IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

CHARLESTON DIVISION

UNITED STATES OF AMERICA

v. CRIMINAL ACTION NO. 2:24-cr-00192-1

KISHA SUTTON

ORDER

Pending before the Court are the ***Defendant's Motion to Dismiss Count One for Lack of Venue*** (ECF No. 184), ***Defendant's Motion to Dismiss Count Two for Lack of Venue*** (ECF No. 185), ***Defendant's Motion to Dismiss Count Three for Lack of Venue*** (ECF No. 186), ***Defendant's Motion to Dismiss Count Four for Lack of Venue*** (ECF No. 187), ***Defendant's Motion to Dismiss Count Five for Lack of Venue*** (ECF No. 188), ***Defendant's Motion to Dismiss Count Six for Lack of Venue*** (ECF No. 189), ***Defendant's Motion to Dismiss Count Seven for Lack of Venue*** (ECF No. 190), ***Defendant's Motion to Dismiss Count Eight for Lack of Venue*** (ECF No. 191), ***Defendant's Motion to Dismiss Count Nine for Lack of Venue*** (ECF No. 192), ***Defendant's Motion to Dismiss Count Ten for Lack of Venue*** (ECF No. 193), and the ***Government's Omnibus Response in Opposition to Defendant Kisha Sutton's Motions to Dismiss*** (ECF No. 201).

On May 20, 2025, the parties came before the undersigned for a hearing on the foregoing, and having considered the arguments of counsel, their respective pleadings, and the pertinent law concerning the issues raised herein, for the reasons stated *infra*, the Court finds that the Defendant's motions[1] should be **DENIED**.

Background

On January 22, 2025, a superseding indictment was returned against the Defendant charging her with conspiracy to commit bank fraud and aiding and abetting bank fraud. (ECF No. 68) The charges stem from a fraudulent scheme prosecution in which the Government alleged the Defendant conspired with several other defendants to apply for fraudulent Covid-19 pandemic Paycheck Protection Program (PPP) loans. It is alleged that the Defendant received personal identifying bank account information from each of the defendants, filled out loan application documents and other financial forms on their behalf, and submitted them for approval. Once the loan was approved and the financial institution deposited the loan proceeds into the other defendants' accounts, they would initiate "kickback" payments to the Defendant.

Relevant Law

"Venue lies in the state and in the district where the offense at issue was 'committed.' " United States v. Stewart, 461 Fed.Appx. 349, 351 (4th Cir. 2012) (citing U.S. Const. art. III, § 2, cl.3). "The venue provisions of the Constitution are meant to act as safeguards, protecting the defendant from bias, disadvantage, and inconvenience in the adjudication of the charges against him." United States v. Ebersole, 411 F.3d 517, 524 (4th Cir. 2005) (internal citations omitted).

To determine the propriety of venue, a court must focus on the essential conduct elements of the offense and the location of the criminal acts. United States v. Smith, 452 F.3d 323, 334-335

[1] During the hearing, counsel for the Defendant conceded that the Government had sufficiently plead venue as to Count One of the superseding indictment, and withdrew the motion seeking dismissal for lack of venue. Accordingly, the Motion (ECF No. 184) is deemed **MOOT** and the Clerk is requested to **TERMINATE** same. For purposes herein, the undersigned only focuses on the remaining Motions.

(4th Cir. 2006). When multiple counts are charged, venue must be proper for each count. Id. at 335. "The inquiry into the place of the crime may yield more than one appropriate venue, or even a venue in which the defendant has never set foot." United States v. Bowens, 224 F.3d 302, 309 (4th Cir. 2000) (citing 18 U.S.C. § 3237(a), the continuing offense venue statute). The continuing offense doctrine applies most broadly where "Congress defines the essential conduct elements of a crime in terms of their particular effects." Id. at 313. In such a case, "venue will be proper where those proscribed effects are felt." Id. "[T]he selection of venue in a bank fraud prosecution is governed by the general venue statute for federal criminal offenses, set forth in 18 U.S.C. § 3237." United States v. Bankole, 39 Fed.Appx. 839, 842 (4th Cir. 2002); see also, United States v. Scott, 270 F.3d 30, 36 (1st Cir. 2001) (bank fraud is a continuing offense under 18 U.S.C. § 3237(a), and venue is proper wherever the offense was "begun, continued, or completed").

