks restitution for legal fees of more than $220,000 incurred by Neal Cupersmith as a subpoenaed witness. The claim for attorney's fees is set forth in billing statements with notable billing rates of $950 and $825 per hour, for services that are not explained.

The MVRA does not apply to witnesses who choose to spend nearly a quarter of a million dollars to pursue what amounts to a private prosecutor role or to otherwise oppose the defendant's trial defenses, particularly when the witness suffered no economic loss from the charged offenses. Neither the statute nor the case law the government cites supports the request.

To be a victim under the MVRA, the claimant must have suffered a harm that "'directly and proximately'" results from the commission of the defendant's offense. *United States v. Bane*, 720 F.3d 818, 827 (11th Cir. 2013) (quoting 18 U.S.C. § 3663A(a)(2).); *accord United States v. Washington*, 434 F.2d 1265, 1268 (11th Cir. 2006)). To meet this standard, the government "must show not only that a particular loss would not have occurred but for the conduct underlying the offense of conviction, but also that the causal connection between the conduct and the loss is not too attenuated (either factually or temporally)." *United States v. Cutter*, 313 F.3d 1, 7 (1st Cir. 2002). *See United States v. Robertson*, 493 F.3d 1322, 1334 (11th Cir. 2007) (holding district court erred in concluding a victim was eligible for restitution under the MVRA where defendant's fraud did not proximately cause the victim's loss); *Robers v. United States*, 572 U.S. 639, 645 (2014) (Section 3663A(a)(2) has a proximate cause requirement involving a proximately close connection between the conduct of conviction and the claimed loss).

Even as to victims who *directly* suffer pecuniary harm from the commission of an offense, the MVRA limits recoverable expenses to "lost income and *necessary* child care, transportation, and other expenses." 18 U.S.C. § 3663A(b)(4) (emphasis added). Under the Restitution Act, 18 U.S.C. § 3664(e) "[t]he burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government." 18 U.S.C. § 3664(e). "[T]he government bears the burden of supporting its loss calculation with 'reliable and specific evidence.'" *United States v. Cabrera*, 172 F.3d 1287, 1292 (11th Cir. 1999). Speculation is barred. Critically, a "victim's unsupported loss estimate [is] insufficient, on its own, to substantiate a restitution amount." *United States v. Steele*, 897 F.3d 606, 613 (4th Cir. 2018) (citing *United States v. Mullins*, 971 F.2d 1138, 1147 (4th Cir. 1992)). "[E]xcessive restitution awards cannot be excused by harmless error; every dollar must be supported by record evidence.'" *United States v. Kim*, 988 F.3d 803, 811 (5th Cir. 2021) (quoting *United States v. Sharma*, 703 F.3d 803, 823 (5th Cir. 2012)). The government has not justified recovery for the attorney time or the rates billed by Cupersmith's attorneys.

Cupersmith cannot claim to be a victim of the offenses of conviction (wire fraud). He did not make a loan to the defendant; instead, he admitted he was paid for any services he provided to the defendant. Most importantly, the defendant was acquitted of the charge of aggravated identity theft, and that charge did not involve pecuniary harm to Cupersmith, in any event.

The government frequently subpoenas witnesses to testify and produce documents for trial, but their status as a subpoenaed witness does not render them MVRA victims. Governing case law as to witnesses in federal criminal cases shows that Cupersmith does not qualify as an MVRA victim warranting restitution.

In the cases cited by the government, persons not directly injured by the defendant's offense conduct nonetheless qualified as victims because they were actually subrogated to the victims and became the ultimate financial victims of the offense, such as a successor lender or other purchaser/investor directly harmed by a fraud. *See United States v. Martin*, 803 F.3d 581, 593 (11th Cir. 2015) (successor lenders who had purchased fraudulently procured mortgages from the lenders who were defrauded); *In re Stewart*, 552 F.3d 1285, 1289 (11th Cir. 2008) (home buyers defrauded into paying higher mortgage fees). Cupersmith in no way fits the category of a subrogated or other direct financial victim of the offense of conviction as in the cases cited by the government.

To the extent the government claims that the offenses of conviction were the proximate cause of an MVRA compensable loss to Cupersmith for attorney fees, the restitution claims and the facts offered by the government do not support imposing such additional financial penalties in this case. *See United States v. Medina*, 485 F.3d 1291, 1304 (11th Cir. 2007).

WHEREFORE, Defendant Eric Dean Sheppard requests that the Court sustain his objections to the government's restitution claims after hearing any relevant evidence at a hearing, including as to claims made by Cupersmith.

Respectfully submitted,

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