UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 18-1033 (L); 18-1618 (Con)

Caption [use short title]
United States of America

Motion for: Motion to Recall Mandate

v.

The Blacksands Pacific Group, Inc., et. al (Brennerman)

Set forth below precise, complete statement of relief sought:
Motion to recall mandate to allow panel Court to correct erroneous disposition creating disparity with Defendant - Appellant Raheem J. Brennerman

MOVING PARTY: Raheem J. Brennerman **OPPOSING PARTY:** United States of America

☐ Plaintiff ☑ Defendant
☑ Appellant/Petitioner ☐ Appellee/Respondent

MOVING ATTORNEY: Raheem J. Brennerman Pro Se **OPPOSING ATTORNEY:** Robert B. Sobelman, Esq.

[name of attorney, with firm, address, phone number and e-mail]

Reg. No. 54001-048
LSCI Allenwood, PO Box 1000
White Deer, PA 17887-1000

US Attorney Office
One St Andrew's Plaza
New York, NY 10007

Court- Judge/ Agency appealed from: Hon. Lewis A. Kaplan

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☐ Unopposed ☐ Opposed ☑ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☐ No ☑ Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUCTIONS PENDING APPEAL:

Has this request for relief been made below? ☐ Yes ☐ No
Has this relief been previously sought in this court? ☐ Yes ☐ No
Requested return date and explanation of emergency:

Is oral argument on motion requested? ☑ Yes ☐ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☐ Yes ☑ No If yes, enter date:

Signature of Moving Attorney:

/s/ Raheem J. Brennerman **Date:** 12/29/2020 Service by: ☐ CM/ECF ☑ Other [Attach proof of service]

Raheem J. Brennerman
Reg. No. 54001-048
LSCI-Allenwood
SPECIAL MAIL - OPEN IN THE
PRESENCE OF INMATE
P. O. Box 1000
White Deer, Pa. 17887-1000

Honorable Debra Ann Livingston
Chief Judge
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

with copy to:

Clerk of Court
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

December 29, 2020

BY CERTIFIED FIRST CLASS MAIL
URGENT CORRESPONDENCE

Regarding: United States v. The Blacksands Pacific Group, Inc., et. al., Appeal Docket No. 18-1033 (L); 18-1618 (Con)
Erroneous Disposition creating disparities with Defendant-Appellant Brennerman
Request-To-Recall Mandate

Dear Judge Livingston:

I, Defendant - Appellant Raheem J. Brennerman ("Brennerman") respectfully submit this correspondence as supplement to the November 23, 2020 correspondence docketed at Appeal No. 18-1033, doc. no. 332, in respect of the erroneous disposition at the above referenced appeal particularly the disparities created by the erroneous disposition. I am currently incarcerated at LSCI-Allenwood arising from the criminal case from which the above referenced appeal arose.

I am writing to you in the first instance, out of an abundance of respect for the Court, to bring your attention to the disparities created by the erroneous disposition and to allow panel Court to correct the disparities. (See "OSRecovery" and "Scrimo")

In OSRecovery, the Second Circuit U.S. Court of Appeals vacated civil contempt adjudicated by Judge Lewis A. Kaplan ("Judge Kaplan") against a party who was not part of the civil case. OSRecovery, Inc., v. One Groupe Int`l, Inc., 462 F.3d 87, 90 (2d Cir. 2006). In vacating the contempt order the Court of Appeals stated directly to Judge Kaplan that the Court abused its discretion by holding a non-party in civil contempt propounded against him solely for the purpose of discovery without providing any legal authority or clear explanation for doing so. In 2016, Judge Kaplan ignored the law and held Brennerman, a non-party who was not involved in the underlying case, ICBC (London) PLC v. The Blacksands Pacific Group, Inc., in contempt without providing any legal authority or clear explanation. ICBC (London) PLC v. The Blacksands Pacific Group, Inc., 15-cv-70 (LAK) (See 15-cv-70 (LAK), Dkt. No. 139-140). This time, Judge Kaplan went a step further and referred Brennerman to Manhattan prosecutors to be prosecuted criminally. The prosecution undertook no diligence or investigation prior to initiating criminal contempt charges against Brennerman.

During trial of the criminal contempt of court case, Judge Kaplan permitted the prosecution to present to the jury the civil contempt order erroneously adjudged against Brennerman which was in tension with the law. See 17-cr-155 (LAK), Trial Tr. 3-7. Such presentment significantly prejudiced Brennerman, because the Judge allowed the presentment of an erroneously adjudged civil contempt order as evidence to the jury (that concluded that Brennerman must be guilty of criminal contempt), without allowing Brennerman to present the background to the adjudication of the civil contempt order. See 17-cr-337 (RJS), Dkt. No. 236, Exhibit 3.

The question of whether the civil contempt order was properly admitted against Brennerman goes beyond a simple analysis of Rules 403 and 404(b) of the Federal Rules of Evidence. Brennerman was a non-party in the civil lawsuit at the time of the order. Because the order was erroneously adjudged against him, its erroneous admission had more serious legal implication above and beyond an abuse of discretion analysis.

The Second Circuit had previously held that "because the power of a district court to impose contempt liability is carefully limited, our review of a contempt order for abuse of discretion is more rigorous than would be the case in other situation in which abuse-of-discretion review is conducted." Hester Indus., Inc. v. Tyson Foods, Inc., 160 F.3d 911, 916 (2d Cir. 1998). "Moreover, we think it is fundamentally unfair to hold [a non-party] in contempt as if he were a party without legal support for treating him, a non-party, as a party but only for the purpose of discovery." OSRecovery, Inc., 462 F.3d 87, 90 (2d Cir. 2006). In OSrecovery, the Second Circuit court had found that the district court abused its discretion by holding a person "in contempt as a party without sufficient explanation or citation to legal authority supporting the basis upon which the court relied in treating [him] as a party --- for discovery purposes only --- despite the fact that [he] was not actually a party." Id. at 93.

Here Judge Lewis A. Kaplan (the same district judge whose contempt order the Second Circuit found inappropriate in OSRecovery) held Brennerman in civil contempt as a non-party and failed to provide any legal authority or present any particular theory for treating him as a party solely for the purpose of discovery. See ICBC (London) PLC v. The Blacksands Pacific Group, Inc., 15-cv-70 (LAK) (S.D.N.Y. 2015) at Dkt. No. 139-140. No court order, subpoenas, or motion to compel were ever directed at Brennerman personally nor was he present during the civil case`s various proceedings.

The erroneous admission of the civil contempt order was more than an evidentiary error. It violated the Second Circuit court`s instructions concerning contempt order against non-parties. On appeal, the Second Circuit affirmed district court`s ruling creating disparity with the Second Circuit`s treatment and review of such orders (Judge Rosemary S. Pooler that issued the opinion in OSRecovery was also on the panel Court that affirmed district court`s ruling that created disparity with the Second Circuit`s treatment and review of such orders) and deprived Brennerman his Constitutional right to an equal protection guarantee.

The panel Court`s disposition created other disparities and issues as highlighted within the appended Petition for writ of Certiorari submitted to the Supreme Court of the United States at "Exhibit 7"

The above is respectfully submitted in an endeavor to allow panel Court to correct its erroneous disposition and the disparities arising from such erroneous disposition, particularly given that the formal request for panel rehearing/rehearing en banc was denied. I am writing to you Pro Se as one of the panel Court judges recently granted permission for my counsel to withdraw from continuing to represent me.

Dated: December 29, 2020
White Deer, PA 17887-1000

RESPECTFULLY SUBMITTED

/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Defendant - Appellant

Cc: REDACTED

Below is a summary of the various excerpts from the civil and criminal case record referenced above and appended to this addendum correspondence

Mandate including Summary Order by panel Court is appended as "Exhibit 1"

Second Circuit disposition in "OSRecovery, Inc., v. One Groupe Int`l, Inc., 462 F.3d 87, 90 (2d Cir. 2006) as "Exhibit 2"

Civil case, in ICBC (London) PLC v. The Blacksands Pacific Group, Inc., 15-cv-70 (LAK), Dkt. No. 139-140 as "Exhibit 3"

Criminal case, 17-cr-155 (LAK), Trial Tr. 3-7 as "Exhibit 4"

Criminal case, 17-cr-337 (RJS), Dkt. No. 236, Exhibit 3 as "Exhibit 5"

Petition for a writ of Certiorari as "Exhibit 6"

Correspondence dated November 23, 2020 submitted to Chief Judge Debra Ann Livingston as "Exhibit 7"

EXHIBIT 1

Mandate and Summary Order

MANDATE

18-1033(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. 18-1033, 18-1618

RAHEEM BRENNERMAN,

Defendant-Appellant,

THE BLACKSANDS PACIFIC GROUP, INC.,

Defendant.

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

Appearing for Appellee: Danielle Renee Sassoon, Assistant United States Attorney
(Nicholas Tyler Roos, Robert B. Sobelman, Anna M. Skotko,

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 (Kaplan, *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 May 21, 2018, judgment of conviction entered in the United States District Court for the Southern District of New York (Kaplan, *J.*), sentencing him principally to 24 months' imprisonment followed by 3 years' supervised release. Following a jury trial, Brennerman was convicted of two counts of criminal contempt, in violation of 18 U.S.C. § 401(3). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

On appeal, Brennerman argues that the district court committed reversible error by: (1) denying his motion to compel compliance with a subpoena that sought the production of certain documents from the Industrial and Commercial Bank of China's London branch ("ICBC"); (2) making improper evidentiary rulings; (3) denying his second Rule 33 motion as untimely; and (4) imposing a procedurally and substantively unreasonable sentence. He further argues that he received constitutionally deficient assistance of counsel.

I. ICBC Subpoena

Rule 17 of the Federal Rules of Criminal Procedure governs the issuance of trial subpoenas in criminal cases. A decision to deny, quash, or modify a subpoena "must be left to the trial judge's sound discretion" and "is not to be disturbed on appeal unless it can be shown that [the district court] acted arbitrarily and abused its discretion or that its finding was without support in the record." *In re Irving*, 600 F.2d 1027, 1034 (2d Cir. 1979).

We find that the district court appropriately concluded that Brennerman failed to effect service of the subpoena on ICBC as required by Rule 17(d). Significantly, Rule 17 provides that "[t]he server must deliver a copy of the subpoena to the witness." Fed. R. Crim. P. 17(d). In an attempt to serve the subpoena, Brennerman sent a copy to ICBC's New York-based attorney in the underlying civil case, not to ICBC's London branch. This plainly did not comply with the rule.

To the extent Brennerman argues that the government was required to retrieve the documents for him, that argument is also meritless. ICBC is not an agent of the government, and therefore the prosecution was under no obligation to make efforts to obtain information beyond what it previously collected and turned over to Brennerman. *Cf. United States v. Yousef*, 327 F.3d 56, 112 (2d Cir. 2003).

II. Evidentiary Rulings

Brennerman next challenges the exclusion of certain evidence concerning settlement discussions with opposing counsel in the civil case, as well as documents Brennerman purportedly provided to ICBC in 2013. He also argues that the district court improperly admitted the redacted civil contempt orders.

"We review a district court's evidentiary rulings under a deferential abuse of discretion standard, and we will disturb an evidentiary ruling only where the decision to admit or exclude evidence was manifestly erroneous." *United States v. McGinn*, 787 F.3d 116, 127 (2d Cir. 2015) (internal quotation marks and citation omitted). "Under Rule 403, so long as the district court has conscientiously balanced the proffered evidence's probative value with the risk for prejudice, its conclusion will be disturbed only if it is arbitrary or irrational." *United States v. Awadallah*, 436 F.3d 125, 131 (2d Cir. 2006).

As to the settlement discussions, Brennerman argues that the district court should have allowed him to introduce certain evidence of those discussions because it showed he was acting in good faith to comply with the court's orders. But we disagree with Brennerman's characterization of the record. The record shows that the district court did allow Brennerman to introduce evidence concerning settlement discussions on the condition that he establish his knowledge of the substance of the exhibits and their relationship to the relevant time period. At the end of trial, the district court admitted those exhibits for which the connection was made. Also, through cross-examination, Brennerman was able to introduce evidence about the parties' settlement discussions. In summation, defense counsel relied on that evidence to argue that Brennerman did not willfully disregard the orders. In our view, the district court did not abuse its discretion in admitting some but not all of this evidence, and Brennerman has failed to point to any specific evidence that would have helped his case had it been admitted.

Brennerman's challenge to the district court's exclusion of documents he turned over to ICBC in 2013 also fails. Such evidence, Brennerman argues, would have cast doubt on his willfulness on his behalf in disobeying orders, because it would have shown that he did not realize he had to re-produce documents that ICBC already possessed. But, as the district court aptly noted, the documents were evidently provided to ICBC long before the civil case began, and were only minimally response to ICBC's discovery requests, so their production was not probative at all of Brennerman's compliance with those discovery requests and subsequent court orders.