Where a conspiracy charge is at issue, venue is proper in any district in which some act in furtherance of the conspiracy was committed. United States v. Moussaoui, 591 F .3d 263, 300 (4th Cir. 2010); United States v. Bowens, 224 F.3d 302, 311 n. 4 (4th Cir. 2000) ("venue is proper for all defendants wherever the agreement was made or wherever any act in furtherance of the conspiracy transpires.").

On a motion to dismiss an indictment for lack of venue, a court must assume the indictment's allegations are true. United States v. Engle, 676 F.3d 405, 412-413 (4th Cir. 2012). To warrant dismissal of a charge in the indictment, a defendant must "demonstrate that the allegations therein, even if true, would not establish venue." Id. at 415 (citing United States v. Thomas, 367 F.3d 194, 197 (4th Cir. 2004).

Any factual disputes concerning venue must be resolved by a jury. United States v. Ebersole, 411 F.3d 517, 526 n.10 (4th Cir. 2005); Engle, 676 F.3d at 412-413. A pretrial evidentiary hearing on the question of venue would be improper and unnecessary. Engle, 676 F.3d at 415 (citing United States v. Jensen, 93 F.3d 667 (9th Cir. 1996)); see also Id. at n.6 ("Citing Jensen, we stated in United States v. Forrest, 1999 WL 436743 (4th Cir. 1999): 'When the motion to dismiss for improper venue is a pretrial motion, only the indictment may be considered. Evidence beyond the face of the indictment should not be considered.' "); see also United States v. Powers, 40 F.4th 129, 134 (4th Cir. 2022) (same).

Arguments for Dismissal

Regarding Counts Two through Ten of the superseding indictment, charging the Defendant with "bank fraud" in violation of 18 U.S.C. § 1344(1)&(2), the Defendant argues that the Government has alleged each of the alleged fraudulent PPP applications were submitted electronically from a residence in New Jersey, received by a third party vendor website called "Womply", which is not a bank or a financial institution as defined by federal law, but is instead a financial technology company that acted as a facilitator to match PPP applicant to lenders. The Defendant states Womply has no servers within the Southern District of West Virginia upon information and belief. In any event, for each of the charges contained in Counts Two through Ten, none of the lenders matched to the alleged fraudulent PPP applications were located in the Southern District of West Virginia, and none of the PPP proceeds were deposited in banks located in the Southern District of West Virginia. Further, no servers processing the PPP loans were located in the Southern District of West Virginia. The Defendant contends that pursuant to this Circuit's prevailing caselaw, the essential conduct making up the bank fraud allegations did not take place within this District – the allegation that the Defendant devised a scheme to defraud with the other defendants is irrelevant – because the execution is what matters when one is charged with committing bank fraud. It is also irrelevant that the other defendants allegedly sent the Defendant "kickback" payments, because the crime of bank fraud had already been completed at the point the Defendant allegedly submitted the false application – which also did not occur within this District.

Arguments Against Dismissal

In response, the United States argues that the Defendant's motions should be denied for being untimely filed, having been submitted after the Court's order regarding the pretrial motions filing deadline; plus, the Defendant did not seek relief from the filing deadline, or explain why she was unable to meet the filing deadline. Moreover, venue in this District has been sufficiently pled in the indictment. While this Defendant is the only named co-conspirator who did not reside within this District, for each count in the indictment alleges essential criminal conduct within this District: the other defendants, who reside within this District, authorized this Defendant to apply for fraudulent PPP loans, and in return, the other defendants remitted a portion of the loan proceeds as a kickback to the Defendant within this District. This Court, at this stage of the proceedings, need only to assess whether the allegations of the indictment, if true, would suffice to establish venue – the pleading requirements in an indictment is a very low bar, and the Government has met it. Further, although the Defendant's motions repeatedly challenge the underlying factual basis of the indictment, this Circuit's jurisprudence does not permit this, as venue is ordinarily decided by a jury.

