UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 2:20-cr-114-FtM-66MRM

CASEY DAVID CROWTHER

UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS SUPERSEDING INDICTMENT AND REQUEST FOR BILL OF PARTICULARS

The defendant seeks to dismiss Counts One through Four of the superseding indictment (Doc. 32) based upon the contention that the superseding indictment fails to state an offense pursuant to Fed. R. Crim. P. 12(b)(3)(B)(v). Doc. 41. The superseding indictment is legally sufficient as it charges the language of the applicable statutes and sufficiently informs the defendant of the charges against him. Therefore, the motion to dismiss and request for a bill of particulars should be denied.

SUMMARY OF THE SUPERSEDING INDICTMENT

The defendant is charged in a seven count speaking superseding indictment with Bank Fraud (18 U.S.C. § 1344) (Counts One and Five), False Statement to Lending Institution (18 U.S.C. § 1014) (Counts Two and Six), and Illegal Monetary Transactions (18 U.S.C. § 1957) (Counts Three, Four, and Seven). Doc. 32. Since the defendant is only seeking to dismiss Counts One through Four of the superseding indictment, the government will only summarize those counts. The superseding indictment contains an introduction section that is specifically applicable to Counts One through Four. *Id.* at 1-4. The introduction section identifies and defines the defendant, defendant's business, Small Business Association ("SBA"), Coronavirus Aid, Relief, Economic Security ("CARES") Act, the Paycheck Protection Program ("PPP"), and the Lender. *Id.* The Lender is defined as "a financial institution federally insured by the Federal Deposit Insurance Corporation ('FDIC') headquartered and with branches in Lee County, Florida…" *Id.* at 4.

The introduction section also describes the PPP loan application process and its requirements. *Id.* at 2-4. Specifically, the introduction section explains that a qualifying business is required to acknowledge the PPP rules and make certain affirmative certifications in its PPP loan application in order to be eligible for a PPP loan. *Id.* at 3. The PPP loan application is processed by a participating lender, and, if approved, the participating lender funds the PPP loan with its own monies, which are 100% guaranteed by the SBA. *Id.* The introduction section also describes the PPP loan proceeds can only be used for certain permissible expenses, including payroll costs, mortgage interest, rent, and utilities. *Id.*

A. Count One

Count One of the superseding indictment, charging bank fraud, consists of three additional sections labeled "The Scheme to Defraud," "Manner and Means of the Scheme," and "Execution of the Scheme" which outline the charge. *Id*. Further, the Scheme to Defraud section tracks the language of the bank fraud statute under 18 U.S.C. § 1344 and states "the defendant did knowingly and intentionally execute, and attempt to execute, a scheme and artifice to defraud a financial institution, and to obtain monies, funds, credits, assets, and other property owned by, and under the custody and control of, a financial institution, by means of materially false and fraudulent pretenses, representations, and promises." *Compare* 18 U.S.C. § 1344 *with* Doc. 32 at 4.

The Manner and Means of the Scheme section further details and outlines how the defendant perpetrated the scheme and artifice to defraud. Moreover, this section describes the false, fraudulent, and misleading representations made to the Lender which caused the Lender to deposit funds into accounts under the defendant's control which the defendant used for his own personal enrichment. *Id.* at 4-6. The Execution of the Scheme section further states the defendant executed the scheme and artifice to defraud, "by submitting a false PPP loan application and revised PPP loan application on behalf of his company, Target Roofing, in order to receive a loan from the

Lender, a bank insured by the FDIC, which loan was guaranteed by the SBA…" *Id.*at 6-7.

B. Count Two

Count Two of the superseding indictment, charging false statement to lending institution, tracks the language of the applicable statute under 18 U.S.C. § 1014. *Compare* 18 U.S.C. § 1014 *with* Doc. 32 at 7. More specifically, Count Two summarizes the false statement made by the defendant in a PPP loan application and revised PPP loan application submitted to the Lender, an institution insured by the FDIC.

