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 FOR JUDGMENT OF ACQUITTAL

The United States of America, through the undersigned Assistant United States Attorney, files this response to the defendant's motion for judgment of acquittal, pursuant to Fed. R. Crim. P. 29. The government's evidence admitted in this trial is sufficient for a reasonable jury to find the defendant guilty beyond a reasonable doubt as to each of the 14 counts of the Superseding Indictment. Accordingly, the defendant's motion should be denied.

BACKGROUND

The Superseding Indictment charges the defendant with devising and participating in a scheme to defraud, by using materially false representations, in order to receive loan proceeds from PayPal/ WebBank, ACAP-SME/ Northeast Bank, Cross River Bank, and the SBA, to which the defendant and his companies were not entitled. The Superseding Indictment charges the defendant with nine counts of wire fraud and five counts of aggravated identity theft, in violation of 18 U.S.C. §§ 1343 and 1028A, relating to his PPP and EIDL applications on behalf of HM Management and Development, LLC ("HM Management"), HM-UP Development Alafaya Trails, LLC ("Alafaya Trails"), and HM Four, LLC ("HM Four"). A jury trial in this case began on November 27, 2023, and the government rested its case-in-chief on December 18, 2023.

The defendant has moved for judgment of acquittal as to wire fraud counts 4 through 9, which are wire transmissions reflecting acts in execution of the defendant's scheme to defraud as it pertains to the Paycheck Protection Program ("PPP"). These` wire fraud counts involve false documents submitted to the private lenders in this case (PayPal/WebBank, ACAP-SME/Northeast Bank ("Northeast Bank"), and Cross River Bank (collectively the "lenders"), although the evidence in this case is that the SBA was involved in both the PPP and the Economic Injury Disaster Loan ("EIDL") programs that were the targets of the defendant's scheme to defraud. The defendant argues that the government's evidence fails to show that the defendant intended to defraud or harm the lenders, as opposed to intending to deceive them or to deprive them of information. The defendant also seeks a judgment of acquittal as to the five aggravated identity theft counts on the basis that the evidence is insufficient under the Supreme Court's decision in *Dubin v. United States*, 599 U.S. 110 (2023). The defendant's motion should be denied, as the government's evidence is sufficient for a reasonable jury to find the defendant guilty beyond a reasonable doubt as to all of the wire fraud counts as well as the counts of aggravated identity theft.

LEGAL STANDARD

When deciding a motion for judgment of acquittal, the Court "should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction." *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999) (*citing United States v. Sellers*, 871 F.2d 1019, 1020 (11th Cir. 1989). "The district court must view the evidence in the light most favorable to the government … resolve any conflicts in the evidence in favor of the government, … and must accept all reasonable inferences that tend to support the government's case." *Ward*, 197 F.3d at 1079 (internal citations omitted). "'It is not necessary for the evidence to exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilty, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt.'" *Id.* (*quoting Sellers*, 871 F.2d at 1021).

ANALYSIS

I. The government presented sufficient evidence of the defendant's scheme to defraud the lenders and the SBA, his intent to defraud them, and that he caused the wires set forth in Counts 1 through 9 to be transmitted in interstate commerce as part of his scheme.

In order to convict the defendant of wire fraud, the government has to prove the following elements:

(1) The defendant knowingly devised or participated in a scheme to defraud (to obtain money or property) by using materially false representations;
(2) The defendant acted with the intent to defraud; and
(3) The defendant transmitted or caused to be transmitted by some wire communication in interstate commerce to help carry out the scheme to defraud.

Eleventh Circuit Pattern Jury Instruction No. 052; *see United States v. Machado*, 886 F.3d 1070, 1082-83 (11th Cir. 2018). "'A scheme to defraud requires proof of 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 defendant's intent to defraud requires that one "intend to use deception to cause some injury …" meaning "to obtain, by deceptive means, something to which the defendant is not entitled." *United States v. Waters*, 937 F.3d 1344, 1353 (11th Cir. 2019); *Maxwell*, 579 F.3d at 1301 ("An intent to defraud may be found when the defendant believed that he could deceive the person to whom he made the material misrepresentation out of money or property of some value."). "A material misrepresentation is one having a natural tendency to influence, or capable of influencing, the decision maker to whom it is addressed." *United States v. Hasson*, 333 F.3d 1264, 1271 (11th Cir. 2003); *Maxwell*, 579 F.3d at 1299. "Because the issue is whether a statement has a tendency to influence or is capable of influencing a decision, and not whether the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement." *United States v. Neder*, 197 F.3d 1122, 1128 (11th Cir. 1999). "'The focus of the language defining a scheme to defraud is on the violator, not the victim.'" *United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (*quoting United States v. Drake*, 932 F.2d 861, 864 (10th Cir. 1991)).

