IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA	
v.	Criminal Action No. 1:23-cr-00061-MN
ROBERT HUNTER BIDEN,	
Defendant.	

MR. BIDEN'S NOTICE OF APPEAL

Notice is hereby given that Robert Hunter Biden, Defendant in the above-named case, appeals to the United States Court of Appeals for the Third Circuit from this Court's April 12, 2024 Orders denying Mr. Biden's motion to dismiss the indictment for violating the immunity conferred by the Diversion Agreement (D.E. 98) and its related Memorandum Opinion (D.E. 97), his motion to dismiss the indictment for the improper appointment of the Special Counsel and violation of the Appropriations Clause (D.E. 101), and his motion to dismiss the indictment for violation of separation of powers (D.E. 99).

Dated: April 17, 2024

Respectfully submitted,

/s/ *Abbe David Lowell*

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Counsel for Robert Hunter Biden

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 23-61 (MN)
	)	
ROBERT HUNTER BIDEN,	)	
	)	
Defendant.	)	

MEMORANDUM ORDER

At Wilmington this 12th day of April 2024:

On June 20, 2023, David C. Weiss, United States Attorney for the District of Delaware, charged Defendant Robert Hunter Biden via Information with unlawful possession of a firearm by a person prohibited under 18 U.S.C. § 922(g)(3). The parties attempted to reach resolution of the charge with pretrial diversion but were ultimately unsuccessful. On August 11, 2023, the United States Attorney General, Merrick Garland, appointed Mr. Weiss as Special Counsel to conduct the ongoing investigations relating to this criminal matter and another matter relating to tax offenses, as well as to conduct investigations into other matters that may arise. *See* OFF. OF THE ATT'Y GEN., ORDER NO. 5730-2023, APPOINTMENT OF DAVID C. WEISS AS SPECIAL COUNSEL (2023). As Special Counsel here, Mr. Weiss is authorized to prosecute any federal crimes arising from his investigations. (*Id.*).

On September 14, 2023, Special Counsel Weiss indicted Defendant on three felony firearm offenses in this case – the original unlawful possession charge along with two related false-statement charges. (*See generally* D.I. 40). Presently before the Court is Defendant's motion to dismiss the indictment because the Special Counsel was purportedly unlawfully appointed and because the prosecution violates the Appropriations Clause. (D.I. 62).

The Attorney General appointed Mr. Weiss to serve as Special Counsel pursuant to 28 U.S.C. §§ 509, 510, 515 and 533. *See* ORDER NO. 5730-2023 at 1. Defendant does not argue that Mr. Weiss's appointment violates this statutory authority. Instead, he argues that the appointment was unlawful because it violates the U.S. Department of Justice ("DOJ") regulations, which describe the general powers of special counsel.[1] (*See* D.I. 62 at 2-6). The DOJ regulations state that "[t]he Special Counsel shall be selected from outside the United States Government." 28 C.F.R. § 600.3. Mr. Weiss, a sitting United States Attorney at all relevant times, was not selected from outside the government. According to Defendant, the regulations preclude Mr. Weiss from serving as Special Counsel, and the indictment must be dismissed.[2] (*See* D.I. 62 at 6). That, however, is not an argument available to Defendant.

The last section of the DOJ regulations, entitled "No creation of rights," provides that "[t]he regulations in this part are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law or equity, by any person or entity, in any matter, civil, criminal, or administrative." 28 C.F.R. § 600.10. This is a criminal matter, and Defendant is a person attempting to rely upon the regulations to create an enforceable substantive (and procedural) right. By its clear terms, the DOJ regulations prohibit Defendant from doing so. He is not entitled to dismissal (or any other remedy) in this case even if the DOJ has violated its own

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1 The regulations are in Part 600 of the Code of Federal Regulations, which is titled "General Powers of Special Counsel." *See* 28 C.F.R. §§ 600.1-600.10.

2 The appointment order states that the Special Counsel is subject to 28 C.F.R. §§ 600.4-600.10. *See* ORDER NO. 5730-2023 at 2. In so specifying, the appointment order excepts § 600.3 from applying to the Special Counsel. The DOJ may waive any or all of Part 600. *See Special Counsel and Permanent Indefinite Appropriation*, GAO B-302582, 2004 WL 2213560, at *4-5 (Comp. Gen. Sept. 30, 2004) ("Thus, 28 C.F.R Part 600 does not act as a substantive limitation on the Attorney General's (or Acting Attorney General's) authority to delegate authority to a U.S. Attorney to serve as a Special Counsel to investigate high ranking government officials and it may be waived.").

DOJ regulations.[3] The Court's conclusion in this regard is bolstered by the fact that at least two other courts have reached a similar conclusion – *i.e.*, that an individual defendant may not invoke the DOJ regulations (or purported violations thereof) to obtain dismissal of an indictment. *See, e.g.*, *United States v. Manafort*, 321 F. Supp. 3d 640, 660 (E.D. Va. 2018) ("[E]ven assuming defendant is correct that the Acting Attorney General violated the Special Counsel regulations when he appointed the Special Counsel here, that fact does not warrant dismissal of the Superseding Indictment. The Special Counsel regulations themselves make clear that the regulations do not 'create any rights, substantive or procedural,' and as such, the regulations are unenforceable 'at law or equity, by any person or entity, in any matter, civil, criminal, or administrative.'" (quoting 28 C.F.R. § 600.10)); *United States v. Manafort*, 312 F. Supp. 3d 60, 75 (D.D.C. 2018) ("Manafort cannot move to dismiss his complaint under the Federal Rules of Criminal Procedure based upon a claimed violation of the Department of Justice Special Counsel Regulations because those regulations are not substantive rules that create individual rights; they are merely statements of internal departmental policy.").

Defendant also claims that any prosecutions resulting from the Special Counsel's appointment violate the Appropriations Clause of the U.S. Constitution. (*See* D.I. 62 at 7-9). As Defendant recognizes, Mr. Weiss's investigation and prosecution is being funded through "an appropriation established in a Note to 28 U.S.C. § 591," one of the lapsed independent counsel

[3] Sitting U.S. Attorneys have been appointed as special counsel in at least two other instances. *See* ATT'Y GEN. ORDER 4878-2020 (2020) (appointing U.S. Attorney John Durham as special counsel under §§ 509, 510 and 515); *see also* Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney (Dec. 30, 2003) (appointing U.S. Attorney Patrick Fitzgerald as special counsel under §§ 509, 510 and 515).

statutes.[4] (D.I. 62 at 7). That appropriation provides "a permanent indefinite appropriation [] established within the Department of Justice to pay all necessary expenses of investigations and prosecutions by independent counsel appointed pursuant to the provisions of 28 U.S.C. 591 *et seq.* or other law." Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987). Defendant argues that this appropriation cannot fund the Special Counsel here because he is not an "independent counsel" who falls within the appropriation. (*See, e.g.*, D.I. 62 at 7 ("Special Counsel Weiss is not an *independent* counsel and that is by design. This appropriation for 'independent counsel' was created in 1987, when everyone understood that 'independent' referred to the circumstances that then-existed concerning the role of an Independent Counsel." (emphasis in original)); D.I. 80 at 12 ("Special Counsel Weiss's claim that the appropriation covers him fails because he is not an 'independent counsel' as envisioned in any 'other law.'")). The Court disagrees.

The use of the permanent appropriation to fund special counsel appointed after the independent counsel statutes lapsed is well established. *See generally United States v. Stone*, 394 F. Supp. 3d 1, 17-23 (D.D.C. 2019) (setting forth the history of independent and special counsel appointments and the funding thereof through the permanent appropriation). Indeed, there have been at least six other special counsel appointed since 1999 who were funded by this appropriation: John Danforth, Patrick Fitzgerald, Robert Mueller, John Durham, Jack Smith and Robert Hur. *See, e.g.*, *Independent and Special Counsel Expenditures for the Six Months Ended September 30, 2001*, GAO-00-120 at Page 6 (March 2000) ("On September 9, 1999, the Attorney General appointed John C. Danforth as a Special Counsel to investigate the government conduct relative to certain events in Waco, Texas. The Department of Justice determined that the

[4] The independent counsel statutes are found at 28 U.S.C. §§ 591-599. When Congress failed to reauthorize them in 1999, the statutes expired. *See* 28 U.S.C. § 599.

appropriation established by Public Law 100-202 to fund expenditures by independent counsels appointed pursuant to 28 U.S.C. 591-599, also is available to fund the expenditures of the Special Counsel."); *Independent and Special Counsel Expenditures for the Six Months Ended September 30, 2004*, GAO-05-359, 2005 WL 1396286, at 3 & n.3 (March 2005) (DOJ approved using "appropriation established by Public Law 100-202 to fund expenditures by independent counsels appointed pursuant to the independent counsel law or other law" to fund Special Counsel Fitzgerald); SPECIAL COUNSELS' OFFICE – STATEMENT OF EXPENDITURES MAY 17, 2017 THROUGH FEBRUARY 25, 2020 Note 1B (2020) (Special Counsel Mueller funded at least in part by "the permanent, indefinite appropriation for independent counsels (IC Appropriation) (28 U.S.C. § 591 note)"); SPECIAL COUNSELS' OFFICE – DURHAM STATEMENT OF EXPENDITURES APRIL 1, 2023 THROUGH SEPTEMBER 30, 2023 Page 4 (2023) (Special Counsel Durham funded by same); SPECIAL COUNSELS' OFFICE – SMITH STATEMENT OF EXPENDITURES NOVEMBER 18, 2022 THROUGH MARCH 31, 2023 Page 4 (2023) (Special Counsel Smith funded by same); SPECIAL COUNSELS' OFFICE – HUR STATEMENT OF EXPENDITURES JANUARY 12, 2023 THROUGH MARCH 31, 2023 Page 4 (2023) (Special Counsel Hur funded by same).

Defendant argues that this longstanding practice of using the permanent appropriation to fund special counsel expenditures has no applicability to the facts of this case. In Defendant's view, Special Counsel Weiss is less independent than other special counsel because Mr. Weiss was not selected from outside the government. (*See* D.I. 62 at 8 ("By choosing a subordinate from within DOJ, there is not even a veneer of independence. Mr. Weiss cannot be both 'independent' of DOJ and a part of DOJ (as he is still the U.S. Attorney for the District of Delaware)."); *see also* D.I. 80 at 13 ("Special Counsel Weiss ignores that the statute still requires that the covered person be a lower-case 'independent counsel' – in a similar sense to the Independent Counsel the

appropriation was primarily intended to fund – and he is in no sense 'independent' from the United States government that he already serves as U.S. Attorney.")). Yet the plain language of the appropriation imposes no such mandate that the special counsel be selected from outside the government in order to receive funds. *See* Pub. L. No. 100-202, 101 Stat. 1329 (Dec. 22, 1987). And, of course, Defendant's argument also ignores the fact that the permanent appropriation has been used to fund at least two other special counsel who were sitting U.S. Attorneys at the time of appointment: Patrick Fitzgerald, U.S. Attorney for the Northern District of Illinois, and John Durham, U.S. Attorney for the District of Connecticut. *See supra* n.3.

In fact, in auditing the expenditures of Special Counsel Fitzgerald, the Government Accountability Office ("GAO") rejected Defendant's argument, finding that a sitting U.S. Attorney appointed as special counsel can qualify as "independent counsel" within the meaning of the appropriation's "other law" language. *See Special Counsel and Permanent Indefinite Appropriation*, GAO B-302582, 2004 WL 2213560 (Sept. 30, 2004). The GAO concluded that, notwithstanding the fact that he was continuing to serve as a U.S. Attorney, Mr. Fitzgerald's special counsel expenditures could be funded by the permanent appropriation because (1) the appropriation itself did not condition such funds on the "independent counsel" being selected from outside the government and because (2) Mr. Fitzgerald was lawfully appointed as an "independent counsel" pursuant to relevant "other law" (*i.e.*, §§ 509, 510 and 515). *Id.* at *1-4. In reaching the latter conclusion, the GAO noted that when constitutional challenges to the independent counsel statutes (*i.e.*, § 591 *et seq.*) were ongoing in 1987, the Attorney General began using other statutory authority (*e.g.*, §§ 509, 510 and 515) to appoint the same people to serve as independent counsel so as to avoid any interruption in investigations if the independent counsel statutes were found unconstitutional. *See* GAO B-302582, 2004 WL 2213560, at *3. Those appointments occurred

around the time that Congress was considering the bill that ultimately enacted the permanent indefinite appropriation into law. *Id.* Therefore, in the GAO's opinion, independent counsel appointed under §§ 509, 510 and 515 were the independent counsel appointed pursuant to "other law" referenced in the appropriation. Because Special Counsel Fitzgerald was appointed under that statutory authority, he was an "independent counsel" contemplated by the appropriation and his special counsel expenditure funding therefrom was proper. GAO B-302582, 2004 WL 2213560, at *4. Defendant cites no cases or other authority that have reached a different conclusion or even cast doubt on the one reached by the GAO. The Court has found none either.

