No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

RAHEEM JEFFERSON BRENNERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

APPENDIX PART I - PETITION FOR A WRIT OF CERTIORARI

Raheem J. Brennerman
FCI ALLENWOOD LOW
P. O. Box 1000
White Deer, Pa. 17887-1000
Pro Se Petitioner

XI. APPENDIX TABLE OF CONTENTS

APPENDIX PART I

APPENDIX PART II

APPENDIX A

**Order of the
United States Court of
Appeals for the Second Circuit in
United States v. Brennerman, No. 18 3546 Cr.
(Affirming Conviction and Sentence)**

18-3546(L)
United States v. Raheem Brennerman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 9th day of June, two thousand twenty.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
WILLIAM J. NARDINI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 18-3546, 19-497

RAHEEM BRENNERMAN,
AKA JEFERSON R. BRENNERMAN,
AKA AYODEJI SOETAN,

Defendant-Appellant.

Appearing for Appellant: John C. Meringolo, Meringolo & Associates, P.C., Brooklyn, N.Y.

Appearing for Appellee: Danielle R. Sassoon, Assistant United States Attorney (Nicholas Roos, Robert B. Sobelman, Matthew Podolsky, Assistant United States Attorneys, *on the brief*), *for* Geoffrey S. Berman, United

States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Sullivan, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is **AFFIRMED**.

Defendant-Appellant Raheem Brennerman appeals from the February 12, 2019, amended judgment of conviction entered in the United States District Court for the Southern District of New York (Sullivan, *J.*), sentencing him principally to 144 months' imprisonment, 3 years' supervised release, forfeiture in the amount of $4,400,000, and restitution in the amount of $5,264,176.19. Following a jury trial, Brennerman was convicted of one count of conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. § 1349; one count of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2; one count of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; and one count of visa fraud, in violation of 18 U.S.C. § 1546(a). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, Brennerman argues: (1) there was insufficient evidence to convict him on the conspiracy count, the substantive bank fraud count, and the substantive wire fraud count; (2) the government made an impermissible constructive amendment to the indictment; (3) the search warrant for Brennerman's Las Vegas apartment was unlawful; (4) the admission of the testimony of Julian Madgett violated Brennerman's constitutional rights; (5) the district court erred by applying a two-offense level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1; and (6) the district court incorrectly determined the restitution amount.

I. Sufficiency of the Evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), as the standard of review is "exceedingly deferential," *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). Ultimately, "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

Brennerman argues there was insufficient evidence to convict him of a conspiracy. He argues the jury could not have adduced the existence of an agreement because the record does not contain a single response from Peter Aderinwale, the purported co-conspirator with whom Brennerman corresponded over email. His argument is both factually and legally flawed. First, the record did contain two responsive emails from Aderinwale concerning draft emails to be sent to ICBC as part of the scheme. Second, a response from an alleged co-conspirator following conspiratorial communication is not legally necessary to establish the existence of a conspiracy. We agree with the government that a reasonable jury could infer the requisite intent from emails in which Brennerman solicited Aderinwale's input on aspects of the fraud scheme and from Brennerman's transfer of substantial scheme proceeds to Aderinwale. These facts would have supported the inference that Aderinwale was a co-conspirator, even in the absence of any email

response from Aderinwale. The jury would have been entitled to infer that Aderinwale's responses had been conveyed over the phone or in person. "This is so because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (internal quotation marks and citation omitted). Thus, viewing the evidence in the light most favorable to the government, we find there was sufficient evidence from which the jury could have reasonably inferred the existence of a conspiracy.

Brennerman also argues that there was insufficient evidence that he intended to defraud an institution insured by the Federal Deposit Insurance Corporation ("FDIC") as required for bank fraud, because most of the evidence offered at trial showed that he targeted the Industrial and Commercial Bank of China's London branch ("ICBC"), which is not FDIC-insured. Contrary to Brennerman's assertions, however, the record did establish that he defrauded Morgan Stanley, an FDIC-insured institution, as part of his broader scheme by, among other things, inducing it to issue him a credit card based on false representations about his citizenship, assets, and the nature and worth of his company. Indeed, the government argued just this theory on summation, asserting that Brennerman was guilty of bank fraud because "he engaged in a scheme to defraud Morgan Stanley" through lies told to a Morgan Stanley employee, which were "all part of an attempt to defraud an FDIC-insured institution." App'x at 1709-10. Defense counsel in summation also emphasized that Morgan Stanley was the sole FDIC-insured institution involved. And the district court instructed the jury on the proper elements of bank fraud, including the FDIC-insured institution element. Brennerman's challenge, therefore, is foreclosed by "the law's general assumption that juries follow the instructions they are given," which applied here would indicate that the jury properly accounted for the evidence related to Morgan Stanley when convicting Brennerman of the bank fraud count. *United States v. Agrawal*, 726 F.3d 235, 258 (2d Cir. 2013).

As to the wire fraud count, Brennerman argues there was insufficient evidence to establish a domestic violation of the statute. "[W]ire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud." *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019). We conclude that the evidence here was sufficient. The record at trial established that Brennerman used domestic wires to carry out the fraudulent scheme. Indeed, he concedes that he used telephone lines and email in the United States to make fraudulent representations in furtherance of the scheme. In addition, the account to which ICBC wired the loan money was a Citibank account within the United States, and Brennerman subsequently moved that money to domestic accounts. This is precisely the kind of use of domestic wires that we have held sufficient under the wire fraud statute. *See, e.g.*, *United States v. Kim*, 246 F.3d 186, 190 (2d Cir. 2001).

II. Constructive Amendment

An impermissible constructive amendment occurs only when the government's proof and the trial court's jury instructions "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense

other than the one charged by the grand jury." *United States v. Vebeliunas*, 76 F.3d 1283, 1290 (2d Cir. 1996) (internal quotation marks and citation omitted).

Brennerman contends that the government constructively amended counts one and two of the indictment by proving a fraud against Morgan Stanley at trial—while the indictment, especially the speaking part, focuses on the fraud against ICBC. We disagree. It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman's alleged fraud. The indictment alleged that Brennerman's scheme in fact targeted "several financial institutions around the world, including in the United States." App'x at 39. It also specifically alleged that Brennerman defrauded an FDIC-insured financial institution. The indictment did not limit the proof only to Brennerman's scheme against ICBC. While the indictment discusses ICBC activity at length, it makes clear that those allegations are illustrations, asserting that "[b]eginning in or about January 2013, [Brennerman] made similar [false] representations to other financial institutions in an effort to induce those institutions to provide financing to Blacksands Pacific and Blacksands Alpha." App'x at 42. At trial, the government offered evidence that Morgan Stanley was one of those "other financial institutions." *See* App'x at 608-09 (testimony of Morgan Stanley's Kevin Bonebrake about a January 2013 telephone call with Brennerman discussing financing to develop oil asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *Vebeliunas*, 76 F.3d at 1290.

III. Search Warrant

Brennerman challenges the lawfulness of the search warrant of his Las Vegas apartment. Even assuming, for the sake of argument only, that the search warrant was unlawful, we conclude that the good faith exception to the Fourth Amendment's exclusionary rule would apply. We therefore need not address the propriety of the search warrant. The district court found that the law enforcement agents who executed the warrant reasonably relied on its terms in good faith, and Brennerman has not challenged this finding. Where, as here, evidence is obtained by police officers executing the search "in objectively reasonable reliance" on a warrant, the good faith exception to the exclusionary rule applies. *United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008) (internal quotation marks and citation omitted).

IV. Testimony of Julian Madgett

Brennerman argues that Julian Madgett's testimony at trial violated due process and his Sixth Amendment rights to confrontation and compulsory process because he was unable to obtain certain exculpatory personal notes from Madgett, and the government would not turn the notes over or otherwise retrieve them from ICBC.

The government has an obligation under the Due Process Clause to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *see also Giglio v. United States*, 405 U.S. 150 (1972). Additionally, the Jencks Act provides that, "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

Brennerman's argument claiming constitutional violations as a result of Madgett's testimony is without merit. The government's discovery and disclosure obligations extend only to information and documents in the government's possession. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (explaining that the *Brady* obligation applies only to evidence "that is known to the prosecutor"). The government insists that every document it received from ICBC was turned over to Brennerman and that it is not aware of the personal notes referenced by Brennerman. Therefore, the government has not violated its disclosure obligation. Nor was the government under any obligation under the Jencks Act to collect materials about Madgett that were not in the government's possession. *See United States v. Bermudez*, 526 F.2d 89, 100 n.9 (2d Cir. 1975).

Even if the documents exist and are material and favorable, Brennerman never sought a subpoena pursuant to Federal Rule of Criminal Procedure 17, never made a timely request for a deposition under Federal Rule of Criminal Procedure 15, and never asked the district court to issue letters rogatory pursuant to 28 U.S.C. § 1781 to obtain documentary evidence or secure testimony from the United Kingdom where ICBC maintains its records. The only indication that such documents are extant comes from Brennerman's bare assertions.

V. Sentence

At sentencing, the court applied a two-offense level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, a finding that relied on, as an alternative basis, Brennerman's false representations in his bail applications to the court. Brennerman argues that those misrepresentations cannot support an obstruction of justice enhancement because the misstatements "were at most minimally connected to the offense conduct in this case and did not obstruct the prosecution in any meaningful way." Appellant's Br. at 54. However, this argument has already been rejected by our Court in *United States v. Mafanya*, 24 F.3d 412, 415 (2d Cir. 1994) ("Appellant's false statement to a judicial officer (the magistrate judge) was an attempt to obstruct justice. Therefore, the district court properly Applied the [Section 3C1.1] enhancement . . . ."). Accordingly, the district court did not err in applying the enhancement.

VI. Restitution

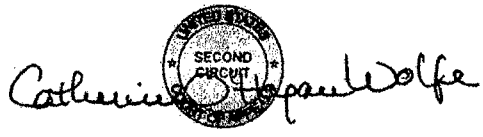
The Mandatory Victims Restitution Act of 1996 ("MVRA") provides that "[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). "[A]t sentencing, the government bears the preponderance burden of proving actual loss supporting a restitution order." *United States v. Rutigliano*, 887 F.3d 98, 109 (2d Cir. 2018). "[W]e review a district court's order of restitution under the MVRA for abuse of discretion." *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012).

Brennerman argues that the district court improperly imposed restitution in the full amount of the $5 million ICBC loan even though Brennerman had already made a payment of $446,466.13. But the testimony at trial established that ICBC released approximately $4.4 million to Brennerman and the rest was used to finance loan servicing fees. The $446,466.13

paid to ICBC by Brennerman was an interest-only payment that did not reduce the $5 million principal owed. Therefore, ICBC's loss of $5 million as a result of the fraud was supported, and Brennerman points to nothing that undermines the district court's finding.

We have considered the remainder of Brennerman's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX B

Judgment of Conviction
United States District Court
for the Southern District of N.Y.
in *United States v. Brennerman*,
No. 17 Cr. 337

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
Raheem Brennerman

JUDGMENT IN A CRIMINAL CASE

Case Number: 17-cr-337

USM Number: 54001-048

Scott Tulman
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)

☐ pleaded nolo contendere to count(s) which was accepted by the court.

☑ was found guilty on count(s) 1, 2, 3, and 4 after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1349	Conspiracy to commit bank fraud and wire fraud	6/1/2017	One
18 U.S.C. § 1344	Bank Fraud	6/1/2017	Two
18 U.S.C. § 1343	Wire Fraud	6/1/2017	Three

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)

☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/19/2018
Date of Imposition of Judgment

Signature of Judge

Richard J. Sullivan, U.S.C.J., Sitting by Designation
Name and Title of Judge

11/19/2018
Date

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1546(a)	Visa Fraud	6/1/2017	Four

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

144 months on Counts One, Two, and Three, and 120 months on Count Four, to run concurrent with each other and to run consecutive to the two year sentence imposed by Judge Kaplan in 17-cr-155.

☑ The court makes the following recommendations to the Bureau of Prisons:

that Defendant be sentenced to a facility in California.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years, to run concurrent on all counts.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

ADDITIONAL SUPERVISED RELEASE TERMS

You must submit your person, residence, place of business, vehicle, and any property or electronic devices under your control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of your probation/supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. You must inform any other residents that the premises may be subject to search pursuant to this condition.

You shall not open any new lines of credit, take out any mortgages, open any credit card accounts, or otherwise assume new debt without the permission of the United States Probation Office. You must provide the probation officer with access to any requested financial information.

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 400.00	$	$	$

☑ The determination of restitution is deferred until 2/18/2019 . An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage

TOTALS	$ 0.00	$ 0.00	

☐ Restitution amount ordered pursuant to plea agreement $

☑ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:
Defendant shall forfeit $4,400,000 as substitute assets reflecting Defendant's proceeds from this offense.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA

v.

Raheem Brennerman

AMENDED JUDGMENT IN A CRIMINAL CASE

Case Number: 17-cr-337

USM Number: 54001-048

Scott Tulman

Defendant's Attorney

Date of Original Judgment: 11/19/2018

(Or Date of Last Amended Judgment)

Reason for Amendment:

- ☐ Correction of Sentence on Remand (18 U.S.C. 3742(f)(1) and (2))
- ☐ Reduction of Sentence for Changed Circumstances (Fed. R. Crim. P. 35(b))
- ☐ Correction of Sentence by Sentencing Court (Fed. R. Crim. P. 35(a))
- ☐ Correction of Sentence for Clerical Mistake (Fed. R. Crim. P. 36)
- ☐ Modification of Supervision Conditions (18 U.S.C. §§ 3563(c) or 3583(e))
- ☐ Modification of Imposed Term of Imprisonment for Extraordinary and Compelling Reasons (18 U.S.C. § 3582(c)(1))
- ☐ Modification of Imposed Term of Imprisonment for Retroactive Amendment(s) to the Sentencing Guidelines (18 U.S.C. § 3582(c)(2))
- ☐ Direct Motion to District Court Pursuant ☐ 28 U.S.C. § 2255 or ☐ 18 U.S.C. § 3559(c)(7)
- ☑ Modification of Restitution Order (18 U.S.C. § 3664)

THE DEFENDANT:

- ☐ pleaded guilty to count(s)
- ☐ pleaded nolo contendere to count(s) which was accepted by the court.
- ☑ was found guilty on count(s) 1, 2, 3, and 4 after a plea of not guilty.

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Title & Section	Nature of Offense	Offense Ended	Count
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18 U.S.C. § 1343	Wire Fraud	6/1/2017	Three

The defendant is sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

- ☐ The defendant has been found not guilty on count(s)
- ☐ Count(s) ☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

11/19/2018
Date of Imposition of Judgment

Signature of Judge
Richard J. Sullivan, U.S.C.J.
Name and Title of Judge

2/12/2019
Date

DEFENDANT: Raheem Brenneman
CASE NUMBER: 17-cr-337

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 1546(a)	Visa Fraud	6/1/2017	Four

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of :

144 months on Counts One, Two, and Three, and 120 months on Count Four, to run concurrent with each other and to run consecutive to the two year sentence imposed by Judge Kaplan in 17-cr-155.

☑ The court makes the following recommendations to the Bureau of Prisons:

that Defendant be sentenced to a facility in California.

☑ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before 2 p.m. on _____
- ☐ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

3 years, to run concurrent on all counts.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☐ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

ADDITIONAL SUPERVISED RELEASE TERMS

You must submit your person, residence, place of business, vehicle, and any property or electronic devices under your control to a search on the basis that the probation officer has reasonable suspicion that contraband or evidence of a violation of the conditions of your probation/supervised release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be grounds for revocation. You must inform any other residents that the premises may be subject to search pursuant to this condition.

You shall not open any new lines of credit, take out any mortgages, open any credit card accounts, or otherwise assume new debt without the permission of the United States Probation Office. You must provide the probation officer with access to any requested financial information.

DEFENDANT: Raheem Brennerman
CASE NUMBER: 17-cr-337

CRIMINAL MONETARY PENALTIES

The defendant must pay the following total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 400.00	$	$	$ 5,264,176.19

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☑ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
ICBC (London) plc	$5,264,176.19	$5,264,176.19	
TOTALS	$ 5,264,176.19	$ 5,264,176.19	

☐ Restitution amount ordered pursuant to plea agreement $ _____

☑ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Raheem Brennerman
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SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

A ☐ Lump sum payment of $ _____ due immediately, balance due

☐ not later than _____, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☑ Payment during the term of supervised release will commence within 30 (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☑ The defendant shall forfeit the defendant's interest in the following property to the United States:

Defendant shall forfeit $4,400,000 as substitute assets reflecting Defendant's proceeds from this offense.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

APPENDIX C

Motion for Rehearing en banc at the United States Court of Appeals for the Second Circuit, No. 18 3546 Cr., EFC No. 190

18-3546(L)

Consolidated with 19-497

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

RAHEEM BRENNERMAN,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PETITION FOR REHEARING *EN BANC* AND FOR RECONSIDERATION OF DEFENDANT-APPELLANT

John C. Meringolo
Meringolo & Associates, P.C.
375 Greenwich St., Fl. 7
New York, NY 10013
(212) 397-7900
john@meringoloesq.com

Counsel for Defendant-Appellant

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PRELIMINARY STATEMENT

Appellant Raheem J. Brennerman respectfully submits this petition for reconsideration pursuant to Fed.R.App.P. 40(a)(2) and for rehearing *en banc* pursuant to Fed.R.App.P. 35(b). The decision of the panel on which rehearing *en banc* and reconsideration is requested, *United States v. Brennerman*, 18-3546-cr (2d Cir. Jun. 9, 2020) (Summary Order), is attached hereto as Exhibit A.

The panel should reconsider its decision because the panel misapprehended key facts in Petitioner's argument concerning the FDIC-insured status of Morgan Stanley's subsidiary entities. The indictment charged that Brennerman had "made false representations to financial institutions in the course of seeking loans and other forms of financing for purported business ventures." A39[1] (Indictment at ¶4). But the conduct that this Court found sufficient to satisfy the FDIC-insured element of the offense—Brennerman's having obtained "perks" from Morgan Stanley's personal wealth division in the form of lower interest rates and access to credit cards—was not business-related. Moreover, Brennerman's personal wealth management account was opened at Morgan Stanley Smith Barney, LLC, which is a brokerage business and is not FDIC-insured, as it does not directly accept deposits. A1305.[2] Similarly, the investment division of Morgan Stanley, which is a wholly owned subsidiary of the parent company and is the entity at which Brennerman's fraudulent representations were directed, is not FDIC insured.

Therefore, there was no conduct directed at an FDIC-insured institution that was sufficient to satisfy every element of the statute of conviction and the Court should reconsider its

[1] Citations beginning with "A" refer to the pagination of the Appendix submitted concurrently with Appellant's Opening Brief on September 6, 2019.

[2] Brennerman additionally refers the Court to the Government's trial exhibits GX1-57A, GX1-73, and GX529, the third page of which indicates that Morgan Stanley Smith Barney, LLC held client funds in a number of FDIC-insured affiliates.

decision. For the same reason, because Brennerman was convicted of fraud related to his personal account, not to his investment scheme, the Court should reconsider and should conclude that a constructive amendment of the indictment occurred.

In addition, the Court should reconsider its decision concerning the complete ICBC file, the Government's obligation to procure it, and Brennerman's constitutional right to present a complete defense insofar as the decision was premised on the assumption that Brennerman had taken no steps to obtain the file and that his bare assertion provided the only indication of the file's existence. The file's existence was confirmed by the testimony of Julian Madgett. A866; A800-803. Brennerman attempted to serve subpoenas and asked the district court to compel production both before and during the trial.

The Court should rehear this case *en banc* because the panel's decision denying Brennerman's appeal is contrary to law insofar as the panel neglected this Court's holding in *In re del Valle Ruiz*, 939 F.3d 520 (2d Cir. 2019) (district courts are not categorically barred from allowing discovery of evidence located abroad) and the Supreme Court's instruction that a criminal defendant has a constitutional right to present a complete defense. *See Scrimo v. Lee*, 935 F.3d 103 (2d Cir.2019) (citing *Crane v. Kentucky*, 476 U.S. 683 (1986)).

STATEMENT OF FACTS

Brennerman incorporates by reference the statement of facts and legal argument in his opening brief on appeal (Dkt. #127) and his reply brief (Dkt. #158) and limits the discussion herein to those facts necessary to the determination of this petition.

This case arose out of a search of Brennerman's Las Vegas, Nevada residence on April 18, 2017, following the issuance of an arrest warrant by Judge Lewis A. Kaplan for Brennerman after the initiation of a petition pursuant to Fed.R.Crim.P. 42 to hold Brennerman in criminal

contempt of court. The search led to a four-count indictment in this case, which alleged *inter alia* that Brennerman's company, The Blacksands Pacific Group, Inc., and its subsidiaries were shell companies and that Brennerman had sought financing from international banking institutions including the Industrial Commercial Bank of China in London ("ICBC") and the investment division of Morgan Stanley for no legitimate purpose. *See, generally*, Opening Brief ("Op.Br.") at 3-4 and citations therein.

The case was tried to a jury in November and December 2017. On December 6, 2017, Brennerman was convicted on all counts. *See generally United States v. Brennerman*, 17-CR-337 (RJS), Indictment (A38-49); A1925.

I. FDIC Insurance: Insufficiency of the Evidence and Constructive Amendment of the Indictment.

Count One of the Indictment describes the scheme in which Brennerman engaged in order to obtain the $20,000,000 bridge loan from ICBC ("Bank-1"). A38-43 (Ind. ¶¶1-9). Count Two, which incorporates the speaking allegations in Count One, charges that Brennerman "made false representations to financial institutions in the course of obtaining or attempting to obtain loans for purported business ventures." A45 (Ind. ¶14).

At trial, the Government failed to prove that Brennerman's conduct with respect to ICBC satisfied every element of the charge. With respect to Morgan Stanley, the Government proved only that Brennerman made false representations in the course of opening a depository account—*not* that his false representations had led to any serious negotiations for a business loan from Morgan Stanley's investment bank.

ICBC London is a subsidiary and a branch of a Chinese bank. It is not FDIC insured. A800; A1308-09. Brennerman avers that his wealth management relationship with Scott Stout

and wealth management account was with Morgan Stanley Smith Barney, LLC[3], a Morgan Stanley subsidiary whose FDIC insurance status commissioner Barry Gonzalez had not confirmed in anticipation of trial. *See* A1308; A1305.

Morgan Stanley Smith Barney, LLC did not hold Brennerman's funds directly, as it is not a depository subsidiary; instead, Brennerman's personal funds were held with another subsidiary within Morgan Stanley, Morgan Stanley Bank National Association, which is FDIC insured. A1300-01. Brennerman avers that the credit card, which was not issued by any Morgan Stanley subsidiary, was never used and was closed with zero balance. A1300-01. Brennerman had no personal relationship with individuals at Morgan Stanley Bank National Association, nor did he make any statements to any individual or have any interaction with that entity that could have been construed as fraudulent.

The Morgan Stanley institutional securities division, with which Brennerman sought to negotiate further financing in his discussions with Kevin Bonebrake, was also not FDIC-insured. A1298-1310. Only depository accounts are FDIC-insured. A1306. The insurance of one subsidiary institution would not apply to its parent corporation. A1308-10.

Yet, when, at the conclusion of the Government's case, the defense moved to dismiss under Rule 29 (A1743), the Government argued, and the district court agreed, that Brennerman's conduct directed at Morgan Stanley fell within the ambit of the Indictment's statutory allegations and satisfied the statutory elements of bank fraud through execution of:

> a scheme to defraud Morgan Stanley by targeting Scott Stout, giving him 200,000, promises $10 million, and then lying about the supposed 45 million he had in assets and what his business was about, and through this fraud on Morgan Stanley and Scott Stout, Mr. Brennerman got access to special perks other people couldn't get, like lower rates, and fancy credit cards, and also the opportunity and

[3] Brennerman additionally respectfully directs the Court to the Government's trial exhibits GX1-57A, GX529, and GX1-73; and to *United States v. Brennerman*, 17-Cr-337 (RJS) at Dkt. #167.

> access to people like -- opportunity to meet and access to do business with people like Kevin Bonebrake.

A1742-43. *See also* A1709-10; A1712.

In his *pro se* Rule 29 and 33 motions, Brennerman asked the district court to vacate his conviction because the FDIC-insured element had not been satisfied as alleged in the Indictment. A1932; A1941-43. The district court declined, reasoning again that the "perks" obtained from Morgan Stanley had been sufficient to bring his conduct within the ambit of 18 U.S.C. § 1344(1). A2020-21. Similarly, the district court relied on these same "perks" to calculate the applicable loss for sentencing purposes. A2035-36.

On appeal, Brennerman argued, as is relevant here, that because he had taken no substantial step with regard to the bank fraud conspiracy or substantive bank fraud toward an FDIC-insured institution, the evidence on those counts was insufficient to convict. Further, because the indictment alleged that he had sought to defraud banks including ICBC to obtain money for his business fraud, the Government's reliance on his personal conduct related to the personal wealth management division of Morgan Stanley (Morgan Stanley Smith Barney, LLC), another non-FDIC-insured entity, had constructively amended the indictment leading to Brennerman's conviction for an offense with which he had not been charged. Op.Br. Argument Point III.

This Court upheld Brennerman's conviction and sentence in a Summary Order on June 9, 2020. The Court misapprehended the record with respect to the FDIC-insured status of Morgan Stanley and overlooked Brennerman's argument about the non FDIC-insured personal wealth division (Morgan Stanley Smith Barney, LLC) and the non-FDIC-insured investment division, generalizing that:

> [T]he record did establish that he defrauded Morgan Stanley, an FDIC-insured

> institution, as part of his broader scheme by, among other things, inducing it to issue him a credit card based on false representations about his citizenship, assets, and the nature and worth of his company.

United States v. Brennerman, 18-3645, Slip Op. (Jun. 9, 2020) at 3.

With respect to Brennerman's constructive amendment argument, the Court similarly misunderstood the crucial distinction between the subsidiary divisions of Morgan Stanley, relying on the Government's arguments at summation and finding that no constructive amendment had occurred because:

> It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman's alleged fraud. . . . At trial, the government offered evidence that Morgan Stanley was one of those "other financial institutions." *See* App'x at 608-09 (testimony of Morgan Stanley's Kevin Bonebrake about a January 2013 telephone call with Brennerman discussing financing to develop oil asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *Vebeliunas*, 76 F.3d at 1290.

Id. Slip Op. at 4.

II. Failure to Obtain the ICBC File and Consequent Violation of Brennerman's Sixth Amendment Rights.

During the trial preparation, the defense became aware that certain files from ICBC including the complete file of Julian Madgett, who had prepared the paperwork for the $20,000,000 bridge loan and submitted it to ICBC's credit committee, were missing. A763; A802. Included in the credit committee documentation would have been a credit application document summarizing the case for making the loan. A802. These documents were not provided to the Government or made available to Brennerman for use at trial. A800-801.

In his motions *in limine*, Brennerman moved to preclude testimony of any individual affiliated with ICBC concerning the financing of the Cat Canyon asset on the ground that, because ICBC, through the Government, had not produced the complete file of discoverable

materials concerning the negotiations, permitting any ICBC representative to testify concerning the negotiations would deny Brennerman his Sixth Amendment right to confront the witnesses against him. Dkt. #59; A242-44. The district court denied the motion. Dkt. # 69 at 25.

Both during the related case in front of Judge Kaplan (*United States v. Brennerman*, 17-CR-155 (LAK)) and in the case at bar, Brennerman moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Brennerman averred that the file would contain Madgett's notes related to the credit paper and credit decision to approve the loan and would support Brennerman's theory of defense. Both Judge Kaplan and Judge Sullivan denied Brennerman's requests for a subpoena to obtain these documents; Judge Sullivan additionally declined to compel the Government to produce them at trial. *See, e.g.*, 17-CR-755 at Dkt.#76; 17-CR-337 at Dkt.#71 (letter motion); A866; A800-803; A867-68; A868-69.

On appeal, Brennerman argued three points with respect to the ICBC file: First, that because the Government had been aware of the file's existence, the Government's failure to procure the file violated its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny; second, that because Brennerman had been forced to cross-examine Madgett without the benefit of the full file, his Sixth Amendment right to cross-examine the witness against him had been violated; and third, that his Sixth Amendment right to present a complete defense had been violated because he was denied the opportunity to present documents to the jury that would have supported his defense.

The Court disagreed with Brennerman on the first two points and did not issue a written opinion on the third, writing that,

> The government's discovery and disclosure obligations extend only to information and documents in the government's possession. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (explaining that the *Brady* obligation applies only to evidence "that is known to the prosecutor"). The government

> insists that every document it received from ICBC was turned over to Brennerman and that it is not aware of the personal notes referenced by Brennerman. Therefore, the government has not violated its disclosure obligation. Nor was the government under any obligation under the Jencks Act to collect materials about Madgett that were not in the government's possession. *See United States v. Bermudez*, 526 F.2d 89, 100 n.9 (2d Cir. 1975).
>
> Even if the documents exist and are material and favorable, Brennerman never sought a subpoena pursuant to Federal Rule of Criminal Procedure 17 . . . . The only indication that such documents are extant comes from Brennerman's bare assertions.

United States v. Brennerman, 18-3645, Slip Op. at 4-5.

Brennerman now brings this petition for reconsideration as to the Court's conclusions concerning his convictions on counts one and two and the adequacy of the evidence of FDIC insurance presented in the Government's case-in-chief and as to the Court's statement that he never sought a Rule 17 subpoena for the complete ICBC file and further that the only indication that such documents (ICBC file) are extant comes from Brennerman's bare assertion and for rehearing *en banc* as to the Court's denial of his Sixth Amendment and Confrontation Clause argument and the exclusion from consideration of his complete defense argument.

REASONS FOR GRANTING RECONSIDERATION AND REHEARING *EN BANC*

I. This Court Should Reconsider Its Denial of Brennerman's Appeal Because The Court's Decision Misapprehended Key Facts.

Fed.R.App.P. 40(a)(2) permits motions for reconsideration where the deciding court has overlooked points of law or fact.

A. The Court's Decision Misapprehended Key Facts About Which Morgan Stanley Subsidiary Was FDIC Insured and Misunderstood Why A Constructive Amendment of the Indictment Occurred.

1. Applicable Law

a. Federal Bank Fraud Requires Intent to Defraud an FDIC-Insured Institution.

Title 18 United States Code section 1344 makes it a crime to "knowingly execut[e], or attempt[t] to execute, a scheme or artifice—(1) to defraud a financial institution; . . ." "The well established elements of the crime of bank fraud are that the defendant (1) engaged in a course of conduct designed to deceive a federally chartered or insured financial institution into releasing property; and (2) possessed an intent to victimize the institution by exposing it to actual or potential loss." *United States v. Barrett*, 178 F.3d 643, 647-48 (2d Cir.1999); *see also* 18 U.S.C. §20 (defining "financial institution"). "[A] defendant cannot be convicted of violating §1344(1) merely because he intends to defraud an entity . . . that is not in fact covered by the statute." *United States v. Bouchard*, 828 F.3d 116, 125 (2d Cir.2016).

b. Constructive Amendment of An Indictment Occurs When the Charging Terms Are Altered.

Constructive amendment of an indictment " 'occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them.' " *United States v. LaSpina*, 299 F.3d 165, 181 (2d Cir.2002) (citations omitted). "To prevail on a constructive amendment claim, a defendant must demonstrate that . . . the proof at trial . . . so altered an essential element of the charge that, upon review, it is uncertain whether the defendant was convicted of conduct that was the subject of the grand jury's indictment." *LaSpina*, 299 F.3d at 181 (citations omitted).

2. Discussion

The theory on which the Government and, in turn, the district court and this Court relied to uphold Brennerman's conviction was that he had obtained certain benefits or "perks" from Morgan Stanley's personal wealth management division through misrepresentations. *See, e.g.*, A1709-10; A1742-43; Slip Op. at 3. But this theory fails on two independent, yet related, grounds.

