UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

CASE No. 22-20290-CR-BLOOM/OTAZO-REYES

UNITES STATES OF AMERICA,

Plaintiff,

v.

ERIC DEAN SHEPPARD,

Defendant.

_____________________________________/

DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL

The Defendant Eric Dean Sheppard submits this Memorandum of Law in support of his Rule 29 Motion for Judgment of Acquittal, pursuant to Fed. R. Crim. P. 29, and states:

BACKGROUND

Mr. Sheppard was charged in June of 2022 with six counts of Wire Fraud, one count for each of the six different loan applications he allegedly applied for through three different companies. On August 24, 2023, the Government filed a Superseding Indictment, drastically changing the charges against Mr. Sheppard. It charged Mr. Sheppard with six additional Wire Fraud counts which were deliberately not charged for an entire year since the original Indictment. [D.E. 60 at 7]. Instead of having one count for each of the six loan applications, the Government chose to only prosecute three loan applications, but added several counts related to each loan: Counts 1-3 relate to the electronic submission of the HM Four's EIDL loan application, and two documents submitted in support of that loan; Counts 4-8 relate to the electronic submissions of HM UP Development Alfaya Trails LLC's ("Alafaya Trails") PPP loan application, and four documents submitted in support of that loan; and Count 9 relates to the electronic submission of

HM Management and Development's ("HMMD") PPP loan application. *Id*. Additionally, the Government charged Mr. Sheppard with five additional counts of Aggravated Identify Theft, which it also deliberately did not include in the original Indictment. In support of their counts for Aggravated Identity Theft, the Government contends that Mr. Sheppard forged signatures of other persons for five documents submitted in support of the different loan applications. *Id*. at 8. The five documents the Government claims were forged include:

- 3 Form 1065 tax returns allegedly submitted in connection with Alafaya Trails' PPP second draw loan application and HMMD's PPP loan application where the alleged identity theft resulted from inserting the name, signature and Preparer Tax Identification Number of an accountant at the Cupersmith accounting firm (the "Tax Returns");
- a lease agreement submitted along with HM Four's EIDL application, on which the Government claims the name, signature and title of the tenant's representative was falsely included (the "Lease"); and
- a letter from a bank to Defendant submitted along with HM Four's EIDL where the Government claims the name, signature and title of the bank employee were falsified (the "Bank Letter").

Id. at 8.

For Mr. Sheppard to be convicted of Aggravated Identity Theft, the Government must have shown that "the defendant's misuse of another person's means of identification is <u>at the crux</u> of what makes the underlying offense criminal." *Dubin v. United States*, 599 U.S. 110, 114 (2023) (emphasis added). "In other words, the means of identification specifically is a key mover in the criminality[,]" "the locus of [the criminal] undertaking," rather than merely "passive," "passing," or ancillary employment in a crime. *Id*. at 122-23. The Court clarified that "being at the crux of the criminality requires ***more than a causal relationship***, such as 'facilitation' of the offense or being a but-for cause of its 'success.'" *Id*. at 131. The Government failed to do just that.

During trial, the evidence was consistent: the accountant's name, signature, and Preparer Tax Identification Number was not required for the Tax Returns and was thus immaterial. [11.28.23 Trial Tr. 99:23-100:4 (Althea Harris SBA); 11.29.23 AM Trial Tr. 67:21-68:11 (Phillip Palmer IRS); 11.30.23 PM Trial Tr. 85:14-86:2 (Jamie Hutchinson PayPal); 12.05.23 AM Trial Tr. 50-51 (David Toye Northeast); 12.05.23 PM Trial Tr. 112-113 (Spencer Lord Cross River Bank)]. Similarly, the identification of the banker in the Bank Letter and the Tenant on the Lease were not material. [12.14.23 Trial Tr. 47-49, 58-59 (Brent Motes SBA)]. As such, the means of identification which form the Aggravated Identity Theft charges were not the crux or the key mover of the alleged crime and therefore, acquittal is required. Irrespective of the identification, there was also no evidence presented at trial for the jury to conclude that the documents themselves (the Tax Returns, Lease and Bank Letter) were necessary or required to be submitted as part of the loan applications, and therefore, they were not the crux or key mover of the crime. [11.30.23 PM Trial Tr. 75:12-76:11, 90:11-91:1, 98:5-99:10, 99:19-100:2 (Jamie Hutchinson PayPal); 12.05.23 AM Trial Tr. 54 (David Toye Northeast); 12.05.23 PM Trial Tr. 78, 110-111 (Spencer Lord Cross River Bank)]. Similarly, the Bank Letter and the Lease were not requested by the SBA nor required as part of the SBA loan applications. [12.14.23 Trial Tr. 41-42, 54-57 (Brent Motes SBA)]. In other words, the alleged falsification of these documents, even if true, does not serve to prove the crime of Aggravated Identity Theft, because, as discussed in detail below, the alleged instances of identity theft were not material in the commission of the charged wire fraud. As such, acquittal of the Aggravated Identity Theft charges is required on this basis as well.

