UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATE OF AMERICA,

Plaintiff,

-against-

ANULI OKEKE,

Defendant.

Case No.: 22-CR-020 (FHB)

**DEFENDANT ANULI OKEKE'S PROPOSED JURY INSTRUCTIONS**

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## PRELIMINARY STATEMENT

Defendant Anuli Okeke respectfully submits the following proposed jury instructions pursuant to Rule 30 of the Federal Rules of Criminal Procedure. Authority for each proposed instruction is noted in footnotes, either immediately following particular portions of the instruction for sources that relate to particular portions of an instruction or at the end of the instruction for sources for an entire instruction. Ms. Okeke reserves the right to object to the government's proposed instructions, which have not yet been filed, and the right to modify her proposed instructions and/or seek additional ones if, for example, the evidence at trial necessitates modification.

### 1. **Function of Court and Role of Jury**

You have now heard all of the evidence in the case as well as the final arguments of the parties.

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them, just as it has been my duty to preside over the trial and decide what testimony and evidence is relevant under the law for your consideration.

On these legal matters, you must take the law as I give it to you. If an attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow.

You should not single out any instruction as alone stating the law, but you should considermy instructions as a whole when you retire to deliberate in the jury room. And you should know that you're going to be able to take a copy of these instructions into the jury room.

Your final role is to pass upon and decide the fact issues that are in the case. You, the members of the jury, are the sole and exclusive judges of the facts. You weigh the evidence or lack of evidence; you determine the credibility of the witnesses; you resolve such conflicts as there may be in the testimony, and you draw whatever reasonable inferences you decide to draw from the facts as you have determined them. I will later discuss with you how to pass upon the credibility—or believability—of the witnesses.

In determining the facts, you must rely upon your own recollection of the evidence. The evidence before you consists of the answers given by witnesses—the testimony they gave, as you recall it—and the exhibits that were received in evidence. The evidence does not include questions. Only the answers are evidence. But you may not consider any answer that I directed you to disregard.

You may also consider the stipulations of the parties as evidence.

Since you are the sole and exclusive judges of the facts, I do not mean to indicate any opinion as to the facts or what your verdict should be. The rulings I have made during the trial are not any indication of my views of what your decision should be as to whether or not the guilt of Ms. Okeke has been proven beyond a reasonable doubt.

I also ask you to draw no inference from the fact that upon occasion I asked questions of certain witnesses. These questions were only intended for clarification or to expedite matters and certainly were not intended to suggest any opinions on my part as to the verdict you should render or whether any of the witnesses may have been more credible than any other witness. I stress to you that the court has no opinion as to the verdict you should render in this case.

As to the facts you are the exclusive judges. You are to perform the duty of finding the facts without bias or prejudice as to any party.[1]

[1] Adapted from charge of Hon. Edward R. Korman in *United States v. Elianor*, 20 Cr. 332 (ERK), Dkt. 73 (E.D.N.Y. Oct. 2022).

**2. Statements of Court and Counsel Not Evidence**

As I said, in determining the facts, you must rely upon your own recollection of the evidence. What the lawyers have said in their opening statements, in their closing arguments, in their objections, or in their questions is not evidence. If your recollection of the facts differs fromthe statements made in opening or closing, you should rely on your recollection. If a statement was made during an opening or summation and you find that there is no evidence to support the statement, you should disregard the statement.

A question put to a witness is not evidence. It is only the answer coupled with question that is evidence. Nor is anything I may have said during the trial or may say during these instructions with respect to a fact to be taken in substitution for your own independent recollection. What I say is not evidence.

Relatedly, do not conclude from any of my questions or any of my rulings on objections or anything else I have done during this trial that I have any view as to the evidence, credibility of the witnesses or how you should decide the case.

In addition, remember that it is the duty of a party to object when the other side offers testimony or other evidence that the party believes is not properly admissible. Therefore, you should draw no inference from the fact that there was an objection to any evidence. An objection is not evidence. Nor should you draw any inference from the fact that I sustained or overruled an objection. Simply because I have permitted certain evidence to be introduced does not mean that I have decided on its importance or significance. That is for you to decide. The personalities and the conduct of counsel are not in any way at issue. If, from their conduct at this trial, you formed opinions of any kind about any of the lawyers in the case, favorable or unfavorable, whether you approved or disapproved of their behavior, those opinions should not enter into your deliberations. The only issue is whether the Government has proven each of the elements of the charged offenses beyond a reasonable doubt.[2]

[2] *Id.*

### 3. Government Treated Like Any Other Party

The fact that the prosecution is brought in the name of the United States of America entitles the Government to no greater consideration than that accorded to any other party to a litigation. By the same token, it is entitled to no less consideration. All parties, whether Government or individuals, stand as equals at the bar of justice.[3]

[3] *Id.*

### 4. **Presumption of Innocence and Burden of Proof**

Now, I will instruct you on the presumption of innocence and the Government's burden of proof in this case. Ms. Okeke has pleaded not guilty. By doing so, she denies the charges in the indictment. Thus, the government has the burden of proving the charges against Ms. Okeke beyond a reasonable doubt. Ms. Okeke is presumed innocent. A defendant does not have to prove her innocence. This presumption of innocence was in Ms. Okeke's favor at the start of the trial, continued in her favor throughout the entire trial, is in her favor even as I instruct you now, and continues in her favor during the course of your deliberations in the jury room.

The government has the burden of proof in this case. The presumption of innocence is removed as to Ms. Okeke if *and only if* you, as members of the jury, are satisfied that the government has sustained its burden of proving her guilt beyond a reasonable doubt.[4]

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[4] Adapted from *id.*

### 5. Reasonable Doubt

The government has the burden of proving Ms. Okeke guilty beyond a reasonable doubt. Some of you may have served as jurors in civil cases where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the Government's proof must be more powerful than that. It must be beyond a reasonable doubt.

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of Ms. Okeke's guilt. A reasonable doubt is one that would cause a reasonable person to hesitate to act in a matter of importance in his or her personal life. Proof beyond a reasonable doubt must, therefore, be proof of a convincing character that a reasonable person would not hesitate to rely upon in making an important decision.

