UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FORIDA

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

UNITED STATES OF AMERICA,

vs.

ERIC DEAN SHEPPARD,

Defendant.
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DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL

Defendant Eric Dean Sheppard, by and through undersigned counsel, pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure, hereby moves this Court to enter a judgment of acquittal for all counts on which he was convicted, and states as follows:

INTRODUCTION

Under *Dubin v. United States*, 599 U.S. 110 (2023), the Court should enter judgment of acquittal on the two aggravated identity theft ("AIT") counts, Counts Thirteen and Fourteen. *Dubin* held that a defendant is guilty of AIT only when his use of the victim's identity is the crux of the predicate fraud—i.e., when the key mover in the underlying fraud is stealing or misrepresenting someone's identity. Here, Sheppard's alleged placement of Neil Cupersmith's name and identifying information on two tax forms, one for HM UP Development Alafaya Trails ("HM UP") and one for HM Management and Development ("HMMD"), is not what allegedly made the loan applications fraudulent. As the government repeatedly told the jury and argued to this Court, its theory of fraud was that Sheppard "l[ied] abut his businesses" and their eligibility to participate in the Payment Protection Program ("PPP"), not that he lied about Cupersmith's identity. [1/11/24 Tr. 57:6-13]; *see also* D.E. 165 at 4-5 (crux of alleged fraud was "misrepresenting his businesses as businesses with employees and payroll amounts that did not exist"). Under *Dubin*, judgment of acquittal is required.

Under the Eleventh Circuit's decision in *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), and the Supreme Court's decision in *Ciminelli v. United States*, 598 U.S. 306 (2023), this Court should enter a judgment of acquittal on the wire fraud counts (Counts Five, Seven, Eight, and Nine) because Sheppard did not engage in a "scheme to defraud." A "scheme to defraud" is one that, if completed as devised, harms the victim's property rights. The government has hypothesized two victims: the lending banks and the Small Business Administration ("SBA"). The banks were not victims of fraud because they received exactly what they bargained for, and they could only benefit from making PPP loans by collecting fees. And the only harm the SBA could have sustained is regulatory. As the SBA's own witness testified, the PPP eligibility criteria Sheppard allegedly lied about were meant to protect the government's *policy interests* in promoting W-2 employment. But because the wire fraud statute protects "property rights only," this asserted harm to the government's "regulatory interests" cannot sustain a conviction. *Cleveland v. United States*, 531 U.S. 12, 19, 21 (2000).

For these reasons and those set out below, the Court should enter a judgment of acquittal on Counts Five, Seven, Eight, Nine, Thirteen, and Fourteen.

BACKGROUND

On June 29, 2022, Sheppard was charged with six counts of wire fraud, one count each for six loans. Three of the loans were issued by the SBA under a program referred to as "EIDL." The other three loans were issued by private lenders under the PPP. On August 24, 2023, Sheppard was charged with a 14-count superseding indictment, upon which he was tried. Counts One through Nine charged wire fraud; Counts Ten through Fourteen charged AIT. Trial began on November 27, 2023. Although originally projected by the government to last 5-7 days, the trial lasted 17 days (the government's case took over 12 trial days, followed by 4 days of defense witnesses, including the testimony of the Defendant). Because of several multi-day breaks over Sheppard's repeated objections, followed by one break lasting three weeks, the jury did not get the case until January 11, 2024. After a note of deadlock and a modified Allen Charge, the next day, January 12, the jury returned a verdict of Not Guilty on eight of the Counts, and Guilty on six of the Counts, and the Court entered judgments of acquittal and conviction on that basis.

DISCUSSION

I. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 29(c), a court must inquire whether, "after viewing the evidence in the light most favorable to the prosecution, would any rational trier of fact have found all the essential elements of the crime beyond a reasonable doubt." *United States v. Lopez*, 403 F. App'x 362, 370-71 (11th Cir. 2010) (citing *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006)). "If there is a lack of substantial evidence, viewed in the government's favor, from which a reasonable factfinder could find guilt beyond a reasonable doubt, the conviction must be reversed." *United States v. Willner*, 795 F.3d 1297, 1307 (11th Cir. 2015) (quoting *United States v. Kelly,* 888 F.2d 732, 740 (11th Cir. 1989)).

I. AGGRAVATED IDENTITY THEFT CONVICTIONS

A. *Dubin* Requires That The Use Of Another Person's Identity Be The Crux Of The Underlying Fraud

Section 1028A makes it a crime to knowingly use, without lawful authority, another person's means of identification during and in relation to a list of predicate felonies. 18 U.S.C. § 1028A. Aggravated identity theft under Section 1028A is a serious charge and carries with it an enhanced penalty—namely, a mandatory two-year prison term to run consecutively with the term imposed for the underlying felony. Before *Dubin*, the government had "wielded § 1028A(a)(1) well beyond ordinary understandings of identity theft." 599 U.S. at 115. *Dubin* put an end to these prosecutions—including the prosecution in this case.

Dubin held that a defendant "uses" another person's means of identification in contravention of the AIT statute only when "the means of identification is at the crux of what makes the predicate offense criminal." *Id.* at 117; *see also id.* at 132. It is not enough for the government to prove that there is a "causal relationship" between the defendant's use of someone's identity and the fraud, "such as facilitation of the offense or being a but-for cause of its success." *Id.* at 131 (quotations omitted). Instead, the defendant's use of someone's identity must be the gravamen or "key mover" of the underlying fraud (here, wire fraud). *Id.* at 122.

To aid courts in this analysis, *Dubin* adopted as a "helpful guide," *id.* at 132, the test articulated by Judge Sutton in *United States v. Michael*, 882 F.3d 524 (6th Cir. 2018). The central question under that test is: What made the defendant's underlying conduct fraudulent? As the Supreme Court explained, a defendant violates the AIT's "use" and "in relation to" elements in the healthcare context when the crux of the underlying healthcare fraud is a misrepresentation about "*who* received the services," whereas a defendant does not commit AIT when the fraud is "misrepresenting *how* and *when* services were provided." *Dubin*, 143 U.S. at 132. What matters, *Dubin* held, is whether the defendant committed the underlying fraud because he lied about someone's identity (which may be AIT), or whether he committed the fraud by lying about something else (which is not).

