UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ERIC DEAN SHEPPARD,

Defendant.
_______________________________________/

GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION FOR NEW TRIAL

The United States of America, through the undersigned Assistant United States Attorney, submits this response in opposition to the defendant's motion for new trial pursuant to Fed. R. Crim. P. 33(a). The defendant's motion for new trial should be denied for the reasons set forth in the following memorandum of law.

LEGAL STANDARD

Federal Rule of Criminal Procedure 33(a) states that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." "'When considering a motion for a new trial, the district court may weigh the evidence and consider the credibility of the witnesses.'" *United States v. Brown*, 934 F.3d 1278, 1297 (11th Cir. 2019) (quoting *United States v. Albury*, 782 F.3d 1285, 1295 (11th Cir. 2015)). "A motion for a new trial based on the weight of the evidence is 'not favored' and is reserved for 'really exceptional cases." *Brown*, 934 F.3d at 1297 (quoting *United States v. Martinez*, 763 F.2d 1297, 1313 (11th Cir. 1985)). "The court may not reweigh the evidence and set aside the verdict simply because it feels some other result would be more reasonable." *Martinez*, 763 F.2d at 1312-13. "[T]o warrant a new trial, the evidence must preponderate heavily against the verdict, such that it would be a miscarriage of justice to let the verdict stand." *United States v. Witt*, 43 F.4th 1188, 1194 (11th Cir. 2022); *Brown*, 934 F.3d at 1297; *Martinez*, 763 F.2d 1313. The Eleventh Circuit has explained, that "'[i]n evaluating whether specific trial errors warrant a new trial, we apply the harmless-error standard.'" *United States v. Jefferson*, 824 Fed. Appx. 634 (11th Cir. 2020) (quoting *United States v. Jeri*, 869 F.3d 1247, 1259) (11th Cir. 2017) (a civil case)); *see* Fed. R. Crim. P. 52(a) (defining harmless error standard as requiring that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

ARGUMENT

I. The Court did not err in its ruling to admit the Rule 404(b) evidence.

The defendant makes a number of accusations that were previously litigated by the parties and ruled upon by the Court. The defendant argues that (1) the government misrepresented Jeffrey Graff's expected testimony regarding the Rule 404(b) evidence; (2) the government "completely changed its story" in its reply filing on the Rule 404(b) notice; (3) Mr. Graff's testimony was speculative as to the forgeries; (4) the defense was precluded from fully cross-examining Mr. Graff about his testimony; and (5) the evidence was highly prejudicial and did not meet the standard under Rule 404(b), nor was the evidence inextricably intertwined with the case.

First of all, this matter was extensively litigated before the trial, and during the trial. On September 15, 2023, the government filed its Rule 404(b) notice (DE 77). The defendant then filed his response in the form of a motion *in limine* to exclude the Rule 404(b) evidence (DE 113). The government filed a reply to the defendant's response (DE 116), and the defendant filed his own reply (DE 118). On November 9, 2023, the Court issued an order denying the defendant's motion *in limine* to exclude the Rule 404(b) evidence (DE123).

The government relies on its Rule 404(b) notice (DE 77), which was accurate, and on its reply (DE 116), in which the government explained that it learned of additional and clarifying information from Mr. Graff after it filed its initial Rule 404(b) notice. Mr. Graff always maintained that his name was used as an authorized representative of HM Management, and that his signature was forged on certain documents, without his knowledge or consent. The government explained in its reply that after filing the Rule 404(b) notice, it learned from Mr. Graff of his decision to be removed as an officer from the defendant's companies, which the government believes was "inextricably intertwined" evidence relating to Mr. Graff's employment history with the defendant. Also in the government's reply, the government noted that after filing the Rule 404(b) notice, Mr. Graff provided an "engagement letter" with his name and forged signature as the person who hired the law firm for the visa application process. Mr. Graff discussed the handwriting of the forgeries with the government, explaining that the defendant's handwriting was reflected on the engagement letter signature, but that the forged signatures on the other Visa documents did not reflect the defendant's handwriting. Mr. Graff, having known the defendant most of his life, and having worked alongside him for 20 years, would testify not only about the forgeries, but that the defendant's staff (which consisted of three people besides Mr. Graff), would have only signed Mr. Graff's name on the visa documents at the defendant's direction. DE 116 at 1-3, 7-8.

The government's evidence was also expected to include a letter the defendant wrote to the law firm after Mr. Graff learned of these events that constituted admissions of the defendant about his misuse of Mr. Graff's name, as well as his efforts to blame his staff for what he had done.

This Court issued a thorough 17-page order that analyzed all of the arguments made by the defendant. The Court did not base its ruling on finding the evidence to be inextricably intertwined. Instead, the Court carefully weighed the factors for admitting the proposed Rule 404(b) evidence:

its relevance, whether there was sufficient proof to allow the jury to find that the defendant committed the extrinsic acts, and whether the probative value of the evidence outweighed the danger of unfair prejudice. The Court committed no error when it ruled that the proposed Rule 404(b) evidence was admissible under Eleventh Circuit precedent on the issue of the defendant's intent. DE 123.

During trial, the defense declined the Court's offer to provide the jury a cautionary instruction regarding the Rule 404(b) evidence before they heard the actual evidence from Mr. Graff. Tr. 12/6/23 AM, at 4-5, 9-10. The defendant invited some of the perceived prejudice he complains about here by refusing the Rule 404(b) cautionary instruction to accompany Mr. Graff's testimony.