Although Special Counsel Weiss was appointed under the same statutory authority,[5] Defendant claims that the GAO's findings are nevertheless inapplicable here because Special Counsel Fitzgerald was "delegated the full authority of the Attorney General" and was therefore more independent than Special Counsel Weiss. Defendant points out that the appointment of Mr. Fitzgerald made clear that Part 600 did not apply to him, whereas the order appointing Mr. Weiss as Special Counsel expressly provides that he is subject to 28 C.F.R. §§ 600.4-600.10. *See* ORDER NO. 5730-2023 at 2. In Defendant's view, Mr. Weiss being subject to the reporting and supervision requirements of 28 C.F.R. § 600.7 destroys any claim that he is independent enough to receive funding from the permanent appropriation for independent counsel. (D.I. 80 at 13-14). Defendant may be correct that Mr. Weiss is subject to certain reporting and supervision requirements that Special Counsel Fitgerald was not, but Mr. Weiss remains free from the day-to-day supervision of the DOJ, and his prosecutorial (and other) decisions may only be overturned when the Attorney General finds the action "so inappropriate or unwarranted under established

[5] The Attorney General also cited his authority under § 533 in his appointment of Mr. Weiss. *See* ORDER NO. 5730-2023 at 2.

[DOJ] practices." 28 C.F.R. § 600.7(b). Indeed, the Special Counsel's decisions are to be given "great weight." *Id.* And if the Attorney General rejects the Special Counsel's decision(s), that must ultimately be disclosed to Congress. *Id.* Defendant thus ignores the substantial degree of independence that Special Counsel Weiss has notwithstanding that he remains subject to the DOJ regulations. Moreover, neither the GAO nor any court has reached the conclusion that Defendant advocates here – *i.e.*, that special counsel subject to the special counsel regulations cannot be "independent" within the meaning of the appropriation. In fact, one court has suggested the opposite. *See Stone*, 394 F. Supp. 3d at 21 ("[T]hat the regulation calls for a certain level of oversight and compliance with the policies and procedures of the Department of Justice does not mean a special counsel is not 'independent' as that term is generally understood and as it was used in the permanent appropriation.").

Because Mr. Weiss was lawfully appointed under §§ 509, 510 and 515 to serve as Special Counsel to conduct investigations and prosecutions relating to this criminal matter, he is an "independent counsel" appointed pursuant to "other law" within the meaning of the permanent appropriation and, as such, the funds of such appropriation may lawfully be used for his expenditures. *See, e.g.*, *Stone*, 394 F. Supp. at 20 ("The phrase 'other law' sweeps broadly, and sections 509, 510, and 515 are surely 'other law' under which special attorneys – including special counsel who investigate the President – may be appointed."). Defendant has failed to convince the Court that funding of the Special Counsel's prosecution in this case violates the Appropriations Clause.[6]

[6] Defendant has also failed to show that the appropriate remedy for a violation of the Appropriations Clause is dismissal rather than an injunction to allow for a funding transition.

For the reasons set forth above, IT IS HEREBY ORDERED that Defendant's motion to dismiss (D.I. 62) is DENIED.

The Honorable Maryellen Noreika
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 23-61 (MN)
	)	
ROBERT HUNTER BIDEN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

David C. Weiss, Special Counsel, Leo J. Wise, Principal Senior Assistant Special Counsel, Derek E. Hines, Senior Assistant Special Counsel, U.S. Department of Justice, Wilmington, DE – attorneys for Plaintiff

Bartholomew J. Dalton, DALTON & ASSOCIATES, P.A., Wilmington, DE; Abbe David Lowell, Christopher D. Man, WINSTON & STRAWN, Washington, DC – attorneys for Defendant

April 12, 2024
Wilmington, Delaware

NOREIKA, U.S. DISTRICT JUDGE

On September 14, 2023, a federal grand jury indicted Defendant Robert Hunter Biden ("Defendant") on three charges: knowingly making a false written statement intended to deceive in connection with acquiring a firearm in violation of 18 U.S.C. § 922(a)(6) and 924(a)(2); knowingly making a false statement in connection with acquiring a firearm in violation of 18 U.S.C. § 924(a)(1)(A); and possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). (D.I. 40). Presently before the Court is Defendant's motion to dismiss the indictment based on immunity purportedly conferred by a pretrial diversion agreement. (D.I. 60). For the reasons set forth below, the Court DENIES Defendant's motion.

I. BACKGROUND

On June 20, 2023, the government filed two Informations against Defendant. One charged Defendant with two misdemeanor tax offenses under 26 U.S.C. § 7203 ("the Tax Case"), and the other with one count of possession of a firearm by a person who is an unlawful user of or addicted to a controlled substance in violation of 18 U.S.C. § 922(g)(3) ("the Firearm Case"). (*See* D.I. 2; *see also* Misdemeanor Information, *United States v. Biden*, Cr. A. No. 23-mj-274 (D. Del. June 20, 2023), D.I. 2). On the same day, the government filed a letter indicating that Defendant had agreed to plead guilty to both misdemeanor tax offenses and also agreed to enter a pretrial diversion program as to the felony firearm charge. (D.I. 1). The Court set a hearing for July 26, 2023.

As to the misdemeanor tax charges, the parties proposed a Memorandum of Plea Agreement ("the Plea Agreement"), whereby Defendant would plead guilty to two counts of willful failure to pay tax in violation of 26 U.S.C. § 7203 and, in exchange, the government would, *inter alia*, "not oppose a two-level reduction in the Offense Level pursuant to [United States Sentencing Guidelines Manual] § 3E.1(a)" at the time of sentencing and "recommend a sentence

of probation." (Cr. A. No. 23-mj-274, D.I. 28 ¶¶ 1, 3, 4 & 5.a-5.c, 6).[1] The Plea Agreement itself contained no language indicating that, in exchange for Defendant's guilty plea, the government was agreeing to dismiss or forego any charges, but it did reference a pretrial diversion agreement ("the Diversion Agreement") related to the firearm charge, the latter of which did contain an agreement not to prosecute. (*Id.* ¶ 5.b; *see also* D.I. 24, Ex. 1 (Diversion Agreement)).

Under the proposed terms of the Diversion Agreement, Defendant would (1) not purchase or possess a firearm during the relevant diversion period, (2) consent to permanent entry into the National Instant Criminal Background Check System so that he will be denied any attempt to legally purchase a firearm, and (3) forfeit his rights and interest in all firearms and ammunition related to the charge referenced in the Information. (D.I. 24, Ex. 1 ¶¶ 9.a-9.c). Defendant also agreed to be subject to "pretrial diversion supervision" by the U.S. Probation and Pretrial Service Office in the District of Delaware ("Probation"), to continue to actively seek employment, to refrain from unlawfully possessing or using any controlled substance, to refrain from using alcohol, to submit to substance-abuse testing and treatment, to submit to fingerprinting by the FBI, to communicate to Probation all international travel plans, and to not violate any federal, state or local law. (*Id.* ¶¶ 10.a-10.h). The proposed Diversion Agreement also cross-referenced the Plea Agreement in the tax cases and stated:

> The United States agrees not to criminally prosecute Biden, outside of the terms of this Agreement, for any federal crimes encompassed by the attached Statement of Facts (Attachment A) and the Statement of Facts attached as Exhibit 1 to the Memorandum of Plea Agreement [in the Tax Case] filed this same day. This Agreement does not provide any protection against prosecution for any future conduct by Biden or by any of his affiliated businesses.

[1] The parties docketed the Plea Agreement and Diversion Agreement in their respective actions on August 2, 2023. (*See* D.I. 24, Ex. 1 (Diversion Agreement); *see also* D.I. 28 in Cr. A. No. 23-mj-274 (Plea Agreement)).

(D.I. 24, Ex. 1 ¶ 15). The Diversion Agreement defined the "Diversion Period" as "twenty-four (24) months, beginning on the date of approval of this Agreement, unless there is a breach as set forth in paragraphs 13 and 14." (*Id.* ¶ 1; *see also id.* ¶ 2).

Defendant made his initial appearance in both criminal actions on July 26, 2023. (*See* D.I. 16). During that appearance, the Court conducted a plea colloquy under Federal Rule of Criminal Procedure 11 for the tax charges before turning to a substantive discussion of the Plea Agreement and then the Diversion Agreement. (D.I. 16 at 11:8-17:5). Although the parties represented that the Plea Agreement was presented under Rule 11(c)(1)(B), it became apparent at the hearing that, in exchange for his guilty plea on the tax charges, Defendant had been relying on promises of immunity from outside the Plea Agreement:

> THE COURT: . . . . Mr. Biden, does the written [Plea A]greement as summarized by Mr. Wise accurately reflect the agreement you have reached with the government?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Has anyone threatened you or forced you into entering this written agreement?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: Has anyone made you any promises that are not contained in the written agreement?
>
> [DEFENDANT'S COUNSEL]: Your Honor, with the exception of the Diversion Agreement –
>
> THE COURT: We're not making an exception. I want to know, has anyone made you any promises that are not contained in the written Memorandum of Plea Agreement?
>
> [DEFENDANT'S COUNSEL]: Yes, there are promises from the government in the Diversion Agreement, Your Honor.

> THE COURT: And sir, are you relying on the promises made in the Diversion Agreement in connection with your agreement to plead guilty?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: And if the Diversion Agreement were not valid or unenforceable for any reason, would you enter into the Memorandum of Plea Agreement?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: . . . .Paragraph 15 of the Diversion Agreement states the United States agrees not to criminally prosecute Biden outside of the terms of this agreement for any federal crimes encompassed by the attached statement of facts, Attachment A to the Diversion Agreement, and the statement of facts attached as Exhibit 1 to the Memorandum of Plea Agreement filed this same day. This agreement does not provide any protection against prosecution for any future conduct by Biden or by any of his affiliated businesses.
>
> And just so we're clear I think you already answered this, sir, but are you relying on that promise in connection with your agreement to accept the Memorandum of Plea Agreement and plead guilty?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: If that provision were not valid or not enforceable, would you accept the Memorandum of Plea Agreement?
>
> THE DEFENDANT: No, Your Honor.
>
> THE COURT: If you had no immunity from the government, perhaps even a different prosecutor and the government could bring a felony tax evasion charge or drug charges against you, would you still enter the plea agreement and plead guilty to these tax charges?
>
> THE DEFENDANT: No, Your Honor.

(D.I. 16 at 39:2-41:5; *see also id.* at 17:6-21 (both parties stating that the Plea Agreement was being offered under Rule 11(c)(1)(B))). Under oath, Defendant repeatedly told the Court that his guilty plea in the Tax Case was conditional on the immunity conferred by the Diversion Agreement in the Firearm Case – *i.e.*, the government's promise not to prosecute Defendant "for any federal

crimes encompassed by" the statement of facts attached to both the Diversion Agreement and Plea Agreement. (D.I. 24, Ex. 1 ¶ 15). Concerned by the interrelatedness of the two agreements and the implications of the Plea Agreement instead being one under Rule 11(c)(1)(A),[2] the Court pressed the parties on their respective understandings as to the government's promises in exchange for Defendant's guilty plea on the tax charges. (D.I. 16 at 41:6-42:23). The Court briefly recessed the hearing so that the parties could discuss. (*Id.* at 42:24-43:8).

After the hearing resumed, Defendant's attorney changed course, insisting that Defendant was "ready to enter a plea to that plea agreement without contingency, without reservation, and without connection" – and seemingly without any of the immunity conferred by the Diversion Agreement. (D.I. 16 at 43:17-19; *see id.* at 44:21-23 ("Yes, my client would resolve this case on these terms in the hypothetical situation that exist without that Diversion Agreement.")). Defendant himself, again under oath, similarly reversed his position. (*Id.* at 45:3-18).

Having received contradictory sworn statements about Defendant's reliance on immunity, the Court proceeded to inquire about the scope of any immunity. At this point, it became apparent that the parties had different views as to the scope of the immunity provision in the Diversion Agreement. In the government's view, it could not bring tax evasion charges based on the conduct set forth in the Plea Agreement, nor could it bring firearm charges based on the particular firearm identified in the Diversion Agreement, but unrelated charges – *e.g.*, under the Foreign Agents Registration Act – were permissible. (D.I. 16 at 54:13-55:9). Defendant disagreed. (*Id.* at 55:17-18). At that point, the government appeared to revoke the deal (*id.* at 55:22) and proceedings were again recessed to allow the parties to confer in light of their fundamental misunderstanding as to

[2] The government admitted that an agreement not to prosecute recited in the Plea Agreement itself would bring that agreement within Rule 11(c)(1)(A). (D.I. 16 at 46:23-47:4).

the scope of immunity conferred by the Diversion Agreement (*id.* at 57:1-7). The hearing resumed, with Defendant's attorney again reversing position and explaining to the Court that the immunity provision covered only federal crimes related to "gun possession, tax issues, and drug use." (*Id.* at 57:23-24).