There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, after fair and impartial consideration of the evidence or lack thereof, you are firmly convinced that Ms. Okeke is guilty of the crime charged, you must find her guilty of that charge. If on the other hand, you have a reasonable doubt as to her guilt with respect to a particular charge, you must give her the benefit of the doubt and find her not guilty of that charge.[5]

[5] "Firmly convinced" language adapted from Tenth Circuit Pattern Jury Instruction 1.05; Federal Judicial Center Pattern Instructions, General Criminal Instruction 21; *Victor v. Nebraska*, 511 U.S. 1, 27 (1994) (Ginsburg, J., concurring in part and concurring in the judgment) ("This model instruction surpasses others I have seen in stating the reasonable doubt standard succinctly and comprehensibly."). The Second Circuit in *United States v. Reese*, 33 F.3d 166, 172 (2d Cir. 1994), affirmed this instruction. *Reese*, however criticized as "potentially confusing" language later in the instruction stating that the jury should acquit if it found a "real possibility" that the defendant was not guilty. This instruction thus omits the "real possibility" language and adds the "hesitate to act" language endorsed by the Second Circuit in *Reese* and included in the Sand instruction.

### 6. Number of Witnesses

The government is not required to prove the essential elements of either offense by any particular number of witnesses. The testimony of a single witness may be sufficient to convince you beyond a reasonable doubt of the existence of the essential elements of the offense if you believe that the witness has truthfully and accurately related what they have told you. Likewise, the testimony of one hundred witnesses may be insufficient if you do not credit their testimony or otherwise find that it does not prove the elements of the charged offenses beyond a reasonable doubt. The government must prove its case beyond a reasonable doubt regardless of the number of witnesses called.[6]

[6] Adapted from charge of Hon. Lewis J. Liman in *United States v. Phillips*, 22 Cr. 138 (LJL) (S.D.N.Y. Oct. 2023).

7. **Direct and Circumstantial Evidence**

There are two types of evidence that you may properly use in deciding whether Ms. Okeke is guilty or not guilty of the crimes with which she is charged.

One type of evidence is called direct evidence. Direct evidence of a fact in issue is presented when a witness testifies to that fact based on what he or she personally saw, heard, or otherwise observed through the five senses. The second type of evidence is circumstantial evidence. Circumstantial evidence is evidence that tends to prove a disputed fact indirectly by proof of other facts.

There is a simple example of circumstantial evidence that is often used in this courthouse. Assume that when you came into the courthouse this morning, the sun was shining, and it was a nice day outside. Also assume that the courtroom shades were drawn, and you could not look outside. Assume further that as you were sitting here, someone walked in with an umbrella that was dripping wet, and then, a few moments later, somebody else walked in with a raincoat that was also dripping wet.

Now, because you could not look outside the courtroom and you could not see whether it was raining, you would have no direct evidence of that fact. But, on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to conclude that it was raining.

That is all there is to circumstantial evidence. You infer on the basis of your reason, experience, and common sense from one established fact the existence or the nonexistence of someother fact.

The matter of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a logical, factual conclusion that you might reasonably draw from other facts that have been proven.

Many material facts, such as a person's state of mind, are not easily proven by direct evidence. Usually, such facts are established by circumstantial evidence and the reasonable inferences you draw. Circumstantial evidence may be given as much weight as direct evidence. The law makes no distinction between direct and circumstantial evidence. The law simply requires that before convicting a defendant, you must be satisfied of Ms. Okeke's guilt beyond a reasonable doubt based on all of the evidence in the case.[7]

[7] *Elianor*, 20 Cr. 332 (ERK) (E.D.N.Y. Oct. 2022).

### 8. Inferences

During the trial you may have heard the parties use the term "inference," and in their arguments they have asked you to infer, on the basis of your reason, experience, and common sense, from one or more established facts, the existence of some other fact.

An inference is not a suspicion or a guess. It is a reasoned, logical decision to conclude that a disputed fact exists on the basis of another fact that you know exists.

There are times when different inferences may be drawn from facts, whether proven by direct or circumstantial evidence. The Government asks you to draw one set of inferences, while the defense asks you to draw another. It is for you, and you alone, to decide what inferences youwill draw.

The process of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a deduction or conclusion that you, the jury, are permitted, but not required, to draw from the facts that have been established by either direct or circumstantial evidence. In drawing inferences, you should exercise your common sense.

So, while you are considering the evidence presented to you, you are permitted to draw, from the facts that you find to be proven, such reasonable inferences as would be justified in light of your experience.[8]

[8] *Id.*

### 9. Prior Inconsistent Statements

You have heard evidence that a witness made a statement on a prior occasion that counsel argues is inconsistent with the witness's trial testimony. It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether or not the prior statement is in fact inconsistent. It is your job to determine the weight, if any, to be given to the prior inconsistent statement in determining whether to believe all or part of the witness's trial testimony. In other words, you may consider whether or not you believe the witness or accept his or her testimony at trial in light of the prior inconsistent statement.

In making this determination, you should consider the importance of the matter to which the statement related. If you find that the matter is relatively trivial, you may decide not to attach much significance to the inconsistency. On the other hand, if the matter to which the prior inconsistent statement related is important, you may decide that it casts substantial doubt on the witness's credibility. You may also consider whether the witness had an explanation for the inconsistency, and whether that explanation appealed to your common sense.[9]

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[9] *Id.*

**10. Stipulations (If applicable)**

In this case you have heard evidence in the form of stipulations of fact and testimony. A stipulation of fact is an agreement between the parties that a certain fact or set of facts are true, and you must regard such agreed facts as true. It is for you to determine the effect or weight to give those agreed-upon facts. A stipulation of testimony is an agreement among the parties that, if called, a witness would have given certain testimony. You must accept as true the fact that the witness would have given the testimony. However, it is for you to determine the effect or weightto give that testimony.[10]

[10] *Id.*

**11. Limiting Instructions (if applicable)**

If certain testimony or evidence was received for a limited purpose, you must follow the limiting instructions I have given and use the evidence only for the permissible limited purpose I indicated.[11]

[11] *Id.*

**12. No Outside Communications, Outside Research, or Internet Research**

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. As I told you at the beginning of this case, you must not conduct any independent research about this case, the matters in this case, and the parties involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet,websites, blogs, social media outlets, or use any other electronic tools to obtain information aboutthis case or to help you decide the case. You must not visit any location mentioned in this case forthe purpose of investigating it. Please do not try to find out information from any source outside the confines of this courtroom.