Mr. Graff testified on direct examination about his lifelong relationship with the defendant: that he and the defendant had been friends since age 7, attended grade school and summer camps together, were best friends, college roommates, and worked alongside each other for 20 years, between 2000 and 2020. Tr. 12/6/23 PM, at 3-5. Mr. Graff testified that he had been able to observe the defendant's handwriting and signature hundreds of times, and that the defendant signed the checks made out to him or to his company. Mr. Graff identified the defendant's handwriting and signature on trial exhibits that the government showed him, particularly bank checks and withdrawal tickets, and he identified the company's bookkeeper, Jeanette Gonzalez's version of the defendant's signature on bank records. *Id.* at 52-60. All of this testimony occurred before the government asked Mr. Graff about his signature on the Rule 404(b) evidence, specifically the engagement letter. *Id.* at 63-66, 78; Govt Exh. 50-1.

Mr. Graff's testimony showed that no one was more qualified to testify about the defendant's handwriting and signature than Mr. Graff. Ignoring the testimony, the defendant argues that Mr. Graff "baselessly speculated that he believed Defendant forged his signature" on the engagement letter. DE 204 at 4. The defendant's argument apparently is based on the fact that Mr. Graff did not *see* the defendant forge his signature on the engagement letter. *Id.* at 5.[1] Mr. Graff testified he learned of this 2018 incident in 2019. That was the point of the Rule 404(b) evidence: that the defendant misused Mr. Graff's name and forged his signature behind his back, and he had others sign for Mr. Graff, without his knowledge or consent, which was relevant to the defendant's intent, knowledge and absence of mistake when it came to the forged documents in this case.

Government Exhibit 50-2, a notice of appearance before the Citizenship and Immigration Service, was the other document admitted in evidence, which listed Mr. Graff, on behalf of HM Management, as the visa petitioner with his purported signature. Mr. Graff testified that his name was forged on that document, that he did not authorize anyone at HM Management to sign for him, that he did not recognize the handwriting on the signature, and that he was not aware of others working at HM Management who would sign his name without his permission. Tr. 12/6/23 PM, at 68-74. In his testimony, Mr. Graff identified the people who worked for HM Management in 2018, which were Jeanette Gonzalez, the defendant's longtime bookkeeper and office manager, her daughter Vanessa Gonzalez, a part-time worker "Mary" and "Elba," who did not come to the office. *Id.* at 28-29. When asked specifically about Jeanette and Vanessa Gonzalez, Mr. Graff said that he had never observed them perform any tasks they were not authorized to perform by the defendant. *Id.* at 50-51. Mr. Graff further testified that Jeanette Gonzalez would not "go

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[1] The defendant's brief replaced with ellipses (. . .) the following question and answer:

> Q: And so you couldn't say that for sure he signed your name, right?
> A: I didn't see him sign the document.

Tr. 12/11/23, at 122; DE 204, at 5.

rogue" by performing tasks the defendant had not authorized her to undertake. *Id*. at 50.

Mr. Graff read portions of a letter the defendant wrote to the immigration attorney in which the defendant admitted that he had "complete and unwavering authority to make all decisions and bind the company," that the sponsoring of the work visa was through his "approval and full authority," that the appearance of Mr. Graff's name on the engagement letter was "inadvertent," and the appearance of Mr. Graff's name on the visa documents was the result of carelessness by the defendant's office staff. *Id.* at 77-79; Govt. Exh. 50-5. The jury was also shown an email that the immigration attorney sent Mr. Graff in March of 2019, explaining that in the "2018 email correspondence between us, Mr. Sheppard, Ms. Ahumada and Ms. Jeanette Gonzalez of HM Management, you [referring to Mr. Graff] were always portrayed as the authorized representative of the petitioning employer for representations made under penalty of perjury and the authorized representative of the Company for engagement of legal services purposes." Govt. Exh. 50-4, Tr. 12/12/23, at 33-34, 38-39. From this evidence, a reasonable jury could conclude that the forgeries on the visa documents were carried out at the defendant's direction.

The defendant complains that the defense was prevented from cross examining Mr. Graff about an incident involving Scott Fish to point out that people did "go rogue" while working for the defendant. DE 204 at 6. The Court properly sustained the government's relevance objections to questions about Mr. Fish, whom the defense introduced to the jury as the "project executive at Orlando from 2010 to 2014." Tr. 12/11/23, at 141. Mr. Graff had testified about Ms. Gonzalez not going "rogue"; she worked for the defendant in 2018 when the events at issue occurred, and she worked at the HM Management office, the business on whose behalf the forged documents were prepared. What Mr. Fish might have done years earlier in connection with a project in Orlando had no relevance to the events at HM Management in 2018.

Notwithstanding the defendant's baseless smear that Mr. Graff committed tax fraud,[2] Mr. Graff's unimpeached testimony, corroborated by the government's exhibits referenced above, established by a preponderance of the evidence, the events set forth in the government's Rule 404(b) notice and its reply (DE 77, 116). The defendant's defense was that others who worked for him, such as Jeanette Gonzalez and Jeffrey Vasilas, prepared and submitted false and forged documents in support of his loan applications, and that they did so without his knowledge. The Rule 404(b) evidence was highly probative of the defendant's intent, knowledge and absence of mistake in this case. Any error in admitting this evidence should be considered harmless because the evidence of the defendant's direct involvement in the fraud was overwhelming.

II. The Court did not err by admitting evidence of false loan applications that were part of the defendant's scheme to defraud, but were not specifically set forth as individual wire fraud counts.

The defendant claims that the Court erred in admitting evidence of what he refers to as "uncharged loans." The Court did not err, as the so-called "uncharged loans" were part of the defendant's scheme to defraud. They constituted evidence that was intrinsic to the Superseding Indictment, which charged a scheme to defraud the private lenders and the SBA by submitting false information and documents in order to be approved for loans to which the defendant was not entitled, under the Paycheck Protection Program and the Economic Injury Disaster Loan program. It is not credible for the defendant to claim surprise. The defendant had notice of these loan

[2] DE 204 at 12. During cross examination of Mr. Graff, the defense falsely suggested that Mr. Graff was cheating on his taxes by underreporting his "salary" to the Florida Department of Revenue. Tr. 12/11/23, at 54-55; Govt Exh 16-3. On redirect examination, Mr. Graff was able to explain that because he was considered self-employed through his company, Graffco, he paid himself a salary/wages from the payments Graffco received from HM Management, which salary is the portion he was supposed to report to the Florida Department of Revenue. As to all payments that Graffco received from HM Management, which included portions he treated as his salary and portions he deemed to be profits, Mr. Graff testified that he reported those payments to the IRS as income and paid the taxes he owed. Tr. 12/11/23, at 164-65; Tr. 12/12/23 AM, at 16-18.

applications from the original Indictment, from the extensive discovery the defendant received about them, and from their listing as trial exhibits.