The government introduced evidence of the defendant's scheme to defraud from the testimony of an IRS expert, two SBA representatives, representatives of banks and loan processors, a former 20-year employee and contractor of HM Management, the defendant's long-time accountant, and two of the defendant's independent contractors. The documentary evidence included the loan documents, IRS-filed tax returns of the defendant and his businesses, the accountant's copies of the tax returns, business records, bank records, phone and email subscriber records, and Internet Protocol ("IP") address records.

A. Scheme to Defraud Pertaining to PPP Loans.

The evidence presented establishes that the defendant devised a scheme to defraud both the lenders and the SBA in order to receive potentially forgivable or 1% interest loans from the Paycheck Protection Program. The scheme involved the submission of false information, supported by a significant number of false documents materially misrepresenting the fact that the defendant paid no wages during the relevant time frame. The testimony by the SBA-PPP witness, Althea Harris, as well as the testimony of the lenders, established that the PPP involved the private lenders receiving and processing the loan applications and issuing PPP loans from bank funds, that were made under SBA guidance and with an SBA guarantee. The defendant made a number of material misrepresentations, such as the type of business/industry of the applicant, the ownership interest of the owner or authorized representative submitting the application, the amount of gross rents, and most importantly by misrepresenting his businesses as businesses with employees and payroll amounts that did not exist. The SBA and the lenders all testified that the PPP loan amount was based on 2.5 times the business' average monthly payroll, which would consist of wage and benefit payments to their W-2 employees. If the applicant applied as a business with employees, as was the case here, the loan amount would be zero if the applicant's "payroll" consisted entirely of payments to non-wage earners, such as independent contractors. As David Toye, Vice President of Northeast Bank, testified,

> Q: And regarding the average monthly payroll amount that is reflected on this application document 20-12, if the information that you had received from the borrower was one, that there were no net earnings paid to the partner and that the figure reflects one hundred percent payments for instance, for independent contractors, what would the loan amount be?
> A: The loan amount would be zero dollars.

Tr. Day 6, pp 5-6; *see* Tr. Day 6, p. 60, Testimony of Spencer Lord, Cross River Bank (Q: What would the loan amount be if the payroll information you were provided were for instance a bunch of 1099s. What would the payroll amount be? A: Zero.").

In this case, the defendant's scheme to defraud and intent to defraud the lenders and the SBA was clear from the information and the documents supporting the loan applications that have been proven to be false. For instance, the evidence established that the defendant submitted "wage reports" containing "withholdings" in place of documents reflecting payments to contractors or suppliers. The defendant also submitted false IRS quarterly Forms 941, false IRS annual unemployment Forms 940, false Florida Department of Revenue re-employment tax forms, and false and forged partnership income tax returns with false entries for wages.

All of it was proven to be false. The testimony of the IRS expert witness, Philip Palmer, the IRS filed tax returns, the absence of filed tax returns concerning wages, the absence of payments to the IRS for employee or employer tax contributions, the accountant's testimony and his copies of the income tax returns, as well as the Florida Department of Revenue's records, were unrefuted and showed that the businesses did not report or pay wages to anyone during the time period of the PPP loan applications – 2019 and 2020. The defendant submitted false information and documents for *all of the PPP loan applications* (1st and 2nd draw loan applications to PayPal for Alafaya Trails, forgiveness application to PayPal, 2nd draw loan application to Northeast Bank for Alafaya Trails, and 2 applications to Cross River Bank for HM Management) that support made-up payroll figures with the intent to convince the lenders and the SBA to approve and fund the loans.