The facts of *Dubin* illustrate this principle. There, the government alleged that the defendant, David Dubin, committed AIT by submitting a fraudulent claim to Medicaid. That claim included patient identifying information because patient identifying information is necessary for Medicaid reimbursement. *See United States v. Dubin*, 27 F.4th 1021, 1401 (5th Cir. 2022) (en banc) (Costa, J., dissenting). But the Supreme Court held that Dubin's inclusion of patient identifying information on the fraudulent claim, although a but-for cause of the fraud's success, was not enough to sustain a conviction for AIT. The underlying healthcare fraud consisted of Dubin's lies on the Medicaid claim form about the value of the services his business provided to the patient and when those services were performed. *Dubin*, 599 U.S. at 115. Because "the patient's name was not at the crux of what made the underlying overbilling fraudulent," the Court held Dubin's conduct did not amount to AIT. *Id*. at 132.

Cases decided after *Dubin* further demonstrate that the key question in evaluating the "use" and "in relation to" elements in any AIT prosecution is whether the defendant committed the underlying fraud by misrepresenting someone's identity. Take the Eleventh Circuit's post-*Dubin* decisions in *United States v. Gladden*, 78 F.4th 1232 (11th Cir. 2023), and *Carter v. United States*, 2024 WL 20847, at *1 (11th Cir. Jan. 2, 2024). In *Gladden*, the court affirmed one defendant's AIT convictions because the underlying fraud consisted of misrepresenting who was receiving prescriptions and, in one instance, who wrote the prescription. 78 F.4th at 1245-46; *see also id*. at 1248 (explaining that the defendant committed AIT because she "misrepresented who was receiving the prescriptions"). By contrast, the court vacated the co-defendant's AIT conviction because the underlying fraud consisted of misrepresenting eligibility for reimbursement, not someone's identity. *Id*. at 1248. Although the defendant put another person's name on a fraudulent bill, "[t]he deception at the heart" of the fraud was the misrepresentation that the prescription was "medically necessary." *Id*. *Carter* is to similar effect. The Eleventh Circuit upheld that defendant's AIT convictions because the crux of the underlying fraud was a misrepresentation about who was enrolled in the defendant's school, "which had the effect of increasing state funding." 2024 WL 20847, at *9.

Section 1028A, in short, is not a general anti-forgery statute. In the context of a fraud prosecution, a defendant cannot be guilty of AIT *unless* a misrepresentation about someone's identity is the crux of the underlying fraud.

B. Sheppard Did Not Commit AIT Under *Dubin*

A judgment of acquittal is required because the crux of Sheppard's conviction for wire fraud was not a misrepresentation about the identify of Cupersmith, a Certified Public Accountant ("CPA"). Indeed, not even the government contended at trial that Sheppard committed wire fraud by misrepresenting Cupersmith's identity. Instead, the government's theory was that he misrepresented the characteristics of his businesses and their eligibility for participation in PPP. If anything, this is an even weaker AIT prosecution than the one in *Dubin* for the independent reason that Sheppard's use of Cupersmith's identity was not even a but-for cause of the fraud—and if the use of someone's identity is not a but-for cause of the fraud, it obviously cannot be the crux of the fraud.[1]

1. *The crux of the alleged wire fraud was Sheppard's eligibility to participate in PPP, not Cupersmith's identity.*

The government advanced two theories of wire fraud at trial. Neither supports an AIT conviction because neither turned on a misrepresentation about Cupersmith's identity. Cupersmith's identity was not the crux of the wire fraud.

The government's first theory was that the PPP program was effectively limited to employers whose payroll consists of W-2 wages, and that Sheppard committed wire fraud by "misrepresenting the fact that [he] paid no [W-2] wages during the relevant time frame." [D.E. 165 at 4-5 (explaining "[t]he scheme"). As the government summarized its theory to this Court, the "most important[]" aspect (i.e., crux) of its wire fraud case was that Sheppard "misrepresent[ed] his businesses as businesses with employees and payroll amounts that did not exist." *Id.* at 5; *see also, e.g.*, *id.* at 6 ("made-up payroll figures with the intent to convince the lenders and the SBA to approve and fund the loans"). The government pressed the same argument to the jury: the "basic material lie[] here," the government urged, was that Sheppard employed "wage employees." 1/11/24 Tr. 59:3-8. The government's fallback theory was that Sheppard "change[d] the industry code for his business" on a form submitted in support of his loan applications, which likewise misrepresented his businesses' eligibility to participate in PPP. *Id.* at 73:11-24 ("the business code has changed").[2]

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[1] Sheppard never challenged Cupersmith's testimony that Cupersmith did not sign or authorize anyone to sign those alleged tax returns. Sheppard was not involved in or aware of this. There was no evidence he was.

[2] This latter misrepresentation about the "industry code" is materially indistinguishable from one of the misrepresentations the Supreme Court rejected as insufficient to ground an AIT conviction in *Dubin*. In *Dubin*, the defendant included a fraudulent code on a claim for reimbursement submitted to Medicaid, which had the effect of "inflat[ing] the amount of reimbursement." *Dubin*, 599 U.S. at 114. Here, Sheppard is alleged to have included a fraudulent code on a tax form, which, had it been reviewed and relied on, would have had the effect of misrepresenting his businesses' eligibility to participate in PPP. As in *Dubin*, allegedly fraudulent code was not a misrepresentation about someone's identity and therefore cannot support an AIT conviction.