The original Indictment charged a scheme to defraud spanning approximately from April 2020 through in and around March 2021, and the acts in execution of the scheme were six wire fraud counts, one for each of the loans that was funded (DE 3). The Indictment included wire fraud counts for a PPP loan application from Alafaya Trails to PayPal/ WebBank submitted on April 15, 2020, and two EIDL loan applications submitted to the SBA on the same day, July 24, 2020, on behalf of HM Management and Alafaya Trails. The Superseding Indictment charged the same scheme during the same approximate time period, but removed three wire fraud counts (the April 15, 2020 PPP application, and the two July 24, 2020 EIDL applications), and added six wire fraud counts that focused on false loan applications with supporting documents that contained forgeries and reflected the unauthorized use of others' identities (DE 60). The three loans did not disappear from the case by virtue of being removed as wire fraud counts from the Superseding Indictment.

The other "uncharged" loans for which evidence was admitted during the trial involved three EIDL applications that were denied: two additional EIDL applications that were also submitted on July 24, 2020, made on behalf HM-UP Development Alafaya Trails, TRU ("Alafaya Trails, TRU") and Sheppard Flagler Holdings; the September 20, 2020 HM Six EIDL application; and the three "modifications" or loan increases from the three EIDLs that were funded on behalf of HM Management, Alafaya Trails and HM Four.[3] The companies whose loan applications were

[3] The defendant did not have to submit new applications to the SBA for the loan modifications. The defendant's companies that received the initial $150,000 EIDLs were automatically eligible to be considered for the modifications, which were loan increases of up to $500,000. The defendant authorized the modification requests for HM Management and Alafaya Trails, on April 27, 2021, and for HM Four on May 4, 2021. Tr. 12/13/23 PM, at 9-12; 12/14/23 AM, at 5-7, 59;

not specifically mentioned in the Indictment or the Superseding Indictment were related to the ones that were, and in some instances, were part of the same series of events, such as the four EIDL applications that were submitted to the SBA on the same day. All were intrinsic to the charged scheme to defraud.

Evidence of criminal activity other than the offense charged is intrinsic to the offense provided that the evidence is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." *United States v. Ellisor*, 522 F.3d 1255, 1269 (11th Cir. 2008) (quoting *United States v. Jiminez*, 224 F.3d 1243, 1249 (11th Cir. 2000); *United States v. Williford*, 764 F.2d 1493, 1499 (11th Cir. 1985); *see also*, *United States v. Jeanty*, 358 Fed. Appx. 55, 58 (11th Cir. 2009). All three factors apply to the loan applications the defendant is complaining about.

The Superseding Indictment charged a scheme to defraud starting in or around April 2020, but the first wire fraud count in the Superseding Indictment had a date of October 22, 2020. Surely the defendant did not think the government was going to charge a scheme to defraud starting in April 2020, but ignore all of the loans and loan applications for which the defendant had received extensive discovery that predated the HM Four application of October 22, 2020. In fact, at trial, the defense did not object to the testimony and documents that were admitted involving the April 15, 2020 PPP loan application to PayPal/ WebBank. *See* Tr. 11/29/23 PM.

The documentary evidence and testimony from Ms. Nelia Palancar with Nationwide showed that four of the EIDL applications (for HM Management, Alafaya Trails, Alafaya Trails

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12/14/23 PM, at 78; Govt Exhs. 52-1, at 4; 54-4, at 7; 58, bates no. 31224; 68, bates 34852-34853. The SBA processed the initial EIDL applications and the modifications under the same loan application numbers.

TRU and Sheppard Flagler Holdings) were submitted by the defendant via Nationwide to the SBA on the same day – July 24, 2020. The defendant's dealings with Ms. Palancar related to all four companies.[4] In addition, all of the companies for which the defendant submitted loan applications were related to each other, or the defendant intermingled them in the applications. For instance, HM Six was the owner of CJUF III Flagler, a company the defendant included in the April 2020 Alafaya Trails PPP application to PayPal, and for which the defendant himself introduced evidence (such as a PPP application in the name of CJUF III Flagler that the defendant claimed he submitted to PayPal as a correction to the initial application information). Sheppard Flagler Holdings held the defendant and his wife's ownership interest in HM Six, and its EIDL submission to Nationwide listed Sheppard Flagler Holdings with a trade name of "HM Six/CJUF Flagler." Gov. Exh. 64, bates no. 033925. Alafaya Trails TRU owned real estate that it transferred to Alafaya Trails for the Orlando shopping center. Govt. Exh. 3-2. Finally, HM Management was the management company for Alafaya Trails and CJUF III Flagler. Tr. 12/6/23 PM, at 18; Govt. Exhs. 23-1, 23-2.

All of the loan applications were submitted to the lenders or to the SBA within the time frame set forth in the Indictment and the Superseding Indictment, except for the modifications, which were not new loan applications, but a continuation or a second phase of the initial EIDLs awarded to HM Management, Alafaya Trails, and HM Four. All of the loan applications were inextricably intertwined with evidence about the loans that were specifically mentioned in the Superseding Indictment, and they were related to each other factually and in time. They were also necessary to complete the story of the defendant's scheme to defraud. For instance, the SBA

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[4] In fact, there was a text message from the defendant to Ms. Palancar that was shown to the jury in which the defendant told Ms. Palancar: "I tried to fill out the 4 applications yesterday and submit them. Let me know if you received them yet." Govt. Exh. 68, bates no. 034810.

notified the defendant that the HM Six application was denied on October 20, 2020, using strong language that it questioned the validity of information he had provided with the application. Govt Exh. 57, bates no. 31075. Two days later, on October 22, 2020, the defendant submitted an EIDL application on behalf of HM Four under his wife's name. Govt Exh. 58, bates nos. 31145-31148.