First, Brennerman's personal wealth management account at Morgan Stanley Smith Barney, LLC, was not a depository account; the funds were held in a depository account at Morgan Stanley Bank National Association. *See generally* A1298-1310. Any statements made by Brennerman to Scott Stout, who worked at Morgan Stanley Smith Barney, LLC (A959, A962) would have been insufficient to establish that Brennerman took any step toward defrauding an FDIC-insured institution. Further, the Morgan Stanley investment division, with which Brennerman sought to negotiate financing in his discussions with Kevin Bonebrake, was not FDIC-insured. A1298-1310. Therefore, there was no evidence at trial that Brennerman had taken any substantial step toward defrauding any FDIC-insured entity. *See* A1880-81 (jury charge); A1881-82 (same).

Second, because the indictment charged Brennerman with having "made false representations to financial institutions in the course of seeking loans and other forms of financing for purported business ventures" (A39 (Indictment at ¶4)), but Brennerman was convicted based on conduct directed at Morgan Stanley Smith Barney, LLC—the personal wealth management division, about which there was no evidence of FDIC insurance, a constructive amendment of the indictment occurred.

There is no question that Morgan Stanley Bank National Association, which held

Brennerman's personal funds, is FDIC-insured. But neither Scott Stout nor Kevin Bonebrake—the individuals with whom Brennerman interacted for the initiation of a personal wealth management account and concerning possible financing of Blacksands' ventures, respectively, worked at Morgan Stanley Bank National Association. Nor, because that institution was merely the repository for Brennerman's personal wealth, could he have taken any actions sufficient to satisfy the language of the indictment directed at it insofar as the financing of his Blacksands ventures were concerned. *See* A45 (Ind. at ¶14).

Therefore, there evidence failed to satisfy every element of the statute of conviction. The Court should reconsider its decision on this point. And because Brennerman was convicted of fraud related to his personal account, not to his investment/fundraising scheme as charged, the Court should reconsider and should conclude that a constructive amendment of the indictment occurred.

B. The Court's Decision Overlooked the Fact that Brennerman Had Made Attempts to Obtain and to Compel the Production of the Complete ICBC File and Erroneously Assumed that the Only Indication of the Documents' Existence Came From Brennerman's Bare Assertions.

Both during the related case in front of Judge Kaplan (*United States v. Brennerman*, 17-CR-155 (LAK)) and in the case at bar, Brennerman moved for discovery of the full ICBC file related to the bridge loan to Blacksands. Brennerman posited that the file would contain ICBC employee Julian Madgett's notes related to the credit paper and credit decision to approve the loan and would support Brennerman's theory of defense. Both Judge Kaplan and Judge Sullivan denied Brennerman's requests for a subpoena to obtain these documents; Judge Sullivan additionally declined to compel the Government to produce them at trial. *See, e.g.*, 17-CR-755 at Dkt.#76; 17-CR-337 at Dkt.#71; A866; A867-68; A868-69.

For these reasons, the Court was mistaken that the record contained no evidence that Brennerman had attempted to obtain the complete ICBC file and the Court's assumption that the only indication that such documents (ICBC file) are extant came from Brennerman's bare assertion was erroneous. The Court should reconsider its decision on this point.

II. The Court Should Grant Rehearing *En Banc* Because the Panel's Decision Conflicts With Settled Law On the Sixth Amendment Rights of A Criminal Defendant to Cross-Examine the Witnesses Against Him and to Present A Complete Defense.

Under Fed.R.App.P. 35(b)(1)(A), a petition for rehearing *en banc* is proper when the Circuit Court panel decision "conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed . . . and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions."

A. Applicable Law

The Due Process Clause requires the Government to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). The Government is further obligated under *Kyles v. Whitley*, 514 U.S. 419, 437 (1995) to "learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."

In some circumstances, discovery may be obtained from abroad. *In re del Valle Ruiz*, 939 F.3d 520, 533 (2d Cir.2019) ("[A] district court is not categorically barred from allowing discovery . . . of evidence located abroad. . . .") (internal reference omitted). "[I]t is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Mees v. Buiter*, 793 F.3d 291, 302 (2d Cir.2015).

B. Discussion

Brennerman argued to the jury that he had negotiated in good faith with ICBC, that he had provided accurate information about Blacksands and its holdings, and that he had intended to repay the bridge loan. *See, e.g.*, A1773-74. But he was precluded from putting all of the evidence necessary to establish his good faith defense before the jury because he did not possess, and the Government did not obtain and disclose, the entire file from ICBC that would, Brennerman posits, have contained the compete credit application and information submitted by Brennerman and evaluated by Madgett in connection with Madgett's preparation of the credit application for the bridge loan. *See Crane v. Kentucky*, 476 U.S. 683, 690 (1986) ("[T]he Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense."); *Scrimo*, 935 F.3d at 113-14; *United States v. Mulder*, 147 F.3d 703, 707 (8th Cir.1998). Because the information and reasoning behind ICBC's decision to grant Brennerman the bridge loan was of paramount importance, the additional evidence in the file might have been sufficient to create a reasonable doubt in the mind of the jury. *See Scrimo*, 935 F.3d at 120 (citations omitted).

Further, because the district court permitted Madgett to testify as to the contents of those documents that ICBC had (selectively, Brennerman argues) provided to the Government and to be cross-examined on those documents, which were removed from the context of the complete ICBC credit application file, Madgett's testimony misled the jury and unfairly prejudiced Brennerman. *See* A242-44.

It was constitutional error to permit Madgett to testify, given that he could not be fully cross-examined. Brennerman was deprived of his Sixth Amendment confrontation right and of

his right to present a complete defense. This deprivation had a substantial and injurious effect and influence in determining the jury's verdict.

The panel's decision to the contrary conflicts with this Court's decisions in *Scrimo* and *In re del Valle Ruiz*, and the Court should rehear the case *en banc* accordingly.

CONCLUSION

Wherefore, Brennerman's petition should be granted and this Court should reconsider its decision and rehear his case *en banc*.

Dated: New York, NY
June 23, 2020

s/ John Meringolo
John Meringolo, Esq.
Meringolo & Associates, P.C.
375 Greenwich St., Fl. 7
New York, NY 10013
(212) 941-2077
john@meringololaw.com

Attorney for Defendant-Appellant
Raheem Brennerman

EXHIBIT A

18-3546(L)
United States v. Raheem Brennerman

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 9th day of June, two thousand twenty.

Present: ROSEMARY S. POOLER,
REENA RAGGI,
WILLIAM J. NARDINI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 18-3546, 19-497

RAHEEM BRENNERMAN,
AKA JEFERSON R. BRENNERMAN,
AKA AYODEJI SOETAN,

Defendant-Appellant.

Appearing for Appellant: John C. Meringolo, Meringolo & Associates, P.C., Brooklyn, N.Y.

Appearing for Appellee: Danielle R. Sassoon, Assistant United States Attorney (Nicholas Roos, Robert B. Sobelman, Matthew Podolsky, Assistant United States Attorneys, *on the brief), for* Geoffrey S. Berman, United

States Attorney for the Southern District of New York, New York, N.Y.

Appeal from the United States District Court for the Southern District of New York (Sullivan, *J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment be and it hereby is **AFFIRMED**.

Defendant-Appellant Raheem Brennerman appeals from the February 12, 2019, amended judgment of conviction entered in the United States District Court for the Southern District of New York (Sullivan, *J.*), sentencing him principally to 144 months' imprisonment, 3 years' supervised release, forfeiture in the amount of $4,400,000, and restitution in the amount of $5,264,176.19. Following a jury trial, Brennerman was convicted of one count of conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. § 1349; one count of bank fraud, in violation of 18 U.S.C. §§ 1344 and 2; one count of wire fraud, in violation of 18 U.S.C. §§ 1343 and 2; and one count of visa fraud, in violation of 18 U.S.C. § 1546(a). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, Brennerman argues: (1) there was insufficient evidence to convict him on the conspiracy count, the substantive bank fraud count, and the substantive wire fraud count; (2) the government made an impermissible constructive amendment to the indictment; (3) the search warrant for Brennerman's Las Vegas apartment was unlawful; (4) the admission of the testimony of Julian Madgett violated Brennerman's constitutional rights; (5) the district court erred by applying a two-offense level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1; and (6) the district court incorrectly determined the restitution amount.

I. Sufficiency of the Evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden," *United States v. Gaskin*, 364 F.3d 438, 459 (2d Cir. 2004), as the standard of review is "exceedingly deferential," *United States v. Hassan*, 578 F.3d 108, 126 (2d Cir. 2008). Ultimately, "the task of choosing among competing, permissible inferences is for the [jury], not for the reviewing court." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001).

Brennerman argues there was insufficient evidence to convict him of a conspiracy. He argues the jury could not have adduced the existence of an agreement because the record does not contain a single response from Peter Aderinwale, the purported co-conspirator with whom Brennerman corresponded over email. His argument is both factually and legally flawed. First, the record did contain two responsive emails from Aderinwale concerning draft emails to be sent to ICBC as part of the scheme. Second, a response from an alleged co-conspirator following conspiratorial communication is not legally necessary to establish the existence of a conspiracy. We agree with the government that a reasonable jury could infer the requisite intent from emails in which Brennerman solicited Aderinwale's input on aspects of the fraud scheme and from Brennerman's transfer of substantial scheme proceeds to Aderinwale. These facts would have supported the inference that Aderinwale was a co-conspirator, even in the absence of any email

response from Aderinwale. The jury would have been entitled to infer that Aderinwale's responses had been conveyed over the phone or in person. "This is so because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Pitre*, 960 F.2d 1112, 1121 (2d Cir. 1992) (internal quotation marks and citation omitted). Thus, viewing the evidence in the light most favorable to the government, we find there was sufficient evidence from which the jury could have reasonably inferred the existence of a conspiracy.

Brennerman also argues that there was insufficient evidence that he intended to defraud an institution insured by the Federal Deposit Insurance Corporation ("FDIC") as required for bank fraud, because most of the evidence offered at trial showed that he targeted the Industrial and Commercial Bank of China's London branch ("ICBC"), which is not FDIC-insured. Contrary to Brennerman's assertions, however, the record did establish that he defrauded Morgan Stanley, an FDIC-insured institution, as part of his broader scheme by, among other things, inducing it to issue him a credit card based on false representations about his citizenship, assets, and the nature and worth of his company. Indeed, the government argued just this theory on summation, asserting that Brennerman was guilty of bank fraud because "he engaged in a scheme to defraud Morgan Stanley" through lies told to a Morgan Stanley employee, which were "all part of an attempt to defraud an FDIC-insured institution." App'x at 1709-10. Defense counsel in summation also emphasized that Morgan Stanley was the sole FDIC-insured institution involved. And the district court instructed the jury on the proper elements of bank fraud, including the FDIC-insured institution element. Brennerman's challenge, therefore, is foreclosed by "the law's general assumption that juries follow the instructions they are given," which applied here would indicate that the jury properly accounted for the evidence related to Morgan Stanley when convicting Brennerman of the bank fraud count. *United States v. Agrawal*, 726 F.3d 235, 258 (2d Cir. 2013).

As to the wire fraud count, Brennerman argues there was insufficient evidence to establish a domestic violation of the statute. "[W]ire fraud involves sufficient domestic conduct when (1) the defendant used domestic mail or wires in furtherance of a scheme to defraud, and (2) the use of the mail or wires was a core component of the scheme to defraud." *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019). We conclude that the evidence here was sufficient. The record at trial established that Brennerman used domestic wires to carry out the fraudulent scheme. Indeed, he concedes that he used telephone lines and email in the United States to make fraudulent representations in furtherance of the scheme. In addition, the account to which ICBC wired the loan money was a Citibank account within the United States, and Brennerman subsequently moved that money to domestic accounts. This is precisely the kind of use of domestic wires that we have held sufficient under the wire fraud statute. *See, e.g.*, *United States v. Kim*, 246 F.3d 186, 190 (2d Cir. 2001).

II. Constructive Amendment

An impermissible constructive amendment occurs only when the government's proof and the trial court's jury instructions "modify essential elements of the offense charged to the point that there is a substantial likelihood that the defendant may have been convicted of an offense

other than the one charged by the grand jury." *United States v. Vebeliunas*, 76 F.3d 1283, 1290 (2d Cir. 1996) (internal quotation marks and citation omitted).

Brennerman contends that the government constructively amended counts one and two of the indictment by proving a fraud against Morgan Stanley at trial—while the indictment, especially the speaking part, focuses on the fraud against ICBC. We disagree. It is clear from the indictment that the scheme against ICBC was merely one target of Brennerman's alleged fraud. The indictment alleged that Brennerman's scheme in fact targeted "several financial institutions around the world, including in the United States." App'x at 39. It also specifically alleged that Brennerman defrauded an FDIC-insured financial institution. The indictment did not limit the proof only to Brennerman's scheme against ICBC. While the indictment discusses ICBC activity at length, it makes clear that those allegations are illustrations, asserting that "[b]eginning in or about January 2013, [Brennerman] made similar [false] representations to other financial institutions in an effort to induce those institutions to provide financing to Blacksands Pacific and Blacksands Alpha." App'x at 42. At trial, the government offered evidence that Morgan Stanley was one of those "other financial institutions." *See* App'x at 608-09 (testimony of Morgan Stanley's Kevin Bonebrake about a January 2013 telephone call with Brennerman discussing financing to develop oil asset). Thus, there was not a "a substantial likelihood that the defendant may have been convicted of an offense other than the one charged by the grand jury." *Vebeliunas*, 76 F.3d at 1290.

III. Search Warrant

Brennerman challenges the lawfulness of the search warrant of his Las Vegas apartment. Even assuming, for the sake of argument only, that the search warrant was unlawful, we conclude that the good faith exception to the Fourth Amendment's exclusionary rule would apply. We therefore need not address the propriety of the search warrant. The district court found that the law enforcement agents who executed the warrant reasonably relied on its terms in good faith, and Brennerman has not challenged this finding. Where, as here, evidence is obtained by police officers executing the search "in objectively reasonable reliance" on a warrant, the good faith exception to the exclusionary rule applies. *United States v. Falso*, 544 F.3d 110, 125 (2d Cir. 2008) (internal quotation marks and citation omitted).

IV. Testimony of Julian Madgett

Brennerman argues that Julian Madgett's testimony at trial violated due process and his Sixth Amendment rights to confrontation and compulsory process because he was unable to obtain certain exculpatory personal notes from Madgett, and the government would not turn the notes over or otherwise retrieve them from ICBC.

The government has an obligation under the Due Process Clause to make a timely disclosure of any exculpatory or impeaching evidence that is material and in its possession. *See Brady v. Maryland*, 373 U.S. 83 (1963); *see also Giglio v. United States*, 405 U.S. 150 (1972). Additionally, the Jencks Act provides that, "[a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement . . . of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b).

Brennerman's argument claiming constitutional violations as a result of Madgett's testimony is without merit. The government's discovery and disclosure obligations extend only to information and documents in the government's possession. *United States v. Avellino*, 136 F.3d 249, 255 (2d Cir. 1998) (explaining that the *Brady* obligation applies only to evidence "that is known to the prosecutor"). The government insists that every document it received from ICBC was turned over to Brennerman and that it is not aware of the personal notes referenced by Brennerman. Therefore, the government has not violated its disclosure obligation. Nor was the government under any obligation under the Jencks Act to collect materials about Madgett that were not in the government's possession. *See United States v. Bermudez*, 526 F.2d 89, 100 n.9 (2d Cir. 1975).

Even if the documents exist and are material and favorable, Brennerman never sought a subpoena pursuant to Federal Rule of Criminal Procedure 17, never made a timely request for a deposition under Federal Rule of Criminal Procedure 15, and never asked the district court to issue letters rogatory pursuant to 28 U.S.C. § 1781 to obtain documentary evidence or secure testimony from the United Kingdom where ICBC maintains its records. The only indication that such documents are extant comes from Brennerman's bare assertions.

V. Sentence

At sentencing, the court applied a two-offense level enhancement for obstruction of justice, pursuant to U.S.S.G. § 3C1.1, a finding that relied on, as an alternative basis, Brennerman's false representations in his bail applications to the court. Brennerman argues that those misrepresentations cannot support an obstruction of justice enhancement because the misstatements "were at most minimally connected to the offense conduct in this case and did not obstruct the prosecution in any meaningful way." Appellant's Br. at 54. However, this argument has already been rejected by our Court in *United States v. Mafanya*, 24 F.3d 412, 415 (2d Cir. 1994) ("Appellant's false statement to a judicial officer (the magistrate judge) was an attempt to obstruct justice. Therefore, the district court properly Applied the [Section 3C1.1] enhancement . . . ."). Accordingly, the district court did not err in applying the enhancement.

VI. Restitution

The Mandatory Victims Restitution Act of 1996 ("MVRA") provides that "[i]n each order of restitution, the court shall order restitution to each victim in the full amount of each victim's losses as determined by the court and without consideration of the economic circumstances of the defendant." 18 U.S.C. § 3664(f)(1)(A). "[A]t sentencing, the government bears the preponderance burden of proving actual loss supporting a restitution order." *United States v. Rutigliano*, 887 F.3d 98, 109 (2d Cir. 2018). "[W]e review a district court's order of restitution under the MVRA for abuse of discretion." *United States v. Zangari*, 677 F.3d 86, 91 (2d Cir. 2012).

Brennerman argues that the district court improperly imposed restitution in the full amount of the $5 million ICBC loan even though Brennerman had already made a payment of $446,466.13. But the testimony at trial established that ICBC released approximately $4.4 million to Brennerman and the rest was used to finance loan servicing fees. The $446,466.13

paid to ICBC by Brennerman was an interest-only payment that did not reduce the $5 million principal owed. Therefore, ICBC's loss of $5 million as a result of the fraud was supported, and Brennerman points to nothing that undermines the district court's finding.

We have considered the remainder of Brennerman's arguments and find them to be without merit. Accordingly, the judgment of the district court hereby is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX D

**Order of the
United States Court
of Appeals for the Second Circuit
denying motion for Rehearing en banc in
United States v. Brennerman,
No. 18 3546 Cr., EFC No. 195**

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of July, two thousand twenty.

United States of America,

Appellee,

v.

Raheem Brennerman, AKA Jeferson R. Brennerman, AKA Ayodeji Soetan,

Defendant - Appellant.

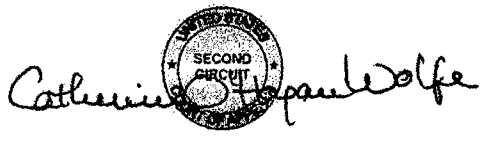
ORDER

Docket Nos: 18-3546 (Lead)
19-497 (Con)

Appellant, Raheem Brennerman, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



APPENDIX E

Opinion and Order of the United States District Court for the Southern District of N.Y. in *United States v. Brennerman*, No. 17 Cr. 155 (EFC No. 76)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

17-cr-0155 (LAK)

RAHEEM BRENNERMAN, et ano.,

Defendants.

----------x

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge.*

Defendants move for an order compelling ICBC (London) plc ("ICBC") to respond to a trial subpoena dated August 22, 2017. The subpoena purports to be returnable on September 7, 2017. The trial is to begin on September 6, 2017. ICBC opposes the motion on a number of grounds. At present, however, it suffices to address only one.

Defendants have not filed any conventional proof of service of the subpoena on ICBC. Rather, their moving declaration relates only that (1) defendants' counsel had a number of communications with Paul Hessler, Esq., who represents ICBC in the civil case in which (i) the orders that defendants are accused of violating contumaciously were entered and (ii) the government filed the petition to hold defendants in criminal contempt, and (2) Mr. Hessler took the position that the civil case and this prosecution are separate cases, that ICBC is not a party in this criminal case, and that he is not authorized to accept service of a subpoena in this case. Defendants' declaration attaches as Exhibit B an email chain that indicates that defendants' counsel provided a copy of the subpoena to Mr. Hessler.

In opposing defendants' motion, ICBC argues that it has not been, and could not be, served in this action. Its argument in essence rests on the proposition that this criminal contempt proceeding and the civil case in which ICBC is a plaintiff-judgment creditor (and in which Mr. Hessler appears on its behalf) are entirely separate. Defendants, however, contend that service on Mr. Hessler (assuming that emailing him a copy of the subpoena constituted service) was valid because, in view of this Court's previous orders, this prosecution is part of the underlying civil case.

These opposing arguments in other circumstances might raise interesting questions in light of the fact that criminal contempt proceedings occupy a unique position in our jurisprudence:

> "A contempt proceeding is *sui generis*. It is criminal in its nature, in that the party is charged with doing something forbidden, and, if found guilty, is punished. Yet it may

> be resorted to in civil as well as criminal actions, and also independently of any civil or criminal action." *Bessette v. W.B. Conkey Co.*, 194 U.S. 324, 326 (1904).

But it is unnecessary for present purposes to probe the precise boundaries here.

The fact that Mr. Hessler is counsel to ICBC in the civil case would not make the purported service on him (even if that purported service were sufficient, which it was not) effective as to ICBC regardless of the view taken of the fact that this prosecution was initiated by a petition filed by the government in the civil case. Mr. Hessler is not the witness whose attendance, and the production of whose documents, the subpoena seeks to compel. Even a party to a civil case who is represented by counsel must be served personally with a subpoena. Service on a party's lawyer is not sufficient. *Harrison v. Prather*, 404 F.2d 267, 273 (5th Cir. 1968) (service of subpoena on lawyer for party insufficient); *Cadlerook Joint Venture, L.P. v. Adon Fruits & Vegetables, Inc.*, No. 09-cv-2507 (RRM), 2010 WL 2346283, at *3 (E.D.N.Y. Apr. 21, 2010) ("service . . . on plaintiff's counsel, as opposed to personal service on plaintiff, . . . improper") (citing *Harrison*); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Ams.*, 262 F.R.D. 293, 304 (S.D.N.Y. 2009) ("Unlike service of most litigation papers, service on an individual's lawyer will not suffice."); *In re Smith*, 126 F.R.D. 461, 462 (E.D.N.Y. 1969) ("service of subpoena on plaintiff's counsel, as opposed to personal service on plaintiff, . . . improper") (citing *Harrison*); 9A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2454 (3d ed. 2017 update) (same); *see Khachikian v. BASF Corp.*, No. 91-cv-0573 (NPM), 1994 WL 86702, at *1 (N.D.N.Y. Mar. 4, 1994). The relevant language of the criminal rule is substantially identical.[1] And defendants' application would be denied even if one were to pass over that rather obvious point.

Rule 17(d) of the Rules of Criminal Procedure provides for service of subpoenas in criminal cases. It states in relevant part: "A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance." Rule 17(e) governs the permissible place of service, and clause (2) provides that "[i]f the witness is in a foreign country, 28 U.S.C. § 1783 governs the subpoena's service." Rule 45 of the Federal Rules of Civil Procedure, which provides for the service of subpoenas in civil cases, is to exactly the same effect, as Rule 45(b)(3) is substantively identical to Criminal Rule 17(e)(2). Thus, regardless of whether this criminal contempt proceeding is to be treated—for purposes of service of subpoenas—as part of the underlying civil case or as a separate criminal case, the bottom line is that the availability and service of a subpoena on a witness outside the United States is controlled by Section 1783 of the Judicial Code.

Section 1783(a) authorizes a district court to issue a subpoena to "a national or resident of the United States who is in a foreign country." Section 1783(b) goes on to provide in relevant part:

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[1] Fed. R. Crim. P. 17 provides that "[t]he server must deliver a copy of the subpoena to the witness." Fed. R. Civ. P. 45(b)(1) provides that "[s]erving a subpoena requires delivering a copy to the named person."

> "Service of the subpoena and any order to show cause, rule, judgment, or decree authorized by this section . . . shall be effected in accordance with the provisions of the Federal Rules of Civil Procedure relating to service of process on a person in a foreign country. The person serving the subpoena shall tender to the person to whom the subpoena is addressed his estimated necessary travel and attendance expenses, the amount of which shall be determined by the court and stated in the order directing the issuance of the subpoena."

In this case, defendants did not seek, and this Court did not issue, an order authorizing the issuance of this subpoena.[2] Nor would the Court authorize its issuance *nunc pro tunc* because it is undisputed that ICBC is "a foreign bank located approximately 3,500 miles from the courthouse." DI 69. It is not "a national of the United States who is in a foreign country." Accordingly, Section 1783(a) does not authorize issuance of a subpoena to it. *See Aristocrat Leisure*, 262 F.R.D. at 305; *United States v. Korolkov*, 870 F. Supp. 60, 65 (S.D.N.Y. 1994) (citing Fed. R. Crim. P. 17(e)(2), 28 U.S.C. § 1783, and *United States v. Johnpoll*, 739 F.2d 702, 709 (2d Cir. 1984)); *accord* WRIGHT, *supra*, § 2462.

For the foregoing reasons, defendants' motion to compel ICBC [DI 59] to respond to the subpoena dated August 22, 2017 is denied in all respects.

SO ORDERED.

Dated: September 1, 2017

/s/ Lewis A. Kaplan

Lewis A. Kaplan
United States District Judge

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[2] The Clerk of Court ordinarily provides to counsel, on request, signed and sealed subpoena forms with counsel left to fill in the name of the witness and perhaps the date and time of the required appearance. The Court assumes that is unobjectionable where the witness subpoenaed is in the United States. Section 1783(b), however, refers explicitly to an "order directing the issuance of the subpoena." Thus, the issuance of a § 1783 subpoena is appropriate only upon a judicial order.

APPENDIX F

Motion and Order of the United States District Court for the Southern District of N.Y. in *United States v. Brennerman*, No. 17 Cr. 337 (EFC Nos. 54; 58-59; 71; 167)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. RAHEEM J. BRENNERMAN, Defendant.	Case. No. 17 Cr. 337 (RJS) ECF Case

DEFENDANT'S MEMORANDUM OF LAW IN RESPONSE TO GOVERNMENT'S MOTION IN LIMINE

THOMPSON HINE

Maranda E. Fritz
Brian D. Waller
Brian K. Steinwascher
Thompson Hine LLP
335 Madison Avenue, 12th Floor
New York, New York 10017
Telephone: (212) 344-5680

Counsel for Defendant Raheem Brennerman

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PRELIMINARY STATEMENT

This memorandum is submitted in response to the Government's motion *in limine* seeking pretrial rulings on the admissibility of certain evidence.

The Government puts forth inconsistent justifications for what evidence should and should not be admitted, essentially arguing that any evidence that supports the allegations of the Indictment is admissible and any evidence supporting Mr. Brennerman's defense is inadmissible. But one aspect of the Government's motion is consistent throughout: the Government contends that Mr. Brennerman's criminal conduct was "completed" when he provided financial institutions with allegedly misleading information in connection with obtaining financing for the Cat Canyon oil field transaction.

Specifically, according to the Government's own theory of the case, the Court need not admit evidence pertaining to anything that took place after Mr. Brennerman's alleged misrepresentations to obtain financing: "[Mr. Brennerman's] crimes were complete, *before he obtained any funds on the basis of his fraud*, when he deprived his victims of the accurate information they needed to properly assess the risk of lending the defendant money." Gov't Mot. at 21 (emphasis added). According to the Government, it is irrelevant whether Mr. Brennerman (i) actually obtained the financing he requested (e.g., it is irrelevant that ICBC (London) plc ("ICBC (London)") only agreed to provide a bridge loan, but not to finance the transaction itself, and that Morgan Stanley was not asked to provide financing in any form); or (ii) intended to pay back the loan he received from ICBC (London).

Given the Government's position, the Court should not delve into whether post-conduct evidence is admissible on other grounds, such as for *res gestae* purposes or under F.R.E. 404(b). The Government has conveniently constructed a limited framework for the crimes alleged in the Indictment. Mr. Brennerman's alleged scheme to defraud – supporting the bank and wire fraud

counts and the overarching conspiracy count – turns entirely on Mr. Brennerman's alleged misrepresentations to ICBC (London) (and to a lesser extent, Morgan Stanley) in order to obtain financing for the Cat Canyon oil field transaction.

In any event, even under a more expansive view of the alleged criminal conduct, the Government fails to present any convincing basis for the admission or exclusion of the evidence identified in its motion:

- The Government's attempt to introduce evidence relating to the civil litigation and contempt proceeding against Blacksands Pacific Group, Inc. ("Blacksands"), is utterly irrelevant to the criminal charges against Mr. Brennerman personally. Further, it would create an entire trial-within-a-trial, and the Government effectively would be re-litigating a separate, civil case – with its lower standard of proof – in an attempt to show tangential issues such as Mr. Brennerman's supposed consciousness of criminal guilt. Such evidence is also impermissibly prejudicial to Mr. Brennerman.
- The Government's position that none of the actions taken by ICBC (London) with respect to granting the bridge loan are relevant is contrary to its above argument, i.e., that the bank's actions are necessary to show Mr. Brennerman's state of mind. Moreover, the Government ignores that such evidence is necessary and admissible on the issue of materiality, and that excluding evidence concerning the actions or inactions of ICBC (London) would be patently unfair to Mr. Brennerman because he would be incapable of effectively cross-examining the bank's witnesses at trial.

APPENDIX F

- The Government also inconsistently argues that Mr. Brennerman's state of mind – including whether he believed he had furnished all material information to the bank, was using the loan proceeds appropriately, and planned to pay them back – is inadmissible, despite arguing that other post-loan conduct is relevant to show his state of mind in other situations. But if some of Mr. Brennerman's actions are relevant to showing his state of mind with respect to his guilt, his other actions that evidence his state of mind are also admissible. Alternatively, none of Mr. Brennerman's post-loan conduct should be admitted.
- The Government creates a strawman by asserting that Mr. Brennerman should be precluded from calling any attention to the Government's investigation (or lack thereof) in this case because it invites jury nullification. Yet Mr. Brennerman has never suggested, let alone argued, that he intends to seek nullification. And courts consistently recognize that a defendant is permitted to point out to the jury the absence of evidence supporting the Government's charges, which is precisely what Mr. Brennerman seeks to do with respect to the Government's lack of an investigation against him or Blacksands.

The Government's motion is both misplaced and meritless, and the Court should decline to rule in the Government's favor on any of these issues.

ARGUMENT

I. THE ONLY RELEVANT, ADMISSIBLE EVIDENCE PERTAINS TO MR. BRENNERMAN'S REPRESENTATIONS TO THE ALLEGED VICTIM BANKS

The Government has confirmed that ICBC (London) and Morgan Stanley are the only financial institutions that Mr. Brennerman allegedly defrauded – and that ICBC (London) is the

only one from which he obtained money. And the Government now clearly has circumscribed the scope of the fraudulent scheme allegedly perpetrated by Mr. Brennerman:

> By intentionally depriving his victims [ICBC (London) and Morgan Stanley] of material information, Brennerman intentionally harmed lenders and potential lenders. *His crimes were complete, before he obtained any funds on the basis of his fraud, when he deprived his victims of the accurate information they needed to properly assess the risk of lending the defendant money.*

Gov't Mot. at 21 (emphasis added). In other words, according to the Government, the conduct relevant to the crimes charged in the Indictment *ended* with Mr. Brennerman's representations to ICBC (London) and Morgan Stanley. Nothing that occurred after those representations – including how Mr. Brennerman purportedly used the bridge loan proceeds from ICBC (London), his failure to repay the loan, or any subsequent litigation or related proceedings between Blacksands and ICBC (London) – is necessary to prove the elements of the crimes charged in the Indictment.

Thus, according to the Government's own argument, this Court need not admit any such evidence. The Government's entire case turns on the veracity and materiality of Mr. Brennerman's representations to these financial institutions, and whether he had the requisite intent to defraud them at that time. Any conduct that followed these representations is simply irrelevant to the crimes charged and thus not admissible under F.R.E. 401. For this reason, the Government should not be permitted to admit any evidence pertaining to the subsequent, civil lawsuit filed by ICBC (London) and the related civil contempt proceeding because it is neither direct evidence of the representations Mr. Brennerman made to the bank nor otherwise admissible under F.R.E. 404(b) because it fails to show Mr. Brennerman's state of mind, intent, or consciousness of guilt with respect to those previously made representations. Nor is such

evidence necessary to "complete the story at trial" since, according to the Government, the "story" *ends* with Mr. Brennerman's representations to ICBC (London) and Morgan Stanley.[1]

II. THE GOVERNMENT'S ARGUMENTS FOR THE ADMISSIBILITY OR EXCLUSION OF CERTAIN EVIDENCE ARE UNSUPPORTED BY LAW

A. There Is No Basis to Admit Evidence of Blacksands' Failure to Comply With Court Orders

Despite delineating a narrow framework for the conduct relevant to the crimes charged in the Indictment, the Government asserts that the failure of Mr. Brennerman's company, Blacksands, to comply with court orders in a *civil* litigation and related *civil* contempt proceeding are evidence of his consciousness of *criminal* guilt.

