IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

UNITED STATES OF AMERICA v. VIKAS SINGLA	Criminal Action No. 1:21-CR-00228-MLB-RDC

DEFENDANT'S MOTION TO DISMISS INDICTMENT FOR LACK OF SPECIFICITY OR FOR A BILL OF PARTICULARS

Defendant Vikas Singla, by and through counsel, respectfully files this Motion to Dismiss the Indictment for Lack of Specificity pursuant to Rule 12(b)(3)(B)(iii), or, if the Court is not inclined to dismiss the Indictment in its entirety, for a court order requiring the government to produce a bill of particulars pursuant to Rule 7(f) of the Federal Rules of Criminal Procedure as to any remaining counts, showing the Court as follows:

I. INTRODUCTION[1]

The grand jury's eighteen-count indictment against Mr. Singla under the Computer Fraud and Abuse Act of 1986 ("CFAA") must be dismissed in its entirety because it fails to allege the essential facts necessary to inform Mr. Singla of the

[1] The salient factual background is set forth in Mr. Singla's accompanying Motion for Early Issuance of Rule 17(c) Subpoenas, filed concurrently herewith, and is incorporated by reference as if fully set forth herein.

charges against him as required by the Constitution. In particular, despite investigating the alleged cyberattack upon which Mr. Singla's charges are predicated for more than two years before it presented the Indictment to the grand jury, the Indictment fails to identify which, if any, internet-connected computers Mr. Singla is alleged to have damaged, a threshold prerequisite for federal jurisdiction in this case; how Mr. Singla is alleged to have damaged such computers; any program, information, code, or command he allegedly transmitted; or how any access by him to any internet-connected computer was without authorization or exceeded authorized access. This woefully inadequate Indictment fails to provide facts sufficient to enable Mr. Singla to prepare his defense, avoid the possibility of prejudicial surprise at trial, and to plead double jeopardy, mandating dismissal as set forth below.

II. RELEVANT LEGAL STANDARDS

Due Process requires that the accused receive adequate and fair notice of the charges against him. *Bartell v. United States*, 227 U.S. 427, 431 (1913) ("It is elementary that an indictment, in order to be good under the Federal Constitution and laws, shall advise the accused of the nature and cause of the accusation against him, in order that he may meet the accusation and prepare for his trial."). This principle is embodied in both the Sixth Amendment and the Federal Rules of

Criminal Procedure, which require the accused "to be informed of the nature and cause of the accusation" and that an indictment include "a definite written statement of the essential facts constituting the offense charged." U.S. Const. amend. VI; Fed. R. Crim. P. 7(c)(1).

When an indictment fails to meet these minimum standards, it should be dismissed. *See, e.g.*, *Russell v. United States*, 369 U.S. 749, 770 (1962) (reversing convictions and ordering dismissal of indictment that failed to allege essential facts); *United States v. Schmitz*, 634 F.3d 1247, 1261 (11th Cir. 2011) (reversing bribery conviction and ordering dismissal of bribery indictment for failure to allege essential facts); *United States v. Murphy*, 762 F.2d 1151, 1155 (1st Cir. 1985) (reversing convictions and ordering dismissal of indictment where it was "wholly unclear from the indictment" which official proceeding the grand jury had indicted the defendant for obstructing). Otherwise, "[f]ar from informing [the defendant] of the nature of the accusation against him" as required by the Constitution, "the indictment [would] instead le[ave] the prosecution free to roam at large—to shift its theory of criminality so as to take advantage of each passing vicissitude of the trial and appeal." *Russell*, 369 U.S. at 768. Notably, even if an indictment tracks the language of the criminal statute, it still must include enough facts and circumstances to inform the defendant of the specific offense being charged. *United States v. Bobo*, 344 F.3d 1076, 1083

(11th Cir. 2003).

In addition, Rule 7(f) of the Federal Rules of Criminal Procedure authorizes the Court to order the government to produce a bill of particulars "to inform the defendant of the charge against him with sufficient precision to allow him to prepare his defense, to minimize surprise at trial, and to enable him to plead double jeopardy in the event of a later prosecution for the same offense." *United States v. Cole*, 755 F.2d 748, 759 (11th Cir. 1985); *United States v. White*, 50 F.R.D. 70, 71-72 (N.D. Ga. 1970). "[W]here an indictment fails to set forth specific facts in support of requisite elements of the charged offense, and the information is essential to the defense, failure to grant a request for a bill of particulars may constitute reversible error." *Cole*, 755 F.2d at 760 (quoting *United States v. Crippen*, 579 F.2d 340, 347 (5th Cir. 1978)); *United States v. Moore*, 57 F.R.D. 640, 642 (N.D. Ga. 1972) (bill of particulars may be required to enable a defendant to prepare his defense even if the facts pleaded are sufficient to meet the minimum threshold to sustain an indictment).