The defendant complains that the government did not file a Rule 404(b) notice, but such a notice is not required for intrinsic evidence. *See Jeanty*, 358 Fed. Appx. at 58 (Rule 404(b) "notice provision does not apply when the prior bad acts are intrinsic to the charged offense."). The defendant in this case received ample notice that evidence of these related loan applications would be part of the government's case, both from the discovery the defendant received about them, and from the government's exhibit lists and witness lists.

The government's discovery regarding these loan files consisted of the following:

- Discovery production of August 2, 2022, almost 16 months before the start of the trial, which contained the PPP loan documents, including the loan of April 2020 to PayPal/WebBank, and it contained SBA's EIDL records for the July 24, 2020 loan applications on behalf of HM Management and Alafaya Trails, the October 22, 2020 loan application on behalf of HM Four, as well as the loan modification records for those three EIDLs that were funded (HM Management, Alafaya Trails, and HM Four). DE 25.

- Discovery production of June 9, 2023 (almost six months before the start of the trial), which reproduced the SBA EIDL records, organized by loan file, and included the four additional EIDL files for the loan applications that were not approved. These were: the July 24, 2020 applications from Alafaya Trails, TRU and Sheppard Flagler Holdings; the September 2020 HM Six application; and the September 2021 HM Six application (not admitted at trial). DE 47.

- Discovery production of September 12, 2023, which included Cupersmith's copy of the HM Six tax return for 2019, and the records from Nationwide Lending Direct, consisting of loan files for EIDL applications that the defendant submitted using Nationwide (and which were previously produced as SBA loan files): HM Management, Alafaya Trails (and their loan modifications); Alafaya Trails, TRU; and Sheppard Flagler Holdings. DE 75.

- Discovery production of September 15, 2023, which included additional Nationwide records for the loan files identified in the discovery of September 12, 2023, and the email communications between Ms. Palancar from Nationwide and the defendant about the EIDL applications she handled on the defendant's behalf. DE 80.

- Discovery production of October 10, 2023, which included a deed between Alafaya Trails, TRU and Alafaya Trails involving land at the Orlando shopping center. DE 117.

- Discovery production of November 15, 2023, which included text messages retrieved from Ms. Palancar's cell phone with the defendant about the EIDL applications she handled on the defendant's behalf.

On September 19, 2023, the government filed a detailed exhibit list and its witness list. DE 97, 98. The government's witness list included the PayPal witness, two SBA witnesses, and Ms. Palancar from Nationwide. The government's exhibit list identified the PayPal loan records for the Alafaya Trails April 2020 PPP loan application, broken down document by document (Composite Exh 17, and Exh. 17-1 through 17-13). As for the EIDL records, the exhibit list included the SBA EIDL records, some of which were broken down by company applicant: HM Management EIDL records, including the modification (Composite Exhibit 23, and 23-1 through 23-7); Alafaya Trails EIDL records, including the modification (Composite Exhibit 24, and 24-1 through 24-7); HM Four EIDL records, including the modification (Exh. 26, 26-1 through 26-14); and HM Six EIDL records (Exh. 25, 25-1, 25-2). It also listed Nationwide's records (Composite Exhibit 49, and 49-1 through 49-3). In the government's amended exhibit list of November 13, 2023, the government listed the Nationwide records in greater detail, setting forth the records for each of the applicant companies for which it handled loan applications, HM Management, Alafaya Trails, Alafaya Trails, TRU, Sheppard Flagler Holdings, and HM Six (Composite Exhibit 49 and 49-1 through 49-1). DE 126.

The defendant suggests that the government misled the Court about the *Davis* case it cited when it argued in support of admitting this evidence, and that it led the Court to mistakenly believe it was bound by the *Davis* decision, a Ninth Circuit case. DE 204 at 8. The defendant misrepresents what transpired in Court, including about the case the Court actually cited and relied upon. The Court cited *Morris v. United States*, 112 F.2d 522 (5th Cir. 1940), where the Fifth Circuit upheld the trial court overruling objections over the admissibility of evidence of a "kindred character" involving corporations not specifically charged in the indictment, but which were connected to the corporations charged in the indictment, and that occurred at about the same time. The Fifth Circuit determined that such evidence helped prove the scheme to defraud and the defendant's intent to defraud. 112 F.2d at 529; Tr. 12/13/23 AM, at 95-96. The Court invited the parties to provide additional case law following the lunch break. *Id.* at 100-103. After lunch, the prosecutor cited for the Court *United States v. Davis,* 172 Fed. Appx. 175 (9th Cir. 2006), and mistakenly referred to it as an Eleventh Circuit case.[5] Tr. 12/13/23 PM, at 2. Almost immediately after the government mentioned *Davis*, defense counsel corrected the government and noted it was a Ninth Circuit case. *Id.* at 3. The Court concluded that it was bound by the Fifth Circuit case it had previously cited to the parties – the *Morris* case (as the Court had not cited the *Davis* case)-which was still good law and, as a pre-1981 case, it was binding case law in the Eleventh Circuit. *Id.* at 6. The Court was not mistaken in its reliance on the *Morris* decision, and it did not err in admitting evidence about loan applications that were part of the defendant's scheme to defraud.