Further evidence of the defendant's knowledge of the scheme and his intent to defraud is the absence of any information or documents in the loan files that would suggest the defendant was mistaken or confused as to whether payments to independent contractors or suppliers may qualify as payments to "employees" and thus, support his payroll figures. The testimony and records from the lenders establish that they received *no information or documents* from the defendant, such as Forms 1099 (non-employee compensation), to indicate that the "employees" listed or the "payroll" figures provided on the loan applications reflected a genuine misunderstanding that the defendant's calculations were based on payments to independent contractors.

Additional evidence of the defendant's purposeful misrepresentations and his intent to defraud is found in the changes he made to the false information he provided on the applications in order to continually deceive the lenders and satisfy their concerns as he learned of them. One example is the defendant's change to the business code on the loan applications in order to get the loans approved and funded. On March 6, 2021, PayPal denied the second draw loan application from Alafaya Trails based, ironically, on something the defendant had reported truthfully, i.e., the business code from his business's income tax return (as the instructions indicated) reporting that the business was a lessor of commercial property, which was type of business that was ineligible for PPP loans. On March 11, 2021, the defendant applied to Northeast Bank on behalf of the same company, but this time he reported a business code that corresponded with construction of commercial buildings. The defendant submitted the same false and forged tax return to Northeast Bank that he had submitted to PayPal, except that the tax return now had the construction-related business code hand-written on the tax return document.

Another example was the defendant's manipulation of the number of employees he reported to fit the situation. For instance, the testimony and records from PayPal and Cross River Bank indicate that the defendant applied to both lenders on January 19, 2021, and provided them false payroll figures and documents to correspond with 80 employees for Alafaya Trails, and 23 employees for HM Management, respectively. On January 24, 2021, the defendant uploaded a hand-written application to PayPal indicating he had 74 employees, and then on February 23, 2021, he uploaded another hand-written application to PayPal with the same payroll amounts, but listing 19 employees. The SBA and lender witnesses testified that the SBA put in place a moratorium in February 2021 directing the lenders to process only applications from businesses with fewer than 20 employees. The unexplained reduction in the number of employees the defendant provided to PayPal on February 23, 2021 (from 80, to 74, down to 19), also occurred when the defendant submitted a second application for HM Management to Cross River Bank on March 12, 2021, which reduced the number of employees to comport with the moratorium (from 23 down to 18).

B. Scheme to Defraud Pertaining SBA EIDLs.

Brent Motes from the SBA testified that the Economic Injury Disaster Loans followed a nationwide disaster declaration from the COVID-19 pandemic. The first offering of COVID-19

EIDL loans was intended to provide businesses the minimum amount of funding to stay afloat. Tr. Day 10, p. 112. Mr. Motes explained that businesses would receive six months of working capital up to $150,000, to help cover fixed debts and obligations to operate the business, not to expand the business. Tr. Day 10, pp. 113, 115. The applicant would provide information about their economic injury by filling out gross rents and cost of goods sold, or if they were a landlord, they would indicate the amount of rent lost during the disaster period. Tr. Day 10, p. 116. The defendant executed a scheme to defraud the SBA in order to receive very favorable 30-year, below-market interest loans. The defendant's scheme involved submitting EIDL applications that contained material misrepresentations regarding the business's operations. The defendant chose to apply for EIDLs for businesses that either existed only on paper as entities that held an ownership interest in another business, or businesses that had no operations and/or no economic injury to report truthfully on the application as gross revenues minus cost of goods sold, or lost rents. Even as to the two businesses that had actual operations, Alafaya Trails and HM Management, the defendant supplied Nationwide Lending Direct ("Nationwide") false information and a false and forged tax return for HM Management.

The defendant's EIDL application for HM Four demonstrates his scheme to defraud and intent to defraud the SBA's EIDL program. The defendant applied for this loan on his own, not through Nationwide, after he was approved and received the funds for the Alafaya Trails' EIDL. The tax returns in evidence show HM Four was 99% owner of Alafaya Trails in 2019 and 2020. Alafaya Trail's EIDL application reported falsely that the business was *not* owned by another entity. The defendant submitted HM Four's EIDL application under his wife's name, Jennifer Sheppard, as 80% owner – which HM Four's tax returns show she was not – and reported $950,000 in gross revenues, $250,000 in cost of goods sold, and $450,000 in lost rents, for the 12 months ending January 31, 2020. HM Four's tax returns reflect that it had no operations of its own, no income of its own, no expenses of its own. As 99% owner of Alafaya Trails, it simply reported 99% of Alafaya Trails income/losses. As was the case with the PPP loan applications, the defendant submitted false and forged documents to support the HM Four EIDL application.

