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May 24, 2024

BY ECF

Honorable Frederic Block
United States District Judge
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: United States v. Anuli Okeke
22 Cr. 20 (FB)

Dear Judge Block:

We write on behalf of the defendant Anuli Okeke ("Okeke") in response to the government's motions *in limine* ("Mot.", Dkt. 78). For the reasons stated below, the Court should deny motions 1, 2, 3, and 7. Defendant does not object to motions 4 and 5 and does not object to motion 6 on the understanding that the parties are in agreement, as described below, on the proper use of law enforcement reports of witness interviews.

1. Loan Documents and Business Emails

The government states that "it intends to offer various loan contracts and related PPP and EIDL loan documents and accompanying correspondence" as verbal acts or business records. Mot. at 6. While the defense disputes that the documents are verbal acts,[1] they might nevertheless be admissible as either business records or as non-hearsay. However, the government, which does not appear to request any ruling on the motion from the Court, has not identified the documents to which it is referring with sufficient specificity for the defense to respond.

The vagueness of the government's request is compounded by the fact that the government's current exhibit list is so lacking in specificity as to be nearly illusory. The

[1] Verbal acts are verbal or written statements that "give rise to legal consequences" like contracts. *See United States v. Cardascia*, 951 /f.2d 474, 486-87 (2d Cir. 1991). The government's motion papers do not refer to any allegation that Okeke or any alleged co-conspirator entered into any contract or legal agreement with any other party.

government and the defendant have had multiple discussions regarding the defense's issues with the exhibit list—including the fact that exhibits are missing, nearly 80 percent of the exhibits are in a single series and described simply as "Popular Bank Records," exhibits are compilations of multiple documents or videos that are hours long, and hundreds of exhibits are listed with little or no explanation of what they are or their source, many of which appear unlikely to actually be used at trial. Given the current state of the government's exhibit list, it is impossible for the defendant to determine to which exhibits or portions thereof the government's current motion refers. The government has informed the defense that it is currently endeavoring to amend the exhibit list.

In addition to these discussions regarding the government's amending its exhibits list, the defense has also solicited from the government potential stipulations regarding the admissibility of bank records that will hopefully moot this issue. At present, however, the government's motion is vague and unripe and should be denied.

2. <u>Other Acts Evidence</u>

The government "moves *in limine* to admit testimony and limited documents as to certain other acts evidence." Mot. at 7. While the government offers a general description of categories of other acts evidence it wishes to admit, it provides no specific description of the documents or testimony it seeks to introduce, let alone exhibit or Bates numbers identifying the documents. For this reason and the problems discussed above regarding the government's exhibit list, this application, too, is premature and should be denied.

First, the government asserts that it "anticipates introducing evidence that the defendant in some instances knowingly violated Bank 1 policies, practices, and procedures." Mot. at 8. The government further states—vaguely—that the evidence it seeks to introduce relates to "ethics, including conflicts of interests, abusive sales practices, falsifying or manipulating applications, anti-money laundering practices, and know-your-customer requirements." Mot. at 9.

While evidence regarding Bank policies allegedly violated and relating to the conduct at issue in this case would be relevant and likely admissible, the government has simply not provided sufficient information to conduct such an analysis. General ethics policies and trainings, for example, would appear to be irrelevant and inadmissible under Federal Rules of Evidence 402 and 403. Because the government has failed to identify any specific policy or practice in its motion or on its exhibit list, this branch of the motion is premature and should be denied.

The second branch of this motion relates to the government's intention to "introduc[e] evidence that the defendant did not report her earnings from the fraudulent scheme on her taxes." Mot. at 8. Once again, the government has not identified what sorts of documents it intends to introduce and/or who it would call to testify regarding this issue. Neither the government's motion papers nor the exhibit list identify any relevant tax filings or documents relating to the defendants income and taxes for the relevant time period. This branch of the motion should thus also be denied.