In other words, the government claimed that Sheppard committed wire fraud by misrepresenting the *characteristics of his businesses* to convince the banks that he was eligible to participate in the PPP program. As the government put it, the "basic scheme" was Sheppard "lying about his businesses in order to qualify for the loans." [1/11/24 Tr. 57:6-13]; *see also, e.g.*, *id*. at 52:11-18 (Defendant lied "to make his businesses appear as if they were eligible for these COVID relief loans").

Lying about the characteristics of one's businesses—and thus their eligibility to participate in a government program—is not AIT under *Dubin*. *Dubin* asks whether the crux of the defendant's underlying fraud was a misrepresentation about *someone's identity*. And as the government's submissions all but admit, Sheppard's alleged invocation of Cupersmith's identity was not "at the crux of what made [those applications] fraudulent." *Dubin*, 599 U.S. at 132. Rather, "[t]he crux of the [wire] fraud here was a misrepresentation about the qualifications of" Sheppard's businesses, and thus their eligibility to participate in the PPP program. *Id*.

Sheppard is thus no different from many defendants who have been acquitted by appellate courts of AIT for misrepresenting their eligibility to participate in a government program or receive reimbursement. Take David Dubin himself. He lied about when services were performed to convince Medicaid that those services were eligible for reimbursement. *Dubin*, 27 F.4th at 1026 (Owen, C.J., concurring) ("Dubin falsified the date that services were provided since, had he used the correct date, the services would have been ineligible for reimbursement because they were performed within a twelve-month period for which maximum benefits had already been paid."). But the Supreme Court expressly held that this lie did not amount to AIT because a misrepresentation about someone's identity was not at the crux of the fraud. Likewise, in *Gladden*, where the Eleventh Circuit reversed (under plain error review) one defendant's AIT conviction for misrepresenting that prescriptions were "medically necessary." 78 F.4th at 1248. The crux of the fraud was about reimbursement eligibility (medical necessity), not the victim's identity. So too in the out-of-circuit cases cited approvingly by the Supreme Court in *Dubin*, 599 U.S. at 116, where the gravamen of the defendants' frauds was lying "about their own eligibility for reimbursement," *United States v. Medlock*, 792 F.3d 700, 706 (6th Cir. 2015) (no AIT where the fraud involved misrepresenting how services were performed to deceive Medicare into reimbursing for the services); *United States v. Hong*, 938 F.3d 1040, 1051 (9th Cir. 2019) (no AIT where massage "was misrepresented as a Medicare-eligible physical therapy service"). And so too here. The government may have claimed that Sheppard coopted Cupersmith's identity, but Cupersmith's identity was not "at the crux of the underlying criminality." *Dubin*, 599 U.S. at 122.

The convictions sustained in *Gladden* and *Carter* illustrate this point in reverse. In both cases, the Eleventh Circuit affirmed AIT convictions where "the heart of the deception" constituting the underlying fraud was a misrepresentation about someone's identity—*who* wrote and received prescriptions in *Gladden*, 78 F.4th at 1245-56, and *who* was enrolled in the defendant's sham school in *Carter*, 2024 WL 20847, at *9. Here, the government's own words to this Court and the jury belie any suggestion that Cupersmith's identity was at the heart of Sheppard's wire fraud conviction. According to the government itself, the "crux of the underlying criminality," *Dubin*, 599 U.S. at 122, were misrepresentations about the characteristics of Sheppard's businesses allegedly designed to deceive the banks into believing they were eligible to participate in PPP. That is not identity theft under *Dubin*.

In denying Sheppard's earlier Rule 29 motion, the Court correctly recognized that "the crux of the Wire Fraud in this case is Sheppard's misrepresentations about the nature of his worker's employment relationship, i.e., whether those workers were employees or independent contractors." [D.E. 170 at 12; see also *id*. at 9-10 (summarizing the evidence)]. But the Court held that the government's evidence was sufficient to present the Counts to the jury because the inquiry under *Dubin* does not turn on whether the "use" of Cupersmith's identity "was 'at the crux' of the wire fraud." *Id*. at 14. With respect, the Court's reasoning is flatly inconsistent with *Dubin*, which held that the precise question under Section 1028A is whether the use of another person's identity is "at the crux of what made the underlying [conduct] fraudulent"—here, whether Sheppard's alleged use of Cupersmith's identity is at "[t]he crux of the [wire] fraud." 599 U.S. at 132. *Gladden*, which applies *Dubin*, is to the same effect. Indeed, sustaining Sheppard's conviction merely because he allegedly placed Cupersmith's name and identifying information on the tax forms would collapse the "use" and "in relation to" elements at issue in *Dubin* into the "without lawful authority" element in Section 1028A. That Sheppard allegedly coopted Cupersmith's identity on the forms proves at most that he used that identity "without" Cupersmith's "lawful authority." But the "use" and "in relation" to elements are different—they are about the relationship between the use of the identity and the underlying "predicate offense." *Dubin*, 599 U.S. at 132. *Dubin* held that this nexus requirement is satisfied only where the defendant's use of the identity is *the crux of that predicate offense*, and this Court's Rule 29 decision recognizes that the "crux" of predicate wire fraud offenses here were misrepresentations about the employment status of Sheppard's businesses' workers. Under *Dubin*, that is not AIT.

2. *Cupersmith's identity was not even the but-for cause of the fraud.*

The analysis above is sufficient to enter a judgment of acquittal on Counts Thirteen and Fourteen because Cupersmith's identity clearly was not the crux of the wire fraud. Further support comes from the fact that Cupersmith's identity was not even a but-for cause of that fraud. *See Dubin*, 599 U.S. at 131 ("being at the crux of the criminality requires more than a causal relationship"). Cupersmith's name appeared on forms that were not material to the approval of Sheppard's PPP loan applications and thus by definition could not have been the key mover in the alleged fraud. In this respect, the government's prosecution in this case is even weaker than the one the Court unanimously rejected in *Dubin*. In *Dubin*, the defendant's inclusion of the victim's identity on the Medicaid claim form was at least a but-for cause of the fraud. Medicaid will not approve a claim for reimbursement unless it has patient identifying information, so Dubin's use of the patient's identity was in that sense necessary for his healthcare fraud. But the Supreme Court rejected that theory of AIT. This case is several steps removed. Unlike Dubin's use of the patient's name on the Medicaid claim form, Cupersmith's name played no causal role in the approval of his PPP loan application.

a. The tax form on which Cupersmith's name appeared was not material to the PPP loans.