Finally, with respect to the admission of the redacted contempt orders, we find no error. As the district court correctly determined, the civil contempt orders were relevant to Brennerman's willfulness. To minimize any potential prejudicial effect, the district court redacted portions of the orders and instructed the jury on the limited purposes for which it could consider the civil contempt orders in the context of a trial about criminal contempt. Thus, the district court appropriately accounted for the probative value of the evidence as well as its potentially prejudicial effect, and we cannot conclude that its decision was arbitrary, irrational, or manifestly erroneous.

III. Rule 33 Motion

Brennerman first filed a Rule 33 motion on February 14, 2018, which was denied without prejudice in the event that he were to terminate counsel and proceed pro se. Brennerman elected to proceed without counsel on February 26, and on February 28, 2018 he filed another Rule 33 motion. He then filed what he styles as an amended Rule 33 motion on March 26, 2018, also pro se. On appeal, Brennerman challenges the district court's denial of his March 26 motion as untimely.

A Rule 33 motion for a new trial on grounds other than newly discovered evidence must be filed within fourteen days after the verdict. Fed. R. Crim. P. 33(b)(2). Pursuant to Rule 45(b)(1)(B), however, this time limit may be extended if the moving party failed to act because of "excusable neglect." Fed. R. Crim. P. 45(b)(1)(B). When, as here, a defendant does not raise an argument below, we review for plain error. *United States v. Alcantara*, 396 F.3d 189, 207 (2d Cir. 2005.)

Brennerman concedes that his March 26 motion was untimely, but he argues excusable neglect because his counsel withdrew. We are not convinced that Brennerman's justification is sufficient for a finding of excusable neglect. Brennerman was permitted to proceed pro se on February 26 and nonetheless timely file his February 28 motion. Nor is there any allegation that the information contained in the March 26 motion was newly discovered. Accordingly, because the delay was not justified, the district court did not err—let alone plainly err—by denying the March 26 motion as untimely. In any event, the district court addressed the merits of Brennerman's motion.

IV. Sentence

Brennerman further challenges the procedural and substantive reasonableness of his sentence. A district court commits procedural error if it fails to calculate the Guidelines range, makes a mistake in its Guidelines calculation, treats the Guidelines as mandatory, does not consider the Section 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact. *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). Facts in support of a sentencing calculation need be established only by a preponderance of the evidence. *United States v. Beverly,* 5 F.3d 633, 642 (2d Cir. 1993).

In calculating Brennerman's Guidelines range, the district properly found that Brennerman's conduct "resulted in substantial interference with the administration of justice" and applied the appropriate offense level enhancement, pursuant to U.S.S.G. § 2J1.2(b)(2). Examples of "substantial interference with the administration of justice" include "the unnecessary expenditure of substantial governmental or court resources." U.S.S.G. § 2J1.2 cmt. n.1. The district court found that Brennerman lied to and withheld documents from the court, requiring the government to spend substantial time and resources in connection with his trial for criminal contempt. Accordingly, the district court's decision to impose a three-level enhancement was not an abuse of discretion.

In reviewing claims of substantive unreasonableness, we consider "the totality of the circumstances, giving due deference to the sentencing judge's exercise of discretion," and we "will . . . set aside a district court's *substantive* determination only in exceptional cases where the

trial court's decision cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 189-90 (internal quotation marks and citations omitted).

On the record before us, Brennerman's sentence of 24 months' imprisonment is not substantively unreasonable. The district court imposed a sentence on the low end of the Guidelines range. Indeed, Brennerman makes no argument, and cites no authority or facts, to support his claim that his conduct warranted a below-Guidelines sentence. In light of these circumstances and the deference we owe to the district court, we cannot say that the sentence falls outside the range of permissible decisions.

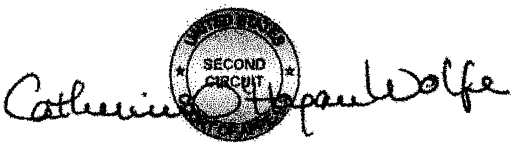
V. Ineffective Assistance of Counsel

Lastly, Brennerman faults his attorney for failing to obtain records from ICBC and for moving to disqualify the district court judge. We decline to address Brennerman's ineffective assistance of counsel arguments at this time.

Our Circuit has "a baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Khedr*, 343 F.3d 96, 99 (2d Cir. 2003). Though we have exercised our discretion to address these claims when their resolution is beyond a doubt, *id.*, we decline to do so here given the absence of a fully developed record on this issue. *See Sparman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998) (explaining that, "except in highly unusual circumstances," a lawyer charged with ineffectiveness should be given "an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs"). Accordingly, we dismiss Brennerman's ineffective assistance counsel claims without prejudice.

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



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Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

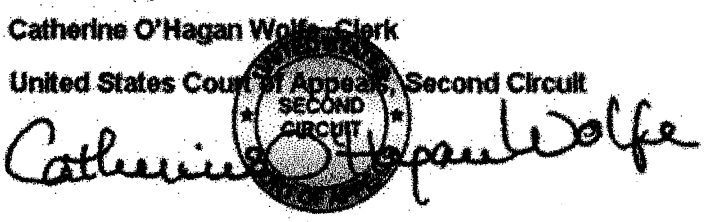

EXHIBIT 2

OSRecovery Inc., v. One Group Int'l, Inc.
462 F.3d 87 (2d Cir. 2006)

Docket No. 05-4371-cv
United States Court of Appeals, Second Circuit

Osrecovery v. One Group Intern

462 F.3d 87 (2d Cir. 2006)
Decided Sep 5, 2006

Docket No. 05-4371-cv.

Argued: May 16, 2006.

88 Decided: September 5, 2006. *88

89 Appeal from the United States District Court for the Southern District of New York, Lewis A. Kaplan, J. *89

Franklin B. Velie, Sullivan Worcester LLP, New York, N.Y. (Richard Verner, on the brief), for Appellant.

Lawrence W. Newman, Baker McKenzie LLP, New York, N.Y. (Scott C. Hutchins, on the brief), for Defendants-Appellees.

Before CARDAMONE, CALABRESI, POOLER, Circuit Judges.

POOLER, Circuit Judge.

Appellant Gray Clare appeals from an August 3, 2005, order of the United States District Court for the Southern District of New York (Kaplan, J.) holding him in contempt of court. *See OSRecovery, Inc. v. One Groupe Int'l, Inc.*, No. 02 Civ. 8993(LAK), 2005 WL 1828736, *2, 2005 U.S. Dist. LEXIS 15699, *5 (S.D.N.Y. Aug. 3, 2005). The court issued the order in response to a motion from defendant-appellee, Latvian Economic Commercial Bank ("Lateko"), requesting that the court hold Clare in contempt for his failure to comply with a January 13, 2005, order compelling Clare to respond to Lateko's discovery requests. *See id.* 2005 WL 1828736 at *1, 2005 U.S. Dist. LEXIS 15699, at *1-2. The January 13, 2005, order instructed Clare to respond to all of Lateko's requests, including document requests annexed to Clare's Notice of Deposition, requests for production, and interrogatories. Clare objects to these requests, the January 13, 2005, order compelling discovery, and the contempt order on the basis that he is not a party to the underlying litigation, and he was not subpoenaed as a non-party. *Id.* 2005 WL 1828736, at *1, 2005 U.S. Dist. LEXIS 15699, at * *2-3.

All parties have agreed and asserted to this Court that Clare is not actually a party. The district court, while also acknowledging Clare's non-party status, treated Clare as a party — but only for discovery purposes — by using two theoretical devices: estoppel and party by proxy.

We first hold that we have jurisdiction over the instant appeal because it is "final" within the meaning of 28
90 U.S.C. § 1291. Although appeals from civil contempt orders *90 issued against parties are not "final" and thus not immediately appealable, such appeals by non-parties are "final." *See Int'l Bus. Machs. Corp. v. United States*, 493 F.2d 112, 114-15 n. 1 (2d Cir. 1973). Because Clare is in fact a non-party, the appeal from his contempt order is properly appealable at this juncture.

We next hold that the district court abused its discretion by issuing a contempt order to a wow-party for failing to respond to discovery requests propounded to him as a *party* without providing sufficient legal authority or explanation for treating him as a party solely for the purposes of discovery. Non-parties are entitled to certain discovery procedures, such as receiving a subpoena, before they are compelled to produce documents. *See* Fed.R.Civ.P. 34(c); Fed.R.Civ.P. 45. The district court, however, permitted Lateko to treat Clare as a party, thereby eliminating some of the procedural protections that would have been afforded to Clare had he been dealt with as a non-party. We offer no opinion on whether the district court's theories for proceeding in this manner were appropriate in the instant case because we find that the contempt order applying these theories did not lend itself to meaningful review by this Court and therefore must be vacated solely on that basis.

We therefore vacate the order of the district court holding Clare in contempt of court and remand the case to the district court for further proceedings in accordance with this decision.

BACKGROUND

OSRecovery, Inc. and a number of plaintiffs who have been referred to as numbered "Doe" plaintiffs throughout the litigation (collectively, "plaintiffs") brought suit against defendants, including Lateko, for, inter alia, violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 *et seq.*, alleging that defendants were engaged in a Ponzi scheme to defraud investors. The Doe plaintiffs' identities were kept under seal and confidential, so that neither Lateko — nor the district court at one point — knew which individuals were Doe plaintiffs. It is this unusual circumstance that created much of the confusion that gave rise to the instant appeal.

At the time the action was filed, Clare was president of OSRecovery, a corporation formed for the purposes of bringing the underlying action. Clare was also the sole shareholder of OSRecovery. He was not, however, a plaintiff individually named in the action, and, as ultimately became apparent, he was not one of the Doe plaintiffs either.

Because the identities of the Doe plaintiffs were unknown to the district court and to Lateko, much confusion arose regarding whether Clare was actually one of the Doe plaintiffs. This confusion created issues during discovery regarding the appropriate procedure for propounding discovery requests to Clare. Clare contributed to this confusion by initially referring to himself as a plaintiff. For instance, in a letter sent to the district court and dated May 28, 2004, plaintiffs' counsel requested that the court take action on behalf of "one of the Plaintiffs, the President of OSRecovery, Inc. — Gray Clare."

In Clare's brief, he argues that he initially referred to himself as a plaintiff because he was attempting to become one, but his efforts were rejected by the district court. According to Clare, a motion was filed on April 15, 2004, to amend the complaint, which would have, inter alia, added Clare as one of the Doe plaintiffs. But, on May 17, 2004, the district court denied the motion to amend the complaint. Clare suggests that it was at this
91 point that he *91 realized he would not have an opportunity to become a plaintiff. Despite this supposed realization, however, on May 28, 2004 — nearly two weeks after the court's denial order — plaintiffs' counsel sent the letter to the court in which Clare was characterized as "one of the Plaintiffs."

Allegedly unsure of Clare's party status, Lateko propounded numerous discovery requests to Clare as if he were a plaintiff. OSRecovery and the Doe plaintiffs objected to these requests on Clare's behalf. Notably, their objections did not include a claim that the requests were not properly propounded to Clare under the rules pertaining to non-parties. Clare concedes that plaintiffs' counsel erred in neglecting to raise his status as an

objection, but he claims that this omission occurred because counsel anticipated that Clare would ultimately become a plaintiff, given that the motion to amend the complaint to add Clare as a plaintiff had not yet been rejected at this point.

On January 13, 2005, the district court issued an order compelling Clare to respond in full to Lateko's discovery requests by answering the interrogatories and turning over the requested documents, and on February 8, 2005, the court denied Clare's motion to reconsider its decision. In its order denying Clare's motion for reconsideration, the court addressed Clare's contention that he was not a party to the underlying litigation. The court explained that "[w]hile it appears that all now agree that Gray Clare is not in fact a plaintiff in this case . . . the fact remains that his attorneys repeatedly referred to him as a plaintiff and Lateko relied upon those references in the unique circumstances here, in which the names of the individual plaintiffs have been filed under seal." Because of this, the court determined that Clare "[was] estopped to deny, at least for the purposes of amenability to party discovery, that he is a plaintiff." The court rejected Clare's argument that counsel had referred to Clare as a plaintiff because there was confusion over whether he was one. According to the court, plaintiffs' counsel, who were also Clare's counsel, plainly knew who their clients were.

Subsequently, Lateko filed a motion for summary judgment dismissing plaintiffs' complaint. On August 1, 2005, the district court partially granted Lateko's summary judgment motion, dismissing some of the Doe plaintiffs and OSRecovery from the litigation. With OSRecovery no longer a plaintiff, the only plaintiffs remaining were the Doe plaintiffs who were not dismissed from the lawsuit upon the court's grant of Lateko's summary judgment motion.

Maintaining that he was not a party, Clare continued to refuse to comply with the January 13, 2005, order compelling his response to discovery, and on August 3, 2005, the district court issued an order holding Clare in contempt. *See OSRecovery, Inc.*, No. 02 Civ. 8993(LAK), 2005 WL 1828736, at *2, 2005 U.S. Dist. LEXIS 15699, at *5-6. The order decrees that Gray shall be fined $2,500 for each day, commencing on August 12, 2005, that he fails to comply with the January 13, 2005, order. *Id.* 2005 WL 1828736, at *2 2005 U.S. Dist. LEXIS 15699, at *5. It also directs that "Clare be arrested wherever in the United States and its possessions he may be found, transported to an appropriate detention facility in [the] district, and there held pending further order of [the district court], which will be forthcoming when [Clare] demonstrates that he has complied fully with the January 13, 2005 order." *Id.* (internal citation omitted).

