

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
vs.	)	
	)	CASE NO.
BERNARD OKOJIE,	)	4:22-CR-00084-LGW-BWC-1
	)	
<u>Defendant.</u>	)	

MOTION HEARING
BEFORE THE HONORABLE BENJAMIN W. CHEESBRO
November 2, 2022; 10:04 a.m.
Brunswick, Georgia

APPEARANCES:

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For the Defendant:	JOHN J. OSSICK, JR., Esq. John J. Ossick, Jr., PC P. O. Box 1087 Kingsland, Georgia 31548-9190 912.729.5864 ossick@tds.net
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P R O C E E D I N G S

(Call to order at 10:04 a.m.)

THE COURT: Ms. Mixon, please call the case.

THE CLERK: Case Number 4:22-CR-84, United States of America versus Bernard Okojie, Jonathan Porter for the Government, John Ossick for the defendant.

MR. PORTER: Good morning, Your Honor, the Government is ready to proceed.

MR. OSSICK: Good morning, Your Honor.

THE COURT: I'm going to go over a little bit of background before we get started. The indictment in this case was filed on June 9th of this year, and the charges in that indictment are contained in three separate counts.

Count 1 is conspiracy to commit wire and bank fraud. Count 2 is wire fraud. Count 3 is a money laundering conspiracy charge. All of those counts concern applications for Economic Injury Disaster Loan applications that were submitted to the United States Small Business Administration as well as Payroll Protection Program loans under the CARES Act.

Mr. Okojie appeared before Judge Bly in the Northern District of Georgia for his initial appearance on June 17th was released on bond at that time and was transferred to the Southern District for further proceedings, and he appeared before me on July 20th for his arraignment.

He was continued on bond and Mr. Ossick was appointed to

1 represent Mr. Okojie.

2 Scheduling order was entered setting the time for the
3 pretrial motions and that was extended once and Defendant timely
4 filed 11 motions and the Government filed one motion.

5 The parties filed a joint status report identifying
6 which motions are opposed and which are not and specifically
7 requested oral argument on two motions. No evidentiary hearing
8 was requested on any of the motions.

9 One minor point of clarification: The Government's
10 motion for reciprocal discovery was not identified on the status
11 report. I reviewed the response to that, and it appears to be
12 unopposed and there is no need for argument or any evidentiary
13 hearing; is that correct?

14 MR. PORTER: Correct, yes.

15 THE COURT: Do you agree, Mr. Ossick?

16 MR. OSSICK: Yes.

17 THE COURT: So the two pending motions that we're going
18 to address today are Defendant's motion to dismiss Counts 1 and
19 3. That's Document Number 29 and Defendant's motion for a
20 pretrial hearing to determine the existence of any
21 conspiratorial agreements that will be admitted and statements
22 in particular. That's Document Number 38. Both of those
23 motions are fully briefed.

24 Mr. Ossick, these are your motions. I'm going to ask
25 you to present any argument you have in support of the motions

1 first.

2 MR. OSSICK: Thank you, Your Honor. Essentially the
3 motion raises the issue of whether or not the conspiracy count
4 is adequately pled.

5 We don't believe that it is, and the reason, you know,
6 certainly The Court is aware that it's whether or not it's
7 sufficient to give us notice about how to defend, what we have
8 to defend against and is it a bar to subsequent prosecution.

9 The conspiracy count may well -- it identifies a number
10 of transactions, and they may well have set out individually
11 wire or bank fraud charges in a valid way, but nowhere does it
12 identify any coconspirator, indicted or unindicted, and as a
13 consequence, a number of the entities which allegedly sought
14 these loans and payments and stuff are solely controlled.

15 So while you could have a conspiracy between an
16 individual and a corporate or business entity if it's not
17 controlled by the same person because you can't conspire with
18 yourself, those could in another context be a sufficient
19 allegation.

20 Now, it does contain also allegations about other people
21 who these submissions were supposedly made for, but they are not
22 identified as being some unidentified or unindicted
23 coconspirator, so there's -- I don't understand what the
24 agreement allegedly is or who the agreement allegedly is with.

