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 COUNTS ONE THROUGH FOUR OF THE SUPERSEDING INDICTMENT OR, IN THE ALTERNATIVE, REQUEST A BILL OF PARTICULARS AND SUPPORTING MEMORANDUM OF LAW

NOW COMES the Defendant, Casey David Crowther through undersigned counsel, and respectfully moves this Honorable Court to dismiss Counts One through Four of the Superseding Indictment [D.E. 32] against him pursuant to Federal Rules of Criminal Procedure 7(c) and 12(b)(3)(B). The Government fails to state an offense for which Mr. Crowther ("**Crowther**") can be prosecuted by fundamentally misinterpreting and misapplying the federal regulations that govern the Paycheck Protection Program (**"PPP"**). In the alternative Crowther respectfully moves this Court to direct the Government to file a bill of particulars in accordance with Rules 7(f) and 12(b) of the Federal Rules of Criminal Procedure. Specifically, Crowther requests that the Government state the specific violation of the regulations governing the Coronavirus Aid, Relief, and Economic Security Act ("**CARES Act**") that Crowther allegedly violated. A bill of particulars will adequately apprise Crowther of the scope of the Government's allegations and allow Crowther to prepare his defense and avoid unfair and prejudicial surprise at trial. Crowther incorporates the below Memorandum of Law in support of his motion pursuant to Local Rule 3.01.

REQUEST FOR ORAL ARGUMENT

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

WHEREFORE, as further set out in their accompanying memorandum of law, Crowther respectfully moves the Court to dismiss Counts One through Four of the Superseding Indictment, or in the alternative, respectfully moves the Court to direct the Government to file a bill of particulars.

Respectfully Submitted,

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MEMORANDUM OF LAW

I. INTRODUCTION

The theory of fraud that the Government relies upon for Counts One through Four of the Superseding Indictment is premised on the Government's misunderstanding and misapplication of the regulations that govern the CARES Act that was signed into law on March 27, 2020. The Government's misinterpretation of the standards and rules adopted by the Small Business Administration (**"SBA")** have created a legal deficiency in the Superseding Indictment as a matter of law. As described below, the regulations require specific loan terms and loan forgiveness requirements - the government summarily dismissed those legal requirements by prematurely arresting Crowther and filing a Superseding Indictment that completely disregards the legislative intent of the CARES Act.

The facts are not in dispute. For purposes of this Motion, Crowther stipulates that he:

- Was a resident of North Fort Myers and, Florida who served as president, director, and registered agent of Target Roofing and Sheet Metal, Inc. (**"Target Roofing"**). [D.E. 32, ¶1];
- Submitted a PPP loan application on or about April 7, 2020 and revised PPP loan application on April 13, 2020 to the Lender and SBA. [*See* D.E. 32, p. 5 ¶11b];
- Certified that the PPP funds acquired would be used to retain workers and maintain payroll or make mortgage [interest][1] payments, lease payments and utility payments on behalf of Target Roofing. [*See* D.E. 32, p. 5 ¶11d];
- Caused the SBA to approve the PPP application and the SBA to issue

[1] The Government misstates the regulation; the regulation states "mortgage interest payments."

$2,098,700.00 in PPP funds to the Lender, which the Lender deposited into an account under the defendant's control. [*See* D.E. 32, p. 5 ¶11e];

- Caused $100,000 to be transmitted via wire from the Lender account ending in 6781 in the name of Target Roofing to S.A. in connection with a $722,474.00 promissory note. [*See* D.E. 32, p. 8 ¶2];
- Caused $689,417.00 to be transmitted via wire from the Lender account ending in 6781 in the name of Target Roofing to Sara Bay Marina in connection with the defendant's purchase of a 40' Invincible Catamaran Boat [*See* D.E. 32, p. 8 ¶2];

The only dispute is that of a matter of law. The Superseding Indictment fails to specify which regulations governing the CARES Act, if any, Crowther violated. The regulations governing the CARES Act, as applied to the facts stipulated above for purposes of this Motion, do not constitute a violation of the SBA Interim Final Rules. Without a violation of the regulations governing the PPP, there is no sufficient legal basis for the Government's theory of fraud. Application of the regulations that govern the PPP also make it legally impossible for the Government to prove that Crowther knowingly made false statements on his PPP application as the designated time period "**Covered Period**") within which Target Roofing was permitted to make allowable expenses had yet to expire at the time of Crowther's arrest.