Finally, acquittal of Wire Fraud Counts 4-9, related to the PPP loan applications, is appropriate as well because the Government failed to show that Mr. Sheppard intended to cause an economic injury or loss to the alleged victims, here, the Banks. *See United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016), as revised (Oct. 3, 2016), opinion modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016) ("to defraud, one must intend to use deception to cause some injury"). The testimony presented at trial demonstrates the contrary: Mr. Sheppard intended to be compliant[1] and the Banks suffered no harm. The PPP loans were fully guaranteed by the Government. [11.28.23 Trial Tr. 91 (Althea Harris SBA)]. If the loan proceeds were used according to the Rules, it was 100% forgivable and if the Government didn't forgive the loan, it was paid back in five years at 1% interest. [11.28.23 Trial Tr. 76, 78 (Althea Harris SBA)]. The victims here, the Banks, could not have suffered any harm and instead, got exactly what they bargained for and therefore, acquittal as to the Wire Fraud charges related to the PPP loans is appropriate as well.

ARGUMENT

I. Legal Standard.

"Federal Rule of Criminal Procedure 29 provides that a defendant is entitled to a judgment of acquittal if 'the evidence is insufficient to sustain a conviction.'" *United States v. Moore*, 76 F.4th 1355, 1363 (11th Cir. 2023) quoting Fed. R. Crim. P. 29(a). "When deciding a motion under Rule 29, the district court must determine 'whether the evidence, examined in a light most favorable to the Government, was sufficient to support the jury's conclusion that the defendant was guilty beyond a reasonable doubt.'" *United States v. Fraser*, 18-CR-60021, 2018 WL 11251001,

[1] For example, as evidenced by Government Exhibit 50-7 at bates 34481-34483, which contains an email from Defendant to Graff asking for assurance that everything was filed properly.

at *1 (S.D. Fla. July 9, 2018) quoting *United States v. Williams*, 390 F.3d 1319, 1323–24 (11th Cir. 2004). "Thus, the test is whether a reasonable jury could find, beyond a reasonable doubt, that Defendant is guilty of violating the crimes alleged in the indictment." *Id*. quoting *United States v. Macko*, 994 F.2d 1526, 1532 (11th Cir. 1993)

II. <u>The Government Failed to Provide Evidence of Aggravated Identity Theft</u>.

To convict Mr. Sheppard of aggravated identity theft, the government needed to prove that he (1) knowingly transferred, possessed, or used, (2) without lawful authority, (3) a means of identification of another person or a false identification document (4) during and in relation to the wire fraud offense. *See United States v. Bonilla*, 579 F.3d 1233, 1242 (11th Cir. 2009); *United States v. Presendieu*, 880 F.3d 1228, 1240 (11th Cir. 2018) ("To convict for aggravated identity theft, the government must prove that the defendant: (1) knowingly transferred, possessed, or used; (2) the means of identification of another person; (3) without lawful authority; (4) during and in relation to a felony enumerated in 18 U.S.C. § 1028A(c).").

In an effort to curb prosecutorial overreach in applying this statute, the Supreme Court recently severely limited the application of the Aggravated Identity Theft statute in *Dubin v. United States*, 599 U.S. 110 (2023), and specifically clarified what it means to "use" the means of identification of another in the commission of a felony. Justice Sotomayor who authored the opinion, clarified that "§ 1028A(a)(1) is violated when the defendant's misuse of another person's means of identification is <u>at the crux</u> of what makes the underlying offense criminal." *Id.* at 114 (emphasis added). "In other words, the means of identification specifically is a key mover in the criminality[,]" "the locus of [the criminal] undertaking," rather than merely "passive," "passing," or ancillary employment in a crime. *Id*. at 122-23. The Court clarified that "being at the crux of the criminality requires ***more than a causal relationship***, such as 'facilitation' of the offense or being a but-for cause of its 'success.'" *Id*. at 131.