Before deciding how to proceed, the Court turned to further discussion of the Diversion Agreement. The government recited a summary of the terms of the agreement (D.I. 16 at 83:4-90:12), and the Court asked about the unusual procedure regarding a potential breach found in Paragraph 14:

> If the United States believes that a knowing material breach of this Agreement has occurred, it may seek a determination by the United States District Judge for the District of Delaware with responsibility for the supervision of this Agreement. Upon notice to Biden, the United States may seek a determination on a preponderance of the evidence presented to such District Judge. Biden shall have the right to present evidence to rebut any such claim in such proceeding. If after that process the judge overseeing such process makes a final determination that Biden committed a knowing material breach of this Agreement, then the United States may elect from [one of the two] following remedies depending on the nature and seriousness of the breach . . . .

(D.I. 24, Ex. 1 ¶ 14). The Court pressed the government on the propriety of requiring the Court to first determine whether Defendant had breached the Diversion Agreement before the government could bring charges – effectively making the Court a gatekeeper of prosecutorial discretion. (D.I. 16 at 92:22-95:17). Acknowledging that such a requirement was without precedent, the government offered little defense for such a limitation on its power to charge. (*Id.* at 95:3-10). After raising the possibility that such a limitation might be unconstitutional or that the Court might refuse to undertake the tasks the parties assigned to it, the Court questioned the validity of the entire Diversion Agreement given the absence of a severability provision. (*Id.* at 98:5-19). The parties attempted to analogize the breach procedure to a violation of supervised release, but the

Court was left with unanswered questions about the constitutionality of the breach provision, leaving open the possibility that the parties could modify the provision to address the Court's concerns. (*Id.* at 102:5-106:2).

At the conclusion of the hearing, the Court explained that it could not accept or reject the Plea Agreement as offered. The Court remained unconvinced that the Plea Agreement was properly offered under Rule 11(c)(1)(B) and concerned that, if not, Defendant's contradictory sworn testimony as to whether he believed the Diversion Agreement's immunity was part of his plea bargain left issues unresolved – as did the confusion surrounding the scope of immunity. (D.I. 16 at 104:19-105:2; *see also id.* at 107:2-108:7). The Court asked for further briefing on these issues, as well as on the constitutionality and severability of the Diversion Agreement's breach provision. (*Id.* at 105:23-106:2). The Court also suggested that the parties clarify the scope of any immunity conferred by the immunity provision of the Diversion Agreement. (*Id.* at 105:16-22). Defendant then entered a plea of not guilty. (*Id.* at 109:6-10).

On August 11, 2023, the government filed a motion to vacate the Court's briefing schedule in both criminal actions, as well a motion to dismiss the Information in the Tax Case so that charges could be brought in another venue, because the parties were at an impasse on both the Plea Agreement and Diversion Agreement. (*See* D.I. 25, *see also* D.I. 30 & 31 in Cr. A No. 23-mj-274). That same day, United States Attorney David Weiss was appointed as special counsel to conduct the ongoing investigations relating to these two criminal matters, as well as to conduct investigations into matters arising from the ongoing ones. *See* OFF. OF THE ATT'Y GEN., ORDER NO. 5730-2023, APPOINTMENT OF DAVID C. WEISS AS SPECIAL COUNSEL (2023); *see also id.* (also authorizing David Weiss to prosecute federal crimes arising from the investigations).

On September 14, 2023, a federal grand jury returned an indictment against Defendant charging him with three firearm offenses: knowingly making a false written statement intended to deceive in connection with acquiring a firearm in violation of §§ 922(a)(6) and 924(a)(2); knowingly making a false statement in connection with acquiring a firearm in violation of § 924(a)(1)(A); and possession of a firearm by a prohibited person in violation of §§ 922(g)(3) and 924(a)(2). (D.I. 40). The indictment contained the same unlawful possession charge that was present in the original Information (D.I. 1), along with two additional charges for making a false statement in connection with acquiring a firearm. On October 3, 2023, Defendant made his initial appearance and was arraigned on the indictment. (D.I. 49). On October 4, 2023, the government moved to dismiss the earlier filed firearm Information (D.I. 51 & 52) and the Court granted that motion on October 19, 2023 (D.I. 57).

Pretrial motions were due on December 11, 2023. To date, Defendant has filed one motion for issuance of subpoenas *duces tecum* pursuant to Federal Rule of Criminal Procedure 17(c) (D.I. 58), four pretrial motions to dismiss the indictment based on various grounds (D.I. 60, 61, 62, 63), one motion for discovery and an evidentiary hearing relating to his selective and vindictive prosecution motion (D.I. 64) and one motion to compel discovery (D.I. 83). This opinion addresses Defendant's motion to dismiss the indictment on the grounds that the government is barred from bringing these charges by the existence of the Diversion Agreement. (D.I. 60).

II. DISCUSSION

Both sides agree that diversion agreements are contracts to be interpreted in accordance with the principles of contract law. (*Compare* D.I. 60 at 8-10 (Defendant asserting that the Diversion Agreement "is a binding and enforceable contract" and citing contract cases); *with* D.I. 69 at 8-9 (the government noting that plea agreements are analyzed under contract law standards and analogizing plea agreements to diversion agreements)). And both sides agree that

the Diversion Agreement here is a contract to be interpreted under Delaware law. (*Compare* D.I. 60 (Defendant citing Delaware contract law), *with* D.I. 69 at 8-9 (government citing Delaware contract law)). Any mutual understanding as to the Diversion Agreement stops here. What remains is a contentious fight over whether the agreement is a valid contract that binds the parties today. Defendant argues that it is and that the "broad immunity" conferred by the Diversion Agreement requires dismissal of the indictment in this case. (D.I. 60 at 21-23). The government argues that the Diversion Agreement is not in effect – and never was. (D.I. 69 at 7). For the reasons discussed below, the Court finds that the Diversion Agreement is not an effective agreement and therefore its immunity provision does not require dismissal of the indictment.

A. The Diversion Agreement Required Probation's Approval

The issue before the Court is whether the Diversion Agreement is in effect – if it is, then the firearm charges against Defendant in this case would appear to be prohibited by Paragraph 15 of the agreement (unless Defendant is in breach). The crux of the dispute between the parties about whether the Diversion Agreement is in effect is whether Probation's signature, evidencing approval, was required. In short, the government maintains that Probation had to approve the agreement for it to become effective, whereas Defendant contends that no such approval was required. The source of this disagreement is the language found in the first two numbered paragraphs of the Diversion Agreement:

> 1. The term of this Agreement shall be twenty-four (24) months, beginning on the date of approval of this Agreement, unless there is a breach as set forth in paragraphs 13 and 14. Obligations hereunder survive the term of this Agreement only where this Agreement expressly so provides.
>
> 2. The twenty-four (24) month period following the execution and approval of this Agreement shall be known as the "Diversion Period."

(D.I. 24, Ex. 1 ¶¶ 1-2). In Defendant's view, "approval" only means approval by two parties – the government and Defendant. (D.I. 60 at 8-10 & 16-18). That is, if and when those two parties execute the signature page, the term of the Diversion Agreement (*i.e.*, the Diversion Period) begins to run. The government maintains that "approval" refers to approval by Probation and that the Diversion Agreement never becomes effective (and the Diversion Period never begins to run) if Probation fails to execute the signature page. (D.I. 69 at 10-14). Although both sides apparently agree that "approval" is used unambiguously in the Diversion Agreement, they dispute what that "approval" means. (*Compare* D.I. 60 at 8, *with* D.I. 69 at 8-9 & n.5). To resolve the parties' dispute over the meaning of "approval," the Court turns to basic principles of contract interpretation.

"Delaware adheres to the 'objective' theory of contracts, *i.e.* a contract's construction should be that which would be understood by an objective, reasonable third party." *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (Del. 2010) (quoting *NBC Universal v. Paxson Commc'ns*, No. 650-N, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)). "The true test is not what the parties to the contract intended [a term] to mean, but what a reasonable person in the position of the parties would have thought it meant." *Rhone-Poulenc Basic Chemicals Co. v. Am. Motorists Ins. Co.*, 616 A.2d 1192, 1196 (Del. 1992). "If a writing is plain and clear on its face, *i.e.*, its language conveys an unmistakable meaning, the writing itself is the sole source for gaining an understanding of intent." *City Investing Co. Liquidating Tr. v. Cont'l Cas. Co.*, 624 A.2d 1191, 1198 (Del. 1993); *see also Eagle Indus., Inc. v. DeVilbiss Health Care, Inc.*, 702 A.2d 1228, 1232 (Del. 1997) ("If a contract is unambiguous, extrinsic evidence may not be used to interpret the intent of the parties, to vary the terms of the contract or to create an ambiguity."). "The determination of ambiguity lies within the sole province of the court." *Osborn*, 991 A.2d at 1160.

Although the parties dispute the meaning of "approval" and whose approval is required by the Diversion Agreement, the relevant language unambiguously requires Probation to approve the agreement. *See Osborn*, 991 A.2d at 1160 ("The parties' steadfast disagreement over interpretation will not, alone, render the contract ambiguous."). There are just three references to the word "approval" or any variation thereof in the Diversion Agreement. Paragraphs 1 and 2 each recite "approval" when describing and defining the term of the agreement (*i.e.*, the Diversion Period). (D.I. 24, Ex. 1 ¶¶ 1-2). As set forth above, Paragraph 1 of the Diversion Agreement explicitly provides that the term shall be twenty-four months "beginning on the date of approval," and Paragraph 2 defines the "Diversion Period" as the twenty-four months "following the execution and approval" of the agreement. The only other place that any variant of the word "approve" appears is on the last page of the Diversion Agreement – above a line intended for the Chief of Probation's signature. (*Id.* at 9). And Probation's signature line is the only one accompanied by the phrase "APPROVED BY." (*Id.*). Neither the government nor Defendant's signature line carry the same words; instead, they are preceded only by the phrase "ON BEHALF OF." (*Id.*). There are no other references to the concept of or the word approval in the Diversion Agreement. Simply put, the only place where any person or entity is to indicate approval is reserved for Probation – no one else. A reasonable person viewing the plain language of the agreement would understand that it was parties' intent to require Probation's explicit approval before the agreement becomes effective and the Diversion Period begins to run.

In light of this plain language, the Court is unpersuaded by Defendant's suggestion that the recited "approval" merely means approval by the parties – *i.e.*, by the government and Defendant. (D.I. 60 at 16). Delaware courts must "read a contract as a whole and . . . give each provision and term effect, so as not to render any part of the contract mere surplusage." *Kuhn Const., Inc. v.*

Diamond State Port Corp., 990 A.2d 393, 396-97 (Del. 2010); *see also NAMA Holdings, LLC v. World Mkt. Ctr. Venture, LLC*, 948 A.2d 411, 419 (Del. Ch. 2007) ("Contractual interpretation operates under the assumption that the parties never include superfluous verbiage in their agreement, and that each word should be given meaning and effect by the court."), *aff'd*, 945 A.2d 594 (Del. 2008). In Paragraph 2 of the Diversion Agreement, there is a distinction made between execution and approval: "[t]he twenty-four (24) month period following the execution and approval of this Agreement shall be known as the 'Diversion Period.'" (D.I. 24, Ex. 1 ¶ 2). That is, the agreement calls for execution ***and*** approval before the agreement goes into effect and the Diversion Period begins to run. Presumably, neither the government nor Defendant (or any other reasonable party) would execute the Diversion Agreement without having approved it first, so the phrase "execution and approval" must require approval separate and apart from execution by the parties. And the only additional approval ever sought by the Diversion Agreement is found on the signature page – where Probation signs to indicate approval. Thus, the "approval" recited in the phrase "execution and approval" means Probation's approval. This conclusion is bolstered by the fact that, if Defendant were correct that only the parties' approval is required to satisfy this "approval" language, then the signature section for Probation accompanied by the words "APPROVED BY" would be superfluous. An interpretation that leaves surplusage in a contract is rarely the correct answer. In the Court's view, the Diversion Agreement unambiguously requires Probation's approval for the agreement to become effective.[3]

[3] Defendant also argues that the signature line for Probation's approval was merely to indicate that it approved supervisory responsibility for Defendant. The Court is unpersuaded, particularly because the Diversion Agreement clearly states that the Diversion Period begins to run upon approval – and the only entity whose approval is called for anywhere is that of Probation.

