UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES

v. Criminal No. 2:20-cr-114-FTM-66MRM

CASEY DAVID CROWTHER
Defendant.
_______________________________/

DEFENDANT'S MOTION TO DISMISS INDICTMENT AND SUPPORTING MEMORANDUM OF LAW

NOW COMES the Defendant, Casey David Crowther through undersigned counsel, and respectfully moves this Honorable Court to dismiss the Indictment [D.E. 15] against him pursuant to Federal Rules of Criminal Procedure 7(c) and 12(b)(3)(B). Mr. Crowther incorporates below his accompanying Table of Contents, Table of Authorities and Memorandum of Law in support of his motion pursuant to Local Rule 3.01.

REQUEST FOR ORAL ARGUMENT

Pursuant to Local Rule 3.01, Mr. Crowther respectfully requests that oral arguments be scheduled on this Motion. Mr. Crowther does not anticipate more than one hour for argument.

WHEREFORE, as further set out in their accompanying memorandum of law, Mr. Crowther respectfully moves the Court to dismiss the Indictment.

Respectfully Submitted,

/s/ *Nicole H. Waid*____
Nicole H. Waid, Esq.
FISHERBROYLES, LLP
2390 Tamiami Trail North, Suite 100
Naples, Florida 34103
Florida Bar # 0121720
Phone: (202) 906-9572
Fax: (239) 236-1360
Email: nicole.waid@fisherbroyles.com

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INTRODUCTION

The Government Indictment is legally deficient, fails to state an offense for which Casey David Crowther ("**Crowther**") can be prosecuted, and should be dismissed for several reasons, which are demonstrated by the circumstances surrounding Crowther's arrest and the Indictment. The Government prematurely arrested Crowther on his birthday, apparently upon receiving information from a third party source that Crowther intended to sell a boat that he purchased earlier this year at a significant profit. Yet, there is absolutely no legal basis to seize this asset or any legal justification for Crowther's arrest, which was based upon a misguided understanding of how the Paycheck Protection Program ("**PPP**") operates.

In fact, as the sole principal and 100% owner of Target Roofing ("**Target**"), Crowther utilized the proceeds from the PPP loan for entirely legitimate, lawful, and appropriate purposes – i.e., to keep current employees on Target's payroll and to re-hire employees who had been previously laid off due to the Covid-19 global pandemic. Not only did Crowther properly and lawfully utilize the PPP Loan proceeds for these legitimate purposes, but he caused Target to spend millions of dollars above and beyond the amount of the loan on employee payroll in order to hire additional employees within the community. Crowther never made any misrepresentations on his PPP application and never intended to use PPP funds for the purchase of the subject boat. Crowther's purchase of the boat – which he intended to sell to a buyer shortly before his arrest – was a legal purchase and cannot be shown otherwise. Consistent with his legal right to do so, as the sole owner of Target, Crowther caused the company to properly record a loan for the purchase of the vessel to himself, which he was obligated to repay to Target. In fact, when he was arrested Crowther already had repaid the vast majority of the loan to Target.

Nevertheless, the Government's Indictment is legally deficient for several reasons. For one thing, the Indictment fails to state an offense for which Crowther can be prosecuted pursuant to FRCrP 12(b)(3)(B)(v). Crowther lawfully utilized the PPP loan proceeds fully consistent with the directives of the Cares Act and SBA Loan program. On this basis alone, the Indictment should be dismissed in its entirety. Separately, the Government's charge against Crowther for Bank Fraud (Count One) is legally deficient because the SBA definitively is not a "financial institution" within the meaning of 18 U.S.C. § 20. Moreover, Count One and Count Two (False Statement) fail to properly allege the requisite intent and fail to state an offense for which Crowther can be prosecuted, requiring dismissal. Counts Three and Four (Money Laundering) fail without a surviving specified unlawful activity and, independently, fail to state an offense requiring dismissal.