Ultimately, the Supreme Court reversed the conviction of Healthcare Fraud and Aggravated Identity Theft under § 1028A(a)(1) of a defendant who had overbilled the Medicaid program by inflating the value of the services provided to patients. *Dubin*, 599 U.S. at 114-15. In submitting for reimbursement, the defendant included the patient's Medicaid reimbursement number, a means of identification. *Id.* at 115. However, this "use" of the patient's information in submitting for reimbursement is not sufficient to satisfy § 1028A(a)(1). The *Dubin* Court held that the words "use" and "in relation to" in § 1028A should not be construed so that the provision would "apply automatically any time a name or other means of identification happens to be part of the payment or billing method used in the commission of a long list of predicate offenses." *See Dubin*, 599 U.S. at 117. The Government's broad position was that any misuse of identification-whether ancillary to the underlying predicate offense, meets the requirement that there be a true causal relationship—a genuine nexus - between the misuse of the identification and the underlying crime. The Court disagreed and held that § 1028A applies[2] where there is "a genuine nexus" between the use of a means of identification and a predicate offense. *See Dubin*, 599 U.S. at 177. A genuine nexus requires that the means of identification be "a key mover in the criminality." *Dubin*, 599 U.S. at 122-23. The Court explained that it is not whether the information was used that is important to the analysis, but "what the defendant does with the means of identification in particular." *Id.* The Court found that the fraud involved "how and when services were provided to a patient, not who received the services"; hence, the identity of the individuals was not the crux of the crime. *Id*. The focus should be on whether "identity" of the victim has been stolen or misappropriated. In making the distinction, the Court have examples of the conduct that it would

[2] The Court also notes that the very title of § 1028A including the word "Aggravated" suggests that Congress had in mind a particularly serious form of identity theft, not just all manner of everyday billing. *Id*. at 120-22.

not consider aggravated identity theft, but which would meet the Government's broad interpretation:

> If a lawyer rounds up her hours from 2.9 to 3 and bills her client using his name, the name itself is not specifically a source of fraud; it only plays an ancillary role in the billing process. The same is true for the waiter who substitutes one cut of meat for another; we might say the filet mignon's identity was stolen, perhaps, but not the diner's.
>
> ***
>
> Take an ambulance service that actually transported patients but inflated the number of miles driven. The crux of this fraud was "how" services were rendered; the patients' names were part of the billing process, but ancillary to what made the conduct fraudulent. In contrast, take the pharmacist who swipes information from the pharmacy's files and uses it to open a bank account in a patient's name. That "misuse of th[e] means of identification" would be "integral to" what made the conduct fraudulent, because misrepresentation about who was involved was at the crux of the fraud.

Id. at 114-17.

As this Court explained, "*Dubin* stands for the proposition that § 1028A does not automatically apply merely where a means of identification is used in the commission of an underlying crime." *United States v. Sheppard*, 22-CR-20290, 2023 WL 7157874, at *4–5 (S.D. Fla. Oct. 31, 2023). However, this Court's opinion was based on the mere allegations in the Superseding Indictment for purposes of considering a Motion to Dismiss before the Court. At this juncture, the Court has now had the benefit of hearing the evidence that, in fact, the alleged fraudulent documents were at best merely ancillary to the alleged wire fraud. The undisputed evidence before this Court is that the documents at issue of misuse of an identification were not even required to be signed and therefore, the Governments allegation of their forgery is misplaced. At best, the alleged forgeries are ancillary or incidental to the underlying alleged crime. Therefore, contrary to the government's argument on the Motion to Dismiss, there has been no evidence before this Court that the Defendant fabricated these alleged forgeries, and thus, this Court should no longer rely on *Gladden.* The question is not whether unauthorized identification was used, or fabricated, but whether the unauthorized identification used was the "key mover" in the underlying criminal conduct alleged; here, wire fraud alleged to have occurred in connection with submission of the loan applications. *Id*. In other words, was the purpose of the crime to steal someone's identity for a nefarious purpose or was the use of the identifying information just incidental to the alleged crime. The alleged misuses of identification in this case is completely analogous to those in *Dubin*. In fact, Justice Sotomayor explains certain examples of "classic identity theft" the statute was meant to protect:

> There is 'the defendant [who] has gone through someone else's trash to find discarded credit card and bank statements,' *ibid*., and thus has taken possession unlawfully. There is the bank employee who passes along customer information to an accomplice, and thus transfers it unlawfully. Then there is use involving fraud or deceit about identity: "a defendant [who] has used another person's identification information to get access to that person's bank account." *Ibid*.