In the event that the government were able to identify evidence probative of whether defendant declared income connected to the charged conduct—which, to date the government has not done—the defense would agree that such evidence could be admitted pursuant to Rule 404(b) and the jury be given a limiting instruction. The government is incorrect, however, that this evidence could be admitted as direct evidence of the charges. In a recent opinion, Judge Nicholas Garaufis considered this very issue and held that "the court declines to find that the tax returns are admissible as direct evidence," noting that "the Government has not pointed the Court to any cases in which courts have admitted tax return evidence solely under the standard for direct evidence." *United States v. Kurland*, No. 20 Cr. 206 (NGG), 2022 WL 2669897, 2022 U.S. Dist. LEXIS 121821, at * 22-23 (E.D.N.Y. July 11, 2022). Indeed, in *Kurland*, Judge Garaufis noted that in the case on which the government seeks here to rely, *United States v. Black*, No. 13 Cr. 316 (DLI), 2014 WL 5783067, U.S. Dist. LEXIS 156884 (E.D.N.Y. Nov. 5, 2014), while the Court acknowledged that it was persuaded by out of circuit authority that tax returns could constitute direct evidence, the returns ultimately came in only after a Rule 404(b) analysis. *Kurland*, 2022 U.S. Dist. LEXIS 121821, at * 22-23; *accord United States v. Hurt*, No. 14 Cr. 250 (JBA), 2016 U.S. Dist. LEXIS 446 (D. Conn. Jan. 4, 2016) (noting Rule 404(b) analysis in *Black* and admitting tax returns with limiting instruction under same rationale).

The government's motion should thus be denied as premature because the Court and the defense lack notice of which document/s or document types the government intends to offer. In the event that the government in the future does present relevant and admissible tax documentation, those documents should be admitted only with an appropriate limiting instruction.

3. <u>Statements of Co-Conspirators</u>

The government writes that it "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." Mot. at 12. Because the government seeks no relief and the defense is confident that the Rules of Evidence will be adhered to, no response is necessary.

4. <u>Evidence Regarding Punishment, and Prior Good Acts</u>

The government moves "to preclude evidence and argument" regarding "potential punishment or consequences" faced by defendant and "prior commission of any alleged 'good acts.'" Mot. 13-14. Defendant has never stated any intention to offer such evidence or make such an argument and has no such intention.

5. <u>Evidence Regarding Alleged Negligence by Popular Bank and the SBA</u>

The government moves to preclude evidence that "because [Popular Bank] or the [Small Business Administration] SBA . . . were [] negligent," defendant should be exonerated. Mot. at 15. Defendant has never stated any intention to offer such evidence or assert such an argument and has no such intention.

6. <u>Use of Agent Reports</u>

The government moves to preclude the defense from publishing Form 302s or similar law enforcement reports summarizing witness interviews to the jury as prior inconsistent statements of witnesses. The defense and government have discussed this motion and appear to be in agreement regarding the appropriate process for using such agent reports. Defendant intends to question the government's cooperating witnesses regarding their meetings with law enforcement and various false and inconsistent statements the cooperators made during those meetings. During that examination, the defense may show the cooperators the reports to refresh their recollection, where appropriate, but will not display the reports to the jury.

If the witnesses deny making the statements, the defense will thereafter attempt to enter into any necessary stipulations with the government reflecting the prior statements of the witnesses. Should the parties fail to reach stipulations, the defense intends to call the law enforcement officer notetakers to the stand and to examine them. During that testimony, the defense might seek to introduce the reports or portions thereof should the officers testify inconsistently with prior statements they made in their own reports. Defendant has submitted a list of notetakers to the government, and the government has indicated that it will attempt to make those individuals available to testify (if needed) during the trial.

7. Defense Exhibits and Trial Statements

The government "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." Mot. at 18. Initially, the government's request is overbroad, as it improperly includes cross-examination exhibits used to impeach witnesses. Rule 16 makes clear that its disclosure requirement includes only documents and records the defendant intends to use "in the defendant's case-in-chief at trial." Fed. R. Crim. P. 16(b)(1)(A).

The defense is aware of its obligations under the Rules and has complied with them. Defendant does not at this time have any exhibits or Rule 26.2 materials in her possession relating to evidence she intends to use in her case-in-chief. If, in the future, this position were to change, Defendant would produce the relevant materials promptly. The government's motion, which fails to identify any exhibit or statement the government believes has been withheld, should therefore be denied.

CONCLUSION

For the reasons stated above, the Court should deny motions 1, 2, 3, and 7. Defendant does not object to motions 4 and 5 and does not object to motion 6 on the understanding that the parties are in agreement on the proper use of law enforcement reports of witness interviews.

Very truly yours,

Sanford Talkin
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Noam Greenspan

cc: all counsel of record (via EFC)