It is no "defense to a motion for Bill of Particulars that the granting of the motion may unnecessarily freeze the government's proof." *United States v. Thevis*, 474 F. Supp. 117, 123 (N.D. Ga. 1979) (citations omitted). "Nor is it a legitimate objection to a motion for a Bill of Particulars that it calls for an evidentiary response

or a legal theory of the government, when the furnishing of this information is necessary to prepare a defense and to avoid prejudicial surprise at trial." *Id.* (citations omitted); *see also United States v. Barnes*, 158 F.3d 662, 665 (2d Cir. 1998) ("[A] bill of particulars will be required even if the effect is disclosure of the government's evidence or theories.").

Moreover, the government cannot avoid its obligation to produce a bill of particulars simply by pointing to its significant document production; in fact, numerous courts have observed that voluminous discovery cuts strongly in favor of particularization. *See, e.g., United States v. Bortonovsky*, 820 F.2d 572, 574-75 (2d Cir. 1987) (need for bill of particulars not obviated when government provides "mountains of documents to defense counsel" which have the effect of "shrouding in mystery" key events in the case); *United States v. Bazezew*, 783 F. Supp. 2d 160, 168 (D.D.C. 2011) ("[I]t is not sufficient for the government to respond to a motion for a bill of particulars by pointing to the voluminous discovery already provided or by relying on a governmental open file policy."); *United States v. Nachamie*, 91 F. Supp. 2d 565, 571 (S.D.N.Y. 2000) (bill of particulars necessary despite production of voluminous discovery).

If the Court is unable to determine whether nondisclosure would prejudice the defense, then the Court must balance the competing interests, resolving any doubts

in favor of the defendant. *Thevis*, 474 F. Supp. at 123 ("In resolving areas of doubt when the competing interests are closely balanced, the interests of the defendant in disclosure must prevail."). Finally, it should be noted that even a bill of particulars cannot save an invalid indictment. *Russell*, 369 U.S. at 770.

III. ARGUMENT

The Indictment in this case charges Mr. Singla with eighteen felony violations of the CFAA. Count One charges with Mr. Singla with violating 18 U.S.C. § 1030(a)(5)(A), as follows:

> On or about September 27, 2018, in the Northern District of Georgia and elsewhere, the defendant, VIKAS SINGLA, aided and abetted by others unknown to the Grand Jury, knowingly caused and attempted to cause the transmission of a program, information, code, and command, and, as a result of such conduct, intentionally caused and attempted to cause damage without authorization to a protected computer — that is, one or more computers used by Gwinnett Medical Center that operated the Duluth, Georgia hospital's Ascom phone system — and the offense caused and would, if completed, have caused:
>
> a. loss to Gwinnett Medical Center during the one-year period from SINGLA's course of conduct affecting protected computers aggregating at least $5,000 in value;
>
> b. the modification, impairment, and potential modification and impairment of the medical examination, diagnosis, treatment and care of one or more individuals; and
>
> c. damage affecting at least 10 protected computers during a one-year period[.]

(Doc. 1 ¶ 3). Counts Two through Seventeen charge sixteen additional violations of Section 1030(a)(5)(A), as follows:

> On or about September 27, 2018, in the Northern District of Georgia and elsewhere, as specified in the following table, the defendant, VIKAS SINGLA, aided and abetted by others unknown to the Grand Jury, knowingly caused and attempted to cause the transmission of a program, information, code, and command, and, as a result of such conduct, intentionally caused and attempted to cause damage without authorization to a protected computer — that is, one or more computers used by Gwinnett Medical Center in the Duluth and Lawrenceville, Georgia hospitals that operated the printers identified in the following table — and the offense caused and would, if completed, have caused:
>
> a. loss to Gwinnett Medical Center during the one-year period from SINGLA's course of conduct affecting protected computers aggregating at least $5,000 in value; and
>
> b. the modification, impairment, and potential modification and impairment of the medical examination, diagnosis, treatment and care of one or more individuals[.]