Dubin, 599 U.S. at 126. Here, it is clear that there was never an intent to steal someone's identity in the traditional sense.

In reversing the 5th Circuit and the trial court, the Supreme Court held that Dubin's use of the patient information was not the key mover of the crime of Medicaid fraud, because the patient's identification was not stolen in a traditional sense, and **"not the crux of what made the underlying overbilling fraudulent**". *Id*. at 132 (emphasis added). Instead, what makes the overbilling fraudulent was the inflation of the price and services, not the use of the patient's information in submitting bills for reimbursement. <u>*Dubin* asks courts to look at more than just the unauthorized use, but whether a victim's identity was stolen to perpetrate a crime.</u> Thus, the patients whose identity was allegedly stolen in *Dubin* were not the victims of the crime and using their information was merely incidental to the crime whose object was to defraud Medicaid. As in *Dubin*, the identity allegedly stolen here was, at best, merely incidental to the crime. For that reason, under *Dubin*, the alleged crime is not traditional identity theft, and the Government has failed to prove the crime of Aggravated Identity Theft as a matter of law.

Two recent 11th Circuit decisions help us understand this distinction: *United States v. Detling*, 22-10630, 2023 WL 6060576, at *1 (11th Cir. Sept. 18, 2023); *United States v. Gladden*, 78 F.4th 1232, 1245 (11th Cir. 2023).

In *Detling*, the defendant attorney forged his clients' authorization in obtaining litigation funding loans without his clients' permission, thereby stealing his clients' identity and defrauding the litigation funding company into believing that the clients' authorized the transaction. The lawyer in *Detling* stole his client's identity and falsely represented that his client approved the transaction, <u>and directly damaged his client</u> by incurring a substantial debt that his client's litigation assets would be now responsible for paying without said client's approval. Thus, unlike here, *Detling* involved actual identity theft and the crux of the crime was stealing the client's identity to defraud said client. Unlike in *Detling*, here, the loans would have been funded irrespective of the accountant's signature on the Tax Returns, the banker's signature on the Bank Letter, or the tenant's signature on the lease because the identities and signatures of those persons were immaterial, and, clearly those documents were not the "crux" of the loan applications, under the definition set forth in *Dubin.*

In *Gladden*, defendant Linton falsified prescription requests on behalf of patients who were supposedly continuously refilling their prescriptions, but never received the drugs, which went to the defendant. In such a circumstance, "[b]ecause the deception centered on the identity of the individual receiving the product [the patient], Linton committed identity theft." *Gladden*, 78 F.4th at 1245 citing *Dubin*, 143 S.Ct. at 1568 ("This central role played by the means of identification, which serves to designate a specific person's identity, explains why we say that the 'identity' itself has been stolen."). There, the defendant's forgeries were at the heart of the deception because the defendant used the identities of others to continue refilling prescriptions in their names, even though they were neither aware of nor received any drugs. The identity of the patients and doctor was what enabled Linton to fill the prescriptions, which is why the court concluded that "the means of identification specifically [was] a key mover in the criminality." *Id*. at 1244. In contrast, the court there ruled that defendant Gladden could not be guilty of identity theft under the standards articulated in *Dubin*, and vacated his conviction. *Id*. at 1248-49. That was because the only deception regarding a prescription obtained for a minor child was whether the prescription was medically necessary: "[t]he use of [the] identifying information was merely ancillary to the deception; indeed, at no point did [the defendant] [] misrepresent who received the prescriptions. . . .". *Id*.

In both *Gladden* and *Detling* the alleged use of the identity is what resulted in the crime. In both these cases, the identity of a person was stolen to show that such person falsely authorized the conduct or was falsely due to receive a benefit, and, therefore, necessary to the commission of the charged crime. In Detling, the clients' authorization in obtaining litigation funding loans was necessary in obtaining the loan. Similarly, in *Gladden*, the patient and doctor's identifying information was necessary to fill the prescriptions. On the other hand, in *Dubin*, although the identity of the patients was used in the overbilling, the identity of the patients was not necessary to the charged crime, nor where the patients the victim of a deceitful use of their identity.