Having determined that the Diversion Agreement required Probation's approval to enter into effect, the Court now turns to whether such approval was, in fact, given. Probation did not sign on the line provided to indicate approval of the Diversion Agreement. (D.I. 24, Ex. 1 at 9). Thus, as evidenced by the document itself, Probation did not approve. Defendant nevertheless suggests that Probation's approval may be implied from the fact that Probation recommended pretrial diversion and suggested revisions to the proposed agreement before the July 2023 hearing. (D.I. 60 at 18-19). The Court disagrees. That Defendant was recommended as a candidate for a pretrial diversion program does not evidence Probation's approval of the particular Diversion Agreement the parties ultimately proposed. Probation recommended that Defendant was of the type of criminal defendant who may be offered pretrial diversion and also recommended several conditions that Probation thought appropriate. (D.I. 60, Ex. S at Pages 8-9 of 9). That is fundamentally different than Probation approving the Diversion Agreement currently in dispute before the Court. And as to Probation's purported assent to revisions to the Diversion Agreement (D.I. 60, Ex. T at Page 2 of 28), Defendant has failed to convince the Court that the actions described can or should take the place of a signature required by the final version of an agreement, particularly when the parties execute the signature page. Ultimately, the Court finds that Probation did not approve the Diversion Agreement.

By its terms, the Diversion Agreement required Probation's approval – and that approval was not given.[4] Without Probation's approval, the proper trigger for the Diversion Period to start running never occurred and, as such, the Diversion Agreement never went into effect. The

[4] Although not part of the Court's decision, the Court finds it noteworthy that the government clearly stated at the hearing that "approval" meant "when the probation officer . . . signs it" and Defendant offered no objection or correction to this. (D.I. 16 at 83:13-17 & 90:13-15).

Diversion Agreement therefore provides no immunity to Defendant and no basis for dismissal of the indictment.[5]

B. The Scope of Defendant's Immunity from the Diversion Agreement Is Unclear

Even if the Diversion Agreement had been approved by Probation as required, the Court would nevertheless be unable to find it an enforceable agreement in existence today. "[A] valid contract exists when (1) the parties intended that the contract would bind them, (2) the terms of the contract are sufficiently definite, and (3) the parties exchange legal consideration." *Osborn*, 991 A.2d at 1158. Although the parties may have manifested an intent to be bound by signing the agreement, the Court is not convinced that all essential terms of the contract are sufficiently definite.[6] "A contract is sufficiently definite and certain to be enforceable if the court can – based upon the agreement's terms and applying proper rules of construction and principles of equity – ascertain what the parties have agreed to do." *Eagle Force Holdings, LLC v. Campbell*, 187 A.3d 1209, 1232 (Del. 2018). Terms are sufficiently definite if they permit a court to determine if a breach has occurred and to fashion an appropriate remedy. *Id.* (citing Restatement (Second) of Contracts § 33(2)); *see also Indep. Cellular Tele., Inc. v. Barker*, No. 15171, 1997 WL 153816, at *4 (Del. Ch. Mar. 21, 1997) ("The material terms of a contract will be deemed fatally vague or

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5 This Court recognizes that, relying largely on California and Ninth Circuit law, the judge overseeing tax charges brought against Defendant in the Central District of California decided that Probation's approval is "a condition precedent to performance, not to formation," and that the absence of Probation's approval means that "performance of the Government's agreement not to prosecute Defendant is not yet due." *United States v. Biden*, No. 2:23-cr-00599-MCS-1, 2024 WL 1432468, at *8 & *10 (C.D. Cal. Apr. 1, 2024). Neither of those issues nor that law was raised by the parties before this Court.

6 Although related and sometimes conflated, there is a difference between the first two prongs of the *Osborn* test. *See Eagle Force*, 187 A.3d 1209 at 1242 (Strine, J. concurring-in-part and dissenting-in-part). The first prong is concerned with whether there has been a meeting of the minds on all material terms of an agreement. The second prong is focused on whether the material terms are sufficiently definite so as to be enforced.

indefinite if they fail to provide a reasonable standard for determining whether a breach has occurred and the appropriate remedy."). Here, the Court is unable to find that the parties reached agreement on at least one essential term – Defendant's immunity from prosecution.[7]

Initially, the immunity provision of the Diversion Agreement recited:

> 15. The United States agrees not to criminally prosecute Biden, outside of the terms of this Agreement, for any federal crimes encompassed by the attached Statement of Facts (Attachment A) and the Statement of Facts attached as Exhibit 1 to the Memorandum of Plea Agreement filed this same day. This Agreement does not provide any protection against prosecution for any future conduct by Biden or by any of his affiliated businesses.

(D.I. 24, Ex. 1 ¶ 15). As evidenced by the Court's questions at the July 2023 hearing, the scope of immunity provided by this language was not readily apparent. The Diversion Agreement was offered in the Firearm Case only, but it contained a government promise not to prosecute any federal crimes encompassed by the Statement of Facts attached to the Plea Agreement in the Tax Case. And the Statement of Facts in the Tax Case was expansive in its reach. Those facts covered a time period ranging from at least 2015 to 2021. (*See* Cr. A. No. 23-mj-274, D.I. 28, Ex. 1). And those facts describe conduct at least on behalf of Defendant, other domestic individuals, domestic corporations and foreign business entities. (*Id.*). The Court struggled to understand from the terms of the agreement what charges would be prohibited by the words of this provision versus those that would be permissible – a critical issue for any later determination of whether the government may be in breach of its promise not to prosecute. Pressing the parties on their respective understandings of what conduct was protected by the immunity from prosecution led to a collapse of the agreement in court. (D.I. 16 at 54:10-55:22).

[7] The Court assumes that it is beyond dispute that the immunity conferred by the "Agreement Not to Prosecute" in Paragraph 15 is an essential term of the Diversion Agreement.

Apparently acknowledging that the immunity provision as initially drafted was not sufficiently definite, the parties attempted to revise the scope of the immunity conferred by the Division Agreement orally at the July 2023 hearing. (*See* D.I. 16 at 57:19-24 ("I think there was some space between us and at this point, we are prepared to agree with the government that the scope of paragraph 15 relates to the specific areas of federal crimes that are discussed in the statement of facts which in general and broadly relate to gun possession, tax issues, and drug use.")). The Court recognizes that Delaware law permits oral modifications to contracts even where the contract explicitly provides that modifications must be in signed writings, as the Diversion Agreement did here. (*See* D.I. 24, Ex. 1 ¶ 19 ("No future modifications of or additions to this Agreement, in whole or in part, shall be valid unless they are set forth in writing and signed by the United States, Biden and Biden's counsel.")). That being said, although the government asserted that that oral modification was binding (D.I. 16 at 89:9-14), the Court has never been presented with modified language to replace the immunity provision found in Paragraph 15. The Court therefore cannot determine whether the parties agreed to a sufficiently definite immunity term – an essential term of the Diversion Agreement.

C. The Parties Never Addressed the Court's Concerns about the Constitutionality of the Breach Provision in Paragraph 14

Contractual provisions that are against public policy are void. *See Lincoln Nat. Life Ins. Co. v. Joseph Schlanger 2006 Ins. Tr.*, 28 A.3d 436, 441 (Del. 2011) ("[C]ontracts that offend public policy or harm the public are deemed void, as opposed to voidable."). "[P]ublic policy may be determined from consideration of the federal and state constitutions, the laws, the decisions of the courts, and the course of administration." *Sann v. Renal Care Centers Corp.*, No. 94A-10-001, 1995 WL 161458, at *5 (Del. Super. Ct. Mar. 28, 1995). Embedded in the Diversion Agreement's breach procedure is a judicial restriction of prosecutorial discretion that may run afoul of the

separation of powers ensured by the Constitution. *See, e.g.*, *United States v. Nixon*, 418 U.S. 683, 693 (1974) ("[T]he Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case . . . ."); *United States v. Wright*, 913 F.3d 364, 374 (3d Cir. 2019) ("[A] court's power to preclude a prosecution is limited by the separation of powers and, specifically, the Executive's law-enforcement and prosecutorial prerogative.").

At the hearing in July 2023, the Court expressed concern over the breach provision of the Diversion Agreement and the role the parties were attempting to force onto the Court.[8] (*See* D.I. 16 at 92:12-98:19). In the Court's view, the parties were attempting to contractually place upon the Judicial Branch a threshold question that would constrain the prosecutorial discretion of the Executive Branch as to the current Defendant. As the government admitted, even if there were a breach, no charges could be pursued against Defendant without the Court first holding a hearing and making a determination that a breach had occurred. (*Id.* at 94:10-15). If the Court did not agree to follow the procedure, no charges could be pursued against Defendant. (*Id.* at 94:16-20). Mindful of the clear directive that prosecutorial discretion is exclusively the province of the Executive Branch, the Court was (and still is) troubled by this provision and its restraint of prosecutorial decisions. Although the parties suggested that they could modify this provision to address the Court's concerns (*id.* at 103:18-22), no language was offered at the hearing or at any time later. And no legal defense of the Diversion Agreement's breach provision has been provided to the Court – the deals fell apart before any supplemental briefing was received.

Even if the Court were to find the Diversion Agreement was approved by Probation as required and the scope of immunity granted sufficiently definite, the Court would still have

[8] It is an odd situation indeed where contracting parties attempt to obligate a federal trial court to perform in some way but never seek that court's consent to be bound.

questions as to the validity of this contract in light of the breach provision in Paragraph 14. To be clear, the Court is not deciding that the proposed breach provision of Paragraph 14 is (or is not) constitutional. Doing so is unnecessary given that the Diversion Agreement never went into effect. The Court simply notes that, if the Diversion Agreement had become effective, the concerns about the constitutionality of making this trial court a gatekeeper of prosecutorial discretion remain unanswered. And because there is no severability provision recited in the contract, more would be needed for the Court to be able to determine whether this provision could properly remain in the Diversion Agreement and whether the contract could survive should the Court find it unconstitutional or refuse to agree to serve as gatekeeper.

D. Judicial Estoppel Does Not Apply Against the Government Here

Defendant also argues that judicial estoppel prevents the government from repudiating the Diversion Agreement or arguing that Probation did not agree to the Diversion Agreement. (D.I. 60 at 20-21). According to Defendant, the government represented to the Court that the Diversion Agreement was approved by Probation and in effect and, as such, the government is judicially estopped from arguing there is no Diversion Agreement in effect. (*Id.* at 20). Defendant, however, cites no law to support his argument that judicial estoppel should apply here; in fact, Defendant does not even present the relevant test for judicial estoppel.[9] Nor does the government – whose response is almost nonexistent. (D.I. 69 at 4 n.2). Yet even if both sides had adequately addressed this theory, the Court would nevertheless find judicial estoppel inapplicable here.

"The doctrine of judicial estoppel prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Carlyle*

[9] Defendant dedicated little effort to this argument in his opening brief, only adding sparse details and identifying particular statements (but still no law) in his reply brief. (*Compare* D.I. 60 at 20-21, *with* D.I. 78 at 13-16).

Inv. Mgmt. LLC v. Moonmouth Co. SA, 779 F.3d 214, 221 (3d Cir. 2015). Judicial estoppel is concerned with judicial integrity and serves to prevent litigants from "playing fast and loose with the courts." *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107, 121 (3d Cir. 1992) (quoting *Scarano v. Cent. R. Co. of N. J.*, 203 F.2d 510, 513 (3d Cir. 1953)). It is thus a doctrine "intended to protect the courts rather than the litigants." *Fleck*, 981 F.2d at 121-22; *see also Delgrosso v. Spang & Co.*, 903 F.2d 234, 241 (3d Cir. 1990) ("Unlike the concept of equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between the litigant and the judicial system, and seeks to preserve the integrity of the system."). "The application of judicial estoppel constitutes an exercise of a court's inherent power to sanction misconduct." *Montrose Med. Grp. Participating Sav. Plan v. Bulger*, 243 F.3d 773, 784 (3d Cir. 2001).

In the Third Circuit, judicial estoppel does not apply unless (1) the party to be estopped has taken two positions that are irreconcilably inconsistent, (2) the party's change in position was "in bad faith – *i.e.*, with intent to play fast and loose with the court" and (3) no sanction short of judicial estoppel "would adequately remedy the damage done by the litigant's misconduct." *Montrose*, 243 F.3d at 779-80. The party to be estopped need not have benefitted from the prior inconsistent position for judicial estoppel to be available. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 361 (3d Cir. 1996); *see also Krystal Cadillac-Oldsmobile GMC Truck, Inc. v. Gen. Motors Corp.*, 337 F.3d 314, 324 (3d Cir. 2003) ("[A]pplication of judicial estoppel does not turn on whether the estopped party actually benefitted from its attempt to play fast and loose with the court."). "[J]udicial estoppel is generally not appropriate where the defending party did not convince the District Court to accept its earlier position." *G-I Holdings, Inc. v. Reliance Ins. Co.*, 586 F.3d 247, 262 (3d Cir. 2009), *as amended* (Dec. 4, 2009). Whether to apply judicial estoppel

is a question committed to the Court's discretion. *See New Hampshire v. Maine*, 532 U.S. 742, 750 (2001).

