No. 19 - _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

HOWARD WEBBER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

NOT FOR PUBLICATION

FILED

NOV 1 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. HOWARD WEBBER, Defendant-Appellant.	No. 17-10242 D.C. No. CR 13-00662-RS-2 MEMORANDUM*

Appeal from the United States District Court
for the District of Northern California,
Richard Seeborg, District Judge, Presiding

Argued and Submitted October 10, 2018
San Francisco, California

Before: MURGUIA and FRIEDLAND, Circuit Judges, and HINKLE,** District Judge

The jury convicted the defendant Howard Webber of mail fraud and aggravated identity theft. He raises three issues on appeal.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Robert L. Hinkle, United States District Judge for the Northern District of Florida, sitting by designation.

First, he challenges the denial of his motion for a judgment of acquittal on aggravated identity theft. The identity theft occurred when fraudulent tax returns were submitted bearing the purported signatures of three individuals, which were actually signed by Mr. Webber's co-conspirator Clifford Dale Bercovich. There was sufficient evidence for a rational jury to conclude Mr. Webber aided and abetted Mr. Bercovich's forgeries.

Aggravated identity theft occurs when a person "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person," during and in relation to a felony of a kind enumerated in the statute. 28 U.S.C. § 1028A(a)(1). Mr. Webber argues that an identity is "used" only when a person attempts to pass himself off as someone else. But in *United States v. Blixt*, 548 F.3d 882, 887–88 (9th Cir. 2008), we held that the defendant "used" an identity when she submitted a document with a forged signature. The jury was entitled to find that that occurred here.

Second, Mr. Webber challenges the giving of an aiding-and-abetting instruction on aggravated identity theft. The statute that makes it a federal crime to aid and abet another federal crime is 18 U.S.C. § 2. We have held that every indictment implicitly alleges aiding and abetting; an explicit allegation or citation to § 2 is unnecessary. *See, e.g.*, *United States v. Armstrong*, 909 F.2d 1238, 1241 (9th Cir. 1990) ("Aiding and abetting is implied in every federal indictment for a

substantive offense."); *see also United States v. Garcia*, 400 F.3d 816, 817 (9th Cir. 2005) (same). Here the indictment alleged aiding and abetting on mail fraud, not on identity theft, but this omission could not have misled or prejudiced Mr. Webber. The government's theory of the case from the outset was that Mr. Webber acted together with Mr. Bercovich to carry out the unlawful scheme. This was a classic case of aiding and abetting, not just on mail fraud, but also on identity theft.

Third, Mr. Webber challenges the district court's determination that he was an organizer or leader of criminal activity involving five or more participants, resulting in a four-level increase under United States Sentencing Guidelines Manual § 3B1.1. The determination was not clearly erroneous. There was evidence that Mr. Webber directed the activity of Mr. Bercovich and others who recruited additional individuals for whom tax returns were submitted. The number of participants exceeded five, even counting only Mr. Webber, Mr. Bercovich, and the recruiters.

AFFIRMED.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

AUG 31 2015

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA, Plaintiff - Appellant, v. CLIFFORD D. BERCOVICH and HOWARD WEBBER, Defendants - Appellees.	No. 14-10319 D.C. No. 3:13-cr-00662-RS MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Richard Seeborg, District Judge, Presiding

Submitted August 25, 2015**

Before: McKEOWN, CLIFTON, and HURWITZ, Circuit Judges.

The government appeals from the district court's order dismissing the aggravated identity counts against Clifford D. Bercovich and Howard Webber

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

("appellees"). We have jurisdiction under 18 U.S.C. § 3731 and 28 U.S.C. § 1291, and we reverse and remand.

The district court dismissed the aggravated identity theft counts brought under 18 U.S.C. § 1028A, because the indictment failed to allege that appellees transferred, possessed, or used another person's means of identification without that person's consent. We later held in *United States v. Osuna-Alvarez*, 788 F.3d 1183 (9th Cir. 2015) (per curiam), that "regardless of whether the means of identification was stolen or obtained with the knowledge and consent of its owner, the illegal use of the means of identification alone violates § 1028A." *Id.* at 1185-86. In light of our intervening decision in *Osuna-Alvarez*, we reverse the district court's order dismissing the section 1028A counts, and remand for further proceedings.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES,

Plaintiff,

v.

