IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Newport News Division

UNITED STATES OF AMERICA	:	
	:	
Vs.	:	**Criminal No: 4:19-CR- 84**
	:	**Hearing Date: TBA**
OBINWANNE OKEKE	:	**Trial: 2/18/2020**
Defendant(s)	:	
.....	:	

MOTION TO DISMISS INDICTMENT
WITH MEMORANDUM OF POINTS AND AUTHORITIES

Defendant, Obinwanne Okeke, by and through John O. Iweanoge, II and THE IWEANOGES' Firm, PC his attorneys, move for the dismissal of the two counts charged in the indictment because the extraterritorial application of United States law is improper in this case.

This Court should find that the extraterritorial application of the law here is improper for two reasons. First, computer fraud and wire fraud statutes are not intended to have extraterritorial reach, nor are the offenses, as they are charged, domestic. Second, the prosecution violates Mr. Okeke's due process rights as to the two counts because he had no substantial nexus with the United States during the relevant time period covered by the indictment. Accordingly, the Court should grant this motion and dismiss the indictment in its entirety.

BACKGROUND

Mr. Okeke was arrested on August 6, 2019, on a criminal complaint for computer and wire fraud to defraud Unatrac Holding Limited, headquartered in United Arab Emirates (UAE). At all times material to the allegations, Mr. Okeke was a citizen and resident of Nigeria.

The two-count indictment centers around various alleged violations of the wire fraud statute and Computer Fraud and Abuse Act. In Count One, Mr. Okeke is charged

with conspiracy to commit wire fraud in violation of 18 U.S.C. §1349 and in Count Two, Mr. Okeke is charged with conspiracy to commit computer fraud in violation of 18 U.S.C. 1030(b).

As part of the purported conspiracy, the indictment alleges that Mr. Okeke engaged with others in several computer phishing and other activities from outside of the United States to defraud Unatrac Holdings Limited branch in the United Kingdom. Unatrac is a company with its headquarters in UAE. No activity concerning the alleged defrauding of Unatrac occurred in the United States.

All other alleged overt acts in furtherance of the purported conspiracy pertain solely to Unatrac Holdings Limited being defrauded of Eleven Million Dollars ($11,000,000.00). Per the indictment, there are no other allegations or identification of any individual within the continental United States or the Eastern District of Virginia whose information was used in any manner to defraud Unatrac Holdings Limited. Indictment ¶¶ 1, 2, 3, 4, 5, 6, & 7. The sole allegation about the Eastern District of Virginia are generalizations alleged in paragraphs 11 and 12 which does not identify victims or scheme to defraud the victims. Aside from a bare allegation that each offense was committed "in the Eastern District of Virginia and elsewhere," the indictment does not describe any connection to this District.

LEGAL STANDARD

A defendant may move to dismiss a criminal indictment on the ground that the court lacks jurisdiction at any time during the pendency of the matter. Fed. R. Crim. P. 12(b)(2). "Congress has the authority to apply its laws, including criminal statutes, beyond the territorial boundaries of the United States." *United States v. Dawn*, 129 F.3d 878, 882 (7th Cir.1997). *See also United States v. Bowman*, 260 U.S. 94, 97–98, 43 S.Ct.

39, 67 L.Ed. 149 (1922). Whether Congress has exercised that authority is a matter of statutory construction and, generally, statutes enacted by Congress, including criminal statutes, apply only within the territorial jurisdiction of the United States. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991). Supreme Court decisions also suggest a presumption against extraterritorial effect. See, *e.g.*, *Small v. United States*, 544 U.S. 385, 125 S.Ct. 1752, 161 L.Ed.2d 651 (2005); *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 113 S.Ct. 2549, 125 L.Ed.2d 128 (1993); *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 77 S.Ct. 699, 1 L.Ed.2d 709 (1957).

The court must dismiss the indictment when it fails to state an offense. Fed. R. Crim. P. 12(b)(3)(B)(v).

ARGUMENT

The indictment must be dismissed because it is an improper attempt by the Government to enforce United States law against Mr. Okeke, a citizen and resident of the Federal Republic of Nigeria acting entirely abroad at all times material to the indictment.

