UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

UNITED STATES OF AMERICA

v. CR No. 14-118 ML

ERNEST KAR

JURY INSTRUCTIONS

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PART I: GENERAL INSTRUCTIONS

1. INTRODUCTION

Members of the jury, we have now come to the end of this trial. This case, like all criminal cases, is a serious one. I say this because the defendant and the United States have a deep concern for your mature consideration of the evidence as presented and the law which I am about to give you.

Although you as the jury are the sole judges of the facts, you are duty bound to follow the law as I instruct you, and to apply that law to the facts as you find them to be from the evidence which has been presented during this trial. You are not to single out any one instruction as stating the law. Rather, you must consider these instructions in their entirety. You are not to be concerned with the wisdom of any rule of law, regardless of any opinion which you might have as to what the law ought to be. It would be a violation of your sworn duty to base your verdict upon any version of the law other than that which I am about to give to you.

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the allegations of the indictment and the denial made by the "not guilty" plea of the defendant. You are to perform this duty without bias or prejudice as to any party. The law does not permit jurors to be governed by sympathy, prejudice, or public opinion. The accused and the government are entitled to an impartial consideration of all the evidence. Moreover, the parties and the public expect that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the Court, and reach a just verdict, regardless of the consequences.

The fact that the prosecution is brought in the name of the United States of America entitles the government to no greater consideration than that accorded to any other party to a

litigation. By the same token, it is entitled to no less consideration. All parties, whether government or individuals, stand as equals at the bar of justice.

2. FUNCTION OF A JURY

Ladies and gentlemen, you are the trier of facts; you alone must determine what the facts are in this particular case. My function and duty is to instruct you on the law that applies to this case. It is your duty to accept the law as I give it to you—whether or not you agree with it—and to apply that law to the facts as you find them.

3. JURY'S RECOLLECTION CONTROLS

If any reference by the Court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

4. CONSIDER ONLY THE OFFENSES CHARGED

The defendant is not on trial for any act or any conduct other than that specifically charged in the indictment.

5. PRESUMPTION OF INNOCENCE

In all criminal cases, there is a presumption of innocence. Every defendant under our system of law is presumed to be innocent of the accusation which is filed against him or her, and this presumption of innocence must remain with the defendant from the moment the charge is brought, throughout the trial, through the arguments of counsel, throughout the instructions of the

Court, and throughout your deliberations when you retire to consider your verdict in the secrecy of the jury room.

The presumption of innocence remains unless and until you find that the defendant is guilty beyond a reasonable doubt of a charge as stated in the indictment. If you find, however, that the defendant is guilty beyond a reasonable doubt of each and every element of the crime with which he is charged, the presumption of innocence disappears and is of no further avail to him.

6. BURDEN OF PROOF

In criminal cases, the law places the burden of proof upon the government. The government has the burden of proving each and every element of the offense as charged beyond a reasonable doubt.

What is meant by the term "beyond a reasonable doubt?" Obviously, the obligation resting upon the government to prove a defendant's guilt beyond a reasonable doubt does not mean that it must do so beyond all conceivable doubts. Nor does it require the government to prove a defendant's guilt to a mathematical or scientific certainty. Reasonable doubt means that the government must adduce evidence which, on examination, is found to be so convincing and compelling as to leave in your minds no reasonable doubt about the defendant's guilt. We know from experience what a doubt is, just as we know when something is reasonable or unreasonable. Reasonable doubt by definition means a doubt founded upon reason and not speculation, that is, a doubt for which you can give some reason.

If, therefore, after reviewing all the evidence, there remains in your mind a doubt about

the defendant's guilt, and this doubt appears in the light of the evidence to be reasonable, your duty is to find the defendant not guilty. If, however, at the end of your deliberations, you are convinced by the evidence beyond a reasonable doubt that the defendant is guilty, your duty would be to return a verdict against him.

7. CONSIDER EACH CHARGE SEPARATELY

The indictment in this case contains four counts or "charges." You should consider each charge and the evidence pertaining to it separately. The fact that you may find the defendant guilty or not guilty as to one of the offenses charged should not control your verdict as to the other offenses charged.