Crowther certified that the PPP funds acquired would be used to retain workers and maintain payroll or make mortgage interest payments, lease payments and utility payments on behalf of Target Roofing. There is no factual dispute that Target Roofing retained employees and maintained payroll during the Covered Period established by the CARES Act. The Government has been in possession of these payroll records for months and knows that Target Roofing spent well over the $2,098,700.00 in PPP loan proceed amounts to pay employees during the Covered

Period. However, without taking into consideration this undisputed fact[2] and remaining within the four corners of the Superseding Indictment, the Government still cannot legally prove its case because the arrest was premature. The regulations establishing the twenty-four (24) week Covered Period[3] do not require that specific funds for payroll be paid out of a specific account and they do not designate when the allowable expenses need to be spent. For example, a company that received PPP funds can spend the amount of the loan proceeds in the last week of the Covered Period and still be eligible for forgiveness. Target Roofing submitted its PPP application on April 13, 2020 [D.E. 32, pg. 5(b)] and the loan was disbursed thereafter on April 14, 2020.[4] Target Roofing had until September 29, 2020 to spend the allotted loan amount on allowable expenses within the twenty-four week Covered Period to qualify for forgiveness. Crowther was arrested and charged via Complaint on September 3, 2020, prior to the end of the regulatory time period by which Target Roofing was permitted to spend the amount of the loan proceeds for allowable expenses and qualify for forgiveness. The Government simply cannot establish intent in light of their premature arrest and based upon the current charges in Counts One through Four of the Superseding Indictment in conjunction with the regulations that govern the CARES Act.

Moreover, the deadline for both loan repayment and the application for forgiveness, pursuant to the PPP and established in the SBA Final Interim Rules, is not until 2021. Thus, at the

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[2] We understand we are bound to the four corners of the Superseding Indictment; however, it is important to note that the Government provided the payroll records in discovery and should be able to stipulate to those records. Because we understand that the Government is not required to do so, we do not rely on this fact (which clearly negates criminal intent) for purposes of this Motion. *See United States v. Zayas-Morales*, 685 F.2d 1272 (11th Cir. 1982).

[3] The Paycheck Protection Program Flexibility Act of 2020 amended the definition of ''covered period'' for a PPP loan from ''the period beginning on February 15, 2020 and ending on June 30, 2020'' to ''the period beginning on February 15, 2020 and ending on December 31, 2020. *Paycheck Protection Program—Revisions to First Interim Final Rule, Fed. Reg. Vol. 85, No. 116 (June 16, 2020).* It also extended the loan forgiveness covered period from eight (8) weeks to twenty-four (24) weeks from the date of loan disbursement. *Id.*

[4] The exact date of disbursement is not reflected in the Superseding Indictment. For purposes of this Motion, we can calculate the twenty-four-week time period from the April 13, 2020 application date providing Target Roofing until September 28, 2020 to expend the allowable expenses for forgiveness.

time of his arrest and the filing of the Superseding Indictment, the loan terms of Crowther's PPP loan were not due (no payments were required) and the eligibility period for filing a loan forgiveness application had not yet opened. The Government cannot possibly prove a scheme or intent to defraud when there has been no default on a loan, no loan forgiveness request filed, no actual loss amount, no intended loss amount, no victim and no violation of any regulation that governs the PPP.

More importantly, an expenditure that does not qualify for forgiveness is not *per se* illegal, it is simply paid back by the borrower in due course pursuant to the terms of the loan with the Lender. Without any allegations of misrepresentations in the Superseding Indictment pertaining to qualifying requirements of the PPP loan application (ie. number of employees, payroll calculations, etc.), the government cannot impute illegality on how a company accounts for the PPP funds or when those funds are spent if those requirements are not found within the regulations themselves. The Government can enforce the regulations, it cannot create them. For all of these reasons, we respectfully request that Counts One through Four of the Indictment be dismissed.

