UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 22-20290-CR-BLOOM/OTAZO-REYES

UNITED STATES OF AMERICA,

v.

ERIC DEAN SHEPPARD,

Defendant.
______________________________/

GOVERNMENT'S RESPONSE TO
DEFENDANT'S MOTION FOR BILL OF PARTICULARS

The United States, by and through the undersigned Assistant United States Attorney, hereby files this Response to the Defendant's Motion for Bill of Particulars (the "Motion"), ECF No. [37], and states:

I. INTRODUCTION AND PROCEDURAL HISTORY

The Defendant has been charged with six counts of wire fraud arising out of his fraudulent applications for loans through the Paycheck Protection Program ("PPP") and Economic Injury Disaster Loan ("EIDL") program. Under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, Congress authorized forgivable loans to small businesses for job retention and certain other expenses, known as PPP loans. With regard to the EIDL program, this was an SBA program that existed before the COVID-19 pandemic to provide low-interest financing to small businesses, renters, and homeowners in regions affected by declared disasters. The CARES Act authorized the SBA to provide EIDLs to eligible small businesses experiencing substantial financial disruptions due to the COVID-19 pandemic.

The Defendant, through three different entities that he controlled, HM Management and

Development, LLC ("HMMD"), HM-Up Development Alafaya Trails, LLC ("Alafaya Trails"), and HM Four LLC ("HM Four"), applied for three EIDL and three PPP loans. In doing so, the Defendant submitted or caused to be submitted false and fraudulent PPP loan applications and EIDL applications. These false and fraudulent applications included, among other things, falsified tax forms that purported to substantiate nonexistent business profits and misrepresentations about the borrowing entities' revenues, monthly payroll, and numbers of employees. Based on the false and fraudulent PPP loan and EIDL applications three different financial institutions disbursed PPP loan proceeds to Alafaya Trails and HMMD, and the SBA disbursed EIDL proceeds to bank accounts held by HMMD, Alafaya Trails, and HM Four, all controlled by the Defendant. Once the fraudulently obtained proceeds were deposited into the designated accounts of each entity, the Defendant used the proceeds for his personal use and benefit rather than the permitted uses under the EIDL and PPP loan programs.

In his Motion, the Defendant claims that the Indictment does not identify any false statements made in any of the loans at issue, does not identify any misuses of the loan proceeds or in what ways the use of such funds is criminal, and does not identify any accomplices. Not only does the Indictment contain all required information to put him on notice of the wire fraud charges, but the discovery contains all necessary details that the Defendant needs to prepare a defense, plead double jeopardy in a subsequent prosecution, and avoid surprise at trial. Because the requested bill of particulars seeks information detailing the Government's theory of the case at trial, which Federal Rule of Criminal Procedure 7(f) does not authorize, the Defendant's Motion should be denied.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Criminal Procedure 7(f), "[t]he court may direct the government to file a bill of particulars." Fed. R. Crim. P. 7(f). "The defendant bears the burden of showing that the information requested is necessary and that he will be prejudiced without it so as to justify granting a bill of particulars." *United States v. Bickers*, No. 18-CR-98-SCJ-LTW, 2019 WL 7559292, *1, at *7 (N.D. Ga. Sept. 17, 2019) (citing *United States v. Barnes*, 158 F.3d 662, 666 (2d Cir. 1998)). A defendant does not satisfy this burden by merely stating that he or she will be prejudiced without the bill. *Id.*

A bill of particulars is intended to "'inform[ ] a defendant of the nature of the charges against him so that he will have sufficient detail to prepare for [his] defense, to avoid or minimize the danger of surprise at trial, and to enable him to plead double jeopardy' in a later prosecution for the same offense." *United States v. Holzendorf*, 576 F. App'x 932, 935–36 (11th Cir. 2014) (quoting *United States v. Perez,* 489 F.2d 51, 70–71 (5th Cir.1973)). A district court has the discretion to grant or deny a defendant's request for a bill of particulars. *Id.*