25 And there's nothing in -- you know, the Government in

1 its response talks about sufficiency of evidence is not what
2 this hearing is about, and I agree it's not. This is nothing
3 about the sufficiency of the evidence. This is sufficiency of
4 the identification of what the agreement and people the
5 agreement is with, and I just made the reference to the matters
6 of what was in the discovery to show that in some cases it helps
7 you identify what it's about.

8 Here it appears the contentions are that those other
9 parties are not in agreement with, you know, some conspiracy.
10 Now if they are and are, in fact, unidentified, unindicted
11 coconspirators, then that's a different way to look at it, but
12 it doesn't say that at all.

13 So it doesn't give an indication what the agreement is.
14 As a consequence, how would you know who could testify or what
15 testimony could come in and say this is a coconspirator's
16 admissible statement because it's during the pendency and
17 meeting all the other tests. Who would that apply to, which is
18 sort of getting into the *James* request.

19 What, right now, from this indictment would we know
20 about whose statement out of court will be admissible under
21 those rules that allow that? And in what way is it admissible
22 because of what the agreement was?

23 Now, maybe there could be and certainly could allege
24 that with, you know, Person A there was a conspiracy with them
25 and that B was also part of that perhaps and maybe C and D

1 didn't know anything about it.

2 But it doesn't do any of that. That's not what we're
3 looking at based on the allegations in these counts, and I'm
4 using Count 1 but the same will apply to the money laundering
5 because it's exactly the same deficiency in terms of what I
6 believe is wrong with it, so I think that we have to have an
7 indictment that gives us an idea of exactly, you know, is this
8 some other friend that we don't even know their name that is
9 supposedly the unindicted coconspirator of Mr. Okojie's?

10 Did some family member participate and that's who the
11 agreement is with? Or is it somebody at the bank? Is it
12 somebody with some government agency?

13 I have no idea and nothing here would help me know that
14 it is or it isn't and I also then wouldn't know whose statement
15 might be read at some point and be admissible under
16 coconspirator.

17 So I mean, unless you have some specific questions you
18 want me to address, I think that's the gist of my argument, Your
19 Honor.

20 THE COURT: I do have a few specific questions, and I
21 want to preface my questions with sort of a statement to kind of
22 frame my thinking, and if you disagree with this reading or
23 interpretation of the indictment, then please do tell me.

24 I follow your argument completely and I understand your
25 linking Count 1 to Count 3 and the arguments there. Focusing on

1 Count 1 -- and this may be a little bit of an
2 oversimplification -- but I read the substantive conspiracy
3 allegations to be contained in Paragraphs 26, 27, 28 and 29, and
4 within those four paragraphs, I read it to divide it into really
5 three sets of allegations.

6 Paragraph 26 with all its subparts appears to relate
7 specifically to the EIDL applications made by Mr. Okojie and his
8 businesses.

9 MR. OSSICK: Okay.

10 THE COURT: Paragraphs 27 and 28 are linked together in
11 that they relate to EIDL applications allegedly made by Mr.
12 Okojie on behalf of others known to Mr. Okojie and these
13 subparagraphs identify those unnamed individuals Individual 1,
14 2, 3, et cetera.

15 In Paragraph 26, it identifies the applications and then
16 in Paragraph -- I'm sorry, I misstated. In Paragraph 27 it
17 identifies the applications, and in Paragraph 28 it
18 identifies -- and I'm going to use just a shorthand term of
19 "alleged kickbacks" from the recipients to Mr. Okojie.

20 So to reiterate, Paragraphs 27 and 28 are linked to
21 those individuals other than Mr. Okojie identified by their
22 anonymous identifiers both in the applications and in the
23 kickbacks.

24 And then Paragraph 29 addresses a third set of
25 allegations which are not EIDL loans but rather PPP applications

1 made, and as I read that paragraph, it relates specifically to
2 Mr. Okojie and a financial institution through which the
3 business application was submitted.

4 First off, would you agree that that's a fair way to
5 sort of break these allegations down?

6 MR. OSSICK: Yes.

7 THE COURT: Well, I want to focus you first to the ones
8 in the middle, Paragraph 27 and 28, where you have individuals
9 identified, application dates, identifying information related
10 to the applications and specific alleged kickback schemes.

11 When you look at *Stapleton* as cited by the Government
12 and the cases that *Stapleton* is based on, it says specifically
13 the indictment doesn't have to name the individuals who are the
14 alleged coconspirators.