II. <u>PAYCHECK PROTECTION PROGRAM REGULATIONS</u>

The 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. *SBA Paycheck Protection Program, Fed. Reg. Vol. 85, No. 73, pg. 20811 (April 25, 2020) (to be codified in 13 CFR Part 120).* The SBA received funding and authority through the Act to modify existing loan programs and establish a new loan program to assist small businesses nationwide adversely impacted by the Covid-19 emergency. *Id.* Among the provisions contained in the CARES Act are provisions authorizing SBA to temporarily guarantee loans under a new 7(a) loan program known as the PPP. *Id at 20812.* Loans guaranteed under the PPP will be 100 percent (100%) guaranteed by the SBA, and the full principal amount of the loans may qualify for loan forgiveness. *Id.*

Businesses were eligible for a PPP loan if the business had 500 or fewer employees and a principal place of residence in the United States. *Id*. Under the PPP, the maximum loan amount was the lesser of $10 million or an amount calculated using a payroll-based formula specified in the Act. *Id.* The SBA's funds were facilitated through low interest loans through federally insured Lenders to the borrower. *Id at 20813.* The low-interest loan provided low cost funds to borrowers to meet eligible payroll costs and other eligible expenses during this temporary period of economic dislocation caused by the coronavirus. *Id.*

The SBA will forgive loans if all employee retention criteria are met and the funds are used for eligible expenses. Eligible expenses include the following: i. payroll costs; ii. costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; iii. mortgage interest payments; iv. rent payments; v. utility payments; vi. interest payments on any other debt obligations that were incurred before February 15, 2020; and/or refinancing an SBA EIDL loan made between January 31, 2020 and April 3, 2020. *Id at 20814*. The CARES Act defines the term ''payroll costs'' broadly to include compensation in the form of salary, wages, commissions, or similar compensation. *SBA Paycheck Protection Program – Requirements – Loan Forgiveness, Fed. Reg. Vol. 85, No. 105, pg. 33006 (June 1, 2020).* Payroll costs paid or incurred during the covered period are eligible for forgiveness. *Id.* A nonpayroll cost is eligible for forgiveness if it was: i. paid during the covered period; or ii. incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. *Id at 33007.* In order to qualify for forgiveness, the borrower must submit documentation to aid in verifying payroll and nonpayroll costs as specified in the instructions to the Loan Forgiveness Application Form. *Id.* **Proof that the borrower has spent money on an eligible expense any time during the Covered Period would qualify the borrower for forgiveness**.

An expenditure that does not qualify for forgiveness is not *per se* illegal, it is simply paid back by the borrower in due course pursuant to the terms of the loan agreement with the Lender. If [the borrower] used PPP funds for unauthorized purposes, SBA will direct [the borrower] to repay those amounts. *Fed. Reg. Vol. 85, No. 73, pg. 20814.* If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. *Id.*

On June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 (Flexibility Act) was signed into law, amending the CARES Act. This interim final rule revises SBA's interim final rule published in the Federal Register on April 15, 2020, by changing key provisions, such as the loan maturity, deferral of loan payments, and forgiveness provisions, to conform to the Flexibility Act. *Paycheck Protection Program—Revisions to First Interim Final Rule, Fed. Reg. Vol. 85, No. 116 (June 16, 2020).* Section 3(a) of the Flexibility Act amended the definition of ''covered period'' for a PPP loan from ''the period beginning on February 15, 2020 and ending on June 30, 2020'' to ''the period beginning on February 15, 2020 and ending on December 31, 2020.'' *Id at 36309.* It also extended the loan forgiveness covered period from eight (8) weeks to twenty-four (24) weeks from the date of loan disbursement. *Id.* The Flexibility Act also provides that a borrower shall use at least 60 percent of the PPP loan for payroll costs to receive loan forgiveness during the Covered Period. *Id at 36310.*

Section 3(c) of the Flexibility Act extended the deferral period on PPP loans. *Id at 36310.* If [a borrower] submits to [the] lender a loan forgiveness application within 10 months after the end of [the] loan forgiveness covered period, [the borrower] will not have to make any payments of principal or interest on [the] loan before the date on which SBA remits the loan forgiveness amount on [the] loan to [the borrower's] lender (or notifies your lender that no loan forgiveness is allowed). *Id.* If [the borrower] does not submit to [the] lender a loan forgiveness application within 10 months after the end of [the] loan forgiveness covered period, [the borrower] must begin paying principal and interest after that period. For example, if a borrower's PPP loan is disbursed on June 25, 2020, the 24-week period ends on December 10, 2020. If the borrower does not submit a loan forgiveness application to its lender by October 10, 2021, the borrower must begin making payments on or after October 10, 2021. *Id.* Thus, the deadline to apply for forgiveness and the loan repayment date are both scheduled in 2021.