1. The Court Should Dismiss Counts One and Two of the Indictment Because the Offenses are Not Domestic as Charged

A vital principle of the American legal system is that "United States law governs domestically but does not rule the world." *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007). As such, courts presume that statutes do not apply extraterritorially unless there is a clearly expressed congressional intent. *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010). Generally, United States criminal law does not reach acts committed by foreign nationals acting abroad against foreign interests due to the presumption against extraterritorial effect. *Morrison*, 561 U.S. at 255. The law is

well established that, for a statute to be given exterritorial effect, two requirements must be met. First, Congress must clearly state that it intends the law to have extraterritorial effect. *United States v. Ibarguen-Mosquera*, 634 F.3d 1370, 1378 (11th Cir. 2011). Second, the extraterritorial application of the law must comport with due process, meaning that the application of the law must not be arbitrary or fundamentally unfair. Id.

The Supreme Court has adopted a two-part analysis to determine whether a statute applies to foreign conduct. The court first asks whether "the statute gives a clear, affirmative indication that it applies extraterritorially." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016). If Congress does not clearly indicate that a statute is meant to apply extraterritorially, the court then determines whether the case involves a domestic application of the statute by looking to the "focus" of congressional concern. *RJR Nabisco*, 136 S. Ct. at 2101; *Morrison*, 561 U.S. at 249. "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad[.]" *RJR Nabisco*, 136 S. Ct. at 2101. But if the conduct relevant to the statute's focus occurred in a foreign country, "then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.*; *see also Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124-25 (2013).

The text of 18 U.S.C. §1349 clearly does not support the extraterritorial application of the wire fraud statute and facts alleged in support did not occur within the United States. Similarly, the text of 18 U.S.C. §§ 1030(a)(4), 1030(a)(6) and 1030(b) do not clearly indicate that they apply extraterritorially. The definition of "Protected Computer" stated in 18 U.S.C. §1030(e)(2) does not provide the clear language that Congress intended for the offenses to apply to computers and victims outsides the United States.

The Supreme Court has found that "general" or "fleeting" references to foreign commerce in a statute do not overcome the presumption against extraterritoriality. *Morrison*, 561 U.S. at 262-63; *see also EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (*Aramco*). More importantly, even though the computer may be located inside or outside the United States, it must be "used in a manner that affects interstate or foreign commerce or communication of the United States.", which did not happen in this case. Mr. Okeke did not access a protected computer located inside the United States, did not access a protected computer outside the United States from within the United States and Unatrac Holdings Limited is not located in the United States.

The second prong of the extraterritoriality analysis is whether the indictment alleges a domestic application. Count One and Two each rest on the claim that Mr. Okeke and alleged co-conspirators while outside the United States engaged in fraudulent business email compromise, phishing and other computer-based schemes targeting Unatrac Holding Limited London Office. The only business or alleged victim named in the indictment is Unatrac Holdings Limited that is a UAE business with Office in the United Kingdom where the purported fraud occurred. The ways manner and means alleged in Count One and also applicable to Count Two are generalizations without identification of any business or entity in the Eastern District of Virginia whose protected computer was involved. The indictment, as can be deciphered from the allegations in paragraphs 1 through 10 of the general allegations section and the forfeiture count, rests solely on the alleged fraud against Unatrac Holdings Limited since there is no other alleged victim mentioned in the indictment. Similarly, the allegations are devoid of any allegations of any unauthorized computer intrusion in the Eastern District of Virginia by Mr. Okeke or the alleged co-conspirators.

Mr. Okeke's alleged actions were performed abroad, in the countries in which he

was located. And on the face of the indictment, no specific act or result is alleged to have occurred within the United States or targeted the United States.

In sum, Counts One and Two should be dismissed because they impermissibly attempt to apply United States law to foreign conduct. The presumption against extraterritoriality should defeat the counts.

2. The Court Should Dismiss All Counts Because Their Extraterritorial Application Violates Mr. Okeke's Constitutional Right to Due Process

The Fifth Amendment provides that no person shall be "deprived of life, liberty, or property, without due process of law." See U.S. Const. amend. V. In *Brehm*, the recognized that the enforcement of an extraterritorial statute "in a particular instance must comport with due process." See *United States v. Brehm* , 691 F.3d 547, 552 (4th Cir. 2012). The Fifth Amendment requires a "sufficient nexus" between the United States and a foreign national facing criminal prosecution to ensure that the application of this country's law "would not be arbitrary or fundamentally unfair." *United States v. Davis*, 905 F.2d 245, 248–49 (9th Cir. 1990). As the Court stated in *Brehm*, it is not arbitrary to prosecute a defendant in the United States if his "actions affected significant American interests"—even if the defendant did not mean to affect those interests. 691 F.3d at 552–53. In this case, there is no American interest affected.