C. Counts Three and Four

Counts Three and Four of the superseding indictment, charging illegal monetary transactions, track the language of the applicable statute under 18 U.S.C. § 1957. *Compare* 18 U.S.C. § 1957 *with* Doc. 32 at 8-9. Further, both counts allege the defendant knowingly engaged in monetary transactions in criminally derived property of a value greater than $10,000 and it was derived from specified unlawful activity. *Id.* Counts Three and Four describe the unlawful activity as bank fraud and further describes each monetary transaction in criminally derived property of a value greater than $10,000. *Id.* These monetary transactions include a $100,000 wire made to S.A. in connection with a $722,474.00 promissory note, and a $689,417.00 wire to Sara Bay Marina for the purchase of a 40' Invincible Catamaran boat. *Id.*

ARGUMENT

In determining the legal sufficiency of an indictment, "a district court is limited to reviewing the face of the indictment and, more specifically, the language used to charge the crime." *United States v. Sharpe*, 438 F.3d 1257, 1263 (11th Cir. 2006) (citing *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). Further, the Court is to read the indictment in the light most favorable to the United States and assume the factual allegations to be true. *Sharpe*, 438 F.3d at 1258-59. To be valid, an indictment "must contain the elements of the offense intended to be charged, and sufficiently apprise the defendant of what he must be prepared to meet." *Id.* at 1263 (quoting *United States v. Bobo*, 344 F.3d 1076, 1083 (11th Cir. 2003). Moreover, an indictment "is sufficient if it charges in the language of the statute." *Critzer*, 951 F.2d at 307.

With criminal cases, there is no summary judgment mechanism that would enable the Court to engage in the pre-trial determination of the sufficiency of the government's evidence. *United States v. Salman*, 378 F.3d 1266, 1268 (11th Cir. 2004). Here, the defendant has submitted a motion to dismiss that is akin to a civil motion for summary judgment. The defendant's motion, in essence, asks this Court to make a pre-trial determination of the facts and evidence of the case based on what the defendant believes the facts and evidence to be. For example, the defendant contends "[t]he 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 regulation that govern the CARES Act." Doc. 41 at 5. However, the government is not required to submit a proffer of what it will prove at trial in its response to the defendant's motion to dismiss. *See Critzer*, 951 F.3d at 307-8. Moreover, the focus of the defendant's argument for dismissal is that the government misinterpreted the CARES Act. *See* Doc. 41. As will be discussed further below, the superseding indictment does not charge the defendant with violating the CARES Act. It charges the defendant with violating 18 U.S.C. §§ 1344, 1014, and 1957. The government's response will therefore be limited to the legal sufficiency of the four corners of the indictment.

A. The superseding indictment properly charges and tracks the language of the applicable criminal statutes, and the defendant is not charged with violating the CARES Act.

The defendant has asked this Court to dismiss Counts One through Four of the superseding indictment based upon the premise that the government has misinterpreted the CARES Act. Doc. 41 at 11-14. The

Defendant is not charged with violating the CARES Act, but is charged in Counts One through Four with committing bank fraud, false statement to a lending institution, and illegal monetary transactions. Doc. 32 at 1-9. The superseding indictment accurately summarizes, in part, relevant portions of the CARES Act and PPP for the purpose of charging, with sufficient detail, the applicable criminal statutes.

Congress created the Paycheck Protection Program when it passed the CARES Act on March 27, 2020. Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Pub. L. No. 116-136, 134 Stat. 281 (2020). Sections 1102 and 1106 of the CARES Act make amendments to the SBA's 7(a) loan program to include the PPP, under 15 U.S.C. § 636(a)(36). *Id.* PPP loans were to be administered under the SBA's (7)(a) loan program. To be eligible for PPP loan funding, the borrower was required to make a number of certifications. 15 U.S.C. § 636(a)(36)(G)(i). Significant to this case, the PPP borrower was required to make a good faith certification "acknowledging that funds [would] be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments." *Id.* Additionally, 15 U.S.C. § 636(a)(36)(F) sets forth the allowable uses of the PPP loan proceeds. The superseding indictment accurately summarizes these applicable sections of the CARES Act and 15 U.S.C. § 636(a)(36)(G) and (F) in paragraphs six and eight of the introduction section. Doc. 32 at 2-4.