Since the inception of the CARES Act, the SBA has issued twenty-five (25) Interim Final Rules related to the PPP. Although the regulations are continually changing, one thing is perfectly clear: businesses that spend the amount of money loaned to the business pursuant to the PPP on payroll, or other allowable expenses, qualify for forgiveness of the loan[5]. The regulations governing the PPP do not require segregation of PPP loan proceeds into a separate bank account. The regulations do not prohibit the commingling of loan proceeds with business operating funds; the PPP proceeds are not specifically "earmarked" by the SBA or the Lender for use by the Company. The regulations do not require that a borrower utilize the funds in the first week or the last week of the Covered Period, as long as the amount of money loaned to the business is utilized on payroll or other allowable expenses at any time during the Covered Period, the borrower qualifies for forgiveness of the loan. Furthermore, an expenditure that does not qualify for forgiveness is not *per se* illegal, it is simply paid back by the borrower in due course pursuant to the terms of the loan agreement with the Lender.

[5] See [D.E. 32, ¶8, pgs. 3-4].

III. LEGAL STANDARD

"A party may raise by pretrial motion any defense, objection or request that the court can determine without a trial of the general issue." Fed. R. Crim. P. (12)(b)(2). The general issue is evidence relevant to the question of guilt or innocence. *United States v. Ayarza-Garcia, 819 F.2d 1043, 1048 (11th Cir. 1987).* "An indictment is sufficient if it: (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequent prosecution for the same offense." *United States v. Steele*, 178 F.3d 1230, 1233-34 (11th Cir. 1999) (quotation marks omitted). "The sufficiency of a criminal indictment is determined from its face." *United States v. Salman,* 378 F.3d. 1266, 1268 (11th Cir. 2004). In order to avoid dismissal, the charging document "must contain the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet." *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006). A district court may not dismiss an indictment based on a determination of facts that should have been developed at trial. *See id*. Indeed, in *United States v. Critzer*, 951 F.2d 306 (11th Cir. 1992), we held that a district court cannot properly dismiss an indictment on the ground that there is insufficient evidence to support the allegations. *Id*. at 307.

The Government's Superseding Indictment is insufficient on its face. Within the four corners of the document, the Government misstates and misinterprets the regulations that govern the CARES Act and constitute the alleged regulatory violations that are the underlying basis for the fraud and false statement charges against Crowther. The Government relies upon regulations within the Superseding Indictment [D.E. 32, ¶8, pgs.3-4] which directly contradict the government's theory of the case. Without reviewing any facts alleged outside the Superseding

Indictment, the Government's misapplication of the law and fundamental misunderstanding of the regulations governing the PPP require dismissal of Counts One through Four of the superseding indictment.

IV. ARGUMENT

A. The Indictment Should Be Dismissed in its Entirety Because the Government has Misinterpreted the CARES Act and its Governing Regulations and Crowther's Arrest was Premature

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*. Congress facilitated this goal through low-interest loans to businesses via a Lender. If the amount of the loan was utilized by the business "for certain permissible expenses, including payroll costs, mortgage interest payments, rent and/or utilities, the interest and principal on the PPP loans was eligible for forgiveness if the business spent the loan proceeds on the expense items within a designated period of time and used a certain portion of the loan towards payroll expenses." [See D.E. #32, §8, pgs. 3-4]. Because this undisputed fact is not addressed within the Superseding Indictment and for purposes of this Motion, we are setting aside the argument that the Government has been in possession of Target Roofing's payroll records for several months and knows that Target Roofing paid its employees well over the amount of the PPP loan proceeds in payroll costs during the designated time period and, as such, qualifies for forgiveness. Instead, we will focus on the specific language of the Superseding Indictment as stated above. The Government's own Superseding Indictment acknowledges that if payroll costs or other allowable expenses are spent "within the designated period of time" then the PPP loan is eligible for forgiveness. Thus, the Government acknowledges that if Target Roofing spent $2,098,700.00, the amount of the loan proceeds, on allowable expenses within the very last week of the designated period of time then the Company would qualify for forgiveness. Yet, the Government arrested Crowther and charged him with a federal crime prior to the end of the designated period, effectively terminating his ability to fulfill the requirements of the regulation if he had not already done so. This premature arrest legally precludes the Government from arguing that Crowther intended to commit any crime during the relevant time period.