In the order, the court addresses Clare's contention that he is not a party to the underlying litigation and therefore should not be compelled to respond to the discovery requests. *See id.* 2005 WL 1828736, at *1, 2005
92 U.S. Dist. LEXIS 15699, at *3. *92 The court, again rejecting this argument, maintains its position that Clare is estopped to deny, for discovery purposes, that he is not a party. *Id.* Additionally, the court finds that Clare should be treated as a party because "OSRecovery is nothing more than a front for Clare, who entirely dominates and controls it." *Id.* Thus, according to the court, Clare is a party as OSRecovery's proxy. *Id.* 2005 WL 1828736, at *1, 2005 U.S. Dist. LEXIS 15699, at *3-4.

Subsequently, Clare filed a motion in this Court seeking a stay of the contempt order pending his appeal.[1] During the hearing on this motion, Clare persisted in his position that he has never been a party to the underlying litigation, arguing that "[everybody agrees [Clare] was not a party." Lateko's counsel concurred, stating that he did not think there was a doubt about it: "[Clare] is, *in fact*, a third-party," and "[there is] a final order with respect to him." Both Clare and Lateko also agreed that "[Clare] never received a subpoena." This

Court then sought affirmation from both parties that everyone was in agreement that Clare is in fact a non-party. Again, Lateko's counsel affirmed that "[both sides] are in agreement on that, yes." The motions panel granted a stay, and we heard argument on May 16, 2006.

[1] During the instant appeal, Clare filed a motion to file exhibits with his reply brief, including the transcript of the stay hearing, and this Court granted his request.

DISCUSSION

I. Jurisdiction

We have jurisdiction to review "final" decisions of the district courts of the United States pursuant to 28 U.S.C. § 1291. In general, an order of civil contempt[2] is not "final" within the meaning of Section 1291 but is interlocutory and therefore may not be appealed until the entry of a final judgment in the underlying litigation. *Int'l Bus. Machs. Corp.*, 493 F.2d at 114-15. "Exceptions to this rule are rare, but where they occur it is because the interlocutory nature of the order is no longer present. Hence, civil contempts against *non-parties* are immediately appealable because the appeal does not interfere with the orderly progress of the main case." *Id.* at 115 n. 1 (emphasis added). However, civil contempt orders against *parties* are interlocutory and therefore *not* immediately appealable. Rather, they must await the termination of the underlying litigation. *See In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987).

[2] It is not disputed that the district court's order was a civil contempt order rather than a criminal contempt order, and this is indeed correct. A civil contempt order is remedial in nature while a criminal contempt order is punitive. *Int'l Bus. Machs. Corp.*. 493 F.2d at 115. A civil contempt order is also contingent and coercive. *Id.* Just because a contempt order includes a large fine and/or prison term does not render the order criminal. *Id.* at 115-16. An order that imposes sanctions on a party for each day she disobeys the court's discovery order is a civil contempt order. *See id.* This is precisely the type of order at issue in the instant case.

Clare's status in the underlying litigation is therefore critical to whether we have jurisdiction over this appeal at this juncture. If he is a party, we may not now entertain his appeal, but if he is not a party, we may. As the district court recognized, and all parties have agreed, Clare is in fact not a party to the underlying litigation. Even the district court, who treated Clare as a party for the limited purposes of discovery, did not deem Clare a party for all purposes; thus, it is clear that Clare is not actually a party to the underlying litigation, and the
93 contempt order *93 is "final," 28 U.S.C. § 1291. We therefore have jurisdiction over his appeal.

II. The Contempt Order

We review a finding of contempt for abuse of discretion. *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 915 (2d Cir. 1998). "We have held, however, that because the power of a district court to impose contempt liability is carefully limited, our review of a contempt order for abuse of discretion is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted." *Id.* at 916 (internal quotation marks omitted). We find that the district court abused its discretion by holding Clare in contempt as a party without sufficient explanation or citation to legal authority supporting the bases upon which the court relied in treating Clare as a party — for discovery purposes only — despite the fact that Clare was not actually a party.

The contempt order relies on two theories for treating Clare as a party: a party-by-estoppel theory and a party-by-proxy, or alter-ego, theory. *See OSRecovery, Inc.*, No. 02 Civ. 8993(LAK), 2005 WL 1828736, at *1, 2005 U.S. Dist. LEXIS 15699, at *3-4 The contempt order, however, does not provide citation to legal support for applying either theory in this context. In particular, the order does not explain how Clare could be transformed into a party for discovery purposes but not for any other aspect of the litigation. *See id.* Additionally, the order

does not provide enough information on the precise legal theories it is attempting to invoke. For instance, the order states merely that Clare is "estopped" to deny that he is a party for discovery purposes. *See id.* 2005 WL 1828736, at *1, 2005 U.S. Dist. LEXIS 15699, at *3. However, there are numerous types of estoppel, including, inter alia, judicial and equitable estoppel, to which the district court may have been referring. *See Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037-38 (2d Cir. 1993) (stating the differences between judicial and equitable estoppel).[3] The order also states simply that Clare should be treated as a party because he has acted as OSRecovery's proxy, but it does not explain what party-by-proxy theory it is invoking. *See OSRecovery, Inc.*, No. 02 Civ. 8993(LAK), 2005 WL 1828736, at *1, 2005 U.S. Dist. LEXIS 15699, at *3-4. From the court's brief statements, we are unable to discern, for example, whether the proxy theory to which it is
94 referring is something more *94 akin to "piercing the corporate veil," *see, e.g., Am. Fuel Corp. v. Utah Energy Dev. Co.*, 122 F.3d 130, 134 (2d Cir. 1997) ("Typically, piercing analysis is used to hold individuals liable for the actions of a corporation they control."), or to treating someone as a "controlling person" under the Securities laws, *see, e.g., SEC v. First Jersey Sec, Inc.*, 101 F.3d 1450, 1472-73 (2d Cir. 1996) (explaining that controlling-person liability may attach if there is proof of both a violation by the controlled person and control of the primary violator by the defendant).

[3] Judicial estoppel, which requires, inter alia, that "a party both takes a position that is inconsistent with one taken in a prior proceeding, and has had that earlier position adopted by the tribunal to which it was advanced," *Uzdavines v. Weeks Marine, Inc.*, 418 F.3d 138, 148 (2d Cir. 2005) (internal quotation marks omitted), is likely inapplicable in the instant case where any inconsistencies appear limited to the same proceeding, *see Adler v. Pataki*, 185 F.3d 35, 41 n. 3 (2d Cir. 1999) ("[J]udicial estoppel applies only when a tribunal in a prior *separate* proceeding has relied on a party's inconsistent factual representations and rendered a favorable decision.").

Unlike judicial estoppel, which is designed to protect the integrity of the judicial process, equitable estoppel ensures the fairness between the parties. Bates, 997 F.2d at 1037. Equitable estoppel is proper where the enforcement rights of one part}' would create injustice to the other party who has justifiably relied on the words or conduct of the party against whom estoppel is sought. *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706, 725 (2d Cir. 2001). According to federal law, "a party may be estopped from pursuing a claim or defense where: 1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely on it; 2) and the other party reasonably relies upon it; 3) to her detriment." *Id.*

It is unclear, however, which estoppel and which party-by-proxy theory the court applied because the contempt order does not specify.[4] Nor does the January 13, 2005, order compelling Clare's compliance with the discovery requests shed any light on this issue. That order merely states that it grants Lateko's motion to compel discovery, but it does not provide a rationale for treating Clare as a party, especially in light of the peculiar circumstance of treating him as a party for this limited purpose only.[5]

[4] The contempt order similarly fails to specify on which facts the court relies in concluding that OSRecovery is merely a front for Clare.

[5] The district court also used this party-byestoppel theory to treat Clare as a party in the February 8, 2005, order denying Clare's motion for reconsideration of the court's order compelling Clare to respond to discovery. This order also lacks citation to precedent or an explanation for applying estoppel in this manner.

Although we review the district court's order for abuse of discretion, "[r]eviewable-for-abuse-of-discretion does not mean unreviewable." *In re Mazzeo*, 167 F.3d 139, 142 (2d Cir. 1999); *see also Jones v. UNUM Life Ins. Co. of Am.*, 223 F.3d 130,138 (2d Cir. 2000). The lower court's findings of fact and conclusions of law must be sufficient to permit meaningful review, "and where such findings and conclusions are lacking, we may vacate

and remand." *In re Mazzeo*, 167 F.3d at 142. Moreover, we think it is fundamentally unfair to hold Clare in contempt as if he were a party without sufficient legal support for treating him, a non-party, as a party but only for the purposes of discovery.

There may be grounds for applying equitable estoppel, and even for applying it solely to discovery as the district court did in the instant case. But, if those are the grounds, the district court should provide: (1) more explicit factual findings supporting this, and (2) since it seems to us to be possibly a new legal theory, citations to whatever adjacent support exists. That way we may decide whether to adopt that theory, which may be a broadening of the concept of equitable estoppel. Alternatively, if it is not a broadening because there are cases on point, we invite the district court's assistance in telling us so.

We therefore vacate the order and remand the case, so that the district court may decide how to proceed. If the court deems it appropriate to hold Clare in contempt of court, it should address the issues set forth above, so that this Court may ascertain the appropriateness of such action.

CONCLUSION

For the foregoing reasons, we vacate the contempt order and remand the case to the district court for proceedings in accordance with this decision.

95 *95

EXHIBIT 3

ICBC (London) PLC v. The Blacksands Pacific Group, Inc.,
No. 15 Cv. 70 (LAK), EFC. No. 139-140

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICBC (LONDON) PLC,

Plaintiff,

-against-

THE BLACKSANDS PACIFIC GROUP, INC.,

Defendant.

15 Civ. 0070 (LAK) (FM)

~~[PROPOSED]~~ ORDER OF CONTEMPT AS TO RESPECT TO RAHEEM BRENNERMAN

THE BLACKSANDS PACIFIC GROUP, INC. and BLACKSANDS PACIFIC ALPHA BLUE, LLC,

Counter-Plaintiffs

-against-

ICBC (LONDON) PLC,

Counter-Defendant.

Plaintiff ICBC (London) plc's motion [ECF 125] seeking an Order holding Raheem Brennerman in civil contempt of court and imposing coercive sanctions against him is granted (except that) The Court reserves decision on the portion of ICBC's motion requesting an award of compensatory damages.

Having considered the papers submitted by ICBC, Mr. Brennerman having failed to file any papers in opposition, and the Court having heard oral argument, the Court finds that (1) its orders of August 22, 2016 and September 27, 2016 compelling Defendant The Blacksands Pacific Group, Inc. ("**Blacksands**") to fully comply with ICBC's post-judgment discovery requests (the "**Outstanding Discovery Orders**") are clear and unambiguous, (2) the proof of Blacksands' willful noncompliance with the Outstanding Discovery Orders is undisputed, clear

and convincing, (3) Blacksands has not diligently attempted to comply with those orders in a reasonable manner, and (4) Mr. Brennerman is properly charged with contempt because he has abetted and directed Blacksands' noncompliance with the Outstanding Discovery Orders and because he is legally identified with Blacksands. The Court therefore ORDERS that:

1. Mr. Brennerman shall pay a coercive fine of $1,500 per day, commencing December 13, 2016, for each day in which Blacksands continues to fail to comply with the Outstanding Discovery Orders. The amount of the coercive fine will double every seventh day until it reaches $100,000 per day, and it will thereafter continue at the rate of $100,000 per day, unless otherwise ordered by this Court.

2. If Mr. Brennerman and Blacksands comply fully with the Outstanding Discovery Orders, the judgment is satisfied, or at least $3 million cash is paid on account of the judgment, in each case by 5:00 p.m. New York time on December 20, 2016, the Court will abrogate the coercive fines imposed on Mr. Brennerman and incurred through that date; provided, that such production or payment shall not moot the contempt that has been committed.

3. Upon application by the Plaintiff, the Court will consider the imposition of further sanctions, if there is an adequate showing that those imposed by this Order do not achieve compliance. Without limiting the generality of the foregoing, ICBC is at liberty to commence by appropriate process further civil and/or criminal contempt proceedings against Mr. Brennerman and anyone else who is properly chargeable with contempt in this matter.

4. The substance of this order was issued orally on December 13, 2016.

12/15/16

SO ORDERED

LEWIS A. KAPLAN, USDJ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ICBC (LONDON) PLC,

Plaintiff,

-against-

THE BLACKSANDS PACIFIC GROUP, INC.,

Defendant-Counterclaimant,

-and-

BLACKSANDS PACIFIC ALPHA BLUE, LLC,

Additional Counterclaimant.