BACKGROUND

A. Paycheck Protection Program

The Coronavirus Aid, Relief, and Economic Security Act ("**Cares Act**") was signed into law on March 27, 2020 after President Trump declared the ongoing Coronavirus Disease 2019 ("**COVID–19**") pandemic of sufficient severity and magnitude to warrant an emergency declaration. See *Fed Reg Vol. 85, No. 73 at Section III 2. r*. Part of the law established a Paycheck Protection Program ("**PPP**") to assist businesses with retaining workers and maintaining payroll. The PPP was originally a $350-billion program intended to provide American small businesses with eight (8) weeks of financial assistance through 100 percent federally guaranteed loans. The loans are administered, approved and backed by the Small Business Administration ("**SBA**"). The program was expanded by the Paycheck Protection Program and Health Care Enhancement Act in late April of 2020, adding an additional $310 billion in funding. Because the Cares Act was pushed through Congress quickly to help support businesses and American workers, the rules and regulations regarding facilitation and implementation of the Program have changed several times. The Paycheck Protection Program Flexibility Act enacted in June of 2020 made important changes to the program, by allowing for more time to spend the funds, and making it easier to get a PPP loan fully forgiven. Details surrounding PPP loan forgiveness eligibility continue to change and new rules and regulations are consistently being published by the SBA. Included in the current coronavirus relief packages being debated on Capitol Hill right now are yet more revisions, rules and regulations for the PPP loan forgiveness process.

Currently, the SBA will forgive loans if all employee retention criteria are met and the funds are used for eligible expenses. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for the forgivable purposes described and the borrower's employee and compensation levels are maintained. The remedy for the utilization of funds that do not qualify for forgiveness is that they simply remain a loan. The SBA will direct the borrower to repay those amounts and the unforgiven amounts remain a low-interest loan through the facilitating lender. Under other SBA programs, the SBA guarantees up to 85% of loans of $150,000 or less and up to 75% of loans over $150,000. Pursuant to the Cares Act, however, the PPP loan proceeds are 100% guaranteed by the SBA. *See* *https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-5*.

B. Background of Case

On September 23, 2020, the Government published the Indictment. [D.E. 15]. The Indictment alleges that Crowther unlawfully obtained a PPP loan in an amount exceeding $2 million, with the intent to defraud the Government of such funds for improper personal gain. *See* *id*. at ¶¶ 10-12. The Indictment charges Crowther with (a) Bank Fraud (Count One); (b) False Statement to a Lending Institution (Count Two); and (c) Illegal Monetary Transaction (Counts Three and Four).

Target Roofing ("**Target**") is a locally owned and operated company that has been providing roofing services since 2015 and employs over one hundred (100) employees in Lee County, Florida. Crowther is Target's president and sole owner. In May 2017, Target began a banking relationship with the Lender named within the Indictment (the "**Bank**") by transferring its corporate accounts to the Bank. Target has banked exclusively with the Bank for over three (3) years; consequently, the Bank is intricately aware of the Company's operations, revenue stream/cash flow, assets, and collateral. Target maintains its operating account and a line of credit with the Bank. As such, Target is required to provide corporate financial information to the Bank on a regular basis, including accounts receivable and accounts payable reports. At all times material, the Bank was fully aware of the Company's operational cashflow, assets and collateral and had access to Target's corporate accounts.

When the COVID-19 pandemic hit, Target was extremely concerned about its business operations and financial security. Lee and Collier Counties had closed construction sites due to the global health emergency, and Target was panicked about whether or not it would be able to keep its employees on the payroll. At the time, Target was working on installing a temporary dry roof membrane on a client's building, to protect the roof in the event that the County decided to halt all inspections on projects due to the pandemic. This project was 80% of Target Roofing's revenue at the time; if this project shut down, then Target's business also would shut down.

Target switched employees to part-time and furloughed others to reserve money and maintain as many jobs as possible. In February 2020, Target was forced to lay-off seven (7) employees. In March 2020, Target was forced to lay-off twelve (12) more employees due to the pandemic and the uncertainty of Target's future business revenue.

In early April, the Bank offered Target an opportunity to apply for PPP relief in the form of a loan provided by the SBA and designed to provide a direct incentive for small businesses to keep workers on the payroll. The Bank reviewed Target's financial submissions, sent the financial information to underwriters for due diligence, and notified Target that it qualified for the loan. There were no misrepresentations in the loan application and the Indictment does not allege that any of the information provided by Target regarding workers, payroll, financials, etc. was fraudulent. On April 13, 2020, Target submitted an application for PPP funds ("**PPP loan**"). On April 14, 2020, the Bank deposited $2,098,700 of PPP funds into an account that was unilaterally established by the Bank (the "**Corporate Account**") for Target, and not at Target's request.

On April 24, 2020, Crowther emailed the Bank's Vice President and Office Manager and requested a wire transfer to Sara Bay Marina (the "**Marina**") in connection with Crowther's purchase of the Invincible Catamaran vessel (the "**Boat**") described in the Indictment. Notably, the Bank approved and initiated the wire transfer from the Corporate Account having full knowledge of (a) the source of the funds; and (b) the wire's purpose. In any event, the Bank clearly approved the wire transfer because the Bank (a) knew that the PPP Loan originated from the Bank and (b) knew that Target and Crowther had sufficient funds to cover the expense.