Here, under the purview of Dubin, the identity of a person was not "stolen" as it was not necessary to constitute an unauthorized use that was the crux of the alleged criminal activity. Notably, the so called "victims" whose identity was supposedly used, were not necessary or required for the commission of the alleged wire fraud in securing the loans, as the patients in *Gladden* or the clients in *Detling* were. Instead, in the case at bar, there is absolutely no evidence that the use of the identity of the CPA in the Tax Returns, the Banker in the Bank Letter, or the Tenant in the Lease were the "crux" or "key mover" of the crime.

In fact, even the most favorable view of the evidence presented shows that the identifications were irrelevant. The alleged deception here did not center around the identity of the individuals nor did it directly enable Mr. Sheppard to continue the alleged scheme of the approval of the loan applications. This point is made even more clear by the evidence presented at trial, where the identities of the individuals were irrelevant.

As to the Tax Returns, Althea Harris from the SBA testified that the Tax Returns did not have to have the name of the accountant because not everyone has an accountant who prepares their taxes. [11.28.23 Trial Tr. 99:23-100:4]. Phillip Palmer from the IRS also testified that he reviewed the tax returns in this case and agreed that you don't necessarily need an accountant to fill our or send in tax returns. [11.29.23 AM Trial Tr. 67:21-68:11]. Jamie Hutchinson from PayPal testified that the Tax Returns accepted by PayPal for the PPP loan didn't need the name or any information of an accountant on it. [11.30.23 PM Trial Tr. 85:14-86:2]. In fact, she testified, PayPal relies on tax returns submitted, whether or not there's a name, signature, or PTIN number. [*Id.*]. Similarly, David Toye from Northeast Bank testified that if a tax return was submitted, it did not have to be signed by a CPA; there was no requirement that it needed to be signed by a tax preparer or that it be prepared by a tax preparer. [12.05.23 AM Trial Tr. 50-51]. In fact, the tax return submitted could be a copy without the preparer's name on it. [12.05.23 AM Trial Tr. 51-52]. Finally, Spencer Lord at Cross River Bank testified that if Cross River ever needed tax returns, it didn't require any information from a CPA; the signature and PTIN number on the Tax Returns could have been blank. [12.05.23 PM Trial Tr. 112-113]. This was partially because some people file without CPA's and partially because the bank knows they are getting copies of the tax returns, not the originals, which don't need to have that information. [12.05.23 PM Trial Tr. 113].

As to the Bank Letter and Lease Agreement, Brent Montes from the SBA testified that there was no request for a bank letter so there wouldn't be a request for any specific name of a specific individual at a bank. [12.14.23 PM Trial Tr. 58-59]. Moreover, the bank letter was ignored- and they continued to request a bank statement. [*Id*. at 56-57]. Additionally, he testified that the SBA wasn't checking to see whether the tenant was a real person – the SBA wasn't checking the identity of the signer for the tenant and that the name of tenant wasn't the critical aspect or crux of the loan application. [*Id*. at 47-49]. It is therefore clear from the testimony presented at trial that since the identities of the individuals were immaterial, irrelevant, and not critical, it cannot be said that they were at the "crux" of the crime. *See Dubin*, 599 U.S. at 132 (finding that the identity of the individuals whose identity is allegedly stolen has to be used to commit the underlying crime).

Moreover, irrespective of the identities of the individuals, the documents relied upon by the Government as constituting identity theft where neither necessary nor required as part of the loan applications at issue. Consequently, the documents that evidence the alleged identity theft were not the "crux of the commission of the alleged crime. Accordingly, it cannot be said that the alleged unauthorized use of identities in the Tax Returns, the Bank Letter or the Lease was central to the alleged fraudulent scheme to have SBA loans approved. *Gladden*, 78 F.4th at 1245 (holding that use of fraudulent identities has to be "central to the scheme" to satisfy the Aggravated Identity Theft statute"); *Dubin*, 599 U.S. at 122-23 ("This central role played by the means of identification, which serves to designate a specific person's identity, explains why we say that the 'identity' itself has been stolen.").