Discussion

As an initial matter, the undersigned observes that this Court ordered that "any motions to be addressed at the pretrial motions hearing . . . shall be filed no later than May 6, 2025." (ECF No. 167 at 2) The only motion filed by this Defendant on May 6, 2025 was her Second Motion to Continue Trial, Pre-Trial Deadlines (ECF No. 179), however, on May 12, 2025, the Court denied it (ECF No. 196), thus, the trial in this matter is set to begin June 9, 2025 (ECF No. 167 at 2). There is no dispute that the instant motions were filed on May 8, 2025, and would therefore be deemed untimely pursuant to Rule 12(b)(3) of the Federal Rules of Criminal Procedure. Additionally, the Defendant has provided no reasons why these motions could not have been filed by the deadline. Thus, the issues raised in the instant untimely motions may be deemed waived. See United States v. Chavez, 902 F.2d 259, 263 (4th Cir. 1990) (listing cases showing that appellate courts rarely grant relief from denials of untimely filed pretrial motions); see also, United States v. Boone, 324 Fed.Appx. 272 (4th Cir. 2009) (defendant waived right to file untimely suppression motion prior to deadline set by trial court). Notwithstanding the potential for draconian results due to the untimely filing, the undersigned nevertheless notes that the instant motions were only filed two days post-deadline, and based on the pertinent jurisprudence governing motions to dismiss for improper or lack of venue, the untimely filing is of no moment.[2]

It is noted that the indictment alleges the necessary conspiracy-related activity needed to justify venue in this District. For starters, in Count One, following a lengthy background history of the essential offense, the indictment alleges that "[b]eginning no later than in or about April

[2] Additionally, during the hearing, counsel for the Defendant explained that he received voluminous discovery from the Government two days before the deadline to file any pretrial motions, and did not have the information in order to challenge venue. The undersigned deemed this explanation reasonable, and thus, good cause was demonstrated for the untimely filing.

2021, and continuing until at least in or about July 2021, at or near Charleston, Kanawha County, West Virginia, within the Southern District of West Virginia, and elsewhere, defendants KISHA SUTTON, SHAMIESE WRIGHT, CYLENA SUTTON, RAHMEL MEEKINS, WILLIAM POWELL, DAMISHA BROWN, and JASMINE SPENCER, and Lydia Spencer, named but not indicted, knowingly and intentionally conspired with each other and with other persons both known and unknown to the Grand Jury, to commit bank fraud in violation of 18 U.S.C. § 1344, that is to knowingly execute a scheme and artifice to defraud Financial Institutions 1, 2, and 3 by means of false and fraudulent pretenses, representations, and promises made in PPP loan applications and Schedules C." (ECF No. 68 at 9, ¶ 20) (emphasis in original) The indictment then specifies the "overt acts" the Defendant(s) had taken in furtherance of the conspiracy, as set forth under the "Manner and Means" heading, including but not limited to:

> Defendant KISHA SUTTON caused the creation and submission of PPP loan applications on behalf of defendants . . . [the co-conspirators] and with the authorization of each of the co-conspirators in exchange for payment from the fraudulent PPP loan proceeds.
>
> In the applications, KISHA SUTTON falsely stated either the existence of a sole proprietorship prior to the pandemic that generated $75,000 in gross income or greatly inflated the revenues of any "businesses" that did exist in 2020.
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> Defendant KISHA SUTTON also caused the creation of fictitious Schedules C to support each of the fraudulent PPP loan applications that would be submitted to Financial Institutions 1, 2, and 3 on behalf of the co-conspirators. These Schedule Cs falsely stated that defendant KISHA SUTTON's co-conspirators had operated sole proprietorships in 2020 that had $75,000 in gross receipts or sales.
>
> Financial Institutions 1, 2, and 3 received the applications and Schedules C and funded the PPP loans.
>
> Once the PPP loans were funded, the co-conspirators paid defendant KISHA SUTTON up to 25 percent of the total funded amount of the PPP loans for her assistance. The co-conspirators kept the remainder of the funds and spent the

money on ineligible expenses.