III. <u>The Court did not err by dismissing Juror no. 3 during trial.</u>

The defendant complains that the Court improperly dismissed Juror No. 3. "A district court may remove and replace a seated juror before deliberations begin whenever "'facts arise … that cast doubt on [that] juror's ability to perform her duties.'" *United States v. Godwin*, 765 F.3d 1306, 1316 (11th Cir. 2014) (quoting *United States v. Smith*, 918 F.2d 1501, 1512 (11th Cir. 1990));

[5] The *Davis* decision, while not binding on this Court, had a similar holding, in which the Ninth Circuit upheld the trial court's decision to admit evidence of other loans in a wire fraud case, which loans were considered inextricably intertwined with the ongoing fraud scheme, and did not constitute "other acts" evidence under Rule 404(b). 172 Fed. Appx. at 177. The Ninth Circuit believed the government had satisfied its notice obligation of its intended use of the loans at trial in its "discovery letter and production, which identified the loan documents and made them available for [the co-defendant's] inspection." *Id.*

United States v. Fajardo, 787 F.2d 1523, 1525 (11th Cir. 1986); *see* Fed. R. Crim P. 24(c). The Eleventh Circuit reviews a district court's decision to excuse a juror "only for abuse of discretion" and "will not disturb a district court's decision to remove a juror before deliberations 'absent a showing of bias or prejudice,' which includes removal 'without factual support, or for a legally irrelevant reason.'" *Id.* (quoting *Fajardo*, 787 F.2d at 1525).

In this case, Juror No. 3's travel schedule was accommodated with a day and a half recess at the end of the first week of trial. Then on Monday of the third week of trial, Juror No. 3 advised the Court that he needed to take his wife, who had cancer, and had suffered a broken vertebrae, to the doctor to assess her condition, and that he did not know what would happen after that. Tr. 12/11/23 AM, at 1. The Court questioned Juror No. 3 outside the presence of the jury, and he indicated he could continue to serve, although he said "it's day by day or hour by hour, unfortunately." *Id.* at 6-7. The Court recessed for half of that court day so that Juror No. 3 could take his wife to the doctor that afternoon. The next day, Juror No. 3 advised the Court that his wife was going to need emergency back surgery. Tr. 12/12/23 AM, at 3. When questioned outside the presence of the jury to find out about his availability going forward, Juror No. 3 discussed the various doctor's appointments he would need to attend with his wife that week, indicating that he would need to miss part of the morning of the next day, Wednesday, the full morning on Thursday, the afternoon on Friday,[6] and the afternoon of the following Monday. *Id.* at 4-5. Juror No. 3 said he did not know his availability beyond the following Monday. *Id.* at 5. Based on Juror No. 3's significant impact on the trial schedule, the Court excused him. *Id.* at 6.

The Eleventh Circuit has upheld similar excusals. In *Fajardo*, for instance, the trial court

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[6] Earlier, Juror No. 3 had advised the Court that he would need to take a full court day off that Friday to deal with work-related matters. Tr. 12/6/23, at 47-48.

decided to excuse a juror who was experiencing sinus problems and distracted other jurors by gagging, sniffling, snorting and blowing his nose. 787 F.2d at 1525. When questioned by the court, the juror stated that he was neither ill nor in discomfort. *Id.* In other words, the juror did not indicate he was unable to serve and did not ask to be excused. The Eleventh Circuit upheld the trial court's decision, finding that its decision was supported by a factual basis and that it had not abused its discretion. *Id.* at 1525-26. In this case, the Court acted within its discretion and had a factual basis to excuse Juror No. 3. The juror's ability to serve was impaired by his wife's medical condition. Juror No. 3's unavailability was going to significantly impact the trial schedule, and it was going to impose additional time burdens on the other jurors and their ability to receive evidence and testimony in a regularized manner.

IV. The Court did not err in admitting the testimony of the IRS expert witness and the <u>documentary evidence that showed the defendant's loan documents had been falsified.</u>

The defendant argues he was prejudiced by the testimony of IRS expert witness Philip Palmer about the defendant's tax violations or crimes. As the government explained in its response to the defendant's motion *in limine*, which was borne out by the trial testimony, the evidence presented by Mr. Palmer was intrinsic to the wire fraud crimes charged in the case. DE 91. At no time was Mr. Palmer asked to give an opinion, nor did he give an opinion that the defendant had violated any tax laws. Mr. Palmer testified, not about the defendant having committed tax crimes, but about the payroll and income tax records that the defendant's businesses had filed or not filed with the IRS in order to demonstrate that the tax returns the defendant submitted to the lenders to support his PPP loan applications were false and fraudulent. Mr. Palmer's expert testimony regarding an employer's requirements for W-2 employees versus 1099 independent contractors was directly relevant to: explain the PPP payroll requirements; help prove the defendant's knowledge and intent with respect to the false tax documents; and explain the significance of the false document listing "withholdings" from purported employees that was part of the April 2020 Alafaya Trails PPP application to PayPal/ WebBank. *See* Govt. Exh. 17-8.

The defendant also complains that the government's "bad acts" evidence regarding the defendant's taxes improperly reached back to 2018. The IRS records showed that 2018 was the last year that HM Management reported and paid payroll taxes to the IRS. This was evidence of the defendant's knowledge and intent to defraud because it showed that he knew how to differentiate W-2 employees from other types of workers, and the employer tax filing obligations that went along with having employees.[7] Tr. 11/28/23 PM, at 34-35. The defendant's own expert accountant analyzed the defendant's finances going back to 2014. Tr. 1/10/24 PM, at 69-75.

Regarding the defendant's personal income tax returns, Mr. Palmer and Mr. Cupersmith testified about the fact that income and losses from partnerships get reported on the partner's personal income tax returns. Tr. 12/12/23 PM, at 15-16. As a result, the defendant's personal tax returns were relevant to complete the story as to the partnership tax returns that were admitted in the case. With respect to the defendant's claim that the government attacked the defendant's wealth, it was the defense who bragged about the defendant's wealth throughout the trial. In fact, it was part of his defense to argue to the jury that the defendant did not need this money and that he could fund his projects without the proceeds from these loans.