15 Here we've got quite a bit of identifying information
16 that would put you and Mr. Okojie on the path as to who those
17 conspirators would be. Would you not concede that at least for
18 those allegations that what's in the indictment is enough to
19 point to the coconspirators?

20 MR. OSSICK: No, because, Your Honor, what the
21 indictment does not tell us, are these, in fact, people that are
22 unindicted coconspirators. In other words, are these people who
23 have an agreement to commit this offense -- and I'm shortening
24 that a little bit -- or are these just innocent victims who
25 thought they were doing something that's completely allowed and

1 therefore they are not coconspirators; they are not statements
2 they made to third parties; they are not admissible. They're
3 not 801(d)(2) or whatever. I don't know. When I look at the
4 discovery, it's the latter. They are victims.

5 THE COURT: I understand.

6 MR. OSSICK: I realize that discovery is not part of
7 doing that, but it helps me illustrate what the problem is. I
8 mean, if it just said these are unindicted coconspirators, fine.
9 I realize you don't have to identify everybody, but you still
10 have an indictment that is sufficient so that we know what is
11 this agreement and who is this agreement with, not every person
12 in it, Your Honor.

13 I'm not trying to suggest that the law requires any of
14 that, but just how can you read those paragraphs that name those
15 people and say are these separate conspiracies, are they
16 multiple conspiracies here, is it one overall conspiracy that
17 some are just in for a little bit or out, or are these even
18 coconspirators?

19 THE COURT: For the sake of argument, even if I were to
20 agree on Paragraph 27 where it simply alleges that the
21 applications were made on their behalf, Paragraph 28 alleges a
22 kickback scheme between these individuals.

23 Doesn't that additional allegation at least suggest or
24 imply that that is the agreement, applications are submitted,
25 kickbacks are made, that is the alleged conspiracy, even if it

1 doesn't define that in sort of precise terms?

2 MR. OSSICK: Well, that would then preclude a person
3 from innocently paying a kickback? In other words, if I'm
4 Individual 6 and I let Mr. Okojie submit this application and
5 I'm in agreement to paying this fee or kickback, if I think it's
6 okay, I'm not in agreement to commit an offense, even though I'm
7 in agreement about paying a fee for services.

8 I don't think that the word "kickback" versus "fee" can
9 identify a coconspirator sufficient to allow protection. What
10 if half --

11 THE COURT: Go ahead.

12 MR. OSSICK: What if half are one way, Your Honor, and
13 half are the other. So now we have, okay, according to you,
14 I've got a valid indictment, your reading, a valid indictment,
15 but, well, maybe it's two different conspiracies or only one
16 conspiracy and it's much more limited in scope and participants?
17 How do I know that?

18 THE COURT: Well, then my question would be where do you
19 draw the line between the valid indictment and what should be
20 proven at trial. Perhaps it's an avenue of argument and proof
21 to demonstrate that while there was an agreement, it was not a
22 conspiratorial agreement in the sense of a criminal conspiracy
23 but rather it was a legitimate agreement like what you
24 hypothesized with these individuals, but for the purposes of the
25 facial sufficiency of the indictment, the agreement and the

1 scheme and the conspiratorial arrangement is sufficiently
2 defined at least as to those individuals. Do you still maintain
3 that that's not enough even with the payment scheme allegation?

4 MR. OSSICK: If these people were labeled victims, which
5 again would just be surplusage in the indictment, for instance,
6 okay, what would be different about what I know about this case
7 in terms of defending it and what's a bar for a subsequent
8 prosecution?

9 I'm at a loss, Your Honor, about that. I mean, okay,
10 let's say, for instance, they just said they are unindicted
11 coconspirators. Okay. Maybe in the evidence in the case, then
12 at least I know who purportedly is part of this agreement, and
13 maybe the evidence would be that two of them are and five of
14 them aren't or whatever.

15 That again, I agree with The Court that would be just
16 sort of the matter of what the proof of the evidence is about,
17 but in terms of knowing what is -- I mean, would it not flow
18 that, right now, any out-of-court statement of any of these
19 people is at least, subject to proof of the conspiracy,
20 admissible?

21 THE COURT: I don't want to merge the two separate
22 motions, but I understand how they are intertwined, but speaking
23 specifically to the sufficiency of the indictment, let me ask
24 you a different question.