The Government of course leaves out many of the foregoing facts in the Indictment and most notably the Government avoids any discussion that on March 24, 2020 (i.e., before the Boat's purchase), Crowther attempted to deposit in Target's Operating Account over $400,000 in cash, which represented Crowther's proceeds from the sale of another vessel. The Bank, however, did not permit this cash deposit and requested further documentation of the origins of the funds.

Crowther requested that the Bank representative speak with internal bank auditors and request the specific information needed to effectuate the cash deposit to Target's Operating Account. When the purchaser of the vessel declined to provide the necessary information, Crowther continued to invest money into Target as discussed below.

The transaction involving the Boat was properly recorded in Target's accounting records as a loan to Crowther. Even though the funds used to purchase the Boat properly could have been recorded in Target's accounting records as a valid distribution to Mr. Crowther (because Target is an S Corporation and Crowther is Target's sole owner), Target's records reflect the transaction as a loan to Crowther because Crowther, in fact, intended to repay the funds to Target. Crowther's intent is corroborated by his actions, including payments that Crowther made to Target before purchasing the Boat, along with payments against Target's loan, collectively totaling over $500,000.00.[1]

The Boat transaction for which the Government makes as the basis of this unlawful prosecution, was simply another business transaction for Crowther. Again, the Government fails to include the known fact that Crowther has made a number of smart investments over the past several years by buying boats and selling those boats for profit. Crowther historically has utilized boats that he owned at one time or another to entertain Target's clients, which is an entirely legitimate, acceptable, and lawful business practice. Crowther was preparing to sell the Invincible Catamaran for a substantial profit in August 2020, less than four (4) months after the purchase of the Boat, however the Government moved quickly to arrest Crowther pursuant to a Criminal Complaint and seized the boat via forfeiture prior to the sale. This investment money was to be

[1] Notably, Crowther began the process of purchasing the Boat months before the pandemic began. Crowther sold his 40' Yellowfin anticipating the Boat's purchase and was in possession of $400,000.00 cash from the sale. Crowther simply was unable to utilize this cash to purchase the Boat from the Marina for the same reason he could not deposit the money into his Operating Account.

used as an additional cash infusion into Target's business.

As described below in greater detail, Crowther utilized the PPP funds to re-hire employees and pay employee salaries during the Covered Period, exactly as Congress intended the money to be utilized. Despite his arrest and Indictment, Target remains a valued customer of the Bank and its accounts remain in good standing.

ARGUMENT

A. The Indictment Should Be Dismissed in its Entirety Because Crowther's Use of the Loan Proceeds Was Lawful and Permissible Pursuant to the Cares Act and the SBA Loan Program

The Indictment alleges nothing more than Crowther's entirely lawful and appropriate utilization of the PPP Loan proceeds pursuant to the relevant provisions of the Cares Act and the SBA Loan Program. As such, the Indictment should be dismissed because the Government has not alleged any unlawful actions by Crowther and has failed to state an offense for which Crowther can be prosecuted.

Congress' overarching goal in passing the Cares Act was to retain jobs and keep employees on the payroll. *See Fed Reg Vol. 85, No. 73 at Section III 2. r.* As the sole owner of Target, Crowther utilized the PPP funds for this exact purpose – retaining, re-hiring and paying employees. During the relevant time frame of the PPP ("**Covered Period**"), Target utilized the PPP funds to re-hire employees it had previously laid off the prior month due to the pandemic and hired new employees, creating **59 new jobs** for the community within the first few weeks of the Company's PPP Covered Period. The payroll records, obtained by the Government, also provide evidence that Target spent 100% of the PPP funds on payroll, qualifying the Company for forgiveness pursuant to SBA guidelines. From April 2020 to August 2020, Target spent **$3,452,411.43 on payroll expenses, $1,353,711.43 more than was allocated in PPP funds**, a sum that Target happily paid in order to keep members of the community employed. These indisputable and uncontested facts render the Government's Indictment moot.

