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.

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**DEFENDANT'S REPLY IN SUPPORT OF RULE 29 MOTION FOR JUDGMENT OF ACQUITTAL**

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

## I. The Government Failed to Provide Evidence of Aggravated Identity Theft as Defined by *Dubin v. United States*.

The Government cannot meet its burden under *Dubin v. United States*, 599 U.S. 110 (2023) so it acts like the Supreme Court case does not exist. Like in *Dubin*, the Government here would like this Court to have a "boundless interpretation" of Aggravated Identity Theft ("AIT"), which carries a mandatory 2-year prison sentence. *Id*. at 114. The Government's broad position, which the Supreme Court expressly and firmly rejected, was that any misuse of identification that is somehow related to the underlying office is sufficient. The Supreme Court put an end to the Government's abuse of the AIT statute, as recognized in *United States v. Gladden*, 78 F.4th 1232, 1245 (11th Cir. 2023), by holding that §1028A applies where the means of identification is "a key mover in the criminality," requiring even greater than a direct causal connection between the identity theft and the underlying felony. *Dubin*, 599 U.S. at 177, 122-23.

**B. Count 11: The Alleged Falsified Bank Letter for the HM Four EIDL Loan.**

**1. There is No Evidence of Identity Theft.**

After the Rule 29 Motion was filed, Mr. Barrios (whose identity the Government alleges was forged on the Bank Letter) testified. Contrary to the Government's assertions, Mr. Barrios did not testify that his signature was forged, or that he did not sign the Bank Letter.[1] The Government provided no cites to the record showing Mr. Barrios did not sign or authorize the Bank Letter because there is nothing on the record in support of the Government's allegation. The evidence is that Mr. Barrios said he did not recall—not that it was forged. For this reason alone, acquittal on the Aggravated Identity Theft charge on the Bank Letter, Count 11, should be granted.

**2. There is No Evidence Mr. Barrios' Identity Was a "Key Mover" in the Alleged HM Four EIDL Wire Fraud.**

With respect to the *Dubin* requirement, the Government produced no evidence that Mr. Barrios' identity was a "key mover" in the alleged HM Four EIDL wire fraud. Even if the letter itself was a key mover (as discussed below, it was not) the Government's response pointed to no evidence in the record that Mr. Barrios' identity was the crux of the fraud, or that the name of a real, actual person (as opposed to a fictious name or simply an indication that the letter was approved by anonymous authorized bank representative) was required.[2] For this additional reason,

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[1] [12.14.23 AM Trial Tr. 79-81, 91, 102]. Mr. Barrios refused to testify that he did not sign or authorize the Bank Letter, saying only it was not the norm and he does not recall signing the Bank Letter. *Id*. at 79 ("**So I would not be able to tell you the specific instant whether I signed this or not, because I've signed so many of them**") (emphasis added); *Id*. at 91("I'm telling you **I don't recall signing the letter**"); *Id*. at 102 (Q: And Mr. Barrios, with regards to the letter, I mean, your bottom line is you just don't remember it, right?" A: "Correct. . . . I agree that **it has my email on it and it has my signature that would normally be on my emails, yes . . . nobody else had access to that email, correct")** (emphasis added).

[2] *See Dubin v. United States*, 599 U.S. 110, 122-23 (2023) ("[T]he 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.); *United States v. Gladden*, 78 F.4th 1232, 1245 (11th Cir. 2023) citing *Dubin*, 143 S.Ct. at 1568 ("This central role played by

the Motion for Acquittal on the Aggravated Identity Theft charge on the Bank Letter, Count 11, should be granted.

3. **There is No evidence the Bank Letter Was a "Key Mover" in the Alleged HM Four EIDL Wire Fraud.**

As shown in *the Motion*, the contemporaneous emails and Mr. Motes' hearsay testimony about them demonstrated there was no record evidence that the Bank Letter was required, requested, relied upon, or *even read by the SBA representative when it approved the loan*. [Motion at 12, 14]. And, the record cited in the Motion shows that it was disregarded by the SBA, in favor of the documents the SBA did request and require to verify the bank account–the void check and bank statement. [*Id*.]. In its Response, the Government ignores this and proffers no record citations that could support this charge. [Response at 12-15]. Instead, the Government admits that the Bank Letter was not required by the SBA. [Response at 18]. As such, there is no evidence for a reasonable jury to convict on the Aggravated Identity Theft charge on the Bank Letter, requiring acquittal on Count 11.