25 MR. OSSICK: Okay.

1 THE COURT: I kind of broke this into three constituent
2 parts in Count 1. Even if there were any problems with Part 1
3 and Part 3, the part related to Mr. Okojie and his businesses
4 for the EIDL applications and for the PPP applications, I have a
5 lot of hesitation and concern about the concept of carving up
6 the indictment to say that these allegations that don't pertain
7 to the conspiracy in Paragraphs 26 and 29 would fall away when
8 Paragraphs 27 and 28 demonstrate this relationship with the
9 other unidentified individuals. I understand you maintain that
10 27 and 28 aren't sufficient either, but if they were, what would
11 be the recourse there for those other parts of the conspiracy
12 charge?

13 MR. OSSICK: Well, let's say that you proved those
14 things happened, but not the ones involving other third parties,
15 let's say.

16 You wouldn't have proven conspiracy because that would
17 only have been with himself, so it would be -- now, they could
18 have been charged as wire fraud counts or bank fraud counts or
19 whatever, which is what you would do when there is not another
20 party to an agreement.

21 THE COURT: Well, you wouldn't maintain that those
22 allegations that relate solely to Mr. Okojie and his individual
23 businesses have to be carved off or excluded in the conspiracy
24 charge? They just, in your view, wouldn't be sufficient to
25 support a conspiracy conviction; is that right?

1 MR. OSSICK: Well, I would think that in order to
2 prevent a verdict that's not properly based, in other words,
3 let's say that the jury found that I believe that Mr. Okojie 9
4 or pick one of the -- car business, that he, in fact, did that,
5 but I don't think he did these other things with these other
6 people in an agreement with them, you know, that's consistent
7 with a charge of conspiracy, you know. If they were to attempt
8 to return a verdict of guilty for the conspiracy, it wouldn't
9 stand.

10 THE COURT: I will ask it in a more hypothetical way.
11 There may be a number of ways where a conspiracy may be charged,
12 and in the course of alleging facts related to that conspiracy,
13 there may be non-conspiratorial actions, individual action by
14 one particular defendant; this defendant establishes this
15 business without coordination with others for the purposes of
16 furthering the scheme. That is a proper allegation in a
17 conspiracy indictment, wouldn't you agree?

18 MR. OSSICK: Yes.

19 THE COURT: All right. Let me ask you about the second
20 motion, the motion for the pretrial *James* hearing. Is there
21 anything that you can point to specific about the nature of this
22 alleged conspiracy different from other types of charged
23 conspiracies that would support a need for a pretrial *James*
24 hearing in this case?

25 MR. OSSICK: Not different than the conspiracy but

1 different in the fact that almost always -- in fact, every time
2 I think in the past in a conspiracy count I've had a pretty
3 solid idea -- at least I thought I did -- about what the
4 agreement was and who it was with so that I had a pretty good
5 idea of when some piece of evidence was going to be introduced,
6 whether or not it's probably going to qualify as a coconspirator
7 hearsay exception or not.

8 I have no idea here, Judge, but it goes back to the
9 argument I've just made.

10 THE COURT: I want to make sure there is agreement on
11 this point. You would agree that ordering a pretrial *James*
12 hearing is purely discretionary for the trial court?

13 MR. OSSICK: Yes, under the law, I agree.

14 THE COURT: I'm trying to discern exactly when it is
15 appropriate under the law to require any sort of pretrial *James*
16 hearing, and I can't find a scenario that would mandate a
17 pretrial *James* hearing, and without any sort of mandatory
18 requirement, I'm trying to identify specific factors or concerns
19 that would support ordering a pretrial *James* hearing, and quite
20 frankly, I have not found a single instance of a pretrial *James*
21 hearing ordered in any recent years that I can identify, so I'm
22 looking at what may be exceptional or different about this case
23 that would warrant one.

24 MR. OSSICK: Well, the only thing I can say in response
25 to that, Judge, this is the only indictment that I've seen for

1 conspiracy charges that didn't give any indication as to who a
2 coconspirator was.

