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June 16, 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:

On behalf of defendant Anuli Okeke, we write regarding certain defense objections and requested edits to the Court's draft jury instructions.

I. Willfulness Instruction

As requested in the defense's proposed jury charge, the Court should conform the scienter instruction for bank and wire fraud (Dkt. 33 at 26)—consistent with the Sand instructions¹—and include the same instruction regarding willfulness in connection with wire fraud that is currently only in the section of the instructions on bank fraud. That proposed instruction, which was requested by both the government and defense in regard to bank fraud, is currently on page 30 of the Court's Draft Jury Instructions and reads:

“To act ‘willfully’ means to act knowingly and purposely, with an intent to do something the law forbids; that is to say, with bad purpose either to disobey or to disregard the law. The defendant need not have known that she was breaking any particular law or any particular statute. The defendant need only have been aware of the generally unlawful nature of her act. ‘Willfully’ thus means to act deliberately and with a bad purpose, rather than innocently.”²

¹ See 2 *Modern Federal Jury Instructions-Criminal* P. 44.5 (wire fraud); 2 *Modern Federal Jury Instructions-Criminal* P 44-11 (2023) (bank fraud).

² The Second Circuit and other courts have explicitly endorsed the Court's definition of willfulness. See *United States v. Kukushkin*, 61 F.4th 327, 332 (2d Cir. 2023) (“When used in

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That instruction is consistent with the Sand model jury instructions and is the instruction given in the majority of trials in this District and in the Southern District. While the government criticized this instruction on the record as “erroneous,” Tr. 621, apparently failing to recognize that it had proposed it with regard to bank fraud, the government cannot point to any Second Circuit law stating as much. Indeed, in the two unpublished district court opinions on which the government relies, *United States v. Novis*, No. 20 Cr. 335 (JMA), 2023 WL 4746541, at *22 (E.D.N.Y. July 24, 2023) and *United States v. Middendorf*, No. 18 Cr. 36 (JPO), 2019 WL 4254025, at *7 (S.D.N.Y. Sep. 9, 2019), while the opinions expressed skepticism regarding the necessity of including a “willfulness” instruction, in both cases such an instruction was given at trial. Indeed, Judge J. Paul Oetken, who authored the *Middendorf* opinion, recently gave the Court’s proposed instruction for both bank fraud and wire fraud in *United States v. Mizrahi*, 22 Cr. 650 (JPO); Dkt. 104, 2024 U.S. Dist. LEXIS 35748 (S.D.N.Y. Feb. 26, 2024).

The bottom line is that while there is some divergence of opinion among jurists on whether willfulness should be included in wire fraud instructions, given the Second Circuit’s silence on the matter, the better and fairer course would be to give an instruction that conforms with the Sand instructions and is given in the majority of cases. Likewise, the Sand wire fraud instruction on willfulness is particularly appropriate here in order to conform the instruction on bank fraud and wire fraud. No doctrinal rationale exists for having different scienter requirements for bank fraud and wire fraud when both are (nearly identical) fraud charges and relate to the exact same conduct. Ms. Okeke therefore requests that the Court’s proposed willfulness charge on Counts 3 (bank fraud) also be given with regard to Count 2.

II. Multiple Conspiracies Charge

In its opening, the defense argued to the jury that while a fraudulent conspiracy existed in this case, that conspiracy did not include the defendant. Evidence to support such a conclusion has been introduced throughout the trial, and the defense therefore requests that the Court give the jury the Sand instruction on multiple conspiracies, 1 Sand et al., Modern Federal Jury Instructions ¶ 19.01, Instruction 19-5, which reads:

In this case, the defendant contends that the government’s proof fails to show the existence of only one overall conspiracy. Rather, they claim that there were actually several separate and independent conspiracies with various groups of members.

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).

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Whether there existed a single unlawful agreement, or many such agreements, or indeed, no agreement at all, is a question of fact for you, the jury, to determine in accordance with the instructions I have given you.

When two or more people join together to further one common unlawful design or purpose, a single conspiracy exists. By way of contrast, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes.

Proof of several separate and independent conspiracies is not proof of the single, overall conspiracy charged in the indictment, unless one of the conspiracies proved happens to be the single conspiracy described in the indictment.

You may find that there was a single conspiracy despite the fact that there were changes in either personnel, or activities, or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy you are considering for the purpose charged in the indictment. The fact that the members of a conspiracy are not always identical does not necessarily imply that separate conspiracies exist.

On the other hand, if you find that the conspiracy you are considering, as charged in the indictment, did not exist, you cannot find the defendant guilty of the conspiracy charged in that Count of the indictment. This is so even if you find that some conspiracy other than the one charged in this indictment existed, even though the purposes of both conspiracies may have been the same and even though there may have been some overlap in membership.

Similarly, if you find that a particular defendant was a member of another conspiracy, and not the one charged in the indictment, then you must acquit the defendant of the conspiracy charge.

