UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
	)	
v.	)	**No. 1:25-CR-76-JMC**
	)	
CORTNEY MERRITTS,	)	
Defendant.	)	

<u>REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS THE INDICTMENT PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 12</u>

Defendant Cortney Merritts ("Merritts"), by and through undersigned counsel, Justin K. Gelfand and Gregory P. Bailey and the law firm Margulis, Gelfand, DiRuzzo & Lambson, respectfully submits this Reply in support of his motion to dismiss the Indictment. (Doc. 1).

In its response, (Doc. 17), the Government conflates two legal principles: the idea of adequate detail in an indictment and Constitutionally required adequate notice. In that respect, the Government is correct that Merritts has not moved for a bill of particulars, because the way in which the indictment reads leaves innumerable unanswered and unanswerable questions about *what the grand jury considered* to be the wire transmissions charged in Counts 1 and 2. This means that a bill of particulars would substitute the Government's recitation of operative wires for the required findings under the Fifth and Sixth Amendments of the United States Constitution from a deliberative body, namely the grand jury.

In an effort to avoid the consequence required by black letter law that an indictment must be dismissed when the defendant has not been properly charged with a crime, the Government cites headings, vague phrases, and a separate section within an indictment that contains eleven separate sections and subsections—all to claim Merritts has been provided Constitutionally adequate notice to prepare a defense. (Doc. 17). However, the Government's interpretation of the indictment, *post facto*, is not Constitutional notice, and provides no insight into what the grand jury actually found. The Government claims that titling a section "Execution of a Scheme to Defraud" somehow insulates it from the Constitutional requirements of setting forth each count for the Defendant to contest and to plead double jeopardy. (Doc. 17).

But as has been the law for nearly a century, federal criminal indictments are not read in sections; rather, an "indictment must be read as a whole." *Randle v. United States*, 113F.2d 945, 947 (D.C. Cir. 1940). The Government would have this Court disregard very clear language in the indictment to reach a conclusion that this case was properly charged. However, in addition to the Government's highlighted section, the indictment also includes two clear and factually operative phrases that cannot be disregarded in reading the indictment as a whole. The first, cited in Merritt's opening motion, is that each and every wire listed in the indictment was incorporated into the charging language in Paragraph 20: "Paragraphs 1 through 19 are hereby realleged." (Doc. 1). The second, and an even clearer indication that each and every wire could be the operative wire, is the closing phrase: "All in violation of Title 18, United States Code, Section 1343." (*Id.*). Where, as here, every paragraph is alleged as part of the charging language and all acts are in violation of 18 U.S.C. § 1343, then Merritts cannot adequately prepare a defense for two counts of wire fraud based on this Constitutionally deficient indictment.

Even taking the Government's representations regarding the time limiting constraint in Paragraph 21 to be true, the indictment still fails. (Doc. 17).[1] The Government concedes that it lists three wires that fall within that timeframe, but only two are charged as substantive counts. The Government, once again, cannot substitute its narrative for the findings of the grand jury. The

[1] If the Government truly seeks to limit the indictment to the operative timeframe in Paragraph 21, and if this Court denies Merritt's motions to dismiss (Docs. 13 and 14), Merritts intends to file, with leave of the Court, a motion to strike surplusage for all acts outside the charged timeframe. This is not a conspiracy count, and wire fraud, as the Government concedes, charges discrete events in time.

Government states that the language in Paragraph 21 also limits the subject matter beyond question by referencing "applications" in that paragraph, but the indictment actually says "*in connection with* applications." (Docs. 1, 17) (emphasis added). The wiring of money subsequent to an application for that money could certainly be "in connection" with that application.[2]

What the Government entirely misses in its response is that, as a matter of settled law, each wire in a wire fraud count is an essential element. *See Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) ("[a]n indictment must set forth each element of the crime that it charges."). And an indictment must "'fully, directly, and expressly, *without any uncertainty or ambiguity*, set forth all the elements necessary to constitute the offence intended to be punished.'" *Hamling v. United States*, 418 U.S. 87, 117 (1974) (quoting *United States v. Carll*, 105 U.S. 611, 612 (1882)) (emphasis added). "This rule"—that an indictment must set forth all elements—"ensures that the grand jury has considered and found all essential elements of the offense charged." *United States v. O'Hagan*, 139 F.3d 641, 651 (8th Cir. 1998). Where an element is omitted, "the defendant's Fifth Amendment right to be tried on charges found by a grand jury has been violated." *Id.*

The bottom line is this: the indictment fails to properly charge Merritts with a crime because, based on the four corners of the indictment, it is not facially valid in that it purports to charge two counts of wire fraud but lists eleven separate wire transmissions in the charging language. Despite the Government's response to the pending motion, neither Merritts nor this Court can know which one or more of the eleven wires listed in the charging language was considered by the grand jury to be operative for purposes of Count One or Count Two—and this

[2] Similarly, if the Government truly seeks to limit the indictment to the "applications" for EIDL and PPP funds, and if this Court denies Merritt's motions to dismiss (Docs. 13 and 14), Merritts intends to file, with leave of the Court, a motion to strike surplusage for all acts listed other than the submission of applications. This is not a conspiracy count, and wire fraud, as the Government concedes, charges discrete events in time.

violates the Fifth Amendment's Grand Jury Clause and negates Merritts' ability to claim a violation of double jeopardy as the law requires.

To be clear, if the Government thought this was as clear as it wants this Court to believe, then, in a document with eleven sections and subsections, why did the Government omit numerals 1 and 2 in the spots the Government claims they are presumed to be? The Government is no doubt "in a 'ditch' but it [is] a ditch created by the government's own charging document." *United States v. Farr*, 536 F.3d 1174, 1181 (10th Cir. 2008).

Counts One and Two of the indictment fail as a matter of law, pursuant to the Fifth and Sixth Amendments to the Constitution and Federal Rules of Criminal Procedure 12(b)(3)(B)(i) and 12(b)(3)(B)(iii), because they are impermissibly duplicitous and lack specificity. Merritts respectfully asks this Court to dismiss the indictment.

Respectfully submitted,

Margulis Gelfand DiRuzzo & Lambson, LLC

/s/ Justin K. Gelfand
JUSTIN K. GELFAND (D.C. Bar 90023996)
GREGORY P. BAILEY (D.C. Bar 1781925)
1325 G St., NW, Suite 500
Washington, DC 20005
Telephone: 314.390.0234
Facsimile: 314.485.2264
justin@margulisgelfand.com
greg@margulisgelfand.com

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed electronically with the Clerk of Court and that all counsel of record received notice.

/s/ Justin K. Gelfand
JUSTIN K. GELFAND (D.C. Bar 90023996)
GREGORY P. BAILEY (D.C. Bar 1781925)
1325 G St., NW, Suite 500
Washington, DC 20005
Telephone: 314.390.0234
Facsimile: 314.485.2264
justin@margulisgelfand.com
greg@margulisgelfand.com