3 THE COURT: All right. Thank you, Mr. Ossick.

4 I will give you a chance for rebuttal, but let me hear
5 from Mr. Porter next.

6 MR. PORTER: Your Honor, just picking back up on what
7 Mr. Ossick said, I've seen a lot of indictments where the
8 indictment alleges a conspiracy and it alleges that the
9 defendant conspired with others.

10 That's what's required in indictments, Your Honor.
11 That's it. I've seen a lot of them, and apparently the Eleventh
12 Circuit has upheld all of those because that's what the
13 *Stapleton* case stands for. That's what a lot of other cases
14 stand for.

15 Sort of the interesting part about this is rather than
16 just saying there was a conspiracy to commit wire and bank
17 fraud, the grand jury alleged additional facts.

18 The grand jury alleged specific instances where acts in
19 furtherance of the conspiracy occurred, and I think what Mr.
20 Ossick is saying is that the thing he's struggling with is the
21 grand jury identified in the indictment individuals rather than
22 labeling them as conspirators or non-conspirators, but that in
23 and of itself doesn't make the indictments insufficient to put
24 the defendant on notice of what he's being charged with.

25 The indictment is crystal clear of what conduct he's

1 been charged with, and that's the whole point of this is to
2 ensure that the defendant knows the conduct that's being alleged
3 and knows that if he's indicted in wherever, Mississippi, for
4 the same conduct that he can point to the indictment and say,
5 "Your Honor, I've already been charged with this; I went to
6 trial and I was" whatever "on this same conduct," so I don't
7 think that's, by alleging additional facts, that somehow makes
8 the indictment insufficient and I think the case law that we
9 cited in our brief is more than sufficient to make that point.

10 THE COURT: Let me point your attention to the
11 three-part way that I sort of read this. Paragraph 26, Part 1,
12 27 and 28, Part 2, and 29, Part 3.

13 MR. PORTER: Yes, Your Honor.

14 THE COURT: I'm having some difficulty identifying how
15 Paragraphs 26 and 29 fit into the conspiracy allegations. Are
16 those allegations that are there effectively to tell the story
17 or are they an aspect of the conspiracy that's charged?

18 MR. PORTER: It's an aspect of the conspiracy that's
19 charged. They're acts in furtherance of this scheme. So the
20 scheme was one to defraud the Government coming from the
21 COVID-19 pandemic. The EIDL program, the PPP were passed as
22 part of the same CARES Act and the indictment alleges
23 sufficiently I believe that the conspirators sought to get all
24 of these funds and, therefore, there are instances where Mr.
25 Okojie was creating businesses on his own in order to launder

1 the funds. Some of the same businesses that were listed in
2 Paragraph 26 are the same businesses that received funds from
3 the folks mentioned in 27.

4 So to me, Your Honor, it's all part of the same
5 conspiracy.

6 THE COURT: Well, let me ask you specifically about
7 Paragraph 29. That's the only paragraph that has any specific
8 allegations about PPP loans, and as I read that paragraph, it
9 relates exclusively to one business that Mr. Okojie allegedly
10 controlled, and my concern there is Count 3 is also a conspiracy
11 charge, and it invokes the PPP loans.

12 I don't see where there's even an unnamed or general
13 allegation of a coconspirator or any other participant in that
14 at all, and again, I may be oversimplifying, but it reads to me
15 that Mr. Okojie is charged with, in Count 29, submitting a PPP
16 application for one of his businesses and then got funds back.
17 Where is the conspiratorial element in Count 1 or Count 3
18 relative to PPP loans?

19 MR. PORTER: Yes, Your Honor. So Count 29, you're
20 correct. Count 29 by itself would not be sufficient to allege a
21 bank fraud conspiracy, but Paragraph 23 alleges both a wire and
22 a bank fraud conspiracy.

23 It says that Mr. Okojie with other coconspirators
24 conspired to commit wire and bank fraud. That, Your Honor, is
25 the way the PPP side of this is alleged, and again, Your Honor,

1 it could just be that the grand jury alleged all of these things
2 and didn't allege, you know, all of the facts known to the grand
3 jury, and so that, Your Honor, I understand where you're going
4 with that, and I understand how Paragraph 29 by itself would not
5 suffice but -- yes, Your Honor.