**C. <u>Count 10: The Alleged Falsified Lease</u>.**

1. **There is No Evidence of Identity Theft.**

As the Government pointed out, the lease does not have Maged Salem's name on it, and there is no representation in the record that the signature belonged to Maged Salem (as opposed to Mages Salem, evidently not a real person). [12.14.23 AM Trial Tr. 36-38]. For this reason alone, acquittal on the Aggravated Identity Theft charge on the Lease, Count 10, charged only as to "Maged Salem," must be granted.

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the means of identification, which serves to designate a specific person's identity, explains why we say that the 'identity' itself has been stolen.").

### 2. There is No Evidence Mr. Salem's Identity Was a "Key Mover" in the Alleged HM Four EIDL Wire Fraud.

Even if the Court accepts the Government's invitation to pretend that Maged Salem's name is on the Lease, the Government produced no evidence that his name was a "key mover" in the alleged HM Four EIDL fraud. Even if the lease itself was a key mover in the alleged fraud (as discussed below, it was not) the Government's response pointed to no evidence that Maged Salem's identity was a "key mover" to the fraud, or that the name of a real, actual person (here, there was not a real person on the lease) was required. For this reason alone, acquittal on the Aggravated Identity Theft charge on the Lease, Count 10, must be granted.

### 3. There is No evidence the Lease Was a "Key Mover" in the Alleged HM Four EIDL Wire Fraud.

Even if the Court, again, pretends Maged Salem's name was on the Lease and also pretends that his name had to be on this allegedly fraudulent document, the contemporaneous emails and Mr. Motes' hearsay testimony about them show that there is no evidence the Lease was required, requested, relied upon*, or even read by the SBA representative when it approved the loan*. [Motion 12, 14]. The record is crystal clear on this, which is why the Government ignores the record cited by the Defendant and offers no record cites on its behalf. [Response at 13-15]. The Government admits the Lease was not required by the SBA. [Response at 18]. For this additional reason alone, acquittal on the Aggravated Identity Theft charge on the Lease, Count 10, must be granted.[3]

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[3] The Government seems to suggest that if the banks had discovered fraudulent information, the loan would have been rejected [Response at 14-15] but as the Defendant pointed out in his Motion—which was ignored by the Government in its Response—this argument is just a side-step around *Dubin* and *Gladden*. [Motion at 15]. Obviously, the SBA would reject any attempted loan if it discovered fraudulent information in the loan package, but that would not convert otherwise non-"key mover" information into "key mover" information under *Dubin*. For example, in *Dubin*, if Medicaid knew the patient didn't receive the services provided by that psychologist, it is axiomatic that Medicaid wouldn't have approved the reimbursement. This is just another assault on *Dubin* and *Gladden* because the Government cannot meet its burden of proof.

D. **Counts 12-14: The Alleged False Tax Returns for Specified PPP Loans.**

**1. There is No Evidence that the CPA's Identity Was a "Key Mover" in the Alleged PPP Loan Wire Fraud.**

As discussed in Defendant's Motion, even in the view most favorable to the Government, the evidence presented shows that the alleged forged identifications were irrelevant. [Motion at 11-12]. The alleged deception here did not center around the identity of the CPA. The evidence establishes that the use of the CPA's identity in the Tax Returns was irrelevant; the accountant's name, signature, and Preparer Tax Identification Number was not required or even considered for the Tax Returns, and was thus immaterial. [Motion at 3, 11-12]. The Government cannot cite to any record evidence to establish how the identity of the CPA was central to the alleged scheme.

With no evidence, the Government can only cite this Court to an out-of-circuit district court case, *United States v. Fullerton*, 2023 WL 6150782 (W.D. Tx. Sept. 20, 2023), but *Fullerton* was *deciding a motion to dismiss with no evidentiary record.* We are here on a Rule 29 motion – in which the Government has rested, and there is no evidence whatsoever that the CPA's identity had any impact with respect to the PPP loans. In fact, the evidence is to the contrary. The SBA and lender PPP witnesses said *when* they needed tax returns (which they did not need here), they *did not expect* any CPA names because some taxpayers do not use CPAs and others provide copies which may not have the name of the CPAs that are on the originals filed with the IRS. [Motion at 3, 11-12]. There is no evidence in the record for a reasonable juror to conclude that that the allegedly stolen CPA identity was of any moment, and the Court is not free to ignore the dictates of *Dubin* and *Gladden*.