As a threshold matter, the Government cites not a single case in support of such a proposition. And the cases the Government does rely upon do not even deal with the admissibility of evidence, but rather with post-trial motions regarding the *sufficiency* of evidence – an analytically distinct concept that has no bearing on whether the Federal Rules of Evidence permit the admission of the specific type of evidence identified by the Government.[2] Moreover, these cases deal with conduct specifically targeted at concealing ill-gotten gains, typically through money laundering. *See, e.g.*, *United States v. Silver*, 117 F. Supp. 3d 461, 473 (S.D.N.Y. 2015) (money-laundering), *cited by* Gov't Mot. at 8. This type of conduct is utterly dissimilar to Blacksands' failure to comply with court orders to produce documents – which, as the Government is aware, occurred for myriad reasons including issues with Blacksands' legal

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[1] Similarly, the Government should not be permitted to introduce any emails or other communications made by Mr. Brennerman or anyone else at Blacksands that occurred subsequent to the representations made to the two financial institutions identified by the Government.

[2] *See* Gov't Mot. at 8 (citing *United States v. Rosen*, 716 F.3d 691, 701 (2d Cir. 2013) (resolving post-trial motion directed to sufficiency of evidence); *United States v. Zichetello*, 208 F.3d 72, 105 (2d Cir. 2000) (same)).

representation. It would require not just one but several inferential leaps to equate Blacksands' failure to abide by court orders, related to post-judgment discovery issues under the more lenient civil burden of proof, to the egregious attempts to conceal funds through money laundering in the cases relied upon by the Government. Thus, even assuming that the evidence of Blacksands' failure to comply with court orders in a civil proceeding is arguably relevant to establishing consciousness of criminal guilt – which it is not – such evidence is certainly more prejudicial than probative and should be excluded under F.R.E. 403.

Nor is evidence of Blacksands' conduct in a subsequent civil litigation necessary to "complete the story" of Mr. Brennerman's alleged crimes. As already noted *supra*, the "story" the Government intends to present is that the alleged criminal conduct was completed at the point of Mr. Brennerman's representations to the financial institutions to obtain financing. Blacksands' non-compliance with court orders in a subsequent civil matter does nothing to help tell the story of Mr. Brennerman's representations to those banks. Either Mr. Brennerman's representations were false, material, and made with the intent to defraud *at the time they were made* or they were not – Blacksands' subsequent conduct is irrelevant to establishing those facts.

Finally, in addition to all these evidentiary infirmities associated with evidence of Blacksands' conduct in the subsequent civil litigation, introducing such evidence would effectively give rise to a trial-within-a-trial. The Government would attempt to portray Blacksands' and Mr. Brennerman's conduct in the civil litigation as evidence of criminal intent, despite the differing standards of proof. And Mr. Brennerman would be forced to present a defense not only to the criminal charges against him but also to the allegations in the civil action and the basis for the civil contempt proceeding. The Court would need to make evidentiary rulings on those issues as well, which would likely entail additional limiting or clarifying

instructions to the jury. For this additional reason, to avoid any unnecessary complication – which pertains to evidence that has only the smallest, if any, probative value – the Court should deny the Government's motion to introduce evidence related to the civil litigation or civil contempt proceeding.

B. The Government Should Only Be Permitted to Introduce Properly Authenticated Emails of Blacksands' Employees or Agents Relevant to Representations to the Financial Institutions

The Government seeks to introduce emails from Blacksands' email accounts that were sent to various "victims," apparently in furtherance of the alleged scheme to defraud. In line with the Government defining the alleged crimes as being completed at the point Mr. Brennerman made representations to the financial institutions in order to obtain funds, any emails not probative of or concerning that conduct should be excluded.

Furthermore, the Government seeks to introduce these emails as statements of Mr. Brennerman himself as either "'made by the party in an individual or representative capacity.'" Gov't Mot. at 12 (quoting F.R.E. 801(d)(2)(A)). But the Government then asserts that these email accounts were "fictitious," and that the Government cannot supply witnesses to authenticate who authored these emails. The Court should therefore exclude any emails that are not authored by Mr. Brennerman that the Government cannot authenticate otherwise. *See* F.R.E. 901.

C. Mr. Brennerman Should Be Able to Introduce Evidence Both With Respect to His Interactions with the Financial Institutions and His Intent With Respect to the Loan

The Government seeks to exclude *any* evidence that would support a defense to the charges in the Indictment, including the preclusion of evidence pertaining to ICBC (London)'s interaction with Mr. Brennerman and its decision to extend him a bridge loan, as well as any evidence demonstrating Mr. Brennerman's intent, or lack thereof, to defraud. The Government's

position is both unsupported by the law it relies on and, more importantly, would severely hamper Mr. Brennerman's ability to put forth any meaningful and constitutionally adequate defense.

The Government's basis for excluding evidence of ICBC (London)'s internal deliberations and decision-making with respect to extending financing to Mr. Brennerman is that it supposedly amounts to nothing more than a "blame the victim" defense, which the Government contends is impermissible. But the Government ignores the fact that this evidence from ICBC (London) is critical to other contested issues in this case – including materiality and Mr. Brennerman's state of mind. Indeed, the Government acknowledges that the state of mind and/or knowledge of both Mr. Brennerman and his alleged victims is an important consideration justifying the admission of other evidence. *See, e.g.*, Gov't Mot. at 10 (contending that failure to disclose documents relevant to showing Mr. Brennerman's state of mind); *id.* at 21 (noting importance of determining what information financial institutions received from Mr. Brennerman "to properly assess the risk of lending [him] money").

Equally, if not more, important is that the Government intends to call at least one witness from ICBC (London) and Morgan Stanley to testify at trial. *See* Gov't Witness List; *see also* Gov't Mot. at 10-11 (noting that the Government intends to call "a witness from ICBC who is expected to testify at trial regardless of the Court's ruling on" the issue of the subsequent ICBC (London) civil litigation). Thus, it appears the Government intends to examine witnesses from the financial institutions with respect to their dealings with Mr. Brennerman, but does not want the defense to be able to introduce any evidence that would demonstrate that the representations Mr. Brennerman made to either ICBC (London) or Morgan Stanley were accurate or immaterial or done without any intent to defraud.

It would be contrary to settled law, let alone a defendant's constitutional rights, to preclude Mr. Brennerman from offering or attempting to adduce evidence that would negate any attempt to defraud or would demonstrate his good faith. Appellate courts routinely grant a defendant wide latitude in raising such a defense in fraud cases, and find that trial court's abuse their discretion when excluding evidence, however minimally probative, that would demonstrate the defendant's intent. For example, faced with a situation in which the trial court in a bank fraud case excluded a piece of evidence probative of the defendant's intent – "Exhibit C," which was a financial statement in the defendant's file reflecting the defendant's representations to a bank – the Eighth Circuit held that:

> [T]he district court abused its discretion in excluding Exhibit C. We agree that Exhibit C, *which was in the bank's possession and contained in the defendant's lending file*, was relevant to the requisite element of intent to defraud. Exhibit C was also probative of the defendant's good faith defense. Good faith constitutes a complete affirmative defense to a charge of fraudulent intent. Moreover, Exhibit C was not unfairly prejudicial to the government. During its case in chief, the government offered three financial statements prepared by outside sources. Although Exhibit C can be construed as internally inconsistent, [the defendant] should have been allowed an opportunity to explain the inconsistencies to the jury. Because [the defendant's] intent to defraud was a material issue at trial, we conclude that the district court's exclusion of Exhibit C constituted reversible error, and we remand for a new trial.

United States v. Mulder, 147 F.3d 703, 707 (8th Cir. 1998) (emphasis added); *see also United States v. Certified Envtl. Servs.*, 753 F.3d 72, 90 (2d Cir. 2014) ("While evidentiary rulings are reviewed for abuse of discretion, the question of the defendants' intent and good faith was a contested issue in this case, and the definition of relevance under F.R.E. 401 is very broad. On review, we find that the district court abused its discretion in finding that the proffered evidence [relating to the defendant's intent] was temporally irrelevant.").[3]

[3] Similarly, in the context of approving jury instructions relating to intent and good faith, the Second Circuit has approved the following language:

Evidence of the conduct by ICBC (London) and Morgan Stanley also is necessary to establish materiality. Materiality is an objective standard, but one that still must be analyzed in the context of the transactions at issue. *See United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) ("'[M]ateriality looks to the effect on the likely *or actual behavior of the recipient* of the alleged misrepresentation.'") (citation omitted; emphasis added); *United States v. Corsey*, 723 F.3d 366, 373-74 (2d Cir. 2013) (assessing materiality and nature of alleged fraudulent misrepresentation based on testimony from the victim, and explaining that "the initial misrepresentation remains material; a reasonable jury could find that a promise of five billion dollars in collateral could persuade Re, his colleagues, and reasonable lenders to make a three-billion-dollar loan"). Thus, the Government is incorrect when it asserts that the actions ICBC (London) or Morgan Stanley undertook following Mr. Brennerman's representations are irrelevant; to the contrary, that evidence is necessary to prove or disprove an essential element of the bank and wire fraud charges, i.e., whether those representations were material.

Therefore, not only is the evidence the Government seeks to exclude relevant and admissible, excluding it runs counter to well-established law and would violate Mr. Brennerman's constitutional right to assert a meaningful defense at trial. As the Second Circuit has stated, it "is rarely proper to cut off completely a probative inquiry that bears on a feasible defense." *United States v. Harvey*, 547 F.2d 720, 723 (2d Cir. 1976); *see also United States v.*

> Because an essential element of the crime charged is an intent to defraud, it follows that good faith on the part of the defendant is a complete defense to this charge. Each of the defendants contends that she had a good faith belief in the program and that she believed that what she told investors was true.... *However[] misleading or deceptive a plan may be, it is not fraudulent if it was devised or carried out in good faith.*

United States v. Dupre, 462 F.3d 131, 139 (2d Cir. 2006) (emphasis added); *see also United States v. Pascarella*, 84 F.3d 61, 70-71 (2d Cir. 1996) (approving jury instructions that defendant should not be convicted of bank fraud if defendant actually believed checks were not stolen).

Foster, 982 F.2d 551, 555 (D.C. Cir. 1993) (Ginsburg, J.) ("If the evidence is *crucial*, the judge would abuse his discretion in excluding it.") (internal quotation marks and citation omitted; emphasis in original). The Government's motion should be denied as to this request as well.

D. Mr. Brennerman Should Be Permitted to Address Whether the Government Obtained and Presented Evidence Sufficient to Convict

The Government confusingly raises a strawman by arguing that Mr. Brennerman should not be permitted to argue for jury nullification based on the Government's investigative efforts or techniques. At no point has Mr. Brennerman suggested, let alone argued, that he will pursue a jury nullification strategy; nor would he. Thus, the Government's argument in this regard is misplaced.

In any event, the defense should be permitted to address the Government's investigation, and the evidence produced therefrom and introduced at trial, to argue whether or not the Government has met its burden of establishing every element of the crimes charged in the Indictment beyond a reasonable doubt – including commenting on whether the Government failed to introduce specific evidence – which has long been recognized as an appropriate form of argument by the defense. *See, e.g.*, *United States v. Preldakaj*, 456 F. App'x 56, 60 (2d Cir. 2012) (noting with approval the district court's instruction "that reasonable doubt may arise out of the evidence or the lack of evidence in the case") (internal quotation marks and citation omitted), *decision reached on appeal by, remanded by*, 489 F. App'x 507 (2d Cir. 2012); *see also United States v. Hoffman*, 964 F.2d 21, 26 (D.C. Cir. 1992) ("It is permissible for a defense attorney to point out to the jury that no fingerprint evidence has been introduced and to argue that the absence of such evidence weakens the Government's case . . . ."); *United States v. Latimer*, 511 F.2d 498, 502-03 (10th Cir. 1975) (same but with respect to surveillance tapes).

CONCLUSION

For the foregoing reasons, Government's motion should be denied in its entirety.

Dated: New York, New York
November 9, 2017

Respectfully submitted,

/s/Brian D. Waller
Maranda Fritz (MF 8060)
Brian D. Waller (BW 7163)
Brian K. Steinwascher (BS 1469)
THOMPSON HINE LLP
335 Madison Avenue
New York, NY 10017
(212) 344-5680
maranda.fritz@thompsonhine.com
brian.waller@thompsonhine.com

Counsel for Defendant Raheem Brennerman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA

-v.-

RAHEEM BRENNERMAN,
a/k/a "Jefferson R. Brennerman,"
a/k/a "Ayodeji Soetan,"

Defendant.

17 Cr. 337 (RJS)

THE GOVERNMENT'S MOTIONS *IN LIMINE*

JOON H. KIM
Acting United States Attorney
Southern District of New York
Attorney for the United States of America

Nicolas Roos
Danielle R. Sassoon
Robert Sobelman
Emil J. Bove III
Assistant United States Attorneys
Of Counsel

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INTRODUCTION

The Government respectfully submits these motions *in limine* seeking the following pretrial rulings with respect to the upcoming trial of defendant Raheem J. Brennerman:

1. Evidence of the defendant's failure to comply with court orders and withholding of documents and information relating to his finances and the finances of The Blacksands Pacific Group, Inc. ("Blacksands") from ICBC (London) plc ("ICBC"), one of the victim banks, is admissible.

2. Emails purportedly sent by employees of Blacksands, the defendant's company, are admissible as the defendant's own statements or as statements of his employees and agents.

3. Defense arguments that the victim banks failed to conduct sufficient diligence, were negligent, or otherwise acted unreasonably in relying on the defendant's misrepresentations are improper.

4. Defense arguments that the defendant lacked intent to defraud because he intended to repay fraudulently-obtained proceeds are improper.

5. Defense arguments relating to the Government's initiation of investigations related to the defendant, charging decisions, and reasons for charging the defendant are improper.

BACKGROUND[1]

Brennerman is charged in a four-count indictment with conspiracy to commit bank and wire fraud, in violation of 18 U.S.C. § 1349 (Count One); bank fraud, in violation of 18 U.S.C. § 1344 (Count Two); wire fraud, in violation of 18 U.S.C. § 1343 (Count Three); and visa fraud, in violation of 18 U.S.C. § 1546(a) (Count Four).

[1] The Government currently plans to offer in its case-in-chief evidence relating to the following events and materials, without prejudice to its ability to offer additional proof at trial and irrespective of whether *in limine* rulings are currently being sought with respect to evidence, information, and materials described in this submission.

At trial, the evidence will show that as part of the multi-year schemes to defraud charged in Counts One, Two, and Three, Brennerman lied to banks and other potential investors in connection with efforts to obtain large loans for himself and Blacksands, the purported oil and gas company he controlled. The defendant sought to entice potential lenders and investors through misrepresentations relating to, among other things, his background and experience, the assets and operations of Blacksands and related entities, intended uses of loan and investment proceeds, and, in particular, the status of negotiations relating to the acquisition of the Cat Canyon oil field in Santa Barbara, California.

On the basis of these and other falsehoods, Brennerman asked ICBC for $600 million to acquire the oil field, and made similar requests to Morgan Stanley and others. For instance, Brennerman made misrepresentations about: Blacksands's daily oil production (he claimed it produced 17,500 barrels per day in 2012); its proved and prospective oil reserves (he claimed it had 156.62 million in proved reserves); its revenue and operating expenses (he said "net income revenues" were $87,337,000 in 2012); the existence and value of its assets (he claimed to have assets in, among other places, the Gulf of Mexico, North Dakota, and California); the existence of its offices and employees (he sent emails from employees that did not exist); its planned use of loan and investment money (Brennerman said it would be used for the Cat Canyon project); and even about Brennerman's background and education (he falsely claimed he was a native New Yorker and a graduate of Columbia University). In late 2013, to secure a $20 million bridge loan from ICBC, Brennerman falsely represented that Blacksands had an agreement to acquire the Cat Canyon oilfield, and signed a loan agreement requiring that the proceeds of the loan be used for the oilfield acquisition.

The representations made by Brennerman to ICBC and other financial institutions were false. The evidence will show that Blacksands did not have any oil production or assets in the United States. Blacksands never owned the particular oil fields that Brennerman told investors were the company's assets. Bank records and Brennerman's own internal ledgers show that the company did not have the multi-million dollar annual income he claimed. Rather, almost all Brennerman's income constituted loan proceeds procured by fraud, and even those tainted funds did not amount to nearly the revenue source that he described to potential victims. Brennerman also went to great lengths to make Blacksands appear to be more than the empty shell it was. Brennerman invented fake employees by the names of "Mike Kelly," "Michael Sloanes," and "Annisa Rodriguez." He created email accounts for these fake employees, wrote emails in their names, and subscribed their names to documents. He misappropriated the names, resumes, and credentials of other people who worked in the oil industry, and misrepresented them as employees of Blacksands in materials he sent to potential victims. Blacksands paid the company Regus to use mailing addresses in New York, Los Angeles, and Texas, and a telephone answering service to disguise the fact that Brennerman was operating his purported oil company, which he falsely maintained had global reach and far-flung assets on multiple continents, from his apartment in Las Vegas, Nevada. Blacksands's acquisition of the Cat Canyon oil field was never imminent or close to being realized, as Brennerman had told the victim banks. Instead, the evidence at trial will show that the seller of the oil field, ERG, did not take Brennerman seriously and suspected he did not have the funds to buy the oil field. The evidence will also show that once Brennerman got the $20 million bridge loan from ICBC, he worked with his co-conspirator in the United Kingdom, Peter Aderinwale, to obscure the source and intended purpose of the loan by moving the funds through

multiple bank accounts and ultimately used them on personal expenses like hotel, airfare, clothing, wine, and expensive watches.

While Brennerman's approach succeeded with ICBC, he did not fare as well with Morgan Stanley. In or about January 2013, Brennerman communicated with Scott Stout, a financial analyst in Morgan Stanley's wealth management department, about opening an account. Brennerman identified himself as an oil and gas executive at Blacksands, estimated his net worth at $45 million, and told Stout that in 2012, Blacksands had revenues of approximately $643 million and earnings of approximately $189 million. Brennerman then broached the possibility of Morgan Stanley providing financing for Blacksands, and for the Cat Canyon deal in particular. Throughout 2013, Brennerman engaged with various employees of Morgan Stanley about obtaining financing for the Cat Canyon deal. In the process, he misrepresented his own background, the scope of Blacksands's assets and business, and the state of his efforts to acquire Cat Canyon. Brennerman, however, resisted Morgan Stanley's due diligence requests, and Morgan Stanley raised concerns to Brennerman about its inability to find any information about Blacksands or the people who purportedly worked there, Brennerman's lack of external contacts, and his failure to provide financial statements. Ultimately, Morgan Stanley did not provide financing to Brennerman or Blacksands.

In addition to scheming to defraud financial institutions, Brennerman made similar misrepresentations about his business to United States immigration authorities in connection with his 2012 application for an L1 multi-national executive non-immigrant visa, as charged in Count Four. Specifically, Brennerman's visa application claimed that Brennerman was a senior executive for Blacksands, which he described, in substance, as a company with extensive business

operations and assets in the United States and abroad. The visa application included a letter from Aderinwale setting forth some of these fraudulent statements. Brennerman's application also contained false statements about his name and his national origin (he is from Nigeria, not the United Kingdom, as he claimed on his visa application), and omitted the fact that he had previously applied for a visa to the United States (from Nigeria). Specifically, in 2000 he was issued a B1/B2 visitor's visa under the name Ayodeji Soetan, which listed his place of birth as Nigeria. Once Brennerman procured this fraudulently-obtained L1 visa in 2012, he used it to, among other things, obtain a Social Security card and a New York identification in Manhattan in December 2012. In 2013, Brennerman applied for an EB1 multi-national executive immigrant visa, and in a 2014 interview related to that application, he made a series of similar false statements about his background and his business. In 2015, Brennerman applied to extend his L1 visa and made misrepresentations similar to those in his prior applications.

The defendant was arrested on April 19, 2017 in connection with a criminal contempt case before Judge Lewis A. Kaplan. During a recorded post-arrest statement, excerpts of which the Government will offer at trial, the defendant admitted that Blacksands had—at most—five employees whom he struggled to identify, and made a series of false exculpatory statements relating to the fraudulent schemes.[2] The defendant was arrested on this Indictment on May 31, 2017.

[2] *See United States v. Anderson*, 747 F.3d 51, 60 (2d Cir. 2014) (observing that, along with other evidence, "acts that exhibit 'a consciousness of guilt, such as false exculpatory statements,' may also tend to prove knowledge and intent of a conspiracy's purpose" (citation omitted) (quoting *United States v. Gordon*, 987 F.2d 902, 907 (2d Cir. 1993)). On the other hand, the defendant may not introduce his own prior self-serving statements. *See, e.g.*, *United States v. Marin*, 669 F.2d 73,

DISCUSSION

I. Evidence of Brennerman's and Blacksands's Withholding of Financial Information from ICBC in Violation of Court Orders is Admissible as Direct Proof of Fraud or, Alternatively, Under Rule 404(b)

The Government moves to introduce as direct proof of the defendant's fraudulent schemes, or in the alternative pursuant to Rule 404(b), evidence of the defendant's non-compliance with court orders in the lawsuit *ICBC (London) plc v. Blacksands Pacific Group, Inc.*, 15 Civ. 70 (LAK). In summary, the Government intends to offer evidence that:

- ICBC commenced a lawsuit to recover loan proceeds and related fees owed by Blacksands, the defendant's company;
- A judgment in the amount of approximately $5 million with interest and costs was entered against the defendant's company; and
- In the course of post-judgment discovery—in order to conceal the fraud Brennerman had perpetrated against ICBC—the defendant, through Blacksands, refused to comply with (and at times lied in response to) Judge Kaplan's discovery orders to turn over documents and information relating to Blacksands's assets.

A. Relevant Facts

On December 8, 2014, ICBC commenced a lawsuit against Blacksands to recover $5 million plus interest and attorneys' fees, resulting from Blacksands's failure to repay a loan that the defendant obtained in connection with the fraudulent schemes charged in Counts One, Two, and Three. Judge Kaplan granted ICBC's motion for summary judgment on its claim, and the Clerk of the Court entered judgment in favor of ICBC and against Blacksands.

84 (2d Cir. 1982) ("When the defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible.").

ICBC served post-judgment discovery requests in an effort to locate assets that could have satisfied the judgment. The defendant stonewalled ICBC and ICBC moved to compel discovery responses. On August 22, 2016, Judge Kaplan granted ICBC's motion and directed Blacksands to comply fully with the outstanding discovery requests within fourteen days of the order. Blacksands failed to comply with the order. On September 27, 2016, Judge Kaplan entered a second order finding that Blacksands had not complied with the first order, and directing Blacksands to pay the judgment or comply fully with the discovery requests by October 3, 2016.

Blacksands did not comply with Judge Kaplan's order, and ICBC moved to hold Blacksands in civil contempt. In October 2016, Judge Kaplan granted the motion and imposed coercive sanctions. On November 4 and 11, 2016, the defendant submitted partial discovery responses that claimed, among other things, that Blacksands was no longer operating and therefore could not produce documents. The defendant also provided ICBC with a collection of documents that were not responsive to the requests for information about Blacksands's finances, including draft commercial leases and incorporation documents.

On December 7, 2016, ICBC moved to hold Brennerman in civil contempt and to impose coercive sanctions on him personally. Judge Kaplan held Brennerman in civil contempt, and to date, neither Brennerman nor Blacksands has complied with the discovery orders, or paid the judgment or sanction awards.[3]

[3] On September 12, 2017, the defendant was convicted of criminal contempt in a separate case pending before Judge Kaplan, *United States v. Brennerman*, 17 Cr. 155 (LAK). The Government does not intend to introduce evidence of that conviction in its case-in-chief.

B. Applicable Law

A defendant's efforts to conceal his conduct is admissible as direct proof of the defendant's consciousness of guilt. *See, e.g.*, *United States v. Rosen*, 716 F.3d 691, 702 (2d Cir. 2013) (defendant's "failure to disclose . . . consulting agreements evidenced either (1) a deliberate attempt to conceal a corrupt relationship . . . or (2) consciousness of guilt"), *abrogation recognized on other grounds by United States v. Silver*, 864 F.3d 102 (2d Cir. 2017), *cert. pet. filed*, Dkt. No. 17-562 (Oct. 13, 2017); *United States v. Zichettello*, 208 F.3d 72, 105 (2d Cir. 2000) (defendant's "strong intentions to conceal the scheme" was "evidenc[e] [of] consciousness of guilt"); *United States v. Deutsch*, 451 F.2d 98, 118 (2d Cir. 1971) ("[T]he use of nominee names evidenced a desire to conceal the transaction, from which the jury could infer consciousness of guilt.").

Courts have specifically recognized that efforts to conceal ill-gotten gains may be offered as direct proof that the defendant was conscious of his guilt. *United States v. Silver*, 117 F. Supp. 3d 461, 473 (S.D.N.Y. 2015) ("Evidence that Silver went to lengths to conceal his allegedly ill-gotten gains is . . . evidence of Silver's consciousness of guilt regarding his allegedly fraudulent and extortionate activities."), *vacated on other grounds by* 864 F.3d 102 (2d Cir. 2017); *see also United States v. Schultz,* 333 F.3d 393, 416 (2d Cir. 2003) (reasoning that "effort to conceal property" can "indicate[] a consciousness that [defendant's] actions were illegal in some way").

Evidence of criminal activity that is not charged in the indictment is not considered "other crimes" evidence under Rule 404(b) "if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000). Under Rule 404(b), evidence of an uncharged crime may be

admissible, among other reasons, to prove a defendant's knowledge. Fed. R. Evid. 404(b). Typically, evidence of other bad acts is not unduly prejudicial under Federal Rule of Evidence 403 when the other bad acts "did not involve conduct any more sensational or disturbing than the crimes with which [the defendant] was charged." *United States v. Roldan-Zapata*, 916 F.2d 795, 804 (2d Cir. 1990).

C. Discussion

Evidence concerning the defendant's refusal to provide information relating to Blacksands's assets and the related noncompliance with Judge Kaplan's orders is admissible as direct evidence of the defendant's intent and consciousness of guilt. In the alternative, this proof is admissible pursuant to Rule 404(b) because it is probative of the defendant's intent, knowledge, and absence of mistake or accident, with respect to Counts One, Two, and Three.

The documents and information withheld by the defendant would have provided evidence to ICBC that numerous representations made in the course of his relationship with ICBC were false and that he had used portions of the ICBC loan proceeds to fund his lavish lifestyle rather than anything related to the Cat Canyon deal. Had the defendant believed that his representations were accurate and that his disposition of the funds was proper, there would be no incentive for him to withhold those documents and risk contempt proceedings. Courts have admitted similar evidence of a defendant's efforts to conceal his conduct as direct proof of the defendant's consciousness of guilt. *See, e.g.*, *Silver*, 117 F. Supp. 3d at 473.

This evidence also is admissible as direct proof because it is "necessary to complete the story of the crime on trial." *United States v. Towne*, 870 F.2d 880, 886 (2d Cir. 1989). It is well established that "evidence that adds context and dimension to the government's proof" is relevant,

even if it does not "directly establish[] an element of the crime." *United States v. Gonzalez*, 110 F.3d 936, 941 (2d Cir. 1997); *see also Carboni*, 204 F.3d at 44. Here, the litigation between the defendant and ICBC, and the defendant's subsequent withholding of financial information and noncompliance with court orders, arose from the fraudulent schemes at issue. The litigation was a direct result of the defendant's failure to repay the loan, the court orders followed a judgment in ICBC's favor, and the defendant deliberately concealed responsive documents and information—which would have revealed the fraud perpetrated on ICBC—from ICBC after ICBC sought to satisfy the judgment.

In the alternative, this evidence is admissible pursuant to Rule 404(b) as, among other things, proof of the defendant's intent, knowledge, and absence of mistake—he refused to produce the responsive documents and information concerning Blacksands's assets because he knew it would risk disclosing his fraudulent scheme. *Cf. United States v. Black*, No. 13 Cr. 316 (DLI), 2014 WL 5783067, at *4 (E.D.N.Y. Nov. 5, 2014) ("[E]vidence of the defendant's failure to report significant sums of money in his tax filings is admissible under Rule 404(b) as evidence of the defendant's knowledge that the money was proceeds of illegal activity.").

This evidence and testimony carries a low risk of unfair prejudice because failing to produce documents pursuant to a court order and being held in civil contempt are no more sensational or disturbing than the allegations relating to ICBC—that the defendant committed wire fraud and engaged in a conspiracy to do the same. *See Roldan-Zapata*, 916 F.2d at 804. And in order to offer this evidence, the Government currently intends to call only one additional witness beyond those who will testify regarding other aspects of the Government's case-in-chief (such as

a witness from ICBC who is expected to testify at trial regardless of the Court's ruling on this issue). Accordingly, Rule 403 does not serve as a bar to the admissibility of this evidence.

II. Emails from Blacksands's "Employees" Are Admissible as the Defendant's Own Statements or, Alternatively, as Statements of the Defendant's Employees and Agents

The Government seeks to offer email communications from Brennerman and purported Blacksands employees to the victims of Brennerman's fraud and others sent during the period of the charged conspiracy. The Government will prove that many of these supposed employees were not real people, or not employees of Blacksands, but rather inventions of Brennerman, used to lend a patina of legitimacy to his fraudulent business. These communications should be admitted under Federal Rule of Evidence 801(d)(2).

A. Relevant Facts

The Government's proof at trial will consist, in part, of the defendant's own statements—including excerpts from the defendant's post-arrest statement, prison calls, Blacksands-related corporate presentation materials, text messages, and emails. The Government intends to show that the defendant communicated by email to victims not only through a Blacksands email address bearing his name (rbrennerman@blacksandspacific.com) and in emails bearing his electronic signature, but also through the email accounts of supposed Blacksands employees. These additional individuals included: (1) Annisa Rodriguez, "Senior Executive Assistant" for Brennerman, at arodriguez@blacksandspacific.com; (2) Michael Sloanes, "General Counsel" for Blacksands, at msloanes@blacksandspacific.com; and (3) Michael Kelly, "Senior Vice President of Acquisitions" in the Business Operations Group of Blacksands, at mkelly@blacksandspacific.com. The Government anticipates that a number of witnesses at trial,

including Julian Madgett of ICBC, will authenticate evidence that includes emails from purported Blacksands employees sent by or on behalf of the defendant in furtherance of the conspiracy.

The Government intends to demonstrate that Brennerman controlled these email accounts and the communications issuing from them. Specifically, the evidence will show, among other things, that: (1) these email accounts were logged into from Brennerman's personal computer; (2) the telephone numbers that allegedly belonged to these employees were numbers for Brennerman's phones; (3) Brennerman never emailed these employees directly; and (4) Brennerman proposed to Aderinwale that he send emails on behalf of these purported individuals. Additionally, the Government expects that the testimony will establish that none of the victims who met with Brennerman about doing business with Blacksands ever met Rodriguez, Sloanes, or Kelly in person. Mike Dean, a former Blacksands employee, is also expected to testify that he never met any of these supposed work colleagues.

B. Discussion

The Government will establish by a preponderance of the evidence that Brennerman controlled the Blacksands email accounts, and the emails from those accounts are therefore admissible nonhearsay because the statements are "offered against an opposing party" and were "made by the party in an individual or representative capacity," *i.e.* by Brennerman himself. Fed. R. Evid. 801(d)(2)(A). Brennerman's use of these fictitious employees with various titles created the false impression that Brennerman had an assistant, executive team, and legal staff at Blacksands, and was part of a larger effort to mislead victims of his fraud regarding matters that were material to their lending and investment decisions, such as the scale and legitimacy of Blacksands.