As an initial matter, the Court is not convinced the government has taken "irreconcilably inconsistent" positions as to the Diversion Agreement. During the summary of the terms of the Diversion Agreement at the July hearing, the government clearly stated:

> Roman two describes the terms and conditions of the agreement. Paragraph 1 provides that it's for a two-year period, twenty-four months ***beginning on the date of approval of this agreement, and that would be when the chief probation officer, Ms. Brey [sic] signs it***, unless there is a breach as set forth in paragraphs 13 and 14.

(D.I. 16 at 83:13-17 (emphasis added); *see also* D.I. 24, Ex. 1 ¶ 1). As the Court understood that statement at the time, the government's position was that the diversion period did not begin to run until Probation's approval was given – approval to be indicated by a signature on the Diversion Agreement itself. That is, the Diversion Agreement would not become effective until approval through signature was given. That continues to be the Court's understanding today. Defendant concedes that he took no issue with this recitation of the terms despite being given the opportunity to correct. (D.I. 78 at 15). He attempts to defend that silence by arguing that "it did not seem particularly important" to object to the government's statement about approval because he purportedly believed Probation had approved the Diversion Agreement. (*Id.*). The Court is unpersuaded, particularly because the government did not merely say the Diversion Agreement "would run on upon approval." (*Id.*). The government went further – clearly stating that "approval of this agreement . . . would be when the chief probation officer . . . signs it." (D.I. 16 at 83:15-16).[10] In any event, Defendant's understanding of the government's position is irrelevant here because the doctrine of judicial estoppel is focused on protecting the Court from a litigant's

[10] Defendant has never taken the position that Probation signed the agreement. Nor could he. (*See* D.I. 24, Ex. 1 at 9 (Diversion Agreement signed by the parties but not by Probation)).

inconsistent positions. And the Court never understood the government's position to be that the Diversion Agreement was in effect with the diversion period running at the time of the hearing.

Contrary to Defendant's suggestion (D.I. 78 at 13-15), the Court can find no instance where the government asserted that the Diversion Agreement was already binding on the parties at the time of the plea hearing and regardless of the outcome of the plea hearing. The Court rejects Defendant's suggestion that statements by defense counsel can trigger judicial estoppel against the government. (*See* D.I. 78 at 15 ("Mr. Biden's counsel was not speaking in the context of some future, hypothetical world, he was clearly stating both what he understood the existing reality to be *and* that he understood the prosecution agreed. He was purporting to speak for the prosecution as well, discussing the view of the parties." (emphasis in original))). Judicial estoppel is a rarely applied doctrine that functions as a sanction against a litigant who is attempting to play fast and loose with the Court. Allowing one party to make statements on behalf of an adversary only to then turn around and allege those statements judicially estop the adversary would be a strange result – and one subject to abuse. That Defendant cites nothing in support of his argument suggests that there is no precedent for applying judicial estoppel in this way. Ultimately, the Court remains unpersuaded that the government took the position that the Diversion Agreement was a binding agreement in effect without Probation's approval as manifested by signature. In now asserting that the Diversion Agreement never became effective, the government is not taking a position that is "irreconcilably inconsistent" with any position it has previously taken with the Court.

Even if the Court were to find that the positions taken by the government were irreconcilably inconsistent, the Court would nevertheless decline to apply judicial estoppel because there is no evidence that any change in position was done in bad faith or with an intent to play fast and loose with the Court. *See Montrose*, 243 F.3d at 779. Judicial estoppel is not available as a sanction unless the inconsistent positions were assumed in bad faith. And bad faith for purposes

of judicial estoppel requires that the litigant "behaved in a manner that is somehow culpable" and that that "culpable conduct has assaulted the dignity or authority of the court." *Id.* at 781. Defendant makes no showing as to either element, seemingly suggesting that the purported inconsistencies alone are sufficient to show the government was attempting to play fast and loose with the Court. More is clearly required in this Circuit. *See Klein v. Stahl GmbH & Co. Maschinefabrik*, 185 F.3d 98, 111 (3d Cir. 1999) (bad faith in the context of judicial estoppel "must be based on more than inconsistency in factual positions"). The Court on its own can discern no bad faith or intent to play fast and loose with the Court on the part of the government.

As it is unnecessary to do so, the Court declines to reach the last prong of the inquiry – *i.e.*, whether any lesser sanction would remedy the damage done. Judicial estoppel is inapplicable here.

III. CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss the indictment based on the Diversion Agreement (D.I. 60) is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 23-61 (MN)
	)	
ROBERT HUNTER BIDEN,	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

David C. Weiss, Special Counsel, Leo J. Wise, Principal Senior Assistant Special Counsel, Derek E. Hines, Senior Assistant Special Counsel, U.S. Department of Justice, Wilmington, DE – attorneys for Plaintiff

Bartholomew J. Dalton, DALTON & ASSOCIATES, P.A., Wilmington, DE; Abbe David Lowell, Christopher D. Man, WINSTON & STRAWN, Washington, DC – attorneys for Defendant

April 12, 2024
Wilmington, Delaware

NOREIKA, U.S. DISTRICT JUDGE

Defendant Robert Hunter Biden is charged with knowingly making a false written statement intended to deceive in connection with acquiring a firearm in violation of 18 U.S.C. §§ 922(a)(6) and 924(a)(2), knowingly making a false statement in connection with acquiring a firearm in violation of 18 U.S.C. § 924(a)(1)(A), and possession of a firearm by a prohibited person in violation of 18 U.S.C. §§ 922(g)(3) and 924(a)(2). (D.I. 40). Presently before the Court are Defendant's motion to dismiss the indictment for selective and vindictive prosecution (D.I. 63) with a related motion for discovery and an evidentiary hearing (D.I. 64), as well as Defendant's motion for issuance of subpoenas *duces tecum* pursuant to Federal Rule of Criminal Procedure 17(c) (D.I. 58). For the reasons set forth below, the Court DENIES Defendant's motions.

I. BACKGROUND

The Court has set forth a detailed factual background in a prior opinion. (*See* D.I. 97). The Court will not revisit those facts and instead will limit the discussion here to the facts relevant to the motions at issue.

In October 2018, during a time when Defendant was struggling with addition, he purchased a "small firearm" after certifying that he was not an unlawful user of or addicted to any controlled substance. (D.I. 63 at 5; *see also id.* (admitting his "past drug use" was widely reported) & D.I. 40). He contends that he never loaded the firearm, never fired it and only owned it for eleven days. (D.I. 63 at 5). The gun was taken from him at some point after purchase and was discarded (along with ammunition) in a public trash can. (D.I. 68 at 7). It was discovered by a member of the public (*id.*) and later recovered by local police in Delaware, who did not pursue charges against Defendant (D.I. 63 at 5).

At some point in 2018, the government began investigating Defendant's financial affairs. (D.I. 63 at 4). That investigation spanned roughly five years and involved at least the Internal Revenue Service ("IRS") and a number of Department of Justice ("DOJ") officials from the prior and current administrations, all of whom were investigating Defendant's "tax and financial affairs, and his foreign business dealings." (*Id.* at 1 & 4-5). During the investigation, federal law enforcement became aware of Defendant's firearm purchase and his "past drug use." (*Id.* at 5).

In June 2023, the government decided to charge Defendant with several misdemeanor tax offenses and one felony firearm offense. (*See* D.I. 2; *see also* Misdemeanor Information, *United States v. Biden*, Cr. A. No. 23-mj-274 (D. Del. June 20, 2023) (tax offenses)). The parties attempted to resolve these charges with a plea agreement on the tax offenses and pretrial diversion on the firearm offense. As detailed in an earlier opinion, those efforts were unsuccessful after negotiations fell apart when it became clear that the parties had fundamentally different understandings of the scope of immunity conferred by their agreements. (*See* D.I. 97).

After the government and Defendant failed to reach final agreement on a pretrial diversion resolution for the original firearm charge, on September 14, 2023, Defendant was indicted on the three felony firearm charges currently at issue. (D.I. 40). On November 15, 2023, Defendant filed a motion seeking issuance of subpoenas *duces tecum* under Rule 17(c) to four individuals allegedly in possession of documents and information bearing on the question of whether the investigation or prosecution of Defendant was based on pressure from any Executive Branch official or other outside influences. (*See generally* D.I. 58). Nearly a month later, on December 11, 2023, Defendant filed a number of pretrial motions. Relevant here, Defendant seeks to dismiss the indictment on the basis that his prosecution is selective and vindictive and violates the separation

of powers. (*See* D.I. 63). Defendant has also moved for discovery and requested an evidentiary hearing relating to this motion to dismiss. (*See* D.I. 64).

II. LEGAL STANDARD

A. Selective and Vindictive Prosecution

The Executive Branch, led by the President, is vested with the exclusive authority to prosecute cases. *See United States v. Nixon*, 418 U.S. 683, 693 (1974). "In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985) (quoting *United States v. Goodwin*, 457 U.S. 368, 380 n.11 (1982)). As long as probable cause exists, the decision of whether or not to prosecute or to present charges to a grand jury is generally committed entirely to the prosecutor's discretion. *See Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). That being said, each charging decision must be consistent with and not run afoul of the rights and protections afforded by the Constitution. *See United States v. Batchelder*, 442 U.S. 114, 125 (1979) ("Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints."). A claim of selective prosecution is "an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996). Such a claim is founded on principles of equal protection. *Id.* at 465.

To demonstrate selective prosecution, a defendant must show that the federal prosecutorial policy was "motivated by a discriminatory purpose" and had a "discriminatory effect." *Armstrong*, 517 U.S. at 465. The defendant bears the burden of showing that "persons similarly situated have not been prosecuted" for the same offense to satisfy the "discriminatory effect" element. *United States v. Schoolcraft*, 879 F.2d 64, 68 (3d Cir. 1989). The defendant must also show that "the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or

some arbitrary factor" to satisfy the "discriminatory purpose" element. *Id.* Each of these elements must be shown with "clear evidence sufficient to overcome the presumption of regularity that attaches to decisions to prosecute." *United States v. Taylor*, 686 F.3d 182, 197 (3d Cir. 2012) (cleaned up). This standard is "a demanding one." *Armstrong*, 517 U.S. at 463.

One form of selective prosecution is vindictive prosecution, which derives from the principle that "an individual certainly may be penalized for violating the law, [but] he just as certainly may not be punished for exercising a protected statutory or constitutional right." *Goodwin*, 457 U.S. at 372; *see also Bordenkircher*, 434 U.S. at 363 ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort . . . ."). There are two ways in which a defendant may demonstrate vindictive prosecution. "First, a defendant may use evidence of a prosecutor's retaliatory motive to prove actual vindictiveness. Second, in certain circumstances, a defendant may show facts sufficient to give rise to a presumption of vindictiveness." *United States v. Paramo*, 998 F.2d 1212, 1220 (3d Cir. 1993) (citations omitted). A presumption of vindictiveness only attaches where there is a "realistic likelihood" of vindictiveness. *Id.* "The inquiry here is not whether there is a possibility that the defendant might be deterred from exercising a legal right, but whether the situation presents a reasonable likelihood of a danger that the State might be retaliating against the accused for lawfully exercising a right." *United States v. Esposito*, 968 F.2d 300, 303 (3d Cir. 1992). As the Third Circuit has warned, "courts must be cautious in adopting" such a presumption. *Id.*

B. Discovery in Support of Selective or Vindictive Prosecution

Not only is the standard for showing selective prosecution a "rigorous" one, but so is the standard for obtaining discovery in support of such a claim. *See Armstrong*, 517 U.S. at 468. ("The justifications for a rigorous standard for the elements of a selective-prosecution claim thus

require a correspondingly rigorous standard for discovery in aid of such a claim."). Six years after *Armstrong*, the Supreme Court again reiterated the significant burden facing a defendant, explaining that defendant must show "some evidence of both discriminatory effect and discriminatory intent" even to obtain discovery in support of a selective-prosecution claim. *See United States v. Bass*, 536 U.S. 862, 863 (2002). The Third Circuit has recently explained the nuanced differences between the standard to obtain discovery and the standard to prevail on the merits of a selective prosecution claim:

> A criminal defendant, however, will not often have access to the information, statistical or otherwise, that might satisfy a "clear evidence" burden. Thus, the two component cases that make up the *Armstrong*/*Bass* test – *United States v. Armstrong* and *United States v. Bass*, both of which arose from selective prosecution challenges – propounded a facially less rigorous standard for criminal defendants seeking *discovery* on an anticipated selective prosecution claim. Instead of "clear evidence," a successful discovery motion can rest on "some evidence." "Some evidence" must still include a showing that similarly situated persons were not prosecuted. Furthermore, under *Armstrong*/*Bass*, the defendant's showing must be "credible" and cannot generally be satisfied with nationwide statistics.