Count Thirteen involved a PPP loan application funded by Northeast Bank. Count Fourteen involved a PPP loan application funded by Cross River Bank. The government claimed at trial that Sheppard misrepresented "wages and salaries" on 1065 tax returns submitted in support of those loan application, and that he included Cupersmith's identifying information on those returns without Cupersmith's consent. But those forms played no role in the banks' approvals of the loan applications and thus Cupersmith's identity could not have been the crux of the fraud.

Northeast Bank/Count Thirteen. The government offered no evidence that anyone at Northeast Bank or its loan processor, ACAP, even looked at the form on which Cupersmith's name appeared in deciding to approve the loan. No one from ACAP, the actual loan processor for Northeast Bank, testified at trial. The only witness who testified regarding this loan was Mr. David Toye, a senior executive at Northeast who was not involved in, and admittedly, had no personal knowledge of, the loan application or the approval. [12/5/23 AM (Toye) 8:20-9:12; 12:13-13:10]. Thus, when pressed on AIT-related questions of what borrower materials were actually relied upon, or even reviewed or requested by Northeast, Toye admitted his answers were limited to the information written in documents he looked at. [12/5/23 AM (Toye) 9:22-12:12, 52:15-53:3].

That said, even Toye testified that the 1065 tax return (with Cupersmith's name) was not relied upon to approve the loan.

> Q. There's nothing in the documentation provided by Northeast or ACAP that you have in your files that indicate that this tax return was relied upon in the approval process; is that correct?
> A. That's correct
> . . . .
> Q. All you have [is] the documents to determine what was relied upon, correct?
> A. Yes.
> Q. And they don't say they relied on the tax return, correct?
> A. They don't say they relied on the business tax return.

[12/5/23 AM (Toye) 52:15-53:3].[3]

Toye also testified that the 2020 1065 return was not needed or used to substantiate loss of revenue because the loan amount was under $150,000, which meant there was no requirement to substantiate loss. [12/5/23 AM (Toye) 53:4-54:11]; *see* Ex. B ("Revenue Decline") and **Exhibit C** (marked up portion of Trial Exhibit 20-14). Toye said essentially the same thing on direct, with no

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[3] The government, on direct, misled Toye into speculating that the K-1 portion of the 1065 tax return (which does not have a place for CPA information [12/5/23 AM (Toye) 57:22-58:13]), was necessary to substantiate average monthly payroll through an inapplicable part of the ACAP/Northwest loan review excel spreadsheet. [12/4/23 AM (Toye) 87:17-91:3]. On cross, Toye admitted his answers to the prosecutor's questions were based on an assumption and were incorrect. [12/5/23 (Toye) 56:19-57:21, 59:19-63:4]. Specifically, he admitted that Northeast *would have* relied on the K-1 (which, again, does not have a place for CPA information [12/5/23 AM (Toye) 57:22-58:13]) ***only if*** Northeast treated the applicant as a partnership. [12/5/23 (Toye) 59:19-63:4]. Based on the documents created and used by the loan reviewers, Toye admitted on cross that Northeast treated the applicant as an LLC (or corporation), not as a partnership, and, as result, *the K-1 was not requested or relied upon for average monthly payroll (or anything else)*. *Id.* Toye further admitted that the loan review tab of the excel spreadsheet that referenced the K-1, misleadingly used by the government on direct, indicated that it was the "wrong tab" for this loan and that the application would have "fail[ed]" treating HM UP as a partnership. [12/5/23 AM (Toye) 59:19-62:20]; *see* **Exhibit A** (marked up portion of Trial Exhibit 20-3) By contrast, the LLC/corporation loan review tab indicated it was the "correct" tab for the HM UP loan, included the actual loan "approv[al]," and *did not discuss or reference the K-1 or any other part of the 1065 tax return*. [12/5/23 AM (Toye) 62:21-63:4]; *see* **Exhibit B** (marked up portion of Trial Exhibit 20-3). There is no other way to read these documents, which is all that is available to discern what was relied upon in the approval process, with no contrary testimony on re-direct.

contrary testimony on re-direct.[4] Finally, Toye admitted that the 2020 business return was *not* even *listed as a suggested supporting document* by Northeast. [12/5/23 (Toye) 65:18-25]. There was no contrary testimony on re-direct. In sum, any misrepresentation about Cupersmith's identity could not have been "the crux," *Dubin*, 599 U.S. at 127, of the fraudulent scheme to convince Northeast Bank to approve the PPP loan application, because the form on which Cupersmith's identifying information appeared played no role in Northeast Bank's approving the loan.

Cross River/Count Fourteen. The evidence for Count Fourteen is equally deficient. No one from Revenued, the loan processor for Cross River, testified. The only witness who testified regarding this loan, Cross River representative Spencer Lord, was not involved in, and had no personal knowledge of, the loan application or approval. [12/5/23 PM (Lord) 72:11-15, 73:8-22]. Unlike Toye, Lord's management role in the PPP program began *only after this loan was approved*. [12/5/23 PM (Lord) 73:2-10]. Therefore, even more so than Toye for Northeast, when Lord was pressed on AIT-related questions for what borrower materials were requested, relied upon, or even reviewed by Cross River to fund the loan, he admitted he could not provide an answer if it was not clearly set forth in the documents he looked at. [12/5/23 PM (Lord) 74:5-25].