However, "[a] defendant may not request a bill of particulars 'to obtain a detailed disclosure of the government's evidence prior to trial,' or to acquire 'information which is already available through other sources.'" *Id.* (quoting *United States v. Martell,* 906 F.2d 555, 558 (11th Cir.1990)). *See also United States v. Detling*, No. 118CR00309LMMLTW1, 2019 WL 3006623, at *7–9 (N.D. Ga. Apr. 30, 2019), *report and recommendation adopted,* No. 1:18-CR-309-LMM-LTW, 2019 WL 2284726 (N.D. Ga. May 29, 2019) (emphasis in original, citations omitted) ("A bill of particulars supplements an indictment by providing information *necessary* for a defendant to prepare for trial, and it is not meant to function as a discovery device."). "Similarly, a bill of particulars is not a tool that allows defendants to obtain every fact that the Government may possess regarding a conspiracy." *Bickers*, 2019 WL 7559292, *7 (citing *United States v. Rosenthal*, 793 F.2d 1214, 1227 (11th Cir. 1986), *modified on other grounds*, 801 F.2d 378 (11th Cir. 1986)). A bill of particulars likewise may not seek to determine in advance the government's proof. *Id.* (citing *United States v. Johnson*, 575 F.2d 1347, 1356 (5th Cir. 1978); *United States v. Smith*, 341 F. Supp. 687, 690 (N.D. Ga. 1972)). Nor is a bill of particulars "designed to compel the government to detail[ ] exposition of its evidence or to explain the legal theories upon which it intends to rely at trial." *United States v. Palacio*, No. 21-20301-CR, 2021 WL 4066894, at *2 (S.D. Fla. Sept. 7, 2021) (quoting *United States v. Roberts*, 174 F. App'x 475, 477 (11th Cir. 2006)).

III. THE REQUESTED BILL OF PARTICULARS SHOULD BE DENIED

In the Motion, the Defendant claims that the Indictment does not identify a single alleged false statement in any of the six applications for EIDL and PPP loans, does not identify a single instance of alleged misuse of the proceeds in any of the six loans or in what ways the use of such funds is criminal, and does not identify any accomplices. The Defendant has failed to satisfy his burden to demonstrate that he is entitled to a bill of particulars as the allegations in the Indictment coupled with the voluminous discovery produced to date give him ample notice of the charges against him, requiring denial of the Motion.

1. The Government is not Required to Itemize Every Single Misrepresentation in a Bill of Particulars When the Defendant Has Notice of the Charges.

The Defendant has full notice of the wire fraud charges alleged against him through both the speaking indictment and the discovery. As a result, the requested bill of particulars should be denied.

The Eleventh Circuit has considered requests similar to those of the Defendant and has found no abuse of discretion in the district court's denial of a bill of particulars. *See Holzendorf*, 576 F. App'x at 935–36. In *Holzendorf*, the district court denied a bill of particulars seeking "every single material misrepresentation the government intended to show at trial," finding that the "request was nothing more than a thinly veiled attempt to have the government make a detailed disclosure of the evidence that it planned to present at trial." Noting there was no showing the defendant was actually surprised at trial, the Eleventh Circuit explained that the indictment described the nature of the fraudulent scheme and that the government's response to the motion for bill of particulars listed nine types of misrepresentations that it intended to prove at trial. *Id.* In addition, the Eleventh Circuit noted that the information the defendant requested was already available from other sources, such as the trial transcripts of his co-conspirators and their plea agreements, which included specific examples of misrepresentations made in the transactions at issue. *Id.* at 936. *See also United States v. Maurya*, 25 F.4th 829, 838 (11th Cir. 2022) (finding that the defendant had adequate notice of the charges when the defendant's request for bill of particulars referenced the transactions the government contended were fraudulent and simply wanted the government to explain prior to trial which transactions, amounts, accounts, and other details would be most significant at trial, thereby seeking the government's specific legal theory.).