United States v. Washington, 869 F.3d 193, 214-15 (3d Cir. 2017) (emphasis in original) (footnotes omitted). Although the Third Circuit has not squarely addressed the standard to obtain discovery for a vindictive-prosecution claim, it appears to be the same as for selective prosecution. *See, e.g.*, *United States v. Sanders*, 211 F.3d 711, 717 (2d Cir. 2000) ("We see no reason to apply a different standard to obtain discovery on a claim of vindictive prosecution."); *see also United States v. Bucci*, 582 F.3d 108, 113 (1st Cir. 2009); *United States v. Wilson*, 262 F.3d 305, 315-16 (4th Cir. 2001). Thus, a defendant may fail to demonstrate dismissal is warranted for selective or vindictive prosecution, but discovery may nevertheless be appropriate if the defendant comes forward with some evidence of the essential elements of the underlying selective- or vindictive-prosecution claim.

III. DISCUSSION

Defendant argues that his felony firearm possession charge and the two related false-statement charges are selective and vindictive and also that they violate the separation of powers, requiring their dismissal. Before turning to the merits of Defendant's arguments, the Court must first clarify the scope and reach of Defendant's selective- and vindictive-prosecution claims.

Defendant's motion sets forth a winding story of years of IRS investigations, Congressional inquiries and accusations of improper influence from Legislative Branch and Executive Branch officials within the prior administration, including former President Trump himself. (*See* D.I. 63 at 4-20). Yet, as Defendant explains in reply, his selective and vindictive prosecution claims are focused on "the prosecution's decision to abandon the Plea and Diversion Agreement framework it had signed in response to ever mounting criticism and to instead bring this felony indictment." (D.I. 81 at 2 n.1). That decision occurred in the summer of 2023. Any allegation of selective or vindictive prosecution stemming from the IRS investigations or prior administration officials or any conduct that preceded this past summer appears largely irrelevant to the present motions. Moreover, the only charges at issue in this case are firearm charges – Defendant's financial affairs or tax-related charges (or investigations thereof) also appear irrelevant. Thus, the only charging decision the Court must view through the selective and vindictive prosecution lens is Special Counsel David Weiss's decision to no longer pursue pretrial diversion and instead indict Defendant on three felony firearm charges.

A. Selective Prosecution

Defendant argues that he has been "selectively charged for an improper political purpose" because he is the son of the sitting President, the latter of whom is a candidate in the upcoming presidential election. (D.I. 63 at 26; *see also id.* at 23 ("This case exists because Mr. Biden is politically affiliated with his father, the sitting President and a candidate for reelection, at a time

when a historically divided nation prepares for a contentious presidential election."); D.I. 81 at 8 ("Mr. Biden is being targeted because he is the son of a sitting Democratic President and a political rival of former President Trump, who seeks to defeat President Biden in the upcoming presidential election.")). To prevail on his selective-prosecution claim, Defendant must demonstrate that the Special Counsel's decision to abandon pretrial diversion on the firearm charges and proceed with indictment was "motivated by a discriminatory purpose" and had a "discriminatory effect." *Armstrong*, 517 U.S. at 465. Defendant has failed to show either.

1. Discriminatory Effect

As to discriminatory effect, Defendant must show with "clear evidence" that similarly situated persons have not been prosecuted. *See Taylor*, 686 F.3d at 197. "A similarly situated offender is one outside the protected class who has committed roughly the same crime under roughly the same circumstances but against whom the law has not been enforced." *United States v. Lewis*, 517 F.3d 20, 27 (1st Cir. 2008); *see also Washington*, 869 F.3d at 214 ("Meeting this standard generally requires evidence that similarly situated individuals of a difference race or classification were not prosecuted, arrested, or otherwise investigated."). Defendant's claim of selective prosecution differs from the more common equal protection arguments seen in cases where selective prosecution is raised – *e.g.*, the protected class comprised of individuals of a certain race or nationality. In fact, Defendant struggles to define the class to which he belongs. (*Compare* D.I. 63 at 23, 26 & 27 n.45, *with* D.I. 81 at 8-9, 11, 14). Defendant never argues that he is being selectively prosecuted because he is a member of any specific political party or because he engaged in any specific political activity.[1] Instead, he claims that his prosecution is unconstitutionally

[1] "[M]embership in a political party is protected by the First Amendment, and the mere exercise of that right cannot be punished by means of selective prosecution." *United States v. Torquato*, 602 F.2d 564, 569 n.9 (3d Cir. 1979). The closest that Defendant comes to

selective because he is being targeted politically and because he is "politically affiliated with his father." (D.I. 63 at 23; *see also id.* at 26). Thus, Defendant's articulated protected class is apparently family members of politically-important persons.[2] Like the government (D.I. 68 at 20), this Court has been unable to find any instance where a defendant's familial relationship to a politically-important person on its own gave rise to a claim of selective prosecution. Even if that were a cognizable claim, however, Defendant has failed to come forward with "clear evidence" that similarly situated individuals (*i.e.*, people who are not family members of politically-important persons) have not been prosecuted for comparable firearm-related conduct.

Defendant points to several categories of evidence that he contends support a finding of discriminatory effect. First, citing a news article, Defendant contends that Special Counsel Weiss admitted that he originally did not want to pursue the current charges in this case because "the average American" would not be charged based on the same facts. (D.I. 63 at 6, 41). Next, Defendant claims that "[s]everal experienced legal experts and law enforcement officials" agree with the Special Counsel's initial decision to not pursue charges, again citing a news article.[3] (*Id.*

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arguing this is his suggestion that he is being prosecuted because he is the son of the sitting Democratic President (and candidate for re-election) or, more broadly, because he is a Biden – a family with well-known and strong ties to the Democratic Party.

[2] To the extent that Defendant's claim that he is being selectively prosecuted rests solely on him being the son of the sitting President, that claim is belied by the facts. The Executive Branch that charged Defendant is headed by that sitting President – Defendant's father. The Attorney General heading the DOJ was appointed by and reports to Defendant's father. And that Attorney General appointed the Special Counsel who made the challenged charging decision in this case – while Defendant's father was still the sitting President. Defendant's claim is effectively that his own father targeted him for being his son, a claim that is nonsensical under the facts here. Regardless of whether Congressional Republicans attempted to influence the Executive Branch, there is no evidence that they were successful in doing so and, in any event, the Executive Branch prosecuting Defendant was at all relevant times (and still is) headed by Defendant's father.

[3] Defendant also detours into a discussion about the tax charges currently pending in California, claiming that former Attorney General Eric Holder and unidentified

at 41). Defendant then cites general statistics about federal firearm prosecutions from 2008 to 2017. (*Id.* at 42-43). According to Defendant, of the roughly 132,400 prosecutions for federal firearm offenses in this timeframe, only 1.8% were charges under § 922(g)(3). (D.I. 63 at 42). And as for charges under §§ 922(a)(6) and 924(a)(1)(A) for falsely denying unlawful drug use or addiction when attempting to purchase a firearm, Defendant claims that less than 1,000 of such false-statement cases are even referred for investigation – let alone prosecuted. (D.I. 63 at 42). None of this evidence, however, constitutes the requisite "clear evidence" that similarly situated persons were not prosecuted for the same offenses as Defendant.

As to the claim that the Special Counsel "admitted" others would not be prosecuted under the same facts, Defendant cites to a *New York Times* article quoting an anonymous source as providing that information. (D.I. 63 at 6 & n.9; *see also id.* at 37 & n.85). Yet, as the government points out, that same article goes on to say that "[a] senior law enforcement official forcefully denied" that the Special Counsel made any such statements. (D.I. 68 at 40). An anonymous source – let alone a contradicted one – is certainly not "clear evidence" of anything.

Next, as to Defendant's argument that "legal experts and law enforcement officials have agreed" with the initial decision not to prosecute Defendant for the firearm-related offenses (D.I. 63 at 41), the evidence he uses here is again a single *New York Times* article. That article also relies primarily on anonymous sources reaching generic conclusions about Defendant's case:

> A substantial percentage of those accused of lying on a federal firearms application, like Mr. Biden has been, are not indicted on that charge unless they are also accused of a more serious underlying crime, current and former law enforcement officials said. Most negotiate deals that include probation and enrollment in programs that include counseling, monitoring and regular drug testing. . . .

"Republican and Democratic U.S. attorneys . . . all agreed" that those tax charges would not have been brought absent "political pressure." (D.I. 63 at 41). Again, that is of minimal relevance here where the charging decision at issue relates only to the firearm offenses.

> When officials with the federal Bureau of Alcohol, Tobacco, Firearms and Explosives reviewed Hunter Biden's gun application several years ago, they believed the case most likely would have been dropped if the target were a lesser-known person – because the gun had not been used in a crime and Mr. Biden had taken steps to get and stay sober, according to a former law enforcement official familiar with the situation.

Glenn Thrush, *The Gun Charges Against Hunter Biden Are Unusual. Here's Why.*, N.Y. TIMES (Sept. 15, 2023), https://www.nytimes.com/2023/09/15/us/politics/hunter-biden-gun-charges.html. The only individual identified by name is John Fishwick Jr., a former U.S. Attorney for the Western District of Virginia for the time period of 2015 to 2017. He states that this case is "rare" and that "[t]hese charges are usually brought against convicted felons who illegally possess a gun or who commit a violent or drug-related charge." *Id.* Yet neither Mr. Fishwick nor any of the anonymous sources provide any specific details about the individuals who have been prosecuted for the same offenses and those who have not. And nowhere in the article is there any mention of charging practices for prosecutors here in Delaware. *See Bass*, 536 U.S. at 863-64 ("Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case) . . . ."). Simply put, the "legal experts and law enforcement officials" that Defendant relies on offer no "clear evidence" regarding the charges (or lack thereof) brought against similarly situated individuals.

The statistics cited by Defendant also fail to constitute "clear evidence" that similarly situated individuals were not prosecuted when Defendant was. Citing a report issued by the Government Accountability Office, Defendant attempts to show the discriminatory effect element by arguing that just 1.8% of the 132,464 federal firearm prosecutions between 2008 and 2017 were for persons unlawfully using or addicted to controlled substances within the meaning of § 922(g)(3). (*See* D.I. 63 at 42). Even if national statistics could suffice as "clear evidence" to

warrant dismissal on the basis of selective prosecution,[4] the statistics cited by Defendant are nevertheless deficient because they say nothing about the individuals who have been prosecuted between 2008 and 2017 under § 922(g)(3) versus those who have not – *e.g.*, there is no information about their family connections, their family's political activity, their own political activity, etc. And Defendant's evidence regarding the false-statement charges is similarly lacking, again offering no specifics about whether those prosecuted versus not are family members of politically-important persons. (*See* D.I. 42-43). At best, Defendant has offered national statistics regarding how often the government prosecutes firearm charges against persons unlawfully using or addicted to controlled substances in general. That is not "clear evidence" that Defendant was selectively prosecuted because of his familial connection to politics when similarly situated persons were not. *See Bass*, 536 U.S. at 863-64 ("[R]aw statistics regarding overall charges say nothing about charges brought against *similarly situated defendants*." (emphasis in original)).

Finally, Defendant points to several DOJ announcements of firearm-related charging policies and press releases of successful prosecutions under § 922(g)(3). (*See* D.I. 63 at 43-46). In Defendant's view, these DOJ statements evidence a prosecutorial policy regarding drug-related firearm charges that targets only violent conduct or other "aggravating factors creating risk to public safety." (*Id.* at 43-44). Setting aside the fact that the United States Sentencing Commission does appear to consider false statements on firearms applications as an aggravating factor, as the government points out, roughly half of all prohibited-person prosecutions in 2021 actually lacked

[4] In the context of a request for discovery on selective prosecution, the Supreme Court has cast doubt on the utility of national statistics instead of statistics tailored to the specific charging prosecutors. *See Bass*, 536 U.S. at 863-64 ("Even assuming that the *Armstrong* requirement can be satisfied by a nationwide showing (as opposed to a showing regarding the record of the decisionmakers in respondent's case) . . . ."). If national statistics do not suffice to obtain discovery in support of a selective-prosecution claim, those same statistics do not warrant dismissal of the charges.

any aggravating factor. (*See* D.I. 68 at 28 (discussing UNITED STATES SENTENCING COMMISSION, *What Do Federal Firearms Offenses Really Look Like?* 24-25 (July 2022))). Defendant has offered no evidence that, in any given year, all firearm-related prosecutions have included aggravating factors. Thus, although Defendant claims that recent DOJ statements and press releases indicate a policy to only prosecute firearm offenses that involve violence or threats to public safety, that is not borne out by the evidence provided. Nothing in these DOJ materials demonstrates that Defendant was prosecuted when similarly situated others were not.