Undeterred, the Government requests that the jury be permitted to speculate that Defendant allegedly put CPA information in the fake returns out of fear the PPP lenders would see the original returns with the CPA's information because of the alleged submission of forms 4506T. [Response at 18-19]. *First*, there is no evidence of 4506Ts being submitted to the PPP lenders. The evidence is they were submitted to Nationwide and the SBA for EIDL loans (about which there is no AIT charge for tax returns), so there is no reason to guess that the Defendant speculated that the Banks would get his returns. *Second,* the argument makes no sense because the evidence is that PPP lenders understood they were getting copies and only originals submitted to the IRS had to have CPA information on them for those returns prepared by a CPA. [12.05.23 AM Trial Tr. 50-51 (David Toye Northeast); 12.05.23 PM Trial Tr. 112-113 (Spencer Lord Cross River)]. *Finally*, and most importantly, even if everything the Government speculates here is based on evidence, that would still not make the CPA's identity a "key mover" in the charges under *Dubin* and *Gladden*.[4]

[4] The Government's reliance on *United States v. Daniels*, 2023 WL 4532675 (M.D. Fla. July 13,2023) is also misplaced. As the Government argues, contrary to the instant case, the forgery there is what resulted in the tax collector's office providing clear title to the vehicle; it was the crux of the criminality there. *Id*. at *3 ("Upon review of the forms [which included a forged signature for J.E.], a representative with the tax collector's office then provided a clear title to the vehicle."). In finding the use of J.E.'s signature constituted Aggravated Identity Theft, the court there explained:

> [A]s part of the wire fraud scheme, [Daniels] and his coconspirators stole and used the identity of J.E., the lienholder, on the tow slip to make it look like the lienholder had been notified of the tow . . . [T]he key reason the fraud scheme worked is that the persons at the tax collector's office believed the lienholders had notice of the tows. The employees thought the tows were legitimate because they saw the signatures on the tow slips.

*Id*. Here, as the Government admits in its Response, "neither the lenders nor the SBA required the tax returns to be signed by an accountant" and with respect to the HM Four EIDL application, "the SBA did not require the specific documents [the Bank Letter or Lease Agreement] the defendant produced." [Response at 18]. Additionally, unlike in *Daniels*, the Government provided no evidence that the use of the identities in the Tax Returns, Bank Letter, or Lease Agreement, is the key reason the alleged fraud scheme worked, or that the identifying information made any difference whatsoever in funding the loans. As such, unlike *Daniels*, the documents, nor the identities of the individuals on those documents, could be the crux of the fraud alleged here.

### 2. There is No Evidence that the Tax Returns were "Key Movers" in Any of the Alleged PPP Loan Wire Frauds.

As shown in Defendant's Motion, and explained in more detail below, there is also no evidence that the tax returns themselves were either required or relied upon in funding the loans. For this additional reason, an acquittal is required.

PayPal: PayPal's representative, Jamie Hutchinson, testified that she personally was not involved in the loan application. [11.30.23 PM Trial Tr. 3-4, 6, 15, 18, 24, 26-27, 29, 61, 80]. As such, she could not testify from personal knowledge as to what documents PayPal relied upon in funding the specific loan at issue. She could not opine what was actually considered or relied on much less central to the loan application. Although Ms. Hutchinson claimed to know, three years later and with no personal involvement, that that Tax Returns were required, she clarified on cross examination that: **There's no record information the that would indicate that anyone from PayPal reviewed the 2020 tax return from HM-UP, or relied upon them return in funding the loan** [11.30.23 PM Trial Tr. 90-91]; **and the applicant elected to prove loss of revenue quarter over quarter, and therefore, Tax Returns were not required**. [11.30.23 PM Trial Tr. 98-100].

Northeast Bank: Similarly, David Toye from Northeast Bank testified that he did not have personal involvement in the specific loan the applied for. [12.05.23 AM Trial Tr. 8, 13]. Although Mr. Toye testified to his opinion that the bank would have wanted to review a business' tax returns for a standard commercial loan, he did not testify as to the PPP loan and admitted on cross-examination 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]. In fact, he admitted that, while he believes the applicant should have applied as a partnership, in which case the K-1 part of a tax return (which does not have any place for CPA information] would have been required*, the records showed that the applicant applied as LLC, and was treated as an LLC by Northeast Bank, such that no part of any tax return was required.* [12.05.23 AM Trial Tr. 56-65]. He also admitted that when an applicant is looking at the applicant portal, the portal stated that the 2019 tax returns were optional, not required, and it didn't suggest even an option to submit 2020 tax returns. [*Id.*].