(Id. at 10-11, ¶¶ 22-26)

As discussed above, since all that is necessary is one act in furtherance of the conspiracy to be committed in the district where the suit is brought, the requirements for proper venue have been met.

In Counts Two through Ten, each of which incorporates the foregoing paragraphs, including the lengthy background narrative supporting the charges set forth in paragraphs one through eighteen, the indictment re-alleges the factual bases for the conspiracy count, though with greater specifically as to the Defendant's activities with each of the named co-conspirators regarding the aiding and abetting offenses. For instance, for Count Two, the indictment states:

> Between on or about May 7, 2021, and on or about May 21, 2021, Defendant SHAMIESE WRIGHT, within the Southern District of West Virginia, remitted \$3,000 of the fraudulent PPP loan proceeds to defendant KISHA SUTTON. Defendant SHAMIESE WRIGHT spent the remainder of the PPP loan proceeds on personal, ineligible expenses.

As pointed out by the United States, this Count (and the remaining Counts) aligns with the conspiracy theory of liability to the extent that it also relies upon an aiding and abetting theory, which does not rely upon the actual physical presence of the Defendant within this District to establish venue. See United States v. Stewart, 256 F.3d 231, 244 (4th Cir. 2001).[3] In any event, while the undersigned appreciates the parties' arguments in furtherance of their respective

[3] Though not cited in the Government's Response, during the hearing, counsel noted that the Supreme Court of the United States discussed various fraud statutes in Neder v. United States, 527 U.S. 1 (1999), observing how similar they are, and that instead of focusing on conduct, Congress emphasized that the scheme to defraud is the driving force of these statutes, including bank fraud. In short, the Government argued that the scheme to commit bank fraud here is not reliant on the individual acts, but on the scheme itself, thus, parsing out where servers for the various financial institutions are located, or the location of the "essential conduct", is not relevant to this Court's determination of venue. Additionally, acts taken in furtherance of the conspiracy is attributable to other acts involved in the scheme. The Defendant notes this is incongruent to Fourth Circuit jurisprudence that emphasizes the "essential conduct", or the individual acts themselves, not the overreaching scheme.

positions, the undersigned recognizes that ultimately, the issues presented here concern questions of fact, that are more appropriate to be tried by a jury – as the burden of proof at this stage in the proceedings is merely a preponderance of the evidence, and it is up to a jury to determine if the Government has carried its burden at trial to prove venue beyond a reasonable doubt.

Accordingly, the motions to dismiss for lack of venue regarding Counts Two through Ten (ECF Nos. 185-193) are hereby **DENIED**.

Because of the imminency of trial, and in the event that the parties intend to object to the undersigned's ruling on these particular issues, the undersigned finds that an expedited timeframe for filing objections is necessary pursuant to Rule 59(b) of the Federal Rules of Criminal Procedure governing rulings on dispositive motions.[4] Accordingly, this ruling may be contested by filing objections no later than **Friday, May 23, 2025,** with any responses due no later than **Wednesday, May 28, 2025**, any replies due no later than **Friday, May 30, 2025**, with District Judge Irene C. Berger. If objections are filed, the District Judge will consider the objections and modify or set aside any portion of the Order found clearly erroneous or contrary to law.

The Clerk is directed to send a copy of this Order to the Defendant, Counsel for Defendant, and to the Assistant United States Attorney.

ENTER: May 20, 2025.

Omar J. Aboulhosn
United States Magistrate Judge

[4] Objections to rulings on dispositive motions typically are to be filed within 14 days.