Even if Annisa Rodriguez, Michael Sloanes, or Michael Kelly were Blacksands employees—and the Government will establish that they were not—these individuals' statements would still be admissible under Rule 801(d)(2). In particular, the email communications from all three individuals are admissible, in the alternative, as statements offered against Brennerman that were "made by a person whom the party authorized to make a statement on the subject" and "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." Fed. R. Evid. 801(d)(2)(C), 801(d)(2)(D).

During the time period of the communications, Rodriguez, Kelly, and Sloanes were held out as employees of Blacksands, and can therefore be considered employees and agents of Brennerman, the CEO of the purported company, for purposes of Rule 801(d)(2). *See, e.g.*, *United States v. Vilar*, 729 F.3d 62, 87 (2d Cir. 2013). Communications purportedly from these individuals to potential business partners, sent in their capacity as Blacksands employees in the service of obtaining loans or investments, were within the scope of the employment and agency relationship between them and Brennerman. For example, emails that the Government intends to introduce that were sent from Rodriguez typically included carbon copies to rbrennerman@blacksandspacific.com, and included the following signature block, or some substantially similar variation:

> Ms. A Rodriguez
> Senior Executive Assistant
> On Behalf of Mr. Brennerman

Thus, many of the emails from the Rodriguez account indicated that they were sent "On Behalf of" Brennerman, by his purported "Senior Executive Assistant," and that Brennerman was copied on the messages. These communications support the inference that to the extent Brennerman did

not himself send the emails, an agent or employee of Blacksands sent them with his authorization. The communications from Sloanes and Kelly support similar inferences, and all of these emails are admissible, if not pursuant to Rule 801(d)(2)(A), then under Rules 801(d)(2)(C) and 801(d)(2)(D).

III. The Court Should Preclude the Defendant from Raising a Blame-the-Victim Defense

The federal fraud statutes, including bank and wire fraud, do not require the Government to prove reliance on a defendant's conduct as an element of the offense. The defense should therefore be precluded from suggesting during the trial—whether in jury addresses or witness examinations—that the victims of Brennerman's fraud are to blame, either because they failed to conduct sufficient diligence, were negligent, or otherwise acted unreasonably in relying on the defendant's misrepresentations.

A. Applicable Law

Under Federal Rule of Evidence 402, "[i]rrelevant evidence is not admissible" at trial, Fed. R. Evid. 402, and under Rule 403, a court may exclude even relevant evidence "if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403; *see also United States v. Miller*, 626 F.3d 682, 689 (2d Cir. 2010).

The essential elements of wire fraud—as charged in Count Three and in one of the objects of the Count One conspiracy—are: (1) a scheme to defraud; (2) money or property as the object of the scheme, and (3) use of wires to further the scheme. *United States v. Binday*, 804 F.3d 558, 569 (2d Cir. 2015). The elements of bank fraud—as charged in Count Two and the other object

of the Count One conspiracy—are principally the same, but the intended victim must be a financial institution insured by the FDIC. *See* 18 U.S.C. § 1344.

To "prove the existence of a scheme to defraud, the government must also prove that the misrepresentations were material, and that the defendant acted with fraudulent intent." *United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) (internal citations and quotation marks omitted). A "statement is material if the misinformation or omission would naturally tend to lead or is capable of leading a reasonable [person] to change [his] conduct." *Id.* In other words, materiality is an objective standard, and actual reliance is not an element of criminal fraud. *Neder v. United States*, 527 U.S. 1, 24-25 (1999). In *United States v. Thomas*, the Second Circuit rejected as a matter of law the proposition that a victim's "vigilance (or lack thereof) was relevant." 377 F.3d 232, 241, 243 (2d Cir. 2004). This proposition was reaffirmed more recently in *United States v. Weaver*, where the Circuit observed that the "unreasonableness of a fraud victim in relying (or not) on a misrepresentation does not bear on a defendant's criminal intent in designing the fraudulent scheme, whereas the materiality of the false statement does." *Weaver*, 860 F.3d at 95. Just as "justifiable reliance" is not an element of criminal fraud, neither does the Government need to prove damages, because the fraud statutes criminalize the "scheme" rather than the completed fraud. *Id.*; *see also United States v. Rybicki*, 287 F.3d 257, 262 (2d Cir. 2002), *on reh'g en banc*, 354 F.3d 124 (2d Cir. 2003) ("[T]he only significance in a fraud case of proof of actual harm befalling the victim as a result of the scheme is that it may serve as circumstantial evidence from which a jury could infer the defendant's intent to cause harm."). It is enough to show that the defendant "*contemplated* some actual harm or injury to [the] victims." *Weaver*, 860 F.3d at 95 (quoting *United States v. Greenberg*, 835 F.3d 295, 306 (2d Cir. 2016) (emphasis in original)).

The pertinent statutes therefore focus on the defendant's statements and intent, not on the state of mind of his victims.

B. Discussion

Second Circuit authority, including but not limited to *Weaver* and *Thomas*, establishes that it is irrelevant under Rules 401 and 402, and unduly confusing under Rule 403, for the defense to suggest to the jury that Brennerman is innocent because victims of his fraud were unreasonable in their reliance on his misrepresentations or could have been more diligent in their dealings with him, his co-conspirators, and Blacksands. *E.g.*, *United States v. Amico*, 486 F.3d 764, 780 (2d Cir. 2007) ("The majority of circuits to address the issue have rejected this defense, holding that a victim's lack of sophistication is not relevant to the intent element of . . . wire fraud" (citations omitted)). In this case, as well as the related criminal case before Judge Kaplan, defense counsel has repeatedly brought up diligence performed by ICBC as a mitigating consideration relative to the defendant's intent and actions.[4] Put simply, any such argument at trial would be contrary to law.

[4] *See* June 1, 2017 Tr. 24:21-25:2, *United States v. Brennerman*, 17 Cr. 337 (RJS) ("The claim is broad but then it very quickly focuses on ICBC. But the allegation that it's making is, essentially, nonsensical. What it says is Mr. Brennerman made certain allegations about his assets or resources or wherewithal and thereby got a loan, ignoring the year-long diligence process that went into this transaction and it goes into any transaction like this."); *id.* at 9:8-10 ("What I would expect to see in this case is a whole ton of material that reflects the ICBC due diligence that went on for literally a year I think back in 2013."); *see also* Trial Tr. 39:20-40:4, *United States v. Brennerman*, 17 Cr. 155 (LAK) ("Mr. Brennerman is providing not just a little information to the bank but what would literally fill a truck, information to the bank, not surprisingly, because they were talking about and he got preliminary approval for a $600 million loan from ICBC. Now, you don't get to that point unless you have been vetted every which way but Sunday. . . . So that's the backdrop. They had gone through almost two full years of discussions. He's been vetted to a fare thee well. They got approvals with respect to larger financing for his oil and gas projects"); *id.* at

As part of the defendant's scheme, he attempted to defraud multiple financial institutions. In some instances he was successful (*e.g.*, ICBC), and in others, the targeted victim detected enough red flags to ultimately decline Brennerman's business (*e.g.*, Morgan Stanley). In each case, Brennerman acted with fraudulent intent and made material misrepresentations and omissions relating to, among other things, his background and experience, Blacksands's oil production, assets, revenue, and scale of business, and his intended uses of loan and investment proceeds. The diligence and sophistication of those Brennerman targeted during this scheme to defraud are not appropriate considerations at trial. *E.g.*, *United States v. Thomas*, 377 F.3d at 243 ("We refuse to accept the notion that the legality of a defendant's conduct would depend on his fortuitous choice of a gullible victim." (internal quotation marks omitted)).[5] Indeed, in proving a scheme to defraud, the Government is "not required to show that the intended victim was actually defrauded." *United States v. Wallach*, 935 F.2d 445, 461 (2d Cir. 1991) (internal citations omitted). Defense counsel should therefore be prevented from blaming the victims—whether

594:12 ("ICBC had the banking information with respect to Blacksands."); *id.* at 609:23-25 ("There was also a whole another issue that you heard some things about and that had to do with documents that had already been produced provided I should say by Blacksands . . . ."); *id.* at 612:2-15 ("So I was talking about the fact that you have evidence received that ICBC had received information years earlier in 2013 in connection with the loan . . . . Mr. Hessler also told you that earlier this year in response to a request from the government he provided to the government roughly 5,000 or more pages of information that had been possessed by ICBC relating to the Blacksands transaction.").

[5] Although some cases discuss an "ordinary prudence standard" relating to the scheme-to-defraud element, "[t]he ordinary prudence standard . . . focuses on the violator, not the victim," and "is not a shield which a defendant may use to avoid a conviction for a deliberately fraudulent scheme." *Thomas*, 377 F.3d at 243.

through argument or evidence elicited through direct testimony or cross examination—because such evidence is irrelevant and would violate Rule 403.

IV. The Court Should Preclude the Defendant from Arguing That He Lacked Intent To Defraud Because He Intended To Repay Fraudulently-Obtained Loans

The defense should also be precluded from arguing that he planned to repay his victims—and thus, for example, lacked fraudulent intent—but was prevented from doing so for reasons beyond his control (including the crash of the oil markets and the conduct of the victims after the loan was executed).

A. Relevant Facts

Brennerman has suggested previously that he intended to repay the loan from ICBC, but was prevented from doing so for reasons beyond his control. For example, in his post-arrest statement on April 19, 2017, Brennerman blamed the economy, contending that his business suffered, and he was unable to repay his loans, because the price of oil unexpectedly fell in 2014. As another example, in his filings before Judge Kaplan in ICBC's civil lawsuit against Blacksands for repayment of the loan, Brennerman argued that he would have closed the deal to purchase the Cat Canyon oilfield if not for ICBC's conduct. Specifically, in Blacksands's opposition to ICBC's motion for summary judgment, the defendant claimed that ICBC's conduct "materially impeded Blacksands's ability to close on its acquisition of the California oil field" because ICBC breached its promise to provide a $20 million revolving credit facility following issuance of the bridge loan. (Defendant's Opposition to Plaintiff's Motion for Summary Judgment, *ICBC (London) plc v. Blacksands Pacific Group, Inc.*, 15 Civ. 70 (LAK), Dkt. 14 at 8.) According to the defendant, that breached promise, and Blacksands's resulting failure to finance the Cat Canyon deal, led ERG to

seek out another buyer.

Brennerman's contentions are belied by the evidence. The ICBC transaction was not completed because the seller of the Cat Canyon oil field had a deal to sell itself to another company, and because Blacksands never paid back the bridge loan, among other reasons. Once Brennerman obtained funds from financial institutions as a result of his fraudulent scheme, he moved them through multiple bank accounts and then spent a majority of the fraudulent proceeds on personal expenses. The ICBC loan agreement, for example, specified that the $5 million ICBC bridge loan was to be used for the Cat Canyon transaction, but Brennerman instead used that money to pay, among other things, for the lease of his Las Vegas apartment, first-class flights from the United States to Europe, private car services, room service, designer clothing, jewelry, and spa treatments. ICBC sued Blacksands civilly to recover its unpaid loan and obtained a judgment in its favor. When Judge Kaplan later ordered Brennerman to disclose information regarding financials relating to himself and Blacksands, Brennerman refused to comply and exposed himself to civil (and later criminal) contempt penalties rather than reveal to ICBC and the Court what he had done with ICBC's loan.

B. Applicable Law

To prove bank and wire fraud, and conspiracy to commit the same, the Government must establish, among other things, that the defendant intended to harm the victims of his scheme. *See, e.g.*, *United States v. Stavroulakis*, 952 F.2d 686, 694 (2d Cir. 1992) (bank fraud); *United States v. DiNome*, 86 F.3d 277, 283 (2d Cir. 1996) (wire fraud). The property interests protected by the fraud statutes are not limited to funds and physical assets, but include the victims' "right to control" their property. *See id.* at 283-84. A defendant acts with intent to harm his victim when he takes

steps in an effort to "deny the victim the right to control its assets by depriving it of information necessary to make discretionary economic decisions." *United States v. Rossomando*, 144 F.3d 197, 201 n.5 (2d Cir. 1998); *see also Wallach*, 935 F.2d at 462 (holding that "inaccurate reporting of information that *could* impact on economic decisions can provide the basis" for a fraud prosecution (emphasis added)).

When a "defendant deliberately supplies false information to obtain a bank loan but plans to pay back the loan and therefore believes that no harm will 'ultimately' accrue to the bank," he has committed fraud, even if it was his "good-faith intention to pay back the loan." *Rossomando*, 144 F.3d at 201; *accord United States v. Finazzo*, 682 F. App'x 6, 9 (2d Cir. 2017) (summary order). Such a belief or intention, even if genuine, is "no defense" because, regardless, the defendant "intended to inflict a genuine harm upon the bank—*i.e.*, to deprive the bank of the ability to determine . . . for itself on the basis of accurate information whether, and at what price, to extend credit to the defendant." *Rossomando*, 144 F.3d at 201. In *United States v. Karro*, 257 F.3d 112, 118 (2d Cir. 2001), the Second Circuit reiterated that it is "irrelevant whether the borrower intended in good faith to repay the loan," where there is proof of the "intentional withholding of information from a lender which lowers the value of the transaction due to the lender's lack of information pertinent to the accurate assessment of the risk it faces and the propriety of extending credit to that particular individual."

C. Discussion

The Government will establish at trial that the defendant intended to harm his victims by lying to them in an effort to induce investment and loan decisions on the basis of his misrepresentations and omissions. *See United States v. Chacko*, 169 F.3d 140, 148 (2d Cir. 1999)

("When it is clear that a scheme, viewed broadly, is necessarily going to injure, it can be presumed that the schemer had the requisite intent to defraud."). By intentionally depriving his victims of material information, Brennerman intentionally harmed lenders and potential lenders. His crimes were complete, before he obtained any funds on the basis of his fraud, when he deprived his victims of the accurate information they needed to properly assess the risk of lending the defendant money.

As part of the litany of excuses the defendant has already offered to justify his brazen misconduct, he has claimed that he planned to repay the loans, after putting the funds to proper use, but was prevented from doing by forces beyond his control. Specifically, he has tried to take cover in the fall in oil prices in 2014, and also blamed ICBC for the collapse of the Cat Canyon deal on that theory that the transaction would have come to fruition if ICBC had only issued a multi-million dollar revolving credit facility in addition to the $5 million ICBC provided as part of a bridge loan. Even if the jury were to credit any such farfetched claims by Brennerman, his contentions are irrelevant. He can take no refuge in the decline of oil prices under the circumstances of this case. *Cf. In re Sadia, S.A. Sec. Litig.*, 269 F.R.D. 298, 317 (S.D.N.Y. 2010) (rejecting, in securities fraud class action, the defense of "don't blame me, blame the financial crisis"). And because intent to repay fraudulently obtained funds is irrelevant to a determination of the defendant's guilt, and is likely to confuse the jury, the defendant should be precluded from presenting evidence of such intent—or related evidence about the economy or the victim's post-lending conduct—under Federal Rules of Evidence 401, 402, and 403.[6]

[6] The Government also reserves the right to seek what has been described as the "'good-faith defense' instruction" from Instruction 44-5 of *Modern Federal Jury Instructions*, which was endorsed by the Second Circuit in *Rossomando*, 144 F.3d at 201. The pattern instruction states, in

V. The Court Should Preclude the Defendant from Making Arguments About the Government's Charging Decisions and Motives

Based on the defendant's pretrial motions, it appears the defense may try to inappropriately invite nullification by arguing, for example, that this prosecution was (1) improperly initiated at the behest of Judge Kaplan when he referred the contempt-related aspects of the lawsuit between ICBC and Blacksands to this Office, and (ii) inadequately investigated by personnel at this Office, without adequate assistance from external law enforcement, resulting in a so-called rush to judgment. *See, e.g.*, *United States v. Young*, 470 U.S. 1, 8 (1985) ("Just as the conduct of prosecutors is circumscribed, the interests of society in the preservation of courtroom control by the judges are no more to be frustrated through unchecked improprieties by defenders." (internal quotation marks omitted)); *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) ("We categorically reject the idea that, in a society committed to the rule of law, jury nullification is desirable or that courts may permit it to occur when it is within their authority to prevent.").

In pretrial motions, the defense asserted that the case was "never investigated by these prosecutors or by the Federal Bureau of Investigation and so was never properly vetted or scrutinized," and that the "matter was referred . . . by Judge Kaplan" who "communicated at high volume that [he] wanted the matter to be handled more aggressively." (Dkt. 32 at 2.) Moreover, according to the defense, in response to Judge Kaplan's urging, the Government "hurriedly decided

pertinent part: "If the defendant participated in the scheme for the purpose of causing some financial or property loss to another, then no amount of honest belief on the part of the defendant that the scheme would (*e.g.*, ultimately make a profit for the investors) will excuse fraudulent actions or false representations by him." Sand *et al.*, *Modern Federal Jury Instructions*, Instr. 44-5.

to adopt the completely unsubstantiated and unpersuasive claims of supposed fraud that had been leveled by the plaintiff in the civil case." (Dkt. 32 at 2.)[7] These arguments, sounding in the doctrine of "outrageous government conduct," are to be "directed to the court rather than the jury." *United States v. Regan*, 103 F.3d 1072, 1082 (2d Cir. 1997). Accordingly, the defense should be precluded at trial from making such claims, or introducing any evidence in support of them.

It is well-established that the Government's motives for and conduct during the prosecution of a defendant are irrelevant to guilt or innocence and therefore cannot be presented to the jury. *See United States v. Regan*, 103 F.3d 1072, 1081 (2d Cir. 1997) (affirming decision precluding "evidence at trial that the grand jury investigation was illegitimate"); *United States v. Rosado*, 728 F.2d 89, 93 (2d Cir. 1984) (finding that defendant's trial arguments involving, *inter alia*, "invit[ation of] nullification by questioning the Government's motives in subpoenaing appellants and prosecuting them for contempt" functioned as a defense "ploy for turning the trial away from a determination of whether the elements of the offense charged had been proved beyond a reasonable doubt into a wide-ranging inquiry into matters far beyond the scope of legitimate issues in a criminal trial"). The same is true of the Government's techniques in investigating and prosecuting crimes. *United States v. Saldarriaga*, 204 F.3d 50, 53 (2d Cir. 2000) ("The jury correctly was instructed that the government has no duty to employ in the course of a single investigation all of the many weapons at its disposal, and that the failure to utilize some particular

[7] *See also* Trial Tr. 44:17-20, *United States v. Brennerman*, 17 Cr. 155 (LAK) ("You're also going to see soon after that that Judge Kaplan states in open court that he intends to refer this matter to the U.S. Attorney's Office for prosecution, criminal prosecution, based on the failure to produce documents.").

technique or techniques does not tend to show that a defendant is not guilty of the crime with which he has been charged."). The defendant remains free to impugn the weight and/or the quality of the proof that the Government actually adduces at trial to the extent that it bears on guilt or innocence, but he may not put the motivations or conduct of prosecutors or law enforcement agents in issue in order to invite the jury to acquit based on alleged governmental misconduct.

Nor should the defendant be permitted to suggest in any way that he is being selectively prosecuted or singled out, whether by referral from Judge Kaplan or otherwise. "The issue to be determined is whether [the defendant] committed the crimes charged; not whether others may have committed uncharged crimes." *United States v. White*, No. 02 Cr. 1111 (KTD), 2003 WL 721567, at *7 (S.D.N.Y. Feb. 28, 2003). Selective prosecution is not a defense on the merits to the criminal charge itself, but one based on "defects in the institution of the prosecution," Fed. R. Crim. P. 12(b)(1). Such claims must therefore be asserted before trial, not during it. *United States v. Sun Myung Moon*, 718 F.2d 1210, 1229 (2d Cir. 1983); *United States v. Taylor*, 562 F.2d 1345, 1356 (2d Cir. 1977). Accordingly, the defense should be precluded from making these types of arguments at trial.

CONCLUSION

For the foregoing reasons, the Court should grant the Government's *in limine* motions.

Dated: New York, New York
November 2, 2017

Respectfully submitted,

JOON H. KIM
Acting United States Attorney
Southern District of New York

By: /s/ Danielle R. Sassoon
Danielle R. Sassoon
Nicolas Roos
Robert Sobelman
Emil J. Bove III
Assistant United States Attorneys

Cc: Defense Counsel
(Via ECF)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. RAHEEM J. BRENNERMAN, Defendant.	Case. No. 17 Cr. 337 (RJS) ECF Case

NOTICE OF DEFENDANT RAHEEM J. BRENNERMAN'S
MOTION *IN LIMINE*

PLEASE TAKE NOTICE that, upon the accompanying Memorandum of Law in Support of Defendant's Motion *In Limine*; and all prior pleadings and proceedings had herein, Defendant Raheem J. Brennerman ("Defendant"), will move this Court, before the Honorable Richard J. Sullivan, United States District Judge, at the Daniel Patrick Moynihan United States Courthouse, 40 Foley Square, New York, New York 10007, on Monday, November 20, 2017 at 1:00 p.m., for an Order (i) granting Defendant's Motion *In Limine* seeking pretrial rulings on the admissibility of certain evidence; and (ii) for such other and further relief as this Court may deem just and proper.

PLEASE TAKE FURTHER NOTICE that any opposition to Defendant's Motion *In Limine* is due on November 15, 2017 pursuant to an Order dated August 3, 2017 [Dkt. 24].

Dated: New York, New York
November 13, 2017

Respectfully submitted,

/s/Brian D. Waller

Maranda Fritz (MF 8060)
Brian D. Waller (BW 7163)
Brian K. Steinwascher (BS 1469)
THOMPSON HINE LLP
335 Madison Avenue
New York, NY 10017
(212) 344-5680
maranda.fritz@thompsonhine.com
brian.waller@thompsonhine.com

Counsel for Defendant Raheem Brennerman

TO: Nicolas Roos
Danielle R. Sassoon
Robert Sobelman
Emil J. Bove III
Assistant United States Attorneys
Of Counsel

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, v. RAHEEM J. BRENNERMAN, Defendant.	Case. No. 17 Cr. 337 (RJS) ECF Case

MEMORANDUM OF LAW IN SUPPORT OF
DEFENDANT'S MOTION IN LIMINE

Maranda E. Fritz
Brian D. Waller
Brian K. Steinwascher
Thompson Hine LLP
335 Madison Avenue, 12th Floor
New York, New York 10017
Telephone: (212) 344-5680

Counsel for Defendant Raheem Brennerman

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PRELIMINARY STATEMENT

This memorandum is submitted in support of Defendant Raheem Brennerman's motion *in limine* seeking pretrial rulings on the admissibility of certain evidence.

In its own motion in limine ("Gov't Mot."), the Government set forth its case: "[Mr. Brennerman's] crimes were complete, *before he obtained any funds on the basis of his fraud*, when he deprived his victims of the accurate information they needed to properly assess the risk of lending the defendant money." Gov't Mot. at 21 (emphasis added). Thus, according to the Government's own representation, and as explained in Mr. Brennerman's response to the Government's motion, the Court need not admit any evidence pertaining to acts that took place after Mr. Brennerman's alleged misrepresentations to obtain financing for the Cat Canyon oil field transaction.

In light of the Government's characterization of the charges against Mr. Brennerman, and under general principles of evidence, Mr. Brennerman seeks the following *in limine* rulings:

- The exclusion of testimony from any ICBC(London) witness that pertains to the decisions: (i) not to extend financing to Mr. Brennerman for the Cat Canyon oil field transaction, or (ii) to extend Mr. Brennerman a bridge loan as he attempted to secure such financing. This includes testimony that relates to ICBC(London)'s internal decision-making and underwriting processes. Mr. Brennerman has repeatedly sought, but has been denied, documents related to these issues. It would be patently unfair to permit the Government to illicit testimony from ICBC(London) witnesses on these topics when the defense has no meaningful ability to cross-examine the witnesses or assess their credibility. Exclusion of this testimony is the only way to adequately protect Mr. Brennerman's constitutional

right to a fair trial. This is particularly so where the witnesses lack personal knowledge of ICBC(London)'s interactions with Mr. Brennerman.

- The exclusion of testimony by Melanie Stauffer and any related evidence that pertains to alleged interactions with Mr. Brennerman that are both temporally and substantively separate from the alleged crimes charged in the Indictment, as they have been limited by this Court's prior rulings and the Government's own representations.
- The exclusion of any evidence, including testimony, pertaining to the use (or alleged misuse) by Mr. Brennerman of the bridge loan funds received from ICBC(London). Such evidence is not relevant to establishing whether Mr. Brennerman made material false representations to ICBC(London) with an intent to defraud. Mr. Brennerman's use of funds – which the Government has yet to establish as inconsistent with the terms of the bridge loan[1] – occurred well after his representations to the bank and do not establish any of the elements of the crimes charged in the Indictment.
- The exclusion of all evidence pertaining to Morgan Stanley, including testimony. The Government has not, and will not, be able to show that any of Mr. Brennerman's interactions with Morgan Stanley rose to the level of criminal conduct; at most, his dealings with Morgan Stanley can be categorized as an "incomplete attempt" to commit bank fraud. Nor would any such evidence be

[1] It also appears that the Government continues to cling to the erroneous idea that the bridge loan funds were meant to be used directly to finance the acquisition of the Cat Canyon oil field. *See* Gov't Mot. at 19 ("The ICBC loan agreement, for example, specified that the $5 million ICBC bridge loan was to be used for the Cat Canyon transaction . . . ."). Mr. Brennerman also seeks a ruling precluding the Government from incorrectly portraying the terms of the bridge loan agreement at trial.

admissible under Rule 404(b) as it would not be probative of any elements of the crimes charged in the Indictment.

For the reasons set out below, the Court should grant Mr. Brennerman's motion and exclude these categories of evidence at trial.

ARGUMENT

I. THE ONLY RELEVANT, ADMISSIBLE EVIDENCE PERTAINS TO MR. BRENNERMAN'S REPRESENTATIONS TO THE ALLEGED VICTIM BANKS

As noted above and in Mr. Brennerman's response to the Government's motion in limine, the Government has represented that ICBC(London) and Morgan Stanley are the only financial institutions that Mr. Brennerman allegedly defrauded – and that ICBC(London) is the only one from which he obtained money. And the Government now clearly has circumscribed the scope of the fraudulent scheme allegedly perpetrated by Mr. Brennerman: "By intentionally depriving his victims [ICBC(London) and Morgan Stanley] of material information, Brennerman intentionally harmed lenders and potential lenders. *His crimes were complete, before he obtained any funds on the basis of his fraud, when he deprived his victims of the accurate information they needed to properly assess the risk of lending the defendant money.*" Gov't Mot. at 21 (emphasis added). Thus, the Government has made clear that the conduct relevant to the crimes charged in the Indictment *ended* with Mr. Brennerman's representations to ICBC(London) and Morgan Stanley. Nothing that occurred after those representations is necessary to prove the elements of the crimes charged in the Indictment.

A. The Court Should Exclude Any Testimony From ICBC(London) Witnesses Concerning the Cat Canyon Financing or Bridge Loan Because It Would Be Patently Unfair to Defendant to Admit It

Mr. Brennerman has repeatedly sought discovery of documents or other materials internal to ICBC(London) documenting its decision-making and/or underwriting processes with respect

to its decision not to extend financing for the Cat Canyon oil field acquisition and/or its decision to provide Blacksands with a bridge loan to assist it in securing such financing. All of Mr. Brennerman's requests – whether made to the Government or ICBC(London) directly – have been denied. Nor have such materials been disclosed by the Government otherwise. Thus, on the eve of trial, Mr. Brennerman has had no opportunity to review any documents pertaining to ICBC (London)'s internal processes respecting the Cat Canyon financing or bridge loan, which are the transactions at the core of the Government's theory in this case.

At the same time, both the Government's recently disclosed witness list and *in limine* motion make clear that the Government intends to call at least one, if not several, witnesses from ICBC(London) to testify in some regard about the Cat Canyon financing and bridge loan. *See* Gov't Witness List; *see also* Gov't Mot. at 10-11 (noting Government will call ICBC witness to testify at trial regardless of the Court's rulings on its *in limine* motion). Moreover, in order to prove that Mr. Brennerman's representations were material, the Government will be required to elicit testimony from the ICBC(London) witness(es) regarding the information the bank received from Mr. Brennerman and how this factored into the bank's decision not to extend financing to Blacksands for the Cat Canyon oil field acquisition but, instead, to provide him with a bridge loan facility. *See United States v. Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) ("[M]ateriality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.").

In other words, as it currently stands, the Government will introduce testimony and evidence that pertain to an element common to each of the fraud charges in the Indictment. But the defense will be prevented from engaging in any effective cross-examination on these issues, whether as to substance or credibility, because Mr. Brennerman has had no opportunity to review ICBC(London)'s complete records. This would be patently unfair to Mr. Brennerman and would

deprive him of his constitutional right to a fair trial. *Cf. United States v. Mulder*, 147 F.3d 703, 707 (8th Cir. 1998) (holding it reversible error for trial court in bank fraud case to exclude from evidence document in bank's files relevant to establishing defendant's intent and good faith defense).

The only proper solution at this juncture is to preclude any ICBC(London) witness from testifying at trial on these issues – e.g., the nature of the bank's lending and underwriting processes, generally and with respect to its dealings with Blacksands.[2] This is particularly true for the witnesses the Government has identified to date, who do not appear to have had any direct involvement in the decision not to extend financing to Blacksands for the Cat Canyon oil field acquisition but instead to provide a bridge loan to assist Blacksands in securing the necessary financing. Otherwise, Mr. Brennerman would be severely and unfairly prejudiced in his ability to mount a meaningful and constitutionally appropriate defense. "[W]ell established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. S. Carolina*, 547 U.S. 319, 326, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006) (citing Fed. R. Evid. 403).

B. The Court Should Preclude the Testimony of Melanie Stauffer and Any Associated Evidence Pertaining to Representations that Do Not Have Any Relation to the Cat Canyon Oil Field Acquisition or Related Bridge Loan

The Government has included on its witness list an individual named Melanie Stauffer. As the Court will recall, the Government previously relied on this individual and her interactions with Mr. Brennerman in its opposition to Mr. Brennerman's application for reconsideration of the terms of his pre-trial detention and bail. *See* Dkt. No. 13 (referring to Ms. Stauffer as

[2] The same applies to any witness the Government intends to call from Morgan Stanley.

"Victim-1"). In particular, the Government argued in that submission, and in hearings before the Court, that Ms. Stauffer was the victim of a fraud allegedly perpetrated on her by Mr. Brennerman in connection with an investment into a piece of real estate located in Brooklyn, New York. These alleged representations occurred in 2017, after Mr. Brennerman's arrest in connection with the Indictment. These representations are both temporally and substantively distinct from the allegations supporting the crimes charged in the Indictment, particularly in light of how the Government repeatedly has characterized this case as involving representations that Mr. Brennerman made to ICBC(London) and Morgan Stanley in connection with the acquisition of the Cat Canyon oil field in 2013.

Thus, Ms. Stauffer's testimony is wholly irrelevant to establishing any elements of the crimes charged in the Indictment; nor is it necessary for contextual purposes. Similarly, her testimony, and any related evidence, is not admissible under Federal Rule of Evidence 404(b) because it is too distinct from conduct relevant to conduct alleged in the Indictment and, in any event, would be more prejudicial than probative. The Court should therefore preclude the Government from offering Ms. Stauffer as a witness at trial and should exclude any evidence related to Mr. Brennerman's interactions with her.

C. The Court Should Exclude Any Evidence Pertaining to Mr. Brennerman's Use of the Bridge Loan Funds and Should Limit the Government to Accurately Portraying the Terms of the Bridge Loan

The Government has made clear that it intends to introduce evidence showing that Mr. Brennerman allegedly misused the ICBC(London) bridge loan funds by spending them on himself and not on financing the acquisition of the Cat Canyon oil field. *See, e.g.*, Gov't Mot. at 19 ("Once Brennerman obtained funds from financial institutions [*sic*] as a result of his fraudulent scheme, he . . . then spent a majority of the fraudulent proceeds on personal

expenses."). The Government's proffered evidence is impermissible for at least two reasons and should be excluded from trial.