Cross River Bank: Similar to the PayPal and Northeast Banks representative, the Cross River Bank representative, Spencer Lord, also lacked personal knowledge about the actions that were taken by Cross River Bank related to this specific loan. [12.05.23 PM Trial Tr. 72-74]. As such, he could not testify from personal knowledge as to what documents Cross River requested or relied upon in funding the specific loan at issue, nor was there any document to substantiate any reliance on 2020 tax returns by the examiner. Therefore, there is insufficient evidence for the jury to conclude that the fraudulent Tax Returns were relied upon by PayPal in funding the loan to the Defendant's companies, thereby failing to prove that the document itself was central to the Defendant's alleged scheme. Further, although Mr. Lord claimed to know that that Cross River requested filed tax returns from either 2019 or 2020 [12.05.23 PM Trial Tr. 59], on cross examination, Mr. Lord testified:

- There was no document produced or evidence that shows that Cross River requested the 1065 Tax Return from HM Management [12.05.23 PM Trial Tr. 75-76].
- **None of the documents produced show that a 1065 was requested or that anyone at Cross River read the 2020Tax Return** [12.05.23 PM Trial Tr. 78].
- **A Tax Return was required for partnerships, but HM Management was an LLC, therefore it was not required**. [12.05.23 PM Trial Tr. 76].
- **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].

## II. <u>The Government Failed to Prove Wire Fraud on Counts 4-9, the PPP Loans</u>.

In his Motion, the Defendant pointed to only to one element the Government failed to prove: that the Defendant did not participate in a scheme to defraud a property interest as required for wire fraud by *Ciminelli v. United States*, 598 U.S. 306, 308 (2023) and *United States v. Takhalov*, 827 F.3d 1307, 1312 (11th Cir. 2016). [Motion at 16-19]. As the Defendant pointed out, a "scheme to defraud" in the wire fraud statute is not scheme that is intended to deceive someone only of information needed to make discretionary decisions about the use of money or property or harm to strictly policy interest.[5] Rather, a scheme to defraud is a scheme that is intended to cause an economic injury or loss on the alleged victim. *Takhalov*, 827 F.3d at 1312 ("to defraud, one must intend to use deception to cause some injury").[6] Here, there was no possible economic injury to the Banks because the SBA guaranteed the loans and paid them a fee, per the program. [Motion at 19]. That is insufficient for wire fraud under *Ciminelli* and *Takhalov*.

Recognizing it cannot defend the wire fraud charges with the Banks as the victims, the Government now argues that the SBA was really the victim of the charged PPP loan frauds. This shameful maneuver by the Department of Justice must be rejected as it varies from the Indictment, creates counts that are multiplicitous because they allege multiple victims, ***and contradicts its own***

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[5] *Ciminelli*, 598 U.S. at 308 (2023) (Because "potentially valuable economic information" "necessary to make discretionary economic decisions" is not a traditional property interest, we now hold that the right-to-control theory is not a valid basis for liability under § 1343."); *Id*. at 316 ("In sum, the wire fraud statute reaches only traditional property interests. The right to valuable economic information needed to make discretionary economic decisions is not a traditional property interest. Accordingly, the right-to-control theory cannot form the basis for a conviction under the federal fraud statutes.")

[6] *Id*. at 1310 ("§ 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.") (emphasis added).

***admission in the middle of trial.*** [Motion at 18; D.E. 152 at 1; 12.4.23 AM Trial Tr. 48:18-49:7]. Even if permitted to do so, the Government also cannot prove wire fraud on the SBA for PPP because the SBA PPP witness admitted the only harm that could come from an ineligible applicant getting a PPP loan is *harm to the policy interests of the SBA*, *not to its economic interests*. [Motion at 19]. The SBA was duty-bound and determined to use up all of its allocations and did so with demand still not met, and so there was no scenario where the SBA was going to keep any of its funds from being allocated for a PPP loan. [11.28.23 Trial Tr. 5, 88-89, 91-93]. The wire fraud does not protect harm to a policy interests. The case law cited by the Government [Response at 3-4] does it no good, because here there was no misrepresentation about the economic "benefit of the bargain." The evidence is the Defendant's companies requested the exact same economic "benefit of the bargain" as any other PPP loan applicant. [11.28.23 Trial Tr. 74-77]. There was no alleged fraud on economic terms. The alleged fraud was regarding the policy interests of the program, not protected by the wire fraud statute.

## III. The Government Failed to Prove Wire Fraud on Counts 1-3, the EIDL Loan.

In his Motion, the Defendant challenged Counts 4-9, the Wire Fraud counts related to the PPP loan applications, not the EIDL loan applications. Yet, the Government chose to brief the EIDL HM Four loan, Counts 1-3, in order to supposedly demonstrate that the Government met its burden of proof. While this was not raised in the Motion, the Response showed that there was insufficient evidence of this charged wire fraud. The Government's argument, focusing on the Lease and Bank Letter which were not required or considered by the SBA, demonstrates it has no evidence of a material misrepresentation in the HM Four EIDL loan.

**WHEREFORE**, Defendant, Eric Dean Sheppard, respectfully requests that this Court 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.

Dated: December 26, 2023

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 26, 2023 the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

/s/ *Jayne C. Weintraub*
Jayne C. Weintraub