CLIFFORD D. BERCOVICH and HOWARD WEBBER,

Defendants.

_____/

No. C 13-0662 RS

ORDER GRANTING MOTION TO DISMISS AGGRAVATED IDENTITY COUNTS

I. INTRODUCTION

This motion, brought by defendant Clifford Bercovich, poses a question left so far unanswered in this circuit: Can a defendant be convicted under the federal aggravated identity theft statute even where he obtains and uses another person's identity with that person's consent? Bercovich argues that an indictment under 18 U.S.C. § 1028A is invalid unless it alleges, among other things, that the defendant transferred, possessed, or used the means of identification of another person without that person's consent. The government disagrees, contending it is immaterial whether a third party consents to the use of his or her means of identification. As explained below, the government takes too broad a view of the statute. Because § 1028A requires that the defendant transfer, possess, or use another person's means of identity without that person's consent, and because the indictment fails to make allegations supporting this requirement, the charges of aggravated identity theft must be dismissed.

II. BACKGROUND[1]

The government alleges that Clifford Bercovich and Howard Webber devised and executed a scheme to prepare and file fraudulent federal income tax returns on behalf of various prison inmates. Bercovich, who was residing in California during the scheme's execution, formed an entity called Inmate Assets Recovery and Liquidation Services ("IARLS"). He created an IARLS "information sheet" to be used to solicit personal identifying information from incarcerated individuals. Webber, who was incarcerated in Wisconsin, obtained personal identifying information from various inmates, and then transcribed the information onto the sheets created by Bercovich.

Using "means of identification" gleaned from the IARLS information sheets, Bercovich filed twelve false federal income tax returns on behalf of various inmates. These returns reported fictitious figures for "wages, salaries, and tips," thereby inflating the Earned Income Credit and/or the Making Work Pay Credit claimed on the returns. As a result of these fraudulent filings with the Internal Revenue Service, tax refunds were mailed by the Department of the Treasury to a P.O. Box in Kentfield, California rented by Bercovich. Refunds were deposited into a Wells Fargo account for IARLS. Bercovich and Webber split the IARLS fee of $250 or 25% of the fraudulent refund for each corresponding false tax return. The indictment is silent as to whether the identified inmates received any of the remaining refund monies or were without knowledge of the use of their identities.

The government charges Bercovich with conspiracy (18 U.S.C. § 1349), twelve counts of mail fraud (18 U.S.C. § 1341), aiding and abetting (18 U.S.C. § 2(b)), and twelve counts of aggravated identity theft (18 U.S.C. § 1028A)—one count for each of the twelve allegedly fraudulent tax returns he filed. Invoking Rule 12(b)(3)(B) of the Federal Rules of Criminal Procedure, Bercovich moves to dismiss the twelve counts of aggravated identity theft, arguing the indictment fails to state a charge under § 1028A.[2]

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[1] The factual background is based on the allegations in the indictment, which must be taken as true for purposes of a motion to dismiss. *See United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002).

[2] Webber, who also faces charges under § 1028A, joins Bercovich's motion. (*See* Notice of Joinder, ECF No. 49).

III. LEGAL STANDARD

An indictment will survive a motion to dismiss "if it contains the elements of the charged offense in sufficient detail (1) to enable the defendant to prepare his defense; (2) to ensure him that he is being prosecuted on the basis of facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge." *United States v. Bernhardt*, 840 F.2d 1441, 1445 (9th Cir. 1988). An indictment that "tracks the words of the statute violated" is generally sufficient. *United States v. Jackson*, 72 F.3d 1370, 1380 (9th Cir. 1995). When a necessary element is not explicit in the text of the statute, however, it must be included in the indictment. *See id.* "A defendant may not properly challenge an indictment, sufficient on its face, on the ground that the allegations are not supported by adequate evidence." *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996) (quoting *United States v. Mann*, 517 F.2d 259, 267 (5th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976)) (*alteration omitted*).