The testimony from former contractors of the defendant that the defendant owed them money was relevant to the case, as the defendant had included their names on false "payroll,"

[7] The evidence also showed that the defendant withheld payroll taxes from three purported employees of HM Management in 2019, but he failed to report or pay those tax withholdings to the IRS. This is corroborated by the defendant's own trial exhibit Y-1, which were 2019 W-2s issued to three people who worked for HM Management. They reflect that payroll taxes were withheld, not that IRS Forms 941 were filed with the IRS or that the employer transferred those withholdings to the IRS. Tr. 01/10/24 PM, at 131.

"labor," and "wages" reports listing payments to them in the form of wages, which were submitted to support the loan applications. Govt. Exhs. 17-8, 18-3, 19-5, 19-14, 20-10. Furthermore, the defendant claimed at trial that he used the loan proceeds to pay his "workers." In addition, the fact that the defendant still owed the witnesses money was a potential bias issue that the government thought the jury should be aware of.

The government's evidence of the defendant's actual tax filings, and the related evidence about which the defendant complains, was relevant, not unduly prejudicial, and was properly admitted at the trial.

V. The Court did not err by denying the defense re-cross examination of witnesses.

The defendant claims that the Court erred by not permitting the defendant to re-cross examine the PayPal and the Cross River Bank witnesses on the same issue involving income tax returns. Subject to the Sixth Amendment, the trial court has discretion to limit re-cross examination. *United States v. Ross*, 33 F.3d 1507 (11th Cir. 1994); *see Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986) ("[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on … cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."). The Court did not curtail the defendant's right to confront the government's witnesses, as defense counsel cross examined the government's witnesses extensively, especially regarding the tax returns.

Jammie Hutcheson from PayPal testified on direct examination that in 2021, PayPal required the applicant's 2020 tax return to be submitted with their application. Tr. 11/30/23 AM, at 34. Ms. Hutcheson's direct examination lasted approximately two and a half hours. The defendant's counsel cross-examined Ms. Hutcheson for approximately three and a half hours, including extensively questioning her about what tax returns were required, not required, reviewed and relied upon by PayPal. As part of the defendant's cross-examination, counsel did not take yes for an answer from Ms. Hutcheson that the partnership's 1065 tax return was required. Tr. 11/30/23 PM, at 55-56.[8] On re-direct examination, the government asked Ms. Hutcheson questions about tax returns being required, and asked Ms. Hutcheson to explain that one reason they were required for partnerships was because a partner's net earnings were supposed to be included in the PPP payroll calculation. Tr. 11/30/23 PM, at 106. The defendant, having cross-examined Ms. Hutcheson for three and a half hours – much of it about whether PayPal required tax returns - was denied re-cross to again challenge Ms. Hutcheson about whether tax returns were required. In any event, the defendant was acquitted on the wire fraud and aggravated identity theft counts relating to the fraudulent income tax return submitted to PayPal, and thus, any error in failing to allow re-cross of the PayPal witness on this issue was harmless.

Regarding the testimony of Spencer Lord from Cross River Bank, the government's redirect examination was brief. The government asked if Cross River Bank required an income

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[8] During one exchange with Ms. Hutcheson regarding tax returns, defense counsel asked:
Q: So all that testimony on your direct examination about the need for the 1065 tax returns was false?
[objection sustained]
Q: Isn't it a fact that because the borrower chose to show loss and revenue from quarter to quarter, it was not obligated to provide 1065 tax returns?
A: I would need to refresh on the SBA documentation, but my recollection is that the SBA did say that if you have not yet filed your 2020 tax return fill it out and submit it.
Q: Only if you need to submit it, correct?
A: I don't have every word of the SBA guidelines memorized.
Q: Okay. Let me just get this straight. Are you saying for a fact that the 2020 tax returns were required by PayPal on this application?
A: Yes. We saw earlier where we requested the 2020 tax return.

Tr. 11/30/23 PM, 55-56. Defense counsel's questions regarding tax returns continued.

tax return for the application; a question that the government had asked on direct examination and the defense cross-examined the witness about extensively. Tr. 12/5/23 PM, at 124. The government asked Mr. Lord if he was aware whether a partner's earnings could be included as part of the payroll amount (a reason to require the 1065 tax return). *Id.* Mr. Lord indicated he did not know, and thus, there was no basis on which to allow re-cross examination on this issue. *Id.*

As to both the testimony of the PayPal witness and the Cross River Bank witness, the defendant conducted lengthy cross examinations. The Court acted within its discretion to limit re-cross examination of the witnesses about an issue that defense counsel had covered extensively on cross-examination, and because the re-cross would have been repetitive, cumulative and would not have made a difference to the verdict.

VI. The Court did not err by limiting cross-examination of irrelevant or improper matters.

The defendant argues that the Court improperly limited his cross-examination of Martin Joe Beirne to impeach his credibility. The Court's ruling to deny cross examination into extrinsic matters was proper. Defense counsel attempted to ask Mr. Beirne that he moved to Florida, not because his business was slow, but "because you had 22 pending lawsuits at the time didn't you?" Tr. 11/29/23 PM, at 23. After the Court sustained the government's objection on relevance grounds, defense counsel argued that the question was proper under Fed. R. Evid. 608.

Federal Rule of Evidence 608(b) allows a witness, on cross-examination, to be asked about "specific instances of a witness's conduct" if it is "probative of the character for truthfulness or untruthfulness." Asking the witness whether he had 22 pending lawsuits is not a specific instance that is probative of anything, much less the witness's character for truthfulness. The Court allowed defense counsel to make a proffer during a side bar, which was that there had been 22 civil lawsuits and a bankruptcy involving Mr. Beirne. *Id.* at 36. Defense counsel confirmed that there had been no specific findings relating to those lawsuits that the witness had committed fraud, only a civil complaint and a settlement agreement. *Id.* at 37.