As with Northeast, it is undisputed that the 1065 return (on which Cupersmith's name appeared) was not used to verify Sheppard's eligibility to participate in PPP. When asked if there were any documents showing if Cross-River even looked at the purported form 1065, Lord claimed that there was a specific notation of this in the "UW" (for underwriter) notes section of the documents produced by Cross-River. [12/5/23 PM (Lord) 78:13-24]. But that assertion was thoroughly disproved on cross. The defense confronted Lord with the "UW" notes section in the documents, and contrary to Lord's assurance, the "UW" notes did not mention the 1065 return. [12/5/23 PM (Lord) 110:2-111:18]; *see* **Exhibit D** (marked up portion of Trial Exhibit 21). Thus, Lord admitted that: (1) there is no evidence that the underwriter or any other person at Cross River read the 1065 return with Cupersmith's identifying information, and (2) the "UW" notes confirm that the Cross-River underwriter reviewed and relied on a *different* tax form (that did *not* have

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[4] As it happens, Northeast could not have performed a 2020-to-2019 revenue comparison using 1065 returns because Northeast did not have a 2019 1065 return. [12/5/23 AM (Toye 53:4-54:11].

Cupersmith's identifying information), to substantiate average monthly payroll and thus PPP eligibility:[5]

> Q. . . . I asked you isn't it a fact that there's no record of anyone reading the 1065 and you said no I think it would be in the UW analysis do you remember that?
> A. Yes.
> Q. And we're looking at the UW analysis here, correct?
> A. Correct.
> Q. And it's not here?
> A. It's not that – they didn't list the 1065 out.
> Q. Is there anything in the record that [would] verify that a single person at cross river actually read the 1065 return?
> A. Not that was specifically notated.
> Q. Okay. And again you don't have personal knowledge, right?
> A. Right.

[12/5/23 PM (Lord) 110:17-111:6]; *see* Ex. D.

Spencer Lord"s testimony that Cross-River did not rely on the 1065 form and that there is no evidence of Cross-River even reviewing the 1065 in the approval process was unchallenged on re-direct.[6] There is also no evidence that Cross River even requested the 1065 from HMMD.[7]

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[5] There was no evidence of a loss of revenue requirement for applicants that were not applying for their second PPP loans (or that the 1065 was used for a revenue analysis).

[6] On re-direct, the government tried to confuse the jury by showing Lord a document that showed someone looked at the 1065 return in January 2022, *long after* the loan was funded (and while Cross-River was likely preparing documents for the government in this case). [12/5/23 (Lord) 121:3-123:9]; *see* **Exhibit E** (marked up portion of Trial Exhibit 21). The government used this document to try to elicit testimony that the 1065 return had to have been reviewed in March 2021. *Id.* But the *only* thing the document shows is that the 1065 return and other documents were "Recent Items" viewed by someone on January 19, 2022, presumably in response to the government subpoena. *See* Ex. E. Defendant requested and was denied recross examination to clarify this for the jury. [12/5/23 (Lord) 126:23-25]. Similar documents produced by Cross River demonstrate that the "Recent Items" viewed tab does not even have a link to any loan application. In other words, the documents listed under "Recent Items" could be totally unrelated to the application being viewed on the main part of the screen. *See* **Exhibit F** (Marked up portion of Trial Exhibit 21), showing "rsm consultants sch C-TaxReturn.pdf" as a "Recent Item" on the HMMD screen. The RSM Consultants document is not a document that was submitted for HMMD and relates to some other loan also likely subpoenaed for another case).

[7] The government tried and failed to show that Cross-River merely requested the 1065 from HMMD: On direct, the government led Spencer Lord to say that Cross-River requested unidentified "tax forms," which *could* include 940s or 941s. [12/5/23 PM (Lord) 59:7-11]. On cross, Spencer Lord claimed to recall from three years ago that the portal at some point (he was

As the evidence at trial shows, Cupersmith's identifying information appeared on a form that was not important to anyone's approval of the PPP loan applications. His identifying information appeared on form 1065s, but both Cross River and Northeast Bank representatives admitted that they did not rely on the form 1065s. By definition, a defendant's use of someone's name on a form that plays no causal role in a fraud cannot be the "crux" of that fraud.

b. Cupersmith's identity played no role in the approval of the loan applications.

There is also no evidence that Cupersmith's identity was important to the banks' consideration of whether to approve the loan application. Cupersmith was a CPA. But the 1065 tax forms on which Cupersmith's name appeared did not even require that a CPA be identified. [12/5/23 AM (Toye) 50:7-52:3; 12/5/23 PM (Lord) 112:14-113-16]]. This was because the loan processors and banks understood that not every taxpayer uses a CPA, and even when they received returns it was in the form of copies of the returns, the original being filed with the IRS, and copies may not have CPA information even when the originals do. *Id.* There thus was no testimony or suggestion that having a CPA listed on the 1065 was material to the banks' consideration of the loan applications,[8] and certainly no evidence that having a CPA was important to the bank's approval of the loan. In other words, any misrepresentation about Cupersmith's identity most decidedly was *not* the "key mover," *Dubin*, 599 U.S. at 123, in Sheppard's alleged scheme to convince the banks to approve his loan applications.

This, too, distinguishes this case from *Dubin*, in which the Court held the defendant did *not* commit AIT. In *Dubin*, there was no question that the victim patient's name played a causal

not involved with PPP loans at the time of the application and its approval [12/5/23 PM (Lord) 73:8-10]) purportedly requested a 1065 tax return from applicants ***if*** the applicant was a partnership, but he did not testify that Cross-River treated HMMD as a partnership for which its 1065 allegedly would have been requested (as the Court knows, and the witness admitted, HMMD is an LLC and applied as such). [12/5/23 PM (Lord) 75:4-19]. Spencer Lord admitted that no documents produced by Cross-River show that Cross-River requested the 2020 1065 return from HMMD**.** [12/5/23 PM (Lord) 78:3-12]. On re-direct, the government improperly tried a new approach: it led Spencer Lord to generally state for the first time, with no specifics or time frame, that the "income tax return is one of the documents that you require" with no basis in the documents upon which his hearsay testimony was necessarily derived. [12/5/23 PM (Lord) 124:5-8]. The Court permitted this new testimony on re-direct and refused Defendant's request to recross Lord on that testimony. [12/5/23 PM (Lord) 126:20-25].