Since being signed into law on March 27, 2020, interim rules have been published in the Federal Register concerning the CARES Act and PPP. The interim rule published on April 15, 2020 directly specified the certifications the PPP borrower makes in the PPP application. Specifically, the borrower certifies the "funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments." 85 Fed. Reg. 20814. This certification goes on to state that, "I understand that if the funds are knowingly used for unauthorized purposes, the Federal Government may hold me legally liable such as for charges of fraud." *Id.* Moreover, this interim rule directly addressed the criminal repercussions associated with the unauthorized use of PPP funds. More specifically, that "if you knowingly use the [PPP] funds for *unauthorized* purposes, you will be subject to additional liability such as charges for fraud." *Id.* (emphasis added). Notwithstanding the defendant's claims in the motion to dismiss, the defendant also cites to this exact section of the April 15, 2020 interim rules. Doc. 41 at 8.

In his motion, the defendant focuses on the claim that a borrower is only required to use PPP loan proceeds for authorized purposes if the borrower is seeking loan forgiveness. *Id.* at 12-14. However, the defendant overlooks the fact that his PPP loan would not have been approved had he disclosed his true intent to use over $700,000 for unauthorized purposes. Most importantly, the superseding indictment does not charge the defendant with committing fraud in the PPP loan "forgiveness" process. *See Id.* Count One of the superseding indictment outlines, in detail, the manner and means by which the defendant executed his scheme to defraud the Lender. Doc. 32 at 5. That the defendant made materially false and fraudulent misrepresentations to the Lender concerning his intended use of PPP loan proceeds in his PPP loan applications. *See Id.*

While the defendant may seek to introduce his understanding of the CARES Act and PPP in defense of his unauthorized use of PPP funds at trial, this is not proper grounds for dismissal under Fed. R. Crim. P. 12(b)(3)(B)(v). These arguments should be made in a motion for acquittal following the close of evidence at trial. *See* Fed. R. Crim. P. 29; *Salman*, 378 F.3d at 1268.

The government maintains it correctly summarized relevant portions of the CARES Act and PPP program in the introduction section of its superseding indictment, and the defendant is not charged with violating the CARES Act. When Congress passed the CARES Act, they did not enact a criminal statute by which someone can be prosecuted for violating the act. As such, the defendant is charged in Counts One through Four with bank fraud, false statement to lending institution, and illegal monetary transactions. Each count charges the language of the applicable criminal statutes and sufficiently apprises the defendant of what he is charged with. *Critzer*, 951 F.2d at 307. Therefore, dismissal would not be appropriate under Fed. R. Crim. P. 12(b)(3)(B)(v).

B. Count One alleges the financial institution is the Lender, not the SBA.

The defendant argues Count One of the superseding indictment, charging bank fraud, should be dismissed because the SBA is not a financial institution. Doc. 41 at 14-16. Nowhere in Count One of the superseding indictment does the government allege the SBA is the defrauded financial institution. Further, Count One of the superseding indictment sufficiently alleges the defendant defrauded the Lender, described in the Introduction section as "a financial institution federally insured by the Federal Deposit Insurance Corporation ('FDIC')…" Doc. 32 at 4-7. Count One further alleges the defendant knowingly and intentionally executed a scheme and artifice to defraud the Lender by making false, fraudulent, and misleading representations in PPP loan applications. *Id.* Moreover, the defendant executed the scheme to defraud "in order to receive a loan from the Lender, a bank insured by the FDIC, which loan was guaranteed by the SBA and which proceeds were deposited into accounts at the Lender under the defendant's custody and control." *Id*. at 7.