6 THE COURT: Just carrying Mr. Ossick's argument forward,
7 if the indictment charges PPP and EIDL in these three groups of
8 alleged actions and hypothetically at trial the jury concludes
9 that Mr. Okojie did, in fact, submit fraudulent PPP loan
10 applications for his business but did not engage in any EIDL
11 application fraud and then found him guilty on Count 1, that
12 would suggest the possibility at least of an improper conviction
13 on a conspiracy charge unless there is some additional evidence
14 that comes out at trial that shows others involved in the PPP
15 scheme; is that a fair assessment?

16 MR. PORTER: I think your last point is the most
17 important one, depending on how the evidence comes out at trial.
18 That's also why special verdict forms exist where the jury would
19 be ensured that they agree what exact fraud crime the defendant
20 conspired to commit.

21 THE COURT: Well, let's discuss the motion for pretrial
22 *James* hearing. I understand the case law makes it
23 discretionary. I understand *Bourjaily* -- I'm not quite sure how
24 to pronounce it --

25 MR. PORTER: Yes.

1 THE COURT: -- suggests there's this consideration of
2 the statement and all the external evidence. Let me ask you
3 specifically: What is the disadvantage or the problem of
4 conducting one in these circumstances?

5 MR. PORTER: Your Honor, this is not a case where we had
6 a wire up, and there's coconspirators that are caught on the
7 wire and we're going to try to take what that coconspirator said
8 and we're going to try to apply it to Mr. Okojie.

9 That's not this type of case. This is going to be a lot
10 more straightforward. There was no wire. It's going to be very
11 straightforward, so a *James* hearing, we would just be sort of
12 speculating as to what witnesses are going to say at trial, so
13 I'm not sure that this is a scenario where a *James* hearing is
14 appropriate.

15 THE COURT: In other words -- and I don't want to
16 recharacterize -- but it sounds to me that you're saying that
17 there is not any written statement, any recorded statement that
18 the Government can identify at this point. It would only be a
19 matter of trial testimony that would be at issue; is that
20 correct?

21 MR. PORTER: Good question, Your Honor. I believe there
22 are going to be written statements. I'm not sure what form they
23 will take. I don't have like a written statement in my mind
24 right now where I'm saying is going to be Government's Exhibit
25 whatever. So I don't want to go as far as to say there's not

1 going to be any sort of recorded statements because it could be
2 that a witness comes forward and says, "Here's a text message
3 and it's a text message going on on both sides."

4 That could very well happen. I don't have that right
5 now where I'm saying here is the coconspirator statement that
6 we're going to try to apply to Mr. Okojie. This is going to
7 be -- it's just not one of those cases, Your Honor.

8 THE COURT: Well, I want to press you on the same issue
9 that I pressed Mr. Ossick on, which is there is not a lot of
10 indication from the case law as to when you get to that point
11 that a pretrial *James* hearing would be warranted. You cite
12 *Magluta* in your briefs, and that case suggests to me that there
13 are instances where it is a valuable endeavor to conduct a
14 pretrial *James* hearing, and there the conviction for obstruction
15 was set aside because the coconspirator statements did not
16 qualify under the hearsay exception, and that unwound the entire
17 conviction, and it was because there was a difficult legal issue
18 as to whether there was actually a conspiracy still ongoing at
19 that time.

20 Mr. Ossick argues that it's difficult for him to
21 determine if any conspiracy existed, what the agreement was and
22 whether any statements were made in furtherance of that
23 conspiracy, so can you articulate any factors or standard to try
24 to determine when it's appropriate to have one.

25 MR. PORTER: Good question, Your Honor. I have not

1 studied it as much as you have. I appreciate your going back to
2 try to find the instances where this district has conducted a
3 *James* hearing, and I'm not -- I don't recall offhand what the
4 coconspirator statements were in *Magluta*, but, Your Honor, I
5 would again say that I think if this were a case where we were
6 going to try to prove everything by coconspirators' statements,
7 that would be one thing and that could be potentially where a
8 *James* hearing would be helpful. But where we're not sort of
9 banking on coconspirator statements to prove up our case, I
10 don't think this is one where a *James* hearing is appropriate. I
11 think this is one where the trial judge is going to be able to
12 hear the statements and sort of address this on a
13 situation-by-situation basis.

