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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,  
  
Plaintiff,  
  
v.  
  
ROBERT ALAN SOLOWAY,  
  
Defendant.

NO. CR07-187MJP

ORDER DENYING DEFENDANT’S  
MOTION TO DISMISS COUNTS 19  
THROUGH 25 OF THE SECOND  
SUPERSEDING INDICTMENT

This matter comes before the Court on Defendant’s motion to dismiss counts 19 through 25 of the second superseding indictment. (Dkt. No. 62.) Having reviewed the motion, the Government’s response (Dkt. No. 64), Defendant’s reply (Dkt. No. 66), and all materials submitted in support thereof, the Court DENIES the motion for the reasons set forth below.

**Background**

On January 3, 2008, the government entered a second superseding indictment against Mr. Soloway that includes charges of mail fraud, wire fraud, fraud in connection with electronic mail, aggravated identity theft, willful failure to file income tax, and money laundering. Mr. Soloway brings this motion to dismiss the seven counts of aggravated identity theft under Fed. R. Crim. Pro. 12(b)(2). Rule 12(b)(2) states that “[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.”

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**Analysis**

A district court may dismiss an indictment on a pretrial motion for insufficient evidence only when undisputed facts show that the Government cannot support the indictment. See U. S. v. Phillips, 367 F.3d 846, 855 fn.25 (9th Cir. 2004) (citing U. S. v. Hall, 20 F.3d 1084, 1087 (10th Cir. 1994)). Such dismissal “is equivalent to a determination that as a matter of law, the government is incapable of proving its case beyond a reasonable doubt.” U. S. v. Weiss, 469 F. Supp. 2d 941, 948-949 (D. Colo. 2007) (internal citation and quotation marks omitted). Pre-trial dismissal is not warranted if the Government could conceivably produce evidence at trial supporting the indictment.

Mr. Soloway first argues that the conduct alleged does not constitute aggravated identity theft under 18 U.S.C. §1028A. However, the Government claims that it will present evidence showing that Mr. Soloway sent bulk emails to third parties that contained another person’s email address in the “From” header. Mr. Soloway contests the existence of such evidence. Because the relevant facts are disputed, the issue of whether Mr. Soloway’s alleged conduct constitutes aggravated identity theft cannot be decided as a matter of law. Further, the Court declines to offer an advisory ruling on whether the act of substituting a recipient’s email address for the sender’s address in the header of an email constitutes aggravated identity theft.

Mr. Soloway’s second argument, that the alleged conduct supporting the counts of aggravated identity theft is “already covered” by the count of fraud in connection with electronic mail, is imprecise and disregards established law. The same conduct can be used to support multiple offenses as long as each offense requires proof of a fact that the other does not. Blockburger v. United States, 284 U.S. 299, 303 (1932). The crimes of aggravated identity theft and fraud in connection with electronic mail, defined in 18 U.S.C. §1028A(a)(1) and 18 U.S.C. §1037(a)(3), are not multiplicitous because each requires that the Government prove distinct elements.

1 **Conclusion**

2 The Court DENIES Mr. Soloway's motion to dismiss counts 19 through 25 on the ground of  
3 insufficient evidence because the parties are in dispute about the facts to be presented at trial. The  
4 Court also DENIES Mr. Soloway's motion to dismiss counts 19 through 25 on the ground that those  
5 counts are multiplicitous with count 18 because each offense requires proof of distinct elements.

6 The clerk is directed to send copies of this order to all counsel of record.

7 Date: March 6, 2008

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10 Marsha J. Pechman

11 U.S. District Judge