FTB:CWE/AA/JB
F. #2020R00955

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- X

UNITED STATES OF AMERICA

- against -

Docket No. 22-CR-20 (FB)

ANULI OKEKE,

Defendant.

- X

MEMORANDUM OF LAW IN SUPPORT
OF THE GOVERNMENT'S MOTIONS *IN LIMINE*

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PRELIMINARY STATEMENT

The government respectfully submits this memorandum of law in support of its motions in limine in anticipation of trial, which is scheduled to begin on June 10, 2024. The defendant is charged with conspiring to commit wire fraud and bank fraud, wire fraud, bank fraud, and money laundering conspiracy. The government respectfully requests that the Court:

1) permit the government to introduce loan agreements, bank emails and other documents as business records;
2) admit the defendant's other acts, either as direct evidence or pursuant to Rule 404(b);
3) permit the government to introduce statements of co-conspirators;
4) preclude the defendant from presenting evidence and argument concerning possible punishment and collateral consequences and other irrelevant topics;
5) preclude the defendant from victim-blaming, including by introducing evidence and arguments concerning alleged negligence by a bank known to the defendant ("Bank 1") or the U.S. Small Business Administration ("SBA");
6) preclude improper use of law enforcement reports; and
7) order the defense to produce Rule 16 and 26.2 materials.

For the reasons set forth herein, the Court should grant the government's motions in limine.[1]

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[1] This memorandum cannot anticipate every type of evidence and testimony that will be offered at trial and does not detail all the specific testimony the government will elicit at trial. The government respectfully reserves its right to supplement this filing with additional papers setting forth legal authority for the introduction of evidence and/or additional motions in limine as legal issues are identified closer to trial, the government interviews potential witnesses, or in response to any objection by defense to the introduction of evidence. Additionally, the government intends to file motions in limine to preclude cross-examination of certain government witnesses regarding specific topics pursuant to Rules 608 and 609 of the Federal Rules of Evidence, consistent with the timing for its Giglio production.

BACKGROUND

I. Overview of the Scheme

In 2020, the defendant Anuli Okeke, the now former branch manager of a New York branch of Bank 1, exploited the COVID-19 pandemic's unprecedented economic crisis to enrich herself by orchestrating a scheme to prepare and submit fraudulent applications for COVID-19 relief worth millions of dollars. Specifically, the defendant and her co-conspirators submitted fraudulent loan applications and received funding through the Paycheck Protection Program ("PPP") and the Economic Injury Disaster Loan ("EIDL") program, which offered forgivable and low-interest loans to small businesses as economic support to help overcome the loss of revenue due to COVID-19. Both programs were administered by the U.S. SBA.

The defendant and her co-conspirators recruited and assisted borrowers in completing and submitting fraudulent COVID-19 relief loan applications through Bank 1 to the SBA—even though the defendant knew that the borrowers did not qualify for the loans. These applications contained materially false and fraudulent representations concerning the business operations and employees. The applications also included fraudulent supporting documents, such as tax forms. As the branch manager, the defendant was responsible for reviewing and approving each application submitted through her branch. The defendant signed all of the PPP loan agreements on behalf of Bank 1. Despite knowing that the loan applications contained false statements and fraudulent supporting documentation, Okeke and her co-conspirators submitted them for approval to others at Bank 1 and the SBA.

The defendant and her co-conspirators received unauthorized commissions from the fraudulent loans. After the SBA deposited loan proceeds into borrowers' Bank 1 accounts, Okeke and her co-conspirators at times required borrowers to sign Bank 1 "starter" checks, which were legally negotiable instruments issued by banks to customers who opened new checking accounts, as part of the fraudulent scheme. The defendant and her co-conspirators would use the signed starter checks to make withdrawals from borrowers' accounts. In particular, the defendant and her co-conspirators at times used the starter checks to purchase cashiers' checks, which were used to pay the defendant and her co-conspirators unauthorized commissions to which they were not entitled to under the PPP rules. The defendant personally obtained tens of thousands of dollars in cash commissions.