The SBA notes in evidence indicate that the SBA requested "two items" from the applicant to establish that the business had operations, or "proof of business" such as a utility bill, a business cell phone, contracts, or leases. The evidence reflects that the defendant produced a false lease agreement for Mattress One as the tenant and HM Four as the landlord.[1] In addition, Mattress One's president, M.S., testified that the signature on the lease was not his, that he would not enter into a new lease in 2020, and that the landlord was Alafaya Trails, not HM Four. Indeed, Alafaya Trails, not HM Four, was the owner of the Shoppes at Alafaya, according to the deeds in evidence and the testimony of J.G. The other tenants at the shopping center also had leases with Alafaya Trails, not with HM Four (as shown on the other leases in evidence from Dick's Sporting Goods and Burlington Coat Factory). Furthermore, the original lease with Mattress One, which is in evidence, was with Alafaya Trails, and *all* of the lease payments from Mattress One were made to Alafaya Trails, and deposited in the Alafaya Trails account at Suntrust Bank, which is in evidence.

The SBA notes also indicate that as of October 29, 2020, the SBA wanted to confirm that the bank account was associated with the business. After the defendant submitted a voided check with no business name or personally identifiable information, the SBA requested a bank statement as verification of the HM Four bank account. The defendant had just opened the HM Four account on October 22, 2022, the same day that he submitted the on-line HM Four EIDL application. When

[1] The defendant also submitted a "management" agreement from 2014 between HM Four and HM Eight that the government also has reason to believe was falsified or altered before being submitted to the SBA.

the SBA requested the bank statement, the account had no funds in it. The defendant then decided to submit a false and forged letter purportedly from the Suntrust Bank branch manager, H.B., to satisfy the SBA's request. Notably, the letter mentioned the defendant and his wife, Jennifer Sheppard, as owners of HM Four, something H.B. testified he would not know unless she was a signer on the account, which she was not. Ultimately, the SBA again requested a bank statement, which caused the defendant to transfer $60,000 from the Alafaya Trails account into the HM Four account and obtain a partial bank statement to provide the SBA. When the defendant, posing as Jennifer Sheppard, emailed the SBA the bank statement, he stated, "I apologize, I misunderstood you as I thought you wanted the bank to authenticate the bank account and company so they sent a letter for that." Govt Composite Exhibit 58, bate # 31132.

The SBA did not specifically request the Mattress One lease that the defendant provided, or the bank letter that he produced, but these false and forged documents are nevertheless material. They are the type of documents that have the capacity or natural tendency to influence a person's decision regarding the issue for which the documents were requested. Also, the documents were important to the defendant's scheme. The Mattress One lease and the banker's letter are the supporting documentation that the defendant himself elected to provide to carry out his scheme to defraud the SBA.

The defendant's EIDL application for HM Four was not just a case of double-dipping after having received an EIDL for Alafaya Trails. The defendant made material lies on the application regarding revenues and lost rents, and he supplied documents that were materially false and forged.

C. The Defendant Transmitted or Caused to be Transmitted Interstate Wire Communications.

The evidence presented also included email communication the defendant had directly with the lenders for the PPP loans and the SBA for the EIDLs, as well as email and text message the defendant had with the loan broker from Nationwide Lending Direct regarding certain of the SBA EIDL applications. The IP evidence from Breezeline demonstrates that all of the PPP loan applications and the HM Four EIDL application were electronically submitted from the defendant's home. Even as to the EIDL applications that were submitted to the SBA through the Nationwide portal, the defendant DocuSigned those loan agreements from his home. Furthermore, his email and text communication with Nationwide's loan broker, N.P., demonstrate that he controlled and directed N.P.'s actions relating to the loan applications. All of the lenders and the SBA's servers were located outside of the State of Florida, thus satisfying the interstate nexus for each of the nine wire transmission that are counts in the Superseding Indictment.

In sum, based on the evidence presented, a reasonable trier of fact can find that the evidence establishes the defendant's guilt beyond a reasonable doubt as to the nine wire fraud counts.