The Government's designation of the PPP funds within the Superseding Indictment also indicate that the Government has a general misunderstanding of the regulations governing the PPP. By ignoring the designated time period, the Government argues that the PPP loan proceeds (the actual dollars disbursed) were specifically earmarked for allowable expenses. This theory is absurd and goes against all basic general accounting principles. 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. The regulations governing the CARES Act make clear that a borrower must spend the amount of the loan proceeds provided to the borrower on allowable expenses during the designated time period in order to be forgiven – it does <u>not</u> require that the specific dollars disbursed be utilized for the allowable expenses. The CARES Act regulations do not require the borrower to open a separate bank account or segregate, in any way, the PPP loan proceeds. The regulations do not prohibit commingling funds with other business assets or working capital. There is no requirement for the borrower or the Lender to delineate between PPP funds and operating capital for accounting purposes. There is no requirement that allowable expenses be expended from a particular account or via a particular form of accounting. The Superseding Indictment is the Government's attempt to add stricter prohibitions and safeguards to the federal regulations that simply do not exist within the letter of the law.

It is also important to note that the Government's statement of the regulations within the Superseding Indictment is misleading, "PPP proceeds were required to be used for certain permissible expenses, including payroll costs, mortgage interest, rent and utilities." [D.E. 32, ¶8]. First, PPP proceeds were only required to be utilized for these specific allowable expenses if the borrower was requesting forgiveness. Second, 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 <u>***not***</u> 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 Roofing's wire transfer to S.A, a former co-owner, in connection with a $722,474.00 promissory note [_See_ D.E. 32, ¶2, pg. 9] is legally permissible. The promissory note referred to in the Superseding Indictment was a conversion of the company in the form of a recapitalization. As part of a conversion, any payments made under the promissory note, 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. 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 a low-interest loan. ***An expenditure that is not forgiven is not illegal***, it is simply paid back by the borrower in due course. Accordingly, Counts One through Four of the Superseding Indictment should be dismissed in their entirety because it 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 Superseding Indictment wrongly alleges that the subject loan was funded by the Lender. The Lender facilitated the loan; however, 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 Lender. _See_ *Fed Reg Vol. 85, No. 73*. The SBA also approves forgiveness of the loan. _*Id*_. The Government acknowledges in the Superseding Indictment that Crowther's "materially false, fraudulent, and misleading representation would and did cause the _*SBA*_ to approve the PPP application and the _*SBA*_ to issue $2,098,700.00 in PPP Funds to the Lender which the Lender then deposited into an account under the defendant's control." [D.E. 32, pg. 6, ¶11(e)] [emphasis added]. 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. According to the PPP regulations, Crowther has twenty-four weeks from the disbursement of his loan to spend the amount of the loan proceeds on allowable expenses. The Government arrested Crowther prior to the expiration of the designated time period and cannot effectively terminate his ability to fulfill the regulatory requirements if the Government argues that Crowther had not fulfilled those requirements prior to his arrest.

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 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 Superseding Indictment does not adequately allege Crowther's specific intent to defraud with respect to the PPP loan proceeds. The Government cannot prove that at the time Crowther signed the PPP Application that he knowingly misrepresented that the "SBA loan proceeds would only be used for business related purposes and certifying that the PPP funds would be used to retain workers and maintain payroll or make mortgage [interest] payments, lease payments, and utility payments on behalf of Target Roofing." [D.E. 32, ¶2, pgs., 7-8] As stated in the Government's Superseding Indictment, "for certain permissible expenses, including payroll costs, mortgage interest payments, rent and/or utilities, the interest and principal on the PPP loans was eligible for forgiveness if the business spent the loan proceeds on the expense items within a designated period of time and used a certain portion of the loan towards payroll expenses." [*See* D.E. #32, §8, pgs. 3-4]. The Government cannot prove Crowther's intent at the time he signed the PPP loan application because they arrested and charged him with a federal crime prior to the expiration of the time period by which he had to expend the amount of the loan proceeds on allowable expenses.[6]

The Government's premature arrest of Crowther renders its allegation of intent to defraud impossible to prove. 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.

