UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CASE NO: 4:22-CR-084**
	)	
BERNARD OKOJIE	)	

UNITED STATES' COMBINED RESPONSE TO DEFENDANT'S DISCOVERY AND OTHER PRETRIAL MOTIONS

The United States responds to Defendant's various discovery and pretrial motions (Docs. 29–39) as follows.

The United States has complied with its discovery obligations under Federal Rules of Criminal Procedure 12, 16, and 26.2. The United States has produced several gigabytes of discovery in this case, including law enforcement reports, loan applications, loan files, audio files, and bank records, among other evidence. To the extent discoverable items come within the United States' custody, control, or possession that have not been produced, the United States will promptly produce them.

I. Motion to Dismiss Counts One and Three of the Indictment, and the Corresponding Portions of the Forfeiture Allegation (Doc. 29)

Defendant moves to dismiss the indictment on the grounds that, as Defendant argues, the indictment fails to properly allege a conspiracy. Because Defendant misconstrues the law that applies to motions to dismiss an indictment, the Court should deny Defendant's motion.

The law in the Eleventh Circuit is clear on the circumstances in which an indictment should be dismissed. At this stage, the language of the indictment is controlling and defense arguments relating to sufficiency of evidence are not proper bases for dismissal of an indictment. *United States v. Salman*, 378 F.3d 1266, 1268–29 (11th Cir. 2004) (reversing trial court's dismissal because there is no "criminal summary judgment procedure" and "it is not for the courts to filter which criminal cases may reach the trial stage by reviewing the proffered evidence in advance"); *United States v. Rangel-Rubio*, No. 4:18-CR-274, 2021 WL 8015833, at *1 (S.D. Ga. Oct. 22, 2021) (citing *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992)), report and recommendation adopted, No. CV 4:18-CR-274, 2021 WL 5599647 (S.D. Ga. Nov. 30, 2021) ("When reviewing the sufficiency of an indictment, the Court should only consider the language of the indictment on its face without assessing the sufficiency of the evidence in the case."). The language of "[a]n indictment 'is sufficient if it (1) presents the essential elements of the charged offense, (2) notifies the accused of the charges to be defended against, and (3) enables the accused to rely upon a judgment under the indictment as a bar against double jeopardy for any subsequence prosecution for the same offense." *United States v. Chalker*, 966 F.3d 1177, 1190 (11th Cir. 2020) (quoting *United States v. Woodruff*, 296 F.3d 1041, 1046 (11th Cir. 2002)). "And when 'an indictment specifically refers to the statute on which the charge was based, the reference to the statutory language adequately informs the defendant of the charge.'" *Chalker*, 966 F.3d at 1046 (quoting *United States v. Pena*, 684 F.3d 1137, 1147 (11th Cir. 2012)).

For conspiracy charges, indictments are sufficient when they allege that the defendant conspired with another person, even if the indictment does not specifically name a defendant's co-conspirators. *United States v. Stapleton*, 39 F.4th 1320, 1330 (11th Cir. 2022) ("A conspiracy indictment and a conspiracy charge to a jury may properly refer to unidentified co-conspirators."); *see also United States v. Daniels*, 135 F. App'x 305, 308 (11th Cir. 2005) (unpublished) ("Accordingly, the government's indictment in this case was sufficient, despite its failure to name the co-conspirators.").

Thus, the analysis here is simple. Count One of the indictment alleges that Defendant conspired with co-conspirators to commit wire fraud and bank fraud. Count Three of the indictment alleges that Defendant conspired with co-conspirators to commit money laundering. Both counts (1) present the essential elements of the charges by largely tracking the statutes charged, (2) provide sufficient factual allegations to put the Defendant on notice of the nature of the charges, and (3) will allow Defendant to defend against future charges on the basis of double jeopardy. Therefore, the allegations contained in the indictment are sufficient and the indictment should not be dismissed.

II. Defendant Bernard Okojie's Rule 807 Residual Exception Disclosure (Doc. 30)

The Government will timely comply with its obligations under Federal Rule of Evidence 807(b).

III. Defendant Bernard Okojie's Motion for Information Regarding Bad Prior Acts by Defendant and his Coconspirators (Doc. 31)

The Government has already provided notice of its intent to introduce evidence requested by Defendant in this motion. *See* Doc. 24 (Government's Notice of Its Intent to Introduce Evidence of Uncharged SBA Loans and Money Laundering and Related Information).

IV. Motions for Discovery, Plea Bargains, Grand Jury Transcripts, Scientific Test Results, Criminal Records, Statements, and *Brady* Materials (Docs. 32, 33, 35, 37)

Since the United States has provided expanded discovery in this case, as outlined above, these motions should be rendered moot. The United States has complied with its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). This intention to provide exculpatory, arguably favorable, or impeaching information should not be construed to relieve Defendant of making particularized demands and showings of materiality and need for specifically identified items. While the United States fully intends a good faith effort to identify and produce materials under its obligation as defined by *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), *United States v. Agurs*, 427 U.S. 97 (1976), and their progeny, characterizations of particular items or information as falling within that obligation may differ, and Defendant may find exculpatory or impeaching use of an item of information in a manner not apparent to or anticipated by the United States. Likewise, nothing herein should be construed to relieve Defendant of the obligation to acquire on his own matters of public record. Should additional information subject to *Brady* become available, the United States will disclose it as required. To the extent Defendant has not received disclosure addressed in his motion to which he believes to be entitled, the United States requests that counsel confer with the undersigned attorney to determine if the item exists, and if so, whether it is subject to disclosure.