D. Defendant's argument that the government failed to prove a scheme to defraud instead of merely proving a scheme to deceive lacks merit.

The defendant mischaracterizes the evidence in order to craft an argument that the facts presented may amount to an intent to deceive the banks, but not an intent to cause harm, a distinction made by the Eleventh Circuit in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016). The Court in *Takhalov* explained that "if the defendant does not intend to harm the victim – ' to obtain, by deceptive means, something to which [the defendant] is not entitled' – then he has not intended to defraud the victim." *Id.* at 1313 (*quoting United States v. Bradley*, 644 F.3d 1213, 1240 (11th Cir. 2011)). The defendant argues that the false information given to the banks prevented them from properly evaluating the application, and amounts to having the intent to deceive, but that the defendant did not intend to cause harm, and did not cause financial harm to the banks.

The defendant's argument lacks merit. The defendant ignores much of the record to state that the government "claims the victims of Mr. Sheppard's alleged fraud are the banks, not the SBA." Def. Mtn at p. 20. The SBA-PPP witness, Ms. Harris, as well as each of the lenders, all testified about the coordination between the lenders and the SBA in approving and funding the PPP loans. *See, e.g.,* Testimony of David Toye, Northeast Bank, at Tr. Day 6, p. 7 ("The SBA would review [the loan application information] and as long as it's complete and accurate, they would issue the loan number."). The funding dollars were provided by the lenders on the front end, and the SBA provided rules, guidance and a guarantee. For instance, the PayPal witness testified about the first PPP loan to Alafaya Trails funded by WebBank, and the forgiveness of that loan, which resulted in the SBA paying WebBank the amount of the loan, plus interest.

On this record, it is impossible to advance any credible argument that first of all, the government claims that the lenders were the only victims of the fraud in the PPP context, and second, that the evidence here demonstrates that the defendant's scheme was only intended to deceive, not to cause harm, i.e., to receive funds to which he was not entitled. Quite the contrary, the sole purpose of the defendant's scheme - the only purpose for submitting materially false information and materially false documentation - was to convince the lenders and the SBA to approve the loans and send him the money. The defendant wanted this easy money to which his businesses were not entitled, and every action the defendant took in relation to this case was for the specific purpose of getting that money.

II. The Evidence of Aggravated Identity Theft Satisfies *Dubin v. United States*.

The offense of aggravated identity theft, pursuant to 18 U.S.C. §1028A, requires the government to prove that (1) the defendant knowingly transferred, possessed, or used another person's means of identification; (2) without lawful authority; and (3) during and in relation to the specified wire fraud counts alleged in the Superseding Indictment. *See* Eleventh Cir. Pattern Jury

Instr. O40.3 (Mar. 2023). The evidence is sufficient for a jury to find the defendant guilty beyond a reasonable doubt as to the five aggravated identity theft counts in the Superseding Indictment, pursuant to the Supreme Court's decision in *Dubin v. United States*, 599 U.S. 110 (2023).

A. Pertinent Facts from the Trial.

As discussed above regarding the defendant's scheme to defraud, N.C. did not authorize the use of his name, signature, or PTIN on forged income tax returns that the defendant submitted to the lenders to support the PPP loan applications. Additionally, M.S., the former president of Mattress One testified that he did not sign or enter into a new lease with "HM Four" in 2020, and H.B., the former Suntrust branch manager similarly testified that he did not sign the bank letter that was attributed to him, and that his practice would have been to only mention the signer on the account in the letter (and not include the name of the defendant's wife).

The lenders testified at trial that they requested and required the applicant's income tax returns in 2021, per the SBA's guidance. For instance, Ms. Hutchison from PayPal testified as follows:

> A: We required the 2020 tax return and the guidelines from the SBA indicated that if it had not been filed yet that that [sic] they were to complete the tax return and sign it and submit it to us. . . . It should be reflective of the business income wages paid itself. It should be accurate. . . . .
> Q: So you indicated that you required that the tax return be prepared and signed; is that right?
> A: That is correct.
> . . .
> Generally you have until April to file the tax return with the IRS but the SBA did require that the tax return be submitted to collaborate the application in 2021. . . .
> Q: And what did – what did you require that the tax return contain with respect to the figures that are provided in the tax return?
> A: They should be true and accurate per the business report.

Tr. Day 4, pp. 34, 37, 39.