The defendant, in his motion, suggests the Lender in this case had no authority to approve PPP loans. Doc. 41 at 14. That is incorrect; the SBA delegated authority to authorized lenders to make and approve PPP loans. 15 U.S.C. § 636(a)(36)(F)(ii). The April 15, 2020 interim rule further clarified who was eligible to make PPP loans, which included SBA 7(a) lenders and any federally insured depository institution, as well as other financial institutions. 85 Fed. Reg. 20815. Furthermore, the introduction section of the superseding indictment defines the Lender as an authorized lender and states, "the Lender participated in the SBA's PPP as a lender and, as such, was authorized to lend funds to eligible borrowers under the terms of PPP." Doc. 32 at 4. The introduction section also states the Lender was federally insured by the FDIC. *Id.* Therefore, the defendant's argument in support of dismissing Count One of the superseding indictment because the SBA is not a financial institution lacks merit.

The defendant contends that the government acknowledges the defrauded institution is the SBA and not the Lender based on paragraph e of the manner and means section of Count One of the superseding indictment. (Doc. 41 at 14). While the government maintains this argument does not warrant dismissal of Count One of the superseding indictment, the government intends on amending the language in paragraph e to reflect the Lender funded the PPP loan.[1] This is also consistent with paragraph 7 of the introduction section, which states "the participating lender funded the PPP loan using its own monies, which were 100% guaranteed by the SBA." Doc. 32 at 3.

C. Count One and Count Two state an offense and allege the requisite intent.

The defendant contends Counts One and Two of the superseding indictment should be dismissed because the government failed to allege the requisite intent and state a valid offense. Doc 41 at 16-21. In his motion to dismiss, the defendant conflates the legal sufficiency of an indictment with the sufficiency of the government's evidence. For example, the defendant argues that "the Government cannot prove Crowther's intent at the time he signed the PPP application…" Doc. 41 at 19. The defendant further argues "the Government cannot prove that at the time Crowther signed the PPP Application that he knowingly misrepresented" his use of SBA loan proceeds. Again, rooted in the defendant's reasoning for dismissal is what the

[1] While the language in paragraph e will be amended in a second superseding indictment to reflect the funding of the PPP loan by the Lender, this will not alter the pending charges in the superseding indictment and the government believes the Court can still address the defendant's arguments for dismissal.

government can "prove." This invokes a pre-trial examination of the sufficiency of the government's evidence which is prohibited when ruling on a Rule 12(b) motion to dismiss. *See Salman*, 378 F.3d at 1268.

The sufficiency of the government's evidence of the defendant's intent to defraud is not to be determined in a motion to dismiss under Fed. R. Crim. P. 12(b), as it would involve looking beyond the face of the superseding indictment. *See Critzer*, 951 F.2d at 307. An examination of the sufficiency of the government's evidence is a factual determination to be made by a jury or factfinder and not in a pre-trial motion to dismiss. *See Salman*, 378 F.3d at 1268.

In examining the face of the superseding indictment, Count One and Count Two sufficiently allege the requisite intent. Count One alleges the defendant *knowingly* executed a scheme and artifice to defraud a financial institution, closely mirroring the language of the bank fraud statute under 18 U.S.C. § 1344. Doc. 32 at 4-7. Count Two alleges the defendant *knowingly* made a false statement, which tracks the language of the false statement to lending institution statute under 18 U.S.C. § 1014. Doc. 32 at 7.

The appropriate time and place to argue about the sufficiency of the government's evidence is at trial in a motion for acquittal after the government has presented its evidence, and if the defendant presents a case, or to a jury in closing argument. Even the *McCarrick* case, cited and analyzed by the defendant, involved the appellate review of the sufficiency of the government's evidence presented *at trial* and not the legal sufficiency of the governments indictment. *See United States v. McCarrick*, 294 F.3d 1286 (11th Cir. 2002). Additionally, the defendant's contention that Count One of superseding indictment is deficient because the government does not allege any loss to the Lender or SBA is without merit. Doc. 41 at 20. It is well settled that the bank fraud statute does not require proof that the defrauded bank suffered financial loss, or that the defendant intended the bank suffer financial harm. *See Shaw v. United States*, 137 S. Ct. 462, 466-67 (2016).