You must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through email, instant messaging, text messaging, through any blog or website, through any internet chat room, or by way of any other social networking platforms, including Facebook, Twitter (or "X"), Instagram, Threads, LinkedIn, Snapchat, and YouTube.

If you become aware that any other juror is violating this instruction, you should immediately bring it to my attention through my Courtroom Deputy, but please do not make it known to any other jurors.[12]

[12] *Id.*

**13. Improper Considerations**

Your verdict must be based solely upon the evidence developed at trial or the lack of evidence.

It would be improper for you to consider, in reaching your decision as to whether the government sustained its burden of proof, any personal feelings you may have about Ms. Okeke's race, religion, national origin, sex, or age. As I have explained to you, all persons are entitled to the presumption of innocence, and the Government has the burden of proof.

It would be equally improper for you to allow any feelings you might have about the nature of the crimes charged to interfere with your decision-making process.

I also caution you that, under your oath as jurors, you cannot allow to enter into your deliberations any consideration of the punishment that may be imposed upon Ms. Okeke if she is convicted. The duty of imposing a sentence in the event of conviction rests exclusively with theCourt, and the issue of punishment may not affect your deliberations as to whether the Governmenthas proven her guilt beyond a reasonable doubt.

Under your oath as jurors, you are not to be swayed by sympathy. It must be clear to you that once you let fear or prejudice, or bias or sympathy interfere with your thinking there is a risk that you will not arrive at a true and just verdict.

To repeat, your verdict must be based exclusively upon the evidence or the lack of evidencein the case. If you have a reasonable doubt as to Ms. Okeke's guilt, you should not hesitate for any reason to return a verdict of not guilty. But, on the other hand, if you should find that the government has met its burden of proving her guilt beyond a reasonable doubt, you should not hesitate because of sympathy or any other reason to return a verdict of guilty.[13]

[13] Adapted from *id.* (combining instructions).

**14. Accomplice/Cooperating Witness Testimony**

You have also heard from several witnesses, Jose Anormaliza, Anthony Castro, Brahima Legane, Auguste Nipabi, and Israel Viloria, who testified that they pled guilty to criminal charges. You are instructed that you are to draw no conclusions or inferences of any kind about the guilt of Ms. Okeke from the fact that prosecution witnesses have pled guilty to criminal charges. A witness's decision to plead guilty is a personal decision about his or her own guilt. It may not be used by you in any way as evidence against or unfavorable to the defendants on trial here.

You may consider the guilty pleas only in determining the witnesses' believability. In that connection, let me remind you that they each of these witnesses testified pursuant to an agreement to cooperate with the government. You should bear in mind that a witness who has entered into such an agreement or understanding has an interest in this case different from any ordinary witness. A witness who realizes that he may be relieved from prosecution for criminal offenses, and may be able to receive a lighter sentence in his own case, by giving testimony favorable to the prosecution may have a motive to testify falsely. Therefore, you must scrutinize such testimony with caution and weigh it with great care. You should ask yourselves whether the witness would benefit more by lying, or by telling the truth. Was the testimony made up in any way because the witness believed or hoped that he would somehow receive favorable treatment by testifying falsely? Or did he believe that his interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain or advantage, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color the witness' testimony? If, after examining his testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.[14]

[14] Adapted from Sand et al., Modern Federal Jury Instructions, Instr. 7-10, 7-11; *Elianor*, 20 Cr. 332 (ERK) (E.D.N.Y. Oct. 2022); Jury Charge of Hon. J. Paul Oetken in *United States v. Block*, 16 Cr. 595 (S.D.N.Y. 2017).

**15. The Indictment**

Ms. Okeke has been formally charged in an indictment. An indictment is not evidence. As I instructed you at the outset of this case, the indictment is a charge or accusation. It merely describes the charges made against a defendant. An indictment is a formal method of bringing a case into court for trial and determination by a jury. It creates no presumption that a crime was committed, and no inference of any kind may be drawn from the fact that Ms. Okeke is charged by an indictment. You may not consider an indictment as any evidence of her guilt. The fact that she is the subject of this indictment and is on trial here may not be used against her in any way whatsoever.

Before you begin your deliberations, you will be provided with a copy of the indictment. I will not read the entire indictment to you at this time. Rather, I will first summarize the offenses charged in the indictment and then explain in detail the elements of each of the offenses.[15]

[15] *Id.*

**16. <u>Summary of the Indictment</u>**

The Indictment contains four counts. Each count charges a separate offense or crime. You must, therefore, consider each count separately and you must return a separate verdict on each count.

Count One charges Ms. Okeke with conspiracy to commit wire and bank fraud against Popular Bank and the United States Small Business Administration ("SBA").

In Counts Two and Three, Ms. Okeke is charged respectively with the wire fraud and bank fraud itself. These are sometimes referred to as substantive counts in contrast to the conspiracy count.

Count Four charges Ms. Okeke with money laundering conspiracy.

In a moment I will instruct you on each of these charges in more detail.[16]

[16] *Id.*

**17. <u>Theory of the Defense</u>**

[TO BE INCLUDED AT TRIAL]

### 18. Conspiracy and Substantive Counts

As I have just described, there are two conspiracy counts in the indictment, while two others are what are referred to as substantive counts. Unlike the conspiracy charge, which alleges an agreement to commit certain offenses, the substantive counts are based on the actual commission of offenses.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which may be the object of the conspiracy. Congress has deemed it appropriate to make conspiracy, standing alone, a separate crime, even if the object of the conspiracy is not achieved.

The essence of the crime of conspiracy is an agreement or understanding to violate other laws. Thus, if a conspiracy exists, even if it fails, it is still punishable as a crime. Consequently, in a conspiracy charge there is no need to prove that the crime that was the objective of the conspiracy was actually committed.

By contrast, the substantive counts require proof that the crime charged was actually committed, but do not require proof of an agreement. If a defendant both participates in a conspiracy to commit a crime and then actually commits that crime, that defendant may be guilty of both the conspiracy and the substantive crime, as I will instruct you shortly.

For ease and clarity of instruction, we will turn first to the substantive charges in the indictment before considering the conspiracy charges, despite the fact that this deviates from the order in which the charges are listed in the indictment.[17]

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[17] Adapted from Sand, et al., *Modern Federal Jury Instructions*, Instr. 19-2. *See also United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990) ("Since the essence of conspiracy is the agreement and not the commission of the substantive offense that is its objective, the offense of conspiracy may be established even if the collaborators do not reach their goal.").