Even the case that defense counsel cited for the Court, *United States v. Ramirez-Rivera*, 800 F.3d 1 (11th Cir. 2015), did not support the defendant's position. Tr. 11/29/23 PM, at 35. In that case, the Eleventh Circuit found the district court did not abuse its discretion under Rule 608(b) by limiting the cross examination of a witness about the commission of a murder because it "does not tell anything of his tendency to be truthful …." 800 F.3d at 43. The Court ruled correctly under Rule 608(b) that: "There hasn't been a determination. I understand there have been lawsuits, and there may be hundreds of lawsuits. But unless there's been a determination, under Rule 608, the request to use that for purposes of impeachment is denied." *Id.* at 39.

The defendant's argument that the Court erred by limiting the cross examination of Mr. Graff was addressed above at p. 6. The Court properly exercised its discretion in the rulings it made regarding the cross examination of Mr. Beirne and Mr. Graff.

VII./VIII. <u>The government did not commit prosecutorial misconduct.</u>

The defendant argues that the government committed prosecutorial misconduct during closing argument (as well as during the trial, based on issues raised above). In order to establish prosecutorial misconduct, "'(1) the remarks must be improper, and (2) the remarks must prejudicially affect the substantial rights of the defendant.'" *United States v. Sosa*, 777 F.3d 1279, 1294 (11th Cir. 2015) (quoting *United States v. Eckhardt*, 466 F.3d 938, 947 (11th Cir. 2006)). "'A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would have been different. When the record contains sufficient independent evidence of guilt, any error is harmless.'" *Id.* The prosecutors did not make improper remarks during closing argument, and any error in their closing arguments constitutes harmless error because there was overwhelming evidence of the defendant's guilt.

First, with respect to the Rule 404(b) evidence, the government's discussion of that evidence was entirely appropriate. The Court read the jury instructions before the parties' closing arguments, which included the Rule 404(b) instruction. DE 187, at 10. The government did not mention the Rule 404(b) evidence in its opening closing argument. The prosecutor mentioned the evidence in rebuttal, only after: defense counsel denied that the defendant had committed any crimes, denied that the defendant had signed anything, blamed Mr. Vasilas for the submission of false documents, suggested Mr. Vasilas was the one forging documents, and brought up the Rule 404(b) evidence herself. Tr. 1/11/24, at 98, 121-122.

In the government's 45-minute rebuttal closing, the prosecutor briefly mentioned the Rule 404(b) evidence once, in the context of telling the jury the purpose for which it was admitted: that the defendant's use of another's means of identification was not a mistake, but was intentional. Tr. 1/11/24, at 154. The prosecutor referred to the counts involving the forged tax returns using Mr. Cupersmith's name. *Id.* at 153. The prosecutor mentioned the absence of mistake three times in connection with the forgeries in this case. *Id.* at 154. The only specific reference the prosecutor made to the Rule 404(b) evidence was to say "you know that it's not a mistake because Jeff Graff's name was used in an application for a visa, and it was not with[] his consent." Defense counsel objected, and the prosecutor said, "it's something that you know tells you that there was no mistake in the forgeries in this case. It was intended." *Id.*[9] Based on this record, the defendant's claim that the prosecutor improperly used the Rule 404(b) evidence to argue propensity is meritless.

Second, the defendant complains there was no "competent" evidence establishing Jeanette

[9] The prosecutor further told the jury to refer to the jury instructions that the Court had just given them. *Id.* at 155. When the Court asked about the defense objection after closing arguments were concluded, the prosecutor said she had followed the Court's jury instructions. *Id.* at 163.

Gonzalez's "real" signature, and thus, the government's argument about the defendant forging her signature was improper. This argument has no merit. During the trial, Mr. Graff identified Ms. Gonzalez's handwriting on a check that was shown to him. Tr. 12/6/23 PM, at 55; Govt. Exh. 39-9, at 2. During closing argument, the prosecutor showed the jury a check made out to Ms. Gonzalez (with the same handwriting), that was endorsed on the back with Ms. Gonzalez's signed name. Govt. Exh. 39-5. The prosecutor showed the jury, side-by-side, this check with the signature, and Ms. Gonzalez's purported signature on two false documents, a "Resolution and Certification" the defendant submitted to Nationwide and to the SBA in an effort to obtain approval for the EIDL "modifications" or loan increases on behalf of HM Management and Alafaya Trails. Govt. Exhs. 62-7, 63-5; Tr. 1/11/24, at 76-77. Those documents, which the jury had seen during the trial, falsely listed Jennifer Sheppard, the defendant's wife, as a manager of HM Management and as a 10% member of Alafaya Trails. Govt. Exhs. 62-7, 63-5. The jury had received ample evidence during the trial of Mrs. Sheppard's non-involvement in the businesses, and about the managers and owners of those businesses together with their ownership percentages (including a summary chart of the companies shown during closing argument). *See* Govt. Exh. 23-1. Ms. Gonzalez's purported signature on the false Resolution documents presented very different handwriting from the signature on the endorsed check shown to the jury.

There was nothing improper about the prosecutor showing the jury documents that were in evidence, allowing them to compare the signatures, and asking them to draw reasonable inference from the evidence as part of closing argument. *See Sosa*, 777 F.3d at 1294-1300 (the prosecutor may state conclusions drawn from the evidence). It was reasonable to ask the jury to conclude that the signature reflecting Ms. Gonzalez's name on a check made out to her was her real signature, and that the very different signature on a false EIDL document was yet another instance of the defendant forging someone's name to submit whatever false document he thought was necessary to get the loan approved.[10] This evidence contradicted the defendant and supported the government's case that the defendant – and not the people who worked for him -- was responsible for the false and forged documents that comprised the loan application documents.

The government already addressed the defendant's third argument about purported uncharged tax violations above at pp. 15-17. This argument has no merit.