This requirement, which is akin to the "minimum contacts" test for personal jurisdiction in the civil context, "ensures that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being hauled into court in this country." *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998). Even when Congress clearly shows that it intends a criminal statute to apply extraterritorially, the law may only do so if it doesn't violate the Fifth Amendment. *Al Kassar*, 660 F.3d at 117; *United States v. Yousef*, 327 F.3d 56, 86 (2d Cir. 2003).

The continued prosecution of Mr. Okeke in the United States is arbitrary and fundamentally unfair. The indictment does not articulate a clear nexus between Mr. Okeke and the United States. During the time period covered by the indictment, he was a foreign citizen and resident. The government has not sufficiently alleged that he defrauded any person in the United States or Eastern District of Virginia. Additionally, the indictment does not allege sufficient nexus to the United States based on the *effects* of Mr. Okeke's foreign conduct. As an initial matter, a jurisdictional nexus exists for non-citizens acting entirely abroad only if "the aim of their activity is to cause harm inside the United States or to U.S. citizens or interests." *Al Kassar*, 660 F.3d at 117; *see also Klimavicius-Viloria*, 144 F.3d 1257 (sufficient nexus exists when "an attempted transaction is aimed at causing criminal acts within the United States").

The indictment alleges no particular domestic effect of the alleged Mr. Okeke's foreign conduct. It refers in conclusory terms the compilation of email addresses and passwords of residents of the Eastern District of Virginia, but it makes no factual allegations of specific damage or consequence caused by said compilations or who exchanged the information. Clearly, receipt of information or email, even with notice of its source, cannot qualify as "accessing" a computer. The word "access," in this context, is an active verb: it means "to gain access to," or "to exercise the freedom or ability to make use of something." *Am. Online, Inc. v. Nat'l Health Care Discount, Inc.*, 121 F. Supp.2d 1255, 1272-73 (N.D. Iowa 2000) (citing *Mirriam-Webster's Collegiate Dictionary 6* (10th ed. 1994)) (internal quotations and alterations omitted).

A foreign defendant is not subject to the jurisdiction of the United States merely for directing conduct towards another country from outside the United States, in this case, Great Britain — it must be foreseeable that the conduct could cause harm specifically in the United States. *See Leasco Data Processing Equipment v. Maxwell*, 468 F.2d 1326,

1330, 1342 (2d Cir. 1972).

Finally, the alleged acts of the unknown co-conspirators do not serve as a proxy to create a sufficient nexus for Mr. Okeke. First, the indictment does not establish that the co-conspirators had any nexus to the United States. Although the indictment alleges that the co-conspirators accessed protected computers, it does not allege that the co-conspirators directed any of this conduct at the United States or caused any effect in the United States.

Second, even assuming the co-conspirators have sufficient nexus to the United States, that persons' alleged acts cannot be attributed to Mr. Okeke for purposes of establishing Mr. Okeke's nexus. The Court must find an independent sufficient nexus for each individual: "Each defendant's contacts with the forum State must be assessed individually." *Calder v. Jones*, 465 U.S. 783, 790 (1984).

For all these reasons, the indictment should be dismissed.

CONCLUSION

For the foregoing reasons, this Court should dismiss the indictment.

Respectfully submitted,

Obinwanne Okeke
Defendant by Counsel

THE IWEANOGES FIRM, P.C.

By: /s/JohnIweanoge/s/

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on 15th December 2019 a copy of the foregoing document was filed via electronic case filing system of the United States District Court for the Eastern District of Virginia and accordingly, the Court will notify the United States through the court's e-file system.

/s/JohnOIweanoge/s/
John O. Iweanoge, II

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Defendant(s)	:	
.....	:	

ORDER

UPON CONSIDERATION of Defendant's Motion To Dismiss Indictment and incorporated memorandum of law and United States opposition thereto it is thereupon this _____ day of _____, 2019.

ORDERED, that the Defendant's Motion to Dismiss Indictment is **GRANTED**, and it is

FURTHER ORDERED, that_____

SO ORDERED.

_____
Hon. Judge Rebecca Beach Smith