[8] Unlike a regular loan application, PPP loans processors and banks were checking boxes for required documentation, not assessing the reliability of documents. *See, e.g.,* [12/5/23 AM (Toye) 9:22-10:8, 96:13-97:12]

role in the defendant's fraud. The government will only approve a Medicaid claim if the claim identifies the patient. Here, by contrast, Cupersmith's name played no causal role in the banks' approval of the PPP loans. And if, as in *Dubin*, a but-for causal relationship between the use of the victim's name and the fraud was insufficient to sustain an AIT conviction, then an AIT conviction cannot be sustained here, where there is no evidence that the Cupersmith's name was even causally connected to the fraud.

C. The Evidence Of AIT Was Otherwise Insufficient

The government provided no evidence of who forged Mr. Cupersmith's signature or who submitted the forged returns. The applicants were HMUP and HMMD, not Eric Sheppard. The government provided no evidence that Sheppard acted alone or that he was aware what others were doing in applying for the HMUP and HMMD loans, or that he forged Mr. Cupersmith's name or knew that others did. The government did not even prove the IP address from whoever submitted the forged returns.[9] Instead of providing evidence, the government asked the jury to speculate that Sheppard did all these things, and that is what the jury did.[10] Due to the absence of evidence on the rest of the elements of Counts Thirteen and Fourteen, the Court must enter judgments of acquittal.

II. <u>WIRE FRAUD CONVICTIONS</u>

A. A "Scheme To Defraud" Must Target A Traditional Property Interest

Under settled circuit and Supreme Court case law, a "scheme to defraud" is a scheme that, if completed as devised, causes an economic harm or loss of property to the alleged victim. *See*

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[9] For example, Northeast does not know who submitted the forged 1065 or from which IP address it came. [12/5/23 AM (Toye) 18:12-19:4, 49:4-11].

[10] In closing argument, the government told the jury that the tax returns signed by Cupersmith lent "credibility and reliability" to the applications, and "the means of identification . . . is to lend credibility to his applications." [1/11/23 AM at 78:4-15]. This was wrong, misleading, and prejudicial. There is absolutely no evidence that the use of Cupersmith's identity on the returns had any impact at all on the underwriting process at Northeast or Cross-River (Counts 13 and 14), such as by lending credibility or reliability to the applications. Because the government lacked any evidence of same, it resorted to misleading the jury with false and unsupported statements in closing, telling the jury what to believe. On top of that, *Dubin* requires *<u>more</u>* than a causal relationship to be a "crux" of the fraud. Use of another's identity to lend "credibility or reliability" to an application falls well below the causal standard, let alone being anywhere near a "crux" of the fraud. Under *Dubin*, even if the government's false statements to the jury were true, it does not rise to the level required under *Dubin* to be aggravated identity theft. The government's closing was intentionally inconsistent with the law.

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 the government had to present evidence from which a reasonable jury could conclude that the Masinos conspired to harm the charities by deceiving them about the bargain itself).

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, according to the Eleventh Circuit, 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)).[11]

Similarly, in *United States v. Kachkar*, 19-12685, 2022 WL 2704358, at *4 (11th Cir. July 12, 2022) (internal quotations omitted), the Eleventh Circuit held:

> 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

[11] *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.").

> 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.[12]

The requirement that the scheme to defraud go to actual property harm was addressed by the Supreme Court in *Ciminelli*. There, the Court emphasized that a "scheme to defraud" under the wire fraud statute is not a scheme to deceive someone only of information needed to make discretionary decisions about the use of money or property. Instead, "the wire fraud statute reaches only traditional property interests." 598 U.S. at 308.

In *Ciminelli*, the defendant was convicted of wire fraud for 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 the alleged victim of its ability to control its assets because it was deprived of potentially valuable economic information by Ciminelli. In reversing the conviction, the Supreme Court explained that the deceptive acts in wire fraud must be intended 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 as, in this case, information about whether the workers were W-2 employees. Such interests, however, are not protected by the wire fraud statute.

B. The Government Did Not Prove That Sheppard's "Scheme" Was Designed To Harm A Traditional Property Interest

The government has identified two potential victims of Sheppard's alleged fraud: the banks who made the PPP loans and the SBA. The SBA cannot be considered a victim because the government's "SBA as victim" theory varies from the Indictment, creates counts that are multiplicitous because they allege multiple victims, and contradicts its own admission in the middle of trial. [Motion at 18; D.E. 152 at 1; 12.4.23 AM 48:18-49:7]. Nevertheless, neither of the government's theories make out a viable theory of wire fraud because the government has not proved a scheme designed to cause harm to a traditional property interest.

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[12] The Defendant submitted a proposed jury instruction on these points, but the Court rejected it and, over the Defendant's objection, used an instruction that permitted the jury to convict based on only an intent to deceive.

The SBA. We begin with harm to the SBA because that appears to be the government's primary theory. Sheppard's wire fraud convictions cannot be sustained based on the SBA because any harm that could have been suffered by that government agency was not to a "traditional property interest." *Ciminelli*, 598 U.S. at 309. Instead, the SBA's harm, to the extent it could suffer one, is purely "*regulatory*," and regulatory interests are not protected by the wire fraud statute because that statute "protects property rights only." *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000); *see also Kelly v. United States*, 140 S. Ct. 1565, 1573 (2020) ("a scheme to alter [a governmental] regulatory choice is not one to appropriate the government's property").