8. DEFENDANT'S RIGHT NOT TO TESTIFY OR INTRODUCE EVIDENCE

A defendant does not have to testify or introduce any evidence at all. This principle is related to the fact that the burden of proof is upon the government and not on the defendant.

A defendant in a criminal case need not say anything. It is the right of every defendant not to testify. This right is guaranteed by the Constitution. If the defendant chooses not to testify, you may not draw any adverse inference from that fact. By that I mean you may not say, "Well, he must have something to hide, otherwise he would have testified," or, "He must be guilty because he did not get up on the stand and tell me that he was not guilty." It is absolutely prohibited for you to draw such inferences in this case.

PART II: THE OFFENSES CHARGED

9. INDICTMENT – DEFINED

This case, like most criminal cases, began with the filing of an indictment. You will have the indictment before you in the course of your deliberations in the jury room. An indictment is not evidence. An indictment is nothing more than an accusation. It is a piece of paper filed with the Court to bring a criminal charge against a defendant. The indictment simply brings this matter before you for determination. Beyond that, it has no significance whatsoever. Here, the defendant has pleaded not guilty and has put in issue the charges alleged in the indictment. The government therefore has the burden of proving the allegations made against the defendant.

10. "ON OR ABOUT" – DEFINED

You will note that the indictment charges that the offenses were committed "on or about" certain dates. The proof need not establish with certainty the exact date of the alleged offense. It is sufficient that the evidence in the case establishes beyond a reasonable doubt that the offense was committed on a date reasonably near the date alleged in the indictment.

11. COUNTS 3, 4, and 6 – BANK FRAUD

Counts 3, 4, and 6 of the indictment charge that on certain dates in the District of Rhode Island, the defendant "executed and attempted to execute a scheme to defraud" TD Bank, Inc. and Bank of America "and to obtain monies, funds and property owned by and under the custody of the financial institutions by means of false and fraudulent representations and promises" in violation of 18 U.S.C. §§ 1344 and 2.

The specific financial institution and date alleged in each count are as follows:

Count 3	T.D. Bank, Inc.	August 19, 2013
Count 4	Bank of America	October 7, 2013
Count 6	Bank of America	December 13, 2013

12. 18 U.S.C. § 1344

Section 1344 of Title 18 of the United States Code provides in relevant part:

"Whoever knowingly executes, or attempts to execute, a scheme or artifice

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises"

is guilty of a crime against the United States.

13. 18 U.S.C. § 1344 – ESSENTIAL ELEMENTS

The defendant is charged with bank fraud. It is against federal law to engage in such conduct against certain financial institutions. The defendant is charged with violating 18 U.S.C. § 1344(1) and (2).

For you to find the defendant guilty of violating 18 U.S.C. § 1344**(1)**, you must be convinced that the government has proven each of the following elements beyond a reasonable doubt:

First, a scheme, substantially as charged in the indictment, to defraud a financial

institution;

Second, defendant's knowing and willful participation in this scheme with the intent to defraud; and,

Third, the financial institutions, alleged in this case to be TD Bank, Inc, and the Bank of America, were federally insured.

For you to find the defendant guilty of violating 18 U.S.C. § 1344**(2)**, you must be convinced that the government has proven each of the following elements beyond a reasonable doubt:

First, a scheme, substantially as charged in the indictment, to obtain a financial institution's money by means of false or fraudulent pretenses;

Second, defendant's knowing and willful participation in this scheme to obtain money by means of false or fraudulent pretenses; and,

Third, the financial institutions, alleged in this case to be TD Bank, Inc. and the Bank of America, were federally insured.

14. TERMS DEFINED

A scheme includes any plan, pattern or course of action. The term "defraud" means to deceive the bank in order to obtain money or other property by misrepresenting or concealing a material fact.

The term "false or fraudulent pretenses" means any false statements or assertions that concern a material aspect of the matter in question, that were either known to be untrue when

made or made with reckless indifference to their truth and that were made with the intent to defraud. They include actual, direct false statements as well as half- truths and the knowing concealment of facts.

A "material" fact or matter is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed.

The defendant acted "knowingly" if he was conscious and aware of his actions, realized what he was doing or what was happening around him, and did not act because of ignorance, mistake or accident.

