UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:22-CR-20290-BLOOM/OTAZO-REYES

UNITED STATES OF AMERICA

v.

ERIC DEAN SHEPPARD,

Defendant.
_____________________________________/

**MOTION FOR BILL OF PARTICULARS**

The Defendant Eric Dean Sheppard, by and through his undersigned counsel, and pursuant to Fed. R. Crim. P. 7, respectfully moves this Honorable Court for a bill of particulars.

**PRELIMINARY STATEMENT**

The Indictment charges Mr. Sheppard with six counts of wire fraud, one count each for each of the six different government loan applications he allegedly applied for through two different government loan programs involving three different companies. According to the Indictment, Mr. Sheppard and unidentified accomplices made materially false representations in each application and that he allegedly misused and diverted the loan proceeds. Yet, the Indictment fails to identify a single alleged false statement in any of the six applications that are the basis for the six criminal charges. Nor does the Indictment identify a single instance of alleged misuse of the proceeds of a single dollar of any of the six charged loans, or in what way(s) such use of funds is criminal. For these and other reasons, described in greater detail below, a Bill of Particulars is necessary to put Mr. Sheppard on notice of the crimes for which he is charged and to be able to properly defend himself against such charges.

**A BILL OF PARTICULAR IS NECESSARY**
**TO PROTECT MR. SHEPPARD'S CONSTITUTIONAL RIGHTS**

The Indictment charges Mr. Sheppard alone with six counts of wire fraud involving six loan applications ("Loan Applications"), arising from the Government's efforts to support businesses that tried to continue operating during the pandemic. [Indictment at 1-3, 6-7]. Specifically, the Indictment charges three counts involving Loans Application submitted under the Payroll Protection Program ("PPP") and three counts involving Loan Applications submitted under the Economic Injury Disaster Loan program ("EIDL"). [*Id.* at 6-7 (¶8)]. The Loan Applications were submitted by three different companies, to wit, HM Management and Development, LLC ("HMMD"), HM-UP Development Alfaya Trails, LLC ("Alfaya Trails"), and HM Four, LLC ("HM Four") (collectively the "Three Companies"). [*Id.* at Page 3-7].

**A. The Indictment Does Not Identify The Alleged False and/or Fraudulent Representations For Each Loan Application and Wire Fraud Count**[1]

The Indictment alleges that Sheppard and "other accomplices" made false and fraudulent material representations in submitting, or causing to be submitted, allegedly false and fraudulent PPP and EIDL Loan Applications for the Three companies. [Indictment at 5 (¶¶ 2, 4)]. Moreover, without identifying the co-conspirators, the Indictment alleges—general, non-specific, and incomplete allegations claiming —that: "These false and fraudulent PPP loan and EIDL included, among other things, falsified tax returns that purported to substantiate nonexistent business profits,

[1] In a wire fraud charge, a defendant must be provided notice as to which of his statements the government contends are false or fraudulent. *See*, *e.g.*, *United States v. Velez*, No. 05-20770-CR, 2008 WL 11454799, at *2 (S.D. Fla. July 11, 2008); *See also United States v. McCoy*, 492 F. Supp. 540, 545 (M.D. Fla. 1980) (requiring the government to set forth in a bill of particulars "each false and fraudulent pretense and representation described generally in the indictment"); *United States v. Velez*, No. 05-20770-CR, 2008 WL 11454798, at *5 (S.D. Fla. July 11, 2008) (same).

and misrepresentations about the borrowing entities' revenues, monthly payroll, and numbers of employees." [Indictment at 5-6 (¶ 5)]. There is no other information or notice provided regarding the alleged misrepresentations and or fraud perpetrated.

These overbroad, general claims of misrepresentations are completely insufficient. *First*, the "included, among other things" safety hatch is a hole the Government can drive a truck through. It is meant to surprise Mr. Sheppard at trial with any number of different allegations for which the Government will seek a conviction and for which the defense would be unprepared to respond. *Second*, the Indictment does not even attempt to identify, a single alleged materially false and fraudulent representation for each Loan Application that is charged in each separate count. To be clear, the Indictment does not identify even one of the alleged charged false and fraudulent misrepresentations on any of the six wire fraud charges. *Finally*, it is improper for a criminal fraud charging instrument to so generally state that there were misrepresentations "about" certain topics, "among other things," and not tied to each Loan Application. There is no legitimate reason for the Government to not plainly and clearly allege which representations it will rely on for each loan application, for each count it charged — in seeking to deprive Mr. Sheppard of his freedom.

**B. <u>The Indictment Does Not Provide Sufficient Notice Regarding Diversions of Proceeds</u>**

The Indictment charges that one of the two purposes of Mr. Sheppard and his unnamed "accomplices'" scheme was to "unlawfully enrich themselves" by "diverting fraud proceeds for the defendants' personal use, the use of and benefit of others, and to further the fraud." [Indictment at 5 (¶ 3)]. The Indictment also alleged that Sheppard "used the fraudulently obtained proceeds for his personal use and benefit." [Indictment at 6 (¶ 7)]. Moreover, the Indictment alleges that the proceeds of PPP loans are "required" to be used for only certain business purposes. [Indictment at 2 (¶ 5)]. By contrast, although the Indictment generally alleges some unidentified misuse and diversion of Loan proceeds, the Indictment does not allege that the EIDL loans are "required" to be used for a certain purpose.