IV. DISCUSSION

A. The Scope of § 1028A

The federal aggravated identity theft statute imposes a mandatory consecutive two-year sentence on any person who, in connection with a list of enumerated felonies, "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person[.]" 18 U.S.C. 1028A(a)(1). Section 1028(c) provides the list of predicate offenses. Mail fraud, which the government alleges here, is one of them. See 18 U.S.C. 1028A(c)(5).

Until recently, a steady chorus of federal circuit courts interpreting § 1028A concluded that it is immaterial whether the defendant had consent to transfer, possess, or use the means of identification of another person. *See United States v. Otuya*, 720 F.3d 183, 189 (4th Cir. 2013), *cert. denied*, 134 S. Ct. 1279 (U.S. 2014); *United States v. Lumbard*, 706 F.3d 716, 724-25 (6th Cir. 2013); *United States v. Ozuna-Cabrera*, 663 F.3d 496, 499-501 (1st Cir. 2011); *United States v. Retana*, 641 F.3d 272, 274-75 (8th Cir. 2011); *United States v. Hurtado*, 508 F.3d 603, 608 (11th Cir. 2007), *abrogated on other grounds, Flores-Figueroa v. United States*, 556 U.S. 646, 129

(2009). In each case, the defendant claimed to have obtained the means of identification of another person through some degree of "consent" before committing one or more of the predicate crimes. In *Otuya*, for example, the defendant paid a college student $400 for the student's social security number, ATM card, pin number, and a signed check. 720 F.3d at 185. The defendant subsequently used the information to access the student's bank account and withdraw funds, thereby defrauding the bank. *Id.* at 185. In *Lumbard*, the defendant paid $500 to a third party in exchange for his social security number and birth date. 706 F.3d at 719. The defendant then used the identifying data to obtain a driver's license and passport in the third party's name. *Id.* Similarly, in *Retana*, the defendant's father divulged his social security number and permitted the defendant to use the information to open a bank account, form a business, and file taxes. 641 F.3d. at 272. Each defendant was convicted for aggravated identity theft.

In each case, the defendant argued on appeal that his conduct was beyond the scope of the statute. How can conduct be penalized as "aggravated identity theft," the defendants asked, when there is no identity *theft* or misappropriation to speak of? Pointing to the statute's text, the defendants argued that where the means of identification is obtained through consent, a person does not act "without lawful authority" in subsequently transferring, possessing, or using the identifying information. *See* § 1028A. The First, Fourth, Sixth, Eighth, and Eleventh Circuits each rejected this argument and affirmed the challenged convictions, holding that a third party's consent does not confer "lawful authority" to use his or her means of identification in furtherance of an enumerated felony. "[R]egardless of how the means of identification is actually obtained," stated the First Circuit in *Ozuna-Cabrera*, "if its subsequent use breaks the law—specifically, during and in relation to the commission of a crime enumerated in subsection (c)—it is violative of § 1028A(a)(1)." 664 F.3d at 499. As the Fourth Circuit remarked in *Otuya*, where the college student handed over his personal information knowing that it would be used for criminal purposes, "no amount of consent from a coconspirator can constitute 'lawful authority'" to engage in fraudulent conduct. 720 F.3d at 189. Those five circuit courts uniformly concluded that the breadth of § 1028A is not limited to

instances of actual theft or misappropriation. *See Lumbard*, 706 F.3d at 721 (finding accord amongst the aforementioned circuits).[3]

A recent *en banc* opinion from the 7th Circuit, however, reaches a different conclusion. In *United States v. Spears*, 729 F.3d 753 (7th Cir. 2013) (en banc), the unanimous court held that a defendant violates § 1028A only where he uses another person's identity without that person's consent. The defendant in *Spears* created a counterfeit handgun permit for Tirsah Payne, a third party who had been barred from obtaining a gun license through legitimate channels. Payne used the fake credential, which displayed her name and address, when attempting to purchase a firearm. The defendant was indicted and convicted for several crimes, including aggravated identity theft under § 1028A for "transferring" the means of identification to Payne.

