UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-20290-CR-BLOOM(s)

UNITED STATES OF AMERICA

vs.

ERIC DEAN SHEPPARD,

Defendant.
_________________________________/

UNITED STATES' RESPONSE IN OPPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

The United States of America, through the undersigned Assistant United States Attorney, files this response to the defendant's motion to dismiss. None of the defendant's three arguments are meritorious and his motion should be denied. *First*, the Superseding Indictment properly states a claim of aggravated identity theft—even after *Dubin v. United States*—by alleging that the defendant "used" personal information in his criminal scheme, and the government will prove at trial that the use was the "crux" of his criminality. *Second*, there was no cause-and-effect relationship between the defendant's decision to plead not guilty and the government's decision to seek a Superseding Indictment, and, even if there were, the defendant hasn't adduced any evidence of, or arguments for, prosecutorial vindictiveness. *Third*, the forfeiture allegations are not defective and in fact, provide more information than the Federal Rules require. The defendant's motion should be denied.

BACKGROUND

On June 30, 2022, a federal grand jury indicted the defendant on six counts of wire fraud, in violation of 18 U.S.C. § 1343 for false and fraudulent applications for loans under the CARES

Act. Each count represented a loan application submission that had been approved and disbursed to three of the defendant's businesses, HM Management and Development, LLC, HM-UP Development Alafaya Trails, LLC, and HM Four, LLC. Before indicting the defendant, the government had obtained, pursuant to a Court order, certain tax return information for the defendant's businesses indicating that the tax returns submitted to support several of the Paycheck Protection Program ("PPP") loan applications contained false and fraudulent information. Approximately one month after the defendant was indicted, on July 25, 2022, agents with the Federal Bureau of Investigation ("FBI") interviewed the defendant's accountant, N.C., for the first time. At that interview, the agents learned that N.C.'s name, Preparer Tax Identification Number (PTIN), and his accounting firm's name and Employer Identification Number (EIN) had been used without N.C.'s permission on the falsified income tax returns submitted with several loan applications. Furthermore, N.C. advised that the signature on the returns had been forged and that it was not his signature. The government learned this information—as the defendant well knows—*after* the defendant was indicted because the government has provided to the defendant both of the interview reports of N.C. in its discovery.

In January 2023, the case was reassigned to the undersigned Assistant U.S. Attorney, who took a fresh look at the voluminous discovery materials in this case. After discussion with the undersigned AUSA, defense counsel requested time to review the voluminous records in the case before the government would decide to take steps to add new charges to the indictment.

On June 7, 2023, the FBI interviewed Suntrust Bank's former banker, H.B., in connection with an Economic Injury Disaster loan ("EIDL") the defendant had obtained from the SBA on behalf of HM Four, LLC. The FBI interviewed H.B. about a letter that purported to be from him as the branch manager of Suntrust Bank, which had been submitted to satisfy the SBA's request—

as part of its review of the loan application—that HM Four's business account be verified. H.B. did not recognize the letter and denied that the signature reflected on the letter was his own. Once again, the defendant was aware that the government only learned of this forgery in June of 2023, *after* the defendant was indicted, because the government provided its interview report of H.B. to the defendant in discovery.

While the undersigned AUSA did extend a plea offer to the defendant as to the original Indictment, there was never any indication that the defendant might be interested in resolving the case by way of a guilty plea. On August 23, 2023, the grand jury returned a Superseding Indictment in which three wire fraud counts involving three of the loan applications were removed, and six new wire fraud counts were added, which demonstrated the defendant's scheme to defraud primarily through the submission of false and forged tax returns necessary to support the PPP loan applications, and other false and forged documents provided to support an EIDL application. The Superseding Indictment also added five counts of aggravated identity theft. As to four of the five counts involving aggravated identity theft, the government's evidence was acquired after the initial indictment was returned, as three of the counts involved the submission of falsified and forged tax returns using the identity of the defendant's accountant, N.C., and one involved the falsified banker's letter. As to the fifth count of aggravated identity theft - a falsified and forged lease agreement submitted to falsely establish that HM Four had business operations - the government developed evidence corroborating the forgery and the falsehood of the lease only after the case was indicted.

LEGAL STANDARDS

A district court should dismiss an indictment for failure to state a claim only if the indictment fails to invoke the court's jurisdiction or—assuming all of the facts in the indictment as true and viewed in the light most favorable to the government—fails to state an offense. *United States v. Sharpe*, 438 F.3d 1257, 1258–59 (11th Cir. 2006).

A district court may dismiss an indictment for prosecutorial vindictiveness—meaning "the desire to punish a person for exercising his rights." *United States v. Barner*, 441 F.3d 1310, 1315–16 (11th Cir. 2006) (citing *United States v. Goodwin*, 457 U.S. 368, 372 (1982)).