15 Civ. 0070 (LAK)

MEMORANDUM AND ORDER

LEWIS A. KAPLAN, *District Judge*.

On December 12, 2016, this Court denied an *ex parte* application by Raheem Brennerman for an extension of time within which to resist a motion to hold him in civil contempt and impose sanctions on him. This memorandum and order explains that decision.

The Background

ICBC (London) plc ("ICBC"), The Blacksands Pacific Group, Inc. ("Blacksands"), and counterclaimant Blacksands Pacific Alpha Blue, LLC ("Alpha Blue"), a Blacksands subsidiary, entered into a bridge loan agreement ("BLA") on November 25, 2013.[1] Under the BLA, ICBC provided a $20 million, 90-day loan to Alpha Blue, which Blacksands absolutely and unconditionally guaranteed.[2] Of the available $20 million, Alpha Blue withdrew $5 million.[3]

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[1] DI 1, Ex. A Part 6, at 3 (Pl.'s Mem. of Law in Supp. of Pl.'s Mot. for Summ. J. in Lieu of Compl. under CPLR 3213).

[2] *Id.*; BLA § 9.1. The BLA was attached as an exhibit to the Clark Affidavit in ICBC's original filing, but when the case was removed and docketed electronically, the BLA was

Neither Alpha Blue, as primary obligor, nor Blacksands, as guarantor, repaid the amount owed when it matured in February 2014.[4] ICBC extended the deadline for repayment of principal on two occasions, first to March 31, 2014, and later to July 31, 2014, while still collecting interest payments.[5] After each of these deadlines was missed, however, ICBC sent a notice of default to Blacksands.[6]

On or about December 8, 2014, plaintiff ICBC commenced this action in the New York Supreme Court against defendant Blacksands to recover $5 million plus interest and attorneys' fees of nearly $400,000 on Blacksands' guarantee of the obligations of Alpha Blue under the BLA. Under New York procedure, ICBC moved for summary judgment in lieu of a complaint.[7] Blacksands promptly removed the case to this Court and, in due course, both Blacksands and Alpha Blue filed counterclaims against ICBC.[8]

By order dated September 29, 2015, this Court granted ICBC's motion for summary judgment on its claim on Blacksands' guarantee and granted in substantial part its motion to dismiss the counterclaims.[9] It also granted a Rule 54(b) certificate with respect to ICBC's claim against Blacksands. The Clerk then entered judgment in favor of ICBC and against Blacksands.

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split among four entries: DI 1, Ex. A Part 2 at 11-27; DI 1, Ex. A Part 3; DI 1, Ex. A Part 4; and DI 1, Ex. A Part 5 at 1-11. The Court will cite simply to the BLA for ease of reference. *See also* DI 13 ¶ 4 (Blacksands' Rule 56.1 Response to Plaintiff's Statement of Material Facts) (acknowledging formation of BLA).

[5] DI 1, Ex. 6, at 5.

[6] *Id.*; DI 13 ¶ 15.

[7] DI 1, Ex. 6, at 4-5.

[8] The first notice of default was sent on April 4, 2014 by fax, which Blacksands claims not to have received. *See* DI 1, Ex. A Part 5, at 17-21 (April 4, 2014 Notice of Default); DI 1, Ex. A Part 5, at 13 (January 30, 2014 letter from Blacksands providing fax number); DI 13 ¶ 19 (Blacksands disputing receipt of April fax). The second notice was sent by courier in August 2014, and Blacksands acknowledges receipt. DI 13 ¶¶ 23, 25 (Blacksands acknowledging receipt of August 2014 Notice of Default).

[9] *See* N.Y. C.P.L.R. 3213.

[10] DI 11.

[11] *ICBC (London) plc v. Blacksands Pacific Grp., Inc.*, 2015 WL 5710947 (S.D.N.Y. Sept. 29, 2015).

Blacksands appealed. As no supersedeas bond or other security was posted, however, ICBC began post-judgment discovery in an effort to locate assets that might be used to satisfy the judgment, serving document requests and interrogatories on or about March 24, 2016.[10]

Blacksands initially stonewalled the discovery requests, interposing frivolous objections. ICBC then moved to compel responses. The Court granted the motion and, on August 22, 2016, directed Blacksands to respond in full within fourteen days after the date of the order.[11]

On September 6, 2016, the day Blacksands was obliged to comply with the August 22, 2016 order (the "First Order"), Blacksands' counsel wrote to the Court and claimed that Blacksands had "agree[d]" to pay the judgment "pending its appeal" and purportedly requested the Court's assistance in determining the amount due under the judgment.[12] In reliance on the apparent commitment to pay, ICBC did not immediately seek further relief with respect to compliance with the First Order. The Court, at Blacksands' request, then held two conferences with counsel in what was said by Blacksands to be an effort to determine the amount owing.[13] On September 27, 2016, however, at the conclusion of the second conference, the Court entered the following order (the "Second Order"):

> "On August 22, 2016, this Court directed defendant to comply fully with certain outstanding discovery requests within fourteen days. It has not complied with that order.
>
> "Unless the case is fully and definitively settled on or before October 3, 2016, defendant shall comply fully with those discovery requests no later than 4 p.m. on that date. Any failure to comply with this order may result in the imposition of sanctions, including those associated with contempt of court, as well as in the imposition of coercive sanctions and other relief for civil contempt."[14]

No settlement was reached. Accordingly, Blacksands became obligated under the Second Order to comply fully with ICBC's discovery requests by 4 p.m. on October 3, 2016. It

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[10] DI 84 ¶ 3.

[11] DI 87.

[12] DI 88.

[13] The point supposedly at issue was the interest calculation. *See* DI 88.

[14] DI 92. For the background in this paragraph, see Hessler Decl. [DI 102] ¶¶ 5-6.

failed to respond.[15]

In the meantime, the Court of Appeals affirmed the judgment against Blacksands.[16]

The Contempt Adjudication as to Blacksands and the Contempt Application as to Brennerman

Blacksands

On October 13, 2016, ICBC moved to hold Blacksands in contempt. No opposition was filed. On October 20, 2016, the Court held Blacksands in civil contempt and imposed coercive sanctions on it. In addition, the written order entered on October 24, 2016 [DI 108] reiterated the Court's prior warning[17] that Blacksands' principal, Raheem Brennerman, would be at risk of contempt proceedings directed at him personally in the event full compliance was not forthcoming:

> "Upon application by the Plaintiff, the Court will consider the imposition of further sanctions, if there is an adequate showing that those imposed by this Order do not achieve compliance. Without limiting the generality of the foregoing, ICBC is at liberty to commence by appropriate process civil and/or criminal contempt proceedings against Raheem Brennerman and anyone else who is properly chargeable with contempt in this matter."

Brennerman

On December 7, 2016, ICBC—based on a reasonably documented assertion that Brennerman "controls every aspect of Blacksands' existence and operation," is "legally identified" with it, and "has directed its continuing contempt of Court"[18]—moved by order to show cause to

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15 DI 102 ¶ 7.

16 ___ F. App'x ___, No. 15-3387, 2016 WL 5386293 (2d Cir. Sept. 26, 2016).

17 Tr., Oct. 20, 2016 [DI 110] at 8.

18 Hessler Decl. [DI 123] ¶ 10.

The Court notes that the notice of appeal from the summary judgment against Blacksands was signed by Brennerman personally, on behalf of Blacksands and Alpha Blue, rather than by any attorney. DI 46. In addition, he personally wrote the Court to oppose, on behalf of Blacksands, a motion by its first lawyers in this case to withdraw. DI 37.

hold Brennerman in civil contempt of Court and to impose coercive sanctions.[19] The Court granted the order to show cause, made it returnable on December 13, 2016, and required the service and filing of any responsive and reply papers at or before 4 p.m. on December 11 and 12, 2016, respectively.[20] The order to show cause and supporting papers were served electronically[21] on Brennerman himself at 3:50 p.m. on December 7, 2016.[22] They were served also on Blacksands by personal service on Latham & Watkins ("Latham"), its counsel of record, contemporaneously.[23]

The Ex Parte Application

At 6:34 a.m. on Sunday, December 10, 2016, Brennerman sent an email to the Court's deputy clerk at his court email address.[24] The email is headed PRIVILEGED & CONFIDENTIAL CORRESPONDENCE. Although it indicates that copies were sent to lawyers at Latham, it bears no indication that copies were sent to ICBC's counsel despite the fact that Brennerman knows their email addresses.

Attached to the email was a letter purportedly by Brennerman to the undersigned.[25] The first two paragraphs requested more time to respond to the contempt motion, stated that Brennerman's choice of counsel to represent him in this matter was Paul Weiss which was unable to represent him on this matter, and stated that Brennerman was "in the process of engaging new personal counsel." Attached to the letter were copies of two emails with respect to his purported attempt to retain Paul Weiss and a very long settlement proposal with respect to the ICBC dispute. There was no indication that the letter and emails were sent to ICBC's counsel. At a December 13

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19 DI 122, at 19-23.

20 DI 121; DI 125.

21 Brennerman has refused to provide any information concerning the location of any of his residences or his personal whereabouts. Latham & Watkins, which came into the case on behalf of Blacksands and Alpha Blue and remains their counsel of record, claims not to know anything about his location or whereabouts. *See* Tent Decl. [DI 136]; Harris Aff. [DI 132].

22 Pollak Aff. [DI 126] & Ex. B.

23 DI 126 & Ex. A.

24 DI 127.

25 DI 128.

court proceeding. ICBC counsel confirmed that they had not received copies from Brennerman.

Discussion

The rules authorize extensions of time within which acts may be done on a showing of good cause where, as here, the extension is sought in advance of the deadline.[26] Extensions usually will be granted "unless the moving party has been negligent, lacked diligence, acted in bad faith, or abused the privilege of prior extensions."[27] And while the rules do not explicitly require that notice be given of such applications, "[t]he prudent course . . . is always to file a motion that complies with Rule 7(b) when requesting an extension of a time period,"[28] which among other things requires service on the opposing party. In any case, such applications lie within the broad discretion of the district court.[29] The Court here considers the relevant factors to be these:

1. This application was made *ex parte*. The fact that Brennerman wrote his letter *pro se* gives no excuse for his failure to give notice to ICBC's counsel, as he copied lawyers at Latham, which ostensibly does not represent Brennerman personally.

2. The history of this matter gives little comfort that this application—extraordinary in at least because of its *ex parte* letter and its explication of a purported settlement offer that evidently has not been communicated to the opposing party—is anything other than an attempt to delay matters. Among the indications are these:

- Brennerman was warned on October 20, 2016 that he faced the possibility of an attempt to hold him personally in contempt of court if Blacksands did not fully comply with the First and Second Orders.[30] Brennerman evidently controls Blacksands and therefore presumably knew that Blacksands would not comply. He therefore has known for almost two months that he was extremely likely to face a contempt proceeding. Circumstances do not lend a great deal of credibility to the notion that he first sought to obtain personal counsel in that regard on December 9.

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26 Fed. R. Civ. P. 6(b)(1)(A).

27 1 James Wm. Moore et al., *Moore's Federal Practice* § 6.06[2] (3d ed. 2016).

28 *Id.*

29 *E.g.*, *Saviano v. Town of Westport*, 337 F. App'x 68, 69 (2d Cir. 2009).

30 *See* Harris Aff. [DI 129]; Tent Decl. [DI 131].

- Brennerman has advanced no reason to think that Latham, which has been in this case since the fall of 2015 on behalf of Blacksands, could not represent him personally.

- This is the third and, depending on one's interpretation of the record, perhaps the fourth, instance in this case in which Brennerman has sought an unspecified delay, ostensibly to retain counsel.

  - Brennerman delayed retaining counsel to represent Blacksands in this case despite the fact that he had engaged in extended pre-suit correspondence with plaintiff in which plaintiff made clear that it would sue unless Blacksands paid its debt to ICBC. Counsel did not appear on Blacksands' behalf until January 7, 2015, nearly a month after the action commenced, and they immediately sought a 30-day extension of time on the ground that they were "only retained . . . last week."[31]

  - After Blacksands' first attorneys were granted leave to withdraw on September 18, 2015, new counsel—Latham—did not appear until November 20, 2015.[32] Latham then promptly sought an extension of time within which to cure a default on a motion by a belated filing.

  - Almost immediately after entry of the Second Order and on the day on which the first contempt motion was made, Latham sought to withdraw. The motion was made with Brennerman's consent and ostensibly on the basis that "the only remaining issues relat[e] to Blacksands' counterclaim and Plaintiff's enforcement of the judgment."[33] But the withdrawal, had it been permitted, would have left Blacksands unrepresented. Whatever may have been in Latham's mind, Brennerman's consent to its withdrawal would have been consistent with an intention on his part to leave an unrepresented

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[31] DI 5.

[32] Blacksands and Alphablue were unrepresented during the intervening two months. During that period, Brennerman purported to act on their behalves although he is not a member of the Bar. *See* DI 37, DI 46.

[33] Harris Decl. [DI 97] ¶ 4.