The Indictment's deficiency and failure to state an offense is further compounded by the fact that, according to SBA guidelines, Target qualifies for forgiveness of the loans. The SBA will fully forgive the loan if the funds are used for payroll costs; due to likely high subscription, at least 60% of the forgiven amount must have been used for payroll. See *Paycheck Protection Program Flexibility Act of 2020, Public Law 116-142, Sec.3(b)(8)*. Target expended the entire amount, **100%**, of the PPP Loan Proceeds on employee payroll and would qualify for forgiveness. The only reason that Target has not applied for forgiveness is due to the current Indictment, creating a huge financial burden to the Company and a significant risk of the business failing. Ironically, the Government's overly aggressive interpretation and misunderstanding of the PPP Loan Program requirements is harming the very employees that the Cares Act intended to protect.

Crowther does not dispute either that (a) Target made a payment to a former owner ("**SA**") in the amount of $100,000.00; or (b) Crowther purchased the Boat from the Marina for $689,417.00, which such funds were loaned by Target to Crowther (as reflected in Target's books and accounting records). [D.E. 15, p. 6, ¶f] Crowther, however, disputes the Government's allegations that Crowther intentionally made a false statement when he signed the PPP application or that the aforementioned funds transfers were unlawful in any way, shape, or form. The allegations of the Indictment rely upon the theory that the exact currency deposited into the PPP Account was somehow specifically earmarked for and exclusively limited to PPP-related expenditures; however, as explained herein the Government's theory does not hold merit.

The Government inaccurately states the law with the following statement, "PPP proceeds were required to be used for certain permissible expenses, including payroll costs, mortgage interest, rent and utilities." [D.E. 15, ¶8]. Section 1022(a) of the Act of the Final Cares Act (HR 748) (the "Cares Act") provides that the PPP Loan Program is an amendment of the Small Business Act ("SBA") 7(a) Loan program. With respect to use of loan proceeds, Section 1022(F) states: "During the covered period, an eligible recipient may, ***in addition to allowable uses of the loan made under this subsection . . .***", referring to the SBA Act's subsection. Consequently, a loan recipient's use of PPP Loan proceeds is ***not*** limited to payroll costs, payment of interest on mortgages, rents, and utilities. In fact, the Interim Rules published in the Federal Register state: "While the Act provides that PPP loan proceeds may be used for the purposes listed above and for other allowable uses described in section 7(a) of the Small Business Administration Act (15 U.S.C. 636(a)) the Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a ***substantial portion*** of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed." *See* Fed Reg Vol. 85, No. 73 at Section III 2.

The PPP is an amendment to the SBA's 7(a) loan program which provides for allowable expenditures, as follows:

> The Administration is empowered to the extent and in such amounts as provided in advance in appropriation Acts to make loans for plant acquisition, construction, ***conversion, or expansion***, including the acquisition of land, material, supplies, equipment, and ***working capital***, and to make loans to any qualified small business concern, including those owned by qualified Indian tribes, for purposes of this Act.

SBA § 7, 15 USC 636 (emphasis added).

Under the aforementioned authorities, Target's payment to SA and the loan made to Crowther were legally permissible. SA was Target's former co-owner. In December 2019, Crowther bought out SA's ownership interest in Target and other business ventures pursuant to the terms of a Stock Redemption Agreement. The government's characterizations of the $100,000 payment of a promissory note leaves out the fact that the promissory note was part of a redemption of shares of the Company by the Company – it was part of a purchase price for the Company's own equity. The Stock Redemption Agreement was basically a conversion of the company in the form of a recapitalization. Conversion of a business is changing the corporate structure of a business – either by converting the entity into another legal entity (i.e. LLC to corporation), or some form of recapitalization of the business such as exchanging debt for equity or vice versa, or otherwise changing the capital structure of the business. We have all these elements here – the company bought back basically 50% of itself, thereby changing its outstanding equity in exchange for debt AND thereby significantly changing the capital structure of the organization. Therefore, as part of a conversion, any payments made under the Stock Redemption Agreement, while not forgivable under the PPP, are a perfectly **legal use of funds** under the SBA's 7(a) loan program and thus, under the PPP itself.

The argument for working capital is the same – the $100,000 was used in furtherance of a recapitalization of the company and was paid as part of a purchase price, which is exactly the purpose of working capital. Working capital can be used for the operation of the business which would include making payments against and in connection with the obligations of the company. The payment to SA was completely lawful pursuant to the SBA Act, not forgivable under the PPP, but completely lawful.

Let's assume *arguendo* that the SBA deemed this transaction to be an unqualified expenditure pursuant to the PPP loan forgiveness requirements. If the expenditure was not approved for forgiveness by the SBA, the amount of the expenditure automatically defaults back to being a low-interest loan. ***An expenditure that is not forgiven is not illegal***, it is simply paid back by the borrower in due course.