**19. <u>Count Two – Wire Fraud</u>**

Count Two charges Ms. Okeke with wire fraud. Specifically, it is alleged that between March 2020 and August 2020, she, together with others, knowingly and intentionally devised a scheme and artifice to defraud and obtain money and property from Popular Bank and the SBA by false pretenses, representations and promises, and for the purposes of executing this scheme transmitted or caused to be transmitted interstate wires.

In order to meet its burden, the Government must prove each of the following three elements beyond a reasonable doubt:

<u>First</u>, the defendant employed a device, scheme, or artifice to defraud or to obtain money or property by false and fraudulent pretenses, representations or promises;

<u>Second</u>, the defendant knowingly and willfully participated in the scheme or artifice to defraud, with knowledge of its fraudulent nature and with specific intent to defraud; and

<u>Third</u>, in the execution of the scheme, the defendant used, or caused to be used, interstate wires as specified in the indictment.

If you find that the Government has proven all of these elements beyond a reasonable doubt, then you should find Ms. Okeke guilty of Count One.

If, on the other hand, you find that the government has failed to prove any one (or more) of these elements beyond a reasonable doubt, then you must acquit Ms. Okeke as to Count Two.[18]

[18] 2 Sand et al., Modern Federal Jury Instructions ¶ 44.01, Instruction 44-3.

### 20. Count Two – Wire Fraud: First Element: Fraudulent Act

The first element that the government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud Popular Bank and/or the SBA of money or property by means of false or fraudulent pretenses, representations, or promises.

A "scheme or artifice" is a plan for the accomplishment of an object.

A scheme to defraud is any plan, device, or course of action to obtain money or property by means of false or fraudulent pretenses, representations, or promises reasonably calculated to deceive persons of average prudence.

"Fraud" is a general term that embraces all the various means that human ingenuity can devise and that are resorted to by an individual to gain an advantage over another by false representations, suggestions, or suppression of the truth, or deliberate disregard for the truth.

Thus, a "scheme to defraud" is a plan to deprive another of money or property by trick, deceit, deception or swindle.

The false or fraudulent representation must relate to a material fact or matter. A material fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. This means that if you find a particular statement to have been false, you must determine whether that statement was one that a reasonable person or institution might have considered important in making a decision.

In addition to proving that the statement was false or fraudulent and related to a material fact, in order to establish a scheme to defraud, the government must prove that the alleged scheme contemplated depriving another of money or property.[19]

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[19] *Id.*

### 21. Count Two – Wire Fraud: Second Element: State of Mind[20]

The second element the Government must establish beyond a reasonable doubt is that Ms. Okeke participated in the scheme to defraud knowingly, willfully and with intent to defraud.

To act "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

To act "willfully" means to act with bad purpose, and with knowledge that her conduct was unlawful.[21] The Government must prove that Ms. Okeke acted with the intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

To act with "intent to defraud" means to act knowingly and with an intent to deceive. A defendant does not act willfully or with intent to defraud if she honestly believes that her actions were proper.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to a charge of wire fraud. Under the wire fraud statute, even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith. An honest belief in the

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[20] 2 Sand et al., Modern Federal Jury Instructions ¶ 44.01, Instruction 44-5.

[21] 1 *Modern Federal Jury Instructions-Criminal* P 3A.03 (2023); *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023) ("When used in the criminal context, a willful act is one undertaken with a bad purpose. In other words, in order to establish a willful violation of this statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (cleaned up)); *United States v. Kosinski*, 976 F.3d 135 (2d Cir. 2020) ("[A]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (quoting *Bryan v. United States*, 524 U.S. 184, 191-92 (1998)).

truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. As a practical matter, then, in order to sustain the charges against the defendant, the Government must establish beyond a reasonable doubt that she knew that her conduct as a participant in the scheme was calculated to defraud of deceive in a manner that violated the law, as opposed to merely transgressing ethical standards or workplace rules, and, nonetheless, she associated herself with the alleged fraudulent scheme for the purpose of causing some loss to another.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that he committed an act with fraudulent intent. Such direct proof is not required. Instead, the ultimate facts of knowledge and intent, though subjective, may be established by circumstantial evidence, based upon a person's words, her conduct, her acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them. As I instructed you earlier, circumstantial evidence, if believed, is of no less value than direct evidence.[22]

To conclude on this element, if you find that Ms. Okeke lacked the intent to deceive, you should acquit her. On the other hand, if you find that the government has established beyond a reasonable doubt the first two elements, namely, the existence of a scheme to defraud and that Ms. Okeke acted with the requisite state of mind, then you should next consider the third element below.

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[22] *Phillips* at 17 (modified to delete "You may also infer, but are not required to infer, that people intend the natural and probable consequences of their actions" which is confusing, unsourced, and inapposite on the facts of this case.)

**22. <u>Count Two – Wire Fraud – Third Element: Use of Interstate Wires</u>**

The third and final element that the Government must establish beyond a reasonable doubt is the use of an interstate or international wire communication in furtherance of the scheme to defraud. Wire communications include telephone calls, emails, and text messages. The wire communication must pass between two or more states such as, for example, a telephone call or email between New York and New Jersey.

The use of the wires need not itself be a fraudulent representation. It must, however, further or assist in the carrying out of the scheme to defraud. It is not necessary for the defendant to be directly or personally involved in the wire communication, as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which that defendant is accused of participating.

In this regard, it is sufficient to establish this element of the crime if the evidence justifies a finding that the defendant caused the wires to be used by others. This does not mean that that defendant must specifically have authorized others to, for example, make a call or send an email. When one does an act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires can reasonably be foreseen, even though not actually intended, then he causes the wires to be used.

With respect to the use of the wires, the government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the government does not have to prove that the wires were used on the exact date charged in the indictment. It is sufficient if the evidence establishes beyond a reasonable doubt that the wires were used on a date substantially similar to the dates charged in the indictment.[23]

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[23] Adapted from Sand, et al., *Modern Federal Jury Instructions*, Instr. 44-7.

### 23. Count Three – Bank Fraud

Count Three alleges that Ms. Okeke committed bank fraud. In order to prove the defendant guilty of this crime, the government must establish each of the following beyond a reasonable doubt:

First, that there was a scheme to defraud Popular Bank as charged in the indictment.