The SBA's PPP witness, Ms. Althea Harris, admitted that the SBA suffers only a regulatory harm when ineligible PPP loans are approved. Ms. Harris explained that the purpose of the PPP eligibility criteria, including the requirement that the applicant pay W-2 wages, is not financial, i.e., to increase the likelihood of repayment; rather, the eligibility criteria that Sheppard allegedly misrepresented are designed to implement the government's *policy interests* favoring (among other things) traditional employment relationships. [11/28/23 AM (Harris) 5:1-18, 88:12-89:20, 91:18-93:23]. But as *Cleveland* and *Kelly* teach, the government's regulatory interests are not protected by the wire fraud statute, so any scheme that would cause harm to the government's regulatory interest in ensuring that traditional employers receive PPP loans cannot form the basis for Sheppard's wire fraud conviction.[13]

Beyond Ms. Harris's admission that the SBA's interest here is purely regulatory, the evidence shows that the fraud *could not* have caused harm to a traditional property interest, e.g., pecuniary harm. The SBA had no financial stake in these loans. The evidence was that Congress allowed the SBA to allocate US Treasury funds to be made available to guarantee each PPP loan, not that the SBA spent its own money, or allocated its own money, in this process. [11/28/23 AM

[13] Moreover, the government and its witnesses agreed that the 1099 workers were eligible to receive PPP funds. The government's position was that the 1099 workers had to apply themselves. There is no wire fraud if the same objective could have been accomplished making only immaterial changes—multiple loan requests instead of one loan request. The government failed to put on any evidence of any harm caused by Defendant's companies applying for the 1099 workers, instead of having them all apply individually. For example, the government failed to put on any evidence that any of the workers who were paid by Defendant's companies or who were included in the average monthly payroll calculations for Defendant's companies, separately received PPP funds and thus obtained double recovery. For this additional reason, the government failed to establish any harm caused by Defendant.

(Harris) 5:1-18]. The SBA was an intermediary, playing a role in setting up the rules and making decisions about allocating funds in the United States Treasury. [11/27/23 (Harris) 211:4-7, 212:9-18, 214:2-7; 11/28/23 AM (Harris) 38:4-5]. There is thus no evidence the SBA's own finances were at play. In this respect, the SBA is no different than a broker who sets up a loan guarantee in which the broker has no financial exposure on the guarantee. No one would say the broker is a victim of wire fraud because the broker's traditional property interests are not implicated in the loan. So too here. Because there was never a possibility that the SBA would suffer a harm to a traditional property interest—e.g., that it would go into its *own* coffers for PPP loans—the SBA could not be a victim of the wire frauds charged in Counts Five, Seven, Eight, and Nine.[14]

In addition, the government provided no evidence Sheppard made the allegedly false representations *to the SBA* in connection with the loans. Thus, there was insufficient evidence to determine the SBA was a victim related to these charges given the necessity of convergence. Convergence requires that the party who is deceived must be the same as the party that is defrauded of money or property. The Eleventh Circuit recognizes the necessity of convergence: "Mail and wire fraud, just like common law fraud, … entail an intention to induce *the victim* to act or to refrain from action in reliance upon the misrepresentation." *United States v. Bradley*, 644 F.3d 1213, 1239 n.58 (11th Cir. 2012) (emphasis added); *United States v. Bailey*, 123 F.3d 1381, 1390 n.12 (11th Cir. 1997). In fact, the charges specified that the representations were made to the loan processors, not to the lenders or the SBA. The SBA was two levels removed from the representations, while even the lenders were one level removed.

<u>The Banks</u>. The government pivoted away from a "banks as victim" theory because it fails under settled law. The banks themselves did not suffer a harm to a traditional property interest because they "receive[d] what [t]he[y] bargained for." *Kachkar*, 2022 WL 2704358, at *4. They made a loan, guaranteed by the government, on which they had no financial exposure. [*See*

[14] The government has not paid funds, and the government may never pay funds. The wire fraud statute requires a scheme that is designed to deprive the victim of property. But even with the successful Northeast and Cross-River loans, the government did not lose any property. Funding came from Northeast and Cross-River, not the U.S. Treasury. [11/27.23 (Harris) 211:19-212:4]. HM UP and HMMD did not seek forgiveness and they have been paying back the loans, as per the loan documents. [1/8/24 (Sheppard) 11:6-24]. The possibility that the U.S. Treasury (not charged as a victim) may have to pay any funds is entirely theoretical. As with the SBA, if there was some inchoate harm to the US Treasury if the PPP loan went to a company with 1099 workers, instead of W-2 employees, it is a policy harm not an economic harm.

11.27.23 AM Trial Tr. 214:2-13]. Sheppard's alleged misrepresentations about PPP eligibility were not material to the financial risk of the transaction because those eligibility criteria were meant only to implement government *policy interests*. Indeed, by making the loans to Sheppard, the Banks could realize only financial benefit—they stood to gain fees for making the loans—and faced no potential financial harm from issuing a PPP loan to a borrower later determined to have been ineligible. [12/28/23 AM (Harris) 83:9-11].

The government's "banks as victims" theory thus fails under cases like *Takhalov*. Sheppard may have induced the banks to make PPP loans that they "otherwise would have avoided" because he allegedly did not meet various program eligibility criteria, but that is "insufficient to show wire fraud." 827 F.3d at 1310 (quotations omitted). Under controlling law, "a schemer who tricks someone to enter into a transaction has not 'schemed to defraud' so long as he does not intend to harm the person he intends to trick." *Id*. at 1313. Here, the government offered no evidence that Sheppard's alleged scheme would harm the banks' property interests—as established above, they stood only to gain financially by making the loans. Sheppard thus did not commit wire fraud.[15]

C. The Evidence Of Wire Fraud Was Otherwise Insufficient

First, the only evidence about what Sheppard did or knew for Counts Five, Seven, Eight, and Nine came from Sheppard, whose testimony does not support the wire fraud convictions. While the jury is free to discount Sheppard's testimony, the government offered no alternative testimony to support the conviction, and the jury was not free to fill in the gaps with speculation. Specifically, the wire fraud charges involved the submission of purported 940, 941, and 1065 forms, of which there was no testimony or evidence (and no IP address) that connected them to Sheppard.[16] The only evidence the government was able to muster on Sheppard's alleged involvement in the 941s came from Graff's speculative and unsupported testimony. The government used Graff as its pseudo-handwriting expert. Graff was shown handwriting on several

[15] The banks also cannot be victims due the lack of convergence, discussed above. The evidence is the representations were made to multiple (six) loan processor companies—not to the banks.