Moreover, general accounting principles wholly contradict the Government's position that the PPP loan proceeds somehow were specifically earmarked funds that were required to be utilized within the PPP's Covered Period. Money is fungible by nature, and the assets of a corporation – whether held in one or dozens of bank accounts – are all part of the company's assets. For accounting purposes, all funds are recorded in Target's books and ledgers and are utilized to generate financial statements, profit and loss statements, and account receivables. Importantly, the Cares Act does not require opening a separate bank account or segregating PPP Loan proceeds, and it does not prohibit commingling funds with other business assets or working capital. There was no requirement for the Company or the Bank to delineate between PPP funds and Target's operating capital. Thus, the Corporate Account established by the Bank and Target's Operating Account were interchangeable accounts, containing interchangeable corporate funds for the purpose of business operations.

Finally, the overarching intent of the Act was achieved. The SBA Administrator believes that finite appropriations and the structure of the Act warrant a requirement that borrowers use a ***substantial portion*** of the loan proceeds for payroll costs, consistent with Congress' overarching goal of keeping workers paid and employed." *See* Fed Reg Vol. 85, No. 73 at Section III 2. Target utilized 100% of the loan proceeds to pay its employees and expended additional funds well over the $2 million dollars provided by the PPP funds to maintain jobs and pay employees. For this reason alone, the Indictment fails.

Accordingly, Counts One through Four of the Indictment should be dismissed in their entirety because the Indictment alleges nothing more than Crowther's entirely lawful actions and appropriate use of the PPP Loan proceeds and fails to state an offense for which Crowther can be criminally prosecuted.

B. Count One for Bank Fraud Must Be Dismissed Because the SBA is Not a "Financial Institution"

The charge against Crowther for Bank Fraud (Count One) must be dismissed because the Indictment wrongly alleges that the subject funds were loaned to Crowther by the Bank (see Indictment at ¶ 8). Pursuant to the Cares Act, the PPP is a loan made with the authority and approval of the SBA and the funds are **100%** guaranteed by the SBA, not the Bank. The SBA also approves forgiveness of the loan. The SBA is not a financial institution within the definition of 18 U.S.C. § 20:

> As used in this title, the term "financial institution" means--
>
> **(1)** an insured depository institution (as defined in section 3(c)(2) of the Federal Deposit Insurance Act [12 USCS § 1813(c)(2)]);
>
> **(2)** a credit union with accounts insured by the National Credit Union Share Insurance Fund;
>
> **(3)** a Federal home loan bank or a member, as defined in section 2 of the Federal Home Loan Bank Act (12 U.S.C. 1422), of the Federal home loan bank system;
>
> **(4)** a System institution of the Farm Credit System, as defined in section 5.35(3) of the Farm Credit Act of 1971 [12 USCS § 2271(3)];
>
> **(5)** a small business investment company, as defined in section 103 of the Small Business Investment Act of 1958 (15 U.S.C. 662);
>
> **(6)** a depository institution holding company (as defined in section 3(w)(1) of the Federal Deposit Insurance Act [12 USCS § 1813(w)(1)];
>
> **(7)** a Federal Reserve bank or a member bank of the Federal Reserve System;
>
> **(8)** an organization operating under section 25 or section 25(a) [25A] of the Federal Reserve Act [12 USCS §§ 601 et seq. or 611 et seq.];

> **(9)** a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS § 3101]); or
>
> **(10)** a mortgage lending business (as defined in section 27 of this title [18 USCS § 27]) or any person or entity that makes in whole or in part a federally related mortgage loan as defined in section 3 of the Real Estate Settlement Procedures Act of 1974 [12 USCS § 2602].

Accordingly, Count One is legally deficient and must be dismissed because as a matter of law the SBA clearly is not a "financial institution." *See*, *e.g.*, *United States v. Martin*, 803 F. 3d 581, 588 (11th Cir. 2015) (stating that in order to secure a conviction for bank fraud in violation of 18 U.S.C. § 1344(2), the Government must "prove beyond a reasonable doubt that (1) a scheme existed to obtain money or property in the custody of a federally insured financial institution by fraud; (2) she participated in the scheme by means of false pretenses, representations, or promises; and (3) she acted knowingly") (citing *United States v. McCarrick*, 294 F. 3d 1286, 1290 (11th Cir. 2002)).