Second, that the defendant executed the scheme with the intent to defraud the bank; and

Third, that at the time of the execution of the scheme, Popular Bank had its deposits insured by the FDIC.[24]

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[24] Sand, et al., *Modern Federal Jury Instructions*, Instr. 44-9.

**24. <u>Count Three – Bank Fraud: Element One: Scheme to Defraud</u>**

The first element that the government must prove beyond a reasonable doubt is that there was a scheme to defraud Popular Bank as described in the indictment. A "scheme to defraud" is defined as a pattern or course of conduct concerning a material matter designed to deceive a federally insured bank into releasing property with the intent to cause the bank to suffer an actual or potential loss.

A fraudulent representation must relate to a material fact or matter. A material fact is one that would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision. This means that if you find a particular statement of fact to have been false, you must determine whether that statement was one that a reasonable person might have considered important in making his or her decision.[25]

[25] Sand, et al., *Modern Federal Jury Instructions*, Instr. 44-10.

### 25. Count Three – Bank Fraud: Element Two: Intent to Defraud

The second element the Government must establish beyond a reasonable doubt is that Ms. Okeke participated in the scheme to defraud knowingly, willfully and with intent to defraud Popular Bank.

To act "knowingly" means to act voluntarily and deliberately, rather than mistakenly or inadvertently.

To act "willfully" means to act with bad purpose, and with knowledge that her conduct was unlawful.[26] The Government must prove that Ms. Okeke acted with the intent to do something the law forbids, that is to say, with bad purpose either to disobey or to disregard the law.

To act with "intent to defraud" means to act knowingly and with an intent to deceive, for the purpose of causing financial loss to another. A defendant does not act willfully or with intent to defraud if she honestly believes that her actions were proper.

Since an essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to a charge of wire fraud. Under the fraud statutes, even false representations or statements, or omissions of material facts, do not amount to a fraud unless done with fraudulent intent. However misleading or deceptive a plan may be, it

[26] 2 *Modern Federal Jury Instructions-Criminal* P 44-11 (2023); *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023) ("When used in the criminal context, a willful act is one undertaken with a bad purpose. In other words, in order to establish a willful violation of this statute, the Government must prove that the defendant acted with knowledge that his conduct was unlawful." (cleaned up)); *United States v. Kosinski*, 976 F.3d 135 (2d Cir. 2020) ("[A]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.' In other words, in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct was unlawful.'") (quoting *Bryan v. United States*, 524 U.S. 184, 191-92 (1998)); *United States v. Mizrahi*, 22 Cr. 650 (JPO); Dkt. 104, 2024 U.S. Dist. LEXIS 35748 (S.D.N.Y. Feb. 26, 2024) (endorsing Sand bank fraud instruction on willfulness in draft charge).

is not fraudulent if it was devised or carried out in good faith. An honest belief in the truth of the representations made by a defendant is a good defense, however inaccurate the statements may turn out to be. A defendant, however, has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. As a practical matter, then, in order to sustain the charges against the defendant, the Government must establish beyond a reasonable doubt that she knew that her conduct as a participant in the scheme was calculated to defraud of deceive in a manner that violated the law, as opposed to merely transgressing ethical standards or workplace rules, and, nonetheless, she associated herself with the alleged fraudulent scheme for the purpose of causing some loss to another.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that he committed an act with fraudulent intent. Such direct proof is not required. Instead, the ultimate facts of knowledge and intent, though subjective, may be established by circumstantial evidence, based upon a person's words, her conduct, her acts, and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that may be drawn from them. As I instructed you earlier, circumstantial evidence, if believed, is of no less value than direct evidence.

To conclude on this element, if you find that Ms. Okeke lacked the intent to deceive, you should acquit her. On the other hand, if you find that the government has established beyond a reasonable doubt the first two elements, namely, the existence of a scheme to defraud and that Ms. Okeke acted with the requisite state of mind, then you should next consider the third element below.

**26. <u>Count Three – Bank Fraud: Element Three: Bank was Federally Insured</u>**

The last element of Count Three that the government must prove beyond a reasonable doubt is that Popular Bank was insured by the Federal Deposit Insurance Corporation ("FDIC") at the time of the execution of the alleged scheme to defraud.

It is not necessary for the government to prove that the defendant knew that Popular Bank was insured by the FDIC so long as the government proves beyond a reasonable doubt that Ms. Okeke intended to defraud Popular Bank.[27]

[27] Sand, et al., *Modern Federal Jury Instructions*, Instr. 44-11.

### 27. Count One: Conspiracy to Commit Wire Fraud and Bank Fraud

Earlier in these instructions, I explained to you that a conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which may be the object of the conspiracy. I have already instructed you on the substantive crimes of wire fraud and bank fraud during my instructions on Counts Two and Three. You should consider those instructions in determining whether the Government has proven beyond a reasonable doubt that with respect to the conspiracy count alleged, Count One, two or more conspirators agreed to commit wire fraud and/or bank fraud as an object of the alleged conspiracy. In other words, the government must prove that the conspirators agreed to commit a wire fraud or bank fraud that, if carried out, would have met every element of the substantive wire fraud as I have defined them for you.

I will now discuss the elements of the wire fraud and bank fraud conspiracy charged in the indictment. In order to sustain its burden of proof on this charge, the government must prove beyond a reasonable doubt the following two elements:

First, that there was an agreement or understanding to accomplish the unlawful objective alleged in the indictment, which is wire fraud and bank fraud; and

Second, that the defendant knowingly and willfully became a member of and joined in this conspiracy during the applicable time period.[28]

[28] Adapted from the Jury Charge of Hon. Lewis A. Kaplan, *United States v. Blaszczak*, 17 Cr. 357 (S.D.N.Y. 2018).

### 28. Count One – Conspiracy to Commit Wire Fraud and Bank Fraud: Element One

The first element which the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that two or more persons entered into the unlawful agreement charged in the indictment. The object of a conspiracy is the illegal agreement that the conspirators agree or hope to achieve; here, to commit wire fraud and bank fraud.

In order for the Government to satisfy this element, you need not find that the alleged members of the conspiracy met together and entered into any express or formal agreement. Similarly, you need not find that the alleged conspirators stated, in words or writing, what the scheme was, its object or purpose, or every precise detail of the scheme or the means by which its object or purpose was to be accomplished. What the government must prove is that there was a mutual understanding, either spoken or unspoken, between two or more people to cooperate with each other to accomplish the unlawful objective alleged which, for purposes of this count, is wire fraud.