An act or failure to act is "willful" if done voluntarily and intentionally, and with the specific intent to do something the law forbids, or with specific intent to fail to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law.

Intent or knowledge may not ordinarily be proven directly because there is no way of directly scrutinizing the workings of the human mind. In determining what the defendant knew or intended at a particular time, you may consider any statements made or acts done or omitted by the defendant and all other facts and circumstances received in evidence that may aid in your determination of the defendant's knowledge or intent. You may infer, but you certainly are not required to infer, that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted. It is entirely up to you, however, to decide what facts are proven by the evidence received during this trial.

The government need not prove that the scheme was successful, that the financial institutions suffered a financial loss, that the defendant knew that the victim of the scheme was a federally insured financial institution or that the defendant secured a financial gain

15. 18 U.S.C. § 2 - AIDING AND ABETTING

In counts 3,4 and 6, the defendant is also charged with violating Title 18, Section 2 of the United States Code.

Title 18, Section 2 of the United States Code provides that "[w]hoever . . . aids [or] abets" the commission of an offense against the United States is punishable as a principal.

16. AIDING AND ABETTING – ESSENTIAL ELEMENTS

To "aid and abet" means intentionally to help someone else commit the charged crime. To establish aiding and abetting, the government must prove beyond a reasonable doubt:

First, that someone else committed the charged crime; and

Second, that the defendant consciously shared the other person's knowledge of the underlying crime, intended to help him, and took part in the endeavor, seeking to make it succeed.

The defendant need not perform the underlying criminal act, be present when it is performed, or be aware of the details of its execution to be guilty of aiding and abetting. But a general suspicion that an unlawful act may occur or that something criminal is happening is not enough. Mere presence at the scene of a crime and knowledge that a crime is being committed are also not sufficient to establish aiding and abetting. But you may consider these among other factors.

17. COUNT 1 – CONSPIRACY TO COMMIT BANK FRAUD

Count one of the indictment charges that "beginning on or about October 1, 2010, and

continuing to on or about January 17, 2014, in the District of Rhode Island, the District of New Hampshire and elsewhere, the defendant Ernest Kar together with" Garty Togbasi, Allarick Hill, John Sumo, Jerry Zeah, Jamal Mansaray, Marvin Medina, James Davies "and others known and unknown to the Grand Jury, knowingly, willfully, and unlawfully combined, conspired and agreed together and with each other to commit bank fraud, by knowingly executing and attempting to execute a scheme and artifice to defraud the financial institutions and to obtain monies, funds, assets, and other property owned by, and under the custody and control of the financial institutions by means of false and fraudulent pretenses, representations, and promises" contrary to 18 U.S.C. § 1344 and in violation of 18 U.S.C. § 1349.

18. 18 U.S.C. § 1349

Section 1349 of Title 18 of the United States Code provides in relevant part:

"Any person who . . . conspires to commit [bank fraud] shall be subject to the same penalties as those proscribed for the offense, the commission of which was the object of the . . . conspiracy."

19. ESSENTIAL ELEMENTS– CONSPIRACY TO COMMIT BANK FRAUD

For you to find the defendant guilty of conspiracy to commit bank fraud you must be convinced that the government has proven each of the following three elements beyond a reasonable doubt:

First, that the agreement specified in the indictment, and not some other agreement or agreements, existed between at least two people to commit bank fraud; and

Second, that the defendant willfully joined in that agreement; and

Third, that one of the conspirators committed an overt act during the period of the conspiracy in an effort to further the purpose of the conspiracy.

A conspiracy is an agreement, spoken or unspoken. The conspiracy does not have to be a formal agreement or plan in which everyone involved sat down together and worked out all the details. But the government must prove beyond a reasonable doubt that those who were involved shared a general understanding about the crime. Mere similarity of conduct among various people, or the fact that they may have associated with each other or discussed common aims and interests does not necessarily establish proof of the existence of a conspiracy, but you may consider such factors.