Because Defendant has failed to come forward with "clear evidence" that he has been prosecuted where others similarly situated were not, he is unable to show discriminatory effect, one of the two necessary elements of a selective-prosecution claim. As such, his motion to dismiss the indictment on that basis must be denied.

2. Discriminatory Purpose

Even if Defendant had made an adequate showing as to discriminatory effect, to prevail on his claim of selective prosecution, he would still need to prove that "the decision to prosecute was made on the basis of an unjustifiable standard, such as race, religion, or some other arbitrary factor, or that the prosecution was intended to prevent his exercise of a fundamental right." *Schoolcraft*, 879 F.2d at 68. Defendant contends that the arbitrary factor driving the prosecution here is his affiliation with his politically active father. To satisfy this second element, then, Defendant needs to show with "clear evidence" that the decision to prosecute him was because he is the family member of a politically-important person. *See Wayte*, 470 U.S. at 610 ("In the present case, petitioner has not shown that the Government prosecuted him *because of* his protest activities. Absent such a showing, his claim of selective prosecution fails." (emphasis in original)); *see also Taylor*, 686 F.3d at 197. Defendant has again failed to meet his burden.

Defendant contends that the discriminatory purpose behind his prosecution is targeting based on "his political affiliations and as a proxy for the political affiliations of his father." (D.I. 63 at 27 n.45; *see also id.* at 27 ("Top GOP government officials admittedly are openly weaponizing this case to influence voters and the next presidential election.")). In attempting to show discriminatory purpose, Defendant points to past and recent statements made by former President Trump, alleged conduct of one of the former president's personal attorneys (Rudy Giuliani) and a purported criticism and pressure campaign by Congressional Republicans. (*See id.* at 27-37). None of this evidence, however, is relevant to any alleged discriminatory purpose in this case. The charging decision at issue here – from 2023 – did not occur when the former president was in office. Nor did it occur when Mr. Giuliani was purportedly trying to uncover "dirt" about Defendant and presenting that information to U.S. Attorneys across the country. (*See id.* at 30). And the pressure campaign from Congressional Republicans may have occurred around the time that the Special Counsel decided to move forward with indictment instead of pretrial diversion, but the Court has been given nothing credible to suggest that the conduct of those lawmakers (or anyone else) had any impact whatsoever on the Special Counsel. It is all speculation.

Defendant also attempts to use statements and conduct by the DOJ to support his claim of discriminatory purpose. (*See* D.I. 63 at 37-40). He alleges that the "DOJ confirmed its own improper motive" when it pursued a "rarely used gun charge" that the Special Counsel purportedly admitted would not be brought against the average American. (*Id.* at 37; *see also id.* at 38 ("That is an admission of improper motive.")). The Court has already found this evidence insufficient to show discriminatory effect; the unsupported statement of a contradicted anonymous source also cannot suffice as "clear evidence" of any discriminatory intent of the prosecutors here. Defendant then claims that the "DOJ's efforts to torpedo [the original] plea deal in response to political

blowback puts the matter to rest."[5] (*Id.* at 39). According to Defendant, the abrupt change in course from proceeding with pretrial resolution of the tax and firearm charges to pursuing indictments in both cases evidences a "a 180-degree about-face in response to congressional ire and criticism" that can only be interpreted as an improper motive. (*Id.* at 39-40). The problem with Defendant's argument, however, is that he offers nothing concrete to support a conclusion that any member of Congress – or anyone else – actually influenced the Special Counsel or his team. The Court is provided with only Defendant's speculation and suspicion. But suspicion based on temporal proximity is not "clear evidence" of discriminatory purpose, particularly where there are non-discriminatory reasons to explain the government's decision.[6]

Although Defendant asks this Court to find that the prosecution's decision to abandon pretrial diversion and proceed with indictment on the three firearm charges only occurred because of Defendant's political affiliations (or his father's political affiliations), Defendant has failed to offer "clear evidence" that that is what happened here. Moreover, in this case, there appear to be legitimate considerations that support the decision to prosecute. *See Armstrong*, 517 U.S. at 465 (recognizing "the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan" as legitimate factors that may motivate a particular prosecution). Defendant has published a book about his life, where he admitted that his firearm was taken from him at some

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[5] Defendant complains about the initial reversal from non-prosecution for all charges to seeking a guilty plea for the misdemeanor tax offenses and pretrial diversion for the firearm charges. (*See* D.I. 63 at 38-39). Defendant has made clear, however, that his selective-prosecution claim is focused on the decision to abandon pretrial diversion and pursue indictment on the three felony firearm charges – a decision that occurred after the Court's hearing in July 2023. (*See* D.I. 81 at 2 n.1).

[6] For example, the government may have simply decided it no longer wanted to follow through with pretrial diversion when it became apparent that the Court had concerns over the role that the parties wanted the Court to assume.

point after purchase and it was discarded (along with ammunition) in a public trash can, only to be discovered by a member of the public. (D.I. 68 at 2, 7). The government has an interest in deterring criminal conduct that poses a danger to public safety, and prosecutors are not frozen in their initial charging decisions. *See Goodwin*, 457 U.S. at 382 ("A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.").

Because Defendant has failed to offer "clear evidence" that the firearm charges in this case were motivated by a discriminatory purpose and with a discriminatory effect, his claim of selective prosecution must fail. Dismissal of the indictment is not warranted.

B. Vindictive Prosecution

Defendant also claims that his prosecution is vindictive. To prevail on this theory, Defendant must show either actual animus on the part of the prosecutor or that a presumption of vindictiveness applies under the facts of this case. *See Paramo*, 998 F.2d at 1220. Defendant has failed to show either.

As to actual vindictiveness, Defendant does not accuse the prosecutor here, Special Counsel Weiss, of harboring any actual animus towards him. Instead, Defendant makes claims of animus by a number of other individuals – the former president, his supporters and "other opponents of the Bidens." (D.I. 63 at 49). Yet, as was the case with selective prosecution, the relevant point in time is when the prosecutor decided to no longer pursue pretrial diversion and instead indict Defendant. Whether former administration officials harbored actual animus towards Defendant at some point in the past is therefore irrelevant. This is especially true where, as here, the Court has been given no evidence or indication that any of these individuals (whether filled with animus or not) have successfully influenced Special Counsel Weiss or his team in the decision to indict Defendant in this case. At best, Defendant has generically alleged that individuals from

the prior administration were or are targeting him (or his father) and therefore his prosecution here must be vindictive. The problem with this argument is that the charging decision at issue was made during this administration – by Special Counsel Weiss – at a time when the head of the Executive Branch prosecuting Defendant is Defendant's father. Defendant has offered nothing credible to support a finding that anyone who played a role in the decision to abandon pretrial diversion and move forward with indictment here harbored any animus towards Defendant. Any claim of vindictive prosecution based on actual vindictiveness must fail.

Defendant argues that, even in the absence of actual vindictiveness, a presumption of vindictiveness should apply because the DOJ purportedly "upped the ante" several times in response to Congressional Republicans and other outside pressure. (D.I. 63 at 50-54). First, according to Defendant, when IRS whistleblowers came forward, the ensuing "Republican fervor" caused DOJ officials to change course from allegedly pursuing no charges to a guilty plea on the tax charges and pretrial diversion on the firearm charges. (*Id.* at 50). Then, DOJ "upped the ante again" when, in response to undefined criticism, it abandoned the plea and diversion agreements and brought additional felony firearm charges. (*Id.*). And finally, Defendant accuses the DOJ of "upping the ante" a third time, indicting Defendant on nine counts of tax offenses in California because members of Congress purportedly pressured the DOJ into doing so. (*Id.* at 50-51).

As to any presumption of vindictiveness, the Court begins by noting that the Supreme Court has cast doubt on the applicability of the presumption in pretrial settings.[7] *See generally Goodwin*, 457 U.S. 368, 372-84 (discussing the propriety of the presumption in cases where a defendant successfully challenges a conviction and faces enhanced punishment upon retrial but declining to

[7] The government pointed this out in its opposition (D.I. 68 at 44) and Defendant had no response (*See* D.I. 81 at 20-22). This Court has found no cases from within the Third Circuit where a presumption of vindictiveness was applied in the pretrial context.

apply the presumption in the pretrial context where the defendant faced additional charges and enhanced punishment after refusing to plead guilty as demanded by the prosecutor). As the Supreme Court explained:

> There is good reason to be cautious before adopting an inflexible presumption of prosecutorial vindictiveness in a pretrial setting. In the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor's assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins – and certainly by the time a conviction has been obtained – it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision.

Id. at 381. Although the Supreme Court did not go so far as to hold that the presumption is categorically unavailable in the pretrial context, this Court finds that there is no reason to disregard the general concern announced in *Goodwin* and allow a presumption in the pretrial setting here.

Defendant claims that the Special Counsel's decision to abandon pretrial diversion and indict Defendant on the three felony firearm charges in this case is presumptively vindictive. (*See* D.I. 81 at 2 n.1). Because that decision occurred in the summer of 2023, his complaints about original charging decisions (or lack thereof) in this case are irrelevant, as are charging decisions for the unrelated tax offenses being pursued in another venue. Yet even as to the Special Counsel's decision to indict after failing to reach agreement on pretrial diversion, Defendant fails to identify any right that he was lawfully exercising that prompted the government to retaliate. *See Esposito*, 968 F.2d at 303. He generically claims that the "self-serving and vindictive motives" at play here "rang[e] from a desire to punish him and others for engaging in constitutionally protected speech and political activity to influencing elections, avoiding scrutiny and criticism, and other interests

unrelated to the fair administration of justice." He goes on to claim that he is being targeted because of his "familial and political affiliations" and because of unspecified "actions taken by the Administration and democratic party."[8] (D.I. 63 at 49). The only thing that appears relevant to Defendant's vindictive-prosecution claim is the purportedly "constitutionally protected speech and political activity" of Defendant.[9] But Defendant identifies no such instances of protected speech or activity with any specificity – in fact, he offers no timeframe when the right was purportedly exercised. Under these circumstances, the Court cannot find that Defendant engaged in any constitutionally protected activity such that any charging decision by the Special Counsel should be viewed as presumptively vindictive. Thus, even if a presumption of vindictiveness could be invoked in the pretrial context, Defendant has failed to demonstrate that such a presumption is appropriate here.

In sum, Defendant has failed to show that his prosecution is vindictive.

C. Separation of Powers

At the end of his selective- and vindictive-prosecution arguments, Defendant argues that his prosecution also violates the separation of powers. (*See* D.I. 63 at 54-60). The gist of

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[8] Defendant has offered no authority for the proposition that a claim of vindictiveness may exist where a defendant is being prosecuted only to target a family member, particularly where legitimate reasons may exist to prosecute the defendant in the first place.

[9] To the extent that Defendant believes that his prosecution is presumptively vindictive because additional charges were brought in response to something that transpired during the plea and pretrial diversion negotiations (and breakdown thereof), that argument would also be unavailing. If charges – including additional or more serious charges – are pursued following the failure to reach a plea agreement, that prosecution is not presumptively vindictive. *See Goodwin*, 457 U.S. at 379-80 ("Since charges brought in an original indictment may be abandoned by the prosecutor in the course of plea negotiation – in often what is clearly a 'benefit' to the defendant – changes in the charging decision that occur in the context of plea negotiation are an inaccurate measure of improper prosecutorial 'vindictiveness.'"). This Court sees no reason why the same principle should not apply in the context of a failed diversion agreement.

Defendant's argument is that the Legislative Branch has failed to respect the prosecutorial discretion vested in the Executive Branch and instead attempted to usurp that authority. (*Id.*). In particular, Defendant claims that many members of Congress "are actively interfering with DOJ's investigation" and conducting "a criminal investigation of private conduct by a private citizen" – *i.e.*, Defendant. (*Id.* at 58). He goes so far as to assert that these Legislative Branch officials "have overcome Special Counsel Weiss's independent judgment" and, even further, those officials are the reason that pretrial diversion was abandoned in favor of indictment. (*Id.*). Defendant's separation-of-powers argument is not credible.

As an initial matter, Defendant never disputes that the Executive Branch holds the ultimate power to prosecute in his case and that that branch of government is headed by his father. And Defendant does not actually accuse the Legislative Branch of successfully encroaching on or usurping the Executive Branch's power. Indeed, Defendant's argument is more subtle and nuanced; he alleges that the Legislative Branch is exerting pressure on the Special Counsel, purportedly causing him to make charging decisions that he would not otherwise make simply because members of Congress are unhappy. Yet members of the Legislative Branch pressuring Executive Branch officials or the Special Counsel to act is fundamentally different than actually making charging decisions or influencing them. And, apart from Defendant's finger-pointing and speculation, the Court has been given no evidence to support a finding that anyone other than the Special Counsel, as part of the Executive Branch, is responsible for the decision to indict Defendant in this case instead of continuing to pursue pretrial diversion. There is thus no basis to find a violation of the separation of powers under the facts here.