And Defendant should consider production of all evidence of its intent to use such evidence in the United States' case in chief at trial.

V. Defendant Bernard Okojie's Motion to Preserve Evidence and Authority Therefor (Doc. 36)

The United States does not oppose this motion.

VI. Defendant Bernard Okojie's Motions for Hearsay Exceptions and for a Pretrial Hearing to Determine the Existence of any Conspiratorial Agreements (Docs. 34 & 38)

The United States is aware of its obligations under Federal Rule of Evidence 801 and will abide by them. But the United States opposes Defendant's request for a pre-trial hearing to determine the admissibility of out-of-court statements by alleged co-conspirators. To lay the proper foundation for admission of a co-conspirator statement pursuant to Federal Rule of Evidence 801(d)(2)(E) and under the standard enunciated in *United States v. James*, 590 F.2d 575, 582 (5th Cir. 1978) (en banc), "the government must establish by a preponderance of the evidence: (1) that a conspiracy existed, (2) that the defendant and the declarant were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy." *United States v. Harrison*, 246 F. App'x 640, 651 (11th Cir. 2007). However, as the trial court may consider both co-conspirator statements and independent external evidence in making a determination on admissibility, a pre-trial determination under James is not required. *United States v. Magluta*, 418 F.3d 1166, 1177-78 (11th Cir. 2005); *United States v. Van Hemelryck*, 945 F.2d 1493, 1497-98 (11th Cir. 1991). "Thus, the required finding need not be made pre-trial and can be made at the close of the government's case in chief." *United States v. Register*, No. 3:15-cr-13, 2016 WL 589707, at *2–3 (S.D. Ga. Feb. 11, 2016) (citations omitted). "Indeed, the Supreme Court has ruled that a trial court may examine hearsay statements prior to admission when making a preliminary factual determination under Rule 801(d)(2)(E) and further explained, 'the judge should receive the evidence and give it such weight as his judgment and experience counsel.'" *Id.* (quoting *Bourjaily v. United States*, 483 U.S. 171, 181 (1987)). As the need for a *James* hearing is lessened in light of *Bourjaily*, and in the interest of judicial economy, the United States requests that the determination concerning co-conspirator statements be made at trial, if necessary.

VII. Defendant Bernard Okojie's Motion to Interview Government Informants Prior to Trial (Docs. 39)

Although Defendant may attempt to interview witnesses in this case, the Eleventh Circuit has made clear that the United States has no duty to present its witnesses for interviews. *United States v. Pepe*, 747 F.2d 632, 655 (11th Cir. 1984); *see also United States v. Savage*, No. CRIM.A. 07-550-03, 2013 WL 271800, at *2 (E.D. Pa. Jan. 24, 2013) ("We may easily dispose of Defendants' request to compel the Government to make the witnesses available for interviews. There is no constitutional guarantee granted to a defendant to interview a witness.").

To the extent Defendant in this motion seeks a list of witnesses or conspirators with each's current address, that should be denied. In non-capital cases such as this case, a defendant is generally not entitled to a list of government witnesses. *United*

States v. Massell, 823 F.2d 1503, 1509 (11th Cir. 1987); *United States v. Johnson*, 713 F.2d 654, 659 (11th Cir. 1983); *United States v. Colson*, 662 F.2d 1389, 1391 (11th Cir. 1981). Further, in light of the United States' liberal discovery in this case, Defendant has received much of the information sought in discovery.

* * *

Given the nature of the motions, the Government submits that a motions hearing is not necessary, as all motions are either moot, can be denied on the face of the indictment, or are considerations that are best determined at trial. *See Rangel-Rubio*, No. 4:18-CR-274, 2021 WL 8015833, at *1 (denying motion to dismiss indictment based on language of indictment and without presenting argument at motions hearing); *United States v. Wilson*, No. 2:16-CR-12-17, 2017 WL 1015324, at *3 (S.D. Ga. Mar. 15, 2017) (denying motion for *James* hearing because "Defendant has not presented sufficient evidence specific to the facts of this case to warrant such a hearing and inviting parties' use of usual process under Fed. R. Evid. 801(d)(2)(E)).

Respectfully submitted, this 28th day of September 2022.

DAVID H. ESTES
UNITED STATES ATTORNEY

/s/ Jonathan A. Porter
Jonathan A. Porter
Assistant United States Attorney
Georgia Bar Number 725457

CERTIFICATE OF SERVICE

This is to certify that I have on this day served all the parties in this case in accordance with the notice of electronic filing ("NEF") which was generated as a result of electronic filing in this Court.

This 28th day of September 2022.

Respectfully submitted,

DAVID H. ESTES
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