First, given the Government's assertion that the Mr. Brennerman's "crimes were complete, *before he obtained any funds on the basis of his fraud*, when he deprived his victims of the accurate information the needed," (Gov't Mot. at 21), it necessarily follows that Mr. Brennerman's use of the funds he did obtain is wholly irrelevant to proving the crimes charged in the Indictment. Thus, the Government has acknowledged that there is no probative value to how Mr. Brennerman used the funds, and any such evidence should therefore be excluded from trial.

Second, the Government inconsistently, and often erroneously, characterizes Mr. Brennerman's use of funds as improper. For example, the Government ambiguously argues that Mr. Brennerman used the funds on "personal expenses," such as on the lease of his Las Vegas apartment (which the Government acknowledges was from where Mr. Brennerman primarily operated Blacksands). The Government then confusingly contends that the bridge loan funds – i.e., funds that are meant to "bridge" a specified time period and become due at the expiration of that period[3] – were somehow meant to be used only to finance the acquisition of the Cat Canyon oil field. The Government fails to explain how a short-term loan, for an amount far less than the contemplated acquisition price of the target asset, can be used as financing for that asset. To the extent the Government seeks to raise such an argument at trial, the Court should preclude it as lacking foundation.

[3] *See, e.g.*, "Bridge Loan," Investopedia.com, http://www.investopedia.com/terms/b/bridgeloan.asp ("A bridge loan is a short-term loan used until a person or company secures permanent financing or removes an existing obligation").

D. The Court Should Exclude Any Evidence Pertaining to Morgan Stanley Because Mr. Brennerman's Conduct In That Regard Cannot Be Said to Constitute Criminal Conduct and It Is Not Probative Of Any Other Issue

The Government plans to introduce testimony from Morgan Stanley witnesses, as well as related documentary evidence. *See generally* Gov't Witness List; Gov't Exhibit List. Although the Government's position on why Mr. Brennerman's interactions with Morgan Stanley support the crimes charged in the Indictment has shifted over time,[4] it is now clear that evidence of Mr. Brennerman's conduct respecting Morgan Stanley does not support *any* of the charged criminal offenses. Thus, the evidence should be precluded under Federal Rules of Evidence 401 and 402. Nor is such evidence admissible under Federal Rule of Evidence 404(b) because it carries little to no probative value and admitting it under that basis would be overly prejudicial. *See* Fed. R. Evid. 403.

Under any of the Government's various, and constantly shifting, theories, Mr. Brennerman's dealings with Morgan Stanley in 2013 do not amount to any actionable criminal conduct. The nebulous allegations that Mr. Brennerman "met with" Morgan Stanley employees about "opening an account," or that he wanted to "utiliz[e] Morgan Stanley's investment banking services to facilitate" the Cat Canyon oil field transaction, or even that he "broached the possibility of Morgan Stanley providing financing for Blacksands" for that transaction are wholly insufficient to establish any of the elements of bank fraud.

Indeed, the facts, as proffered by the Government and demonstrated by the evidence, do not even show that Mr. Brennerman *attempted* to commit bank fraud – i.e., that he took a

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[4] *Compare* Dkt. 33-2, ¶ 15 (Ellard Aff. in Support of Search Warrant) ("Brennerman contacted Morgan Stanley *about utilizing Morgan Stanley's investment banking services to facilitate the sale* of an oil exploration business . . . .) *with* Gov't Mot. at 4 ("Brennerman then broached the possibility *of Morgan Stanley providing financing* for Blacksands, and for the Cat Canyon deal in particular.").

"substantial step" designed to defraud the bank. *See United States v. Martinez*, 775 F.2d 31, 35 (2d Cir. 1985). "A substantial step must be something more than mere preparation . . . ." *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980). "Whether conduct represents a substantial step towards the fulfillment of a criminal design is a determination so dependent on the particular factual context of each case that, of necessity, there can be no litmus test to guide the reviewing courts." *Id.* at 988. "But it is clear that a substantial step is not identical to an overt act; *it is something more and takes into consideration not only what has been done, but what remains to be done before the crime can be committed.*" *United States v. Plotitsa*, No. 00 CR 393 (KTD), 2001 U.S. Dist. LEXIS 18860, at *8 (S.D.N.Y. Nov. 19, 2001) (citing *Manley*, 632 F.2d at 987) (emphasis added); *see also United States v. Farhane*, 634 F.3d 127, 148 (2d Cir. 2011) ("[I]mportant to a substantial-step assessment is an understanding of the underlying conduct proscribed by the crime being attempted."); *United States v. Ivic*, 700 F.2d 51, 66 (2d Cir. 1983) (Friendly, J.) (observing that substantial step requirement serves to ensure that person is convicted for attempt only when actions manifest "firm disposition" to commit charged crime).

Here, none of the conduct relied on by the Government in relation to Mr. Brennerman's dealings with Morgan Stanley in 2013 can be characterized as a "substantial step" towards defrauding the bank. The Government's sole basis, at trial, in support of its case that Mr. Brennerman defrauded Morgan Stanley appears to rely on two emails that Morgan Stanley received from China International Capital Corporation (Hong Kong) Limited ("CICC") – another Chinese bank – forwarding along proposals from Mr. Brennerman and Blacksands. *See* GX 406 & 407. In other words, the Government apparently does not intend to offer any evidence that Mr. Brennerman made any representations to *Morgan Stanley* with respect to the Cat Canyon oil field transaction, but instead focuses on representations he made to a foreign bank. Thus, the

Government itself concedes that Mr. Brennerman neither defrauded nor attempted to defraud Morgan Stanley.[5]

Because Mr. Brennerman's conduct in this regard does not rise to the level of a criminal offense, the Government should be precluded from offering any evidence related to Morgan Stanley at trial, including the testimony of its witnesses. Similarly, the Government should not be permitted to introduce this evidence under Rule 404(b): Mr. Brennerman's conduct was not criminal and therefore it would not be relevant to any of the permitted bases for admission under that rule, and, in any event, its prejudicial effect vastly outweighs any probative value.

CONCLUSION

For the foregoing reasons, Mr. Brennerman's motion should be granted in its entirety.

Dated: New York, New York
November 9, 2017

Respectfully submitted,

/s/Brian D. Waller

Maranda Fritz (MF 8060)
Brian D. Waller (BW 7163)
Brian K. Steinwascher (BS 1469)
THOMPSON HINE LLP
335 Madison Avenue
New York, NY 10017
(212) 344-5680
maranda.fritz@thompsonhine.com
brian.waller@thompsonhine.com

Counsel for Defendant Raheem Brennerman

[5] Even putting aside that the Government has no evidence for the theory that is, arguably, most favorable to the it – that Mr. Brennerman sought to obtain financing from Morgan Stanley – the Government still goes through lengths to disclaim that Mr. Brennerman made direct representations to Morgan Stanley to obtain financing. Instead, the Government caveats its own theory of Mr. Brennerman's conduct by describing him as "broach[ing] the possibility" of obtaining financing from Morgan Stanley – conduct that hardly can be described as a "substantial step" toward defrauding the bank.

THOMPSON HINE ATLANTA CLEVELAND CINCINNATI COLUMBUS DAYTON NEW YORK WASHINGTON, D.C.

November 29, 2017

Via ECF and Email

Hon. Richard J. Sullivan
Thurgood Marshall
United States Courthouse, Room 905
40 Foley Square
New York, NY 10007

Re: *United States v. Raheem J. Brennerman*; No. 17 Cr. 337 (RJS)

Dear Judge Sullivan,

We write to address the issue raised today with respect to the production of certain documents. Specifically, we learned today that that the notes of the Government's witness, Julian Madgett, pertaining to matters to which he testified, were not obtained by the Government, or provided to the defense. For the reasons detailed below, it is our position that the materials should have been produced pursuant to Fed. Rule Crim. P. 16 and the Jencks Act, 18 U.S.C. § 3500; in addition, the defendant is serving a subpoena on counsel for this witness, Paul Hessler, for their production and the production of other documents.

The Government has asserted that Mr. Madgett's notes – made by the alleged victim and pertaining to the precise subject matter at issue in this trial – are not in its actual "possession," and therefore it has no obligation to produce them. But possession is not so narrowly defined. Courts have required the Government to disclose evidence material to the defense where the Government "actually or constructively" possesses it. *E.g.*, *United States v. Joseph*, 996 F.2d 36, 39 (3d Cir. 1993) ("The prosecution is obligated to produce certain evidence actually or constructively in its possession or accessible to it." (internal quotation marks omitted)); *cf. Kyles v. Whitley*, 514 U.S. 419, 437 (1995) (holding that, to satisfy *Brady* and *Giglio*, prosecutors have "a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case"). In particular, in *United States v. Paternina-Vergara*, the Second Circuit held that the Government had an obligation to make good faith efforts to obtain Jencks Act statements possessed by a third party that had cooperated extensively, and had a close relationship with, the Government. 749 F.2d 993 (2d Cir. 1984). And in *United States v. Stein*, the court directed the Government to produce documents in the actual possession of a third party, KPMG, because KPMG had voluntarily agreed to do so in an deferred prosecution agreement. 488 F. Supp. 2d 350, 361 (S.D.N.Y. 2007) (noting that the term "control" has been "broadly construed"); *see also United States v. Kilroy*, 488 F. Supp. 2d 350, 362 (E.D. Wis. 1981) ("Since Standard Oil is cooperating with the Government in the preparation of the case and is making available to the Government for retention in the Government's files any records which Standard Oil has and

Maranda.Fritz@ThompsonHine.com Fax: 212.344.6101 Phone: 212.908.3966

THOMPSON HINE LLP
ATTORNEYS AT LAW
335 Madison Avenue
12th Floor
New York, New York 10017-4611
www.ThompsonHine.com
O: 212.344.5680
F: 212.344.6101

which the Government wants, however, it is not unreasonable to treat the records as being within the Government's control *at least to the extent of requiring the Government to request the records on the defendant's behalf and to include them in its files for the defendant's review if Standard Oil agrees to make them available to the Government.*" (emphasis added)).[1]

Here, there can be no question that Mr. Madgett and his employer, ICBC (London) plc ("ICBC"), are in a cooperative relationship with the Government. ICBC is the complainant and alleged victim in this case. Moreover, counsel for ICBC confirmed in the recent criminal contempt trial before Judge Kaplan that ICBC had voluntarily produced more than 5000 pages of documents at the mere request of the Government. And Mr. Madgett is voluntarily appearing as a Government witness. Given this close relationship, and one demonstrating extensive cooperation between Mr. Madgett, ICBC, and the Government, the Government had (and has) an obligation to obtain and produce to Mr. Brennerman materials required by Rule 16 and the Jencks Act. Yet, Mr. Madgett testified today that the Government never asked him for any notes.

Mr. Brennerman therefore moves this Court to direct the Government to request, at a minimum, Mr. Madgett's notes that pertain to the subject matter of this case and his testimony. This is especially necessary given the critical importance of such materials to this case and Mr. Brennerman's defense, as *no* documents have been produced to date that pertain to the critical issue of ICBC's decision-making process with respect to the loan it provided to Mr. Brennerman – i.e., the transaction at the very core of the Government's case.

Additionally, since Mr. Brennerman has been unable to obtain any such materials, and in light of Mr. Madgett's testimony, we are issuing a subpoena directly to ICBC, through its counsel Mr. Hessler, for these records and others.

We are prepared to address these issues at any time convenient to the Court.

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[1] Courts have granted motions to dismiss an indictment where the Government fails to satisfy its discovery and disclosure obligations, either on the basis of a due process violation or under the court's inherent supervisory powers, including where the Government belatedly disclosed Jencks Act materials. *E.g.*, *United States v. Chapman*, 524 F.3d 1073 (9th Cir. 2008).

THOMPSON HINE

Respectfully,

s/ Maranda E. Fritz

Maranda E. Fritz

Enclosures

AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

UNITED STATES DISTRICT COURT

for the

Southern District of New York

United States of America)
v.)
) Case No. 1:17-cr-0377-RJS
Raheem J. Brennerman)
Defendant)

SUBPOENA TO TESTIFY AT A HEARING OR TRIAL IN A CRIMINAL CASE

To: Julian Madgett

YOU ARE COMMANDED to appear in the United States district court at the time, date, and place shown below to testify in this criminal case. When you arrive, you must remain at the court until the judge or a court officer allows you to leave.

Place of Appearance:	Southern District of New York 500 Pearl Street New York, New York	Courtroom No.:	15C
		Date and Time:	12/06/2017 9:30 am

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

Please see attached rider.

(SEAL)

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Raheem J. Brennerman _____, who requests this subpoena, are:

Maranda E. Fritz, Esq.
Brian D. Waller, Esq.
Brian K. Steinwascher, Esq.
Thompson Hine LLP
335 Madison Avenue, 12th Floor
New York, New York 10017-4611
(212) 908-3966
Maranda.Fritz@ThompsonHine.com, Brian.Waller@ThompsonHine.com & Brian.Steinwascher@ThompsonHine.com

Case No. 1:17-cr-0377-RJS

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____ _____

Server's signature

_____

Printed name and title

_____

Server's address

Additional information regarding attempted service, etc:

RIDER
(Subpoena to Julian Madgett)

Definitions and Instructions:

1. Please produce any documents responsive to this Subpoena by 12/6/2017 at 9:30 am.

2. Please produce requested records in electronic form (native format where necessary to view the material in its full scope) in a manner that is OCR-searchable, and with all available electronic metadata.

3. The term "documents" includes writings, emails, text messages, drawings, graphs, charts, calendar entries, photographs, audio or visual recordings, images, and other data or data compilations, and includes materials in both paper and electronic form.

4. The term "ICBC" refers to the Plaintiff in the civil litigation in the Southern District of New York captioned *ICBC (London) plc v. The Blacksands Pacific Group, Inc.*, 15 Cv. 70 (LAK) and includes its agents, representatives and counsel.

5. The term "Blacksands Pacific" includes The Blacksands Pacific Group Inc. and the Blacksands Pacific Alpha Blue, LLC or any Blacksands Pacific entity and any of its subsidiaries and affiliates, and any officer, employee, volunteer, representative, or agent of those entities.

6. The Subpoena calls for the production of documents from the period January 1, 2013 to March 3, 2017.

7. Any documents withheld on grounds of privilege must be identified on a privilege log with descriptions sufficient to identify their dates, authors, recipients, and general subject matter.

Materials to be Produced:

1. All notes relating to meetings and communications with representatives of Blacksands Pacific.

2. All documents relating to or reflecting the decision by the credit committee at ICBC to issue a bridge loan to Blacksands Pacific including but not limited to the "credit paper" and memorialization of the committee's decision.

AO 89 (Rev. 08/09) Subpoena to Testify at a Hearing or Trial in a Criminal Case

UNITED STATES DISTRICT COURT

for the

Southern District of New York

United States of America
v.
Raheem J. Brennerman
Defendant

Case No. 1:17-cr-0377-RJS

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		Date and Time:	12/06/2017 9:30 am

You must also bring with you the following documents, electronically stored information, or objects *(blank if not applicable)*:

Please see attached rider.

(SEAL)

CLERK OF COURT

Date: _____

_____
Signature of Clerk or Deputy Clerk

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Raheem J. Brennerman _____, who requests this subpoena, are:

Maranda E. Fritz, Esq.
Brian D. Waller, Esq.
Brian K. Steinwascher, Esq.
Thompson Hine LLP
335 Madison Avenue, 12th Floor
New York, New York 10017-4611
(212) 908-3966
Maranda.Fritz@ThompsonHine.com, Brian.Waller@ThompsonHine.com & Brian.Steinwascher@ThompsonHine.com

Case No. 1:17-cr-0377-RJS

PROOF OF SERVICE

This subpoena for *(name of individual and title, if any)* _____

was received by me on *(date)* _____.

☐ I served the subpoena by delivering a copy to the named person as follows: _____

_____

_____ on *(date)* _____; or

☐ I returned the subpoena unexecuted because: _____

_____.

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also tendered to the witness fees for one day's attendance, and the mileage allowed by law, in the amount of $ _____.

My fees are $ _____ for travel and $ _____ for services, for a total of $ 0.00.

I declare under penalty of perjury that this information is true.

Date: _____

_____
Server's signature

_____
Printed name and title

_____
Server's address

Additional information regarding attempted service, etc:

RIDER
(Subpoena to Julian Madgett)

Definitions and Instructions:

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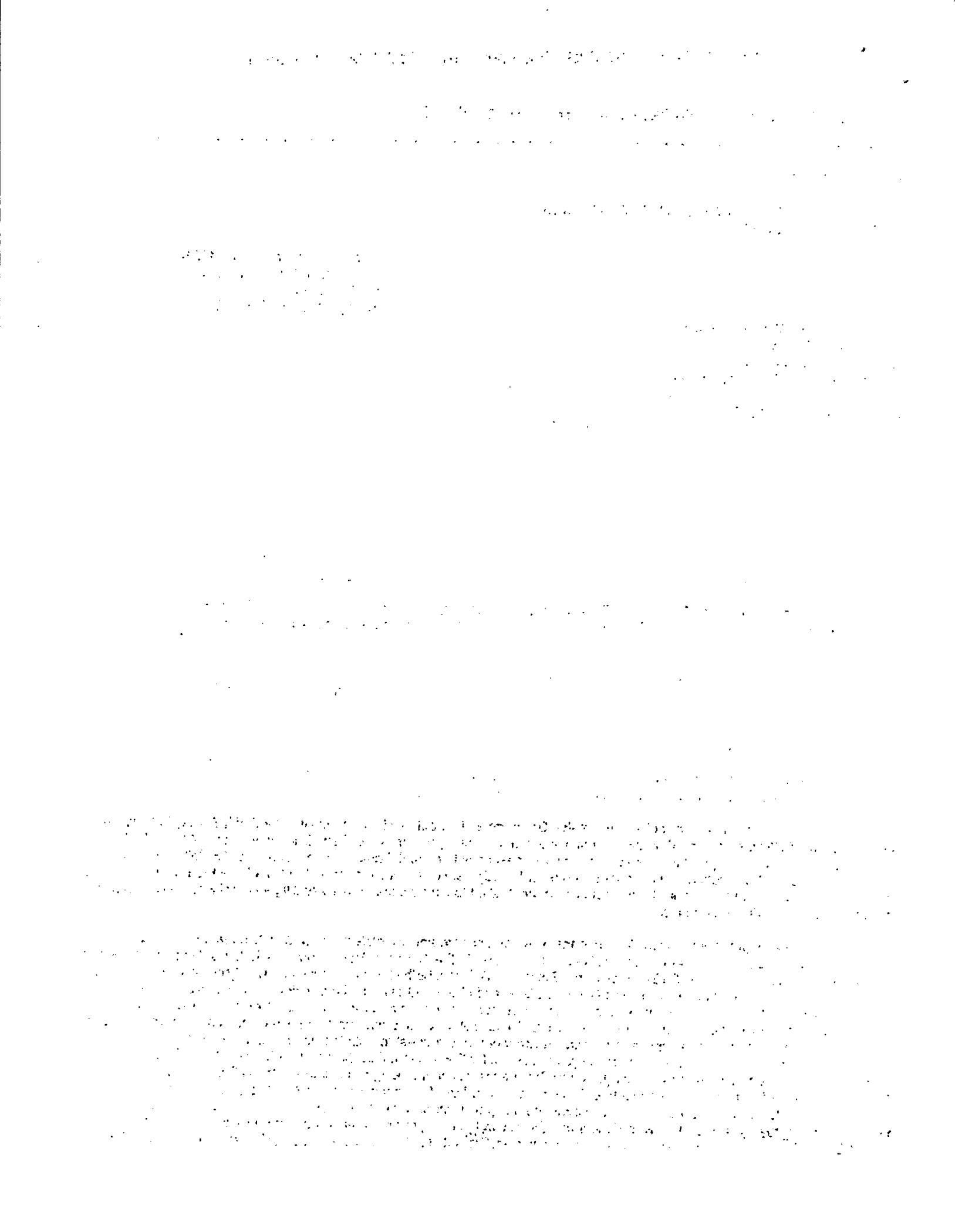
1. All notes relating to meetings and communications with representatives of Blacksands Pacific.

2. All documents relating to or reflecting the decision by the credit committee at ICBC to issue a bridge loan to Blacksands Pacific including but not limited to the "credit paper" and memorialization of the committee's decision.



TRULINCS 54001048 - BRENNERMAN, RAHEEM J - Unit: BRO-I-B

FROM: 54001048
TO:
SUBJECT: Re: LEGAL CORRESPONDENCE -06.20.18
DATE: 06/20/2018 02:25:49 PM

x

Raheem J. Brennerman (54001-048)
Metropolitan Detention Center
P O Box 329002
Brooklyn, New York 11232

Honorable Judge Richard J. Sullivan
United States District Judge
United States District Court
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

June 20, 2018

Re: United States v. Raheem J. Brennerman
Case No: 1:17-cr-337 (RJS)

Dear Judge Sullivan

Defendant Pro Se, Raheem Brennerman ("Brennerman") submits additional evidence to bolster his arguments, which are succinctly highlighted in correspondences dated June 10, 2018 (see 17-cr-337 (RJS), dkt. no. 164), the June 11, 2018 and June 17, 2018 correspondences.

Brennerman submits, Government Exhibit 1-57, e-mail correspondence between Mr. Scott Stout and Brennerman, which highlights the e-mail signature of Scott Stout and the Beverly Hills, California address of Morgan Stanley Smith Barney LLC (not Morgan Stanley Private Bank); Government Exhibit 1-57A, the account opening form, which highlights "Morgan Stanley Smith Barney (not Morgan Stanley Private Bank)" at the top right corner of the form; Government Exhibit 1-73, e-mail between Scott Stout and Brennerman, which highlights Brennerman`s alleged fraud - the perks which he became entitled to, however more important, page two of the e-mail correspondence highlights within the "Important Notice to Recipient" in relevant parts that "The sender of this e-mail is an employee of Morgan Stanley Smith Barney LLC ("Morgan Stanley"); Government Exhibit 529, the Morgan Stanley account statement, which highlights Morgan Stanley Smith Barney LLC (not Morgan Stanley Private Bank) at the bottom left corner of the bank statement cover page. Additionally Brennerman submits the profile of Mr. Scott Stout which highlights that Mr. Scott Stout worked at Morgan Stanley Wealth Management between May 2011 and November 2014, as well the announcement on September 25, 2012 by Morgan Stanley Smith Barney LLC stating in relevant parts that "Morgan Stanley Smith Barney is now Morgan Stanley Wealth Management.

These evidence are important to highlight that Brennerman interacted with Morgan Stanley Smith Barney LLC which is indisputably not FDIC insured and thus the essential element necessary to convict for bank fraud in violation of 18 United States Code Section 1344(1) and its related conspiracy - conspiracy to commit bank fraud in violation of 18 United States Code Section 1349 cannot be satisfied and Brennerman`s relief for judgment of acquittal, pursuant to Rule 29 of the Federal Rules of Criminal Procedure should be granted, and that Government failed to conduct the necessary diligence or investigation prior to indicting and prosecuting Brennerman.

Brennerman highlights the following as to the wire fraud charge and its related conspiracy. Brennerman was charged in two criminal cases - criminal contempt of court in case no. 17-cr-155 (LAK), before Hon. Judge Lewis A. Kaplan and the related fraud case in case no. 17-cr-337 (RJS), before Hon. Richard J. Sullivan, both stemming from the underlying civil case, case no. 15 cv 70 (LAK) captioned - ICBC (London) PLC v. The Blacksands Pacific Group, Inc before Hon. Judge Lewis A. Kaplan. Because the trial in the case before Judge Kaplan was scheduled ahead of that before this court, Brennerman sought to obtain the relevant ICBC London lending and underwriting file which is probative as to materiality an essential element of the charged crime of wire fraud and its related conspiracy. Because Brennerman`s request to both the government and directly to ICBC (London) PLC had been denied, Brennerman sought to compel for the relevant files through U.S District Court (S.D.N.Y), since the criminal cases stemming from the ICBC (London) PLC transaction were being prosecuted at the U.S District Court (S.D.N.Y), however Brennerman`s request to U.S District Court (S.D.N.Y) was denied (see 17-cr-155 (LAK), dkt. no. 76). Deprived of the relevant files necessary to cross-examine any government witness as to substance or credibility, Brennerman moved in his motion in limine and reply to Government`s motion-in-limine, prior to trial of the related fraud charge, for U.S District Court (S.D.N.Y) to exclude the testimony of any witness from ICBC (London), because such testimony will be highly

prejudicial and unfair to Brennerman as government will simply be allowed to present any witness, who will be able to say anything without corroboration and without Brennerman having the opportunity to cross-examine him as to substance or credibility, as Brennerman would not have been able to review the relevant lending and underwriting files. Moreover, he will be unable to assert his good faith defense, thus violating Brennerman's constitutional rights to a fair trial.

Even after trial, Brennerman has presented evidence to highlight that Mr. Robert Clarke (not Mr. Julian Madgett) was responsible for the relevant transaction at ICBC (London) PLC as evidenced through his affidavit in the underlying civil case at 15 cv 70 (LAK). (See copy of Robert Clarke affidavit at, (17-cr-337 (RJS), dkt. no. 164, exhibit 2). Additionally Brennerman submitted evidence - Government Exhibit 1-19 and 1-22 which highlights that Blacksands had already incurred and disbursed $6.45 million in satisfying the finance conditions of ICBC (London) PLC and that the bridge finance was agreed to replace part of those funds which Blacksands already disbursed, further that Brennerman informed both Mr. Bo Jiang and Mr. Julian Madgett at ICBC (London) PLC and ICBC (London) PLC agreed to the use of the bridge finance. (See 17-cr-337 (RJS), dkt. no. 164, exhibit 2). Among others, Brennerman submitted newly discovered evidence (see 17-cr-337 (RJS), dkt. no. 164, exhibit 3) - the 2017 ICBC (London) PLC financial and company disclosure which was made publicly available on June 6, 2018, after trial. The disclosure highlights that there was no fraud. Because ICBC (London) PLC, the alleged victim of the wire fraud and related conspiracy has made no disclosure, representation or announcement that the transaction involving Blacksands Pacific was fraudulent or that it became a victim of fraud due to the transaction with Blacksands. Notwithstanding, that ICBC (London) PLC, a financial institution and publicly traded company in United Kingdom (England and Wales) is mandated by regulations to disclose publicly, if it became a victim of fraud or became involved with fraudulent transaction. This is particularly significant, where Government never reviewed, adduced or presented the relevant ICBC London lending and underwriting files, and because Brennerman was deprived from engaging in any meaningful cross-examination of the sole witness presented by Government from ICBC (London) PLC as to credibility and substance. In addition to the fact that, the sole witness - Mr. Julian Madgett, is not a member of the credit committee responsible for approving the transaction at ICBC (London) PLC.

Thus, Brennerman submits, arguing that since Government ostensibly argued (although erroneously) that Scott Stout worked at Morgan Stanley Private Bank (instead of Morgan Stanley Smith Barney) in their opposition to his Rule 29 and 33 motion. (See 17-cr-337 (RJS), dkt. no. 149), now highlighted as an erroneous proffer by Government given the overwhelming evidence which were all available to Government. Government's credibility is questionable; further that, because Brennerman was deprived of the relevant ICBC London lending and underwriting file prior to trial and even Government concedes that it had not reviewed the files; additionally, because Robert Clarke and not Julian Madgett is/was responsible for the relevant transaction at ICBC (London) PLC as highlighted through his affidavit; additionally, because Brennerman suffered for ineffective assistance of counsel due to the conflict of interest issue, with his trial counsel; additionally, because Brennerman submitted and highlighted newly discovered evidence - the 2017 financial and company disclosure, by ICBC (London) PLC, which was filed and made public on June 6, 2018. Brennerman respectfully requests and pleads for the Court to resolve the factual dispute as to the relevant ICBC London transaction with Blacksands Pacific, as it pertains to this case, by reviewing the relevant ICBC London lending and underwriting files, especially in light of the newly discovered evidence which demonstrates that, ICBC (London) PLC, the alleged victim has not disclosed or represented that the transaction with Blacksands was fraudulent or that it became a victim of fraud through the transaction with Blacksands, which it would have had to disclose by regulation if any fraud occurred.

The above presents significant issues, because Brennerman suffered prejudicial spillover on other counts of the charged crime, due to Government's erroneous argument and presentment to the court and jury at trial. In addition, Brennerman suffered prejudice due to the conflict of interest issue with his trial counsel. Evidence submitted to date, supports, Brennerman's pleading for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure.

Brennerman submits the above and the appended evidence in addition to his submissions at (dkt. no. 164), his June 11, 2018 and June 17, 2018 correspondences, and awaits the Court's decision

Dated: June 20, 2018
New York City, New York

RESPECTFULLY SUBMITTED

/s/ Raheem J. Brennerman
Defendant Pro Se

From: BRENNERMAN, R. J @The Executive Office
To: Stout, Scott
Cc: BRENNERMAN R. J@Executive Office
Subject: Re: Morgan Stanley (Wealth Management)
Date: Tuesday, January 8, 2013 9:09:49 AM
Attachments: Morgan Stanley (Client Profile).pdf
Importance: High

Dear Scott,

As discussed, attached is the completed forms, as advised the account will be in the corporate name however you wanted me to also complete a form with personal information. As discussed, I will require Debit Card and AMEX card with the account.

Please let know what are the next steps.

Best Regards

From: Stout, Scott
Sent: Monday, December 10, 2012 1:10 PM
To: mailto:rbrennerman@blacksandspacific.com
Subject: RE: 2013 Preparation

Hi RJ,

Just a reminder to get those forms to me so I can get everything in order prior to our lunch on Friday.

Thanks,
Scott

Scott Stout
F.A. - Wealth Management
MorganStanley
Direct: 310 205 4912
9665 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

http://www.morganstanley.com/fa/scott.stout
scott.stout@morganstanley.com

GOVERNMENT EXHIBIT 1-57 17 Cr. 337 (RJS)

9665 Wilshire Boulevard
Suite 600 Beverly Hills, CA 90212

MorganStanley SmithBarney

Kindly provide all personal information.
For additional owners, please complete a 2nd profile.

Full Name KAREEM JEFFERSON BRENNERMAN

Address 245 PARK AVENUE, 39 FL

City NEW YORK State NEW YORK Zip Code 10167

Home Phone _____ Business _____

Cell 917 699 6935 Fax 310 861 1057

SS# or Tax ID [redacted] US Citizen (Y) N

Marital Status SINGLE #of Dependents N/A Date of Birth 04/21/78

E-mail Address KBrenneman@blacksandpac.com

Telephone access Prompts **Mother's Maiden Name** _____

City of Birth _____ **or 1st School Attended** DWIGHT

Employer BLACKSAND PACIFIC ENERGY CORPORATION

Nature of Business OIL & GAS Occupation OIL & GAS EXECUTIVE

Est. Annual Compensation $ 720,000 (BASE SALARY) Employed Since 2010

Primary Source of Income-Check all that apply

Annual Salary X Investments X Retirement Assets ____ Amount $ _____

Est. Total Annual Income (all sources) _____

Est. Liquid Net Worth $ 45M Est. Total Net Worth $ _____

Tax Bracket (percentile) _____

Investment Objectives: ***(Please rank 1 through 4, in order of priority)***

Growth 1X Current Income 3 Tax Deferral 4 Liquidity X 2

Investing Since *(year)* Stocks 11 Bonds 11 Commodities 01 Options 02

Risk Tolerance (check one) Aggressive ___ Moderate X Conservative ____

Speculation Yes _____ No _____

Primary Financial Need: (circle one)

(Wealth Accumulation)	Major Purchase	Healthcare	Education
Estate Planning	Retirement	Charity	Income

Outside Investments: **Firms Used:** _____

Equities $ _____ **Fixed Income $** _____ **Cash$** _____ **Alt Investments** _____

Time Horizon _____ **Liquidity Needs** _____

Are you or anyone in your household a major share holder in a publicly traded company? Y (N)
Are you an executive of a publicly traded company? Y (N)
Do you or anyone in your immediate family work for a brokerage house? Y (N)
Is anyone in your immediate family employed by CitiGroup? Y (N)

1/5/13

Please sign and date above

In order to open your account we are required to obtain this information. Thank you for assisting us.
THIS INFORMATION WILL REMAIN CONFIDENTIAL 02/2012

GOVERNMENT EXHIBIT 1-57A 17 Cr. 337 (RJS)

9665 Wilshire Boulevard
Suite 600 Beverly Hills, CA 90212

MorganStanley SmithBarney

Kindly provide all personal information.
For additional owners, please complete a 2nd profile.