Unlike the aforementioned cases affirming § 1028A convictions, *Spears* did not turn on the phrase "without lawful authority." Instead, the Seventh Circuit found ambiguity in a statutory phrase largely overlooked by the other circuits: "another person." On appeal, the defendant argued that the "means of identification" transferred were not those of "another person." From Payne's perspective, explained the court, "the card she received did not pertain to 'another'; it had her own identifying details." *Id.* at 755. The government argued this was irrelevant because, from the *defendant's* perspective, Payne was "the 'another.'" *Id.* To illustrate the breadth of the government's reading of the statute, the court remarked:

> On [the government's] view, Spears could give Payne a card bearing Spears's name but not anyone else's. If the prosecutor is right, § 1028A acquires a surprising scope. It would, for example, require a mandatory two-year consecutive sentence every time a tax-return preparer claims an improper deduction, because the return is transferred to the IRS, concerns a person other than the preparer, includes a means of identifying that person (a Social Security number), and facilitates fraud against the United States (which § 1028A(c)(4) lists as a predicate crime).

Id. at 756. The court then concluded that § 1028A(a)(1) is ambiguous, reasoning that the statute's text fails to clarify "whether 'another' means 'person other than the defendant' or 'person who did not consent to the information's use.'" *Id.*

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[3] Bercovich attempts to distinguish those decisions on the basis that in this case, as opposed to the facts underlying each of those appellate decisions, the third parties involved, i.e. the inmates, were fully complicit in the overarching scheme. As those alleged facts are not properly before the court on a motion to dismiss the indictment, no such "distinctions" can be relied upon at this juncture.

Faced with this ambiguity, the court looked beyond the text of § 1028A to understand the statute's meaning. The court determined that the law's caption—"Aggravated identity theft"—supported the defendant's theory that some sort of misappropriation is required:

> That § 1028A deals with identity theft helps resolve the ambiguity in favor of the [defendant's interpretation], while reading 'another person' to mean 'person other than the defendant' treats § 1028A as forbidding document counterfeiting and other forms of fraud, a crime distinct from theft.

Id. [4] To illustrate its conclusion, the Seventh Circuit explained that the sort of behavior targeted by the government in *Spears* would "fit comfortably" within several provisions of § 1028, which prohibits various types of identity fraud. "But instead of using § 1028," the court noted, "the prosecutor charged Spears under § 1028A—which, if it means what the prosecutor says, would convert most identity fraud into identity theft and add a mandatory, consecutive term to every conviction, even though § 1028 lacks any equivalent sentencing provision." *Id.* at 757. The court found further support in *Flores-Figueroa*, the only Supreme Court case interpreting § 1028A. *See* 556 U.S. at 646. In *Flores-Figueroa*, the Court concluded that, contrary to the position of the government and the holdings of numerous circuit courts, the statute requires the prosecutor to show the defendant knew that the "means of identification" unlawfully transferred, possessed, or used belonged to "another person." *Id.* at 647. When weighing the authorities offered in support of the parties' competing interpretations, the Court noted that the juxtaposition of § 1028 and § 1028A supported the defendant's narrower, more theft-focused reading of the statute. *See id.* at 655 ("On the other hand, Congress separated the fraud crime from the theft crime in the statute itself.").