II. Covid-19 Relief Programs

A. The Paycheck Protection Program

The CARES Act was a federal law enacted in or about March 2020, which was designed to provide emergency financial assistance to the millions of Americans who were suffering the economic effects of the COVID-19 pandemic. One source of relief provided by the CARES Act was the authorization of up to $349 billion in forgivable loans to small businesses for job retention and certain other expenses through the PPP loan program. In or about April 2020, Congress authorized over $300 billion in additional PPP funding.

To obtain a PPP loan, a qualifying business was required to submit a PPP loan application signed by an authorized representative of the business. The PPP loan application required the business (through its authorized representative) to acknowledge the program rules and to make certain affirmative certifications. In the PPP loan application, the small business (through its authorized representative) was required to state, among other things, its: (a) average monthly payroll expenses, and (b) number of employees. These figures were used to calculate the amount of money the small business was eligible to receive under the PPP. In addition, businesses applying for a PPP loan were required to provide documentation showing their payroll expenses.

The PPP was overseen by the SBA, which was headquartered in Washington, D.C., and had authority over all PPP loans. Individual PPP loans, however, were issued by approved private lenders such as participating financial institutions and credit unions (the "Lenders"). The Lenders received and processed PPP applications and supporting documentation and made loans using the Lenders' own funds.

Upon approval of a PPP loan application, the Lenders funded the PPP loan, which was 100 percent guaranteed by the SBA. Data from the PPP loan application, including information about the borrower, the total amount of the loan and the listed number of employees, was transmitted by the Lenders to the SBA in the course of processing the loan.

PPP loan proceeds were permitted to be used by a borrower on specified expenses, such as payroll costs, interest on mortgages, rent and utilities. The PPP allowed the interest and principal on a PPP loan to be entirely forgiven if the borrower spent the loan proceeds on the enumerated expenses within a designated period of time and used a certain amount of the PPP loan proceeds on payroll expenses.

B. The Economic Injury Disaster Loan Program

The EIDL program was an SBA program that provided low-interest financing to small businesses, renters and homeowners in regions affected by declared disasters.

The CARES Act authorized the SBA to provide EIDLs of up to $2 million to eligible small businesses experiencing substantial financial disruption due to the COVID-19 pandemic. Under the program, the SBA was authorized to issue advances of up to $10,000 to small businesses within three days of their applying for an EIDL ("EIDL Advances"). The amount of an EIDL Advance was determined based on the number of employees working for the applicant. The advance did not have to be repaid.

To obtain an EIDL or EIDL Advance, a qualifying business was required to submit an application to the SBA and provide information about its operations, such as the number of employees, gross revenues for the 12-month period preceding the disaster and cost of goods sold in the 12-month period preceding the disaster. In the case of EIDLs for COVID-19 relief, the 12-month period was the period preceding January 31, 2020. The applicant also was required to certify that all the information in the application was true and correct to the best of the applicant's knowledge.

EIDL applications were submitted directly to the SBA and processed by the SBA with support from a government contractor, Rapid Finance. The amount of the loan, if the application was approved, was determined based, in part, on the information provided in the application about the number of employees, revenue and cost of goods, as described above. Any funds issued under an EIDL were issued directly by the SBA. EIDL funds could be used for payroll expenses, sick leave, production costs and business obligations, such as debts, rent and mortgage payments. If the applicant also obtained a loan under the PPP, the EIDL funds could not be used for the same purpose as the PPP funds.

III. Procedural History

On September 24, 2021, the defendant was arraigned on a complaint charging her with conspiring to commit wire fraud and bank fraud in connection with PPP and EIDL applications at her bank. See ECF No. 1. On January 12, 2022, a grand jury returned an indictment charging the defendant with conspiring to commit wire fraud and bank fraud, wire fraud, bank fraud, and money laundering conspiracy. See ECF No. 12.