The Court denied the motion without prejudice to renewal after complete disposition of the contempt motion, which had been filed by the time the order was entered. DI 100. The motion has not been renewed.

corporate entity to face the contempt proceeding that either had begun or obviously was imminent and with a further excuse for a delay to find new counsel.

3. ICBC asserts that events have been and are in train that have resulted, or may result, in assets being placed beyond its reach.[34] Moreover, Brennerman's email to a lawyer at Paul Weiss enclosed a proposal—not submitted to the Court—for a reorganization of "Blacksands Pacific Group + Personal Re-Organization."[35] The risk of prejudice to ICBC in consequence of further delay is palpable.

4. Finally, the entire purpose of these *civil* contempt proceedings has been to coerce compliance with the First and Second Order, which do no more than require full and complete responses to the document requests and interrogatories ICBC served in March 2016, approaching a year ago. It thus has been open to Brennerman for that entire period to eliminate the reason for civil contempt proceedings by producing the discovery. The fact that he has not caused Blacksands to do so despite court orders compelling that action has been in bad faith throughout and remains so.

The Disposition of the Contempt Motion Against Brennerman

No appearance was filed and neither Brennerman nor any attorney for Brennerman appeared at the December 15 hearing. The Court held Brennerman in civil contempt and imposed coercive fines on him for each day during which Blacksands continued in its failure fully to comply with the First and Second Orders. It reserved decision on ICBC's request for compensatory damages and attorneys fees.[36] Moreover, the Court made clear if Blacksands complied with the orders, paid the judgment, or paid at least $3 million on account of the judgment on or before December 20, 2016, the Court would abrogate any coercive fines against Brennerman that accrued from December 13, 2016 to and including the date of compliance or payment. It indicated also that if Brennerman on or before December 20, 2016 submitted any papers in opposition to the contempt motion directed at him, the Court would determine whether to consider them despite their lateness and reserved the right to reopen the contempt proceeding with respect to Brennerman.

Conclusion

It long has been said that a person jailed for civil contempt holds the keys to the jail

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[34] *See* Hessler Decl. [DI 123] ¶¶ 13, 23, 50-57.

[35] DI 128, at 3 of 8.

[36] These rulings were embodied in a written order dated December 15, 2016.

in his or her pocket. All that needs to be done to gain release is to do what the Court has ordered. That is true here, albeit not in a strictly literal sense. Brennerman need only see to it that Blacksands complies with the orders to moot or reduce the civil contempt issue. His failure to do so, and hence his application for yet more time to avoid coercive personal sanctions, is bad faith conduct.

The Court concludes also that Brennerman's *ex parte* application was made without notice to ICBC in the hope that the Court would act favorably on his application without benefit of ICBC's input. ICBC was and remains at significant risk of being further prejudiced by delay as Brennerman proceeds, or may proceed, with various steps that may make collection of its judgment even more difficult. Brennerman has articulated no reason why Latham, which has long been in this case, could not represent him on the personal contempt application. And even if there were some issue, or if Brennerman simply would prefer other counsel, he has been on notice of the likelihood of this application since October 20, 2016 and thus has had ample time within which to arrange representation.

In all the circumstances, the Court declined to adjourn the contempt hearing scheduled for December 13, 2016. It declined also to extend the time within which Brennerman was obliged to submit any responsive papers. In the event he files responsive papers before the Court decides the motion, the Court will determine whether it will consider them despite the fact that they will have been filed out of time. Should Brennerman submit such untimely papers, he would be well advised to respond to all of the concerns articulated in this memorandum.

SO ORDERED.

Dated: December 15, 2016

Lewis A. Kaplan
United States District Judge

EXHIBIT 4

Criminal Case
No. 17 Cr. 155 (LAK)
Trial Tr. 3-7

the issue in the charge conference and maybe on motions, but I will tell you that provisionally without hearing anything from either of you about the case. It seems to make a lot of sense to me. The case is *G & C Miriam v. Webster Dictionary*, 639 F.2d, 29 principally at page 37 but not only on page 37. That's the first item.

Now, I have Ms. Fitz's letter of September 3rd. Does anybody have anything further to say about the subject raised there?

No.

MS. FRITZ: Your Honor, with respect to that letter, we forwarded the letter and now we've had a bit of a dialogue on it. The government did respond on the issue and we provided some additional remarks in our September 5th letter. All of those relate to the same issue that was presented in the September 3rd letter.

THE COURT: Yes. I've seen the September 5th letter also. It seems to me that the government is allowed to prove the two civil contempt orders in the civil case because they go at least to the question of whether failure to comply with the underlying disclosure orders was willful at least from the date of the civil contempt adjudications. There is authority that in my view supports that. As long as we have a moment, I will find it here. I refer to *United States v. Wells*, 1994 WL 421471 and *Red Bull Interior Demolition v. Palmadessa*, 908

F.Supp 1226 at 1241. There may be other authority, but those are the things I have in mind.

With respect to that, I have the two orders of contempt before me. I don't know what their exhibit numbers here are. The first one is Document 108 on the civil docket. I think there could be some redactions from this that might improve the situation. So try to follow along with me.

The second paragraph, which starts with the words "Having considered," over onto page 2 and concluding with the words "reasonable manner" seems to me might be usefully might be redacted because the recitals I don't think do much of anything, and they contain findings that are not necessary to the willfulness and indeed the knowledge issues to which this is also relevant.

Secondly, paragraphs two through five are unnecessary and could be redacted. I don't know if either side has a view as to whether the fact that I am the judge who signed the order should remain or should be redacted, just my name and signature.

Does anybody have any comments on those proposed redactions?

MR. LANDSMAN-ROOS: One clarification, point, your Honor. The order, which is Government Exhibit 311 and is the October 24th, 2016 order, referenced the redaction of paragraph five. I assume you're meaning what you have renumbered as

paragraph five in addition to the excised?

THE COURT: No, I didn't renumber it. I don't think I renumbered anything. Oh, I see what you are saying. There are two paragraph fives. I was proposing to redact both of them.

MR. LANDSMAN-ROOS: Okay.

THE COURT: Any other comments from either side on the proposed redactions?

MS. FRITZ: Your Honor, with respect to any of the issues relating to contempt, it has been our position throughout that the contempt information should not be presented. I understand that your Honor just referenced --

THE COURT: I understand that. I am ruling against you.

MS. FRITZ: I want the record to reflect that both sides have now cited for the Court the decision in *Senffner* that your Honor didn't reference a moment ago.

THE COURT: Which I have read and to the extent, if any and I doubt much, it supports or point of view, I disagree with it in this context on these facts.

MS. FRITZ: It appears, though, that your Honor is being guided by it somewhat though by trying to remove findings that would be redundant to what the jury is being asked.

THE COURT: If you don't want them removed or you want to remove different ones, you should tell me. I mean no disrespect. This is not a continuing seminar. I am offering

to redact material because I am trying to be responsive to concerns you have raised where I think the proposed redactions are not necessary to the proper use the government in my view is entitled to make of the contempt finding. Now, if you don't like the redactions, you don't want them, you want them all to stand, fine; but I am not going to back to square one of the discussion of whether the fact of the contempt will go before the jury. It will.

MS. FRITZ: Our position is on the record. We appreciate the redaction.

THE COURT: Fine.

With respect to the order finding Mr. Brennerman personally in contempt, which was Docket Item 139 in the civil docket, I am treating essentially the same way. The second full paragraph, except for the final fragmentary sentence which reads "The Court therefore orders that" would be redacted. At least that is my proposal. It seems to me paragraphs two and three are unnecessary to the proper use. If the defense wants them out, I will take them out.

MS. FRITZ: The defense's position is we would like to keep two, but the other redactions are fine.

THE COURT: Two is relevant why and what is the government's position? Let's take the government's position first.

MR. LANDSMAN-ROOS: Well, your Honor, it is not

immediately clear to me what the relevance of two is.

THE COURT: Do you object to it? You wanted to put the whole order in.

MR. LANDSMAN-ROOS: Yes. We don't have an objection to it.

THE COURT: Paragraph two will stand. That takes care of that. So that takes care of the September 3rd letter.

Now we have Ms. Fitz's letter of September 5th, Docket Item 86 in the criminal docket. What is going on with these transcripts and motion papers, Mr. Landsman-Roos?

MR. LANDSMAN-ROOS: Yes, your Honor. At this time we're not intending to enter in as exhibits the transcripts or the motion papers, at least they are in the 300 series, which is cited in the letter. The one potential exception is the 100 series are documents that were found in Mr. Brennerman's apartment. So to the extent the motions existed there, they are relevant to his notice, knowledge, willfulness.

THE COURT: Ms. Fitz.

MS. FRITZ: My position is to the extent that the motions are being put in, whatever may be the rationale for them being put in, we would object to it first of all but also we want to make certain that whatever the opposition is, whatever the opposing pleading is also becomes part of the record.

THE COURT: We'll deal with it if and when it arises.

EXHIBIT 5

Criminal Case
17 Cr. 337 (RJS)
EFC No. 236, Ex. 3

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Oil Exec Accused Of Lying To Banks Is Convicted Of Contempt

By Jack Newsham

Law360, New York (September 12, 2017, 8:40 PM EDT) -- An oil businessman who failed to disclose his assets to a Chinese bank that won a $5 million judgment against him was found guilty of criminal contempt on Tuesday, with a New York federal jury taking less than three hours to convict.

Raheem J. Brennerman and his company, sued in 2015 by an affiliate of the Industrial and Commercial Bank of China for defaulting on a loan, were each found guilty of two counts of contempt for failing to comply with discovery requests. The verdict comes about three months after prosecutors hit Brennerman with new charges for trying to trick ICBC and at least one other lender out of $300 million.

In closing arguments Tuesday, a lawyer for Brennerman said ICBC buried him with questions about his financial information at the same time as settlement talks were ongoing, and said the bank already had the information he was charged with hiding. But U.S. Department of Justice lawyers told jurors the evidence was clear, showing that Brennerman knew his obligations and willfully ignored them.

"The defense's arguments are distractions," prosecutor Robert Sobelman said. "If you look at the evidence in this case without distractions, then the defendants are done."

Brennerman's lawyers sometimes bucked at the constraints upon them. Although Maranda Fritz, a partner at Thompson Hine LLP, rejected prosecutors' charge that her client showed "defiance" of the court's orders and suggested he simply deferred to his lawyers for matters related to the ICBC case, her effort to explain his actions was at times stymied.

When Fritz said the list of discovery demands slapped on her client was "as big as a truck," the prosecution's objection was sustained, with U.S. District Judge Lewis Kaplan telling jurors that it didn't matter whether the pile of interrogatories was "as big as a truck or as small as a SmartCar." The judge also clamped down when Fritz made a reference to evidence that wasn't admitted.

"They are not permitted to suggest that my rulings are wrong," he instructed jurors.

The jury didn't take long to reach its verdict, breaking for lunch and deliberations at 2 p.m. and returning shortly before 5 p.m., finding both Brennerman and his company, Blacksands Pacific Group Inc., guilty of two counts of criminal contempt related to two discovery orders they were accused of ignoring.

A juror who spoke to Law360 and gave her last name as Gordon said the jury was swayed most strongly by Judge Kaplan's civil contempt orders against Brennerman. One juror was initially unsure of whether he was fully aware of the consequences, but the judge's second contempt order was very clear, Gordon said.

"He had to know [of the legal risks] because if he didn't comply he was going to be fined a lot of money," she said. The closing arguments were not particularly influential, Gordon added, saying jurors stuck to the evidence and followed the judge's instructions.

Sentencing is set for Dec. 21.

Meanwhile, Brennerman faces still more criminal charges related to the ICBC dispute. He was arrested and his bail revoked earlier this year after prosecutors charged him with bank fraud, wire fraud, visa fraud and conspiracy to commit fraud for falsely claiming to ICBC that he had a deal lined up to buy a California oil field so he could obtain a loan. He told other banks a similar story, the government alleged.

Pretrial motions in that case are due at the end of next week.

A lawyer for Brennerman and Blacksands declined to comment. The Justice Department doesn't comment on lawsuits.

The government is represented by Robert B. Sobelman and Nicolas T. Landsman-Roos of the U.S. Department of Justice.

Brennerman is represented by Maranda E. Fritz and Brian D. Waller of Thompson Hine LLP.

The case is U.S. v. Blacksands et al., case number 1:17-cr-00155, in the U.S. District Court for the Southern District of New York.

--Editing by Catherine Sum.

EXHIBIT 6

Petition for Writ of Certiorari

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

PETITION FOR A WRIT OF CERTIORARI

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

I. QUESTIONS PRESENTED

1. Whether the abuse of discretion standard imposed by the United States Court of Appeals for the Second Circuit is Constitutionally impermissible - where trial Court which had an obligation to protect the Constitutional rights of a criminal defendant deliberately deprived him of his Constitutional rights and the United States Court of Appeals for the Second Circuit refused to correct the errors of trial Court.

2. Whether trial Court abused its obligation to protect the Constitutional rights of a criminal defendant at trial - where trial Court deliberately caused the deprivation of a criminal defendant`s Constitutional right in an endeavor to unjustly deprive him of liberty.