The court in *Spears* concluded that if the statute's ambiguity cannot be resolved by its caption or by the contrasting presence of the federal fraud statute, "it must be resolved by the Rule of Lenity, under which conviction is possible only when a law declares in understandable words what is forbidden." 729 F. 3d at 757 (citations omitted); *see also Rewis v. United States*, 401 U.S. 808, 812 (instructing that "ambiguity concerning the ambit of criminal statutes should be resolved in

[4] Other courts have declined to give weight to the caption of § 1028A, reasoning that statutory headings are irrelevant where the text itself is unambiguous. *See, e.g.*, *Otuya*, 720 F.3d at 190. In *Flores-Figueroa*, however, the Supreme Court looked to § 1028A's caption when interpreting its text. *See* 556 U.S. at 655.

favor of lenity"). According to the Seventh Circuit, the statute fails to provide notice that, as happened in *Spears*, an individual can be prosecuted under § 1028A even where he obtains consent:

> Crimes are supposed to be defined by the legislature, not by clever prosecutors riffing on equivocal language. A reasonable person reading § 1028A(a)(1) would not conclude that Congress has definitely used the word "another" to specify every person other than the defendant, as opposed to a person whose information has been misappropriated.

Id. at 758. The court accordingly held that "another person" in § 1028A refers to "a person who did not consent to the use of the 'means of identification.'" *Id.* at 758.

Spears offers a persuasive interpretation of the aggravated identity fraud statute. Although the Seventh Circuit's decision conflicts with the holdings of various other circuit courts, the panels in those earlier cases largely overlooked the meaning of "another person."[5] Since *Spears*, only one other court has weighed in on the issue. In *United States v. Ivanova*, 2014 U.S. Dist. LEXIS 39641 (S.D.N.Y. Mar. 19, 2014) (unpublished), the court disagreed with *Spears* and held that the phrase "another person" is unambiguous:

> To the contrary, that phrase simply makes it clear that the "means of identification" that is "transfer[ed], possesse[d], or use[d], without lawful authority," must belong to someone other than the defendant.

Id. at *17 (citation omitted). The defendant in *Ivanova*, however, did not invoke *Spears* or argue specifically that the phrase "another person" was ambiguous. *Id.* Instead, she made the same losing argument advanced by defendants before the First, Fourth, Sixth, Eighth, and Eleventh Circuits—that the phrase "without lawful authority" is ambiguous. *See id.* at *16-17. Here, by contrast, Bercovich's entire motion is premised on the theory that *Spears* is correct and that "another person" is ambiguous.

[5] *See* 729 F.3d 753 ("We have not located any appellate decision discussing the meaning of 'another person.'"). In *United States v. Zuniga-Arteaga*, 681 F.3d 1220 (11th Cir. 2012), the Eleventh Circuit remarked that "it seems natural to read 'a means of identification of another person' as simply 'a means of identification of anyone other than the defendant.'" *Id.* 1224. As *Spears* explained, though, the parties in *Zuniga-Artega* did not litigate or contest the meaning of "another person." 729 F.3d 753. The only question at issue in *Zuniga-Artega* was whether the "person" had to be alive. *See* 681 F.3d at 1223.

Moreover, Bercovich offers some authority for the notion that the Ninth Circuit, which has not directly addressed the issue, is inclined towards the Seventh Circuit's interpretation of § 1028A. In *United States v. Stargell*, 738 F.3d 1018 (9th Cir. 2013), the defendant was prosecuted for submitting numerous false and fraudulent tax returns to the IRS. The defendant filed some fraudulent returns with the consent of clients who knew she was submitting documents on their behalf. *Id.* at 1021. Other returns were submitted on behalf of former clients without their knowledge or consent. *Id.* The defendant was indicted for all of the fraudulent returns, but the prosecutor charged her under § 1028A only for those returns that were submitted *without* the knowledge or consent of the third party. In dicta, the Ninth Circuit arguably acknowledged this distinction, noting that, in addition to general charges of mail and wire fraud, "the government also proved [the defendant] engaged in identity theft by using the names and social security numbers of former clients or other individuals, *without their knowledge or consent*, to file tax returns." *Id.* at 1021 (emphasis added). To be sure, the significance of third-party consent was not at issue in *Stargell*; the appeal in that case focused on whether the defendant's conduct "affected a financial institution" for purposes of wire fraud under 18 U.S.C. § 1843 and whether her § 1028A conviction was premised on predicate acts committed before the statute's enactment. Nonetheless, the dicta in *Stargell* provides some support for the notion that the Ninth Circuit inclines, like the Seventh Circuit, to the view that § 1028A requires lack of consent for conviction.