Similarly, a district court in this circuit denied a request for the material misrepresentations at issue along with a definition of "non-litigation related expenses," among other requests. *Detling*, 2019 WL 3006623, at *7. Finding that the information requested was not necessary to avoid surprise or prepare a defense, the district court found that the superseding indictment adequately informed the defendant of the charges supporting the fraud and aggravated identity theft claims by listing the dates of each offense, the initials of the person whose identity was used, the nature of the wire communications or the means of identification, the misrepresentations made by the defendant, and examples of non-litigation expenses. *Id.* at *9. Further, the government had provided the defendant with victim statements that identified whose names were used to secure the litigation advances. *Id.* Given that this information had been provided to the Defendant, there was no need to compel it in a bill of particulars. *Id. See also United States v. Jafari*, No. 1:19-CR-0078-SCJ-LTW, 2020 WL 7090698, at *5 (N.D. Ga. Feb. 25, 2020), *report and recommendation adopted,* No. 119CR00078SCJLTW, 2020 WL 6281703 (N.D. Ga. Oct. 27, 2020) (denying request for bill of particulars when the superseding indictment tracked the language of the statutes involved, informed the defendants of the charges, and the government produced bank records, financial statements, witness transcripts/recordings, and business and tax related documents, that provided information about the nature of the charges); *Bickers*, 2019 WL 7559292 at *8 (finding that speaking indictment coupled with the voluminous discovery, including bank records from various financial institutions, including those that were directly related to the charged conduct; investigative reports; witness transcripts and recordings; business records from various institutions; and tax-related records, provided sufficient information about the nature of the charges to enable the Defendant to prepare for trial, avoid unfair surprise, and to plead double jeopardy in the event of a later prosecution).

Recently, a court in this district denied a motion for bill of particulars seeking to compel specific details about the defendant's materially false statements because "the bulk of the government's evidence consist[ed] of testimony regarding conversations the defendant personally participated in, [so] the defendant cannot argue surprise.'" *Palacio*, 2021 WL 4066894, at *4 (quoting *United States v. Ramamurthy,* 2019 WL 633328, at *4 (S.D. Fla. Feb. 13, 2019)). But even assuming that this were an appropriate request, the court noted that the defendant had all of the information she needed as the government produced 103,000 documents, with interview notes totaling 1,100 pages, and the indictment alleged the misrepresentations were based on the defendant falsifying whether the children were qualified to participate in the study, whether the parents and guardians gave informed consent, whether a doctor saw the children for scheduled visits, whether children were paid for study participation, whether the children received the asthma drug, and whether the children reported their experiences with the drug. *Id.* Because the allegations in the indictment gave the defendant notice of the charged offense, she had received the specific misstatements in discovery, and participated in those misstatements, she had more than what she needed to prepare a defense, requiring that the requested bill of particulars be denied. *Id.* *See also United States v. Cole*, 755 F.2d 748, 760–61 (11th Cir. 1985) (finding no abuse of discretion when district court denied bill of particulars as the evidence presented at trial consisted of testimony of conversation and activities in which the defendants participated, making the defendants unable to claim surprise or prejudice at trial); *Ramamurthy*, 2019 WL 633328 at *4 (denying motion for bill of particulars because the defendant and her attorneys were present at her own debriefing when the false statements were made and "the bulk of the government's evidence consist[ed] of testimony regarding conversations the defendant personally participated in," making the defendant unable to argue surprise.); *Jafari*, 2020 WL 7090698, at *6 (denying bill of particulars when the defendant sought advance information as to how much he allegedly paid in bribes, finding such information was not necessary to prepare the defense especially because the defendant was allegedly involved in making the payments so the defendant should have access to this information).