PARTIES TO THE PROCEEDING

All parties appear in the caption of the case on the cover page

II. Table of Contents

III. Table of Authorities

Cases

Statutes

IV. PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Raheem Jefferson Brennerman respectfully petitions this Court for a writ of certiorari to review the judgment and order of the United States Court of Appeals for the Second Circuit entered on June 9, 2020. Mr. Brennerman`s motion for rehearing en banc was denied on September 9, 2020.

V. OPINION BELOW

On June 9, 2020, a panel of the Second Circuit affirmed Petitioner`s conviction. *United States v. Brennerman*, No. 18 1033, 2020 WL 3053867 (2d Cir. June 9, 2020) (Summary Order). Mr. Brennerman`s motion for rehearing en banc was denied by an Order of the Second Circuit dated September 9, 2020. *See* No. 18 1033 Cr., EFC No. 318.

VI. JURISDICTION

The Court of Appeals' judgment affirming Petitioner`s conviction and sentence was entered on June 9, 2020. *See* 18 1033, EFC No. 286. Mr. Brennerman`s motion for rehearing en banc was denied on September 9, 2020. *See* No. 18 1033, EFC No. 314; 318. Following a 150-day period for filing, including the ordinary 90-day filing period plus the 60-day additional time provided by administrative order relating to the COVID-19 pandemic, this Petition for Certiorari would have expired on February 9, 2021. The petition is being filed postmark on or before that date. Sup. Ct. R. 13(1); 13(3); 13(5); 29(2); 30(1). Petitioner invokes this Court`s jurisdiction under 28 U.S.C. § 1254(1).

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Title 18 U.S.C § 401(3) provides:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as—
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limbo, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

VIII. STATEMENT OF CASE

This case presents a matter of significant public interest in highlighting the unusual instance where the Courts, that have an obligation to protect the Constitutional rights of a criminal defendant, veers from the permissible to the impermissible with the Courts deliberately violating the Constitutional rights of Petitioner. The attack on Petitioner Raheem J. Brennerman is an attack on the rule of law, civil rights and liberties affecting everyone as well as the very fabric of United States' democracy. The United States Court of Appeals for the Second Circuit has a Constitutional obligation to review de novo meaning for clear error. *See United States v. Bershchansky*, 755 F.3d 102, 108 (2d Cir. 2015) (internal citation and quotation marks omitted) The Circuit Court exacerbated the Constitutional deprivation already suffered by Petitioner by imposing a Constitutionally impermissible abuse of discretion standard with its review.

Petitioner seeks review of this case for clarification on the obligations of the Courts - United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York particularly where a criminal defendant`s right has been so abridged and abrogated because of his race resulting in a fundamental miscarriage of justice.

The Fifth Amendment of the United States Constitution states, "No person shall be deprived . . .of life, liberty or property without the due process of law." The due process right is enshrined in the bedrock of our democracy by imposing the equal protection of law doctrine. *Abdul-Akbar v. McKelvie*, 239 F.3d 307, 316-17 (3d Cir. 2001) (en banc) (Although the Fifth Amendment contains no Equal Protection Clause . . .[t]he [Supreme] Court has construed the Fifth Amendment to contain an Equal Protection Guarantee [;] . . .Fifth Amendment Equal Protection claims are examined under the same principle that apply to such claims under the Fourteenth Amendment) (internal citations omitted).

The Court had previously promulgated that a criminal defendant has a Sixth Amendment right to present a complete defense. *See Crane v. Ky.*, 476 U.S. 683 (1986) (holding that "It is a federal law that a criminal defendant has a Constitutional right to present a complete defense). The United States Court of Appeals for the Second Circuit recently adopted such holding in *Scrimo* while creating disparity with Petitioner. *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019).

Review of this case is warranted as a matter of public interest to emphasize conformity and uniformity with the law and Constitution among lower Courts in ensuring adherence with their Constitutional obligations and to avoid attack on the civil rights and liberties of criminal defendants because of their race, sex or religion.

BACKGROUND

The history of this matter began in 2014 when ICBC (London) PLC sued The Blacksands Pacific Group, Inc ("Blacksands") in New York Supreme Court primarily alleging, inter alia that Blacksands had failed to repay approximately $4.4 million dollars extended to Blacksands pursuant to a Bridge Loan Agreement. Significantly, Petitioner Raheem J. Brennerman, the CEO of Blacksands, was not named as a defendant in that action. (Notice of Removal; Cv. Cover Sheet, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, No. 15 Cv. 70 (LAK), EFC No. 1-2).

Blacksands removed the case to the Southern District of New York and the matter was assigned to Hon. Lewis A. Kaplan, under the caption *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.* (Notice of Removal, No. 15 Cv. 70 (LAK), EFC No. 1). Based on the loan documents, Judge Kaplan granted ICBC London`s motion for summary judgment against Blacksands. (Mem. Op., No. 15 Cv. 70 (LAK), EFC No. 38).

ICBC London then served Blacksands with extremely broad post-judgment discovery requests. Blacksands counsel, Latham & Watkins LLP ("Latham") interposed objections to those demands and filed a brief in support of those objections. (*See* Def. Interrog., No. 15 Cv. 70 (LAK), EFC No. 84 Ex. 2); (Mem.; Def.'s Decl., No. 15 Cv. 70 (LAK), EFC Nos. 85, 86). The Court conducting no analysis regarding the permissible scope of post-judgment discovery of the actual breadth of plaintiff s demands, instead in

conclusionary fashion declared that the objections were "baseless" and that Blacksands "shall comply fully." (*See* Order, No. 15 Cv. 70 (LAK), EFC No. 87).

Subsequently, ICBC London moved for contempt and coercive sanctions against Blacksands. (Order to Show Cause; Pl.'s Decl.; Mem., No. 15 Cv. 70 (LAK), EFC Nos. 101, 102-103). On October 24, 2016, Judge Kaplan granted ICBC London`s motion holding Blacksands in contempt and imposing coercive sanctions. (Order, No. 15 Cv. 70 (LAK), EFC No. 108). Over the course of the next two weeks, on November 4 and November 10, 2016, Mr. Brennerman on behalf of Blacksands provided detailed discovery responses to ICBC London, including approximately 400 pages of documents, in an effort to comply with ICBC London`s discovery requests. (*See* Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC. No. 123, ¶¶ 9, 11-12). Mr. Brennerman also made continued efforts without support from other shareholders and partners to settle the matter with ICBC London, including meeting with ICBC London executives in London and providing them with even more information about Blacksands and its pending transaction, which were pertinent to Blacksands settlement efforts. (*See* Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC No. 123, ¶¶ 45, 9, 11-12).

On December 7, 2016, ICBC London moved for civil contempt against Mr. Brennerman personally, even though he was not a named defendant in the matter and was not personally named in any discovery orders. (Order; Mem.; Pl.'s Decl., No. 15 Cv. 70 (LAK), EFC Nos. 121-23). A contempt hearing

was scheduled for December 13, 2016, less than a week later. (Corrected Order, No. 15 Cv. 70 (LAK), EFC No. 125).

Mr. Brennerman, however, did not have counsel. In fact, Latham repeatedly and consistently communicated to the Court, and to Mr. Brennerman that they did not represent Mr. Brennerman personally. (*See* e.g. Letter, No. 15 Cv. 70 (LAK), EFC No. 124). Although Mr. Brennerman was out of the country at the time he learned of the pending contempt hearing against him, he immediately sought to retain counsel to represent him in the contempt proceeding and wrote the Court requesting a reasonable adjournment because he was currently outside the United States and needed more time to retain counsel. (Email; Letter, No. 15 Cv. 70 (LAK), EFC Nos. 127-28) (Judge Kaplan was previously a partner at Paul Weiss LLP which represented Mr. Brennerman at the time thus the law firm could not appear before Judge Kaplan hence why Mr. Brennerman had to retain another law firm to represent him for the contempt proceedings). Judge Kaplan denied Mr. Brennerman`s request on December 12, 2016 (Order, No. 15 Cv. 70 (LAK), EFC No. 134), and found Mr. Brennerman personally in contempt on December 13, 2016. (Orders, No. 15 Cv. 70 (LAK), EFC Nos. 139-40). While Mr. Brennerman had provided a substantial document production in November, after Blacksands was found in contempt, the Court made no mention of it and appeared not to have reviewed or considered that

production in its determination that Mr. Brennerman was himself in contempt. (Orders, 15 Cv. 70 (LAK), EFC. Nos. 139-40).

On December 13, 2016 when Judge Kaplan held Mr. Brennerman personally in contempt, he [Judge Kaplan] ignored the law from the Second Circuit U.S. Court of Appeals in *OSRecovery,* where the Appeals Court stated directly to Judge Kaplan in relevant parts: ("[T]he District Court abused its discretion by issuing a contempt order to a non-party for failing to respond to discovery request propounded to him as a party without providing sufficient legal authority or explanation for treating him as a party solely for the purpose of discovery)) and held Mr. Brennerman in contempt (even though there were no court order[s] directed at him personally. No subpoena or motion-to-compel were directed at him). *OSRecovery, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006).

Judge Kaplan also ignored the federal rule to conduct extra-judicial research into Mr. Brennerman by Googling him. (*See* Bail Hr.'g Tr., *United States v. Brennerman*, No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 1 at 28). Then following the erroneous contempt propounded against Mr. Brennerman, Judge Kaplan referred him to the Manhattan federal prosecutors (United States Attorney Office for the Southern District of New York "USAO, SDNY") and persuaded the prosecutors to arrest Mr. Brennerman and prosecute him criminally. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2).

THE CRIMINAL REFERRAL, THE PETITION AND EX PARTE CONFERENCE BETWEEN JUDGE KAPLAN AND THE GOVERNMENT

In late 2016 or early 2017, Judge Kaplan referred Blacksands and Mr. Brennerman personally to the United States Attorney`s Office for criminal prosecution.

Thereafter, on March 3, 2017, the government filed a Petition seeking to initiate criminal contempt proceedings against Blacksands and Mr. Brennerman personally, including an Order to Show Cause for them to appear in Court to answer the charges. On March 7, 2017, Judge Kaplan summoned AUSAs Robert Benjamin Sobelman and Nicolas Tyler Landsman-Roos to his robing room to advise that an arrest warrant should be issued for Mr. Brennerman. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2). The prosecution, consistent with Fed. R. Crim. P. 42, had prepared an Order to Show Cause that would have directed Blacksands and Mr. Brennerman to appear before the Court on a date in the future. The Court made clear, however that it did not agree with the government`s approach and advised the prosecutors that the Court should issue an arrest warrant instead as to Mr. Brennerman, stating his assumption that "the United States can`t find him." The prosecutors repeatedly expressed their view that execution of an arrest warrant was not necessary under the circumstances. (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2). The prosecutors advised, first, that Mr. Brennerman had actually called them on Friday, March 3, 2017, the same day that the Petition was filed to talk to them about that Petition. *Id.* The

prosecutors informed Mr. Brennerman that he could not speak with him, and Mr. Brennerman then provided his phone number so that "there may be a way for the government to be in touch with him via that telephone number." The prosecutors then proposed that the Order to Show Cause previously prepared and filed by the government, could be entered to require Mr. Brennerman to attend the conference and "should he not appear, [] a summons or arrest warrant be issued to secure his appearance." *Id.*

The Court continued to press the issue of an arrest warrant, asking '[w]hy shouldn`t I, given the history in this case issue a warrant?" (*See* Trial Tr., No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 2 At 5). The Prosecutors responded with a number of reasons, stating:

> Mr. Brennerman did try to contact the government on Friday, and we don`t know that he has absconded or seeks to abscond. He`s already knowledgeable about the petition. His email address is included on the ECF notification that went out when the petition was publicly filed. He appears to have the resources to have fled had he intended to, and the government thinks it`s prudent to provide him an opportunity to appear at the conference voluntarily.

Id. The prosecution went on to say that, even if the Court issued an arrest warrant, "the government would likely provide Mr. Brennerman an opportunity to surrender rather than dispatching law enforcement to apprehend him without providing that opportunity." *Id.*

The Court pressed on, stating "I`m inclined to issue an arrest warrant" and pushed back against the prospect that Mr. Brennerman should be allowed to surrender: "Now, if the government is going to give him an

opportunity to surrender; there`s a substantial question as to whether I`m wasting my time because I think the odds are not unreasonable that he will abscond". *Id.* at 6.

Eventually the prosecutors deferred to the Court and confirmed that if an arrest warrant was issued, they would discuss in their office how best to proceed. *Id.* at 7. Thus, as of March 7, 2017, when the government entered the robing room, there was no pending investigation of fraud as to Mr. Brennerman with the prosecutors in the Southern District of New York, and the government was prepared to proceed with a contempt proceeding by Order to Show Cause and had no concern that Mr. Brennerman would seek to abscond.