Therefore, what you must do is determine whether each of the conspiracies charged in the indictment existed. If it did, you then must determine the nature of the conspiracy and who were its members.

III. Policies and Procedures

The defense is concerned that the jury may be confused regarding the import of evidence regarding Popular Bank's 2020 policies and procedures and potentially convict on the basis of perceived violations by the defendant and/or others of these policies and procedures. As such, the defense requests the following instruction, which is adopted from a recent instruction given by Judge Arun Subramanian in *United States v. Avraham Eisenberg*, 23 Cr. 10(AS) (S.D.N.Y. Apr. 17, 2024):

You have heard testimony and seen manuals regarding ethics and other policies and procedures in effect at Popular Bank in 2020. Those policies and procedures were not offered to define the relevant law in this case. Instead, I am now instructing

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you on the law and definitions of terms, and you should only use the definitions I provide. Further, while a violation of policies and procedures may be a civil or administrative matter, this is a criminal case, not a civil or administrative matter. If you find that the defendant violated any policy or procedures that does not, by itself, mean that the defendant has committed a crime. In determining whether the defendant has committed any of the charged offenses, you are to apply the instructions I have given you today. Bank policies and procedures are simply evidence that you may give as much, or as little weight, as you deem appropriate.

IV. Venue

The Court's venue charge lacks sufficient guidance for the jury to understand that the manner in which the principles are applied is different as to the three different substantive statutes charged or underlying the conspiracy charges. The starkest example of this is wire fraud, for which the venue must be established by one or more wires, and not merely any act, in furtherance of the scheme to defraud. The defense thus requests, as specifically outlined below, that the jury receive instructions tailored to the specific statutes charged.

“‘[V]enue is not proper in a district in which the only acts performed by the defendant were preparatory to the offense and not part of the offense.’” *United States v. Tzolov*, 642 F.3d 314, (2d Cir. 2011) (quoting *United States v. Beech-Nut Nutrition Corp.*, 971 F.2d 1181, 1190 (2d Cir. 1989) (applying principle also to continuing offenses)). Except in cases with explicit statutory venue clauses, “‘the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it.’” *Beech-Nut*, 871 F.2d at 1188 (quoting *United States v. Anderson*, 328 U.S. 699, 703 (1946)).

The paragraph on page 48 of the Draft Jury Instructions beginning “In determining whether ...” thus contains legally inaccurate instructions and should be deleted in its entirety. In particular, the sentence “Venue can be conferred based on physical presence or conduct, and passing through a district, including through or over the waters, is sufficient to confer venue,” is not a valid instruction based on the charges in this case. The government, in proposing this charge, notably cited no authority in support.

While the Second Circuit has held that traveling through a district, including over navigable waters, is sufficient to support venue in drug transportation and distribution cases, it has made clear that that holding is dependent on the nature of the offense. *See United States v. Tang Yuk*, 885 F.3d 57, 72 (2d Cir. 2018) (holding that “[b]ecause transportation of cocaine to its final point of sale constitutes and ‘over act’ in furtherance of the conspiracy to distribute cocaine,” traveling over navigable waters was sufficient for venue). In *Tzolov*, the Second Circuit held that the defendant's travel through the Eastern District—specifically, the fact that they traveled through JFK airport on their way to meeting investors that they later defrauded—was insufficient as a basis of venue for securities fraud. 642 F.3d at 318-19. The government's proposed charge in this paragraph is thus a misstatement of the law and should be deleted.

As discussed above, the Second Circuit has made clear that the manner in which venue can be proven depends to some extent on the nature of the count charged in the indictment and that the

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venue analysis for each count must be considered independently. *See United States v. Ramirez*, 420 F.3d 134, 140 (2d Cir. 2006) (“Because venue must be proper with respect to each count, we may conclude that venue was proper as to some counts but not as to others.”). The defense thus requests that the following count specific instructions be added to the venue charge:

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 Eastern District. The wire need not itself be criminal so long as it was transmitted in furtherance of the scheme or artifice to defraud.

In order to establish venue for the bank fraud charge in Count Three, the government must prove that an act in furtherance of a scheme to defraud a bank occurred in the Eastern District. The act itself need not be criminal so long as it was in furtherance of the scheme or artifice to defraud.

In order to establish venue for money laundering conspiracy in Count Four, the government must prove that an act, which need not be criminal itself, in furtherance of an agreement to deposit, withdraw, transfer, or exchange funds derived from criminal activity occurred in the Eastern District.

CONCLUSION

For the reasons stated above, the Court should modify the jury charges by adding a “willfulness” instruction as to wire fraud, adding charges on multiple conspiracies and the violation of policies and procedures, and make the requested changes to the charge relating to venue. The defense further preserves all objections to the extent the Court declines to give any instruction contained in its proposed jury instructions.

Respectfully submitted,

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