ARGUMENT

I. The Court Should Admit SBA Loan Contracts, Other Loan Documents, and Business Emails as Verbal Acts or Business Records

The government intends to offer into evidence various loan contracts and related PPP and EIDL loan documents and accompanying correspondence. Such documents are admissible as verbal acts or as business records.

First, contracts and loan documents, including agreements between Bank 1, borrowers, and the SBA, are admissible non-hearsay. "Verbal acts that give rise to legal consequences," such as contracts, are not hearsay. See United States v. Cardascia, 951 F.2d 474, 486-87 (2d Cir. 1991); Porter v. United States, No. 13-CV-7332, 2015 WL 1004953, at *1 n.2 (S.D.N.Y. Mar. 3, 2015) ("[A] contract is 'a form of verbal act to which the law attaches duties and liabilities."); see also Liani v. Baker, No. 09-CV2651, 2010 WL 2653392, at *6 n.11 (E.D.N.Y. June 28, 2010) ("[L]egally operative statements are not hearsay under Rule 801."); therefore is not hearsay.'") (quoting Mueller v. Abdnor, 972 F.2d 931, 937 (8th Cir. 1992)).

Second, loan applications, internal bank documents, and emails written by Bank 1 employees while they considered, evaluated and discussed the defendant's fraudulent PPP loan applications are admissible under the business records exception to hearsay under Rule 803(6).

"Rule 803(6) renders admissible for its truth a record made at or near the time by a person with knowledge if the record was 'kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum.'" United States v. Stein, No. 05 Cr. 888, 2007 WL 3009650, *1 (S.D.N.Y. Oct. 15, 2007); see also Fed. R. Evid. 803(6). The Second Circuit has adopted "a generous view" of the business records exception, United States v. Strother, 49 F.3d 869, 874 (2d Cir. 1995), emphasizing that "Rule 803(6) favors the admission of evidence rather than its exclusion if it has any probative value at all." United States v. Kaiser, 609 F.3d 556, 574 (2d Cir. 2010) (quoting United States v. Williams, 205 F.3d 23, 34 (2d Cir. 2000)).

Moreover, "business records may be admitted notwithstanding the unavailability of the record's author, so long as a custodian or other qualified witness testifies that the document was kept in the course of a regularly conducted business activity and also that it was the regular practice of that business activity to make the record." Parker v. Reda, 327 F.3d 211, 214–15 (2d Cir. 2003) (quoting Williams, 205 F.3d at 34). "A witness need not be a custodian or have personal knowledge of the actual creation of [a] document to be 'qualified' within the meaning of Rule 803(6)." United States v. El Gammal, 831 Fed. Appx. 539, 543 (2d Cir. 2020). The rule requires only that the witness is "familiar with the record keeping procedures of the organization" and "understands the system." Id. at 543 n.10.

Consistent with this exception, the government anticipates that a witness from Bank 1 would testify, if called, that the relevant documents were kept by the bank in the normal course of business and that the bank's regular practice was to make such a record.[2]

II. The Court Should Admit the Defendant's Other Acts as Direct Evidence

The government also moves in limine to admit testimony and limited documents as to certain other act evidence. Specifically, to prove the charges in the indictment, the government anticipates introducing evidence regarding the defendant's participation in a scheme to defraud Bank 1 by, among other things, falsifying loan applications, submitting loan applications on behalf of individuals without their knowledge, and working with accountants to

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[2] In the alternative, many of these Bank 1 records are independently admissible as statements of a party opponent, statements or party's agent or employee, or statements of co-conspirators—because they are completed or signed by the defendant, bank employees working at the defendant's direction, or co-conspirators in furtherance of the conspiracy. See Fed. R. Evid 801(d)(2).

falsify records. In addition to this evidence of the core criminal scheme, the government also anticipates introducing evidence that the defendant in some instances knowingly violated Bank 1 policies, practices, and procedures. The government also anticipates introducing evidence that the defendant did not report her earnings from the fraudulent scheme on her taxes.