You may, of course, find that the existence of an agreement to commit wire fraud has been established by direct proof. However, since conspiracy is, by its very nature, characterized by secrecy, you may also infer its existence from the circumstances of this case and the conduct of the parties involved.

In a very real sense, then, in the context of a conspiracy charge, actions often speak louder than words. In this regard you may, in determining whether an agreement existed here, consider the actions and statements of all of those whom you found or find to be participants as proof that a common design existed on the part of the persons involved in the conspiracy to act together to accomplish an unlawful purpose.[29]

[29] Adapted from the Jury Charge of Hon. J. Paul Oetken in *United States v. Block*, 16 Cr. 595 (2017); Sand, et al., Modern Federal Jury Instructions, Instr. 19-4.

### 29. Count One – Conspiracy to Commit Wire Fraud and Bank Fraud: Element Two

If you find that the government has proven beyond a reasonable doubt that the wire fraud and bank fraud conspiracy charged existed, then you must consider the second element of the crime. The second element the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that the defendant knowingly, willfully, and voluntarily became a member of the alleged conspiracy.

I have already instructed you on the definitions of knowingly and willfully and you should apply that those definitions here.

If you are satisfied that the conspiracy to commit wire fraud charged in the indictment existed, you must next ask yourselves who were the members of that conspiracy. In deciding whether the defendant was, in fact, a member of the conspiracy, you should consider whether the defendant knowingly and willfully joined the conspiracy and participated in it with knowledge of its unlawful purpose and with the specific intention of furthering its objective?

As I mentioned a moment ago, before the defendant can be found to have been a conspirator, you must first find that she knowingly joined in the unlawful agreement or plan. The key question, therefore, is whether the defendant joined the conspiracy with an awareness of the basic aims and purposes of the unlawful agreement, here, to commit wire fraud as I have defined it for you.[30]

It is important for you to note that each defendant's participation in the conspiracy must be established by independent evidence of his or her own acts or statements, as well as those of the other alleged conspirators, and the reasonable inferences that may be drawn from them.

[30] 1 Sand et al., Modern Federal Jury Instructions ¶ 19.01, Instruction 19-6.

A defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need she have been apprised of all of their activities. Moreover, the defendant need not have been fully informed as to all of the details, or the scope, of the conspiracy in order to justify an inference of knowledge on her part.

The extent of a defendant's participation has no bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of her participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor roles in the scheme. An equal role is not what the law requires. In fact, even a single act may be sufficient to draw a defendant within the ambit of the conspiracy.

I want to caution you, however, that a defendant's mere presence at the scene of the alleged crime does not, by itself, make her a member of the conspiracy. Similarly, mere association with one or more members of the conspiracy does not automatically make the defendant a member. A person may know, or be friendly with, a criminal, without being a criminal herself. Mere similarity of conduct or the fact that they may have assembled together and discussed common aims and interests does not necessarily establish membership in the conspiracy.

I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member. More is required under the law. What is necessary is that the defendant must have participated with knowledge of at least some of the purposes or objectives of the conspiracy and with the specific intention of aiding in the accomplishment of those that unlawful ends. The government is not required to prove that the members of the alleged conspiracy were successful in achieving any or all of the objects of the conspiracy.

In sum, the defendant, understanding the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. That is, the defendant joined an agreement to commit every element of the offense of substantive wire fraud. She thereby becomes a knowing and willing participant in the unlawful agreement—that is to say, a conspirator.[31]

[31] 1 Sand et al., Modern Federal Jury Instructions ¶ 19.01, Instruction 19-6.

**30. Count Four – Money Laundering Conspiracy**

The fourth and final charge in the indictment against Ms. Okeke is conspiracy to commit money laundering. In order to prove this charge, the government must establish beyond a reasonable doubt each of the following elements:

Moments ago, I instructed you with regard to the elements of conspiracy in connection with the fraud conspiracy charge and those same elements apply to the money laundering conspiracy charge. In sum, those elements are:

First, two or more persons entered into an agreement to commit money laundering; and

Second, the defendant knowingly and intentionally became a member of the conspiracy.

The first element requires that the government prove that at least two conspirators had a meeting of the minds, and that they agreed to work together to accomplish the object of the charged conspiracy, here, money laundering.

The second element requires that the government prove that Ms. Okeke knowingly and willfully became a participant in the conspiracy. In sum, the defendant, understanding the unlawful character of the conspiracy, must have intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. That is, the defendant joined an agreement to commit every element of the offense of substantive wire fraud. She thereby becomes a knowing and willing participant in the unlawful agreement—that is to say, a conspirator.

The government need not prove that money laundering was actually committed or attempted for you to find that the money laundering conspiracy has been proven. Rather, this type of conduct alleges only that a defendant conspired to commit the offense of money laundering.[32]

[32] Adapted from the Jury Charge of Hon. Pamela K. Chen, *United States v. Full Play Grp., S.A.*, 15 Cr. 252 (S-3) (PKC), Dkt. 1963 (E.D.N.Y. Mar. 9, 2023).

### 31. Count Four – Money Laundering Conspiracy: Elements of Money Laundering

The elements of the substantive crime of money laundering are:

First, that the defendant engaged in a monetary transaction in or affecting interstate commerce. The term "monetary transaction" means the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce, of funds or a monetary instrument by, through, or to a financial institution.

The term "interstate or foreign commerce" means commerce between any combination of states, territories or possessions of the United States, or between the United States and a foreign country.

Second, that the monetary transaction involved criminally derived property of a value greater than $10,000. The term "criminally derived property" means any property constituting, or derived from, proceeds obtained from a criminal offense. The term "proceeds" means any property derived from or obtained or retained, directly or indirectly, through some form of unlawful activity, including the gross receipts of such activity.

Third, that the property was derived from unlawful activity specified in the indictment.

Fourth, that the defendant acted knowingly; that is, with knowledge that the transaction involved proceeds of a criminal offense.

Again, the government need not prove that money laundering was actually committed for you to find that the money laundering conspiracy has been proven. Instead, the government must prove that two or more people entered into an unlawful agreement to commit the money laundering offense just explained, and the defendant knowingly and intentionally became a member of that conspiracy.[33]

[33] *Id.*; 1 Sand et al., Modern Federal Jury Instructions ¶ 50A-26.