In this case, the speaking Indictment informs the Defendant that he has been charged with wire fraud arising out of three EIDL and three PPP loans, providing a detailed explanation as to both the EIDL and PPP programs. ECF No. [1] at P. 1-3, 6-7. The Indictment specifically identifies the date on which each fraudulent application was made, to which lending institution it was made, and on behalf of which entity the application was made. *Id.* The Indictment identifies the Defendant's role in each of the entities and his control of that entities' bank account in which the EIDL or PPP loans were deposited. *Id.* at 3-4. The Indictment further explains the purpose of the scheme and artifice as involving the Defendant's unlawful enrichment by submitting and causing the submission of false and fraudulent applications for loans and grants available through the SBA consisting of EIDL and PPP loans and the diversion of fraudulently obtained proceeds for the defendant's personal use and benefit. *Id.* at 5. Explaining the nature of the false and fraudulent EIDL and PPP loan applications, the Indictment further alleges that the applications included "falsified tax forms that purported to substantiate nonexistent business profits and misrepresentations about the borrowing entities' revenues, monthly payroll, and numbers of employees." *Id.* at 6. And, the Indictment specifically alleges that the Defendant used the fraudulently obtained EIDL and PPP funds for his personal use and benefit. *Id.* Much like in *Palacio* in which the indictment generally described the types of misrepresentations made, the indictment here puts the Defendant on notice of the types of misrepresentations contained in each of the EIDL and PPP loan applications.

Further, in discovery, the Government has provided voluminous documents to the Defendant. It has provided the EIDL and PPP loans applications and documents within each loan file, which were received from the SBA and lending institutions. As explained in the Indictment, the false statements at issue are contained within the loan applications. The PPP applications contain misrepresentations regarding borrowing entities' revenues, monthly payroll, and numbers of employees. Likewise, the EIDL applications contain misrepresentations regarding the cost of goods sold and the number of employees at each entity. The documents submitted in connection with the loan applications also contain falsified tax forms, which in and of themselves contain misrepresentations regarding each entity. Thus, the Indictment explains the types of misrepresentations contained within the loan file and the Defendant simply needs to review the loan applications and files, which are not voluminous, to obtain the details.

Within the discovery, the Government also provided records that further provide the Defendant with additional information as to the misrepresentations within the loan applications. For example, the Government produced documents from the Department of Revenue revealing any payroll reported to the State of Florida by the three entities that received EIDL and PPP loan money. The Government likewise provided tax documents obtained directly from the IRS for the Defendant and each of the three entities revealing the actual income, profit, cost of goods sold, and wage information reported for each entity. Similarly, the Government produced a copy of the tax returns received from the accountant who prepared the tax returns for the Defendant and each of the entities during the relevant time period. As part of the discovery, the Government also produced the bank records for each of the three entities, including the SunTrust bank accounts in which the EIDL and PPP monies were deposited. The Government has also produced reports for witness interviews for two witnesses (the Defendant's former accountant and an individual who denied signing a purported lease document that was submitted to the SBA in support of the EIDL application) and will be supplementing its discovery in the near future to include two additional interview reports (a second interview of the Defendant's former account and a representative from the Florida Department of Revenue). The Government also produced subpoenaed documents reflecting the Defendant's misuse of EIDL and PPP money for his own personal purposes as well as documents reflecting Internet Protocol and email subscriber information and Docusign information. To date, the Government has produced 11,523 pages of documents.[1] Thus, not only does the speaking Indictment put the Defendant on notice of the wire fraud charges, but the discovery provides additional details from which the Defendant can prepare a defense, avoid surprise at trial, and plead double jeopardy.

Further, courts in this circuit have repeatedly stated that when the evidence is based on a defendant's own statements, the defendant cannot claim unfair surprise at trial. Here, misrepresentations are based on the Defendant' own fraudulent statements to the SBA and lending institutions, making him unable to claim surprise or unfair prejudice regarding the statements at issue in the indictment. As the Defendant has all necessary information from available sources, his request for a bill of particulars should be denied.

2. A Bill of Particulars is not Necessary for Diversion of Proceeds

The Defendant also claims that he has insufficient information as to the allegations involving the diversion of fraudulently obtained proceeds. He contends that the Indictment does

[1] In addition, the Government provided the Defendant with an itemized list of additional documents that the Government has but does not intend to use at trial. These have been available for inspection to the defense since the commencement of discovery.

not identify a single instance of alleged misuse of the proceeds in any of the six loans, how the EIDL funds may be used, or in what ways the use of such funds is criminal.