B. Timing of the Motion

The government argues that even if Bercovich's view of the statute is correct, his motion must fail in any event because it assumes the existence of facts not alleged in the indictment. As explained above, when reviewing a Rule 12 motion challenging the sufficiency of an indictment, the court must take the government's allegations at face value. *Boren*, 278 F.3d at 914. In doing so, the court is "bound by the four corners of the indictment" and may not "consider evidence not appearing on the face of the indictment." *Id.* (citation omitted). Although Bercovich avers that he obtained consent to use the inmates' identifying information, no facts in the indictment support such a

contention.[6] The government alleges only that Bercovich created an information sheet "that solicited personal identifying information from prison inmates," that Webber "obtained the personal information of prison inmates," that defendants "recruited others to assist in obtaining completed information sheets," and that Bercovich ultimately used information gleaned from the sheets to lodge fraudulent tax returns. (Indictment ¶¶ 10-15). Notwithstanding that streamlined charging document, Bercovich advances numerous additional "facts," claiming that the prisoners willingly shared their information with Webber, that they knew how their information was being used, and even that they benefitted financially from the allegedly fraudulent filings.

To be sure, this Rule 12 motion is an improper vehicle for Bercovich to introduce additional "facts" in an effort to explain or prove his theory of the case. The government is wrong, however, to frame the motion as a mere attempt to seek a pre-trial determination of the sufficiency of the evidence. The motion can, and must, be resolved in defendants' favor based on the indictment alone because the charging document fails to allege an essential element of the crime: that the defendant transferred, possessed, or used the "means of identification" of another person without that person's consent.

Although an indictment that tracks the language of the applicable statute is generally sufficient, "implied, necessary elements, not present in the statutory language," must also be alleged. *Jackson*, 72 F.3d at 1380. For example, courts have long recognized that "materiality" is an essential element of a conviction for false statements under 18 U.S.C. § 1001. *See United States v. Facchini*, 874 F.2d 638, 641 (9th Cir. 1989) (en banc). While an indictment's failure to allege materiality will not necessarily render the indictment insufficient, the government must at least allege facts that "warrant the *inference of materiality*." *United States v. Oren*, 893 F.2d 1057, 1063 (9th Cir. 1990) (quoting *Dear Wing Jung v. United States*, 312 F.2d 73, 75 (9th Cir. 1962)). By the same logic, an indictment charging a violation of § 1028A must at least allege facts warranting the inference that the defendant transferred, possessed, or used the "means of identification" of another person without that person's consent.

[6] At oral argument, counsel for Bercovich argued that the inmates' consent is implied in the charging document. Yet the indictment gives no indication whether the inmates consented to any transfer, possession, or use of their means of identification.

The indictment fails to meet this requirement. Just as it lacks allegations supporting Bercovich's claim that the inmates consented to the use of their identifying information, the indictment contains no allegations stating, or even implying, that the defendants operated *without* the inmates' consent.[7] Indeed, the charging document is simply silent on the consent issue. Because the prosecution is tasked with presenting an indictment containing the elements of the offense charged, *see Hamling v. United States*, 418 U.S. 87, 117 (1974), this silence mandates resolution of the motion in defendants' favor.

V. CONCLUSION

An indictment's failure to "recite an essential element of the charged offense is not a minor or technical flaw . . . but a fatal flaw requiring dismissal of the indictment." *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999). Because the present indictment fails to allege that the defendants transferred, possessed, or used the means of identification of another person without that person's consent, the aggravated identity theft charges against Bercovich and Webber cannot go forward. The charges under § 1028A are dismissed without prejudice to the filing of a superseding indictment.

IT IS SO ORDERED.

Dated: 6/3/14

RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

[7] It is evident from the oral argument on this motion that the parties dispute what constitutes "consent" to the use of one's means of identification. This order need not resolve that disagreement; it is sufficient to conclude that regardless of what "consent" (or lack thereof) would mean here, the indictment is fatally mum on the matter.