**32. Venue**

In addition to all of the elements I have just described, you must also consider the issue of venue. Venue refers to the fact that the government must prove that a charge was properly brought in this court as opposed to a different federal court.[34]

Thus, with respect to any given count, the government, in addition to proving the essential elements of that charge, must also prove that Ms. Okeke caused at least one act in furtherance of the charge to occur in the Eastern District of New York and that it was foreseeable that such an act would occur in the district.[35] The Eastern District of New York includes all of Brooklyn, Queens, and Staten Island, as well as Suffolk and Nassau Counties.

While the government does not have to prove that a completed crime was committed within the Eastern District of New York or that Ms. Okeke herself committed any acts in the district, it must prove that she caused a foreseeable act in furtherance of the charged crime to be committed in the district. To be in furtherance of a charged offense, an act, though not necessarily criminal in and of itself, must constitute part of the violation and not be merely preparatory or take place after the offense has been completed.[36]

In order to establish venue for the wire fraud charge in Count Two, the government must prove the defendant caused an interstate wire, such as an e-mail, phone call, or financial transaction to be transmitted into or out of the district. The wire need not itself be criminal so

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[34] Jury charge of the Hon. Arun Subramanian in *United States v. Eisenberg*, 23 Cr. 10 (AS) (S.D.N.Y. Apr. 2024)

[35] *United States v. Svoboda*, 347 F.3d 471, 483 (2d Cir. 2003).

[36] *United States v. Lange*, 834 F.3d 58, (2d Cir. 2016) ("To be 'in furtherance of the charged offense,' acts or transactions must constitute the securities fraud violation – mere preparatory acts are insufficient.") (citing *United States v. Tzolov*, 834 F.3d 58, 69 (2d Cir. 2011)).

long as it was transmitted or caused to be transmitted as part of the scheme or artifice to defraud.[37]

In order to establish venue for bank fraud, Count Three, the government must prove that a foreseeable act constituting part the fraud violation occurred in the Eastern District of New York.[38]

Unlike the elements of the offenses which must be proven beyond a reasonable doubt, the government is only required to prove venue by a preponderance of the evidence. A preponderance of the evidence means that it is more probable than not that some act in furtherance of the crime occurred in this District.[39] Again, it is essentially important to remember that all other elements of the crimes charged against Ms. Okeke must be proven beyond a reasonable doubt by the government.

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[37] *Id.*
[38] *Tzolov*, 834 F.3d at 69.
[39] Adapted from the charge of the Hon. Colleen McMahon in *United States v. Omar Gonzalez*, 10 Cr. 588 (S.D.N.Y. 2010), and from Sand, *Modern Federal Jury Instructions*, Instr. 3-11.

**33. <u>Variance in Dates and Times</u>**

You will note that the Indictment alleges that certain acts occurred on or about various dates. It does not matter if the evidence you heard at trial indicates that a particular act occurred on a different date. The law requires only a substantial similarity between the dates alleged in the Indictment and the dates established by the evidence.[40]

[40] Adapted from the charges of the Hon. Edward Weinfeld in *United States v. Della Rocca*, 72 Cr. 217 (S.D.N.Y. 1972), and from the charges of the Hon. Charles Metzner in *United States v. Koss*, *aff'd*, 506 F.2d 1103 (2d Cir. 1974), cert. denied, 420 U.S. 977 (1975).

**34. <u>Multiple Counts</u>**

You must return a separate verdict of guilty or not guilty for each count charged. Whether you find Ms. Okeke guilty or not guilty as to one offense should not affect your verdict as to any other offense. You must analyze and evaluate the evidence separately as to each count.[41]

[41] *United States v. Phillips*, 22 Cr. 138 (LJL) (S.D.N.Y. Oct. 2023).

**35. Credibility of Witnesses**

You have had the opportunity to observe the witnesses. It is now your job to decide how believable or credible each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony. How do you judge the credibility of witnesses? There is no magic formula.

You should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, the impression the witness made when testifying, the relationship of the witness to the controversy and the parties, the witness's bias or impartiality, the reasonableness of the witness's statement, the strength or weakness of the witness's recollection viewed in light of all other testimony and evidence, and any other matter in evidence that may help you to decide the truth and the importance of each witness's testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. You should use your common sense, your good judgment, and your everyday experiences in life to make credibility determinations.

In passing upon the credibility of a witness, you may also take into account any inconsistencies or contradictions as to material matters in his or her testimony.

If you find that any witness has willfully testified falsely as to any material fact, you have the right to reject the testimony of that witness in its entirety. On the other hand, even if you find that a witness has testified falsely about one matter, you may reject as false that portion of his or her testimony and accept as true any other portion of the testimony which commends itself to your belief or which you may find corroborated by other evidence in this case. A witness may be inaccurate, contradictory, or even untruthful in some aspects, and yet be truthful and entirely credible in other aspects of his or her testimony.

The ultimate question for you to decide in passing upon credibility is: did the witness tell the truth before you? It is for you to say whether his or her testimony at trial is truthful in whole or in part.

In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection that the witness may have towards one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating with a particular party. You should also take into account any evidence of any benefit that a witness may receive from the outcome of the case.

It is your duty to consider whether the witness has permitted any such bias or interest to color his or her testimony. In short, if you find that a witness is biased, you should view his or her testimony with caution, weigh it with care, and subject it to close and searching scrutiny.

Of course, the mere fact that a witness is interested in the outcome of the case does not mean he or she has not told the truth. It is for you to decide from your observations and applying your common sense and experience and all the other considerations mentioned whether the possible interest of any witness has intentionally or otherwise colored or distorted his or her testimony. You are not required to disbelieve an interested witness; you may accept as much of his or her testimony as you deem reliable and reject as much as you deem unworthy of acceptance.

You have heard evidence during the trial that witnesses had discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court. Although you may consider that fact when you are evaluating a witness's credibility, I should tell you that there is nothing either unusual or improper about a witness meeting with lawyers before testifying, so that the witness can be made aware of the subjects that he or she will be questioned about, focus on those subjects, and have the opportunity to review relevant exhibits before being questioned about them. In fact, it would be unusual for a lawyer to call a witness without such consultation. Again, the weight you give to the fact or the nature of the witness's preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.