Thus pursuant to the arrest warrant prepared and signed by Judge Kaplan, Mr. Brennerman was arrested on April 19, 2017 at his home in Las Vegas. As of the date of the arrest warrant and because the Court had declined to sign the order to show cause presented by the government, there was no actual contempt charge pending against Mr. Brennerman. The Court omitted Mr. Brennerman from the signed Order to Show Cause but then failed to otherwise rule or grant the government`s Petition as it related to Mr. Brennerman. There was, therefore, no proper basis for the arrest warrant. The Court`s decision to alter the warrant to reference the Petition was inadequate to support the warrant. (The arrest warrant included an option for a Probation Violation Petition; those instruments, unlike a Petition

in a contempt proceeding, actually do charge an offense). (*See* Arrest Warrant, No. 17 Cr. 155 (LAK), EFC No. 12 Ex. 3).

Mr. Brennerman`s arrest on April 19, 2017 (when government seized his electronic devices and documents (which was adduced as evidence (e-mails between Mr. Brennerman (on behalf of Blacksands) and Madgett (ICBC London) at trial of the contempt and fraud case (where the government actually never obtained or reviewed any pertinent ICBC transaction files from ICBC (London) plc) was in violation of both Mr. Brennerman`s Fourth and Fifth Amendment rights.

THE INDICTMENT AND ORDER TO SHOW CAUSE

On May 31, 2017, weeks after Mr. Brennerman was released on bail in the criminal contempt of court case, he was re-arrested by the U.S. Attorney`s Office pursuant to an indictment alleging fraud in connection with the transaction that was at issue in the underlying civil action, No. 15 Cv. 70 (LAK) between ICBC (London) PLC and The Blacksands Pacific Group, Inc (even though the civil action had been ongoing for two and half years at that point) Mr. Brennerman was charged with Conspiracy to commit bank and wire fraud, bank fraud and wire fraud. *Id.* The case was assigned to Hon. Richard J. Sullivan, under the caption, *United States v. Brennerman*, No. 17 Cr. 337 (RJS).

In August 2017, because Judge Kaplan had failed to sign the Order to Show Cause as it related to Mr. Brennerman in the criminal contempt of

court case at No. 17 Cr. 155 (LAK) (even though Mr. Brennerman had been arrested at the behest of Judge Kaplan) he had revoked the bail granted to Mr. Brennerman even without any violations of the bail conditions. The government realizing their error filed a new two count Order to Show Cause Petition formally charging Mr. Brennerman in the criminal contempt of court case. (*See* Order to Show Cause, *Brennerman* No. 17 Cr. 155, EFC No. 59).

THE DISTRICT COURT`S DECISION

In August 2017, prior to trial for the criminal contempt of court case, Mr. Brennerman sought to obtain the complete ICBC records (including the underwriting file and negotiations between agents of Blacksands and ICBC London) to demonstrate his innocence and to present a complete defense. However Mr. Brennerman`s request to the Manhattan federal prosecutors was denied. The [Manhattan federal prosecutors] refused to obtain or review the complete ICBC records including the underwriting files, arguing that they were not obligated to collect any additional evidence from ICBC London beyond what the bank had selectively provided to them. Judge Kaplan also denied Mr. Brennerman`s request seeking to compel the complete ICBC record. *See* 17-cr-155 (LAK), Dkt. No. 76

THE TRIAL AND POST-TRIAL PROCEEDINGS

During trial, District Court (Judge Kaplan) rejected defendant argument regarding presentment of the civil contempt order to the jury, ruling that the government could present evidence that both the company

and Mr. Brennerman had been found in contempt of Court (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 3-7). A juror named Gordon later told the media - Law 360 that the civil contempt orders swayed the jury to find Mr. Brennerman guilty of criminal contempt (*See* Law 360 Article, No. 17 Cr. 337 (RJS), EFC No. 236, Ex. 3 at 17).

Mr. Brennerman was deprived of the very evidence he required to defend himself. Although such evidence (agents of ICBC London requesting settlement discussion) plainly was relevant to the issue of Mr. Brennerman`s willfulness in failing to comply with the Court`s discovery orders, the District Court refused repeatedly to allow counsel to elicit such evidence on the issue and so the record was devoid of the precise evidence that would have demonstrated the defendant`s lack of intent (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 269-277; 236-249).

The District Court went a step further and proposed an instruction to the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the court's discovery order absent an order suspending or modifying the requirement to comply (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 509-510). Defense counsel objected arguing that even if that were technically true, if the parties specifically engaged in settlement discussion with the understanding that discovery would not be pursued, such evidence was certainly relevant to defendant`s intent in not complying with the Court`s order and should have been considered by the jury. The District

Court (Judge Kaplan) overruled counsel`s objection and instructed the jury as indicated. (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 538-544).

The trial commenced on September 6, 2017 and concluded on September 12, 2017 with the jury returning a guilty verdict on both counts of criminal contempt.

THE COURT OF APPEAL DECISION

The Second Circuit found that the District Court did not err in its failure to compel ICBC`s production of its entire file because Brennerman did not comply with the rules governing subpoenas under Rule 17(d) of the Federal Rules of Criminal Procedure when he served ICBC`s New York-based attorney, not the ICBC`s London branch. *United States v. Brennerman*, No. 18 1033(L), WL 3053867 at *1 (2d Cir. June 9, 2020). The Court further concluded that, "the prosecution was under no obligation to make efforts to obtain information beyond what it previously collected and turned over to Brennerman." *Id.*

As to the evidence concerning settlement discussions, the Second Circuit found that the district court had allowed Brennerman "to introduce evidence concerning settlement discussions on the condition that he establish his knowledge of the substance of the exhibits and their relationship to the relevant time period..." and that "through cross-examination, Brennerman was able to introduce evidence about the parties' settlement discussions. *Id.* at *2. The Second Circuit found that "the district court did not abuse its

discretion in admitting some but not all of this evidence, and Brennerman had failed to point to any specific evidence that would have helped his case had it been submitted." *Id.*

In regard to the admission of the civil contempt order against Brennerman, the Second Circuit found that "the district court correctly determined, the civil contempt orders were relevant to Brennerman`s willfulness. To minimize any potential prejudicial effect, the district court redacted portions of the orders and instructed the jury on the limited purposes for which it could consider the civil contempt orders in the context of a trial about criminal contempt." *Id.*

The panel denied a motion for rehearing by order dated September 9, 2020. (*See* Order, No. 18 1033, EFC No 318).

IX. REASON FOR GRANTING CERTIORARI

ARGUMENT

This Petition presents an opportunity for the Court to clarify (a) whether the abuse of discretion standard imposed by United States Court of Appeals for the Second Circuit is Constitutionally permissible - where the Circuit Court refused to correct errors which substantively abridges and abrogates the rights of criminal defendant which are protected by the United States Constitution and (b) where trial Court deliberately deprived the criminal defendant of his Constitutional rights thus violating his Fifth and Sixth Amendment rights of the U.S. Constitution.

This case will clarify the obligations of lower Courts as a matter of public interest to emphasize conformity and uniformity with the law and Constitution among lower Courts in ensuring adherence with their Constitutional obligations and avoid attack on the civil rights and liberty of criminal defendants because of their race, sex or religion.

I. THE SECOND CIRCUIT ERRED IN AFFIRMING THE DISTRICT COURT`S 1) ADMISSION OF THE CIVIL CONTEMPT ORDER AGAINST PETITIONER; 2) FAILURE TO COMPEL PRODUCTION OF CERTAIN EXCULPATORY MATERIALS; AND 3) PRECLUSION OF THE ADMISSION OF EVIDENCE PERTAINING TO SETTLEMENT NEGOTIATIONS, BECAUSE THE ISSUES RAISED ARE QUESTION OF EXCEPTIONAL IMPORTANCE. THIS CASE RAISE ISSUES OF IMPORTANT SYSTEMIC CONSEQUENCES FOR THE DEVELOPMENT OF THE LAW AND ADMINISTRATION OF JUSTICE

A. ADMISSION OF THE CIVIL CONTEMPT ORDER VIOLATED PETITIONER`S CONSTITUTIONAL RIGHTS WHERE THE COURT FAILED TO AFFORD HIM THE EQUAL PROTECTION GUARANTEE AND THE PROSECUTION VIOLATED HIS RIGHT TO DUE PROCESS OF LAW

In *OSRecovery*, the Second Circuit U.S. Court of Appeals vacated civil contempt adjudicated by Judge Lewis A. Kaplan ("Judge Kaplan") against a party who was not part of the civil case. *OSRecovery, Inc., v. One Groupe Int`l, Inc.*, 462 F.3d 87, 90 (2d Cir. 2006). In vacating the contempt order the Court of Appeals stated directly to Judge Kaplan that the Court abused its discretion by holding a non-party in civil contempt propounded against him solely for the purpose of discovery without providing any legal authority or clear explanation for doing so. In 2016, Judge Kaplan ignored the law and held Petitioner, a non-party who was not involved in the underlying case, *ICBC (London) PLC v. The Blacksands Pacific Group, Inc.*, in contempt without providing any legal authority or clear explanation. (*See* Order; Mem. & Order, No. 15 Cv. 70 EFC. Nos. 139-40). This time, Judge Kaplan went a step further and referred Petitioner to Manhattan prosecutors to be prosecuted criminally. The prosecution undertook no diligence or investigation prior to initiating criminal contempt charges against Petitioner.

During trial of the criminal contempt of court case, Judge Kaplan permitted the prosecution to present to the jury the civil contempt order erroneously adjudged against Petitioner which was in tension with the law. (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 3-7). Such presentment significantly prejudiced Petitioner, because the judge allowed the presentment of an

erroneously adjudged civil contempt order as evidence to the jury (that concluded that Petitioner must be guilty of criminal contempt), without allowing Petitioner to present the background to the adjudication of the civil contempt order. (*See* Law 360 Article, No. 17 Cr. 337 (RJS), EFC No. 236, Ex. 3 at 17).

The question of whether the civil contempt order was properly admitted against Petitioner goes beyond a simple analysis of Rules 403 and 404(b) of the Federal Rules of Evidence. Petitioner was a non-party in the civil lawsuit at the time of the order. Because the order was erroneously adjudged against him, its erroneous admission had more serious legal implication above and beyond an abuse of discretion analysis.

The Second Circuit had previously held that "because the power of a district court to impose contempt liability is carefully limited, our review of a contempt order for abuse of discretion is more rigorous than would be the case in other situations in which abuse-of-discretion review is conducted." *Hester Indus., Inc. v. Tyson Foods, Inc.*, 160 F.3d 911, 916 (2d Cir. 1998). "Moreover, we think it is fundamentally unfair to hold [a non-party] in contempt as if he were a party without legal support for treating him, a non-party, as a party but only for the purpose of discovery." *OSRecovery, Inc.*, 462 F.3d at 90. In *OSRecovery*, the Second Circuit court had found that the district court abused its discretion by holding a person "in contempt as a party without sufficient explanation or citation to legal authority supporting

the basis upon which the court relied in treating [him] as a party—for discovery purposes only—despite the fact that [he] was not actually a party." *Id.* at 93.

Here Judge Lewis A. Kaplan (the same district judge whose contempt order the Second Circuit court found inappropriate in *OSRecovery*) held Petitioner in civil contempt as a non-party and failed to provide any legal authority or present any particular theory for treating him as a party solely for the purpose of discovery. (*See* Order; Mem. & Order, No. 15 Cv. 70 (LAK), EFC. Nos. 139-40). No court orders, subpoenas, or motion to compel were ever directed at Petitioner personally nor was he present during the civil case`s various proceedings.

The erroneous admission of the civil contempt order was more than an evidentiary error. It violated the Second Circuit court`s instructions concerning contempt order against non-parties. On appeal, the Second Circuit affirmed district court`s rulings creating disparity with the Second Circuit`s treatment and review of such order`s and deprived Petitioner of his Constitutional right to an equal protection guarantee.

B. FAILURE TO COMPEL PRODUCTION OF CERTAIN EXCULPATORY MATERIALS VIOLATED PETITIONER`S SIXTH AMENDMENT RIGHT, WHERE HE WAS DEPRIVED OF THE EVIDENCE HE REQUIRED TO PRESENT A COMPLETE DEFENSE

Petitioner`s central argument concerning the ICBC production requests is that there existed exculpatory evidence materials that were not provided to him and could not otherwise be compelled due to Rule 17

limitations regarding foreign entities. (*See* Trial Tr., No. 17 Cr. 337 (RJS), at 551-554). The Second Circuit did not address Petitioner`s argument that, if the government claimed that it had produced all documents in its possession but the omission of the entire file was glaringly obvious, then it follows that the government was aware that relevant information existed and was therefore, withholding material that it could (and should) have obtained, in violation of *Brady*. *See Brady v. Maryland*, 373 U.S. 83 (1963).

Because Petitioner was effectively barred from obtaining relevant evidence, such as the entirety of his communications with ICBC representatives, due to subpoena constraints, he was denied the opportunity to put forth a complete defense.