C. Count One (Bank Fraud) and Count Two (False Statement) Must Be Dismissed Because the Indictment Fails to Properly State an Offense and Allege the Requisite Intent

Counts One and Count Two are also legally deficient and must be dismissed because the Indictment improperly fails to allege the requisite intent and state a valid offense. The Indictment does not properly allege (and the Government cannot prove) that Crowther knowingly intended to defraud the PPP or knowingly misrepresented the use of the PPP funds at the time of the application. Target's employees were paid nearly $3.5 million during the relevant time period, which was far in excess of the total amount of the PPP Loan. During the Covered Period, Crowther (a) maintained employees on the payroll; (b) re-hired employees that previously he had laid off due to the COVID-19 pandemic; and (c) hired new employees, creating fifty nine (59) new jobs for the community within the first few weeks of the Company's PPP Covered Period. As reflected in

Target's payroll records, Target spent 100% of the PPP Loan proceeds on payroll. From April 2020 to August 2020, Target Roofing spent $3,452,411.43 on payroll expenses; i.e., $1,353,711.43 more than was allocated to Target in PPP funds.[2]

In *United States v. McCarrick*, 294 F. 3d 1286 (11th Cir. 2002), the Eleventh Circuit reversed the defendant's convictions for bank fraud, in violation of 18 U.S.C. § 1344, and making a false statement to a government agency, in violation of 18 U.S.C. § 1001 on the basis that the Government had failed to prove the necessary specific intent to defraud. In *McCarrick*, the defendant obtained a SBA-guaranteed $49,000.00 loan. *Id*. at 1288. During the application process, the defendant told the bank's loan officer that the purpose of the loan was to expand the defendant's business into fleet maintenance and auto body work. *Id*. The Eleventh Circuit stated:

> McCarrick stated on his loan application that he planned to use $35,000 of the loan to lease a new building for his business and to purchase five specific pieces of equipment: a spray paint booth, a frame machine, a tire machine, and two lifts. The remaining $14,000 was to be used as working capital.

Id. (footnotes omitted).

After the SBA loan was approved, the financial institution cut various checks to the defendant as per the stated purposes of the loan. *Id*. at 1289. When the defendant received the bank's check for $12,679.00, the spray paint booth had been ordered but not yet delivered. *Id*. "McCarrick testified he deposited the check into Fleet's account because the spray paint booth had not yet arrived, and that he intended to use the money to pay for the booth as soon as it came." *Id*. The Eleventh Circuit observed that over the next month, the defendant's business "experienced

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[2] Because Target is designated as an S Corporation, and Crowther is Target's sole owner, a good portion of the PPP Loan proceeds could have been allocated to Crowther directly as income. Instead, Crowther did not take any personal income from the PPP Loan proceeds so that he could retain current employees and add new employees to Target's payroll.

serious financial difficulties, and he canceled the order . . . for the spray paint booth, using the $12,679 to keep his business afloat." *Id.*

The Eleventh Circuit stated:

> The government's sole allegation of fraud in this case is that, at the time McCarrick signed the loan documents, he had no intention of buying the spray paint booth, as he represented. Specifically, Count One charged that McCarrick committed bank fraud by falsely promising, on his loan application, that he planned to buy a spray paint booth, in order to defraud the government of $ 12,679. Count Two charged McCarrick with making a false statement to the SBA by acknowledging, on his "Settlement Statement," that he planned to use the loan proceeds in accordance with the terms of the loan authorization, even though he knew he was not going to buy the spray paint booth. Thus, McCarrick's convictions under both § 1344 and § 1001 depend on whether the jury could infer, from the evidence adduced at trial, that McCarrick did not intend to buy the spray paint booth at the time he signed the loan documents.

Id. at 1290-91.

In holding that the evidence presented at trial was insufficient to demonstrate the defendant's specific intent to defraud, the Eleventh Circuit noted the complete lack of evidence demonstrating events occurring before the defendant signed the loan documents. *Id*. at 1291. Instead, "[t]he evidence at trial consisted entirely of events that occurred subsequent to the signing of the loan documents." *Id*. The Eleventh Circuit determined that three (3) pieces of circumstantial evidence regarding the defendant's conduct subsequent to signing the loan documents – which was the only evidence presented in the case- was insufficient to support a rational inference of the requisite prior intent, beyond a reasonable doubt. *Id*. First, the court noted that the Government failed to offer any explanation as evidence of checks written by the defendant that were returned for non-sufficient funds would have made the defendant aware, when he signed the loan documents, that he could not afford to purchase the spray paint booth. *Id*. at 1292. Second, "the fact that McCarrick canceled the paint booth only four weeks after it was ordered . . . does not provide a sufficient basis, on this record, for the inference that he did not intend to buy it in the first place." *Id*. With respect to the third piece of evidence, the Eleventh Circuit stated:

> Nor does the fact that McCarrick and his girlfriend may have improperly endorsed the $12,679 check for the spray paint booth and deposited it into Fleet's bank account, by itself, suffice to show that McCarrick did not intend, at the time of the signing of the loan documents, to use that money for its allotted purpose.