[6] Again, for purposes of this Motion, we are not relying on the undisputed fact that Target Roofing paid its employees well over the amount of the PPP loan proceeds during the designated time period, which clearly negates any criminal intent, because this information is not found within the four corners of the Superseding Indictment.

> 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 Superseding 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. Crowther was arrested prior to Lenders receiving loan forgiveness applications and prior to any loan payments being due pursuant to the terms of Target Roofing's loan with the Lender. As such, the Government does not (and cannot) allege any losses to either the Bank or the SBA. There is no victim and the Superseding Indictment fails to allege any misappropriation of monies received. Furthermore, the regulations governing the CARES Act allow twenty-four weeks for the borrower to spend the amount of the loan proceeds on allowable expenses. The Government's arrest of Crowther prior to the expiration of that designated time period prevents the Government from arguing that Crowther intentionally misrepresented that he would utilize the PPP funds for business purposes.

A review of other indictments across the country in relation to PPP funds reveal blatant fraud in the applications for PPP funds: the creation of shell companies, misrepresentation by the Company of the number of employees or fake employees, or failure to utilize the funds to pay employees - <u>**none**</u> of those facts are alleged within the Superseding Indictment. We have yet to find a criminal PPP fraud case where the government relies on the misrepresentation that the company will only utilize the PPP loan proceeds for business purposes but arrests the owner of the business prior to the designated time period in which he has to spend those funds. We have also not seen any indictments for the owners of legitimate businesses who actually paid employees the amount equivalent (or higher) in payroll costs. Accordingly, Count One and Count Two of the Superseding 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.

E. Bill of Particulars

In the alternative, we respectfully request the Court order the Government to file a bill of particulars that adequately apprises Crowther of the scope of the Government's allegations and allows Crowther to prepare his defense and avoid unfair and prejudicial surprise at trial. The Government's own statement of the regulations within the Superseding Indictment belies its theory of prosecution. "PPP loan proceeds were required to be used for certain permissible expenses[7], including payroll costs, mortgage interest payments, rent and/or utilities, the interest and principal on the PPP loans was eligible for forgiveness if the business spent the loan proceeds on the expense items within a designated period of time and used a certain portion of the loan towards payroll expenses." [*See* D.E. #32, §8, pgs. 3-4]. In this paragraph, the Government concedes that if payroll costs or other allowable expenses are spent "within the designated period of time" then the PPP loan is eligible for forgiveness. This statement acknowledges that if Target Roofing spent $2,098,700.00, the amount of the loan proceeds, on allowable expenses within the very last week of the designated period of time then the Company would qualify for forgiveness. Yet, the Government arrested Crowther and charged him with a federal crime prior to the end of the designated period. Thus, we are left wondering what federal regulation the Government is accusing Crowther of violating. A bill of particulars could shed some light on the apparent conflict within the Government's own Superseding Indictment.

V. CONCLUSION

Based on the foregoing, the Counts One through Four of the Superseding Indictment should be dismissed in their 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. 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 Superseding Indictment also fails to state an offense and allege the

[7] ¶8 Misstates the regulations. The PPP loan proceeds were required to be used for certain permissible expenses *to qualify for forgiveness.* There were many other permissible expenses as defined by the SBA that may not qualify for forgiveness but were, by no means, illegal. The remedy for an unqualified expense was a default to the loan terms between the Lender and the borrower.

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. In the alternative, Crowther respectfully requests that the Court order the Government to file a bill of particulars specifying which federal regulation governing the CARES Act Crowther is alleged to have violated.

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 Counts One through Four of the Superseding 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,

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CERTIFICATE OF SERVICE

I, Nicole H. Waid and Brian E. Dickerson, attorneys for Casey David Crowther, do hereby certify that we have, this day, November 13, 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* /s/ *Brian E. Dickerson*
Nicole H. Waid, Esq. Brian E. Dickerson, Esq.