ANALYSIS

The court should deny the defendant's motion. *First*, the Superseding Indictment properly alleges aggravated identity theft because the indictment lists all of the elements of identity theft. The Supreme Court's recent decision in *Dubin v. United States*, 143 S. Ct. 1557 (2023), while it defines and limits the "uses" of a means of identification that may constitute aggravated identity theft, does not add a new element to the offense. *Second*, the government sought to add new charges because it acquired new evidence against the defendant and, in any event, declining a plea offer does not constitute the exercise of a right within the meaning of vindictiveness. *Third*, the forfeiture allegations are sufficient.

A. The Superseding Indictment Properly States an Offense.

The Superseding Indictment properly alleges aggravated identity theft. Pursuant to Fed. R. Crim. P. 7(c)(1), an indictment must be a "plain, concise and definite written statement of the essential facts constituting the offense charged." "If an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge." *United States v. Fern*, 155 F.3d 1318, 1325-26 (11th Cir. 1998) (indictment that did not allege "materiality" as to the false statement offense under the Clean Air Act was nevertheless sufficient).

The Eleventh Circuit requires, to allege aggravated identity theft pursuant to 18 U.S.C.

§1028A, that the indictment say that "(1) the Defendant knowingly transferred, possessed, or used another person's [means of identification] [identification documents]; (2) without lawful authority; and (3) during and in relation to [the eligible felony alleged in the indictment]." Eleventh Cir. Pattern Jury Instr. O40.3 (Mar. 2023). The Superseding Indictment properly alleges each of these elements. [DE 60 at 8]

The defendant's argument to the contrary is not persuasive. In his view, after the recent Supreme Court case, *Dubin v. United States*, ___ U.S. ___, 143 S. Ct. 1557 (2023), to allege aggravated identity theft, the government must allege that the misuse of the identity is at the crux of the underlying criminal offense. *Dubin* does require, to *sustain a conviction* for aggravated identity theft, that the government prove that the use of the means of identification be at the "crux of what makes the conduct criminal" or as interpreted by the Eleventh Circuit in *United States v. Gladden*, that there be "'a genuine nexus'" "between the use of a means of identification and the predicate offense." *Dubin,* 143 S. Ct. at 1573; *Gladden*, 78 F.4th 1232, 1244 (11th Cir. 2023) (quoting *Dubin*, 143 S. Ct. at 1565). But the defendant never explains why he thinks the "crux" language is a necessary *element* of aggravated identity theft. In the government's view, a common sense reading of *Dubin* is that in using the "crux" language, the Supreme Court was defining and *limiting* one of the elements—the element of "using" a person's means of identification. The Supreme Court did not change the magic words necessary to state an offense, nor could it, given Congress's Constitutional role defining a crime. *Dubin,* 143 S. Ct. at 1572 ("After all, crimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language.") (citation omitted). The defendant does not cite to which language in *Dubin* he thinks supports his reading.

In pragmatic terms, *Dubin* spells out what courts should include in their aggravated identity theft *jury instructions* rather than what the grand jury must find to return an *indictment* for that offense. When defining what it means to "use" another person's means of identification for purposes of § 1028A, the Court should instruct the jury that they must find that the use of the victim's identity was the crux of what makes the conduct criminal. But that level of detail does not need to be alleged in the indictment, and nothing in the Supreme Court's opinion in *Dubin* says or suggests that much.

To give an analogy, Supreme Court case law has clarified—and narrowed—what the "in relation to" element of 18 U.S.C. § 924(c) means. *See Smith v. United States*, 508 U.S. 223, 238 (1993) (explaining that a person uses a gun in relation to another crime when the gun facilitates or has the potential of facilitating that other crime). But § 924(c) indictments in the wake of *Smith* do not expressly charge that the gun facilitated or had the potential of facilitating another crime. Instead, they track the statutory language and repeat the allegation that the person used or carried a gun "in relation to" either a crime of violence or a drug trafficking offense. When the time comes for trial, however, courts do instruct juries that "[t]o [use] [carry] a firearm 'in relation to' a crime means that . . . . [t]he firearm must have facilitated, or had the potential of facilitating, the crime." 11th Cir. Pattern Instr. O35.2. *Dubin* is no different from *Smith* in this respect. By specifying the meaning of an element alleged in the indictment, *Dubin* clarifies what a petit jury must find to convict—and hence what the court should explain in its instructions. The government has proposed jury instructions for this case that comply with *Dubin*.

The defendant's motion to dismiss counts 10 through 14 for failure to state an offense should be denied.

B. <u>The Government Did Not Seek More to Add Charges Out of Vindictiveness.</u>

The new charges in the Superseding Indictment are not the result of vindictive prosecution, and they are not intended as punishment for the defendant's decision to proceed to trial.[1] Furthermore, the government did not "threaten" the defendant with adding aggravated identity theft charges if he decided to plead not guilty to the original Indictment. [DE 85 at 8] The defendant correctly summarizes the temporal relationship between his decision not to plead guilty (or rather, his re-affirmation to not plead guilty) and the additional charges—that is, one followed the other. But he errs in supposing the two are causally related and, even if they were, that the causal relationship would provide cause to dismiss the indictment.