(Doc. 1 ¶ 5). And finally, Count Eighteen charges Mr. Singla with violating Section 1030(a)(2)(C), as follows:

> On or about September 27, 2018, in the Northern District of Georgia and elsewhere, the defendant, VIKAS SINGLA, aided and abetted by others unknown to the Grand Jury, intentionally accessed and attempted to access a computer without authorization and exceeded and attempted to exceed authorized access to a computer, and thereby obtained and attempted to obtain information from a protected computer, that is, a Hologic R2 Digitizer used by Gwinnett Medical Center in the Lawrenceville, Georgia hospital and the offense was committed for purposes of commercial advantage and private financial gain, in violation of Title 18, United States Code, Sections 1030(a)(2)(C), (b),

(c)(2)(B)(i), and Section 2.

(Doc. 1 ¶ 6).

The pattern jury instructions applicable to Count One require the government to prove beyond a reasonable doubt that (1) Mr. Singla knowingly caused or attempted to cause the transmission of a program, information, code, or command, (2) as a result of such conduct, the defendant intentionally caused or attempted to cause damage without authorization, (3) the damage was to a protected computer, and (4) the offense caused (a) loss affecting protected computers aggregating at least $5,000 in value during a one-year period, (b) the modification, impairment, or potential modification or impairment of the medical examination, diagnosis, treatment or care of one or more individuals; or (c) damage affecting at least 10 protected computers during a one-year period. Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2022, No. O42.3 (as modified).

The pattern jury instructions applicable to Counts Two through Seventeen require the government to prove beyond a reasonable doubt that (1) Mr. Singla knowingly caused or attempted to cause the transmission of a program, information, code, or command, (2) as a result of such conduct, the defendant intentionally caused or attempted to cause damage without authorization, (3) the damage was to a protected computer, and (4) the offense caused (a) loss affecting protected computers

aggregating at least $5,000 in value during a one-year period, or (b) the modification, impairment, or potential modification or impairment of the medical examination, diagnosis, treatment or care of one or more individuals. *Id*. (as modified)

Finally, The pattern jury instructions applicable to Count Eighteen require the government to prove beyond a reasonable doubt that (1) Mr. Singla intentionally accessed a computer without authorization or exceeded his authorized access to a computer, (2) by accessing the computer the defendant obtained information from a protected computer, and (3) the offense was committed for commercial advantage or private financial gain. Eleventh Circuit Pattern Jury Instructions (Criminal Cases) 2022, No. O42.2 (as modified).

As applicable to all of the charges, the statute defines "protected computer" to mean a computer "which is used in or affecting interstate or foreign commerce or communication." 18 U.S.C. § 1030(e)(2). For purposes of Counts One through Seventeen, "damage" means "any impairment to the integrity or availability of data, a program, a system, or information" (18 U.S.C. § 1030(e)(8)), and "loss" means "any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense . . . " 18 U.S.C. § 1030(e)(11). With respect to Count Eighteen, "exceeds authorized access" means "to access a computer

with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter." 18 U.S.C. § 1030(e)(6).

Particularly in light of these highly technical elements, the Indictment in this case fails to provide the essential facts necessary for Mr. Singla to prepare his defense, avoid prejudicial surprise, or plead double jeopardy as required by the Fifth and Sixth Amendments and Rule 7(c)(1). First, with respect to Counts One though Seventeen, the Indictment fails to identify

1. what "transmission" Mr. Singla is alleged to have caused;

2. what "program, information, code, or command" Mr. Singla is alleged to have transmitted;

3. what "damage" Mr. Singla's conduct is alleged to have caused to a protected computer;

4. which "protected computer" Mr. Singla allegedly damaged;

5. why or how each protected computer that Mr. Singla's conduct allegedly damaged qualifies as a "protected computer" under the CFAA (*i.e.*, how or whether it was connected to the Internet at the time of the alleged offense);

6. what "loss" Mr. Singla's conduct is alleged to have caused affecting protected computers in an aggregate amount of $5,000; and

7. how Mr. Singla's conduct "modifi[ed,]" "impair[ed]," or "potential[ly] modif[ied] or impair[ed] . . . the medical examination, diagnosis, treatment or care of one or more individuals," what "examination, diagnosis, or treatment" or which "individuals."