These latter two categories of evidence are admissible "if [they] arose out of the same transaction or series of transactions as the charged offense, if [they are] inextricably intertwined with the evidence regarding the charged offense, or if [they are] necessary to complete the story of the crime on trial." United States v. Hsu, 669 F.3d 112, 118 (2d Cir. 2012) (citation and internal quotation marks omitted); see also United States v. Quinones, 511 F.3d 289, 309 (2d Cir. 2007). Even if the evidence does not directly establish an element of the offense charged, it can be admitted "in order to provide background for the events alleged in the indictment." United States v. Coonan, 938 F.2d 1553, 1561 (2d Cir. 1991) (citation omitted). Evidence of other acts "may be admitted to provide the jury with the complete story of the crimes charged by demonstrating the context of certain events relevant to the charged offense." United States v. Inserra, 34 F.3d 83, 89 (2d Cir. 1994) (citations omitted); see also United States v. Gonzalez, 110 F.3d 936, 941 (2d Cir. 1997) ("To be relevant, evidence need only tend to prove the government's case, and evidence that adds context and dimension to the government's proof of the charges can have that tendency. Relevant evidence is not confined to that which directly establishes an element of the crime.").

In this case, the expected training and non-compliance evidence is probative for two reasons. The training the defendant received (and at times deliberately did not follow) bears on the defendant's state of mind at the time of the alleged crime. United States v. Flotron, No. 3:17-CR-00220 (JAM), 2018 WL 1790828, at *2 (D. Conn. Apr. 15, 2018) (finding that evidence concerning defendant's training with respect to prohibited trading activities is relevant and appropriate for the government to introduce). One of the elements of wire fraud is that the defendant "knowingly and intentionally participated in the scheme or artifice to defraud." United States v. Mahaffy, 693 F.3d 113, 125 (2d Cir. 2012). Moreover, the government anticipates that the defendant may argue at trial that the defendant lacked knowledge of the unlawful nature of her conduct. As a result, the government seeks to introduce evidence that the defendant learned about ethics, including conflicts of interests, abusive sales practices, falsifying or manipulating applications, anti-money laundering practices, and know-your-customer requirements from Bank 1 trainings. See United States v. Anderson, 533 F.3d 623, 632 (8th Cir. 2008) (evidence of compliance procedures are relevant to proof of intent and knowledge).

In addition, the fact that the defendant did not report her illicit earnings from the fraudulent SBA loan and money laundering scheme is probative of her consciousness of guilt. United States v. Black, No. 13-CR-316 DLI, 2014 WL 5783067, at *5 (E.D.N.Y. Nov. 5, 2014) ("[T]his Court agrees with the other circuits that have addressed this issue and finds that failure to report significant sums of money in tax filings is not … evidence under Rule 404(b). Instead, this failure to report is direct evidence of said offense, as it is inextricably intertwined with the defendant's participation in the money laundering conspiracy."); United States v. Hatfield, 685 F. Supp. 2d 320, 324 (E.D.N.Y. 2010) (admitting "tax evidence" as "direct evidence" because failure to pay taxes on earnings "shows that the income is not valid" and thus represents "the defendants' consciousness of guilt").

To the extent, however, that the Court concludes that the above-referenced evidence is not inextricably intertwined with or arises out of the same transaction as the charged crimes, the government moves in the alternative to admit such evidence pursuant to Rule 404(b) and hereby provides notice of the same. The defendant's training and non-compliance with Bank 1 policies is relevant for non-propensity reasons, namely her motive, intent, knowledge, and absence of mistake. See Fed. R. Evid. 404(b); Anderson, 533 F.3d at 632 (evidence of compliance procedures are relevant to proof of intent and knowledge). Likewise, failure to file taxes "is admissible under Rule 404(b) as evidence of the defendant's knowledge that the money was the proceeds of illegal activity." Black, 2014 WL 5783067, at *5; United States v. Thompson, 439 F. App'x 66, 68 (2d Cir. 2011) (finding that tax return was admissible under Rule 404(b) for the proper purpose of showing the defendant's fraudulent intent and absence of mistake in receiving payments).