First, the government sought to add more charges simply because it obtained more evidence after the case was initially indicted. The discovery in this case is voluminous and as the undersigned reviewed the materials—having taken over for another attorney—more charges became apparent, justified, and even compelling. *See,.e.g.*, *United States v. Spence*, 719 F.2d 358, 362 (11th Cir. 1983) (explaining that a prosecutor's view of the evidence can shift before trial); *United States v. Goodwin*, 457 U.S. 368, 381 (1982) ("In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance."). The post-indictment interviews and investigation revealed that the defendant's partnership tax returns—which were needed for the PPP loans submitted in 2021—were falsified and forged, and furthermore, that documents submitted to support an EIDL application for HM Four, a holding company with no operations, were also falsified and forged. As a result, the

[1] The defendant is factually incorrect when he accuses the government of "waiting" more than a year to charge the defendant with counts it already knew about, and that it did so just before trial to punish the defendant for electing to go to trial. [DE 85 at 2] As noted above, the government did not learn until after the case was indicted that certain key documents had been forged. In addition, the defendant's counsel asked the government for time to review the voluminous discovery. The defendant then initiated litigation that had to be resolved under seal.

government sought to drop three of the wire fraud charges involving some of the loans, and focus a Superseding Indictment around the falsified and forged documents that were central to the defendant's scheme to defraud the lenders and the SBA to approve those loans.

Second, it is black letter law that adding more charges after the refusal to plead guilty does not demonstrate prosecutorial vindictiveness. *Goodwin*, 457 U.S. at 382 ("This Court in *Bordenkircher* made clear that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified."); *Barner*, 441 F.3d at 1316 (explaining that in *Bordenkircher v. Haryes*, 434 U.S. 357, 363 (1978) "[e]ven though the prosecutor added the charge in an attempt to persuade the defendant not to exercise his right to stand trial, the Supreme Court held there was no" vindictiveness).

Indeed, even if the defendant were entirely correct that the government sought to add charges to persuade him to plead guilty and forgo his right to trial—he isn't—he *still* wouldn't be entitled to dismissal. *Id.* ("[T]he [Supreme] Court [has] distinguished between the impermissible attempt to punish an already-accomplished exercise of appeal rights in *Blackledge* and the permissible attempt to persuade the defendant not to exercise his trial right in the future in *Bordenkircher*").

The defendant's citation to the (unpublished) *United States v. Watson*, 400 F. App'x 442 (11th Cir. 2010) makes this point clear. In *Watson* (as here), "the government obtained a superseding indictment against Watson before trial and after Watson declined a plea offer." *Id.* The Eleventh Circuit held that "[t]hese facts, without more, do not give rise to a presumption of vindictiveness." *Id.* The defendant says that the "more" in this case is the fact that the government already knew— before it initially charged the defendant—about the evidence supporting the counts that it added in the superseding indictment. That is simply not true, as the defendant is well aware that two individuals who form the basis of four of the five aggravated identity theft counts were not interviewed until *after* the initial indictment was returned. But even so, the *Watson* court made no such distinction. *Id.* Rather, the relevant question is whether there is evidence of prosecutorial vindictiveness after the defendant *exercised a protected right*. The defendant has made no such allegation nor any such showing. His refusal to plead guilty and go to trial is not the exercise of a protected right. Indeed, "in *Bordenkircher*, the prosecutor explicitly obtained a new indictment because the defendant refused to plead guilty, and the Supreme Court held that this did not violate due process." *Barner*, 441 F.3d at 1319.

The defendant's motion to dismiss for prosecutorial vindictiveness should be denied.

C. The Forfeiture Allegations in the Superseding Indictment are Not Deficient.

Finally, the defendant cursorily argues that the forfeiture allegations are deficient and argues they should be dismissed. [DE 85 at 8–9] This portion of the motion can be denied for three reasons.

First, the defendant has failed to properly brief the argument by "rais[ing] it in a perfunctory manner without supporting arguments and authority." *Sappupo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). The defendant does not explain or provide citations to authority that set forth any reason *why* the forfeiture allegations warrant dismissal.

Second, this motion is premature. Criminal forfeiture allegations in an indictment are only a notice to the defendant that, *if he is convicted*, the government will seek forfeiture. FED. R. CRIM. P. 32.2. The court can deny this motion as premature.

Third, the forfeiture allegations are more than sufficient. The government "need not identify the property subject to forfeiture or specify the amount of any forfeiture money judgment that the government seeks." Fed. R. Crim. P. 32(a). Here, the government specified the amount of money and specific property it will seek to forfeit. That the government went above and beyond the notice it was required to provide does not justify dismissing the allegations.

Conclusion

For the reasons set forth above, the government respectfully requests that the defendant's motion to dismiss the Superseding Indictment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 26, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Aimee Jimenez
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Assistant United States Attorney