Second, not only do Counts One through Seventeen fail to identify each specific "protected computer" that Mr. Singla's conduct allegedly damaged, they vaguely define the "protected computer" in each count as an unidentified, unspecified group of multiple computers at multiple GMC facilities. *See* Doc. 1 ¶ 3 ("***one or more computers*** used by Gwinnett Medical Center that operated the Duluth, Georgia hospital's Ascom phone system") (emphasis added); ¶ 5 ("***one or more computers*** used by Gwinnett Medical Center in the Duluth and Lawrenceville, Georgia hospitals that operated the printers identified in the following table[.]") (emphasis added).

Third, with respect to Count Eighteen, the Indictment fails to identify

8. what "computer" Mr. Singla allegedly accessed without authorization;

9. how such access was "without authorization;"

10. what notice GMC provided to inform Mr. Singla that such access was "without authorization;"

11. how Mr. Singla "exceeded [or] attempted to exceed authorized access;"

12. what notice GMC provided to inform Mr. Singla that such access "exceeded [or] attempted to exceed authorized access;"

13. what "information" Mr. Singla obtained or attempted to obtain;

14. what notice GMC provided to inform Mr. Singla that he was not entitled to obtain such information; and

15. why or how the protected computer at issue in Count Eighteen (a Hologic R2 Digitizer) qualifies as a "protected computer" under the CFAA (*i.e.*, how or whether it was connected to the Internet at the time of the alleged offense)

While Mr. Singla has received some very limited information from the government as part of meet-and-confer discussions regarding questions 3, 5, 13, and 15, above, the government's discovery appears to be devoid of answers to these questions, and the Indictment's overall woefully inadequate level of specificity renders it fatally defective, warranting dismissal.

The Indictment's lack of specificity renders it fatally defective and subject to dismissal for the additional reason that it is insufficient to enable Mr. Singla to plead double jeopardy in the event of a subsequent prosecution for the same conduct. For example, the government could bring new CFAA charges against Mr. Singla for the same conduct based on allegations about a group of unspecified, unidentified "protected computers" and the Court would have no way of determining if any of those computers overlap with, or are included within, the group of unspecified, unidentified protected computers that are alleged in this case. Similarly, the government may bring new CFAA charges against Mr. Singla for the same conduct based on the same "damage" or "loss" alleged in this case, and there will be no way to know if such subsequent prosecution offends the Double Jeopardy Clause.

Moreover, it is impossible to discern based on these allegations whether, for each count, the putative "protected computer" that Mr. Singla allegedly damaged is the same protected computer for which the grand jury found probable cause to charge Mr. Singla, and if each such computer was allegedly damaged in the manner in which the grand jury determined. *United States v. Soldano*, 626 F. Supp. 384, 386 (S.D. Fla. 1986) (ordering dismissal of indictment where it was unclear if "the [conspiracy] beginning date . . . as supplied by the government in the bill of particulars[] was the same beginning date which the grand jury had in mind," or "that at least one co-conspirator named among those in the bill of particulars was one which the grand jury had so found as a co-conspirator."); *United States v. Peterson*, 544 F. Supp. 2d 1363, 1374 (M.D. Ga. 2008) ("allowing the prosecutor, or even the court, to make a guess as to what the grand jury had in their minds when they indicted the defendants 'would deprive the defendant[s] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure . . . [because] a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.'"); *id*. at 1377 ("if the Government was allowed to go forward on this Count, it would be free to secure a conviction based on the official proceeding that it thinks Defendant obstructed, rather than on the official proceeding upon which the grand jury based its

indictment.").

Accordingly, the Indictment should be dismissed in its entirety for lack of specificity. Alternatively, if the Court is not inclined to dismiss the Indictment in its entirety, the Court should require the government to produce a bill of particulars as to any remaining counts that includes factual detail sufficient to enable Mr. Singla to prepare his defense, avoid the potential for prejudicial surprise at trial, permit Mr. Singla to plead double jeopardy, and to otherwise safeguard Mr. Singla's Fifth and Sixth Amendment rights to due process and a fair trial. It should be noted that the risk of prejudicial surprise is particularly acute where, as here, the evidence is highly technical and much of it requires the assistance of experts to analyze and understand.

IV. CONCLUSION

WHEREFORE, Mr. Singla requests that the Court grant this Motion and dismiss the Indictment in its entirety for lack of specificity, or, in the alternative, order the government to produce a bill of particulars as to the matters addressed in questions 1 through 15, *supra* at 10-11.

Respectfully submitted, this 20th day of April, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing document was electronically filed with the Clerk of Court using the CM/ECF system, which automatically serves notification of such filing to all counsel of record:

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