UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:08-cr-441-T-17MAP

PHILIP WILLIAM COON

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MOTION TO HAVE COAST BANK BORROWERS RECOGNIZED AS CRIME VICTIMS PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 3771 AND INCORPORATED MEMORANDUM OF LAW

The 104 Coast Bank of Florida borrowers listed on the attached Exhibit "A" (hereinafter "Borrowers") move this Court, pursuant to Title 18, United States Code, Section 3771, for an order establishing Borrowers as victims of the offense to which defendant Philip William Coon (hereinafter "defendant") has pled guilty, and state: 1. Borrowers are entitled to be recognized as "crime victims" pursuant to 18 U.S.C. §3771 (hereinafter the "Crime Victims' Rights Act" or "CVRA").

2. On November 5, 2008, during a hearing before this Court, Coon pled guilty to conspiracy to commit wire fraud and money laundering, in violation of 18 U.S.C. §371, as provided for in the plea agreement signed by defendant on October 8, 2008 (hereinafter "Plea Agreement").

3. What the defendant has admitted to is conspiring with a mortgage broker to charge an extra point on each of Borrowers' Coast Bank mortgages and then split the extra point with the mortgage broker.

4. The Plea Agreement at page 18 recites the following erroneous conclusion concerning the Borrowers' exposure for the extra point overcharge:

> "The additional one percent charged as a result of the conspiracy did not affect the amount paid by the borrower as the builder/seller was responsible for the payment of all closing costs."

5. To the contrary, Paragraph J.1 of the typical Coast Bank Construction Loan Agreement utilized for Borrowers' loans reads in pertinent part:

> "The Borrower shall pay, or provide payment for all costs of the closing of the Loan and all expenses incurred by the Lender with respect thereto, including but not limited to, . . . loan fees . . ".

Attached as Exhibit "B" is a typical Coast Bank Construction Loan Agreement.

6. Furthermore, Coast Bank required that each Borrower execute "Borrower's Authorization of Closing Funds," which on its face indicates that closings costs were being paid out of the loan proceeds. Attached as Exhibit "C" is a typical "Borrower's Authorization of Closing Funds."

7. Finally, the loan closing statements themselves for these loans reflect closing costs, including the loan fees, being paid out of the loan proceeds. Attached as Exhibit "D" is a typical loan closing statement.

8. Coast Bank and its successor, First Bank, have received loan payoffs from Borrowers which include the extra point overcharge which is the subject of the Plea Agreement or have foreclosed on Borrowers' loans and secured judgments including the extra point overcharge.

9. Pursuant to section (e) of the CVRA, a "crime victim" is defined, in relevant part, as "a person directly and proximately harmed as a result of the commission of a federal offense. . . "

10. Borrowers were directly harmed by the offense to which defendant has pled guilty in the Plea Agreement.

11. Due to the harm Borrowers have suffered as a result of defendant's offense, Borrowers should be recognized as "crime victims" pursuant to the CVRA, and be entitled to any restitution monies which defendant is required to pay under the Plea Agreement.

WHEREFORE, Borrowers request that the Court enter an order recognizing Borrowers as crime victims under 18 U.S.C. §3771.

MEMORANDUM OF LAW

a. The Borrowers are Victims of the Crime Entitled to Restitution

Congress has provided that a "crime victim" has "[t]he right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing. . . " 18 U.S.C. §3771(a)(4). Also, a "crime victim" has "[t]he right to full and timely restitution as provided in law." 18 U.S.C. §3771(a)(6). Furthermore, pursuant to section (d)(3) of the CVRA, "[t]he district court shall take up and decide any motion asserting a victim's right forthwith."

Borrowers file this motion in order to be properly recognized as crime victims so that they will be entitled to restitution as a result of defendant's plea of guilty to conspiracy to commit wire fraud and money laundering, in violation of 18 U.S.C. §371.

Congress has defined a crime victim, in relevant part, as "a person directly and proximately harmed as a result of the commission of a federal offense. . . "18 U.S.C. §3771(e). Therefore, under the CVRA, "a person must be directly harmed as a result of the offense and the harm must be proximate to the crime." United States v. Hunter, 2008 WL 53125 (D. Utah). Additionally, in order to determine who is a crime victim entitled to

restitution, federal courts consider whether there is a "causal link" between a defendant's conduct and the harms suffered by the individuals. See United States v. Bunn, 277 Fed. Appx. 25, 2008 WL 1984258 (2nd Cir., May 6, 2008).

In the instant action, defendant has pled guilty to wire fraud and money laundering in violation of 18 U.S.C. §371. The monies involved in such offenses were the borrowed funds of the Borrowers, and Borrowers are entitled to recover from defendant for their pecuniary loss from defendant's skimming of the extra point from the loan closings.

b. Coast Bank is not a Victim of the Crime

The Plea Agreement on page 19 speaks of the crime having resulted in a higher concentration of loans for Coast Bank in one particular area with one particular builder. However, the Board of Directors of Coast Bank was aware that this was occurring. Assuming arguendo that Coast Bank suffered damage as a result of the defendant's action, the fact is that Coast Bank is defunct, thus no restitution can be made to it.

First Bank purchased Coast Bank in December, 2007 at a steep discount in the wake of defendant's misdeeds and the civil litigation which ensued (mentioned on page 19 of the Plea Agreement) having become public knowledge. Coast Bank's stock at the beginning of 2007 approached $20.00 a share. Due to the public disclosure of the skimming perpetrated by defendant and the civil litigation which ensued, the price of the stock was driven down and First Bank on December 1, 2007 was able to acquire Coast Bank for $1.66 a share. In the process, it acquired a downtown office building and 20 well-located bank branches.

Some Borrowers have paid their mortgages in full, including the extra point overcharge which is the subject of the Plea Agreement. First Bank has entered into

workouts with many Borrowers, resulting in significant sums being paid to the bank. Other homes have been foreclosed upon and sold by First Bank, bringing in additional sums to the bank. First Bank is presently collecting deficiency judgments from several foreclosed Coast Bank borrowers, which judgments include the loan proceeds disbursed by Coast Bank which found their way into the pockets of the defendant. If this Court awards First Bank restitution from the defendant, First Bank would essentially be collecting this money twice.

CONCLUSION

For the foregoing reasons, the Borrowers respectfully request that this Court enter an order pursuant to 18 U.S.C. §3771(d)(3), finding that Borrowers are victims entitled to restitution pursuant to Section (B)(1) of the Plea Agreement; and granting the Borrowers restitution.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing on November 11, 2008, with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to Rachelle DesVaux Bedke, Assistant United States Attorney, (rachelle.bedke@usdoj.gov); James E. Felman, Kynes, Markman & Felman, PA, (jfelman@kmf-law.com), counsel for defendant; and Marcelino J. Huerta, III, (huertalaw@lawyers.com), counsel for defendant and a true and correct copy of the foregoing was furnished by regular U.S. mail to David Tremmel, Federal Probation Officer, Post Office Box 3905, Tampa, FL 33601.

LEVIN TANNENBAUM
1680 Fruitville Road
Suite 102
Sarasota, Florida 34236
Telephone: (941) 308-3157
Facsimile: (941) 316-0301
Attorneys for Borrowers

/s/ Alan E. Tannenbaum
Alan E. Tannenbaum, Esq.
Florida Bar No. 0259144