Mr. Toye, Vice President of Northeast Bank, explained that, as to the income tax return, "[t]hat was one of SBA's requirements or rules was that if you haven't filed it yet to sign the document showing that you're certifying that this is accurate and true." Tr. Day 5, p. 103. Regarding the false entries and the forgery on the tax return, Mr. Toye stated:

> Q: If you had information that that 1065 tax return was falsified as to the business code and the wages, and the gross rents and that the tax preparer name was forged on that document, would it have affected the decision that you made with respect to this loan?
> A: Yes. Definitely.
> Q: What would it have done?
> A: We wouldn't have funded the loan.

Tr. Day 5, p. 108.

Mr. Toye explained the importance of the tax return to a bank's loan decision in the context of a standard commercial loan:

> Q: With respect to a standard or regular commercial loan, would Northeast Bank – well, commercial loan where the applicant is a business, would the bank want to review the business' income tax return?
> A: Yes, we would.
> Q: Why would you want to review it?
> A: For a regular loan, we would review business tax returns – primarily for cash flow to make sure that the borrower could support the debt that they are requesting.

Tr. Day 6, p. 6.

Mr. Spencer Lord, Cross River Bank, stated that Cross River Bank requested "filed tax forms, identification and voided check." As for the types of tax forms, Mr. Lord said, "it depended on the type of business." In this case, what was provided was "a 1065 and a 940." Tr. Day 6, p. 59.

For three of the four PPP loan applications that the defendant submitted to lenders in 2021, he provided false and forged 2020 1065 income tax returns: to PayPal for Alafaya Trails on February 26, 2021 (as well as a forged 2019 tax return), to Northeast Bank for Alafaya Trails on

March 11, 2021, and to Cross River Bank for HM Management on March 12, 2021.[2]

In addition, the evidence included the testimony that N.C. had prepared the defendant's and all of his companies' tax returns essentially for the entire time the defendant has been in business, 20-25 years. The defendant executed IRS Forms 4506-T for Alafaya Trails, HM Four, and his personal tax returns for tax years – 2015-2017 - which witness J.G. testified he submitted to the SBA in late March 2020 on behalf of the defendant, together with an HM Four loan application. Thus, the defendant was aware that the SBA might have access to his earlier years' tax returns, all of which show that N.C. was the preparer on the defendant's business and personal tax returns.

Regarding the EIDL application for HM Four, the SBA file for HM Four indicates that the defendant submitted the forged documents at issue – the Mattress One lease and the banker's letter -- in response to the SBA loan officer's request that HM Four provide documentary evidence of its business operations, and verification of the HM Four bank account. Mr. Motes testified that the SBA would have reviewed all of the documentation provided in its totality.

B. The evidence in this case supporting the Aggravated ID Theft counts satisfies Dubin.

The defendant has extracted terms from the *Dubin* decision, such as "crux of the criminality," and "key mover," and has severed them from the factual context in which the Supreme Court expressed those terms. In *Dubin*, the Supreme Court reversed the Fifth Circuit's decision upholding an aggravated identity theft conviction that involved the use of a Medicaid patient's number on an inflated claim for reimbursement for psychological services. *Id.* at 115-

[2] The defendant also submitted a January application to Cross River Bank for HM Management. He produced to them, not the full 1065 partnership return, but only the K-1 attachment for tax year 2019. Mr. Lord from Cross River Bank testified that this loan application timed out and was never processed by Cross River Bank because their system alerted that it required their manual review.

17. The psychological services were performed on the Medicaid patient whose number was used on the claim; however, the claim was false because the qualifications of the psychologist performing the services were misrepresented in order to justify an upcharge, and not because of anything having to do with the use of the Medicaid patient's identity. *Id.* at 115. The Supreme Court in Dubin held that the words "use" and "in relation to" in Section 1028A should not be construed so that the statute 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." *Id.* at 117. Instead, "using a means of identification in relation to a predicate offense requires 'a genuine nexus to the predicate offense.'" *Id.*

The Supreme Court further stated:

> On this reading, the means of identification is at the crux of what makes the predicate offense criminal, rather than merely an ancillary feature of a payment method. When the underlying crime involves fraud or deceit, as many of § 1028A's predicates do, this entails using a means of identification specifically in a fraudulent or deceitful manner.