Full Name JEFFERSON III HOLDINGS LLC

Address 3960 HOWARD HUGHES PARKWAY, SUITE 500

City LAS VEGAS State NEVADA Zip Code 89169

Home Phone _____ Business _____

Cell 917 699 6430 Fax _____

SS# or Tax ID [redacted] US Citizen (Y) N

Marital Status NP #of Dependents _____ Date of Birth _____

E-mail Address _____

Telephone access Prompts **Mother's Maiden Name** _____

City of Birth _____ or **1st School Attended** DWIGHT

Employer _____

Nature of Business INVESTMENTS Occupation _____

Est. Annual Compensation $_____ Employed Since _____

Primary Source of Income-Check all that apply

Annual Salary____ Investments____ Retirement Assets____ Amount $_____

Est. Total Annual Income (all sources)_____

Est. Liquid Net Worth $_____ Est. Total Net Worth $_____

Tax Bracket (percentile)_____

Investment Objectives: (*Please rank 1 through 4, in order of priority*)

Growth 1 Current Income 2 Tax Deferral 3 Liquidity 4

Investing Since *(year)* Stocks 99 Bonds 99 Commodities 01 Options 02

Risk Tolerance (check one) Aggressive ___ Moderate X Conservative ___

Speculation Yes_____ No_____

Primary Financial Need: (circle one)

Wealth Accumulation	Major Purchase	Healthcare	Education
(Estate Planning)	Retirement	Charity	Income

Outside Investments: **Firms Used:** _____

Equities $_____ **Fixed Income $**_____ **Cash$**_____ **Alt Investments**_____

Time Horizon _____ **Liquidity Needs** _____

Are you or anyone in your household a major share holder in a publicly traded company? Y N
Are you an executive of a publicly traded company? Y N
Do you or anyone in your immediate family work for a brokerage house? Y N
Is anyone in your immediate family employed by CitiGroup? Y N

1/5/13

Please sign and date above

In order to open your account we are required to obtain this information. Thank you for assisting us.
THIS INFORMATION WILL REMAIN CONFIDENTIAL 02/2012

From: BRENNERMAN, R. J @The Executive Office
To: Stout, Scott
Cc: Gevarter, Mona
Subject: Re: Platinum AMEX
Date: Wednesday, January 9, 2013 7:24:39 PM
Importance: High

Dear Mona,

Are you able to call me on my cellphone 917 699 6430 regarding the email below

Best Regards

From: Stout, Scott
Sent: Wednesday, January 09, 2013 4:45 PM
To: mailto:rbrennerman@blacksandspacific.com
Cc: Gevarter, Mona
Subject: Platinum AMEX

RJ,

Please give Mona a call to set up your Platinum AMEX card. 310 205 4751.

As a Morgan Stanley perk, if you spend $100k annually we deposit $500 into your account to cover your annual fee ($450).

Other MS/Platinum Perks Include:

- First Class Lounge Access
- $200 annually in airline fee credits (checking bags, etc)
- No foreign transaction fees
- Premium upgrades for car rentals
- Concierge
- 20% Travel Bonus

Scott Stout
F.A. - Wealth Management
MorganStanley
Direct: 310 205 4912
9665 Wilshire Blvd., 6th Floor
Beverly Hills, CA 90212

http://www.morganstanley.com/fa/scott.stout
scott.stout@morganstanley.com

Morgan Stanley

CLIENT STATEMENT For the Period January 1-31, 2013

#BWNJGWM

RAHEEM JEFFERSON BRENNERMAN
245 PARK AVENUE
39 FLOOR
NEW YORK NY 10167-4000

TOTAL VALUE LAST PERIOD (as of 12/31/12)	[redacted]
NET CREDITS/DEBITS	200,000.00
CHANGE IN VALUE	0.88
TOTAL VALUE OF YOUR ACCOUNT (as of 1/31/13)	**$200,000.88**

(Total Values include accrued interest)

Your Branch
9665 WILSHIRE BLVD STE 600
BEVERLY HILLS, CA 90212
Telephone: 310-285-2600
Alt. Phone: 800-458-9838
Fax: 310-285-2696

Your Financial Advisor
Scott Stout

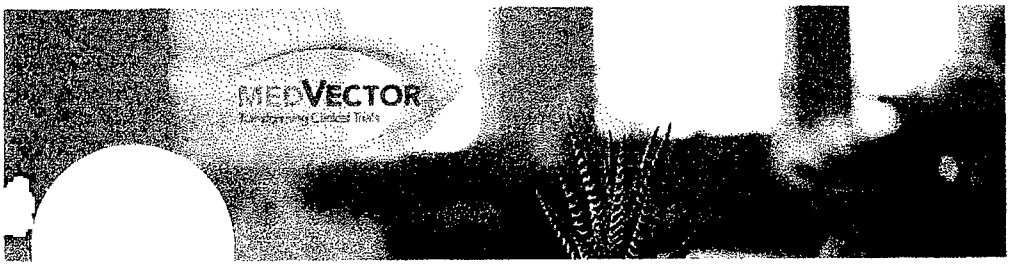
Client Interaction Center
800-869-3326
24 Hours a Day, 7 Days a Week

Access your accounts online
www.morganstanley.com/online

GOVERNMENT
EXHIBIT
529
17 Cr. 337 (RJS)

Morgan Stanley Smith Barney LLC. Member SIPC.

197 - 012515 - 054 - 1 - 0



Scott Stout • 3rd

CEO, Co-Founder at MedVector Clinical Trials

El Segundo, California

InMail

MedVector Clinical Trials

University of Arizona

See contact info

500+ connections

MedVector's mission is to advance medicine by streamlining the clinical trial industry. We provide Pharmaceutical & Biotech companies, Contract Research Organizations (CRO) and research institutes a global patient network, which enables them to quickly identify clinical trial candidates, exponentially im...

Show more

Experience

CEO & Co-Founder
MedVector Clinical Trials
Jun 2017 – Present • 1 yr 1 mo
El Segundo, CA

MedVector's mission is to advance medicine by streamlining the clinical trial industry. We provide Pharmaceutical & Biotech companies, Contract Research Organizations (CRO) and research institutes a global patient network utilizing Telemedicine. This enables researchers to quickly identify and connect to more clinical trial candidates, exponentially improving time to market.

Once suitable candidates have been identified, MedVector connects our research clients to trial participants utilizing a state of the art, HIPAA compliant, telemedicine network, allowing them to virtually move patients to clinical trial site-locations from anywhere in the world.

Our process allows clinical trial sites (locations) to capture marketshare, creates economies-of-scale by removing redundancies in the current marketplace, creates revenue for hospitals not conducting clinical trials, gives remote populations access to cutting edge medicine, and significantly expedites the process of bringing life saving, advanced medicine to market.

To learn more visit: www.MedVectorTrials.com

Financial Advisor
Wells Fargo Private Bank
Oct 2014 – Apr 2018 • 3 yrs 7 mos
Los Angeles, California

Built a Wealth Management team within the Private Bank, incorporting Wealth Managers, Portfolio Managers, Private Bankers and Financial Advisors.

Financial Advisor
Morgan Stanley Wealth Management
May 2011 – Nov 2014 • 3 yrs 7 mos
Beverly Hills

D & S Investments
Jan 2008 – May 2011 • 3 yrs 5 mos

Advised a Family Office regarding options strategy.

Education

University of Arizona
Bachelor of Science (BS), Marketing
1997 – 2002
Activities and Societies: Delta Chi

Interests

University of Arizona
214,411 followers

Barrington Legal, Inc.
40 followers

MedVector Clinical Trials
4 followers

Delta Chi Fraternity
5,471 members

University of Arizona Alumni
34,140 members

Fortis Partners
1,045 followers

See all

Morgan Stanley Smith Barney is Now Morgan Stanley Wealth Management

Sep 25, 2012

Morgan Stanley's U.S. Wealth Management Business Has a New Name Following Largest-Ever Integration in the Wealth Management Industry

New York –

Morgan Stanley (NYSE: MS) today announced that its U.S. wealth management business, Morgan Stanley Smith Barney, has been renamed Morgan Stanley Wealth Management (MSWM).

Morgan Stanley Wealth Management is an industry leader, managing $1.7 trillion in client assets through a network of 17,000 representatives in 740 locations. Morgan Stanley on September 11 announced an agreement with Citigroup to increase its majority ownership of MSWM such that Morgan Stanley will assume full control by June of 2015, subject to regulatory approval. The business was formed in 2009 as a joint venture between Morgan Stanley and Citi's Smith Barney.

"Today, as we move under one name, we are culminating a three-year effort to integrate two outstanding franchises," said James Gorman, Chairman and Chief Executive Officer of Morgan Stanley. "The Smith Barney name stood for investment excellence for three-quarters of a century, and Morgan Stanley Wealth Management will provide the first-class service that has distinguished Morgan Stanley as a firm for more than 75 years. Going forward, we remain focused on being the world's premier wealth management group."

Said Greg Fleming, President of Morgan Stanley Wealth Management, "Today, we are one integrated business, with one overarching mission: to earn the trust of our clients every day

through superior advice and execution. Our name has changed to reflect our integration, but our mission remains the same: We are committed to helping our clients reach their financial goals."

The broker-dealer designation for Morgan Stanley Wealth Management will remain "Morgan Stanley Smith Barney LLC."

Morgan Stanley Wealth Management, a global leader in wealth management, provides access to a wide range of products and services to individuals, businesses and institutions, including brokerage and investment advisory services, financial and wealth planning, credit and lending, cash management, annuities and insurance, retirement and trust services.

Morgan Stanley (NYSE: MS) is a leading global financial services firm providing a wide range of investment banking, securities, investment management and wealth management services. The Firm's employees serve clients worldwide including corporations, governments, institutions and individuals from more than 1,200 offices in 43 countries. For further information about Morgan Stanley, please visit www.morganstanley.com.

Media Relations Contact:

Jeanmarie McFadden, 212.761.2433

Jim Wiggins, 914.225.6161

No. 20-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 2020

RAHEEM JEFFERSON BRENNERMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

APPENDIX PART II - PETITION FOR A WRIT OF CERTIORARI

Raheem J. Brennerman
FCI ALLENWOOD LOW
P. O. Box 1000
White Deer, Pa. 17887-1000
Pro Se Petitioner

XI. APPENDIX TABLE OF CONTENTS

APPENDIX PART I

APPENDIX PART II

APPENDIX G

Transcript of Proceedings and Oral Ruling
United States District Court for the Southern District of N.Y.
***United States v. Brennerman*, No. 17 Cr. 337**
(Trial Tr. 551-554; 617)
(Trial Tr. 384-385; 409; 387-388)
(Trial Tr. 1060-1061; 1057; 1059-1061)

(Jury present)

THE COURT: Okay. Have a seat. We will now begin the cross-examination of Mr. Madgett by Mr. Waller.

CROSS EXAMINATION

BY MR. WALLER:

Q. Good afternoon, Mr. Madgett.

A. Good afternoon.

Q. When did you say you started working for ICBC?

A. 2009.

Q. And you work for ICBC in London, correct?

A. Correct.

Q. And it is a subsidiary of a Chinese bank?

A. It is a subsidiary and a branch of a Chinese bank.

Q. ICBC London is not FDIC insured; is that correct?

A. You are referring to the U.S. arrangement?

Q. That's correct.

A. No, it would not be because it's an operation in the U.K.

Q. When your credit committee makes a decision, a credit decision whether or not to give a loan or not to give a loan, what sort of documentation does it produce? Does it produce a memo that explains its reasons or analysis for giving a loan?

A. The credit committee will have a series of minutes which reflects a discussion of the case in credit committee and records the decision of the credit committee.

Q. Did you ever produce the documents from that credit

committee, the ones you just described, to the government?

MR. ROOS: Objection.

THE COURT: You can answer.

A. To my knowledge, no. But I need to state perhaps it's appropriate to say this: After the loan was defaulted, the internal process of the bank means that the direct relationship managers who were responsible for that dialogue step away and the defaulted loan is then passed to a different department. So, I'm not fully aware of all aspects of what has happened to the management of the loan after around April 2014.

Q. And when I say produced to the government, I meant to the prosecutors here in this case. You understood that?

A. I understood that and to my knowledge, no, that has not been the case.

Q. But ICBC did produce a lot of documents to the government, correct?

A. All I can state is that the documents were provided to our legal advisors and then our legal advisors have interacted with the U.S. Attorney's office.

Q. Would it be fair to say that some documents that are in the underwriting file for ICBC were produced to the document and others were not?

A. Some documents will have been passed across. I do not know whether or not all or some. I'm not in -- I don't have that knowledge.

Q. Is there an underwriting file for a loan application such as the one we are dealing with in this case?
A. There would be a credit application document which is where the case for making the loan has been summarized, and that is the credit application document which then goes to credit committee for approval or decline.
Q. Do you know if that -- well who would have prepared that document?
A. I would have been one of the main authors of that document.
Q. Do you know if that document was produced to the government?
A. I do not and I wouldn't see great relevance in it, but I do not know if it has gone to the government.
Q. Well, relevance is not really your determination, correct?
A. Correct, correct. Yes.
Q. So you don't know if it was produced to the government and it certainly wasn't produced to the defense, correct, by ICBC?
THE COURT: Well, do you know?
THE WITNESS: I don't know, but I'm assuming from your question that it wasn't.
THE COURT: Well, don't assume.
THE WITNESS: Okay, sorry. My apologies.
THE COURT: The jury knows not to assume anything from a question. So, you just answer as to what you know.
THE WITNESS: All right.

BY MR. WALLER:

Q. Was there an answer?

A. Could you repeat the question, please?

Q. Yes.

Do you know if that document that we were talking about was ever produced?

THE COURT: He answered. He said I don't know.

THE WITNESS: I don't know.

THE COURT: And then he started assuming things and that's when I jumped in.

BY MR. WALLER:

Q. So the answer is you don't know?

A. I don't know.

Q. Now, you first met Mr. Brennerman in 2011, correct?

A. Yes.

Q. Did you meet him in person for a meeting?

A. Yes.

Q. Jumeirah Carlton Tower Hotel, does that sound right?

A. On one occasion I met him in a hotel, yes.

Q. At that point when you met him I think you testified that there were no firm deals that he was bringing to you at that point? There were no deals that he was bringing to you, he was just making an introduction?

A. When the initial interaction between us started, yes.

Q. And, do you recall when the first deal was that he brought

MS. FRITZ: Your Honor, your Honor, no. We have it here, but --

THE COURT: You haven't served it yet?

MS. FRITZ: We wanted to hear what your Honor said.

THE COURT: In any event, the witness has indicated he doesn't possess the documents, so the documents are not with him. He doesn't have them. According to his testimony, they're in London with the bank's files that he turned over once the deal went south. He certainly said he didn't review them in preparation for his testimony. He doesn't possess them now.

So, to the extent the bank is subpoenaed with a Rule 17 subpoena, then that would be a different issue, but I don't think serving Mr. -- who is the lawyer, Mr.?

MR. HESSLER: Hessler, your Honor.

THE COURT: Yes, Mr. Hessler. I'm sorry.

I don't think serving Mr. Hessler is adequate service for purposes of the bank.

MS. FRITZ: Let me explain why we did it that way, because initially last night, we had an ICBC subpoena drafted, and the reason that we did it this way is, again, I don't necessarily agree with your Honor's definition of possession. I do think that Julian Madgett, I think quite plainly, has access to these documents. People very rarely walk around with the documents that you're asking for from them, but they do

Q. Is that the same title you had or position you had while you were at Morgan Stanley?

A. My title -- my specific job title at Morgan Stanley varied as I was promoted from vice president, to director, to managing director, and I worked within what they called the institutional securities division. My current title is managing director at Lazard within what they call the financial advisory division, but I'm doing substantially the same job, except I'm more solely focused on mergers and acquisitions now and not so much on financings, if that makes sense.

Q. Staying with Morgan Stanley, you mentioned that Morgan Stanley has two business lines?

A. Broadly, if you look at their financials, that's how they characterize it, yes.

Q. And can you just explain, to the extent you understand, what you mean by "business lines"?

A. Certainly. So, Morgan Stanley has a private wealth management business, which is one of the aforementioned two business lines. That business is composed of individuals who somewhat confusingly are also called financial advisors, who work with high net worth individuals to help them manage their money.

And then the other business line that I was referring to, which I was a part of, is called the institutional securities division. And within that division is housed what

is the traditional investment banking activities, which is capital markets, underwriting, so think about initial public offerings, helping companies with that. Mergers and acquisitions, when two companies merge, and then aside from that, there's sales and trading, which is basically making markets in various securities around the world, and also asset management.

Q. You said business lines, but they're really separate entities; is that correct?

A. They're all a part of the Morgan Stanley & Company LLC, which is listed on the New York Stock Exchange, but we report up through different superiors.

Q. You say "part of." Are they the same company? Are they a separate entity?

A. They're wholly-owned subsidiaries of Morgan Stanley & Company LLC.

Q. And you called it, I believe, wealth management. Is it also referred to as the private bank?

A. I don't believe I have the expertise to answer that.

Q. I understand.

A. I could speculate, but...

Q. So you're not really familiar with anything that's handled on the wealth management side, other than sometimes you have clients referred?

A. I've never worked on the wealth management side, so I don't

BY MS. SASSOON:

Q. Just to clarify, turning back to Exhibit 1-61, page 6, is it clear to you one way or the other from looking at this e-mail whether this is an asset-based lending proposal?

A. It's not clear to me, it would be speculation.

Q. Looking at page 7, going back to the part in blue with the asterisk, can you read that, please?

A. 50 percent working interest owned by Black Sands Pacific Alpha Blue, LLC.

MS. SASSOON: No further questions.

THE COURT: Okay. Any recross?

MR. STEINWASCHER: Very briefly, your Honor.

RECROSS EXAMINATION

BY MR. STEINWASCHER:

Q. Can we go back to that same exhibit, same page?

Very briefly, Mr. Bonebrake. Did this proposal provide you -- I say proposal, overview summary proposal, did it provide you with really any information on which Morgan Stanley could make a decision about financing?

A. To get to the point of actually, quote, making a decision on financing, there would have been a lot more work and information needed than this. Again, this was very preliminary stage of our conversation.

MR. STEINWASCHER: Thank you.

THE COURT: Okay. You can step down. Thanks very

BY MR. STEINWASCHER:

Q. Did you have specific recollection as to your conversations -- specific details of your conversations with Mr. Brennerman prior to looking at the documents when meeting with the government?

A. I had recollections of conversations with Mr. Brennerman that were enhanced by looking at the documents. I did recall the conversations before seeing the documents, but the documents were very helpful.

Q. So, it's safe to say that for some specific details, your memory was refreshed by the documents and not something that you just remembered independently prior?

A. That's a broad statement. I'm not sure I could agree or disagree with that, but...

Q. That's fine. That's fine.

On the topic of financing, you said that for these types of deals, the ones that you have handled primarily, and specifically the one involving Mr. Brennerman, Morgan Stanley would not provide the money that it would seek financing from outside investors; is that correct?

A. They would not typically provide the money. There are some cases where Morgan Stanley -- let me rephrase that. I can only speak for my particular division. So, Morgan Stanley is a $700 billion company operating across the globe with over 50,000 employees. So my particular division would typically

not be providing the financing directly, but we might backstop an offering where we commit that if we can't find third-party investors to purchase these securities, then we would provide the money. But that was not the majority of the cases.

Q. And in the particular case of the proposal from Mr. Brennerman, I believe you said that it was something that you understood he was looking for Morgan Stanley to find financing from investors for?

A. My recollection was that it was unclear. We didn't get very far in our discussions. And then, after reviewing the emails, I think it's still unclear.

Q. You mentioned several times, I believe, a distinction between dealing with public companies and private companies?

A. Yes.

Q. At one point I believe you said your knowledge of the number of private companies that are involved in this type of business that you do, the oil and gas business, you're a little less certain of the specific number because the information is not publicly available; is that correct?

A. Correct.

Q. So, for a private company like Blacksands Pacific, it wouldn't be unusual that you hadn't heard of them, given that they're a private company, and you're not familiar with every single private company out there?

A. It would be unusual that a company -- that I had not heard

A. Not without a certificate of deposit insurance.

Q. I just want to clear this up. Your answer to my previous question was the FDIC does not insure banks outside of the United States.

A. A foreign bank?

Q. Correct.

A. No.

Q. So if there is a foreign bank located in London, even if it held depository accounts, the FDIC could not insure it, is that correct?

A. That is correct.

Q. I apologize for this. I want to go back to one point.

Those two Morgan Stanley banks that we looked at, those two entities that had certificates of insurance with the FDIC, if an entity is a subsidiary of a parent in a financial institution, does the fact that the subsidiary is FDIC insured also mean that the parent is FDIC insured?

A. Can you repeat that? I'm not sure I understand.

Q. Does FDIC insurance for a financial institution, which is a subsidiary of another financial institution, so the FDIC has issued a certificate to that subsidiary, does that certificate somehow also cover the parent corporation?

A. No.

Q. So the parent entity would need a separate certificate of insurance?

A. Yes.

Q. The same thing for an affiliate within a company or affiliates between companies, each entity would require a separate certificate of insurance in order to be FDIC insured?

A. That is correct.

MR. STEINWASCHER: We are just about approaching lunch and I am done with this witness.

THE COURT: Any redirect?

MR. SOBELMAN: No, your Honor.

THE COURT: Why don't we break then. We will pick up at 2.

Don't discuss the case and bring your books with you into the jury room, but don't take them outside of the jury room. Have a good lunch.

All rise for the jury, please.

(Jury exits courtroom)

THE COURT: You can step down. Thank you very much, Mr. Gonzalez.

Have a seat. Let's talk about what we have left and an ETA.

MR. ROOS: We have six witnesses remaining, two of them are on the longer side and the other ones are about the length that some of these shorter witnesses have been today. And we also have three stipulations to read into the record at some point. We can do it right after lunch.

don't.

Q. If it had no depository accounts, would there be any reason for it to need FDIC insurance?

A. I'm not certain.

Q. Does FDIC insurance cover anything else other than depository accounts?

A. No.

Q. So if there is a company that has many different sub-entities, some of those that hold depository accounts and some of those that don't, a financial institution I should say, it's safe to say the FDIC would only offer insurance to those portions of the company that handle depository accounts?

A. You kind of lost me. Can you repeat that?

Q. If there is a financial institution that has one division that covers investments and another division that covers depository accounts, would the FDIC insure the division that covers investment banking?

A. If it does not have a certificate of deposit insurance it would not.

Q. If it had no depository accounts, there was no reason for that institution to seek a certificate of insurance?

A. I can't opine on what someone would want to do, in terms of seeking insurance or not seeking insurance.

Q. Well, there would be nothing for the FDIC to insure in that instance, is that correct?

Q. OK. I am not sure it's reflected on this page, but maybe on the first page of this exhibit.

You see at the bottom here, on the bottom left, there is an italicized text that reads "Morgan Stanley Smith Barney LLC"?

A. It's hard for me to see.

Q. Do you see that text now?

A. Yes.

Q. Are you aware if Morgan Stanley Smith Barney LLC is insured by the FDIC?

A. I'm not aware of that.

Q. Did you conduct any search to confirm that?

A. No.

Q. The rest of this text, it has "member SIPC." Do you see that?

A. Yes.

Q. Are you familiar with that acronym SIPC?

A. I'm not familiar with that acronym.

Q. Does that, as far as you know, pertain to the FDIC in any way?

A. No.

Q. Does the FDIC insure banks outside of the United States?

A. No.

Q. So if there is a bank located in London, in the United Kingdom, that would not be covered by the FDIC?

A. Not without a certificate of deposit insurance.

Q. I just want to clear this up. Your answer to my previous question was the FDIC does not insure banks outside of the United States.

A. A foreign bank?

Q. Correct.

A. No.

Q. So if there is a foreign bank located in London, even if it held depository accounts, the FDIC could not insure it, is that correct?

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APPENDIX H

**Transcript of Proceedings and Oral Ruling
United States District Court for the Southern District of
N.Y. in *United States v. Brennerman*, No. 17 Cr. 337
(Sentencing Hr'g Tr. November 19, 2018)**

IBJQBREs

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
UNITED STATES OF AMERICA

v. 17 CR 337 (RJS)
Sentence

RAHEEM J. BRENNERMAN

Defendant
----------x

New York, N.Y.
November 19, 2018
11:00 a.m.

Before:

HON. RICHARD J. SULLIVAN
District Judge

APPEARANCES

GEOFFREY S. BERMAN
United States Attorney for the
Southern District of New York
NICOLAS T. ROOS
DANIELLE SASSOON
Assistant United States Attorney

SCOTT B. TULMAN
Attorney for Defendant Brennerman

-Also Present-

THOMPSON HINE LLP
Prior Attorneys for Defendant
MIRANDA E. FRITZ
BRIAN D. WALLER

PAUL HESSLER
Attorney for ICBC LONDON PLC

IBJQBREs

(Case called)

THE COURT: Good morning. Let me take appearances for the government.

MR. ROOS: Good morning. Nicolas Roos and Danielle Sassoon for the government.

THE COURT: Good morning to each of you.

For the defendant.

MR. TULMAN: For Mr. Brennerman, good morning, your Honor, Scott Tulman.

THE COURT: Yes, Mr. Tulman.

Mr. Brennerman, good morning.

We have some other folks here in attendance as well. One is related to ICBC. Is that correct, Mr. Roos?

MR. ROOS: That's correct, your Honor.

THE COURT: Just if you could state who that is.

MR. ROOS: It's Paul Hessler, who is counsel for ICBC in various civil litigations.

THE COURT: Mr. Hessler, good morning.

MR. HESSLER: Good morning.

THE COURT: I noticed Ms. Fritz and Mr. Waller here, so good morning to you. I'm not sure if you are intending to speak or if you are in here to watch.

MS. FRITZ: Completely up to you. Mr. Roos kindly advised us over the weekend that he had included a request for funds that were received by Thompson Hine as legal fees. He

IBJQBREs

advised us that that is mentioned in his sentencing submission, so that is why we are here, and we'd be happy to address it if and when it comes up.

THE COURT: All right. Thank you.

Then there was the government's letter from July 20 also mentioned that there would be another person here, Ms. Ifejika?

MR. ROOS: That's correct, your Honor. She is the principal of Brittania U, which is mentioned in our sentencing letter. She made arrangements to be in New York for the prior sentencing date of July 27, but, which, as your Honor knows, was adjourned, and she was unable to make this date.

THE COURT: So she is not here.

MR. ROOS: Correct.

THE COURT: That's fine.

So I have a mountain of materials which I guess I'll go through in a minute. I guess where I thought I would start is with a motion for a new trial under Rule 29 and 33. That was a motion made by Mr. Brennerman some time ago and supplemented at various points along the way.

I issued a short order denying the motion. It was actually several motions. There also was a motion to refer the prosecutors to the Southern Districts's grievance committee. I think I will just address that now in a little more detail.

This was a four-count indictment. The jury returned a

guilty verdict on each count. Mr. Brennerman has moved for relief on all counts of conviction on a variety of arguments. With respect to Count One, which was the conspiracy to commit bank fraud and wire fraud, he challenges that conviction principally on venue grounds.

I think there is sufficient evidence to support venue by a preponderance of the evidence. First of all, he used a fraudulent visa to obtain a social security card that was also fraudulent in Manhattan, and in Manhattan he then used to further the bank fraud and wire fraud conspiracy. He also entered into a contract with Regus for an office in Manhattan that was held out as a Blacksands office. I think that would give you venue as well. He also met with Ms. Charles in Manhattan. He then later used her name without her knowledge or permission, listing her as an employee of Blacksands. And then finally there were various wire transfers into and out of accounts here in Manhattan. So I think there was ample venue on the conspiracy count.

Count Two, the bank fraud conviction, there are a number of grounds for relief that are articulated by Mr. Brennerman. The first is that the government did not introduce evidence at trial to demonstrate that Morgan Stanley Smith Barney or Morgan Stanley Investment Bank were FDIC insured. Actually, there was testimony or evidence about the private bank being FDIC insured. I think there was also

evidence that the Investment Bank was not FDIC insured, but I think the theory here that went forward to the jury was that the private bank was defrauded by false statements made by Mr. Brennerman about his assets, about his holdings, about his history; that he was then enabled to open a private banking account that allowed him to have access to various perks, including free checking, including some sky miles that I don't think were actually used, but also access to other entities within the bank, within the larger holding company of Morgan Stanley.

So I think that that was sufficient to go forward. I think it ultimately didn't lead to a whole lot of loss, so when we talk about loss amount, it seems to me the loss amount associated with Count Two is pretty negligible, but that's a sentencing issue. In terms of the elements of FDIC insured, I think the record was ample on that score, and, therefore, I'll deny a motion on that.

He also challenges whether the jury could adduce from the evidence at trial that he intended to cause any loss or potential liability to Morgan Stanley's private bank. Again, I think the evidence reflects that he opened an account at the private bank using false information, false documents; that that resulted in him having access to perks and benefits that he wouldn't otherwise be entitled to.

So I think that the intent can be inferred from that.

IBJQBREs

I think the intent can also be intended to use that relationship to then parlay that into connection to an investment bank, which was the ultimate goal of the wire fraud scheme, and I think the evidence shows that in spades. So I will deny the motion on those grounds as well.

He also has a venue challenge, which I've already articulated with respect to the conspiracy. The same evidence on venue applies here.

Mr. Brennerman also argues that the government constructively amended their indictment by proceeding with this private bank theory late in the day. Look, the indictment alleges that the defendant willfully and knowingly did execute and attempt to execute a scheme or artifice to defraud a financial institution, the deposits of which were then insured by the FDIC; to obtain monies, funds, credits, assets, securities and other property owned by and under the custody and control of a financial institution by means of false and fraudulent pretenses, representations and promises. I think that language tracks the language of the statute. It is sufficient notice, and it is broad enough to cover the conduct at issue here. And so I will deny that motion as well.

With respect to Count Three, that's the wire fraud count. The first argument asserted by Mr. Brennerman is that he was denied his right to cross-examine witnesses by the government's failure to obtain and turn over the ICBC London

IBJQBREs

lending file. This is a recurrent theme throughout much of Mr. Brennerman's papers and sentencing submissions. The reality is that the government doesn't have an affirmative duty to procure those documents even if they are potentially exculpatory. And, by the way, I've seen nothing to suggest they are potentially exculpatory other than Mr. Brennerman's assertions, but no basis beyond that. So I think the right to cross-examination was not affected.

Mr. Brennerman also asserts that there were violations under *Brady* and *Giglio* by the government's presentation of Mr. Madgett to testify without those files and without those documents. Basically, he is asserting that the government procured perjured testimony. Again, there is no basis to conclude that it was perjured testimony. And, again, the government had no obligation to obtain files that were not in their custody that were in a different country that belonged to a third party, so as well I will deny that.

Ineffective assistance of counsel due to a conflict of interest, I already previously ruled on this as to whether there was a conflict of interest. The government didn't end up calling the witness or introduce evidence about the issue that related to the potential conflict of interest so that resolved the issue, and we didn't get into it any more.

That may be raised again today, I gather. We'll see. But with respect to the trial motions, the Rule 29 and Rule 33

motions, I see no basis to conclude that there was ineffective assistance of counsel based on a conflict of interest that never materialized and didn't even end up needing to be waived.