You have heard the testimony of a law enforcement official. The fact that a witness may be employed as a law enforcement official does not mean that his or her testimony is necessarily deserving of more or less consideration or greater or lesser weight than that of an ordinary witness. In this context, Ms. Okeke is allowed to try to attack the credibility of such a witness on the ground that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

It is your decision, after reviewing all the evidence, whether to accept the testimony of the law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. By the same token, you do not have to accept the testimony of any witness who has not been contradicted or impeached, if you find the witness not to be credible. You also have to decide which witnesses to believe and which facts are true. To do this you must look at all the evidence, drawing upon your own common sense and personal experience. I have just discussed the criteria for evaluating credibility; keep in mind that the burden of proof is always on the

Government and Ms. Okeke is not required to call any witnesses or offer any evidence, since she is presumed to be innocent.[42]

[42] *Elianor*, 20 Cr. 332 (ERK) (E.D.N.Y. Oct. 2022); *United States v. Phillips*, 22 Cr. 138 (LJL) (S.D.N.Y. Oct. 2023).

**36. <u>Particular Investigative Techniques Not Requires</u>**

You have heard references in the arguments in this case to the fact that certain investigative techniques were used by the Government and that certain others were not used. There is no legal requirement that the Government use any specific investigative techniques to prove its case. However, you may consider these facts in deciding whether the Government has met its burden of proof, because, as I told you, you should look to all of the evidence and lack of evidence in deciding whether or not the Government has proven Mr. Okeke's guilt beyond a reasonable doubt.[43]

[43] Adapted from Jury Charge of Hon. Gregory Woods in *United States v. Chow*, 17 Cr. 667 (S.D.N.Y. 2018).

**37. <u>Charts and Summaries (if applicable)</u>**

The Government (or defense) has presented exhibits in the form of charts and summaries. These charts and summaries were shown to you in order to make the other evidence more meaningful and to aid you in considering the evidence. They are no better than the testimony or the documents upon which they are based, and are not themselves independent evidence. Therefore, you are to give no greater consideration to these schedules or summaries than you would give to the evidence upon which they are based.

It is for you to decide whether the charts and summaries correctly present the information contained in the testimony and in the exhibits on which they are based. To the extent that the charts conform with what you determine the underlying evidence to be, you may consider them if you find that they are of assistance to you in analyzing and understanding the evidence.[44]

[44] Adapted from Sand, *Modern Federal Jury Instructions*, Instr. 5-13.

**38. Preparation of Witnesses**

You have heard evidence during the trial that witnesses have discussed the facts of the case and their testimony with the lawyers before the witnesses appeared in court.

You may consider that fact when you are evaluating a witness's credibility. There is nothing either unusual or improper about a witness meeting with lawyers before testifying so that the witness can be aware of the subjects he will be questioned about, focus on those subjects, and have the opportunity to review relevant exhibits before being questioned about them. Such consultation helps conserve your time and the Court's time. In fact, it would be unusual for a lawyer to call a witness without such consultation.

Again, the weight you give to the fact or the nature of the witness's preparation for his or her testimony and what inferences you draw from such preparation are matters completely within your discretion.[45]

[45] Adapted from *Elianor*, 20 Cr. 332 (ERK) (E.D.N.Y. Oct. 2022); Hon. P. Kevin Castel in *United States v. Fuentes Ramirez*, 15 Cr. 379 (PKC), Dkt. 308, 1151 (S.D.N.Y. 2021).

### 39. Evidence Obtained From Searches

You have heard testimony about the evidence seized in connection with certain searches conducted by law enforcement officers or otherwise obtained by law enforcement. Evidence obtained from these searches was properly admitted in this case and may be properly considered by you. Whether you approve or disapprove of how the evidence was obtained should not enter into your deliberations, because I instruct you that the Government's use of the evidence is entirely lawful. You must, therefore, give this evidence full consideration along with all the other evidence in the case in determining whether the Government has proven Mr. Okeke's guilt beyond a reasonable doubt.[46]

[46] Adapted from the charges of the Hon. P. Kevin Castel in *United States v. Fuentes Ramirez*, 15 Cr. 379 (PKC), Dkt. 308, at 1148 (S.D.N.Y. 2021); Hon. William H. Pauley III in *United States v. Meregildo*, 11 Cr. 576 (S.D.N.Y. Nov. 28, 2012).

**40. <u>Defendant's Testimony</u>**

[*Requested only if Ms. Okeke testifies*]

The defendant in a criminal case never has any duty to testify or come forward with any evidence. This is because, as I have told you, the burden of proof beyond a reasonable doubt remains on the Government at all times, and Ms. Okeke is presumed innocent. In this case, Ms. Okeke did testify and was subject to cross-examination like any other witness. You should examine and evaluate the testimony just as you would the testimony of any witness with an interest in the outcome of the case.[47]

[47] *See United States v. Gaines*, 457 F.3d 238, 249 & n.9 (2d Cir. 2006).

**41. Defendant's Right Not to Testify**

[*Requested if Ms. Okeke does not testify*]

Ms. Okeke did not testify in this case. Under our Constitution, a defendant has no obligation to testify or to present any evidence, because it is the Government's burden to prove Ms. Okeke guilty beyond a reasonable doubt. That burden remains with the Government throughout the entire trial and never shifts to the defendant. A defendant is never required to prove that she is innocent. The right of a defendant not to testify is an important part of our Constitution. As the Supreme Court of the United States has said:

> It is not everyone who can safely venture on the witness stand though entirely innocent of the charges against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove any prejudice against him. It is not everyone, however honest, who would therefore willingly be placed on the witness stand.[48]

Therefore, you must not attach any significance to the fact that Ms. Okeke did not testify. You also may not speculate as to why the defendant did not testify. There are many reasons why a defendant may decide not to testify. You may not attach any significance to the fact that the defendant did not testify. No adverse inference against her may be drawn by you because she did not take the witness stand. You also may not consider it in any way in your deliberations in the jury room.[49]

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[48] Adapted from the charge given by Honorable John S. Martin in *United States v. Roy Moody*, 00 Cr. 671 (JSM).

[49] Sand, *Modern Federal Jury Instructions*, Instr. 5-21; Jury charge given by the Hon. Arun Subramanian in *United States v. Eisenberg*, 23 Cr. 10 (AS) (S.D.N.Y. Apr. 2024)

**CONCLUSION**

The defense respectfully requests that the Court accept these proposed jury instructions.

DATED: May 17, 2024

Respectfully Submitted,

By: */s/ Sanford Talkin*

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