

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 23-60173-CR-KMW(s) (GRAHAM)

UNITED STATES OF AMERICA

vs.

**CAROLYN DENISE WADE and
TRACE D. WADE,**

Defendants.

/

**UNITED STATES' REPLY TO
DEFENDANT TRACY D. WADE'S RESPONSE IN OPPOSITION
TO THE UNITED STATES' NOTICE OF INTENTION TO INTRODUCE EVIDENCE
OF OTHER CRIMES, WRONGS, OR ACTS, PURSUANT TO FED. R. EVID. 404(b)(2)**

Introduction

The United States of America, by and through its undersigned counsel, hereby replies to “Defendant Tracy Wade’s Response in Opposition to the Government’s Notice of Intent to Introduce Evidence of Other Crimes, Wrongs, or Acts Pursuant to Fed. R. Evid. 404(b)(2),” which Defendant Tracy D. Wade (“Defendant”) filed on September 24, 2024 (DE 156) (the “Response” or “Resp.”).¹

In the Response, Defendant asserts that the Wade Funeral Home EIDL Applications are inadmissible under Rule 404(b) for two reasons: (1) the evidence is “not probative of any issue other than Mr. Wade’s character;” and (2) “the probative value of the evidence [is] substantially outweighed by unfair prejudice and confusion of the issues.” However, as explained herein, the Response fails to rebut the legal basis for admitting the Wade Funeral Home EIDL Applications

¹ The government filed the 404(b) Notice on August 22, 2024 (DE 135). During a telephonic status conference on September 23, 2024, the Court asked defense counsel if it intended to respond to the 404(b) Notice. Defense counsel advised that it would respond to the 404(b) Notice no later than September 24, and the Court permitted the government to file any reply by 1:00 p.m. on Friday, September 27.

that the government set forth in its 404(b) Notice (DE 135). Accordingly, the Court should admit the Wade Funeral Home EIDL Applications under Rule 404(b)(2).

Argument

1. The Response fails to rebut that the Wade Funeral Home EIDL Applications are relevant to an issue other than Defendant's character.

In conclusory form, the Response asserts that “the evidence of the EIDL loan applications is not probative of any issue other than Mr. Wade’s character, which is prohibited under Fed. R. Evid. 404(a)(1).” Resp. at 3. However, the Response does not directly address, much less rebut, the grounds set forth in detail in the 404(b) Notice upon which the government seeks to properly admit the Wade Funeral Home EIDL Applications (that is, proof of motive, intent, knowledge, absence of mistake or accident, and identity with respect to the charged offenses). *See* 404(b) Notice (DE 135) at 9-11. Instead, the Response offers defenses that raise questions of fact for the jury to consider, not a legal basis for the Court to exclude the evidence in the first place under Rule 404(b), which is a rule of inclusion.

For example, the Response suggests that the Wade Funeral Home EIDL Applications are inadmissible because the inflation of income reflected therein “most likely resulted from a mistake by Mr. Wade or caused by the software guiding the online application process.” Resp. at 3. That is a question of fact for the jury to consider. For the threshold issue of admissibility, as the government articulated in the 404(b) Notice, the Wade Funeral Home EIDL Applications are relevant to show, among other things, Defendant’s motive and intent to obtain pandemic assistance from the SBA that he was not entitled to receive, which is the essence of the conduct charged in the Superseding Indictment.

Although the PPP and EIDL were different programs through which the SBA offered pandemic assistance to small businesses, the 404(b) evidence shows that, almost immediately after

the SBA was authorized to provide such assistance at the start of the pandemic in 2020, Defendant submitted two separate EIDL applications for pandemic relief, each of which inflated Wade Funeral Home's revenue and expenses (i.e., income) by hundreds of millions of dollars. By inflating income in this way, Defendant's applications sought not just \$80,100 from the SBA (the amount of the EIDL loan that Defendant ultimately received), but the *maximum* available amount under the pandemic EIDL program—\$150,000 for each application (\$300,000 total). Defendant's two EIDL Applications, which Defendant certified as true under penalty of perjury, are therefore highly probative of Defendant's motive and intent with respect to the PPP loan applications that, as alleged in the Superseding Indictment, likewise sought for each Defendant the maximum PPP loan available (to a sole proprietorship) based on inflated gross income.