14 THE COURT: Thank you, Mr. Porter.

15 MR. PORTER: Thank you, Your Honor.

16 THE COURT: Mr. Ossick, any rebuttal?

17 MR. OSSICK: Well, first thing I would say in response,
18 I thought that the Government's answer was very telling when it
19 said we often have cases where the defendants have unindicted
20 coconspirators. This is a single defendant.

21 I agree completely when you've got defendants, I know
22 about the agreement the Government is trying to allege and prove
23 because it's between at least these named people, and I agree
24 completely that you don't have to name everyone in the case, but
25 you've got to give me enough information to identify who

1 supposedly is part of the agreement because only then can I
2 start to see what the agreement, you know, the Government is
3 going to prove is, and the idea -- and I'm jumping, of course,
4 but to the -- in the *James*, it's like, well, okay, we don't
5 think that's really important in this case. How do we know? I
6 mean, what one little piece of evidence might be the thing that
7 really counts, so I don't know that that should ever be the
8 rationale for when The Court should think you should or should
9 not make some pretrial determination.

10 I would suggest that it's much more appropriate as I've
11 urged to have it so that when it's so vague as to what that, you
12 know, whose statement that might be that that would be a better
13 criteria to judge when it would be useful to prevent an
14 inappropriate result as a consequence, and one other thing,
15 Judge, when you were questioning about, in my view, when you
16 look at the PPP allegations of 29, I don't legally see any
17 difference between that and the other solely owned controlled
18 companies of the EIDL allegations.

19 I don't see them as being different in terms of legally,
20 and as a consequence, I mean, I don't think that either of those
21 can be a basis to support that this is a valid indictment
22 because all of those would -- neither of those, in my view,
23 legally could sustain a conspiracy conviction.

24 THE COURT: Mr. Ossick, two questions. The first is
25 regarding the Individual Numbers 1 through 8, I believe, as in

1 the indictment, without going too into detail about those
2 individuals, are you able to identify those individuals from the
3 discovery?

4 MR. OSSICK: Oh, yes. Yes, and that's why I say it
5 makes it even more complex or confusing is that "We didn't know
6 that; we weren't part of that; we didn't even see that" is the
7 sort of thing I'm reading in discovery, so it's the -- you know,
8 it's the antithesis of what you would expect to see from a
9 coconspirator's, unindicted coconspirator statement, so why I
10 used the term he could have labeled them victims.

11 He may by the time of trial change his mind about that
12 or whatever, but there's -- and correct me if I'm wrong -- I
13 don't read in the discovery, "Oh, yeah, I was in agreement we
14 would give this a shot, and if it worked out, I would give you
15 15 percent" or whatever. So that's why I say that doesn't --
16 you know, that doesn't identify sufficient to meet either of the
17 tests.

18 THE COURT: So while the individuals are identified,
19 your position is that the -- it's not clear whether those
20 individuals are the conspirators or whether it's someone else or
21 what the conspiratorial agreement even was from the indictment
22 at least.

23 MR. OSSICK: I say that by knowing who they are does not
24 help me identify either who the agreement is with or what is the
25 agreement, and when I go beyond that to the evidence part or

1 expected evidence, it even strengthens the fact that that's not
2 helpful. It wouldn't be them because their testimony, expected
3 testimony, "No, I didn't have any agreement with him about
4 that."

5 THE COURT: Let me ask you a question on the *James*
6 hearing issue. Mr. Porter indicated there may not be any sort
7 of recorded statement that exists right now that would be relied
8 on.

9 I'm having a little difficulty envisioning what a
10 pretrial *James* hearing would look like, if it was just
11 speculation about what might be submitted at trial.

12 If it really is only limited to trial testimony from
13 alleged coconspirators, how would a pretrial *James* hearing work?

14 MR. OSSICK: Well, I would think that what would be the
15 issue in the *James* hearing is there, in fact, sufficient
16 evidence that this is a conspiracy and this is part of it and
17 it's in furtherance of and during.

18 So I would then have an idea of -- let's just say, just
19 picking a person, let's just say Individual 3. Individual 3 may
20 have made a statement to someone I don't know that says "Okojie
21 and I have worked out a deal," et cetera, et cetera, something
22 that would be incriminating or would be relevant that would meet
23 the other tests, okay. If he's, in fact, a coconspirator and is
24 part of the agreement, that's coming in.