The Indictment explains how the use of funds is tied into the wire fraud counts. In particular, the Indictment alleges that the purpose of the scheme and artifice involved in the wire fraud here was, in part, to divert fraud proceeds for the defendant's personal use. ECF No. [1] at P. 5. And, the scheme and artifice explains that the Defendant indeed used the fraudulently obtained loan proceeds for his personal use. *Id.* at 6.

With regard to the information about how the PPP funds can be used, the Indictment specifically explains that information on page 2, paragraph 5. *See* ECF No. [1] ("PPP loan proceeds were required to be used by the business on certain permissible expenses—payroll costs, interest on mortgages, rent, and utilities."). With regard to how EIDL funds can be used, this is located within the discovery. Specifically, it is located within the loan documents for each of the three EIDL applications.[2] Each loan contains a section entitled "USE OF LOAN PROCEEDS" and another section entitled "REQUIREMENTS FOR USE OF LOAN PROCEEDS AND RECEIPTS." These documents clearly outline for the Defendant what the permitted use was of EIDL money. The Defendant can then look at the bank documents produced in discovery to determine whether the EIDL money was used for a permitted or unpermitted purpose. The Government, however, should not be required to itemize each of the unpermitted uses as the Defendant has all of the information at his disposal and has the ability to make those determinations. The Defendant's request instead is an attempt to obtain the Government's theory of the case as to the improper use of the EIDL money. *See Jafari*, 2020 WL 7090698, at *6

[2] In addition, the rules for the SBA's EIDL program are also publicly available on the Internet.

(denying bill of particulars when the defendant sought advance information as to how much he allegedly paid in bribes); *Palacio*, 2021 WL 4066894 at *2-3 (stating that a bill of particulars is not "designed to compel the government to detail[ ] exposition of its evidence or to explain the legal theories upon which it intends to rely at trial."). Simply put, the Defendant is not entitled to obtain this type of information through a bill of particulars, especially when this information was provided to him months ago in discovery.

3. The Government is not Required to Itemize the Names of Accomplices in a Bill of Particulars When the Defendant Has Notice of the Information in Discovery.

Likewise, this Court should deny the request for a bill particulars for the names of any accomplices as this is not the appropriate vehicle to seek such information. And, even if it were, the Defendant has such information available to him in the discovery.

"If a bill of particulars was used to serve as a wholesale discovery device, it would frustrate the federal discovery rule" in that Federal Rule of Criminal Procedure 16(b)(2) states that the rule "does not authorize the discovery or inspection of ... statements made ... by government ... witnesses, or by prospective government ... witnesses." *Id.* (quoting Fed. R. Crim. P. 16(b)(2)). *Palacio*, 2021 WL 4066894 at *2–4. Noting that a defendant who desires a list of government witnesses or unindicted co-conspirators cannot simply bypass the Rule 16(b) restriction on discovery by asking for and receiving a bill of particulars pursuant to Rule 7(f), the court in *Palacios* explained that "a criminal defendant has no right to obtain a list of witnesses by simply calling his request a 'bill of particulars."

Here, the Defendant is seeking the names of any unidentified accomplices mentioned in the Indictment. In doing so, the Defendant attempts to bypass the discovery rule by seeking a bill of particulars, which, as recently explained in *Palacios*, is not allowed. Nonetheless, the discovery contains the names of any accomplices. The Defendant has received copies of the PPP and EIDL loan applications at issue. To the extent there was an accomplice involved in a particular loan application, the loan application documents contain the name of that accomplice, any email communications to or from that accomplice, and any notations regarding any conversations or communications the loan processor had with that accomplice. The Defendant need do little more than review the loan documents, which are the first 750 pages of discovery, to identify the names of any accomplices. As the information is already in the Defendant's possession, there is no reason to compel a bill of particulars from the government.

IV. CONCLUSION

As the Defendant has abundant notice of the charges to prepare a defense, plead double jeopardy in a future prosecution, and avoid surprise at trial, the Court should deny the Defendant's Motion for Bill of Particulars.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 27, 2022, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF, which will send Notices of Electronic Filing to all counsel of record.

/s Marty Fulgueira Elfenbein_________
MARTY FULGUEIRA ELFENBEIN
Assistant United States Attorney