The next argument relied upon by Mr. Brennerman is that the government committed fraud on the Court by its calling Mr. Madgett, who asserts testified falsely under oath, and that the government had an obligation to correct his false testimony. He basically relies on an assertion that there was testimony about a bridge loan agreement and check that was inconsistent with arguments made before Judge Kaplan in that trial. I think that was characterized as actually the evidence in the two trials and I think the fact is that Mr. Madgett testified that he was under oath, he was cross-examined, and had ample opportunity to confront him with these alleged inconsistencies and to ask the jury to draw inferences against Mr. Madgett as a result. So I don't see that there was any fraud on the Court or any obligation to do more than what was done at trial and before trial.

The next argument relied upon by Mr. Brennerman is that the government had an obligation to present all the evidence available. This is a variation, I think, on his claim that ICBC and Mr. Madgett should have produced additional documents that were in London that the government didn't possess and, therefore, didn't turn over in discovery or present at trial. Again, there is no basis for concluding that

the government had an obligation to produce those things or that those things were somehow exculpatory.

Improper summation remarks is another argument on which Mr. Brennerman relies for his Rule 29 and Rule 33 motions. He argues that the government's description of the $11.25 million check as a fake parent guarantee during his closing arguments somehow tainted the verdict. I think the government's argument was supported by the evidence and, therefore, it was fair game for them to characterize it as such. The jury didn't have to credit it. There was argument that it was no such thing, but I don't think it was unfair argument on the part of the government based on the evidence introduced at trial, nor do I think could Mr. Brennerman demonstrate prejudice as a result of this improper summation remark. So I think that one, again, has no legs.

The next argument raised by Mr. Brennerman is with respect to his Fourth and Fifth Amendment rights, which he insists were violated as a result of an illegal search of his home in Las Vegas. The government searched that home pursuant to a valid warrant. I see nothing to undermine the validity of that warrant and, therefore, that motion is also denied.

Finally, he makes also an improper venue motion with respect to Count Three. I have already talked about venue in connection with the conspiracy count, but some of those same facts and same evidence supports venue on Count Three.

IBJQBREs

Finally, the visa fraud count, Count Four, Mr. Brennerman first challenges the sufficiency of the evidence. He makes numerous arguments about what the evidence consisted of. He asserted counterfactual arguments based on his own assertions or things not in the record. I think he has not accurately characterized the record. There was evidence before the jury that supported the elements of a visa fraud count, and so I'm going to deny the motion on sufficiency of the evidence.

He also challenges the indictment because he says it did not include an allegation that defendant's visa was knowingly forged, counterfeited, altered or falsely made. The indictment alleges quite clearly that the defendant knowingly used a visa which he knew to be falsely made; to wit, Brennerman used and possessed a visa that he had procured by making false statements regarding, among other things, his name, national origin, and the nature of scope and status of the corporate entity which sponsored his application. That is certainly sufficient to put Mr. Brennerman on notice as to what the charge is and also tracks the language of the statute.

Mr. Brennerman also alleges that the government constructively amended the indictment. He doesn't really explain how that happened. That was sort of an assertion that didn't really seem to be developed, so I see no basis for that argument and deny that one as well.

He also argues that Count Four, the visa fraud count, requires that a statement be made under oath, and so he says the Court should apply the Rule of Lenity and find that the statute requires that any immigration document or statement must have been made under oath to qualify as a false statement. I think it mischaracterizes the section at issue here, which is 18 United States Code, Section 1546(a) which prohibits the making of knowingly false statements. So I will deny that.

He also makes an improper venue motion for Count Four as well, which fails for the same reasons I articulated before.

And then there may be a lot of other arguments. Some of them are unintelligible; some of them are variations on arguments that I've already discussed. It goes on for pages and multiple submissions. It's all been docketed, and I don't think it is necessary for me to go through every line of every letter submitted by Mr. Brennerman to simply say that I found there to be nothing meritorious in his motion for a new trial or reversal of the verdict under Rule 29 and Rule 33. OK? So I wanted to just elaborate on my short order.

So, we are now here for sentencing, obviously. I have reviewed a number of materials that were submitted in connection with sentencing specifically. I've also reviewed all the other things I've talked about, the various motions and correspondence for Mr. Brennerman, but I just want to focus now on sentencing.

There was a presentence report that was submitted by the probation department on July 13 of 2018. It's a 23-page submission that includes a sentencing recommendation, a number of sentencing submissions, objections to the draft PSR dated June 27, objections to the presentence report dated July 16 for Mr. Brennerman, also requesting a Fatico hearing. Another memorandum from Mr. Brennerman that's dated, I guess, it's also July 13. He characterizes it as a presentencing memorandum with amended presentence report objections.

I have the government's July 20 sentencing submission, which is 11 pages single-spaced. It also includes some attachments which were discussed in their letter, so I've reviewed those as well. I have reviewed the victim statement prepared by ICBC of London that was docketed with the government's submission on July 20, was signed by Paul Hessler, who is here today.

I've also reviewed the July 25 sentencing submission from Mr. Brennerman. That's really about the appointment of counsel, which was another recurring theme as to whether Mr. Brennerman was going to represent himself or whether he was going to have standby counsel, whether he was going to have appointed counsel to represent him, whether he would have new counsel to represent him rather than appointed counsel or whether he would then revert back to representing himself, so on any given day, it might have been any of those things. So

there are a number of submissions made by Mr. Brennerman related to that topic. I resolved that previously, but some of those submissions also relate to sentencing issues so I refer to them now for that purpose.

There was a July 31 submission from Mr. Brennerman in which he writes in an effort to clarify a few misunderstandings with the government's sentencing submission. So I have reviewed that. It also includes a number of attachments related to Brittania U.

I have an August 5 submission from Mr. Brennerman, which he describes as defendant's statement intended to apprize the Court of his pleadings during the appearance that took place previously. He also raises a bond issue, a $100,000 bond that was posted in connection with bail.

He also references his Rule 29 and Rule 33 motions, and then also talks about his request for additional evidence related to his innocence from ICBC, which goes to sentencing as well.

I reviewed the transcript of the proceedings we had on August 6, which was largely about counsel issues.

I reviewed the supplemental sentencing memorandum on behalf of Mr. Brennerman filed by Mr. Tulman. That's dated November 5. It wasn't docketed, I think, until the 13th. That also included a number of exhibits: Exhibits A, B, C, D and E, some of them are quite lengthy. I have read all of them.

IBJQBREs

Then I have the government's November 13 submission, which is a five-page, single-spaced submission largely responding to Mr. Tulman's submission.

I guess last, but not least, I have two letters dated back in June. I got in them June but I mention them now, just because they are letters from Mr. Brennerman's fiancee and his fiancee's daughter. I'm not sure how old the daughter is. How old is the daughter?

THE DEFENDANT: 18.

THE COURT: She is old enough then to be mentioned, so it's a letter from Jamie Sanderson and Haley Logan, letters from each of them. So I've reviewed those as well.

Is there anything else that I've overlooked? Anything that should be before the Court in connection with sentencing that I haven't mentioned. Mr. Roos?

MR. ROOS: No, your Honor.

THE COURT: Mr. Tulman.

MR. TULMAN: No, your Honor.

THE COURT: So let's start then with the presentence report. Mr. Brennerman has a number of objections to the presentence report, both the original version submitted by the probation department to the parties that I didn't receive, and then also the final report, so I'm not sure what the best way to go through that is.

Mr. Tulman, do you have any thoughts?

IBJQBREs

MR. TULMAN: I know that there is a document 173 identifying the objections, and I believe that to some extent the officer of probation sought to respond to those objections.

THE COURT: Right. I'm not going to go through the objections to the first draft of the presentence report because some of those objections resulted in changes to the presentence report. And since I don't get that one anyway, I only get the final, I want to stay focused on the objections to the final report. Some of the objections to the earlier report were rejected or the probation department at least explained why they weren't making a change. So I guess we could sort of reverse engineer it, but I'm not inclined to do that now.

Are there particular paragraphs in the presentence report that Mr. Brennerman objects to and that the Court needs to make findings on?

MR. TULMAN: The primary objection that Mr. Brennerman has to the presentence report would be the guidelines calculation to the extent that they include an obstruction enhancement.

THE COURT: We'll talk about that in a minute for sure.

MR. TULMAN: And the second would be the determination that the fraud loss amount exceeded $7 million as opposed to the $4.4 million that was received by Mr. Brennerman. And so those objections are the primary objections that he has.

IBJQBREs

THE COURT: All right. So guidelines objections we'll talk about in a minute. I think that Mr. Brennerman also, frankly, disputes the factual characterizations that are contained from paragraphs 10 through 21 or so. Those were all, I think, supported by the evidence introduced at trial and are consistent with the jury's verdict, so I am not going to change those.

With respect to the guidelines, we'll talk about those in a minute.

Mr. Brennerman, as I mentioned to you previously, one of the factors that I have to consider in fashioning the sentence is the United States Sentencing Guidelines Manual. Remember I mentioned that to you before?

THE DEFENDANT: Yes.

THE COURT: So the guidelines manual is this big book put out by a commission. It's a commission called the United States Sentencing Commission. That's a group of individuals that consists of some judges and some lawyers and some experts in the field of criminal law.

So the way this book works is that it's designed to give guidance to judges like me to have to impose sentences on real people. So for every crime or type of crime, there's a chapter in this book, and the judge in a particular case is then instructed to go to the chapter or chapters that relate to the conduct that formed the offense. And once in that chapter,

the judge makes findings of fact. And then once the judge makes findings of fact, the judge is then prompted to assigned points. It's like an accounting process, really. The judge makes his findings, assigns points consistent to what's in the book, the judge then adds up points, in some cases subtracts points, and the judge then comes up with a number. That number is referred to as the offense level.

The judge then goes to another chapter in this book, and that's a chapter that relates to criminal history. Not surprisingly, people who have committed crimes before or who were sentenced to prison before, well they typically will be treated more harshly than people who have no prior convictions.

The judge then goes to the chapter on criminal history, makes findings about whether there were prior convictions. If so, when, and for how long the sentence was. Based on the answers to those questions, the judge assigns points. The judge add up those points, and the judge comes up with another number. That number is referred to as the criminal history category.

There are six criminal history categories. Category I is the lowest and least serious. Category VI is the highest and most serious.

With those two numbers that I just talked about, the offense level on the one hand and the criminal history category on the other, the judge goes to the back of this book where

there's a grid or a table. You probably can't see it, but it's a chart, and there's a column here on the far left. That's the offense level column. It starts at number one and goes down to level 43. The judge goes down that column until the judge gets to the number that the judge found to be the offense level.

The judge then goes across these other columns from left to right, each of which reflects a criminal history category, and the judge keeps going until the judge gets to the criminal history category that the judge found to be appropriate. Where the judge's finger finally stops then after that exercise, well, that's the range that in the view of the commission that prepares this book would be appropriate.

I don't have to follow this book. This book is not mandatory. It's advisory. But I do have to consider it, and I have to make my findings under it. So we are going to spend a few minutes now talking about how this book applies in this case. It can be a little complicated. It can be sort of a little like accounting, but it's not too hard to follow, and I think the issues here are relatively straightforward and understandable. So we'll pick them up. All right?

According to the presentence report prepared by the probation department, beginning on page 6 -- there are four counts of conviction here, so according to probation, Counts One, Two and Three are grouped together pursuant to a different section of the guidelines that says where you have crimes that

are distinct crimes but they all involve the same conduct, in most cases you group them all together and you do an analysis all together. You don't count them separately and add them up. You do them together. So the conspiracy to commit bank and wire fraud, the bank fraud and the wire fraud are all treated together, and they're all covered by the same guidelines provision, which is Section 2B1.1. That's the general fraud provision under the guidelines.

Now, I do think, frankly, that it's worth pointing out that the bank fraud calculation here I think would be quite different than the wire fraud, and I guess I want to hear from the parties on that. But the bank fraud here was a scheme or artifice to defraud the private banking arm of Morgan Stanley to enable Mr. Brennerman to get access to the perks which are tangible. They're worth money, free checking among them. I don't get that. And some other perks. But also to get some more intangible perks, which would be access to other arms of the Morgan Stanley family of entities.

I'm only really focused on the first category here. It seems to me the first category here, there's been no evidence that I've seen that suggests that was worth more than $6,500 or so.

Mr. Roos, do you disagree?

MR. ROOS: I think that's right, your Honor.

THE COURT: You agree, OK.

And I assume, Mr. Tulman, you agree with that.

MR. TULMAN: I have no problem with that, Judge.

THE COURT: So, that being the case then, the base offense level is 7, because the maximum sentence of bank fraud is 30 years, but there's no enhancement for loss because the loss amount in dollar terms for the bank fraud count did not exceed $6,500.

Is the government arguing there are any other enhancements for the bank fraud count? I didn't see any, but maybe I'm wrong.

MR. ROOS: Well, your Honor, the PSR sets forth sophisticated means.

THE COURT: Sophisticated means for the bank fraud?

MR. ROOS: It's identified as sophisticated means include, like, for instance, his papering of a fake company, his setting up shell entities. The government's proof at trial was -- while I think your Honor is right that from the FDIC institution, the potential loss to that institution was low, he still used those various sophisticated means, basically, the papering of a company that didn't exist in order to get access to those benefits and expose the bank's potential loss. So I think that enhancement would apply.

THE COURT: Mr. Tulman, thoughts on that?

MR. TULMAN: I don't know that there's anything particularly sophisticated about the conduct.

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THE COURT: Well, it does require you to create a company. It might require you to incorporate a company. It requires you to develop financials for that company and brochures and things like that. There was a lot of evidence about those things. I guess that's more sophisticated than a typical situation where somebody just uses a false name when they go into a bank or adds a zero to their income in a form. I think it's more sophisticated than that. I think ultimately it's not going to matter, the impact of that doesn't add much of anything here, but I think that that argument is -- I'm persuaded there has been proof of sophisticated means that by a preponderance would warrant a two-level increase. So the bank fraud would be at level 9, before we get to obstruction. And I think that's going to be a lot lower than the wire fraud. The wire fraud is what drives this here. So the wire fraud is also going to be a base offense level of 7, correct?

MR. ROOS: That's correct, your Honor.

THE COURT: And then there the loss amount is disputed. The probation department concludes that the loss amount was $20 million because that is what the defendant -- that was the nominal amount of the loan that he fraudulently secured. He didn't get it all, but I guess the argument is that he didn't have to have gotten it all to be on the hook for the full $20 million. It's the loss and the intended loss, at least with the conspiracy count, but probably even for the

substantive count, the intended loss would be relevant. So why don't we talk about that.

The restitution amount will be lower. Obviously, it's not going to be 20 million for restitution. The restitution is not the driver of loss for intended loss. So the government's view is this nominal amount alone of $20 million, that's the fraud?

MR. ROOS: Your Honor, I think this is a relatively conservative estimate by probation. There was plenty of proof at trial that the defendant went to both the ICBC and the non-FDIC insured branch of Morgan Stanley and sought out considerably more --

THE COURT: He was trying to get $600 million. I guess at one point that was what there was discussion about, but you're not seeking that as the loss amount, right?

MR. ROOS: That's right, your Honor, although I think there was evidence at trial that he intended that amount. Julian Madgett testified that this bridge loan of $20 million wasn't contemplated as the exclusive deal. Rather, it was sort of the entree to a much larger deal that the bank was totally serious about. So, I think there actually would be a basis for the Court to conclude that there was a $300 million intended loss.

The government isn't pursuing that though, and that's not what probation did. I think this is very reasonable. He

had a contract, something reduced to writing for $20 million. Sure, the drawdown happened before the fraud was exposed was approximately $5 million, but there is not only a clear evidence in the trial record of intention to take $20 million from the bank, but actually multiple steps taken by the defendant, up to the point of entering into a contract, having money transferred into an escrow account.

So, there is more -- as your Honor pointed out, the test is not exclusively what actually was lost by the bank. That's may be it for restitution, but in terms of intended loss, there is more than sufficient evidence in the record to conclude that $20 million is the appropriate amount.

THE COURT: Mr. Tulman, do you want to be heard on that?

MR. TULMAN: Yes, your Honor.

The issue, as the government rightly points out, is of intended loss, and what Mr. Brennerman has pointed out to the Court is simply the fact that of the $20 million, as a matter of English law, the $15 million was not controlled by Mr. Brennerman, he would never have been able to gain access to it. It was held in a pledged account to ICBC. So he could not and did not intend ever to receive any of those $15 million.

THE COURT: Why are you saying he never intended to get that money?

MR. TULMAN: That's right. What he maintains is that

the only funds that he ever could have had access to would have been, not even $5 million, but $4.4 million that was ultimately disbursed after $440,000 or so was paid over to ICBC, which is certainly not a loss to ICBC. The fact that they are collecting their fees and the like.

With regard to the other $15 million, Mr. Brennerman could not have had the intent because his position is that he knew at the time that there was no way that he could ever have access to those monies. So, therefore, the loss amount in this case would be what was intended by him, which would be the $4.4 million.

THE COURT: I don't think that's consistent with the evidence. It seems to me Mr. Brennerman was happy to take this as far as he could go. Morgan Stanley, the investment banking side, didn't give him the time of day. They weren't interested. If he couldn't produce documents to their satisfaction, they were just ready to ignore him. ICBC was more intrigued or more interested in doing business with him, and Mr. Brennerman strung them along for a long time, and did basically everything he could to get loan proceeds. And it seems to me that he had arranged for a $20 million loan. The goal was to get even more after that, and I don't think that there is anything to suggest that he was content with or satisfied with $4 and a half million, and that's where the thing was going to end. It seems to me he was very interested

in pursuing this much further to get the balance of the $20 million and to get additional monies after that by falsely presenting himself as the head of a pretty serious operation with a lot of employees and with a lot of assets that was all fiction. So I certainly think that the intended loss amount exceeds -- I'm looking at the newer guidelines. I guess we should be looking at the older guidelines.

Mr. Brennerman, just so you know, this book has changed from when you were first charged to now. There was a new book that came out in the last month or so. So, normally, the way it works is that if it is to your benefit, then we go with the new version. If it is to your detriment, then we go with the old version. Whichever one is better for you is the one we go with. It looks like they're both the same. So $9 and a half million is the threshold for a 20-level enhancement and I think you were easily going to get $9 and a half million. So I will add 20.

The next enhancement under the presentence report is for the use of sophisticated means, and that involved the use of fraudulent documents, the use of glossy brochures that were made just to perpetuate this fraud, the creation of corporations that didn't really exist but with documentation that could create the impression that they did, the use of legitimate law firms to add the venire or appearance of legitimacy was very sophisticated and very thorough, incredibly

bold, incredibly ambitious that one would be willing to take on those expenses in order to do the big con, which seems to have been the goal all along. Just a shameless, absolutely unapologetic con to get as much as you could by saying whatever you needed to say to whomever. And to dress yourself up to look like the real genuine part. So I think a two-level enhancement is certainly warranted for the wire fraud. I think it's also warranted for the bank fraud, but as to the wire fraud, there is no question. So I will impose two additional levels under 2B1.1(b)(10)(C) for sophisticated means.

There is then a two-level enhancement that probation recommends because the victim was a financial institution.

Mr. Tulman, do you want to be heard on that one?

MR. TULMAN: No, your Honor. It need not be an FDIC institution.

THE COURT: So that then puts us at 31.

The next enhancement that probation recommends is an adjustment for obstruction of justice. This one I know is disputed, so I want to talk about that. There is the obstruction that took place in the civil action before Judge Kaplan, which then metastasized into a criminal action that predated the indictment here. There are additional things, I guess, that the government would also characterize as obstruction.

So I think it is good to maybe nail down what are the

facts that the government is relying on as obstruction; to what extent are those facts already baked into Judge Kaplan's case; to what extent are they separate in this case; and does it really matter is the final issue. He had two criminal cases. He made bail applications in both. The bail applications included false representations. That I think alone would be enough to support an enhancement for an obstruction of justice, but there is a question as to whether we should create two piles: One for Kaplan and one for me.

Mr. Roos, I'll hear from you first and then I will give Mr. Tulman a chance to respond.

MR. ROOS: Your Honor, you have our letter, but on the questions you raised, I think the first one in our submission which relates to the ICBC conduct is the underlying conduct in the criminal contempt prosecution. Our view is obstructive conduct --

THE COURT: Well, the underlying, you mean in the civil case?

MR. ROOS: That's correct. What the defendant did in the civil case was intended to obstruct ultimate criminal investigation and prosecution of his fraud scheme. And to your Honor's question about -- so certainly there is overlap between the conduct. The entirety of that civil case and what the defendant did in it was the basis for the contempt convictions before Judge Kaplan. But sort of the difference between what

was there and what we have here is sort of the motive or the reason. There, Judge Kaplan was imposing a punishment for failure to follow court orders.

The reason the defendant did it, and the reason why the defendant in that case did things like submit interrogatory responses or deny the existence of documents, beyond disobeying court orders, was to prevent those materials, the materials that were then later seized through a search warrant and shown to the jury in this case, prevented those materials from becoming known because he knew once they were known, you know, the fraud is up.

So that is why, if your Honor recalls, there were some emails that were shown to the jury in this case where the defendant had lists. Some of those things were basically things he felt like he needed to do in order to prevent, you know, there from being issues. He would write things like, "Deal with X." One of those "deal with" was ICBC because ICBC not game, and part of the defendant's scheme was to basically deal with law firms or agree with banks that could potentially result in serious problems for the defendant.

That's the reason why that conduct, which was certainly the basis for the criminal conviction before Judge Kaplan is relevant conduct here in terms of imposing the obstruction of justice offense.

The second reason we listed relates to the evidence of

an attempt to basically discourage a witness from Brittania U from testifying against the defendant. Certainly, that is not a core part of the scheme relating to ICBC. It post dates it in time. While the scheme itself is largely the same --

THE COURT: So what does it have to do with this? How does it obstruct this case?

MR. ROOS: Your Honor, that's a witness who potentially could have been -- the government did not call the witness at trial, to be clear.

THE COURT: Because of conflict issues.

MR. ROOS: Because of conflict issues, and the government felt like -- and I think as your Honor put it, thin to win maybe is sometimes prudent. So we didn't think it was necessary to call that witness or made sense to call that witness in this case.

That said, the defendant made an attempt to discourage that witness from coming forward. The witness could have offered direct proof by the defendant; could have been a 404(b) witness; could have been a witness relevant at the time of sentencing. So we certainly think that is obstructive conduct.

The, to your Honor's last question, I think your Honor is absolutely right that the various lies and misrepresentations that the defendant made in connection with various bail applications to the courts would constitute sufficient conduct to qualify for the obstruction enhancement

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as well.

THE COURT: Then that would go to additional issue of concurrent versus consecutive.

MR. ROOS: That's correct, your Honor.

THE COURT: Let's hold on on that one.

Anything else with the false statements in the bail applications, for example?

MR. ROOS: Well, yes, your Honor. In the context of the bail applications, the defendant -- to be clear, these were written applications through counsel. The defendant never took the stand or anything lying that. But certainly it was the defendant's position throughout that he was a businessman in these applications who needed to return to work.

If your Honor recalls the initial bail application, the argument was made that he had all these deals pending, and if he was just released, he could complete them and pay back ICBC. So certainly there was sort of an attempt to tell the Court that things were not as they seemed, and he was ready to go back to work and obtain money that would make the victims whole. And that's after he was indicted.

THE COURT: Mr. Tulman?

MR. TULMAN: Yes, your Honor.

With respect to the obstruction with respect to Judge Kaplan and the civil matter, it is our position that the obstruction guideline distinguishes between affirmative conduct

to obstruct an investigation. While it's true that the criminal investigation does not necessarily have to be in existence, the conduct in which the individual engages has to be in some way related to that criminal conduct and that it is not an obstruction enhancement to simply take steps to avoid incriminating oneself.

THE COURT: Well, it wasn't just steps to avoid incriminating oneself. It was steps designed to frustrate the civil litigation process to prevent certain facts from being known, and also to chill the victim from, I guess, proceeding with their litigation and with whatever criminal investigation might follow from it. I think that's really the argument, right?

MR. TULMAN: With regard to the latter, your Honor, we have in document 188, the emails are there, I believe. 188 contains the emails, which are the subject matter, I believe, of the government's contention of obstruction, and we just rely upon those documents. They do not appear to indicate obstruction. To the contrary, it was the witness who was to be obstructed who was communicating with Mr. Brennerman. There is an exchange taking place and it is a matter of record. That's document 188, which Mr. Brennerman attached those emails to.

Going back to Judge Kaplan, we maintain and pointed out in the supplemental memorandum that was Mr. Brennerman did not obstruct an investigation; he caused by an investigation by

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his conduct. There was no investigation until the time that he actually engaged in conduct in an effort to perhaps not cooperate in a civil matter, and this is what caused the investigation to take place.

I don't think there is any claim that he ever lied about anything. He didn't take the witness stand and he didn't engage in any other conduct that is described under the guidelines as the kind of conduct that would typically be viewed as being obstructive. So, for that reason, we believe that both of those matters do not rise to the level of obstruction.

With regard to the statement made by his counsel in support of his bail applications and the Court's rejection of those, all we can say in regard to that is Mr. Brennerman maintains that he was a legitimate businessman for a period of years.

THE COURT: Born in the U.K.?

MR. TULMAN: In the U.K.

THE COURT: He was born in the U.K.?

MR. TULMAN: He maintains, your Honor, and it is in his submission that he was born in 1978 and raised between London, New York, and Switzerland primarily by his mother. That is what he maintains, yes, your Honor.

THE COURT: All right. Well, I mean, that's a disputed issue and the jury found that he engaged in visa

fraud, right? Mr. Brennerman makes a number of bail applications even after his conviction in which he asserts facts about his citizenship, right?

MR. TULMAN: That is correct, your Honor, because he maintains it.

THE COURT: He can maintain it all he wants. It doesn't mean I have to credit it, and it doesn't mean I just have to say, well, I guess I've got to take his word for it, right?

MR. TULMAN: Well, your Honor, I know there are documents, passports, other immigration documents which tend to indicate he was an English national. Mr. Brennerman is here. He can't do anything other than state what it is that he knows to be the truth, and that is the truth that he maintains.

He further maintains, your Honor, that prior to his being charged in this case, that he had been involved with in excess of $10 billion United States dollars in legitimate deals, financial transactions involving oil and gas and real estate transactions. That is what he maintains. I wasn't there. I don't know. I'm the mouthpiece here, but he is here, and this is what he maintains. It's what he put in writing before I was assigned to this matter. He has not told me that any of this is false, and so this is what he maintains, your Honor.

So, since all of that is in fact true, and since the

statements made in his bail application were true, obviously, there was no obstruction intended and no obstruction involved in any of his bail applications.

THE COURT: Do you want to respond to that, Mr. Roos?

MR. LANDSMAN-ROOS: Well, in terms of the facts of the bail application, as your Honor pointed out, we see it differently, and we think the proof at trial was different.

One thing I want to highlight about the case before Judge Kaplan, and to add to Mr. Tulman's comment about, you know, the defendant didn't obstruct. He actually sort of exposed himself to law enforcement, that argument is nonsensical, the idea that once the defendant is caught, and his acts obviously are what led to his being caught in some form, therefore, there could never be obstruction.

Here, there were a number of steps the defendant took, including writing things in pleadings, like -- and this is not from a lawyer. He's writing things himself, things like "the company you're looking for doesn't exist any more" or "I'm not the director of that entity." All of these things were designed to obscure the picture, to deter creditors, and ultimately authorities that would investigate the defendant and hold him accountable for his fraud. So I think this is ample evidence for this enhancement.

THE COURT: I am persuaded that obstruction of justice is warranted here several times over. I do think that the

conduct taken in the civil action before Judge Kaplan would alone suffice to establish obstruction of justice of this case and this investigation. It was designed to prevent the victim from being able to proceed with recourse in the U.S. legal system.

But it's more than that. I think the bail applications both before and after trial persisted in portraying Mr. Brennerman as a person who was born in the U.K. and had different immigration status there than I think was demonstrated at trial. Certainly, his attempts to manipulate a potential witness to either come forward or not come forward with information favorable or unfavorable to Mr. Brennerman by making false statements about his being in the hospital, his having family issues that prevented him from paying back what was owed. I think all of that was designed to manipulate witnesses so that they would not come forward, not cooperate with the government, and not be available either at trial, at bail hearings, or at sentencing. So I think all of that is sufficient to justify an enhancement here.

The only question for me, which we'll get to in a minute, is whether or not there is a good reason to make the sentences here consecutive sentences in this case and the sentence before Judge Kaplan consecutive as opposed to concurrent. But I think without question a two-level enhancement for obstruction is warranted, so I will impose that

as well. So that puts us at level 33

The guidelines for the fourth count, the conviction for the visa fraud are ultimately of no moment here, just because they're so much lower. Let me just find the presentence report.

So according to the presentence report, the guidelines for Count Four, which is grouped separately, are base offense level of 8, no additional enhancements given the distance between level 33, which is the wire fraud guidelines, and level 8, which is the visa fraud guidelines, there is no additional enhancement for the visa fraud. So, that puts us at level 33.

The only conviction Brennerman has is his conviction for criminal contempt before Judge Kaplan, and probation has deemed related to this, and, therefore, doesn't count as criminal history, so it results in no criminal history points.

The government agrees with that?

MR. ROOS: Yes, your Honor.

THE COURT: I assume, Mr. Tulman, you do not disagree with that?

MR. TULMAN: Not at all, your Honor.

THE COURT: That us then at a level of 33, Criminal History Category of I, which results in a guidelines range of 135 to 168 months, which is basically 11 to 14 years. Those are the guidelines.

Now, the guidelines are just one factor the Court has

to consider, Mr. Brennerman. There are other factors as well. I think you know this, but I will remind you what the other factors are. In addition to the guidelines, I have to consider, first of all, your own personal history, the facts and circumstances of your life. I have to also consider the facts and circumstances of this crime, or these crimes, which are serious crimes. So, it's important that the sentence I impose reflects the seriousness of the crime; that it promotes respect for the law and provides just punishment for the crimes. So I have to tailor the sentence both to you as an individual and to the particulars of these crimes. I have to consider the need to deter or discourage you and others from committing crimes like this in this future. That is the hope that by imposing sentence on you to today, I will send a message to you and others that this conduct won't be tolerated; that the consequences are severe, and hopefully you and others will think twice before ever doing it again.

That is the hope. I don't have a crystal ball. I can't know for sure what impact my sentence will have on your future behavior or on anybody else's. I have to use my best judgment nonetheless. Sometimes that means looking at how a person responds when confronted with their prior bad conduct in the past, whether it chills them or deters them from doing it again. So I have to consider that, and I will consider that.

I have to consider your own needs while you're in

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custody. That means taking into account your medical history, your psychological, your substance abuse history, your need for treatment, your need for job training, your need for other opportunities while in prison. Those are things that courts have to consider; to make sure that when a person is released, they're in a position to succeed, to avoid mistakes that got them tied up with the criminal justice system in the first place.

Then, finally, the last factor that I have to consider is the need to avoid unwarranted sentencing disparities among similarly situated people. That is kind of a fancy way of saying that before I impose a sentence on you in this case, I have to make sure that that sentence is consistent with or in line with sentences imposed on other people who have engaged in similar conduct and who have similar histories.

Now, no two people are exactly alike, but where there are strong similarities between conduct and histories of defendants, then the sentences should be similar. Otherwise, it might encourage disrespect for the law, and it would look arbitrary. So that is another factor I have to consider.

So, my job is to balance all of those different factors and to come up with a sentence that I think is appropriate in light of all of them. Sometimes that's hard to do because some of these factors are sometimes in tension with one another, and so it requires some judgment and experience.

And that is certainly what I will try to bring to bear as I decide what is an appropriate sentence.

So what we are going to do going forward is I'm going to hear from the attorneys on these other factors. We've talked about the guidelines. I've made my findings under the guidelines, but I want to hear from the lawyers further on these other factors. They've touched on them in their submissions, but I will give them a chance now to speak more fully. We will begin with Mr. Tulman. I will then hear from the government. After that, I will hear from the victim if the victim wants to be heard. Then after that, I will give you, Mr. Brennerman, an opportunity to address the Court if you'd like. OK?

Mr. Tulman.

MR. TULMAN: Your Honor, there have been voluminous submissions in this case.

THE COURT: I would say that's a fair characterization.