In his fourth point, the defendant essentially makes the same argument about the tax returns that he makes about Ms. Gonzalez's signature. The jury surely can conclude that the defendant forged Mr. Cupersmith's signature on the false tax returns in order to lend credibility and reliability to the tax returns so that his applications would receive less scrutiny by the lenders. There is nothing improper about asking the jury to draw reasonable inferences from the evidence.

The defendant's fifth argument was addressed above in the discussion regarding the loan applications that the defendant refers to as "uncharged loans." *See* pp. 7-13. There was nothing improper about showing the jury a summary exhibit that was in evidence as Govt. Exh. 72.

The defendant's sixth argument is that the government argued to the jury that the defendant improperly commingled loan funds. First of all, defense counsel was the only one who mentioned commingling of funds during closing arguments. Tr. 1/11/24, at 123. The government did nothing improper by pointing out to the jury that the PPP and EIDL funds were deposited into business accounts that the defendant used interchangeably for business and personal expenses. The government made the argument to the jury that the defendant had control of the bank accounts that received the loan proceeds, that he was the sole beneficiary of the fraud, and that he used those

[10] The prosecutor similarly pointed out Mr. Vasilas' signature on his endorsed checks compared to his purported signature on the fake Mattress One lease. Tr. 1/11/24, at 151.

funds as he pleased. *Id.* at 53-54. That was the crime after all; to get that money and use it.

In his seventh argument, the defendant claims that the government misrepresented Mr. Graff's testimony regarding his identification of the defendant's handwriting on the IRS Forms 941, and that this was a major factor in finding the defendant guilty as to that count. The government did not misrepresent the evidence regarding the Forms 941. That evidence was strong; it consisted of the defendant's handwriting and his own admission in an email to PayPal.

In Mr. Graff's testimony, he identified handwriting on all of the Forms 941 as belonging to the defendant. It is true that not all of the Forms 941 had the payroll figures filled in with handwriting, and that two of them were typed, but they all had handwriting next to the defendant's signature. Govt. Exh. 19-8. As to that handwriting on the typed ones, Mr. Graff identified it as belonging to the defendant. Tr. 12/12/23 AM, at 46-47.[11] Finally, as to the one Form 941 where

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[11] Regarding the Forms 941, the government asked Mr. Graff:
Q: Does the Defendant – was the Defendant's signature always the same?
A: No.
Q: The handwriting to the right of the signature, do you recognize the handwriting?
A: Yes.
Q: Whose handwriting?
A: Eric's.
Q: Can you go back please. Go to the next one. Do you recognize the handwriting?
A: Yes.
Q: Whose handwriting?
A: Eric's.
Q: Go to the next one please.
[Objection overruled]
Q: Do you recognize the handwriting?
A: Yes.
Q: Whose handwriting is it?
A: Eric's.
Q: Could we go to the last page, please. Page 12. Do you recognize the handwriting?
A: Yes.
Q: Whose handwriting is it?
A: Eric's.

Tr. 12/12/23 AM, at 46-47; Govt. Exh. 19-8.

Mr. Graff indicated he was unsure as to some of the handwriting, he did identify the numbers as being consistent with the defendant's handwriting. Tr. 12/6/23 PM, at 59.

Mr. Graff was corroborated by the defendant's handwriting on bank records. Govt. Exh. 39-9; Tr. 12/6/23 PM, at 54-57. During closing argument, the prosecutor showed the jury – side-by-side - the defendant's handwriting on bank withdrawal slips, and the hand-written Forms 941. Tr. 1/11/24, at 72; Govt. Exh. 39-9. The jury could have believed Mr. Graff, or they could have simply believed their own eyes.

Aside from the handwriting, the jury had a very clear admission from the defendant about the Forms 941, which was his own trial exhibit (P-1). This was an email the defendant sent to PayPal stating, "I received the 941s for 2020 from our accounting department and submitted them to the portal." The prosecutor showed and read to the jury this incriminating email during closing argument. Tr. 1/11/24, at 72-73. Mr. Graff's testimony regarding the defendant's handwriting on the Forms 941 was corroborated by other equally strong evidence.

There is no basis for granting the extraordinary relief the defendant requests to throw out the guilty verdicts reached by the jury. The government properly commented on the evidence during its closing arguments. The defendant's argument that the government made a decision in advance of closing to "cross the line" is nowhere supported by this record. The government's closing arguments did not cross any line or come close to a line. The defendant's request to dismiss the guilty verdicts must be denied.

IX. Defendant's arguments about cumulative impact of errors have no merit.

As the government discussed above, this Court did not err in the rulings the defendant has raised here, nor did the government engage in prosecutorial misconduct. The defendant also argues that some of the jury's verdicts are inconsistent with each other. The defendant argues that the guilty verdict as to Count 5 involving the IRS Forms 941, is inconsistent with the not guilty verdicts as to Counts 4 and 6, involving the PPP loan application and the IRS Form 1065 submitted to PayPal/ WebBank. Similarly, the defendant argues that the guilty verdict as to Count 13, for aggravated identity theft involving the submission of a false and forged tax return to ACAP SME/Northeast Bank, is inconsistent with the not guilty verdict for aggravated identity theft involving the submission of an almost identical false and forged tax return to PayPal/ WebBank.

As the defendant well knows, a not guilty verdict is not the same as the jury finding the defendant to be innocent, or that he did not do something. The jury's verdicts here do not reflect any irrational decision. Quite the contrary. What the jury verdicts demonstrate is that the jury weighed the evidence carefully and followed the jury instructions closely as to each count in order to conclude that the government had not proved specific charges beyond a reasonable doubt.

CONCLUSION

For the reasons set forth above, the United States respectfully requests that the Court deny the defendant's motion to dismiss the charges for which he was found guilty, or to grant him a new trial pursuant to Fed. R. Crim. P. 33. Nothing the defendant has raised in his motion suggests that this is an exceptional case in which the interest of justice requires the dismissal of the jury's guilty verdicts, or the granting of a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 26, 2024, 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