Here, the evidence in the form of unrebutted testimony from PayPal, Northeast Bank, Cross River Bank, and the SBA established that the (1) Tax Returns, (2) the Bank Letter or (3) the Lease were not necessary documents to be submitted applications and that there was no requirement to submit these documents. Unlike *Gladden* and *Detling* there is no indication that the use of the individuals' identities had a direct correlation to the crime being committed and to the actual benefits received from the fraud. To the contrary, if anything the "use" in the application process was merely tangential or superfluous as it was not necessary to obtain the approval of the application. Consequently, the Government has not, and cannot, prove that the Defendant's alleged use of identifying information was the crux of the crime. To the contrary, the information used in this case was neither necessary nor required for the applications which the Government argues were fraudulent.

Specifically, the representatives from PayPal, Northeast Bank, and Cross River Bank all consistently testified that the Tax Returns were neither necessary nor required as part of the respective PPP loan applications.[3] Similarly, there was no requirement to submit Tax Returns for

[3] **Jamie Hutchinson from** PayPal testified that the Tax Returns submitted for 2020 were not relied upon in making funding decisions, and the borrower was not required to submit the tax returns. [11.30.23 PM Trial Tr. 90:11-91:1]. Further, she testified that Mr. Sheppard elected to prove loss of revenue quarter over quarter, and therefore, Tax Returns were not required. [11.30.23 PM Trial Tr. 98:5-99:10, 99:19-100:2]. Similarly, **David Toye from Northeast Bank** testified that there was nothing in the documentation provided to indicate that the Tax Returns were relied upon in making a decision to fund the loan and for the approval of the loan, Northeast Bank did not require any business tax returns to substantiate loss in revenue. [12.05.23 AM Trial Tr. 52-54]. Further, he testified that Northeast Bank required the 2020 Tax Returns because the applicant was a

the EIDL loans. [12.14.23 PM Trial Tr. 85:4-9]. Consequently, the documents cannot be said to be at the crux of the crime. *See Dubin*, 599 U.S. at 132 (finding that the identity of the individuals whose identity is allegedly stolen has to be used to commit the underlying crime).

Similarly, Brett Motes from the SBA testified that the Bank Letter and Lease Agreement were neither necessary nor required as part of the EIDL loan applications. [12.14.23 PM Trial Tr. 41-42, 54-57]. The Bank Letter and Lease Agreement was not even requested by the loan officer to begin with. In fact, after receipt of the Bank Letter, Mr. Motes testified that the SBA sent Mr. Sheppard an email stating that what they needed was an account number, clarifying that the Bank Letter did not contain any material information necessary to complete the SBA application process. Thus, the Bank Letter was clearly not the "crux" or "central" to the alleged crime. [12.14.23 PM Trial Tr. 56-57]. Consequently, none of the documents the government claims to have been used in the commission of identity theft were necessary, required or considered in connection with the SBA loan application process. Accordingly, they could not be considered the key movers nor the crux of the alleged wire fraud charged against Sheppard. Thus, the Government failed to prove a necessary element of Aggravated Identity Theft as outlined in *Dubin*: that the alleged identity thefts are the "crux" of the underlying crimes (or even necessary for the alleged crimes to be completed). As a result a judgment of acquittal is proper.

Further, contrary to the allegations in the Superseding Indictment, there is no evidence that Mr. Sheppard fabricated the means of identification of others without their knowledge and consent

---

partnership, but the applicant was an LLC; when looking at the applicant portal, the portal stated that the 2019 tax returns were option but it didn't even suggest an option for 2020 tax returns. [12.05.23 AM Trial Tr. 56-65]. **Spencer Lord at Cross River Bank** testified that there's nothing in the record that shows that the underwriter reviewed or analyzed the 1065 Tax Return. [12.05.23 PM Trial Tr. 110-111]. None of the documents produced show that a 1065 was requested or that anyone at Cross River Bank read the 1065 Tax Return. [12.05.23 PM Trial Tr. 78].

to obtain a personal benefit. There was no proof presented at trial that these alleged fraudulent documents were used to inure to the personal benefit of the Defendant. Instead, the evidence shows that the loan money was spent on allowable expenses, such as payroll, materials, and a business mortgage. Essentially, money is fungible, and it was expected that within a time period, the loan money would be spent on operating expenses and working capital. [12.14.23 PM 61:18-64:13].