III. The Court Should Admit Statements of Co-Conspirators as Non-Hearsay

At trial, the government intends to offer in its case-in-chief evidence of statements made by co-conspirators pursuant to Federal Rule of Evidence 801(d)(2)(E). The government anticipates introducing statements by individuals such as Bank 1 co-conspirator employees, statements by co-conspirator accountants, and statements by borrower co-conspirators. The evidence at trial will establish by a preponderance that these co-conspirators were in fact part of the conspiracy. The Court should admit these statements at trial in keeping with the practice in this district and Second Circuit law.

Pursuant to Rule 801(d)(2)(E) of the Federal Rules of Evidence ("Rule 801(d)(2)(E)"), a statement offered against an opposing party[3] and "made by the party's

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[3] By contrast, the defendant may not admit her agents' or co-conspirators' statements under Fed. R. Evid. 801(d)(2)(D) or (E). Such statements would not be an "opposing party" statement as to the defendant. The "co-conspirator exception is a one-way street down which only the government may travel." United States v. Persico, No. 04-CR-911, 2006 WL 3246922, at *1 (E.D.N.Y. Nov. 8, 2006)

coconspirator during and in furtherance of the conspiracy" is not hearsay. "The law is well settled within this circuit that declarations that are otherwise hearsay may nevertheless be provisionally admitted, subject to connection of the defendant with the conspiracy alleged, as long as the trial court is ultimately satisfied that the participation of the defendant against whom the declaration is offered has been established by a fair preponderance of the evidence independent of the hearsay utterances." United States v. Cambindo Valencia, 609 F.2d 603, 630 (2d Cir. 1979). "To admit a statement under the co-conspirator exception to the hearsay definition, a district court must find two factors by a preponderance of the evidence: first, that a conspiracy existed that included the defendant and the declarant; and second, that the statement was made during the course of and in furtherance of the conspiracy." United States v. Gigante, 166 F.3d 75, 82 (2d Cir. 1999).

"The conspiracy between the declarant and the defendant need not be identical to any conspiracy that is specifically charged in the indictment." Id. "[W]hile the hearsay statement itself may be considered in establishing the existence of the conspiracy, 'there must be some independent corroborating evidence of the defendant's participation in the conspiracy.'" Id. (quoting United States v. Tellier, 83 F.3d 578, 580 (2d Cir. 1996)). Moreover, statements that "provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy" are admissible. Id. The "Government need not show that the listener, or the person who heard the declarant's statement, was also a member of the conspiracy." United States v. Paredes, 176 F. Supp. 2d 183, 187 (S.D.N.Y. 2001). Indeed, a communication "with a person who is not a member of the conspiracy in a way that is designed to help the coconspirators to achieve the plan's goals" is admissible. Id.

In this case, the government expects to prove at trial that the defendant was a member of the bank fraud and wire fraud conspiracies alleged in the indictment and that the defendant also conspired to launder the proceeds of her fraudulent schemes. Along with the defendant, and as alleged in the indictment, the government expects to show that other members of the conspiracies, including Bank 1 employees, borrowers, and accountants participated in the fraud in exchange for illegal kickbacks to help facilitate the fraudulent loan applications. The defendant and her co-conspirators worked together to obtain PPP and EIDL loans despite knowing that the recipients did not qualify.