[16] There was undisputed evidence that Mr. Jeff Vasilas forged Sheppard's name on other documents, including a personal guarantee for Sheppard. [01/08/24 Tr. (Sheppard) 54:24-56:16]; *see* composite **Exhibit G** (marked up Trial Exhibits X-47-1 and X-47-2). There was also undisputed evidence that Vasilas used DocuSign to execute at least one contract from Sheppard's home IP address. *See* **Exhibit I** (marked up portions of Trial Exhibit X-32).

941s. When asked to identify handwriting on the 941s, he identified some as Sheppard's, some as *not* looking "overly" like Sheppard's, some as completely different from Sheppard's, and seemingly everything in between. [12/6/23 Tr. 58:4-59:13]. It was the same kind of speculative testimony regarding the handwritten numbers on these forms: "*some* of the numbers look *consistent* with [Defendant's] handwriting." [12/6/23 Tr. 59:14-15]. Sheppard was convicted of Count 5, which charged him with transmitting by wire the 941s referred to in the above cited testimony. As a matter of law, Graff's unsupported, inconsistent, and speculative testimony about Sheppard's handwriting should be rejected by this Court as insufficient evidence of guilt beyond a reasonable doubt. Graff is not a handwriting expert and he all but admitted he was speculating on this topic. His haphazard identifications of handwriting and signatures, as a lay witness, should have been stricken and cannot provide sufficient evidence on which a conviction can stand.[17]

As to the purported 1065 forms (which is the only basis for the Count Eight wire fraud charge), there was no evidence that the forms were material in any way. While the standard for materiality in wire fraud is lower than the *Dubin* "crux" standard for AIT, the materiality test still requires that the statement has "a natural tendency to influence, or [is] capable of influencing, the decision of the decision making body to which it was addressed." *United States v. Boffil–Rivera, 607 F.3d 736, 741* (11th Cir. 2010). There was no evidence of this. As discussed in greater detail above, the evidence is that the 1065s were irrelevant to the PPP loan applications which is why they were not even consulted in the approval process. For the jury to conclude that the 1065 forms had "a natural tendency to influence, or [is] capable of influencing, the decision of the" PPP lenders, the jury had to disregard all the evidence that the lenders ignored these forms in favor of their own speculation.

In addition, Count Nine alone charged the submission of a portal application (for Cross-River) on March 12, 2021, which contained an IP address to the home office. But the government failed to put on any evidence that Sheppard was the person who filled out the information from his home office on that date.[18] Notably, the portal application to PayPal on January 19, 2021, charged

[17] Graff, a lay witness, should not have been permitted to testify as to Sheppard's handwriting at all. The government never laid a proper foundation (required by the Court's order on the 404(b) notice) before eliciting his speculative testimony about all the different types of handwriting he was shown. *See* Defendant's motion for new trial at [D.E. 204].

[18] The government's own witness, Maria Ataca, established the existence of the home office and that individual other than Sheppard used it, including Jeff Vasilas. [12/06/23 AM Tr. (Ataca) 57:2-

in Count Four, also came from the same home office IP address (Trial Exhibit 19-2), supposedly linking Sheppard to it, but the jury found the Defendant Not Guilty. As for Count Eight, which charges Sheppard with submission of a portal application to Northeast on March 11, 2021, the government does not even have IP address evidence linking this to Sheppard's home office, let alone proving Sheppard was the one who submitted it. Unwilling or unable to present evidence tying this to Sheppard, the government improperly invited the jury to speculate on Sheppard's involvement, necessitating the entry to judgment of acquittal on the wire fraud counts.

There is another hole in the government's case. The government argued throughout trial and closing that the requirement for PPP loans was for the applicant to file W-2's, not 1099s, for workers. But that is not the rule. The rule is that the workers cannot be "independent contractors," regardless of how the applicant classified (or misclassified) them. *See* **Exhibit H** (Trial Exhibit O-1). The government never proved that the various workers were not bona fide "employees," as opposed to "independent contractors." The government's IRS expert testified to challenges in determining if a worker should be classified as an "employee" or "independent contractor" under the IRS common law test [11/29/23 AM (Palmer) 22:6-23:4, 23:24-25:24, 26:23-27:4] a burden the government made no effort to meet. Although the government called an IRS expert witness (mostly for the improper admission of prejudicial, uncharged alleged tax related violations), the government did not ask its IRS expert witness to opine whether the workers were bona fide "employees." For this additional reason—because there was no evidence that the workers were not, in fact, bona fide "employees" and the government presented and argued a false theory of liability to the jury instead—a judgment of acquittal must be entered on the wire fraud counts.

In the absence of evidence, the government filled in gaps by asking the jury to speculate and otherwise engaging in prosecutorial misconduct by fabricating evidence that did not exist, as discussed in further detail in Defendant's motion for new trial at [D.E. 204].

CONCLUSION

For the reasons set forth above, Defendant Eric Dean Sheppard respectfully requests that the Court enter judgment of acquittal on all counts of conviction.

16; 61:12-63:10]. Witnesses like Ms. Ataca showed the hole in the government's case, which the government never filled, resorting to speculation in the absence of evidence.

Dated: February 2, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 2, 2024, the foregoing document was filed via the Court's CM/ECF system to all counsel of record.

By: /s/ Jayne C. Weintraub
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