Id.

Likewise, the Indictment does not adequately allege Crowther's specific intent to defraud with respect to the PPP loan proceeds. The Government has knowledge that before the PPP loan proceeds were ever deposited by the Bank into the Corporate Account, Target and Crowther collectively had more than enough funds and available credit at their disposal to purchase the Boat and discharge Target's payment obligation to SA under the Redemption Agreement. The fact that the Bank decided to deposit the PPP loan proceeds into the Corporate Account (which was established on the Bank's own initiative, not at Crowther's direction) instead of Target's operating account (which would have been entirely lawful and, in fact, is common practice with respect to funds disbursed under the PPP) negates Crowther's intent. Clearly, the fact that the Bank wired the purchase funds for the Boat from the Corporate Account is wholly insufficient to allege the requisite specific intent because otherwise the PPP loan proceeds already would have been comingled with existing funds held in Target's operating account, thereby precluding any evidence demonstrating that specific PPP loan proceeds were used to purchase the Boat, as differentiated from Target's non-PPP loan related existing assets.

Separately, the Indictment does not (and cannot) allege that Target applied for forgiveness of the loan with the SBA because the Company has not submitted an application for forgiveness of the loans acquired through the PPP. The Indictment does not and cannot allege Target or Crowther missed any payments on the PPP loan because the loan has not yet come due. Neither the Bank nor the SBA has suffered any financial loss whatsoever resulting from Crowther's actions; to the contrary, the Bank actually benefitted financially from loan processing fees in connection with the PPP loan. Moreover, the Bank will benefit financially from interest earned on the PPP loan. These facts precluded the Government from alleging in the Indictment either (a) any financial loss to or victimization of the Bank or the SBA; or (b) that the PPP loan and Target bank accounts are in anything other than good standing.

The Government's knowledge that Crowther paid millions of dollars over and above the amount of the PPP Loan proceeds in employee payroll expenses during the Covered Period renders its allegation of intent to defraud insufficient. In *United States v. Takhalov*, 827 F. 3d 1307 (11th Cir. 2016), the Eleventh Circuit stated:

> For this reason, the law in the Eleventh Circuit makes clear that a defendant "schemes to defraud" only if he schemes to "depriv[e] [someone] of something of value by trick, deceit, chicane, or overreaching." ***But if a defendant does not intend to harm the victim—"to obtain, by deceptive means, something to which [the defendant] is not entitled"—then he has not intended to defraud the victim.***
>
> From that conclusion, a corollary follows: a schemer who tricks someone to enter into a transaction has not "schemed to defraud" so long as he does not intend to harm the person he intends to trick. And this is so even if the transaction would not have occurred but for the trick. ***For if there is no intent to harm, there can only be a scheme to deceive, but not one to defraud.***
>
> Consider the following two scenarios. In the first, a man wants to exchange a dollar into four quarters without going to the bank. He calls his neighbor on his cell phone and says that his child is very ill. His neighbor runs over, and when she arrives he asks her to make change for him. She agrees; the quarters pass to the man; the dollar passes to the woman; and they part ways. She later learns that the child was just fine all along. The second scenario is identical

> to the first, except that instead of giving the woman a true dollar, he gives her a counterfeit one.
>
> The first scenario is not wire fraud; the second one is. Although the transaction would not have occurred but-for the lie in the first scenario—the woman would have remained home except for the phony sickness—the man nevertheless did not intend to "depriv[e] [the woman] of something of value by trick, deceit, [and so on]." But in the second scenario he did intend to do so.

Takhalov, 827 F. 3d at 1312-1313 (citing *United States v. Bradley*, 644 F. 3d 1213, 1240 (11th Cir. 2011) (emphasis added).

Crowther's arrest and the Indictment clearly are premature; the Government cannot prove or even allege that Crowther intended to deprive the Bank or the SBA of anything of value. The Indictment does not (and cannot) allege that Target applied for forgiveness of the PPP Loan because, in fact, Target has not done so. The Indictment also does not (and cannot) allege that Target defaulted on the PPP Loan because the first loan payment is not due until November 2020. The Government does not (and cannot) allege any losses to either the Bank or the SBA because none exist.