The government does not ask the Court to rule on the admissibility of any particular emails or other out-of-court statements by co-conspirators that the government intends to offer at this time, but merely provides notice of the types of co-conspirator statements the government will seek to introduce at trial. The Court should admit these statements at the appropriate time, including subject to connection in certain instances, as appropriate under Second Circuit law. As explained in United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969) (Friendly, J.), "statements proffered as coconspirator statements may be admitted in evidence on a conditional basis, subject to the later submission of the necessary evidence of" the requirements of Rule 801(d)(2)(E). United States v. Tracy, 12 F.3d 1186, 1199 (2d Cir. 1993); see also United States v. Shyne, No. S4 05-CR-1067 (KMK), 2007 WL 1075035, at *34 (S.D.N.Y. Apr. 5, 2007) ("A trial court need not . . . make these determinations prior to trial."). This practice is "well-settled" in this circuit, see United States v. Labate, S1 00-CR-632 (WHP), 2001 WL 533714, at *21 (S.D.N.Y. May 18, 2001), and avoids the need for a "mini-trial, significantly prolonging the proceedings in this case and affording the defendants a complete preview of the government's evidence," United States v. Ianniello, 621 F. Supp. 1455, 1478 (S.D.N.Y. 1985).

IV. Evidence and Argument about Potential Punishment, Prior Good Acts, Lack of Prior Bad Acts, Uncharged Defendants, and Other Irrelevant Topics Should Be Precluded

The government also moves to preclude evidence and argument on the following topics, all of which would be improper or so irrelevant that any probative value would be swamped by the attendant risks of confusion, misleading, delay, and waste of time. These topics are not an exhaustive list of matters to which the government would object at trial, but rather an attempt to address the most likely topics and themes in this case that should be precluded as improper.

First, the defendant should be precluded from offering evidence or argument concerning any potential punishment or consequences that she faces if convicted of the charged offenses. Evidence or argument concerning punishment "invites [jurors] to ponder matters that are not within their province, distracts them from their factfinding responsibilities, and creates a strong possibility of confusion." Shannon v. United States, 512 U.S. 573, 579 (1994) (quoting Rogers v. United States, 422 U.S. 35, 40 (1975)). Because there is no proper basis permitting the defendant to put these issues before the jury in any form, they should be precluded from offering evidence or argument on this subject.

Second, to the extent the defendant seeks to offer evidence or argument concerning her prior commission of any alleged "good acts"—for example, concerning charitable works—or to offer evidence of her non-criminal activities, she should be precluded from doing so. Propensity evidence regarding specific acts is no more admissible to refute a criminal charge than to establish one. Indeed, it is settled law that "[a] defendant may not seek to establish [her] innocence . . . through proof of the absence of criminal acts on [other] specific occasions." United States v. Scarpa, 897 F.2d 63, 70 (2d Cir. 1990).

Similarly, while a defendant may offer general testimony from a character witness about her reputation for a "pertinent trait of character," or the witness's opinion of the defendant as regards that trait, see Fed. R. Evid. 404(a)(2)(A), 405(a), a defendant can neither testify nor offer other proof to establish specific acts in conformity with that trait that are not an element of the offense. See, e.g., United States v. Benedetto, 571 F.2d 1246, 1249-50 (2d Cir. 1978) (finding evidence of defendant's specific acts improperly admitted because "character evidence has long been admissible only in the form of reputation and not in the form of a recitation of good or bad acts"); United States v. Fazio, No. 11 Cr. 873 (KBF), 2012 WL 1203943, at *5 (S.D.N.Y. Apr. 11, 2012) ("[A] defendant may not affirmatively try to prove [her] innocence by reference to specific instances of good conduct; character is to be proven by reputation or opinion evidence."), aff'd, 770 F.3d 160 (2d Cir. 2014). As such, the defendant should be precluded from offering evidence or argument—including in opening statements—concerning any charitable work, philanthropy, religious participation, or other specific instances of prior alleged good acts or service, irrelevant aspects of their family or personal status, lack of prior criminal history, or the lack of prior commissions of other similar or dissimilar bad acts. See, e.g., United States v. Rivera, No. 13 Cr. 149, 2015 WL 1725991 (KAM), at *2 (E.D.N.Y. Apr. 15, 2015) (precluding evidence of charitable giving).