D. Counts Three and Four (Illegal Monetary Transactions) sufficiently allege and specify the unlawful activity.

The defendant requests a dismissal of Counts Three and Four of the superseding indictment because the counts do not specify an unlawful activity. The defendant's reasoning is that since the defendant did not commit bank fraud, he cannot be charged with violating 18 U.S.C. § 1957. The superseding indictment itself tracks the language of 18 U.S.C. § 1957, specifies the unlawful activity as bank fraud, and summarizes two separate monetary transactions, in and affecting interstate and foreign commerce. Additionally, as previously stated, Count One of the superseding indictment sufficiently alleges and charges bank fraud.

The defendant further argues its belief of what the facts and evidence are concerning the appropriate nature of the alleged financial transactions. Such a characterization, which the government would disagree with, is based upon the defendant's representation of the facts and evidence of the case. Again, these are arguments the defendant should be making at the close of the evidence being presented, not in the form of a Rule 12 motion to dismiss.

E. The defendant's request for a bill of particulars is without cause and should be denied.

As an alternative to dismissing the superseding indictment, the defendant has requested the Court order the government file a bill of particulars. "The purpose of a bill of particulars is to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." *United States v. Warren*, 772 F.2d 827, 837 (11th Cir. 1985) (citing *United States v. Cole*, 755 F.2d 748, 760 (11th Cir. 1985); *United States v. Mackey*, 551 F.2d 967, 970 (5th Cir. 1977)). Further, "a defendant is not entitled to a bill of particulars where the information sought has already been provided by other sources, such as the indictment and discovery." *United States v. Davis*, 854 F.3d 1276, 1293 (11th Cir. 2017) (citing *United States v. Martell*, 906 F.2d 555,558 (11th Cir. 1990)).

Here, the defendant requests the government file a bill of particulars that states what federal regulation the defendant violated. Doc. 41 at 21-22. As previously discussed, the superseding indictment charges the defendant with violating 18 U.S.C. §§ 1344, 1014, and 1957 and does not charge the defendant with violating a federal regulation. Further, the superseding indictment is a speaking indictment that sufficiently informs the defendant of the charges against him with detail and particularity.

Additionally, the defendant cannot argue that he is unable to prepare his defense without a bill of particulars. The defendant's first motion to dismiss (Doc. 25) and his subsequent motion to dismiss (Doc. 41) are littered with a variety of alleged defenses. One of these defenses was that the defendant did not intend to use PPP funds to purchase a 40' Catamaran and that the Lender is to blame for using PPP funds for the boat's purchase. Doc. 25 at 5. Another defense was that the funds used to purchase the 40' Catamaran were the proceeds of a loan from Target Roofing and the boat's purchase was an investment with a return that would be reinvested into the business. *Id.* at 6-7. In defense of his use of PPP funds, the defendant also argues he was not required to only use PPP funds on payroll costs, mortgage interest, lease payments, and utilities and that the government has misinterpreted the CARES Act. *Id.* at 8-11; Doc. 41 at 12-14. In the pending motion and previous motion to dismiss, the defendant has argued the government cannot prove the defendant knowingly intended to commit fraud. Doc. 25 at 13-19; Doc. 41 at 16-21. The defendant cannot now argue in good faith that a bill of particulars is necessary to allow him to prepare his defense. Therefore, the defendant's request for a bill of particulars should be denied.

F. The defendant's request for oral argument should be denied.

The defendant has requested that oral argument be scheduled on his motion to dismiss pursuant to Local Rule 3.01. Doc. 41. at 2. However, the Court can determine whether dismissal is warranted by examining the four corners of the superseding indictment, the arguments contained in the defendant's motion, and the government's response. Therefore, oral argument would not be needed.

CONCLUSION

The defendant's motion to dismiss goes far beyond the scope of what this Court may consider in determining the legal sufficiency of the government's indictment under Rule 12. The superseding indictment tracks the language of the applicable statutes and sufficiently apprises the defendant of the charges against him. Furthermore, the defendant is not entitled to a bill of particulars. Wherefore, the United States of America respectfully requests the defendant's motion to dismiss and request for bill of particulars (Doc. 41) be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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