Because no meaningful inquiry was conducted, either at the district court or before the Second Circuit, concerning the discrepancies between the government`s representations that the production was complete and the obviously incomplete materials produced, the issue of whether *Brady* obligations were flouted by the government remains open. *See Brady v. Maryland*, 373 U.S. 83 (1963). The sanctity of *Brady* obligations cannot be interpreted as anything less than a question of exceptional importance warranting further reconsideration on this point. *See Id.*

C. PRECLUSION OF THE ADMISSION OF EVIDENCE PERTAINING TO SETTLEMENT NEGOTIATIONS (DUE TO FAILURE TO PERMIT FULL SETTLEMENT NEGOTIATION EVIDENCE) VIOLATED PETITIONER`S CONSTITUTIONAL RIGHT WHERE HE WAS DEPRIVED OF EVIDENCE HE REQUIRED TO PRESENT A COMPLETE DEFENSE

Without the entire ICBC file, Petitioner was precluded from presenting evidence regarding settlement negotiations between Blacksands and ICBC. Petitioner avers that evidence of these negotiations would have convinced the jury that he had not willfully disobeyed any court orders.

Although Petitioner was permitted certain lines of questioning concerning settlement negotiations, the admitted evidence was woefully inadequate to set forth his complete defense. Petitioner was attempting to elicit evidence of settlement discussions with agents of ICBC that, he argued, would have demonstrated that he was not willfully disobeying the district court`s discovery orders but was instead prioritizing settlement with ICBC over Blacksands' discovery obligations. This evidence was not permitted, could not be elicited through cross-examination of witnesses, and was not part of the jury instruction. (*See* Trial Tr., No. 17 Cr. 155 (LAK), at 236-277). Although such evidence was plainly relevant to the issue of Petitioner`s willfulness in failing to comply with the court`s discovery orders, the record was devoid of the precise evidence that would have demonstrated the Petitioner`s lack and intent. The district court exacerbated the harm by instructing the jury that settlement discussions in a civil case did not excuse a defendant`s failure to comply with the court`s discovery order absent an

order suspending or modifying the requirements to comply. (*See* Trial Tr., No. 17 Cr. at 509-510; 538-544).

The limitation on evidence of settlement negotiations was not merely an evidentiary issues, but rather, a constitutional one which violated Petitioner`s right to present a defense. The violation was compounded by the fact that the district court essentially eviscerated the element of intent in determining whether Petitioner was guilty of criminal contempt. The Second Circuit`s decision failed to address the manner in which the district court`s evidentiary rulings precluded Petitioner`s right to present a complete defense.

The danger of the Second Circuit rule is amply demonstrated by the consequences of erosion of public trust in the United States Justice system and other institutions. As the Fourth Circuit recently promulgated "what gives people confidence in our justice system is not that we merely get things right rather, it is that we live in a system that upholds the rule of law even when it is inconvenient to do so". The lower Court - United States Court of Appeals for the Second Circuit and United States District Court for the Southern District of New York veered from the rule of law in this case. Interests of comity - in addition to fairness and substantial justice as embodied in the Due Process Clause and the U.S. Constitution - warrant reversal of the Second Circuit decision.

X. CONCLUSION

The petition for certiorari should be granted.

Dated: White Deer, Pennsylvania
December 28, 2020

Respectfully submitted,
/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Reg. No. 54001-048
FCI Allenwood Low
White Deer, Pa. 17887-1000

Petitioner Pro Se

XI. APPENDIX TABLE OF CONTENTS

EXHIBIT 7

Correspondence to Chief Judge Livingston
(Nov. 23, 2020)

Raheem J. Brennerman
Reg. No. 54001-048
LSCI-Allenwood
SPECIAL MAIL - OPEN IN
PRESENCE OF INMATE
P. O. Box 1000
White Deer, Pa. 17887-1000

Honorable Debra Ann Livingston
Chief Judge
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

with copy to:

Clerk of Court
United States Court of Appeals
for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

November 23, 2020

BY CERTIFIED FIRST CLASS MAIL
URGENT CORRESPONDENCE

Regarding: United States v. Brennerman, Appeal Docket No. 18-3546(L); 19-0497(Con)
United States v. The Blacksands Pacific Group, Inc., et. al., Appeal Docket No. 18-1033(L); 18-1618(Con)

Dear Judge Livingston:

I, Defendant - Appellant Raheem J. Brennerman ("Brennerman") respectfully submit this correspondence in respect of the erroneous disposition at the above referenced appeals particularly the misrepresentations of material facts, evidence and record. I am currently incarcerated at LSCI-Allenwood arising from the criminal cases from which the above referenced appeals arose.

I have also taken the liberty to underline the relevant sections within the appended copy of Summary Order Mandate as well as included copies of the record (trial testimony from the

various Government witnesses) which contradicts the representation presented by panel Court in the disposition ("Summary Order") to the above referenced appeals.

I am writing to you in the first instance, out of an abundance of respect for the Court, to bring your attention to the misrepresentation of material facts, evidence and record to allow panel Court to correct the misrepresentation of material facts, evidence and record.

1.) Within I. Sufficiency of the Evidence:

The panel Court stated in relevant part ".....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....."

The record at 1:17-cr-337 (RJS), Trial Tr. 384-385; 409; 387-388 and at 1:17-cr-337 (RJS), Dkt. No. 167 (which Judge Sullivan ignored) clearly demonstrate that Morgan Stanley & Company, LLC, the parent company for all Morgan Stanley subsidiaries and divisions is not FDIC-insured. The record also demonstrates that Brennerman opened his wealth management account at Morgan Stanley Smith Barney, LLC which is not FDIC-insured and that a non-Morgan Stanley subsidiary/division issued him a credit card which was closed with zero balance. The record also demonstrates that Kevin Bonebrake whom Brennerman had a single telephone call with to discuss financing about oil asset worked at the Institutional Securities division of Morgan Stanley which is not FDIC-insured. The record demonstrates that Morgan Stanley operates through various subsidiaries and divisions.

The record at 1:17-cr-337 (RJS), Trial Tr. 1057-1061 demonstrates that the FDIC certificates presented by Government at trial, GX530 - FDIC certificate for Morgan Stanley Private Bank; GX531 - FDIC certificate for Citibank; GX532 - FDIC certificate for Morgan Stanley National Bank NA; and GX533 - FDIC certificate for JP Morgan Chase do not cover the subsidiaries/division at Morgan Stanley that Brennerman interacted with. The record demonstrates that Brennerman interacted with Morgan Stanley Smith Barney, LLC (see 1:17-cr-337 (RJS), Dkt. No. 167) where he opened his wealth management account and Brennerman had a single telephone call about oil field financing with Kevin Bonebrake who worked at the Institutional Securities division of Morgan Stanley (see 1:17-cr-337 (RJS), Trial Tr. 384-385; 387-388; 409). The record also demonstrates testimony from Barry Gonzalez, FDIC commissioner that the FDIC certificate for one subsidiary does not cover another subsidiary or the parent company because each subsidiary/division will require its own FDIC certificate. Barry Gonzalez testimony demonstrated that Government failed to prove that either Morgan Stanley Smith Barney, LLC or Morgan Stanley Institutional Securities division are FDIC-insured.

The disposition by the panel Court made material misrepresentation with the facts because it generalized Morgan Stanley as a single entity while ignoring the record and testimony of Government witnesses which demonstrate that Morgan Stanley & Company, LLC, the parent company is not FDIC-insured; That Morgan Stanley operates through various subsidiaries / divisions which are separate entities; That the FDIC certificate of one subsidiary / division does

not cover another subsidiary / division or the parent company as each entity (subsidiary / division) will require its own FDIC certificate; finally, that Brennerman did not interact with any FDIC-insured Morgan Stanley entity (subsidiary/division).

2.) Within IV. Testimony of Julian Madgett:

The panel Court stated in relevant part ".....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....."

The record at 1:17-cr-337 (RJS), Trial Tr. 551-554 clearly demonstrate that Government sole witness from ICBC (London) plc, Julian Madgett testified on behalf of the Government in open Court that evidence exists that document the basis for the bank approving the bridge loan transaction including representation or alleged misrepresentation which the bank relied upon in approving the bridge loan finance. Further that the Government never requested, obtained or reviewed the evidence and thus never provided it to the defense. The record demonstrates that Government were presented in Court when Julian Madgett testified thus became aware of the evidence because A.U.S.A. Roos objected to a question asked by defense counsel.

The record demonstrates that Brennerman made request to the Court at 1:17-cr-337 (RJS), Dkt. No. 71 for the evidence, which the Government never obtained or reviewed, for his defense given the importance and pertinence of the evidence to the theory of the defense, however the Government failed to learn of the evidence thus violated its Brady obligations.

The disposition by panel Court made material misrepresentation that Government was unaware of the evidence which Brennerman required to present a complete defense because panel Court ignored the record which clearly demonstrates that Government was present in Court when their witness testified that evidence which document the basis for the bank approving the bridge loan exists with the bank and that the Government never requested or obtained the evidence and thus never provided it to the defendant for his defense.

3.) Within IV. Testimony of Julian Madgett:

The panel Court stated in relevant part ".....The only indication that such documents are extant comes from Brennerman`s bare assertions....."

The record at 1:17-cr-337 (RJS), Trial Tr. 551-554 demonstrate that Government sole witness, Julian Madgett testified as to the existence of the evidence (documents) which the Government never requested or obtained. The record at 1:17-cr-337 (RJS), Trial Tr. 617 demonstrates that

trial judge (Judge Richard J. Sullivan) acknowledged that the witness had testified to the existence of the evidence (documents) with the bank`s file in London, United Kingdom. The record demonstrates that upon Brennerman learning of the existence of evidence (ICBC underwriting file) which documents the basis for the bank approving the bridge loan finance including the representation of alleged misrepresentation which the bank relied upon to approve the bridge loan finance, further that the Government never requested, obtained or reviewed the evidence, Brennerman immediately made request to the Court at 1:17-cr-337 (RJS), Dkt. No. 71 for the evidence so he may use it to present a complete defense and confront witnesses (Julian Madgett) against him but was denied by the Court (Judge Richard J. Sullivan)

The disposition by the panel Court made material misrepresentation as to the existence of the evidence (documents) which Brennerman required to present a complete defense. The panel Court ignored the argument that Brennerman was deprived of the ability to present a complete defense and the ability to confront witnesses against him. Madgett was allowed to testify as to the content of the evidence (documents) to satisfy the issue of "materiality" (an essential element of the charged crime) while Brennerman was deprived of the ability to use the evidence (documents) to confront him in violation of his Sixth Amendment rights.

4.) The above is in addition to the panel Court ignoring the Circuit Court holding about non-parties in "OSRecovery, Inc., v. One Groupe Int`l, Inc., 462 F.3d 87, 90 (2d Cir. 2006)" where the Circuit Court stated directly to Judge Lewis A. Kaplan that the Court abused its discretion and could not hold non-party in contempt solely for the purpose of discovery. In 2016, Judge Kaplan ignored the law to hold Brennerman, a non-party in the underlying civil case at 15-cv-0070 (LAK) in contempt then persuaded the Government to pursue him criminally. The Government ignored the law in "OSRecovery" to pursue Brennerman for criminal contempt of court and during trial at 17-cr-155 (LAK), Judge Kaplan permitted the Government to present the civil contempt erroneously adjudged against Brennerman to the jury causing significant prejudice to him. During appeal at 18-1033(L), the panel Court in its disposition ignored prior Circuit Court law with respect to holding non-party in contempt.

The above is respectfully submitted in an endeavor to allow panel Court correct its erroneous disposition and misrepresentation of material facts, evidence and record, particularly given that the formal request for panel rehearing / rehearing enbanc was denied. I am writing to you Pro Se as one of the panel Court judges recently granted permission for my counsel to withdraw from continuing to represent me.

Dated: November 23, 2020
White Deer, PA 17887-1000

RESPECTFULLY SUBMITTED

/s/ Raheem J. Brennerman

RAHEEM JEFFERSON BRENNERMAN
Defendant - Appellant

Cc: REDACTED

Below is a summary of the various excerpts from the criminal case record referenced above and appended to this correspondence.

Mandate including Summary Order by panel Court is appended as "Exhibit 1"

Criminal case, 17-cr-337 (RJS), Trial Transcript 384-385; 387-388; 409 are appended as "Exhibit 2"

Criminal case, 17-cr-337 (RJS), Docket No. 167 is appended as "Exhibit 3"

Criminal case, 17-cr-337 (RJS), Trial Transcript 1057-1061 are appended as "Exhibit 4"

Criminal case, 17-cr-337 (RJS), Trial Transcript 551-554; 617 are appended as "Exhibit 5"

Criminal case, 17-cr-337 (RJS), Docket No. 71 is appended as "Exhibit 6"

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CAPTION:
United States of America

v.

The Blacksands Pacific Group, Inc., et. al

CERTIFICATE OF SERVICE*

18-1033 (L); 18-1618 (Con)

Docket Number: 18-1033(L); 18-1618 (Con)

I, Raheem J Brennerman (print name), hereby certify under penalty of perjury that on December 29, 2020 (date), I served a copy of Motion to Recall Mandate (list all documents)

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/s/Raheem J Brennerman
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