MR. TULMAN: So I will be brief because so much of it is there in papers. Mr. Brennerman, for example, in document number 175, his presentence memorandum, in part two of his memorandum, page 5, summarizes his background and history, and in there maintains that he had been involved in excess of $10 billion in legitimate financing transactions in the oil, gas, and real estate business. He has no prior criminal

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history. He has no history of violence.

THE COURT: Well, no history of violence I think that we can agree on. I'm not sure the government is going to agree that he has much experience in the oil and gas business as you've just articulated.

MR. TULMAN: I am speaking to what Mr. Brennerman maintains, and in the presentence report what it says is that matters are largely uncorroborated, and this is what Mr. Brennerman maintains.

I would say this, Judge. It is always a difficult situation for counsel at a time of sentencing to ask or make a recommendation for any kind of sentence at a time when the defendant maintains his innocence of the allegations.

I can say that under the New York State law, had he been convicted in the state courts of grand larceny in the first degree, which is what this would be, a larceny by false pretenses of which he stands convicted, the maximum sentence permissible under the law would be an indeterminate sentence of eight and a third to 25 years for a larceny in excess of $1 million obtained under false pretenses. We're obviously not in the state court.

All I can say then is this, Judge: Mr. Brennerman has requested that a sentence of time served be imposed upon him. And the reason why that sentence of time served is appropriate is because the claim is that he is an innocent person. If your

Honor agreed with that, the rulings on the Rule 29 and Rule 33 perhaps would be different than they are in this case. The Court perhaps would have granted the adjournment; that is, a standing request for adjournment of sentencing. We know the Court has denied it. Mr. Brennerman maintains that if the Court only had the documents from ICBC, which he maintains had been concealed by ICBC, then the truth would be clear that there was no fraud involved in this case at all, and that the puffery and statements that were made by him were wholly immaterial to the issue of the loan in question in this case with regard to ICBC.

So I am not going to make any kind of recommendation myself other than to echo Mr. Brennerman's hope that the Court would appreciate that he has already been sentenced by Judge Kaplan; that for a person who has never been incarcerated before, the harsh conditions of confinement are particularly, particularly difficult for him; that he is now 40 years old; he has family and responsibilities at home; and so for that reason, he would request a sentence of time served. Thank you.

THE COURT: All right.

Mr. Roos, anything you'd like to say in response or just more generally about the factors related to sentencing?

MR. ROOS: Certainly, your Honor.

And, like Mr. Tulman, I won't belabor it. I know your Honor has a great deal of paper, including multiple submissions

from us, but I want to pick up where defense counsel started, which is with the claim that the defendant has $10 billion worth of legitimate prior oil, gas, and real estate experience which is what he said in his submission. I think that is just one example of many examples in his submissions and his post conviction filings where the defendant has really just doubled down on lies, lies that were proven to be falsehoods at the time of trial, various lies that seemingly almost have no importance other than the fact that they've been subsequently been proven false: Where the defendant is from, what his background is, whether his family had a role in the gas and oil industry in the United States; defendant's claim that he has a not-for-profit that helps people come to the United States from Eastern Europe, to assist them in getting an education. All of these things, some of them material to the fraud that he perpetrated against ICBC and attempted on Morgan Stanley or the various other individuals outlined in our sentencing submission, some of them not material at all, but what they do show as a common theme is that the defendant is relentless in pursuing this false narrative about himself and his business. And why that matters, I think it really goes to the question of specific deterrence and the possibility of recidivism and why a guideline sentence is appropriate. And the defendant has done nothing to suggest that he has accepted responsibility; that he's remorseful; that he won't do it again; that he's changed

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his habits; that upon release, he won't go back to the same bills.

In fact, I think the evidence suggests the opposite, which is that the defendant is very likely to be released from prison at some point, and then restart the fraud; return to oil and gas and maybe some different business that he will come up with and attempt to pursue victims to obtain money. Certainly we hope that his conviction, at least under the names that are on the indictment, will prevent future victimization of banks or individuals or investors, but a lengthy and a serious sentence is certainly necessary to disable this defendant from doing that anytime son.

So that is the primary reason why the government thinks a guideline sentence is appropriate. Your Honor also has our points about the seriousness of the offense, the nature of the defense; but unless your Honor has questions, we will otherwise rest on our submissions.

THE COURT: I guess I have questions about forfeiture and whether the sentence should be consecutive or concurrent.

MR. ROOS: Certainly, your Honor.

So, on the question of forfeiture, the government seeks an imposition of forfeiture in the amount of $4.4 million related to the ICBC fraud, and then $800,000 relating to the fraud on Brittania U. The government would ask the Court to impose specific forfeiture, and if the Court agrees with this

recommendation, we can submit an order as to these two specific property items.

Number one, the defendant's watch that was a piece of evidence at trial, which is worth thousands of dollars. The government proposes that that be forfeited towards the sum of forfeiture that I've identified.

THE COURT: That's the watch that was purchased with the proceeds from the loan.

MR. ROOS: From the ICBC, that is correct. The second is the $100,000 that was posted as bail money. This is in various things that your Honor has seen previously, but to sort of recap, the defendant shortly before his arrest received $800,000 from Brittania U. Brittania U was told they were investing in an oil and gas project in Africa. The defendant used the money very quickly to pay for various luxury items, personal expenses, and then ultimately some of it for legal expenses, in particular, the posting of his $100,000 bail in the case before Judge Kaplan.

This fact is not really controverted. First of all, there are bank records. I brought them here today that clearly show the deposit of $800,000 into an account called Blacksands, the near-intermediate transfer in multiple hundred thousand dollars increments into an account name of Raheem Brennerman, and then the use of those funds, including a payment to American Express cards which are then used to pay his bail.

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And the reason we know that is because in the case before Judge Kaplan, there was a litigation dispute between whether that money should go back to Mr. Brennerman or to his prior counsel, because Mr. Brennerman apparently assigned or his prior counsel claims to have assigned that hundred thousand dollars in the event it was returned back to counsel. And in the pleadings in that, the pleadings indicate --

THE COURT: Wait. In the pleadings in what?

MR. ROOS: In the Judge Kaplan case. The pleadings by Mr. Brennerman's prior counsel indicate that the payment came out of the accounts that we're talking about here. So, there's a very straight tracing from the funds that came from Brittania U to what ultimately was posted as bail, to the money that recently in October was returned to Mr. Brennerman's prior counsel.

So the government would ask as a second item of specific forfeiture, and, again, we would give your Honor an order if you were to find this way, that the one hundred thousand dollars that was previously posted as bail and then given to prior defense counsel be forfeited.

THE COURT: Wait. The hundred thousand dollars was already -- there was a hundred thousand dollars posted, and that money now is reverted former defense counsel?

MR. ROOS: Thompson Hine.

THE COURT: And so that might be why Ms. Fritz is

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here.

MR. ROOS: That's correct. That's my understanding.

THE COURT: But you're asking then for the specific property that was posted as bail to be -- that now is in the possession of a third party to be covered by a forfeiture order.

MR. ROOS: Correct, your Honor.

THE COURT: All right. And then the third party can fight this out later, I suppose, right?

MR. ROOS: That's correct, your Honor. Generally, my understanding the way it would work would be that the Court imposes a forfeiture order, and that that effectively the third party is a claimant who would then make an application on to the forfeited property.

THE COURT: But the $100,000 is related to what Brittania U gave to Mr. Brennerman, right?

MR. ROOS: That's correct, your Honor.

THE COURT: You're saying that that is covered by this indictment?

MR. ROOS: Well, your Honor, our view is that it's part of the defendant's overall scheme. Your Honor is absolutely correct, that the defendant was not convicted of this issue.

THE COURT: He wasn't charged with this, right? It's not in the indictment, is it?

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MR. ROOS: So the indictment on this question is general. That is a question your Honor posed to us a number of months ago, and we at the time elected not to proceed on this question. I do think the temporal range in the indictment and the description would cover this conduct.

THE COURT: Well, it certainly doesn't name Brittania U.

MR. ROOS: That's correct. I don't think that's necessary in terms of --

THE COURT: Brittania U is not a financial institution, right?

MR. ROOS: Correct.

THE COURT: So where, for instance, would it be in the indictment?

MR. ROOS: It would be the wire fraud conspiracy, your Honor.

THE COURT: But, I mean, it doesn't say anything --

MR. ROOS: Your Honor is absolutely right. They're not named in the indictment. Our view is they are covered by the temporal period, and there is no obligation on the government to identify every victim in the indictment.

THE COURT: The temporal period being 2011 up to and including the present.

MR. ROOS: Correct.

THE COURT: All right. But so the $100,000 -- this

could have easily been charged as a separate fraud, right?

MR. ROOS: That's right, your Honor.

THE COURT: I suppose it still can. The statute of limitations hasn't run, right?

MR. ROOS: Yes, I believe -- I have to think through if there was a jeopardy issue, but otherwise your Honor is absolutely correct, the statute has not run.

THE COURT: Well, maybe a jeopardy issue whether or not the indictment covers this?

MR. ROOS: That's right, your Honor.

THE COURT: I don't think there is any basis for thinking the indictment covers this, but you think it may?

MR. ROOS: I think the indictment generally charges that the defendant committed a wire fraud and wire fraud conspiracy between 2011 and 20 --

THE COURT: You think that covers every possible wire fraud he engaged in during that period?

MR. ROOS: I think what's described as the wire fraud is a scheme where the defendant made false representations about an oil and gas, business, which is exactly what he said to Brittania U.

THE COURT: But a different oil and gas business?

MR. ROOS: The same oil and gas business; different project.

THE COURT: Different project, right. So the

indictment talks about Blacksands, right?

MR. ROOS: Right. And that's the entity he used to defraud Brittania U. I think it is in some ways is analogous to if an indictment charged between 2011 and the present the defendant robbed a bunch of banks and at trial the government proved up one of the bank robberies and during that period the defendant --

THE COURT: Well, wait a minute. No. No. Because Count One, which is the conspiracy count, that one is a speaking indictment, right?

MR. ROOS: Right.

THE COURT: The other counts are not.

MR. ROOS: Correct.

THE COURT: And the speaking indictment in Count One talks about financial institutions. It doesn't say that he tried to steal money from anybody who was not a financial institution, does it?

MR. ROOS: I don't believe so, your Honor. I'm not sure that the general language of the speaking indictment does anything that provides notice. I don't know necessarily that those paragraphs bind the government from proceeding on some other theory of the case.

THE COURT: You are trying to get yourself so that you can't prosecute separately for the Brittania U. That seems to be what you're trying to do. You are trying to argue that

you're precluded from separately indicting because jeopardy --

MR. ROOS: No, your Honor. I'm saying I think there is a colorable argument, and this was definitely part of a large scheme where the defendant used very similar, if not the same, materials, the same strategy, the same company, the same entities to defraud Brittania U. If it's not covered by the indictment, then your Honor is correct, there is no jeopardy issue, and we could certainly prosecute the defendant again.

THE COURT: I don't see anything in here to suggest it's covered by the indictment. You think differently?

MR. ROOS: Well, I think our view is that it's covered certainly sufficiently for purposes of forfeiture.

THE COURT: What does that mean? Forfeiture you have to forfeit the proceeds of the crime.

MR. ROOS: Mmm-hmm.

THE COURT: Right. So if that crime is not charged in here, why would it be covered as forfeiture?

MR. ROOS: I guess that then brings us back to the same question of whether or not the indictment covers the charge.

THE COURT: So if I don't agree with you about that, then what does that mean with respect to the $100,000. That was Mr. Brennerman's $100,000, right?

MR. ROOS: Well, if your Honor's view is that it's not --

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THE COURT: Who posted the $100,000?

MR. ROOS: He posted the $100,000.

MS. FRITZ: No. No.

MR. ROOS: If I may, I believe it was posted through his counsel, and there is assignment agreement, or at least a purported assignment agreement. I don't want to weigh in on whether or not it's real or true or correct, but there is an assignment agreement that I believe says, at least in writing, the hundred thousand dollars is then is turned over to Thompson Hine upon release.

So, if your Honor decides that the hundred thousand dollars is not acceptable to criminal forfeiture in this action, I think then there is either no dispute that it is with Thompson Hine or there is perhaps a civil dispute as to whether defense counsel of Thompson Hine has it, and certainly I guess the government could proceed in some sort of separate either criminal or civil action on these funds.

THE COURT: But you haven't to date.

MR. ROOS: Correct.

THE COURT: Did you want to be heard briefly, Ms. Fritz?

MS. FRITZ: I do, your Honor. I just want to clarify the circumstances under which Thompson Hine received those funds and the circumstances under which bail was posted.

This was not posted by Mr. Brennerman. These were

funds that were paid to Thompson Hine prior to there being any fraud charge in place for legal fees. When Judge McMahon then set bail, Mr. Brennerman requested of the firm that it agreed to use those funds received by the firm for legal fees; that it agreed to put those forward as bail pursuant to being assigned. The firm agreed to do that.

All of this was actually explored in front of Judge Kaplan recently. Judge Kaplan ordered the exoneration of bail and the return to Thompson Hine of those funds because they were received by us as legal fees and earned legal fees. So I think that's the clarification with respect to those funds.

We agree with your Honor that under 982, these are not within the scope of the forfeiture allegation. The issue was aired in front of Judge Kaplan --

THE COURT: It wasn't aired in front of him when? At sentencing?

MS. FRITZ: Recently.

THE COURT: It really wasn't relevant to the sentencing, right?

MS. FRITZ: No, it was not relevant to the sentencing. As a matter of fact, at no time, even when that $100,000 was posted, did the government ever raise any issue with respect to the $100,000, but nonetheless recently -- was it two months ago, we filed a motion for exoneration of bail and return of the funds to Judge Kaplan.

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The government had every opportunity at that point to put forth any argument they wanted to, and, again, did not make any motion or assert any basis. Perhaps because this all has to do with this sort of separate Brittania U issue.

So our position is it's not in the scope of 982. No evidence was put forth with respect to it being proceeds of any fraud, much less the fraud charged in the indictment, and that those were properly received by my firm for legal fees.

THE COURT: OK. Mr. Roos, do you want to respond?

MR. ROOS: Just to clarify, your Honor, a few things.

Number one, the funds, the account out of which the funds came was the subject of a seizure warrant, I guess a little too late. That happened in 2017. That warrant was produced in discovery. So certainly this has been a live issue for quite some time.

THE COURT: Well, a seizure warrant in connection with this investigation or something else?

MR. ROOS: That's correct, and what happened before Judge Kaplan.

THE COURT: The seizure warrant was to seize what?

MR. ROOS: The seizure warrant was to seize the funds from the Brittania U fraud. At the time the warrant was executed, the funds in question in question had already been taken out of that account. So the warrant was executed in September and the drawdown happened in June, May.

THE COURT: But the seizure warrant is not this case, right? It was issued in a separate matter, correct?

MR. ROOS: It relates to and identifies --

THE COURT: It's got a mag. docket, right?

MR. ROOS: Certainly, the mag docket.

THE COURT: So magistrate judge issued a seizure warrant for the $800,000 that was the Brittania U.

MR. ROOS: Whatever remained in the account, that's correct.

THE COURT: All right.

MR. ROOS: That's point number one.

The second is I don't think defense or former defense counsel has the record quite right regarding Judge Kaplan. This is an issue we've raised and we have had discussions about repeatedly about the hundred thousand dollars. We asked Judge Kaplan to physically put a hold on it pending your Honor's decision today on forfeiture. Judge Kaplan declined, and that's why it was released back to defense counsel.

THE COURT: Right. He exonerated the bonds.

MR. ROOS: I don't think he was necessarily making any sort of determination as whether or not it was forfeitable, whether or not it was crime proceeds, traceable to the crime or the offense conduct.

THE COURT: All right. But the fact is that the indictment doesn't talk about it, the presentence report

doesn't really talk about it, right?

MR. ROOS: That's correct.

THE COURT: There is nothing in the presentence report about the Brittania U $800,000, right?

MR. ROOS: No, your Honor.

THE COURT: All right. Mr. Tulman, do you want to be heard on this?

MR. TULMAN: No, your Honor, except it seems to me that it would not be forfeitable property in this case. But as a practical matter, Judge Kaplan has already directed that those funds be turned over to Thompson Hine. The matter was resolved. Mr. Brennerman no longer has an interest in those funds.

THE COURT: I don't know whether it has or not been resolved. It seems to me there may be a battle brewing between Thompson Hine and the government whether civil or something else, but I don't think there is anything in the presentence report that would lead me to conclude that that $800,000 are the proceeds of this criminal conduct. That's not to say that the shenanigans that went on with Brittania U and the principals there doesn't constitute obstruction of justice because I think that that person would have been a potential witness and might have offered either 404(b) evidence or might have provided additional evidence of the fictional nature of Blacksands and the other entities controlled by Mr. Brennerman.

So I don't think that this upsets my ruling on obstruction of justice with respect to just that piece of it. There are some many other examples of obstruction of justice that I'm not worried about that two-level enhancement. But I think there is nothing inconsistent in my saying that I am not going to order $800,000 of these proceeds to be part of the forfeiture order. It seems to me the forfeiture order should include what Mr. Brennerman got from ICBC. He didn't really get anything else other than the free checking and perks of minimal value that the government is not seeking restitution or forfeiture on that, right?

MR. ROOS: That's right.

THE COURT: All right. So I'm not going order forfeiture of the whatever is ultimately tracing back to Brittania U. It seems to me if you want to charge Mr. Brennerman with that, you should. If you want to proceed civilly on that property, you should. But I don't think the back door here is the way to do it when there is nothing about it in the presentence report. OK.

And then restitution, you're seeking, what you've asked for is basically 90 days to develop the record further, but the restitution would be what?

MR. ROOS: Well, your Honor, I take it your view would be the same as to Brittania U and any other victims not identified in the PSR?

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THE COURT: Yes. Look, I just don't think -- restitution is to make victims whole. I think that that victim is not here today; has not submitted a victim statement; is not in the presentence report; is sort of a shadow. I don't even think there was talk about it at the bail hearing, and I think there were false statements made, and part of what was going on in connection with bail was designed to make it look like he was a legitimate businessman. But I don't know that I have enough for me to conclude that they are a victim that would be entitled to restitution. Not everybody who's been victimized by a con man gets restitution payments at the sentencing on certain counts of an indictment.

MR. ROOS: Certainly, your Honor. So in that case, restitution should be limited to ICBC. Your Honor has ICBC's submission. So the amount of the loss I believe was $4.4. ICBC's submission identifies interests and costs that have developed since then, which I think would be the appropriate amount for restitution. If Mr. Hessler has an exact figure and your Honor deems it appropriate or as the government has recently offered, we'd be happy to put in a restitution order.

THE COURT: I would think since his submission, the numbers are different now just because of the passage of time, right?

MR. ROOS: Correct, your Honor. So we could certainly work with ICBC to come up with the final number that

incorporates any costs and interests.

THE COURT: That we could do. We have time. Forfeiture we need to resolve today.

Restitution under the law we have additional time to nail that down. So there will be restitution here, no question, but the exact amount I think I'll reserve until I get an up-to-date submission from the government and/or ICBC, and I will give Mr. Tulman a chance to respond. I don't think there should be any mystery if it fist reasonable interests and reasonable expenses associated with being made whole, that would be covered by restitution.

Anything else?

MR. ROOS: Your Honor also wanted to hear about the concurrent versus consecutive question.

THE COURT: Yes.

MR. ROOS: As your Honor knows, and as our submission sets forth in our policy statement which is a recommendation and obviously is not binding on your Honor pursuant to the Second Circuit and Supreme Court case law that's cited in our most recent letter, indicates obviously a presumption under these circumstances in favor of a concurrent sentence.

I think here the argument for consecutive and the one that was set forth by Judge Kaplan was that while, certainly, this is relevant conduct that is relevant to the question of obstruction, there are two different crimes here: One, is a

refusal to follow court orders. The other, and perhaps the motive of that was concealing of fraud, it's really a different type of offense. The defendant chose to go to trial on both of these, which is his right, absolutely. He didn't accept responsibility of neither of them. One of the offenses has a pretty substantial loss amount. It has a victim or victims. The other one, the victim is the Court or justice. And so because there are different harms, different victims, different types of conduct, the government believes, as Judge Kaplan set forth, and pursuant to the various policy statements that the Court should exercise its discretion and impose a consecutive sentence.

THE COURT: Thank you.

Mr. Tulman, do you want to be heard on any of those things?

MR. TULMAN: Briefly, your Honor. The views expressed by the department of probation and the policy guideline in the Sentencing Guidelines we think it appropriate here that the sentence be imposed concurrently.

THE COURT: Mr. Hessler, anything you would like to say beyond what's in your submission? If you do, come up. You can use the lectern there.

MR. HESSLER: Thank you, your Honor.

THE COURT: For the benefit of the court reporter, if you could just state your name and spell your name?

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MR. HESSLER: Paul Hessler, H-E-S-S-L-E-R, on behalf of ICBC London PLC.

Your Honor, thank you for the opportunity to be heard. Based on what I have just heard, I anticipate that your Honor would order restitution to make my client whole. We will work with the government to submit a detailed statement of what that loss is. On that subject, I would just say that I have heard several references to what I would consider a base amount of a $4.4 million loss, which I believe people are conceding of as the net amount of the loss of principal to my client. The net loss to my client of principal is $5 million. And just to be very brief about that, your Honor, the price of entering into the $20 million loan agreement was a $500,000 fee. That amount--

THE COURT: Was earned.

MR. HESSLER: -- was earned and owed to my client in addition to the $5 million principal. The fact is that as a convenience to borrowers in these types of situations, banks net out that fee so that the borrower doesn't have to bring a separate $500,000 check and you hand out $500,000. Just so your Honor is not surprised when you see it, the base amount we will be seeking, plus interest in fees, is $5 million.

Your Honor, the only other thing I wanted to address today was that in the underlying civil litigation in front of Judge Kaplan and in the sentencing submissions and the

arguments that have been made today by the defendant, the defendant continues to attack ICBC, my client, which is to say he continues to attack the victim of his crimes.

He is doing that in multiple ways. One is he continues to maintain a counterclaim against my client in front of Judge Kaplan. We expect to obtain dismissal of that counterclaim through a supplemental motion for sanctions that we intend to file shortly. But the reality is that even today, he maintains a counterclaim seeking $50 million, based on what can only be concluded to be perjured statements that are directly contradicted by witnesses that testified in the trial in front of your Honor, including the owners of the oil field that Mr. Brennerman purported to be dealing with, as well as the representatives of Morgan Stanley who entirely refuted sworn statements that Mr. Brennerman had made in front of Judge Kaplan.

Secondly, your Honor, there is a theme that has been running through the statements and arguments today that my client is hiding documents or somehow undermining the proceedings here. We entirely reject any such notion, your Honor. I don't think there is any claim against my client. I think your Honor has rejected the notion that the defendant is entitled to documents from my client, but we would just like to say as a financial institution that does business in this country that has litigated in front of this court, that my

client never engaged in any conduct to undermine any proceeding in front of this Court, has not hidden anything, and we reject any suggestion or indeed statements of impropriety by my client.

Third, your Honor, there is a statement in one of the sentencing submissions by the defendant that my client misled either this Court or its financial regulators in London because in filing a financial statement in 2015 relating to the calendar year 2014, that my client did not disclose that it had been defrauded by the defendant. And I guess all I would say in regards to that, your Honor, is that we filed a civil case in front of Judge Kaplan in late 2014, December 2014. We maintained that suit as a civil suit for years, and it was not until the very end of that case, indeed, when we got into enforcement, that it became obvious to us, mostly through proceedings by the government that were initiated around that time and the fact my client had been defrauded.

So, again, we just want to state on the record that we reject any of the allegations and any of the direct statements of impropriety by my client.

That's all I have to say unless your Honor has any questions.

THE COURT: No. I will want to see the details just as to what the costs were and what the interest is as far as you're concerned, but I'm sympathetic.

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MR. HESSLER: Thank you, your Honor.

THE COURT: Mr. Brennerman, you have a right to address the Court if you'd like. You are not required to, but you are certainly welcome to.

Is there anything you would like to say before I impose sentence?

THE DEFENDANT: Your Honor, I will be short. I just want to offer my sincere apologies for anything that I may have done wrong. Thank you.

THE COURT: OK. Thank you.

What I would like to do, if it's all right, is take a short recess to collect my thoughts, maybe five minutes. I will then come back, state my sentence, explain my reasons for it, and then formally impose sentence. OK? Is that all right? So just five minutes or so. Thanks.

(Recess)

THE COURT: Thanks for your patience. Let me state the sentence I intend to impose and the reasons for it.

In our system, Mr. Brennerman, judges have to explain themselves. They have to give reasons. I think that's a good thing. I don't think a defendant should ever have to wonder what the judge was thinking. I don't think the defendant's family, friends, or the public should have to wonder either. So we ask our judges to explain themselves. Our proceedings take longer as a result, but I think that's a good thing. It

makes our system transparent and makes it more thorough, which is a good thing generally.

So, this is a case I'm certainly familiar with the facts. There have been a lot of submissions. I sat through the trial. I've sat through lots of hearings and bail hearings, arguments. I've read all the submissions. And I think I come away, unremarkably, to the conclusion, or I come away with the conclusion that you are just an inveterate con man. You're a crook. You are somebody for whom truth has no value. You seem to lie at the drop a hat and indiscriminately even when it's unnecessary just because a well-told lie seems to be attractive to you. But, ultimately, your lies were all designed to get you free and easy money, to allow you to live at a very high level without doing what was necessary to earn those things legitimately, and there were victims that were out serious money because of your willingness to engage in a very elaborate, very, very ambitious fraud.

And the fact that you have perpetuated that fraud throughout, the fact that you continue to insist that you are things that you are not, you continue to pretend you are this legitimate businessman, the fact that you created fictional characters as employees of your companies, that you used the name of a person who actually did exist and whom you did know without her permission pretending that she was an employee, the fact that you had used law firms that were legitimate law firms

and had brochures made up and milked people with real knowledge so that you could make your submissions and your glossy brochures more realistic is just, I think, further indication of just how selfish you are and how utterly dismissive you are of people, of institutions, of courts, of laws, of rules of just sort of basic human decency. You are just -- you're a liar. You are among one of the most dishonest people I've encountered. So shame on you.

So, what's the right sentence? Candidly, I have no hesitation to sentence you within the guidelines range, and inexplicably to me, probation has recommended a sentence below the guidelines. I don't see any reason for it. I certainly intend to sentence you within the guidelines.

The harder part for me is whether it should be consecutive or concurrent. Ultimately, I don't know that it makes that much difference. If I were told that it should be concurrent, then I think would give you the high end of the guidelines range, 14 years. But I think Judge Kaplan makes a good point; I think the government makes a good point; that the time should be consecutive because the harms caused in Judge Kaplan's case were real. Not everybody engages in a wholesale assault of the civil criminal justice system the way you did. A lot of people, even people who get obstruction of justice points in criminal cases, are not so arrogant and so disrespectful as to engage in a wholesale fraud on the court in

civil litigation in an effort to utterly thwart the wheels of that system.

So Judge Kaplan was, I think, right when he was incensed at and he sentenced you to two years for the monkey business and shenanigans that you engaged in in the civil litigation system of the federal courts, because you've used that system as an important one that allows people with real disputes to have those disputes resolved with judges and laws and rules of civil procedure that are designed to resolve actual disputes. And you were determined to absolutely frustrate that entire process.

So I am comfortable basically sentencing you to 12 years here, with the two years Judge Kaplan imposed consecutive. If that ever came back to me, I'd give you 14 because if it was all baked in together, I think at the end of the day, 14 for all of this strikes me as appropriate. You are incorrigible. You're unrepentant. You will do this again, I'm convinced, the minute you get out. My only hope is that 14 years in jail will maybe mellow you to the point where you just decide this isn't worth it, but I'm not hugely confident of that. And I imagine wherever you end up, you'll just do it again because you strike me as somebody who enjoys this, who enjoys this.

So the sentence I intend to impose is 12 years consecutive to the two-year term imposed by Judge Kaplan, to be

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followed by a term of supervised release of three years with conditions that I will set forth in a moment.

I am going to order forfeiture, but forfeiture in the amount of $4.4 million, which is what you received net. I will order restitution, but that's going to be at a later date after submissions from the victims.

I am also going to impose a $400 special assessment. That's mandatory. That has to be paid promptly.

That's the sentence I intend to impose.

Is there any legal impediment to my imposing that sentence? Mr. Roos?

MR. ROOS: Well, your Honor, I think it's clear from what you've already said about consecutive versus concurrent, but as you know from our submission, the Second Circuit has said the District Court must consider the policy recommendation in Section 5G --

THE COURT: No, I've considered all of that in spades, and I think because I do think that these are different harms. One might disagree. One might say that Judge Kaplan's entire case is really baked into mine. I don't agree with that because I don't think everybody who engages in a wire fraud or bank fraud conspiracy or visa fraud conspiracy necessarily engages in a massive fraud in civil court in the United States District Court. So I think that the harms are distinct.

But if anyone disagreed and thought that they are not

distinct, that this is all one thing, then my calculation would probably be a little different, but I'm segregating out the obstructions here which are particular to this case and the separate harms that prompted the criminal contempt case before Judge Kaplan, which is really focused on the abuse of the civil process, the refusal to follow court orders and the federal rules of procedure.

So I think that does it. I hope that does it. But that's the sentence that I intend to impose.

Is there any legal impediment to my imposing that sentence otherwise?

MR. ROOS: No, your Honor.

THE COURT: Mr. Tulman?

MR. TULMAN: No. And we accept -- of course we disagree with your Honor's reasoning -- but otherwise, there is no impediment.

THE COURT: Mr. Brennerman, let me ask you to stand.

Mr. Brennerman, as a result of the jury's guilty verdicts on all four counts, I sentence you as follows:

I sentence you to a term of incarceration of 12 years concurrent on each count. Actually, Count Four is a maximum of ten years. So Count Four would really be much, much lower separately, but I guess it doesn't really matter. It's a 12-year total sentence. 144 months on Counts One, Two, and Three, 120 months on Count Four, all to run concurrent, but

consecutive to the undischarged term that was imposed by Judge Kaplan in 17 CR 155.

I'm going to impose three years of supervised release to run concurrently on all four counts of conviction. That will include the mandatory conditions set forth in the presentence report.

You cannot commit another federal, state, or local crime.

You cannot use a controlled substance.

You cooperate in the collection of DNA; that you comply with lawful directives of the immigration authorities.

There are standard conditions, 13 in all. You must follow those as well.

There are special conditions that will include that you provide any requested financial information to the probation officer; that you not open new credit charges or open additional lines of credit without the approval of the probation officer.

I'm ordering forfeiture in the amount of $4.4 million. That's the proceeds of the crimes as charged in the indictment. I'm also going to order restitution, but on a schedule I will ask the government to make a submission in 45 days. Is that all right?

MR. ROOS: Certainly, your Honor.

THE COURT: You will coordinate with the victim on

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that.

Then there is a $400 special assessment. That's mandatory.

Any recommendations you'd like me to make, Mr. Tulman?

MR. TULMAN: Two things, your Honor. I would request on behalf of Mr. Brennerman of the Bureau of Prisons that he be designated to an institution out west in California. Mr. Brennerman apparently has ties there.

THE COURT: I'll make that recommendation.

MR. TULMAN: And the second thing, your Honor, is that in the letter motion seeking the request for an adjournment of sentencing, I also included a request on my part that following the sentencing and filing a notice of appeal in this matter that I be relieved as counsel.

THE COURT: Yes, I will grant that request after the period for filing notice of appeal has passed.

Mr. Brennerman, you have the right to appeal this sentence. I think you're aware of that. If you wish to appeal, you would need to file a notice of appeal within two weeks. I'm going to ask Mr. Tulman to assist you in filing that notice of appeal. After that, he will be relieved. If you wish to appeal and wish to have counsel appointed for the purpose of appeal, you can let me know that or let the Court of Appeals know that, and counsel will be appointed. OK?

All right. Anything else we should cover today?

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MR. ROOS: No, your Honor.

THE COURT: No. Good luck to you, Mr. Brennerman.

Let me thank you the marshals, and let me thank the court reporter as well.

Thanks.

(Adjourned)