V. Evidence and Argument Concerning Alleged Negligence by Bank 1 or the SBA Should Be Precluded

The defendant should not be allowed to advance evidence or arguments that shifts her culpability to the victims of her fraud. Specifically, the Court should preclude the defendant from advancing evidence or arguments that blames the victims—in other words, arguing that because Bank 1 or the SBA failed to detect the defendant's fraud or were otherwise negligent, the defendant cannot be found guilty of fraud.

Any evidence relating to victim negligence is irrelevant to the question of the defendant's guilt and is an improper defense. Just as it is no defense to burglary charges that the victim left a front door unlocked, it is no defense to bank fraud that the victim was negligent. See United States v. Allen, 201 F.3d 163, 167 (2d Cir. 2000) (per curiam) ("The victim's negligence in permitting a crime to take place does not excuse the defendant from culpability for [the] substantive offense . . . ."); United States v. Thomas, 377 F.3d 232, 243-44 (2d Cir. 2004) (affirming restrictions on cross-examination of victim; rejecting defendant's argument that victim's foolishness vitiated defendant's fraudulent intent); see also United States v. Lindsey, 850 F.3d 1009, 1014 (9th Cir. 2017) (explaining that a lender's negligence "does not mean lenders can be victimized by intentional fraudulent conduct with impunity merely because the lenders were negligent, or even because the lenders intentionally disregarded the information in a loan application. Two wrongs do not make a right, and lenders' negligence, or even intentional disregard, cannot excuse another's criminal fraud"); United States v. Colton, 231 F.3d 890, 903 (4th Cir. 2000) ("The susceptibility of the victim of the fraud, in this case a financial institution, is irrelevant to the analysis: If a scheme to defraud has been or is intended to be devised, it makes no difference whether the persons the schemers intended to defraud are gullible or skeptical, dull or bright." (internal quotation marks omitted)).

Evidence of Bank 1's or the SBA's failure to detect the fraud does not tend to prove or disprove any element of the charged offenses, and thus whether either acted negligently is irrelevant to whether the defendant committed fraud. Accordingly, the Court should preclude any evidence and arguments blaming Bank 1 or the SBA.

VI. Improper Use of Agent Reports to Impeach Witnesses Should Be Precluded

In accordance with its obligations under Rule 26.2 and 18 U.S.C. § 3500, the government has produced summaries of witness interviews prepared by law enforcement. The government respectfully requests that the Court preclude the defense from introducing the contents of these reports to impeach such witnesses during cross-examination, publishing the contents of the reports to the jury, or otherwise suggesting to the jury that the reports are statements of the witnesses who did not write or adopt them.

A party may impeach a witness with a prior inconsistent statement of that witness, but the statement must be the witness's *own* statement that he or she either made or adopted. See Fed. R. Evid. 613; United States v. Alamonte, 956 F.2d 27, 29 (2d Cir. 1992) (concluding that the trial court did not err in refusing to admit prosecutor's notes taken during debriefing of witness and explaining that a "third party's characterization" of a witness's statement does not constitute a prior statement of that witness "unless the witness has subscribed to that characterization"); United States v. Leonardi, 623 F.2d 746, 757 (2d Cir. 1980) (holding that because "the written statement of the FBI agent was not attributable to [the witness]," it was "properly rejected as a prior inconsistent statement"). The problem with using a third party's summary or characterization of the witness's statement to impeach is "one of relevancy": "If a third party's notes reflect only that note-taker's summary characterization of a witness's prior statement, then the notes are irrelevant as an impeaching prior inconsistent statement, and thus inadmissible." Alamonte, 956 F.2d at 29.