To act "willfully" means to act voluntarily and intelligently and with the specific intent that the underlying crime be committed—that is to say, with bad purpose, either to disobey or disregard the law—not to act by ignorance, accident or mistake. The government must prove two types of intent beyond a reasonable doubt before the defendant can be said to have willfully joined the conspiracy: an intent to agree and an intent, whether reasonable or not, that the underlying crime be committed. Mere presence at the scene of a crime is not alone enough, but you may consider it among other factors. Intent may be inferred from the surrounding circumstances.

Proof that defendant willfully joined in the agreement must be based upon evidence of his own words and/or actions. You need not find that defendant agreed specifically to or knew about all the details of the crime, or knew every other co-conspirator or that he participated in each act of the agreement or played a major role, but the government must prove beyond a reasonable

doubt that he knew the essential features and general aims of the venture.

Even if the defendant was not part of the agreement at the very start, he can be found guilty of conspiracy if the government proves that he willfully joined the agreement later. On the other hand, a person who has no knowledge of a conspiracy, but simply happens to act in a way that furthers some object or purpose of the conspiracy, does not thereby become a conspirator.

An **overt act** is any act knowingly committed by one or more of the conspirators in an effort to accomplish some purpose of the conspiracy. Only one overt act has to be proven. The government is not required to prove that the defendant personally committed or knew about the overt act. It is sufficient if one conspirator committed one overt act at some time during the period of the conspiracy.

The government does not have to prove that the conspiracy succeeded or was achieved. The crime of conspiracy is complete upon the agreement to commit the underlying crime and the commission of one overt act.

PART III: CONSIDERATION OF THE EVIDENCE

20. EVIDENCE RECEIVED IN THIS CASE

For the purpose of determining whether or not the government has sustained its burden of proof, you must evaluate all of the evidence. The evidence in this case consists of the sworn testimony of the witnesses and all exhibits received in evidence, and any facts to which the parties have stipulated.

Any proposed testimony or proposed exhibit to which an objection was sustained by the Court, as well as any testimony ordered stricken by the Court, must be entirely disregarded.

Anything you may have seen or heard outside the courtroom is not proper evidence and must be entirely disregarded.

21. INFERENCES—DEFINED

In determining whether the government has sustained its burden of proof, you are to consider only the evidence. But in your consideration of the evidence, you are not limited to the statements of witnesses, or solely to what you see and hear as the witnesses testify. You are permitted to draw, from the facts which you find have been proven, such reasonable inferences as seem justified in light of your experiences.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in the case.

22. EVIDENCE—DIRECT AND CIRCUMSTANTIAL

There are, generally speaking, two types of evidence. One is direct evidence, such as the

testimony of an eyewitness. The other is indirect or circumstantial evidence, which is a chain of circumstances pointing to certain facts.

The law makes no distinction at all between the weight to be given to either direct or circumstantial evidence. Nor is a greater degree of certainty required of circumstantial evidence than of direct evidence. In determining whether the government has sustained its burden of proof you can and should weigh all the evidence, both direct and circumstantial.

23. OBJECTIONS AND WEIGHT OF THE EVIDENCE

The fact that the Court may have admitted evidence over objection should not influence you in determining the weight that you will give such evidence. Nor should statements made by counsel, either for or against the admission of offered evidence, influence your determination of the weight that you will give the evidence if admitted. In other words, you should determine the weight that you will give such evidence on the basis of your own consideration of it and without regard to the statements of counsel concerning the admissibility of such evidence.

24. EXHIBITS

Exhibits admitted into evidence by the Court are properly before you, and will be available to you during your deliberations. An exhibit marked by the Court for identification is not evidence in the case unless or until it was admitted by the Court as a full exhibit. If it has not been admitted as a full exhibit, you may not consider it. If it was admitted, however, it is just as much a part of the evidence in the case as the testimony which you have heard from the witness stand.

25. STIPULATIONS

The evidence in this case includes facts to which the parties have agreed or stipulated. A stipulation means simply that the government and the defendant accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You may accept the stipulation as fact and give it whatever weight you choose.

26. REMARKS OF COUNSEL

Remarks, statements, or questions by counsel are not evidence and are not to be considered by you as evidence during your deliberations. Neither should you permit objections by counsel to the admission of evidence, or the rulings of the Court, create any bias or prejudice toward counsel or the party whom he represents. It is the duty of counsel for both sides to represent their clients vigorously and to defend their client's rights and interests. In the performance of that duty, counsel freely may make objection to the admission of offered evidence, or to any other ruling of the Court, and should not be penalized for doing so.