Id. After referring to the dictionary definition of "identity theft," the Supreme Court went on to state that,

> These definitions refer to offenses built around what the defendant does with the means of identification in particular. In other words, the means of identification specifically is a key mover in the criminality. 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.

Id. at 122-23. Finally, the Court analyzed "uses" of another person's means of identification "in relation to" predicate offenses involving "fraud or deceit crimes," and stated that:

> with fraud or deceit crimes like the one in this case [health care fraud], the means of identification specifically must be used in a manner that is fraudulent or deceptive. Such fraud or deceit going to identity can often be succinctly summarized as going to "who" is involved.

Id. at 131-32.

Dubin requires, in fraud cases, a showing that there was fraud or deceit "about identity." *See Dubin*, 599 U.S. at 126. In other words, the means of identification must have been used to misrepresent, in some way, "who" was involved. *Id.* at 132. And so, by misrepresenting to the lenders that his accountant was involved, and by misrepresenting to the SBA that his banker and Mattress One's president were involved, the defendant used their means of identification in relation to his fraud.

The Eleventh Circuit's opinion in *United States v. Gladden*, 78 F.4th 1232, 1244 (11th Cir. 2023) helps illustrate the point. There, the Court held that defendant Gladden's aggravated identity theft conviction—for having his employee, Whitten, go to a doctor to get an unneeded prescription in her daughter's name—must be vacated because his "use of Whitten's daughter's identifying information was merely ancillary to the deception." *Gladden*, 78 F.4th at 1248. The deception at the heart of their conduct, the Court noted, "was obtaining the medically unnecessary prescriptions." *Id.* at 1248-49. But the prescriptions themselves were signed by a "buddy" doctor and were written to real people, like Whitten's daughter, so there were not any misrepresentations about identity. *Id.*

The Court intimated that its holding might have been different, however, had Gladden "forge[d] the name of the prescribing doctor on the prescription" or "misrepresent[ed] who would be receiving the filled prescription." *Id.* at 1249. In those circumstances, the deception at the heart of his conduct not only would involve obtaining medically unnecessary prescriptions, but also misrepresenting who was writing or receiving the prescriptions.

In other words, fraud schemes might involve misrepresentations about who, what, when, where, why, and how. Co-defendant Linton, for example, misrepresented for <u>what</u> reason medications were being prescribed (i.e., they were medically unnecessary) and also by <u>whom</u> the prescriptions were authorized (by, among other ways, changing signed prescriptions to add additional expensive medication). Her use of the doctor's means of identification was fraudulent because she falsely represented that he had authorized additional prescriptions. That her fraud involved other misrepresentations does not mean her misrepresentation about identity was ancillary to the fraud. "Linton's use of Dr. Almirol's identity was central to the deception: she used his 'means of identification itself to defraud or deceive.'" *Id.* at 1245-46.

In this case, contrasted with Dubin, the means of identification of the three persons listed in the aggravated identity theft counts -- the accountant (N.C.), the Mattress One president (M.S.), and the Suntrust branch manager (H.B.) -- were stolen and used in the commission of the underlying scheme to defraud. The victims' identities were used without their knowledge or consent in a manner that was deceitful: the submission to the lenders and the SBA of false documents with the victims' purported signatures that the defendant himself (or someone at his direction) prepared to substantiate the false information the defendant provided about his businesses.

The defendant argues that neither the lenders nor the SBA required the tax returns to be signed by an accountant. Similarly with respect to the HM Four EIDL application, the defendant argues that the SBA did not require the specific documents that the defendant produced. This is true. However, the focus of the inquiry here should be the defendant's criminality – his scheme to defraud – not the victims.

The defendant's business tax returns contained multiple schedules and reported more than a million dollars in annual revenues or rents. They presented a complex financial picture that one would certainly not expect to be prepared by the individual taxpayer using TurboTax, for instance. The defendant, in carrying out his scheme to defraud, elected to include the accountant's name, his signature, his firm's name, and his Preparer Tax Identification Number ("PTIN") to lend credibility and legitimacy to the tax returns containing materially false information about, for instance, salaries and wages, which was supposed to be true and accurate. In addition, it is reasonable to infer that the defendant believed the SBA had, or could acquire, his prior years' tax returns (based on the Forms 4506-T he had submitted) and see that N.C.'s name was on the returns as his preparer. Thus, including N.C.'s name, signature, PTIN, and firm information was important to the defendant's scheme, not just to lend legitimacy to the tax returns, but also to avoid raising suspicion with the lenders or the SBA.