A review of other indictments across the country in relation to PPP funds shows blatant fraud: the creation of shell companies, misrepresentation by the Company of the number of employees or fake employees, payments to brokers, or failure to utilize the funds to pay employees - **<u>none</u>** of those facts are alleged within the Indictment. Target is a legitimate, local business that serves the roofing needs of customers in southwest Florida. Target employees benefitted greatly from the PPP loans – they were not deprived of anything of value but were allowed to keep their jobs and continue to receive paychecks to help support themselves and their families during a global pandemic that nearly destroyed our nation's economy. This is the exact intent of the Cares Act and, quite frankly, this should be a success story not a criminal indictment.

Accordingly, Count One and Count Two of the Indictment must be dismissed because the Government failed to allege the requisite intent and state an offense for which Crowther can be prosecuted.

D. Money Laundering Counts (Counts Three and Four) Must be Dismissed for Failure to State an Offense because No Specified Unlawful Activity Exists

Money laundering pursuant to 18 USC §1957 requires a monetary transaction in criminally derived property of a value greater than $10,000 that is derived from specified unlawful activity. If Counts One and Two fail pursuant to any of the above arguments, Counts Three and Four must also fail as there would be no specified unlawful activity as the basis for the charge.

Assuming *arguendo* that a specified unlawful activity can be established at trial, Count Three still fails to state an offense for which Crowther can be prosecuted. As stated above, the payment to SA via the Stock Redemption Stock Agreement is an allowable expense pursuant to Section 7(a) of the Small Business Act. 15 U.S.C. 636(a). In the event that the SBA found that this was not an authorized expense for forgiveness, the unqualified expense would simply default back to a low-interest loan. The remedy would be that Crowther must pay back the loan pursuant to the terms established by the SBA. This same argument is also applicable to Count Four. For these reasons, Counts Three and Four must fail.

CONCLUSION

Based on the foregoing, the Indictment should be dismissed in its entirety. The Indictment misstates the Cares Act and the SBA Loan Program, fundamentally misinterprets the intent of the legislation passed to protect employees and fails to state an offense for which Crowther can be prosecuted. The allegations of the Indictment demonstrate no unlawful activity; instead, the allegations of the Indictment demonstrate that Crowther acted lawfully pursuant to the provisions of the Cares Act and SBA Loan program. Moreover, Count One must be dismissed because the

SBA is not a "financial institution" within the meaning of 18 U.S.C. § 20; accordingly, the charge of Bank Fraud on the facts alleged is legally deficient. With respect to Count One and Count Two, the Indictment also fails to state an offense and allege the requisite intent, which mandates dismissal of those counts. In addition to the failure to allege an intent to defraud, the Government cannot allege a loss to any person or entity named within the Indictment. Dismissal of Count One or Count Two for any of the above-referenced arguments would negate the necessary specified unlawful activity and would require dismissal of both Counts Three and Four. Moreover, both Count Three and Count Four should be dismissed because the remedy for an unqualified expense under the PPP is that those amounts simply remain a loan outstanding, not a crime. Quite frankly, the Indictment is premature and not ripe for prosecution; it fails to state any offense for which Crowther can be prosecuted.

Accordingly, Defendant, Casey David Crowther respectfully requests that this Court dismiss the Indictment in its entirety for failure to state an offense, along with such other and further relief this Court deems just and proper.

Certification

Pursuant to the Court's Pretrial Criminal Scheduling Order [D.E. 20], the undersigned certifies the following:

i. The undersigned has conferred with opposing counsel regarding this Motion to Dismiss the Indictment;

ii. Counsel has not resolved the motion by agreement; and

iii. the motion concerns a matter not covered by the Court's Scheduling Order.

Respectfully Submitted,

/s/ *Nicole H. Waid*____

Nicole H. Waid, Esq.
FISHERBROYLES, LLP
2390 Tamiami Trail North
Suite 100
Naples, Florida 34103
Florida Bar # 0121720
Phone: (202) 906-9572
Fax: (239) 236-1360
Email: nicole.waid@fisherbroyles.com

CERTIFICATE OF SERVICE

I, Nicole H. Waid, attorney for Casey David Crowther, do hereby certify that I have, this day, October 7, 2020, filed the foregoing with the Clerk of Court via the CM/ECF system, which has caused a true and correct copy to be served on all counsel of record.

/s/ *Nicole H. Waid*____
Nicole H. Waid, Esq.