27. CONDUCT OF COURT AND COUNSEL

If during trial, or in instructing you, I have said or done anything that has caused you to believe that I was indicating an opinion as to what the facts are in this case, you should put that belief out of your mind. I did not intend to indicate any such opinion. In fact, I try not to have an opinion about the case because you are the sole and exclusive judges of the facts.

In determining the facts, you are to consider only that evidence which has properly been placed before you. It is the Court's duty to pass upon the admissibility of the offered evidence,

that is, to decide whether or not offered evidence should be considered by you. Evidence admitted by the Court is properly before you for your consideration; evidence which the Court has refused to admit, or may have stricken from the record after you heard it, is not proper subject for your deliberations and is not to be considered by you.

28. TESTIMONY OF WITNESSES

The law does not require you to accept or credit the evidence I have admitted. In determining what evidence you will accept, you must make your own evaluation of the testimony given by each of the witnesses, and the weight you choose to give to his or her testimony.

In evaluating the testimony of witnesses you may consider several facts-the opportunity of the witnesses to have acquired knowledge of that to which they testified; their conduct and demeanor while testifying; their interest or lack of interest, if any, in the outcome of the case; their intelligence or lack thereof; and the probability or improbability of the truth of their testimony.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to disbelieve or discredit such testimony. Two or more persons witnessing an incident or a transaction may simply see or hear it differently. Innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, however, always consider whether it pertains to a matter of importance or an insignificant detail and consider whether the discrepancy results from innocent error or from intentional falsehood.

The testimony of a witness may be discredited or impeached by showing that he or she

previously made statements which are different than or inconsistent with his or her testimony here in court. These statements may be used to impeach the credibility of that witness. It is within your province to assess the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

From these circumstances, and from all of the other facts and circumstances proved at the trial, you may determine whether or not the government has sustained its burden of proof.

29. CAUTION AS TO COOPERATING WITNESS

You have heard the testimony of Taquala Wigginton. Ms. Wigginton provided evidence pursuant to an agreement with the government.

Some people in this position are entirely truthful when testifying. Still, you should consider the testimony of these individuals with particular caution. They may have had reason to make up stories or exaggerate what others did because they wanted to help themselves.

PART IV: DELIBERATIONS AND VERDICT

30. UNANIMOUS VERDICT -- JURY CONDUCT

To render a verdict, all twelve of you must agree, that is, your verdict must be unanimous. Therefore, during your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your view simply because a majority holds to the contrary view, but in pursuing your deliberations, you should keep your minds reasonably open with respect to any point in dispute so that you will not be prevented from achieving a unanimous verdict due to mere stubbornness. It is your right, however, to maintain your view. The vote of each juror is as important as the vote of any other juror, and you need not give up your view, sincerely held, simply because a majority holds to the contrary view.

Do not approach your consideration of the case in an intellectual vacuum. You are not required to disregard your experiences and observations in the ordinary everyday affairs of life. Indeed, your experiences and observations are essential to your exercise of sound judgment and discretion, and it is your right and duty to consider the evidence in light of such experiences and observations. It is hoped and anticipated that you will sift all of the evidence in this case through maturity and common sense.

Of course, prejudice, sympathy or compassion should not be permitted to influence you. All that any party is entitled to, or expects, is a verdict based upon your fair, scrupulous and conscientious examination of the evidence and an application of the law to that evidence as I have instructed you.

31. COMMUNICATIONS BETWEEN COURT AND JURY DURING DELIBERATIONS

If it becomes necessary during your deliberations to communicate with the Court, you may send a note signed by your foreperson, or by one or more members of the jury. The foreperson may then hand such written request or question to the marshal in whose charge you will be placed. The marshal will bring any written questions or requests to me. I will attempt to fulfill your request or answer your question. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Bear in mind also that you are never to reveal to any person-not even to the Court-how the jury stands, numerically or otherwise, on the question of whether the accused is guilty or not guilty, until after you have reached a unanimous verdict.