The same analysis applies to the Mattress One lease and the banker's letter. Focusing on the defendant's scheme to defraud, these were the documents the defendant chose to submit to the SBA to address its concerns. They demonstrate the defendant's efforts to convince the SBA of information that was false, mainly that: (1) HM Four had operations, and that (2) the business bank account, which he had just opened and was its sole signer, was active and had the involvement of his wife, the purported 80% owner of HM Four. The Mattress One president's signature and the banker's signature were an important and necessary part of the false representations of those documents.

The case of *United States v. Fullerton*, 2023 WL 6150782 (W.D. Tx. Sept. 20, 2023) is factually very similar. In that case, the defendant "engaged in a fraudulent scheme with other conspirators to apply for and receive Payroll Protection Program (PPP) loans during the COVID-19 pandemic." *Id.* at *1. In short, the defendant "used fraudulent documents to support the loan applications, including fraudulent lists of employees and fraudulent tax documents." *Id.* In one instance, he created fake tax records to attach to the fraudulent loan applications he submitted and forged the signature of a CPA to indicate it had been prepared by a tax preparer. *Id.*

The district court found this allegation survived *Dubin* because the defendant used the name and signature of a certified public accountant on fake tax records "to lend credibility to fraudulent loan applications." *Id.* at *4. That action, the court found, "legitimized the loan applications and increased the likelihood that they would be approved by the appropriate financial institutions." In other words, the court held, he used the identity "in a manner that is fraudulent and deceptive." "[I]t is hard to identify a clearer allegation of identity theft." *Id.*

The case of *United States v. Daniels*, 2023 WL 4532675 (M.D. Fla. July 13, 2023) is also instructive. In that case, the defendant was convicted of wire fraud and aggravated identity theft charges based on his role in a scheme "to clear the titles of vehicles of liens from financial institutions and other lienholders" by, among other ways, "claiming false and fraudulent towing and storage liens on the vehicles." *Id.* at *1. In one instance, for example, the defendant "created false and fraudulent paperwork" for a 2015 Ford Focus sedan "as purported proof of a towing and storage lien." *Id.* at *3. The paperwork claimed $1,100 in towing and storage fees to a fake towing and storage company and resulted in the tax collector's office providing clear title to the vehicle. Among other paperwork, the defendant included a towing and storage receipt with a forged signature for J.E., who was deceased at the time his signature was forged." *Id.* The court found that the defendant's conduct fell "squarely within the classic variety of identity theft left untouched by *Dubin*." *Id.* at *4. The defendant's "use of J.E.'s identifying information," the court explained, "was itself fraudulent or deceptive because it involved forging J.E.'s signature on a tow slip he had not reviewed to fool the tax collector's office."

Similarly here, the defendant's use of the others' identifying information was fraudulent and deceptive because it involved forging signatures on important documents in order to further the defendant's scheme, that is, to fool the lenders and the SBA into providing PPP and EIDL loans. In other words, the defendant's conduct fell squarely within "'the classic variety of identity theft left untouched by *Dubin*.'" *United States v. Eric Dean Sheppard*, 2023 WL 7157874, at *5 (SDFL Oct. 31, 2023) (*quoting Gladden*, 78 F.4th at 1246).

The broader point here is that a reasonable jury could find, from the evidence, that the defendant's forgeries had a genuine nexus to his fraud scheme—he used the forged signatures to try to deceive the lenders and the SBA into giving him loans he knew he was not entitled to. Or in a more traditional sense, he stole the identifying information of other persons for fraudulent purposes. *See Dubin*, 599 U.S. at 122 (citing Black's Law Dictionary 894 (11th ed. 2019) (defining "identity theft")). That it's just one of many misrepresentations is beside the point.

Conclusion

For the reasons set forth above, the government respectfully requests that the defendant's motion for judgment of acquittal as to Counts 4 through 14 of the Superseding Indictment be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 22, 2023, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF.

s/Aimee Jimenez
Aimee C. Jimenez
Assistant United States Attorney