The Jencks Act governs the discoverability of a witness's prior statements, and its definition of "statement" accords with Fed. R. Evid. 613(a) and applicable case law on proper impeachment using prior inconsistent statements. Under the Jencks Act, a statement means "a written statement made by said witness and signed or otherwise adopted or approved by him," a recording or transcription that "is substantially [a] verbatim recital of an oral statement made by said witness and recorded contemporaneously," or a statement made by a witness to the grand jury. See 18 U.S.C. § 3500(e). Because the Jencks Act is meant to restrict the defendant's use of discoverable statements for impeachment, "only those statements which could properly be called the witness' own words should be made available to the defense for purposes of impeachment." Palermo v. United States, 360 U.S. 343, 349, 352 (1959). An "agent's interpretations and impressions" of a witness do not fall within the purview of the Jencks Act. Id. at 352-53.

In this case, the government has provided the defense with broad discovery and material pursuant to 18 U.S.C. § 3500, including notes and reports summarizing investigators' interviews with government witnesses. These reports were not reviewed or adopted by any of the government witnesses. Moreover, they were finished after interviews were completed and reflect the thought processes and interpretations of the agents and officers; they do not constitute verbatim recitals or transcripts of any of the witnesses' statements.[4] As a result, the statements in these reports are not statements of any of the government's witnesses (other than the reports' authors, if called to testify at trial); cannot be used for impeachment; and should not be read aloud or shown to the jury. See Alamonte, 956 F.2d at 28; Leonardi, 623 F.2d at 757. The Court should therefore preclude any use or suggestion by defense counsel that a statement in a law enforcement summary report is a statement of the witness being interviewed.[5]

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[4] These reports would, however, constitute prior statements of the agents or officers who prepared the report if they are called as a witness to testify regarding the subject matter contained in the report.

[5] The defense may of course ask a witness whether he or she made a statement that is reflected in a law enforcement report. However, if the defense is not satisfied with the witness's answer, the defense may not publish or introduce the report's contents as a prior inconsistent statement. Additionally, if a witness says that he or she does not remember a fact, the defense

VII. The Court Should Order the Defense to Produce Trial Exhibits and Witness Statements

The government respectfully requests that the Court order the defendant to disclose defense exhibits, including exhibits they intend to introduce through cross-examination of government witnesses, and Rule 26.2 defense witness material.

Federal Rule of Criminal Procedure 16(b) governs a defendant's disclosures in a criminal case. In relevant part, it requires the defendant to provide the government with documents and records that the defendant "intends to use . . . in the defendant's case-in-chief at trial." Fed. R. Crim. P. 16(b)(1)(A). The Rule's purpose "is to avoid surprise and gamesmanship" and "it definitely contemplates reciprocity in the production of evidence that both parties intend to introduce in their case-in-chief at trial." United States v. Hsia, 2000 WL 195067, at *1 (D.D.C. Jan. 21, 2000). Similarly, Rule of Criminal Procedure 26.2 provides that "the court on motion of a party who did not call the witness, must order an attorney for the government or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony."

In this case, the parties agreed to exchange trial exhibits and 18 U.S.C. § 3500 material on or about May 13, 2024. To date, the government has not received any exhibits or witness material from the defense.

CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court: (1) admit loan documents, contracts and related emails as verbal acts or business records;

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may attempt to refresh a witness's recollection by showing the witness the report, but only if the defense does so in a manner that does not imply that the report is the witness's own statement or publish its contents to the jury.

(2) admit the defendant's other acts, either as direct evidence or pursuant to Rule 404(b); (3) permit the government to introduce statements of co-conspirators; (4) preclude the defendant from presenting evidence and argument concerning possible punishment, collateral consequences and other irrelevant topics; (5) preclude the defendant from victim-blaming, including by introducing evidence and arguments concerning alleged negligence by Bank 1 or the SBA; (6) preclude improper use of law enforcement reports; and (7) require the defense to comply with their obligations under Rule 16 and 26.2

Dated: Brooklyn, New York
May 17, 2024

Respectfully submitted,

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By: /s/
Jennifer Bilinkas
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cc: Clerk of the Court (FB) (by ECF)
Defense counsel (by ECF)