D. Defendant's Request for Discovery and an Evidentiary Hearing

Defendant has also filed a motion seeking discovery for his claims of selective and vindictive prosecution, as well as discovery relating to the parties' proposed pretrial diversion agreement. (*See generally* D.I. 64). Defendant has failed to meet his burden to obtain discovery.

Defendant is correct that the standard to obtain discovery is different than the standard to prevail on a motion to dismiss the indictment for selective or vindictive prosecution. (*See* D.I. 82 at 1-2). Indeed, the Third Circuit has clarified that Defendant needs to show with "clear evidence" that his prosecution was selective or vindictive to obtain dismissal, but he only needs to come forward with "some evidence" to obtain discovery. Even with that clarification, however, the Court is mindful that both standards are considered "rigorous." *Armstrong*, 517 U.S. at 468. As the Supreme Court explained:

> If discovery is ordered, the Government must assemble from its own files documents which might corroborate or refute the defendant's claim. Discovery thus imposes many of the costs present when the Government must respond to a prima facie case of selective prosecution. It will divert prosecutors' resources and may disclose the Government's prosecutorial strategy. The justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim.

Armstrong, 517 U.S. at 468. In fact, the standard is so rigorous that, as of 2017, "neither the Supreme Court nor [the Third Circuit] has ever found sufficient evidence to permit discovery of a prosecutor's decision-making policies and practices." *Washington*, 869 F.3d at 215.[10]

This is not the rare case where discovery of a prosecutor's decision-making practices will be permitted. Although Defendant insists that he has come forward with "some evidence" to move past the "frivolous state" and thus warrant discovery, the Court disagrees that Defendant has

[10] This Court has been unable to locate Third Circuit cases since 2017 permitting such discovery.

offered sufficient evidence to warrant discovery under Supreme Court and Third Circuit precedent. Most of Defendant's "evidence" consists of his description of the actions of others – actions that Defendant subjectively believes influenced the Special Counsel here. (*See* D.I. 64 at 5 ("contemporaneous handwritten notes by a former high-ranking DOJ official while on the phone with then-President Trump, IRS criminal investigation agent memorandums, quotes of then-President Trump summarized by former Attorney General Bill Barr in his memoir, and an incessant pressure campaign by partisan congresspersons and their allies, among other things.")).[11] As the Court has explained several times herein, Defendant has failed to offer anything credible to suggest that the Special Counsel's decision to abandon pretrial diversion and pursue indictment was actually influenced by any member of Congress or anyone else. And to the extent that Defendant contends his statistics entitled him to discovery, the Court disagrees. As was the case in *Washington*, Defendant's national statistics "revealed nothing about similarly situated individuals" who were not prosecuted for the same firearm-related conduct. 869 F.3d at 215. Defendant has thus failed to offer "some evidence" of discriminatory effect. That failure is itself enough to deny Defendant's request for discovery. *See Bass*, 536 U.S. at 864 ("[B]ecause respondent failed to submit relevant evidence that similarly situated persons were treated differently, he was not entitled to discovery.").

Finally, part of Defendant's motion for discovery and an evidentiary hearing relates to the parties' attempts to enter into a pretrial diversion agreement ("the Diversion Agreement"). (*See, e.g.*, D.I. 64 at 1 n.1). Defendant apparently seeks an evidentiary hearing where all of the attorneys involved in the pretrial diversion negotiations are required to testify. (*Id.*). Because the Court has

[11] Defendant's motion requesting discovery and an evidentiary hearing is just five pages long, and he waits until the fifth page to identify these "concrete instances" that purportedly entitle him to discovery. (D.I. 64 at 4-5).

previously found that the Diversion Agreement unambiguously required but did not receive Probation's approval, there is no need for discovery or such an evidentiary hearing. Extrinsic evidence is not necessary or appropriate to consider. By its unambiguous approval terms, the Diversion Agreement never went into effect and extrinsic evidence will not change that conclusion. (*See* D.I. 97).

E. Defendant's Motion for Issuance of Rule 17(c) Subpoenas

Defendant also requests an order directing that subpoenas *duces tecum* be issued to Donald J. Trump, William P. Barr, Richard Donoghue and Jeffrey A. Rosen under Rule 17(c). (*See* D.I. 58). Rule 17(c) allows a party to obtain from a witness before trial documents and other evidentiary materials that may be used at trial. FED. R. CRIM. P. 17(c). A party seeking documents under this Rule must demonstrate that (1) the documents are evidentiary and relevant, (2) the documents cannot reasonably be obtained before trial through other means, (3) the moving party cannot prepare for trial without the documents and failure to obtain the documents may unreasonably delay trial and (4) the documents are sought in good faith and not as a "general fishing expedition." *Nixon*, 418 U.S. at 699-700. The Supreme Court has cautioned that Rule 17(c) was "not intended to provide a means of discovery for criminal cases" but instead exists "to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). "Courts must be careful that [R]ule 17(c) is not turned into a broad discovery device, thereby undercutting the strict limitation of discovery in criminal cases found in [Rule] 16." *United States v. Cuthbertson* (*Cuthbertson I*), 630 F.2d 139, 146 (3d Cir. 1980).

Defendant seeks from the four subpoena targets documents and records relating to any investigations or prosecutions of (or decisions to investigate or prosecute) Defendant or, even more

broadly, any discussion of Defendant whatsoever.[12] (*See, e.g.*, D.I. 58-1 at Page 6 of 6). The time period covered by the subpoenas is vast – *i.e.*, January 2017 to present. (*Id.* at Page 4 of 6). Defendant argues that the requested documents "may be used either in pre-trial pleadings or in a pre-trial evidentiary hearing on [his] motions to dismiss the Indictment (or, potentially, another issue)." (D.I. 58 at 10). According to Defendant, he is only seeking documents "reflecting one issue, to determine whether the Subpoena Recipients or those with whom they worked pressured, discussed, influenced, or requested any investigation or prosecution of Mr. Biden, including whether any Executive Branch official placed any undue pressure on another government official to undertake the same." (*Id.* at 12). In other words, Defendant is attempting to obtain discovery from Mr. Trump, Mr. Barr, Mr. Donoghue and Mr. Rosen to support his claim of selective or vindictive prosecution. (*See id.* at 14 ("Mr. Biden seeks specific information . . . that goes to the heart of his pre-trial and trial defense that this is, possibly, a vindictive or selective prosecution that arose out of a n incessant pressure campaign that began in the last administration . . . .")). Defendant is not entitled to such discovery for at least two reasons.

First, as the government points out, Defendant was not charged with the current (or any) firearm offenses while any of the four individuals held office. (D.I. 59 at 2). The decision to prosecute Defendant was made by and during the current administration – one headed by Defendant's father and an Attorney General appointed by and serving at the pleasure of Defendant's father. And that Attorney General appointed the current Special Counsel – *i.e.*, the prosecutor who decided to abandon pretrial diversion and seek indictment in this case in the

[12] Defendant also seeks documents and records that mention Hunter Biden and relate to the January 6th, 2021 attack on the United States Capitol. (*See, e.g.*, D.I. 58-1 at Page 6 of 6). The Court has been given no indication that such materials would have even tangential bearing on the issues in this case.

summer of 2023. None of the four individuals subject to Defendant's proposed Rule 17(c) subpoenas were involved in that charging decision and Defendant has offered nothing to suggest otherwise. Any argument that those individuals have documents in support of his selective or vindictive prosecution claim seems likely doomed from the outset.

Moreover, any materials sought by a Rule 17(c) subpoena must be relevant, admissible and specific. *See Nixon*, 418 U.S. at 700. Yet the Court has found that Defendant failed to make out a claim of selective or vindictive prosecution and, further, that Defendant is not entitled to discovery from the government on those issues. The documents requested by Defendant's Rule 17(c) subpoenas are thus not relevant evidentiary material because there is no viable claim of selective or vindictive prosecution in this case and there is no other purported use for the information sought. *See, e.g.*, *Cuthbertson I*, 630 F.2d at 145-46 ("[O]nly evidentiary material is subject to subpoena under [R]ule 17(c). . . . [S]tatements made by nonwitnesses have no value as possible prior inconsistent statements to impeach trial testimony. The defendants have presented no other evidentiary use for such statements at trial, except for a general assertion that this material might contain exculpatory information."); *United States v. Cuthbertson*, 651 F.2d 189, 195 (3d Cir. 1981) ("[N]aked exculpatory material held by third parties that does not rise to the dignity of admissible evidence simply is not within [Rule 17(c)]."). [13] If Defendant is not entitled to the same type of discovery from the government under Rule 16, the Court can discern no reason why the result under Rule 17(c) would be any different for the third parties here. *See United States v. Charamella*, 294 F. Supp. 280, 282 (D. Del. 1968) ("If the documents sought to be produced and inspected pursuant to Rule 17(c) can have no relevance or evidentiary value to defendant in the

[13] "[R]ule 17(c) is designed as an aid for obtaining relevant evidentiary material that the moving party may use at trial." *Cuthbertson*, 630 F.2d at 144. The Rule does not exist to allow a defendant to search for possible claims or defenses.

conduct of his defense, the Court should decline to permit a pre-trial inspection."). Defendant's will not be permitted to issue the four proposed subpoenas *duces tecum*.

IV. CONCLUSION

For the foregoing reasons, Defendant's motions to dismiss the indictment for selective and vindictive prosecution (D.I. 63), for discovery and an evidentiary hearing (D.I. 64) and for issuance of Rule 17(c) subpoenas (D.I. 58) are DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 23-61 (MN)
	)	
ROBERT HUNTER BIDEN,	)	
	)	
Defendant.	)	

ORDER

At Wilmington, this 12th day of April 2024, for the reasons set forth in the Memorandum Opinion issued on this date, IT IS HEREBY ORDERED that Defendant's motion (D.I. 60) to dismiss the indictment based on immunity conferred by his diversion agreement is DENIED.

Maryellen Noreika

The Honorable Maryellen Noreika
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Criminal Action No. 23-61 (MN)
	)	
ROBERT HUNTER BIDEN,	)	
	)	
Defendant.	)	

ORDER

At Wilmington, this 12th day of April 2024, for the reasons set forth in the Memorandum Opinion issued on this date, IT IS HEREBY ORDERED that:

1. Defendant's motion to dismiss the indictment for selective and vindictive prosecution (D.I. 63) is DENIED;

2. Defendant's motion for discovery and an evidentiary hearing relating to his selective and vindictive prosecution motion (D.I. 64) is DENIED; and

3. Defendant's motion for issuance of subpoenas duces tecum pursuant to Federal Rule of Criminal Procedure 17(c) (D.I. 58) is DENIED.

Maryellen Noreika

The Honorable Maryellen Noreika
United States District Judge

UNITED STATES OF AMERICA

v.

ROBERT HUNTER BIDEN,
Appellant

OFFICE OF THE CLERK

PATRICIA S. DODSZUWEIT

CLERK

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RE: USA v. Robert Hunter Biden
Case Number: 24-1703
District Court Case Number: 1-23-cr-00061-001

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To All Parties:

Attorneys are required to file all documents electronically through the Court's Electronic Case Filing System. See 3d Cir. L.A.R. 113 and the Court's website at

www.ca3.uscourts.gov/cmecf-case-managementelectronic-case-files.

Enclosed please find case opening information regarding the above-captioned appeal by **Robert Hunter Biden** docketed at No. **24-1703**. All inquiries should be directed to your Case Manager in writing or by calling the Clerk's Office at 215-597-2995. This Court's rules, forms, and case information are available on our website at http://www.ca3.uscourts.gov.

Counsel for Appellant

Counsel is required to continue on appeal unless relieved by order of this Court. 3rd Cir. LAR Misc. 109.1.

As Counsel for Appellant(s), you must file:
1. Application for Admission (if applicable);
2. Appearance Form
3. Criminal Appeal Information Statement;and
4. Transcript Purchase Order Form.
These forms must be filed within **fourteen (14) days** from the date of this letter.

Counsel for Appellee
As Counsel for Appellee(s), you must file:
1. Appearance Form
This form must be filed within **fourteen (14) days** from the date of this letter.

Failure of counsel to comply with any of these requirements by the deadline may result in the imposition of sanctions by the Court. 3rd Cir. LAR Misc. 107.2.

Attached is a copy of the full caption in this matter as it is titled in the district court. Please review this caption carefully and promptly advise this office in writing of any discrepancies.

Very truly yours,
Patricia S. Dodszuweit, Clerk

By: Timothy McIntyre
Timothy McIntyre, Case Manager
267-299-4953

cc: Derek E. Hines, Esq.
Leo Wise, Esq.