Finally, the Government's position that if the SBA or the Banks knew the documents were fraudulent, they wouldn't have funded the loans, thereby somehow making them the crux of the crime is misplaced. In *Dubin*, if Medicaid knew the defendant was overbilling Medicaid by inflating the value of the services provided to the patients, it is axiomatic that Medicaid wouldn't have approved the reimbursement. Yet, in holding that the defendant did not commit aggravated identity theft because the crux of the crime was not the misuse of another person's means of identification, Justice Sotomayor did not address this point. The Court did hold that although the defendant's acts amounted to fraud, it didn't amount to aggravated identity theft, which carries a severe penalty: a mandatory minimum sentence of two years in prison in addition to the punishment for the predicate offense." *Dubin*, 599 U.S. at 115. Similarly, in *Gladden*, it is clear that the insurance companies would not have covered the prescription filled by Defendant Gladden if they knew the prescription wasn't medically necessary. Despite this, the Eleventh Circuit holds that Defendant Gladden did not commit aggravated identity theft under the standards articulated in *Dubin*.[4] As such, the Government's argument is misplaced and should be disregarded.

---

[4] In *Detling*, the court there noted that the representatives from the financing companies testified that "had they known that Mr. Detling's clients had not authorized the advances or received the funds, they never would have approved the funding." *Detling*, 2023 WL 6060576, at *2. Additionally, in *Gladden*, the court noted that for Defendant Linton's use of the doctor's identification to fill a prescription, had the insurance companies known that the doctor had not actually authorized the prescription, they would not have provided reimbursement. *Gladden*, 78 F.4th at 1246. Yet, this is not the case here. For example, as to the Tax Returns, the trial evidence

III. <u>The Government Failed to Provide Evidence of a Necessary Element of Wire Fraud</u>.

According to the Eleventh Circuit "mail or wire fraud occurs when a person (1) intentionally participates in a scheme [or artifice] to defraud another of money or property and (2) uses the mails or wires in furtherance of that scheme." *McCulloch v. PNC Bank, Inc.*, 298 F.3d 1217, 1225 (11th Cir. 2002). "A scheme to defraud requires proof of a material misrepresentation, or the omission or concealment of a material fact calculated to deceive another out of money or property." *United States v. Maxwell*, 579 F.3d 1282, 1299 (11th Cir. 2009). "A misrepresentation is material if it has a natural tendency to influence, or is capable of influencing, the decision maker to whom it is addressed." *Id.* (quotation marks and alteration omitted).

However, the "scheme to defraud" under the wire fraud statute is not a scheme that is intended to deceive someone only of information needed to make discretionary decisions about the use of money or property. *Ciminelli v. United States*, 598 U.S. 306, 308 (2023). Instead, "the wire fraud statute reaches only traditional property interests." *Id*. In *Ciminelli*, the defendant was convicted of wire fraud for essentially paying a former associate of the governor of New York, who was then a lobbyist, a large fee to help rig the bidding system for obtaining government contracts relating so that Ciminelli's company was the only one that met the requirements. The Government argued that Ciminelli's scheme deprived that the non-profit company (Fort Schuyler Management Corporation) of its ability to control state assets because it was deprived of potentially valuable economic information relating to Ciminelli when deciding how to use its assets. In essence, the alleged wire fraud caused Fort Schuyler to award government contracts to

---

did not show that had the bankers known that the CPA didn't prepare the Tax Returns, the loan would not have been funded. To the contrary, the evidence shows the Banks did not require a preparer on the Tax Returns. The same can be said about the Bank Letter and Lease.

Ciminelli. In reversing the conviction, the Supreme Court explained that the deceptive acts in wire fraud must be meant to affect traditional property interests, and that the rights implicated by the alleged scheme did not involve traditional property rights but instead related to potentially valuable information necessary to make discretionary economic decisions. Such interests, however, were not protected by the wire fraud statute.

