

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	
	)	Case No. 1:22-cr-00171-MLB-RDC
	)	Second Superseding
CARL DELANO TORJAGBO,	)	
a/k/a	)	
KARL LUCIUS DELANO.	)	
	)	
_____	)	

**REPLY TO GOVERNMENT’S RESPONSE TO
DEFENDANT’S MOTION TO DISMISS COUNT 2**

COMES NOW the Defendant, KARL LUCIUS DELANO, a/k/a CARL DELANO TORJAGBO, by and through counsel, and files this reply to the government’s response (Doc. 191) to his motion to dismiss Count 2 of the Second Superseding Indictment (Doc. 188). In reply and in further support of his motion to dismiss, Mr. Delano shows as follows:

Mr. Delano has moved to dismiss Count 2 based upon *Dubin v. United States*, 599 U.S. 110, 131-132, 143 S. Ct. 1557, 1573-1574 (2023). He submits the face of the indictment fails to adequately state a crime. The indictment alleges the identity of “M.S.” was submitted as one of the 493 (allegedly non-existent) employees. According to the face of the indictment, the PPP loan application was

submitted for and by Kremkov Industries and Mr. Delano. Based upon the face of the indictment, the use of the identity of “M.S.” was ancillary and collateral, and not “at the crux” of the bank-fraud. The crux of the charged PPP loan fraud is the allegation that Mr. Delano did not have a company with 493 employees who needed their payroll checks protected / paid during the COVID pandemic. The specific names of those employees were ancillary to the fraud. (Doc. 188).

In response, the government asserts the Defendant’s request is premature, (Doc. 191-p.6), and normally this might be correct. However, here it is abundantly clear in advance of trial, Count 2 must be dismissed. The government relies upon a district court case from the Western District of Texas, *United States v. Fullerton*, 2023 U.S. Dist. LEXIS 167119, 2023 WL 6150782 (W.D. Tex. Sept. 20, 2023), to argue “even if the Court were to entertain Defendant’s premature motion, it should be denied.” (Doc. 191-p. 6). Mr. Delano respectfully replies - *Fullerton* is not persuasive or correct.

The government writes the following:

In *United States v. Fullerton*, the indictment contained an aggravated identity theft count premised on the defendant having falsely claimed that six individuals were employees of his business, and submitting their names, Social Security numbers, and fake W-2s in connection with his PPP loan application. *United States v. Fullerton*, No. 1:21-

CR-216-RP, 2023 WL 6150782, at *4 (W.D. Tex. Sept. 20, 2023).

Defendant argued that the count must fail “because the only purpose of this information was to complete fully the PPP applications and maximize the amount loaned, which was not the crux of the alleged scheme.” *Id.* (internal quotation marks omitted). The court rejected this argument, reasoning:

[The defendant’s] alleged use of the six employees’ information was “used in a manner that is fraudulent or deceptive,” *Dubin*, 143 S. Ct. at 1573, because the employees did not work at his business nor did their information actually appear on W-2 forms in connection to his business. Instead, the use of the information was crucial to being able to fill out the fraudulent loan applications because the amount of the PPP loans so heavily depended on the number of employees that a business had. If Defendant did not include the employees’ information, he would have been unable to secure the loans. Further, this use of their information falls under *Dubin* because PPP loans were, among other things, supposed to be used to pay the salaries of an applicant business’s employees. By allegedly asserting that EMPLOYEES 1–6 worked at his business, Defendant[] misrepresented who was to be receiving the PPP funds.

Id.

First, in *Fullerton*, the defendant submitted six names, along with false W-2's and Social Security numbers. Here, there is no allegation that Mr. Delano submitted false W-2's or Social Security numbers, but 493 names (with no other identifiers). Second, the district court in *Fullerton* incorrectly applied the exact

type of “but-for” analysis that *Dubin* prohibits: “If Defendant did not include the employees’ information, he would have been unable to secure the loans.”

Fullerton, No. 1:21-CR-216-RP, 2023 WL 6150782, at *4).

Closer to home, Judge Bloom in the Southern District of Florida refused to be persuaded by *Fullerton* in a PPP fraud / aggravated identity theft prosecution:

The Government relies on an out-of-circuit district court decision for its position that Defendant's use of Cupersmith's means of identification is at the crux of both counts of wire fraud. *United States v. Fullerton*, 2023 U.S. Dist. LEXIS 167119, 2023 WL 6150782 (W.D. Tx. Sept. 20, 2023). The defendant was charged with aggravated identity theft after "Defendant allegedly used the name and forged signature of a certified public accountant, S.S., to indicate that the form had been completed by a tax preparer, when in fact, S.S. did not prepare any of the forms for the PPP application" when submitting fraudulent form 940 and 941s in support of a PPP application. 2023 U.S. Dist. LEXIS 167119, [WL] at *1. There, "Defendant stole an accountant's identity and forged his signature for the purpose of signifying that the tax records were properly prepared." 2023 U.S. Dist. LEXIS 167119, [WL] at *4.

After the defendant moved to dismiss this count of the indictment, the court held "[t]his action directly legitimized the loan applications and increased the likelihood that they would be approved by the appropriate financial institutions." *Id.* This was enough for the court to uphold the defendant's charge of aggravated identity theft under *Dubin*. Like the

Government in its response brief, the court in this case stopped at the "identity theft" requirement - tied to the statutory term "uses" - of *Dubin* and discussed it as being identical to the "at the crux" requirement: the court held that "[h]is fraud thus centered on 'who' was involved in the fraudulent action. Because his use of S.S.'s identity was 'used in a manner that is fraudulent or deceptive,' *Dubin*, 143 S. Ct. at 1573, Count 10 properly states facts that would constitute a charge of aggravated identity theft under § 1028A." 2023 U.S. Dist. LEXIS 167119, [WL] at *4.

Dubin requires more than the occurrence of identity theft during a predicate offense: the identity theft must be "at the crux" of the predicate offense. Accordingly, the Court declines to follow the reasoning of *Fullerton*.

United States v. Sheppard, 2024 U.S. Dist. LEXIS 97931 at *38, Note 5; 2024 WL 2815278 (S.D. Fl. June 3, 2024)(emphasis added).

Even closer to home, Judge Grimberg in this district, applied *Dubin* to allow a COVID-19 loan fraud defendant to withdraw his aggravated identity theft guilty plea in *United States v. Noble*, 713 F. Supp. 3d 1366 (N.D. Ga. January 23, 2024), citing *United States v. Sheppard, supra.*, and *United States v. Gladden*, 78 F.4th 1232 (11th Cir. 2023). (*Dubin* made clear that "being at the crux of the criminality requires more than . . . facilitation of the offense[.]")

Gladden, 78 F.4th at 1248.

WHEREBY, Mr. Delano asks that Count 2 be dismissed¹.

Dated: This 17th day of June, 2025.

Respectfully submitted,
s/ **L. Burton Finlayson**
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¹For similar reasons he asks that his motion in limine to exclude evidence related to Count 2, (Doc. 178), be granted.

CERTIFICATE OF SERVICE

This is to certify that I have this day electronically filed the Reply with the Clerk of Court using the CM/ECF system which will automatically send email notifications of such filing upon all counsel of record including the following:

Ms. Kelly Connors, and
Mr. Nicholas Evert
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DATED: This 17th day of June, 2025.

s/ L. Burton Finlayson

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