These allegations about alleged misuse and diversion of proceeds collectively provide insufficient notice to the defense for two reasons. *First*, the Indictment fails to identify the alleged misuse(s) or diversion(s) at all, and certainly, it fails on a per-Loan and per-Count basis as well. Mr. Sheppard is entitled to advance notice in order to properly prepare a defense to the charges as alleged in the Indictment. *Second*, the Indictment is contradictory, confusing and unclear on whether the alleged misuse(s) and diversion(s) are part of the charged crimes themselves (and how that would work in a wire fraud case) as opposed to motive to commit them.

On the one hand, the Indictment alleges that PPP loans proceeds were "required" to be used only for certain business purposes, [Indictment at 2 (¶ 5)], a "purpose" of the scheme (without identifying the applicable Loan(s)) was misuse and diversion of Loan proceeds [*id.* at 5 (¶ 3)], Sheppard and his "accomplices" misused and diverted the funds, including for his personal use and the personal use of "others" (*without identifying the applicable Loan*(s)) [*id.* at 5 (¶ 3), at 6 (¶ 7)]. On the other hand, there are no allegations about the required uses of the EIDL loan proceeds, and the charged wire fraud language refers to false representations, not misuse and diversion. [*Id.* at 5 (¶2)].

In sum, Mr. Sheppard is entitled to notice whether the alleged misuse and diversion by him and/or his accomplices is alleged to be part of the crimes charged in any one or more of the six Counts, (three involving PPP loans, and three involving EIDL loans), the actual alleged diversion(s) and misuse(s) by Sheppard and each of the unnamed "accomplices" for each applicable Loan, and in what misuse and diversion violate the wire fraud statute for each Loan

Application (*e.g.*, is it because of a program requirement, because of a representation or commitment in a loan application, or for some other reason).

**C. The Indictment Does Not Identify the Unindicted Co-Conspirators**[2]

As noted above, the Indictment alleges that Sheppard's unnamed "accomplices" and "others" were involved in the charged crimes in various ways. [Indictment at 5 (¶¶ 3, 4), at 6 (¶ 7)]. Where there may be reasons in certain cases not to disclose the identities of unindicted conspirators in the charging document itself, there does not seem to be any justification here, and the information has not been disclosed in discovery either.

## STANDARD

The purpose of a bill of particulars is: (1) to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense; (2) to minimize surprise at trial; and (3) to enable him to plead double jeopardy in the event of a later prosecution for the same offense. *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986). A bill of particulars is used to "supplement [] an indictment by providing the defendant with information *necessary* for trial preparation." *Id*. at 1441; *See also United States v. Palacio*, No. 21-20301-CR, 2021 WL 4066894, at *2 (S.D. Fla. Sept. 7, 2021). "The test for whether a bill of particulars is necessary is 'whether the indictment sets forth the elements of the offense charged and sufficiently apprises the defendant of the charges to enable him to prepare for trial.'" *United States v. Velez*, No. 05-20770-CR, 2008 WL 11454799, at *1 (S.D. Fla. July 11, 2008) (quoting *United States v. Kendall*, 665 F.2d 126,

[2] *United States v. Barrentine*, 591 F.2d 1069, 1077 (5th Cir. 1979)("A bill of particulars is a proper procedure for discovering the names of unindicted coconspirators who the government plants to use as witnesses at trial. . . It is not uncommon for the trial judge to require the government to disclose their names when information is necessary in a defendant's preparation for trial."); *See also United States v. Velez,* No. 05-20770-CR, 2008 WL 11454798, at *4 (S.D. Fla. July 11, 2008)( *Barrentine* still controls and a bill of particulars is proper [to obtain the identity of unindicted participants]").

134 (7th Cir. 1981)). For the reasons stated above, the Indictment fails to apprise Sheppard of the charges to enable him to prepare his defense, and therefore, a Bill of Particulars is required.

## CONCLUSION

In sum, the Indictment is completely inadequate when it comes to informing the defendant of the charges against him. The Indictment is no more than very general, broad brush language of the wire fraud statute along with the several loans applied for, and is wholly deficient in providing the Defendant with precisely he is charged with in order for him to mount a viable defense.

**WHEREFORE**, Sheppard respectfully requests that this Court direct the United States to provide a Bill of Particulars.

## COMPLIANCE WITH LOCAL RULE 88.9

Pursuant to Local Rule 88.9, the undersigned counsel has conferred with Assistant United States Attorney Marty Fulgueira Elfenbein, who informed the undersigned that the government opposes the relief sought in this Motion.

Dated: December 9, 2022

Respectfully submitted,

**NELSON MULLINS**
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9425
Facsimile: 305.373.9443

By: */s/ Jonathan Etra*
Jon A. Sale
Florida Bar No. 246387
Jayne C. Weintraub
Florida Bar No. 320382

Mark F. Raymond
Florida Bar No. 373397
Jonathan Etra
Florida Bar No. 686905
Christopher Cavallo
Florida Bar No. 0092305

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 9, 2022 the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

*/s/ Jonathan Etra*___
Jonathan Etra