25 Well, is Individual 3 an unindicted coconspirator? Is

1 that part of the agreement or is this a victim just ranting
2 around? You know, so the Government would be required, I would
3 think, in a pretrial *James* hearing to say, okay, what testimony
4 from -- whose out-of-court declarations other than the defendant
5 do you expect to have admitted to be able to show, you know, the
6 agreement, the existence, the relevant topic of whatever it is,
7 and then The Court would say, "Well, wait a minute, I don't
8 think there is enough evidence that shows that that person was
9 in agreement," or to the contrary, they are and therefore it's
10 coming in, but the fact of whether it's recorded, what does that
11 have to do with it? I mean, and I mean that -- that doesn't
12 help me.

13 THE COURT: Well, this is more of a practical question
14 than more of a what benefit may inure to either party or even in
15 terms of judicial economy. A practical question is what would
16 that look like if the Government were to only speculate and say,
17 "Well, we don't have any statement here today from any
18 coconspirator that we intend to introduce at trial but it's
19 possible that Individual 3 may come in and say" whatever it is
20 that they think that they might testify to, and then The Court
21 would be in a position to sort of pre-assess the evidence of the
22 relationship between Mr. Okojie and Individual 3 without the
23 benefit of the trial setting and any other evidence that would
24 come in in order to assess a speculated statement and one that's
25 not actually been made or even adopted by Individual Number 3.

1 While there may be instances where a *James* hearing would
2 be valuable, it would seem to be most valuable where everyone
3 identifies the statement but disputes whether it was made in
4 furtherance of a conspiracy. Here we don't even have the
5 identifiable statements at this point.

6 MR. OSSICK: Well, I agree that that's a valuable way
7 but also if there is nothing offered to show that it would
8 qualify, therefore, it's also a great benefit to my defense to
9 know that I'm not going to be confronted with something that I
10 have no idea what it is like that, where somebody says they have
11 overheard or had a conversation with Mr. 3, you know, and here's
12 what Mr. 3 said at the time.

13 This isn't applying to what 3 testifies to now. That's
14 a whole different issue about admissibility. This is where
15 someone else is evidence supposedly of someone saying what a
16 coconspirator said that would otherwise be admissible against my
17 defendant.

18 THE COURT: Thank you both very much for preparation and
19 very clear oral arguments. Mr. Ossick, any other matters that
20 you want to raise today aside from these motions? I'm going to
21 take these two motions under advisement along with the other
22 motions that are pending to the extent that any portion of those
23 motions are disputed, and I will issue a written ruling on all
24 of those. But any other matters to address?

25 MR. OSSICK: We had several that, of course, we didn't

1 think we need to say anything about but that doesn't mean that
2 we agree that they should be dismissed as moot.

3 Other than that, Your Honor, there have been 404(b)
4 responses, and I think there will probably be, depending upon
5 what issues develop, objections to some of -- whether it is or
6 not but I don't think that's something that The Court could deal
7 with at this point in advance.

8 Some of them are pretty broad ranging probably done to
9 make sure they weren't omitted, but I don't know if something
10 from a package mailed in 2012 is really going to be 404(b), but
11 at least we have the benefit of it being listed, but are you
12 asking about -- I mean, we're not waiving those objections by
13 not bringing them now, are we?

14 THE COURT: No. I understand that was recently filed on
15 the docket. I understand we're outside of the pretrial motions
16 deadline, but obviously you couldn't have asserted any motions
17 based on any of that notice or that evidence. Therefore, as
18 long as the objections are timely made and relatively promptly,
19 those will certainly be considered on the merits and not waived.

20 MR. OSSICK: Thank you.

21 THE COURT: Mr. Porter, anything further?

22 MR. PORTER: Nothing else, Your Honor. Thank you.

23 THE COURT: Is either party requesting a copy of the
24 transcript today?

25 MR. PORTER: No, Your Honor.

1 MR. OSSICK: Probably, yeah. I can't not do that.

2 THE COURT: All right, that is noted. Thank you very
3 much. We will be adjourned.

4 (Proceeding concluded at 10:45 a.m.)

5 CERTIFICATION

6
7 I certify that the foregoing is a true and correct
8 transcript of the stenographic record of the above-mentioned
9 matter.

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11/15/2022

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Debra Gilbert, Court Reporter

Date

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