Additionally, the government articulated in the 404(b) Notice that evidence of Defendant's prior acts of inflating Wade Funeral Home's income in the EIDL applications is properly admissible under 404(b) to show that the subsequent inflation of income in the charged offenses (that is, the Tracy Wade, Carolyn Wade, and Wade Funeral Home PPP Applications) was not a mistake or accident. 404(b) Notice (DE 135) at 10. The Response does not rebut this point either.

The Response also suggests the Wade Funeral Home EIDL Applications are inadmissible because "Mr. Wade's applying for an EIDL does not suggest that Mr. Wade was familiar with the PPP loan application process." Resp. at 4. This too is a defense that raises a question of fact for the jury. For purposes of admissibility, the government explained in the 404(b) Notice that the Wade Funeral Home EIDL Applications are admissible to show Defendant's knowledge with respect to the charged conduct because the EIDL records included the same type of information supplied in the Wade Funeral Home PPP Application, including the number of employees. *See* 404(b) Notice (DE 135) at 10. In the Wade Funeral Home EIDL Application submitted on April 10, 2020,

Defendant represented (under penalty of perjury) that Wade Funeral Home had 10 employees in 2020, which was the maximum number of employees for which a business could receive forgivable advance EIDL funds of \$1,000 per employee.² Yet, in the Wade Funeral Home PPP Application, which was based on the business's payroll, the application represented that Wade Funeral Home had 45 employees in 2020. As explained in the 404(b) Notice, this evidence is admissible to show that Defendant knew that Wade Funeral Home did not have "45" employees, and that this false representation in the Wade Funeral Home PPP Application was not a mistake or accident (but an intentional misrepresentation to apply for a PPP loan of over \$700,000).

2. The Response fails to show that the Wade Funeral Home EIDL Applications are substantially outweighed by unfair prejudice under Rule 403.

The Response asserts the Wade Funeral Home EIDL Applications are "excludable under Fed. R. Evid. 403 because the probative value of the evidence [is] substantially outweighed by unfair prejudice and confusion of the issues." However, the Response does not articulate or otherwise identify any unfair prejudice to Defendant. As stated in the 404(b) Notice, relevant evidence is inherently prejudicial, which is why Rule 403 concerns "unfair" prejudice and "cannot be simplistically defined as evidence having adverse effects on a party's case." 404(b) Notice (DE 135) at 13 (quoting *Cauchon v. United States*, 824 F.2d 908, 914 (11th Cir. 1987)). Furthermore, any risk of jury confusion can be addressed by a limiting instruction from the Court, such as the Eleventh Circuit's pattern instruction on Rule 404(b) Evidence (*e.g.*, Instruction S4.1).

² In the second Wade Funeral Home EIDL Application, submitted on May 7, 2020, Defendant represented that Wade Funeral Home had 5 employees.

3. The Response does not distinguish the EIDL evidence offered under Rule 404(b) in this case from the EIDL evidence admitted at trial in *United States v. Stephanie Smith* under Rule 404(b).

The Response offers no distinction between this case and *United States v. Stephanie Smith* in which Judge Cohn admitted similar evidence of an EIDL application under Rule 404(b) for the same purposes upon which the government seeks to admit the evidence in this case. *See* Docket 23-CR-60203, ECF No. 58 (“Order re Admissibility of EIDL Application”) at 2-3). As in this case, the Judge Cohn noted that the “EIDL application [the Rule 404(b) evidence] was submitted several months prior to the Paycheck Protection Program (“PPP”) loan applications [alleged in the indictment] and provided the same type of information supplied in the PPP loan applications.” *Id.* at 1. As such, Judge Cohn found that “[t]he EIDL evidence is probative of the Defendant’s familiarity with the SBA’s processing of loan applications including both PPP loans and EIDL loans.” *Id.* at 2. Judge Cohn concluded that “the EIDL evidence bears strongly on the Defendant’s motive, intent, knowledge, identity, and absence of mistake with respect to the charged scheme to defraud” and “the probative value of this evidence is not substantially outweighed by the prejudicial effect.” *Id.* at 2-3. The Wade Funeral Home EIDL Applications are admissible in this case for the same reasons that the EIDL evidence was admitted at trial in that case.

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Conclusion

The evidence identified in the government's 404(b) Notice (DE 135) related to the Wade Funeral Home EIDL Applications is, to the extent not otherwise admitted, admissible pursuant to FRE 404(b)(2) as prior uncharged crimes, wrongs, and acts relevant to prove motive, intent, knowledge, absence of mistake or accident, and/or identity with respect to the offenses charged in the Superseding Indictment.

Respectfully submitted,

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