Rather, a scheme to defraud is a scheme that is intended to cause an economic harm or loss of property on the alleged victim. *See United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016), as revised (Oct. 3, 2016), opinion modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016) ("to defraud, one must intend to use deception to cause some injury"); *See also United States v. Masino*, 18-15019, 2021 WL 3235301 at *9 (11th Cir. July 30, 2021) (holding defendants were not guilty of a conspiracy to commit wire fraud because "even if there was evidence that the Masinos conspired to *deceive* the charities regarding their compliance with the specified provisions of the statute, there was no evidence that the Masinos conspired to *harm* the charities by taking from them money or property to which the Masinos were not entitled). In *Takhalov*, the defendants hired women to pose as tourists, locate visiting businessmen, and lure them into the defendants' bars and nightclubs. 827 F.3d at 1310. The women concealed their relationship with the clubs to persuade the men to go to the clubs. *Id*. In the defendants' story, none of these allegedly swindled men were truly victims: they knowingly entered the clubs, bought bottles of liquor, and drank them with their female companions. Thus, in the defendants' view, these men got what they paid for—nothing more, nothing less. *Id.* at 1311. In acquitting defendants of wire fraud, the court in *Takhalov* explained: "§ 1343 forbids only schemes to defraud, not schemes to do other wicked things, e.g., schemes to lie, trick, or otherwise deceive. **The difference, of course, is that deceiving does not always involve harming another person; defrauding does**. That a defendant merely "induce[d] [the victim] to enter into [a] transaction" that he otherwise would have avoided is therefore "insufficient" to show wire fraud." *Id*. at 1310 (emphasis added). Thus, "[a] jury cannot convict a defendant of wire fraud, then, based on 'misrepresentations amounting only to a deceit[]' . . . even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims "received exactly what they paid for." *Id*. at 1314 quoting *U.S. v. Shellef*, 507 F.3d 82, 108 (2d Cir. 2007). [5]

Here, for the PPP loans, the Government claims the victims of Mr. Sheppard's alleged fraud are the Banks, not the SBA. Yet, the Government has failed to provide any evidence that a traditional property interest is implicated by the funding of PPP loans by the banks, or that the Defendant intended to harm or did harm the banks.

The Government's argument that because the information allegedly given to the banks and SBA in connection with the loan application process was false, that the Banks and SBA were prevented from properly evaluating the application of the Defendant's entities is irrelevant. The Supreme Court in *Ciminelli* has explicitly held that "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest and cannot form the basis of wire fraud. In rejecting the right-to-control theory, the Supreme Court explained that Ciminelli could not be convicted of fraud in influencing the bidding process of state

---

[5] *Shellef*, 507 F.3d at 108 (Because "[m]isrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution," we concluded that such a charge can not apply to situations where the alleged victims "received exactly what they paid for" and "there was no discrepancy between benefits reasonably anticipated and actual benefits received."); *United States v. Kachkar*, 19-12685, 2022 WL 2704358, at *4 (11th Cir. July 12, 2022) (holding that "one can 'scheme to defraud' under Section 1343 only if he 'intend[s] to harm the victim.' And we reasoned that a defendant displays such intent if he 'lies about the nature of the bargain itself,' usually by misrepresenting 'the price' or 'characteristics of the good,' so that the victim does not receive 'what he bargained for.'")

government construction contracts, because wire fraud does not apply to fraud connected with obtaining information, but only fraud directly connected to obtaining property. *Id*. at 316.[6]

Moreover, no reasonable juror can conclude that Mr. Sheppard intended to defraud, harm or injure the Banks. Further, there was no harm or injury to the Banks. Althea Harris from the SBA testified that the monies were allocated and reallocated by congress to the SBA to have available to guarantee the loans. [11.28.23 Trial Tr. 91]. In fact, the financial institutions were paid a 5% fee for every loan that was successfully funded. [11.28.23 Trial Tr. 82]. Ms. Harris testified that if an ineligible company got a loan, it didn't create a risk of financial harm to the PPP Program. [11.28.23 Trial Tr. 93]. Thus, the Government failed to prove a necessary element of Wire Fraud. As a result, a judgment of acquittal is necessary.

WHEREFORE, Defendant, Eric Dean Sheppard, respectfully requests that this Court grant enter a judgment of acquittal on all counts related to Aggravated Identity Theft and Wire Fraud Counts 4-9, related to the PPP loan applications, and for such other and further relief as may be just and proper.

[6] Similarly, if the alleged victim was the Government itself, the Government's policy under the rules about who gets the loans would not amount to wire fraud either.

Dated: December 17, 2023

Respectfully submitted,

NELSON MULLINS
One Biscayne Tower, 21st Floor
2 S. Biscayne Boulevard
Miami, FL 33131
Telephone: 305.373.9400

By: /s/ Christopher Cavallo
Christopher Cavallo
Florida Bar No. 0092305
Jayne C. Weintraub
Florida Bar No. 320382
Jonathan Etra
Florida Bar No. 686905

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 17, 2023 the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ Christopher Cavallo
Christopher Cavallo